REVISED EDITION 2011

BUSINESS LAW

For

B.Com. MBA LL.B
ACMA & CA Students

KHALID MEHMOOD CHEEMA

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Hailey College of Commerce
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PREFACE

This book has been written primarily to cater for the requirements of B.Com, LL.B, MBA, ACMA and CA students, professionals and businessmen connected with trade and commerce.

The revised edition includes changes and developments in the Law. New case-law and examples have been added in order to make difficult points easy and clear for the reader.

This book is comprehensive and includes different statutes, e.g. Contract Act, Sale of Goods Act, Negotiable Instruments Act, Carriers Act, Industrial Relations Act, Factories Act, Industrial & Commercial Employment Ordinance, Payment of Wages Act, Workmen's Compensation Act, Social Security Ordinance, Partnership Act, Railways Act, Bill of Lading Act, Carriage of Goods Act, Carriage by Air Act and Trusts Act.

The provisions of different Acts have been presented topic-wise to facilitate the understanding of the subject. Section numbers have been given at appropriate places to enable the reader to refer to the relevant Acts for further details. Some new and simple examples have been included. Suitable headings and sub-headings have been given so that the reader can focus his attention on the important aspects of the Law.

Finally, we acknowledge with pleasure, the assistance of Hamid Raza of Punjab College of Commerce and Naeem Ullah, Mohammad Nawaz Dogar, Iftikhar Hussain Tarar and Javid Akhtar of University Law College, Lahore.

We look forward to helpful comments and opinions for further improvement of this book.

Khalid Mehmood Cheema **Arbab Khalid Cheema**

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01

CONTRACT AND ITS KINDS

CONTRACT

Law of Contract

The law relating to contracts in Pakistan is contained in the Contract Act, 1872. It extends to the whole of Pakistan and came into force on the 1st day of September, 1872. It deals with:

1. General principles governing all types of contracts (Sec. 1-75).
2. Contracts of Indemnity, Guarantee, Bailment, Pledge and Agency (Sec. 124-238).

Initially, sections 76-123 and sections 239-266 relating to sale of goods and partnership were contained in the Contract Act but were subsequently repealed and a separate Sale of Goods Act, 1930 and a Partnership Act, 1932 came into force.

Definition of Contract

Some definitions are as follows:

Pollack: "Every agreement and promise enforceable at law is a contract."

Salmond: "A contract is an agreement creating and defining obligations between the parties".

Sir William Anson: "An agreement enforceable by law made between two or more persons, by which rights are acquired by one or more to acts or forbearance on the part of other or others."

Sec. 2(h) of Contract Act provides "An agreement enforceable by law is a contract." Thus a contract consists of two elements:

(a) Agreement (b) Enforceability by law

1. Agreement

Section 2(e) defines agreement as, "Every promise and every set of promises, forming the consideration for each other, is an agreement."

Section 2(b) defines promise as, "When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise."

A promise comes into existence when one party makes a proposal to the other party and that other party gives consent. Therefore, a contract is an agreement, an agreement is a promise and a promise is an accepted proposal.

EXAMPLE

A offers to sell his car to B for Rs. 8 Lac. B gives acceptance. It is an agreement.

2. Enforceability

An agreement is enforceable by law if it is recognized by the court. In order to be enforceable by law, the agreement must create legal obligations between the parties. Thus, the term agreement is wider than a contract. All contracts are agreements but all agreements are not contracts. Agreements are of two types:

a. Social agreements

Social agreements are not enforceable by law because they do not create legal obligations between the parties. In social agreements, the parties do not intend to create legal relations.

b. Legal agreements

Legal agreements are enforceable by law because they create legal obligations between the parties. In legal agreements, the parties intend to create legal relations. All business agreements are contracts as there is an intention to create legal obligations.

EXAMPLES

a. A invites B to a dinner. B accepts the invitation but does not attend. A cannot sue B for damages. It is a social agreement.

b. A promises to sell his car to B for Rs. 2 Lac. It is a legal agreement because it creates legal obligations. This agreement is a contract.

Essentials of a Valid Contract

A valid contract is binding and enforceable. In a valid contract, all the parties are legally bound to perform the contract. Thus, a contract can be enforced by either of the parties. If one party refuses to perform the contract, the other party can enforce it through court. In order to be enforceable, an agreement must possess the essentials of a valid contract.

According to section 10, "All agreements are contracts if they are made by the free consent of parties, competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void. Where necessary, the agreements must satisfy the requirements of law regarding writing, attestation or registration."

The essentials of a valid contract are as follows:

1. Offer and Acceptance

In order to form an agreement, there must be a lawful offer by one party and a lawful acceptance of that offer by the other party. The term lawful means that the offer and acceptance must satisfy the requirements of Contract Act.

EXAMPLE

A offers to sell his cycle to B for Rs. 2000. This is an offer. If B accepts this offer, there is an acceptance.

2. Legal Obligation

The parties to an agreement must create legal obligations. It means that if one party does not fulfill his promise, he shall be liable for breach of contract. It is presumed in commercial agreements that parties intend to create legal relations.

EXAMPLES

a. A offers to sell his watch to B for Rs. 200. B agrees to buy. It is a contract as it creates legal obligation.

b. A husband promised to pay his wife an allowance of $30 every month. Later, the parties separated and the husband refused to pay. The wife sued. Held, that the wife was not entitled as agreement did not create legal obligations. (Belfour vs. Belfour)[1]

3. Lawful Consideration

For a valid contract, the consideration should be lawful. Consideration is the price paid by one party for the promise of the other party. An agreement is enforceable only when both the parties give and take something. That something given or taken is called consideration.

EXAMPLES

a. A agrees to sell his house to B for Rs.10 Lac. For A Rs.10 Lac is the consideration and for B house is the consideration.

b. A promises B to get him a government job and B promises to pay Rs.1 Lac. The agreement is void as the consideration is unlawful.

4. Capacity of Parties

An agreement is enforceable if it is made by parties who are competent to contract. In order to be competent to contract, it is essential that the parties are of the age of majority, have sound mind and are not disqualified from contracting by law. Contract by a person of unsound mind is void ab-initio (from the beginning).

EXAMPLES

a. M, a person of unsound mind agrees to sell his house to S for Rs. 2 Lac. It is not a valid contract because M is not competent to contract.

b. A, aged 20 promises to sell his car to B for Rs. 3 Lac. It is a valid contract because A is competent to contract.

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[1] (1919) 2 kb 571

5. Free Consent

For a valid contract, it is essential that the consent of parties must be free. Consent is free when it is not obtained by coercion, undue influence, fraud, misrepresentation or mistake. If the consent of either of the parties is not free, the agreement cannot become a contract. (Sec. 14)

EXAMPLE

A compels B to enter into a contract at gunpoint. It is not a valid contract as the consent of B is not free.

6. Lawful Object

It is necessary that agreement is made for a lawful object. The object of agreement must not be fraudulent, illegal, immoral, opposed to public policy, imply injury to the person or property of another. Every agreement with unlawful object or consideration is illegal and therefore void. (Sec. 23)

EXAMPLES

a. A, promises to pay B Rs. 5000 if B beats C. The agreement is illegal as its object is unlawful.

b. A hires a house to use for gambling. The object of the agreement is unlawful, so the agreement is illegal and void.

7. Writing and Registration

A contract may be oral or in writing. It is preferable that the contract be in writing because it is easy to prove in court. If required by law, a particular contract must be in writing, signed, attested by witnesses and registered, e.g. sale and mortgage of land.

EXAMPLES

a. X verbally promises to sell his book to Y for Rs. 200. It is a valid contract because the law does not require it to be in writing.

b. A verbally promises to sell his house to B. It is not a valid contract because the law requires it to be in writing.

8. Certainty of Terms

According to section 29, "Agreements, the meaning of which is not certain or capable of being made certain, are void." The terms of an agreement must be clear, complete and certain. If the terms are uncertain, the agreement is void.

EXAMPLES

a. A promises to sell 20 books to B without specifying their titles. The agreement is void because the terms are not clear.

b. O agreed to purchase a van from S. The price was to be paid over two years. Held, there was no contract as the terms were not certain about rate of interest and mode of payment (Scammel vs. Ouston)[2]

9. Possibility of Performance

A valid contract must be capable of being performed. An agreement to do an impossible act is void. If the act is legally or physically impossible to perform, the agreement cannot be enforced by law. (Sec. 56)

EXAMPLES

a. A agrees with B to discover a treasure by magic, the agreement is not enforceable.

b. A agrees with B to put life into B's dead brother. The agreement is void as it is impossible to perform.

10. Not Expressly Declared Void

The agreement must not be one of those agreements which have been expressly declared to be void by the law. Sections 24-30 explain certain agreements which have been expressly declared to be void, e.g. agreement in restraint of trade and wager etc. are expressly declared void.

EXAMPLES

a. A promises to close his business on the promise of B to pay him Rs. 2 Lac is a void agreement because it is in restraint of trade.

b. A promises to pay Rs. 2000 to B if Pakistan wins the world cup final. The agreement is void being a wagering agreement.

KINDS OF CONTRACT

The contracts can be classified into the following four categories:

1. According to Enforceability

According to enforceability, a contract can be divided as under:

a. Valid Contract

A valid contract is enforceable by law. An agreement becomes enforceable by law when all the essentials of a valid contract are present.

Obligation of Parties

In valid contract, all parties are legally responsible for the performance of the contract. If one of the parties breaches the contract, the other party can enforce it through the court of law.

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[2] (1941) A C 251.

EXAMPLE

A agrees to sell a car to B. If it fulfills all the essentials of a contract, it is a valid contract. If A fails to deliver the car, B can sue him and if B fails to pay, A can sue him.

b. Void Contract

The word void means not binding in law. Section 2(j) defines "A contract which ceases to be enforceable by law becomes void, when it ceases to be enforceable." It means that a void contract is not void from the beginning. It is valid contract when it is made but subsequently it becomes void due to certain reasons.

Obligation of Parties

In void contract both the parties are not legally responsible to fulfill the contract. Under this contract the party who has received any benefit is bound to return it to the other party.

A contract becomes void under the following circumstances:

i. Impossibility of Performance

A contract becomes void due to impossibility of performance. A contract becomes void before performance when it becomes impossible to be performed by any party due to any reason. (Sec. 56)

EXAMPLE

A agrees to sell his house to B after two days. The house is burnt next day. The contract becomes void.

ii. Subsequent Illegality

A contract becomes void by subsequent illegality. A contract may become illegal before performance due to certain reasons. (Sec. 56)

EXAMPLE

A agrees to sell 100 bags of wheat to B. Before delivery the government bans private trade in wheat. The contract becomes void.

iii. Rejection of a Voidable Contract

A voidable contract becomes void when the party whose consent is not free rejects the contract. (Sec. 19)

EXAMPLE

A forcibly buys B's car for Rs. 20,000. The contract is voidable at the option of B. B may accept or reject it. If B rejects the contract it becomes void.

iv. Impossibility of depending Event

The performance of a contingent contract depends upon the happening or non-happening of a certain event. It becomes void when that event does not happen. (Sec 32)

EXAMPLE

A contracts to give Rs. 1 Lac to B, if B gets admission in Hailey College. B fails to get admission. The contract becomes void.

c. Void Agreement

An agreement not enforceable by law is said to be void. The void agreement does not create legal obligations among the parties. An agreement which is void from the beginning is void ab-initio. In void agreement, there is absence of one or more essentials of valid contract except free consent. Agreement with minor and agreement without consideration are void from the beginning. (Sec. 2 (g))

Obligation of Parties

In void agreement, the party who has received any advantage is bound to restore it to the party from which he received it. Both the parties are not responsible for the performance of the agreement.

EXAMPLE

A promises to buy a dog from B for Rs. 10,000. The dog was dead before the contract. The parties were unaware. The agreement is void.

d. Voidable Contract

"An agreement which is enforceable by law at the option of one or more of the parties thereto but not at the option of the other or others is a voidable contract." (Sec. 2 (i))

A contract is voidable when consent of one of the parties is not free. It is a valid contract until it is avoided by the party having the right to avoid it. If the party decides to confirm it, it remains valid. A contract becomes voidable under the following circumstances:

A contract becomes voidable when the consent of one or more of the parties to a contract is obtained by coercion, undue influence, misrepresentation or fraud. (Sec. 15-18).

EXAMPLES

a. A compels B to sell his car at gunpoint. The contract is made by coercion and is voidable at the option of B.

b. A deceives B by stating that his factory produces 90 kg of sugar daily and induces B to buy it. The contract is voidable at the option of B.

B. When one party promises to do something for the other party but the other party prevents him from performing his promise, the contract becomes voidable at his option. (Sec. 53)

EXAMPLE

A contracts to paint B's house. A is ready to paint but B prevents him from doing so. This contract is voidable at the option of A.

C. When a party to the contract promises to do a certain thing within a specified time, but fails to do it, then the contract becomes voidable at the option of the promisee, if time is essence of the contract. (Sec. 55)

EXAMPLE

A contracts to paint B's house within one week. A, does not come within the specified time. The contract is voidable at the option of B.

Obligation of Parties

The following are obligations of the parties:

1. It is a valid contract for both the parties if it is not rejected by the party having the right to reject.
2. The law gives an option to one of the parties to avoid it.
3. The party entitled to cancel the contract is not bound to cancel. If he confirms it, the other party remains bound to perform.
4. The aggrieved party can get damages from the other party.
5. If one party has received some benefit, he must return it to the other.

Burden of Proof

The burden of proof lies on plaintiff i.e. the aggrieved party. It means that the party, who claims that his consent is unfree, has to prove in the court of law. If he fails to prove, the contract remains valid.

e. Unenforceable Contract

An unenforceable contract is that contract which cannot be enforced in a court of law because of some technical defects such as absence of writing, registration, requisite stamp etc. When these defects are removed, the contract can be enforced.

EXAMPLE

A borrows Rs. 1 billion from B and makes a pronote on a Rs. 10 stamp paper. It is unenforceable because pronote is undervalued.

Obligation of Parties

In an unenforceable contract, the parties may perform the contract. But in case of breach of such contract, the aggrieved party is not entitled to legal remedies.

f. Illegal Agreement

An agreement is illegal when its performance is forbidden by any law. Such an agreement can never become a contract. An agreement is illegal and void if it is forbidden by law or is of such a nature that if permitted, it would defeat the provisions of any law or is fraudulent or involves injury to the person or property of another or the Court regards it as immoral or opposed to public policy. (Sec. 23)

EXAMPLE

A gives money to B, a smuggler, to buy smuggled goods. The agreement is illegal and the money cannot be recovered.

Obligation of Parties

The parties to the agreement are not responsible to perform their promises. There is punishment for the parties according to law.

2. According to Formation

According to formation, a contract has the following three kinds:

a. Express Contract

Express contract is one which is expressed in words spoken or written. When such a contract is formed, there is no difficulty in understanding the rights and obligations of the parties. In express contract, the parties directly state the terms of the contract. (Sec. 9)

EXAMPLE

A tells on telephone to B that he wants to sell his car and B informs A that he agrees to buy the car, it is an express contract.

b. Implied Contract

An implied contract is made otherwise than by words spoken or written. It arises from acts, conduct of parties, and course of dealings or circumstances. It arises when one person, without being requested to do so, renders services under circumstances indicating that he expects to be paid for them and the other person knowing such circumstances accepts the benefit of those services. (Sec. 9)

EXAMPLES

a. A went into a restaurant and had a cup of tea. It is an implied contract and A will pay for the cup of tea.

b. M, a shoe shiner starts polishing the shoes of W in his presence, and W allows him to do so. It is an implied contract.

c. Quasi Contract

In a quasi contract, the law imposes certain obligations under some special circumstances. It is based upon the principle of equity that a person shall

not be allowed to get benefit at the cost of another. In fact, it is not a contract but creates relations similar to contract. It is also called constructive contract.

EXAMPLES

a. A, finds lost goods of B. A is bound to return the goods to B.

b. A leaves his goods at B's house by mistake. B treats them as his own and uses them. It is a quasi contract. B is bound to pay for the goods.

3. According to Performance

According to performance a contract is of the following two kinds:

a. Executed Contract

A contract is said to be executed when both the parties have completely performed their obligations. It means that nothing remains to be done by either party under the contract.

EXAMPLES

a. A buys a book from B. A delivers the books and B pays the price. It is an executed contract.

b. A agrees to paint a picture for B for Rs. 2,000. When A paints the picture and B pays the price, the contract is said to be executed.

b. Executory Contract

In an executory contract something remains to be done. In other words a, contract is said to be executory when both the parties to a contract have yet to perform their obligations.

EXAMPLES

a. M sells his car to N for Rs. 2 lac. N has not yet paid the price and M has not delivered the car. The contract between M and N is executory.

b. A agrees to teach B, in May and B promises to pay Rs. 800 to A. It is an executory contract because the promises are yet to be performed.

4. According to parties

According to parties a contract may be of the following two kinds:

a. Unilateral contract

In a unilateral contract only one party makes a commitment. In other words, it is a contract where only one party is bound but the other party chooses to be bound by it.

EXAMPLE

A promises to pay Rs. 1,000 to any one who finds his lost bag. B finds the bag and returns it to A. It is a unilateral contract which comes into existence when the bag is found.

b. Bilateral contract

It is a contract where both parties are bound by it, as soon as the contract is made. In other words, it is a contract in which both the parties have yet to perform their obligations.

EXAMPLE

A promises to paint a picture for B and B promises to pay Rs. 5,000 to A.

DIFFERENCE BETWEEN VOID AGREEMENT & VOID CONTRACT

The differences between void agreement and void contract are as under:

Void Agreement	Void Contract
1. Enforceability	
A void agreement is unenforceable from the beginning.	A void contract is enforceable when it is made. It becomes unenforceable later on.
2. Enforced	
A void agreement can never be enforced.	A void contract can be enforced before it becomes unenforceable.
3. Restoration of Benefit	
In a void agreement, the parties are not entitled for restoration of benefits which they have exchange during the contract.	In a void contract, the parties are entitled for restoration of benefits which they have exchange during the contract

DIFFERENCE BETWEEN ILLEGAL & VOID AGREEMENT

The following are points of difference between the two:

Illegal Agreement	Void Agreement
1. Prohibited	
An illegal agreement is prohibited by law.	A void agreement is not prohibited by law.
2. Punishable	
An illegal agreement is punishable	A void agreement is not punishable.
3. Nature	
An illegal agreement is also void agreement.	A void agreement is not illegal agreement.

4. Object	
The object of illegal agreement is illegal.	The object of void agreement is not illegal.
5. Collateral Agreement	
A collateral agreement to an illegal agreement is not enforceable.	A collateral agreement to a void agreement is enforceable.
6. Restoration of benefit	
In illegal agreement the money paid cannot be claimed back.	In void agreement the money received must be returned to the other party.

Collateral Agreement

When an agreement is illegal, other agreement which is collateral to it is also illegal and so not enforceable by law.

EXAMPLE

A borrows Rs. 2 lac from B to buy a car from X for bomb blast. B knows the purpose of the loan. An agreement between A and B is collateral to the agreement with X so it is also illegal and void agreement.

DIFFERENCE BETWEEN VOID AGREEMENT AND VOIDABLE CONTRACT

The following are points of difference between the two:

Void Agreement	Voidable Contract
1. Enforceability	
A void agreement is not enforceable by law.	A voidable contract is enforceable by law till it is rejected.
2. Defects	
A void agreement is void ab-initio and its defects cannot be removed	A voidable contract is not void ab-initio and its defects can be removed.
3. Rights of Third Party	
In a void agreement, a third party who buys goods in good faith and for consideration does not acquire any rights.	In a voidable contract, a third party who buys goods in good faith and for consideration acquires rights before the contract is rejected.

4. Compensation	
In a void agreement, the person is not entitled to compensation for loss arising due to non-performance of the agreement	In a voidable contract, a person is entitled to compensation for loss arising due to non-performance of the contract.
5. Collateral Agreement	
A collateral agreement to void agreement is not enforceable by law.	A collateral agreement to a voidable contract is enforceable by law.
6. Lapse of time	
It can never become a valid contract on the expiry of reasonable time.	It may become a valid contract if the aggrieved party does not reject it within a reasonable time.
7. Free Consent	
It is void due to lack of any essentials of a valid contract except free consent.	It is voidable contract because the consent of a party is not free.

SHORT ANSWER QUESTIONS

1. What is an agreement?
2. How does an agreement come into existence?
3. Are all agreements contract?
4. Not all agreements are enforceable by law. Why?
5. Define contract.
6. When does an agreement become a contract?
7. What is a voidable contract?
8. Distinguish between a void agreement and a void contract?
9. What is an express contract?
10. What is an unenforceable contract?

TEST QUESTIONS

1. Define contract and discuss the essentials of a valid contract.
2. Define the term agreement. Distinguish between agreement and contract
3. An agreement enforceable by law is a contract. Discuss.

4. All contracts are agreements, but all agreements are not contracts. Discuss the statement explaining the essential elements of a valid contract.
5. Explain the terms, void and voidable contracts. Discuss the rights and obligations of the parties to a void contract and voidable contract after its rescission.
6. Discuss the various types of contract.
7. Distinguish between:
   i. Void agreement and void contract
   ii. Void agreement and illegal agreement
   iii. Void agreement and voidable contract
8. Write short notes on the following:
   i. Express contract
   ii. Implied contract
   iii. Quasi contract
   iv. Executed contract
   v. Executory contract
   vi. Unilateral Contract
   vii. Bilateral Contract

02

OFFER AND ACCEPTANCE

The first essential of a valid contract is an agreement i.e. offer and acceptance. An agreement arises when one party makes an offer and the other party accepts that offer.

OFFER

Definition

Section 2(a) defines a proposal as, "When one person signifies to another his willingness to do or to abstain from doing any thing, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal."

It means that when a person shows his willingness to do or not to do something to obtain the consent of other person, it is considered a proposal.

The person making the offer is called the offeror or promisor. The person to whom the offer is made is called the offeree. The person accepting the offer is called the promisee or acceptor. The word 'offer' in English Law is similar to the word 'proposal' in Pakistani law but the word offer is usually used in our practical life.

EXAMPLES

a. A offers to sell his watch to B for Rs. 100. A makes an offer to B.

b. A promises to sell his car to B for Rs. 3 Lac. A makes an offer to B.

Essentials of a Valid Offer

The following are legal rules or essentials of a valid offer:

1. Express or Implied

An offer may be expressed or implied. An offer which is made by words spoken or written is called an express offer. An implied offer appears from the actions, conduct of parties, course of dealings or circumstances of the case.

EXAMPLES

a. M says to N that he will sell his motorcycle to him for Rs. 40,000. It is an express offer.

b. A railway coolie carries the luggage of B without asking to do so. B allows him to do so. It is an implied offer.

c. New Khan Company runs buses to carry passengers at scheduled fares. This is an implied offer by the company.

2. Legal Relations

The offer must be made in order to create legal relations otherwise there is no agreement. If an offer does not give rise to legal obligations between the parties, it is not a valid offer. In business transactions, it is presumed that the parties intend to create legal relations.

EXAMPLES

a. A invites B to dinner and B accepts the invitation. It does not create legal relations, so there is no agreement.

b. A offers to sell his watch to B for Rs. 200 and B agrees. There is an agreement because the parties intend to create legal relations.

c. Three friends agreed to enter a newspaper competition and share any winnings. It was held that they intended to create legal relations so there was a contract. (Simpkins vs. Pays)

3. Definite & Clear

An offer must be definite and clear. If the terms of an offer are not definite and clear, it cannot be called a valid offer. If such offer is accepted, it cannot create a binding contract. An agreement to agree in future is not a contract because the terms of agreement are not clear.

EXAMPLES

a. A has two motorcycles. He offers B to sell one motorcycle for Rs. 27,000. It is not a valid offer because it is not clear which motor cycle A wants to sell.

b. X purchased a horse from Y and promised to buy another, if the first one proved lucky. X refused to buy the second horse. Y could not enforce the agreement, as it is unclear. (Taylor vs. Portington)

4. Different from Invitation to Offer

An offer is different from an invitation to offer. In an invitation to offer, the person making the invitation does not make an offer but only invites the other party to make an offer. His object is to inform that he is willing to deal with anybody who is willing to deal with him.

EXAMPLES

a. X displays goods for an auction sale. It is not an offer. The offer will come from the buyer in the form of bid.

b. N advertised to sell his furniture at Bury on specified day. H came from London to attend the auction but all furniture was withdrawn from sale. H sued N for loss of time and expenses. Held, H could not recover expenses because the advertisement was an invitation to offer. (Haris vs. Nickerson)[1]

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[1] (1873) LR & QB 286

5. Specific or General

When an offer is made to a specific person or group of persons, it is called specific offer. Specific offer can be accepted only by the person or persons to whom it is made. A general offer is made to public in general and it may be accepted by any person who fulfils the conditions mentioned in it.

EXAMPLES

a. M makes an offer to N to sell his bicycle for Rs. 800, it is a specific offer. In this case only N can accept it.

b. A announces in a newspaper a reward of Rs. 1,000 for anyone who will return his lost radio. It is a general offer.

c. The CSB Co. advertised to pay $ 100 to any person who contracts flue after using their medicine. Mrs. Carlill used the medicine but suffered from flue. She sued for the reward. The company was held liable. (Carlill vs. Carbolic Smoke Balls Co.)[2]

6. Communication with Offeree

An offer is valid only when it is communicated to the offeree. If an offer is not communicated to the offeree, it cannot be accepted. An acceptance of offer without having knowledge of such offer is not a valid acceptance and does not create any legal obligations. Thus, an offer which is not communicated is not a valid offer.

EXAMPLE

G's nephew was missing from home. He sent his servant Lalman in search of the boy. When the servant left, G announced a reward of Rs.501 for anyone who gives information about the boy. The servant before the announcement found the boy and informed G. Later, he claimed for the reward. He failed on the grounds that he could not accept the offer unless he had the knowledge of it. (Lalman vs. Gauri Datt)

7. Negative Condition

An offer cannot contain a condition that the offer would be considered as accepted if acceptance is not communicated up to a certain date. If the offeree does not reply, there is no contract because an obligation to reply cannot be imposed on the grounds of justice.

EXAMPLE

A wrote to B to sell his book adding that if he did not reply within 5 days, the offer would be considered as accepted. There is no contract.

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[2] (1893) 1 QB 256

8. Conditions in Offer

An offeror may include any condition in his offer. There is no contract unless all the conditions of the offer are accepted. If the offeror prescribes a specific mode of acceptance, the offeree must adopt the same mode of acceptance. If the offeree does not follow the prescribed mode, the offeror must inform the offeree regarding its rejection otherwise he is considered to have accepted the acceptance.

EXAMPLE

A asks B to send the reply of his offer by telegram but B sends reply by letter. A may reject such acceptance.

9. Cross Offers

When two parties make similar offers to each other without having knowledge of other's offer, it is called cross-offers. The acceptance of cross offers does not result in formation of a contract.

EXAMPLE

A wrote to B to sell him 1 ton of iron for Rs. 1 Lac. On the same day B wrote to A to buy 1 ton of iron for Rs. 1 Lac. There is no contract.

Revocation of Offer

An offer may revoke in any of the following ways: (Sec.6)

1. Notice of Revocation

An offer can be revoked by sending a notice of revocation to the other party. It means that the offeror may revoke his offer at any time before acceptance, even though the period of acceptance of offer has not yet expired. The offeree cannot create a contract by accepting the revoked offer.

EXAMPLE

A, at an auction gives the highest bid to buy B's goods. He withdraws the bid before the fall of hammer. The offer is revoked.

2. Lapse of Time

When the offer is kept open for a specified time period, it terminates if it is not accepted within that time period. If the offer does not specify any time period, it terminates after lapse of a reasonable time. The reasonable time depends upon the circumstances of each case. If the commodity is perishable, the reasonable time will be relatively shorter.

EXAMPLE

M offered to buy shares of a company R, on 8th June. R allotted shares to M on 23rd November. M refused to accept them. Held that the offer had lapsed by delay in acceptance. (R.V. Hotel Co. vs. Montefiore)[3]

3. Failure to Fulfill Condition

If an offer contains some conditions and the offeree fails to fulfill these conditions, the offer terminates.

EXAMPLE

A offers to sell his scooter to B for Rs. 50,000 if B gets admission in medical college. B fails to get admission, the offer is revoked.

4. Death or Insanity of Offeror

An offer terminates on death or insanity of the offeror, if the offeree comes to know about the death or insanity of offeror before his acceptance. If the offeree does not know about the death or insanity of offeror and gives his acceptance, it is valid acceptance. It results in a valid contract and legal representatives of the deceased offeror will be bound by the contract.

EXAMPLE

X requested D, to give credit to Y and guaranteed payment up to Rs. 1 Lac. X died and D in ignorance of this fact continued to give credit to Y. D sued X's legal representatives on the guarantee. Held, that the legal representatives were liable.

5. Revocation of Offer by Offeree

If the offeree rejects the offer and communicates the rejection to the offeror, the offer terminates even though the period for acceptance of offer has not yet expired.

EXAMPLE

A offers to sell his cycle to B and keeps the offer open for ten days. B refuses after three days. It terminates although the period has not yet expired.

6. Counter Offer by Offeree

When an offer is accepted with some change in the terms of the offer, such acceptance is called counter offer. An offer terminates when a counter offer is made. The party making a counter offer cannot accept the original offer.

EXAMPLES

a. A offers to sell his house to B for Rs. 1 Lac. B counter offers Rs. 80,000. Later, even if B is ready to pay Rs. 1 Lac, the original offer is terminated.

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[3] (1866) LR 1 EX CH 109

b. W offered to sell a farm to H for £1,000. H offered £950. W refused the offer. Subsequently H offered 1,000 £. Held, there was no contract as H by offering 950 £ had rejected the original offer. (Hyde vs. Wrence)[4]

7. Death or Insanity of Offeree

An offer can be accepted only by the offeree. It cannot be accepted by his legal representatives upon his death. If the offeree dies or becomes insane before acceptance, the offer terminates.

EXAMPLE

X offers to sell his camera to Y. Y dies before acceptance. The offer terminates.

8. Subsequent Illegality

An offer lapses if it becomes illegal before its acceptance. An offer may also terminate if it becomes illegal due to change in law before its acceptance by the offeree.

EXAMPLE

A offers to sell 10 bags of rice to B for Rs. 2000. Before its acceptance, a law bans the sale of rice. The offer terminates.

9. Destruction of Subject Matter

An offer lapses if the subject matter of the offer is destroyed before its acceptance by the offeree.

EXAMPLE

A offers to sell his horse to B. The horse dies before the acceptance of offer by B. The offer terminates.

10. Prescribed Manner

If the offeror prescribes the manner of acceptance, the offer terminates if the offeree does not accept according to the prescribed manner. If the offeror wants to reject the offer, he must inform the offeree within a reasonable time. If offeror does not inform, he will be bound by such acceptance.

EXAMPLE

A offers to sell his car to B. A requests B to give acceptance by telephone. B sends acceptance by letter. The offer terminates.

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[4] (1840) 3 Beav 334

ACCEPTANCE

Definition

Section 2(b) defines acceptance as, "When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise."

EXAMPLE

A offers to sell his house to B for Rs. 5 Lac. B accepts the offer. This is an acceptance.

Essentials of Valid Acceptance

The following are legal rules or essentials of a valid acceptance:

1. Acceptance by Offeree

An offer can be accepted only by the person to whom it is made. It cannot be accepted by another person without the consent of offeror. When an offer is made to a particular group, it can be accepted by any member of that group. If the offer is made to general public, it can be accepted by any person who has knowledge of that offer.

EXAMPLES

a. X offered to sell his house to Y. Z who was aware of such offer said that he is ready to buy X's house. There is no contract with Z.

b. A sold his business to B without informing his customers. J sent an order for the supply of goods to A by name. B received the order and supplied the goods. It was held that there was no contract because J never made any offer to B. (Boulton vs. Jones)[5]

2. Absolute & Unconditional

In order to form a valid agreement, the acceptance must be absolute and unconditional. If the offeree imposes any condition in his acceptance, it is not a valid acceptance but a counter offer. There is no contract until the counter offer is accepted by the original offeror.

EXAMPLES

a. A offers to sell his watch to B for Rs. 500. B replies that he can buy it for Rs. 300. There is no acceptance on the part of B.

b. M offered to sell land to N for £280. N accepted and enclosed £80 with a promise to pay the balance by monthly installments of £50 each. Held, there was no contract as the acceptance was conditional. (Neale vs. Merret)[6]

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[5] (1857) 157 ER 232

[6] (1930) W N 189

3. Prescribed Manner

If the offeror prescribes a particular manner of acceptance, the offeree must accept according to that particular manner. If acceptance is not made according to the prescribed manner, the offeror may reject it. If no particular manner is prescribed in the offer then acceptance should be made in a reasonable manner.

EXAMPLES

a. A makes an offer to B and asks him to accept the offer by telegram. B sends his acceptance by post. It is not a valid acceptance.

b. A offered to buy flour from B and requested him to send acceptance by messenger who had brought the order. B sent his acceptance by post thinking that it would reach A earlier than the messenger. Held, A was not bound by the acceptance. (Eliason vs. Henshaw)

4. Communication with Offeror

The offeree or his agent must communicate the acceptance to the offeror in a clear manner. Showing the intention to accept an offer is not a valid acceptance. If the offeree does not accept the offer, no contract is formed. When offeree accepts an offer but fails to clearly communicate, it is not considered an acceptance.

EXAMPLES

a. A offers by letter to purchase B's house. B expresses his intention to sell it but does not reply. B sells to C. A has no legal remedy against B.

b. The manager of a railway company received a draft agreement relating to supply of coal. The manager approved and put the agreement in the drawer and forgot all about it. Held, there was no contract, as the other party was not informed. (Brodgen vs. Metropolitan Railway Co.)[7]

5. Express or Implied

When an acceptance is given by words spoken or written, it is called express acceptance. When acceptance is given by conduct or action it is called implied acceptance. If the offer is made to the public, the contract arises when any person accepts it by words or conduct.

EXAMPLES

a. A offered by letter to sell his cycle to B for Rs. 2,000. B accepted his offer and sent a letter of acceptance. It is an express acceptance.

b. A widow promised to give some property to her niece if she stayed with her. The niece stayed in her residence till her death. Held, the niece was entitled to the property. (V. Rao vs. A. Rao)

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[7] (1877) 2 AC 666

6. Acceptance after Offer

Acceptance must be given after receiving an offer. It cannot precede the offer. If acceptance is made without having knowledge of the offer, there is no contract because no acceptance can be made without an offer.

EXAMPLES

a. A offered a reward for anyone who finds his lost dog. B, in ignorance of the offer, finds and returns the dog. B cannot claim the reward.

b. A company allotted shares to a person who had not applied for them. Later, he applied for the shares. Held, that the previous allotment was invalid.

7. Reasonable time

If offeror specifies a time period for acceptance in his offer, the offeree must give acceptance within that specified time. If no time is specified, the acceptance must be given within a reasonable time. The reasonable time depends upon the circumstances of each case.

EXAMPLE

M applied for shares of a company in June but allotment was made in November. M refused to accept the shares. It was held that M could refuse to take shares because the offer had lapsed after the expiry of a reasonable time. (Ramsgate Victoria Hotel Co. vs. Montefiore)[8]

Communication of Offer, Acceptance and Revocation

When the contracting parties are face to face with each other, there is immediate communication of offer and acceptance. The moment the offeree gives his acceptance, there is a valid agreement. When the parties are at a distance from each other, the services of post office are utilized to enter into a contract. In this case the following rules apply:

1. Communication of Offer

Section 4 explains, "The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made".

It means that communication of an offer completes when the letter containing an offer comes to the knowledge of the offeree.

EXAMPLES

a. A offers, by letter, to sell a van to B for Rs. 1 Lac. The letter reaches B on 8th March. Communication of the offer is complete on 8th march.

b. X sends a letter to Y offering to sell his motorcycle for Rs. 4,000. The letter never reaches Y. The offer is not complete.

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[8] (1866) LR 1 Ex 109

2. Communication of Acceptance

The communication of an acceptance is complete:

a. As against the proposer, when it is put in course of transmission to him, so as to be out of power of the acceptor.

b. As against the acceptor, when it comes to the knowledge of the proposer. (Sec. 4)

It means that the communication of an acceptance completes, as against the offeror, when the letter of acceptance is posted to the offeror, i.e. when letter of acceptance is out of control of the acceptor. The communication of an acceptance completes, as against the acceptor, when the letter of acceptance comes to the knowledge of offeror.

EXAMPLES

a. A offers, by letter, to sell a van to B for Rs. 50,000. The letter reaches B on 8th March. B accepts by a letter sent by post on 9th March. The letter reaches A on 11th March. The communication of the acceptance is complete:

   i. As against A, when the letter is posted, i.e. on 9th March.

   ii. As against B, when the letter is received by A, i.e. on 11th March.

b. G offered by post to purchase share of the company. The letter of allotment posted by the company never reached G. Held, the acceptance was complete as soon as the letter of acceptance was posted. (H. F. Insurance Co. vs. Grant)

3. Communication of Revocation

Revocation means cancellation. There may be a revocation of offer and acceptance. The communication of a revocation is complete:

a. As against the person who makes it, when it is put in course of transmission to the person to whom it is made, so as to be out of the power of person who makes it.

b. As against the person to whom it is made, when it comes to his knowledge. (Sec. 4)

It means that communication of revocation completes as against the person who makes it, when the letter of revocation is posted. The communication of revocation completes as against the person to whom it is made, when the letter of revocation comes to his knowledge.

EXAMPLES

a. A revokes his offer by letter on 8th March. The letter reaches B on 10th March. The revocation is complete as against A on 8th, when the letter of revocation is posted. It is complete as against B on 10th, when the letter of revocation reaches him.

b. T offered by a letter on October 1st, to sell goods to B in New York. B received the offer on 11th and gave his acceptance. On 18th T wrote a letter revoking his offer. The letter was received by B on 20th. Held, the revocation was of no effect until it reached B. A contract made on 11th when B accepted the offer. (Byrne vs. Van Timehoven)[9]

Time of Revocation of Offer and Acceptance

An offer may be revoked any time before communication of its acceptance is complete as against the offeror, but not afterwards. An acceptance may be revoked any time before communication of the acceptance is complete as against the acceptor, but not afterwards. (Sec.5)

EXAMPLE

A offers by letter to sell his house to B. B accepts the offer by a letter posted on 4th May. The letter reaches A on 6th May. A may revoke his offer before B posts his letter of acceptance, i.e. 4th but not afterwards. B may revoke his acceptance before the letter of acceptance reaches A, i.e. 6th but not afterwards.

Loss of Letter of Acceptance

If the letter of acceptance is delayed or lost, following is the effect:

1. Position of Offeror

When the letter of acceptance is posted, the offeror is bound by that acceptance. The contract is valid even if the letter of acceptance is delayed or lost. In order to bind the offeror, the letter must be stamped, correctly addressed and properly posted. If wrong address is given by the offeror himself, he will be bound by the acceptance.

2. Position of Acceptor

The acceptor is not bound by the letter of acceptance till it reaches the offeror. Until the letters of acceptance reaches the offeror, the contract remains voidable at the option of acceptor. He may enforce the contract or revoke his acceptance before the letter reaches the offeror.

3. Accidental Formation of Contract

When both the letter of acceptance and letter of revocation of acceptance are received at the same time by the offeror; the formation of a contract depends upon chance. If the offeror first reads the letters of acceptance, a contract will arise. But if offeror first reads the letter of revocation, there will be no contract.

4. Contracts over Telephone

In case of contract over telephone, there is immediate communication of offer, acceptance and revocation. The rules which apply to contracts made when

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[9] (1880) 5 CPD 344

parties are face to face with each other, also apply to contracts made over telephone. If acceptance is not communicated to the offeror due to a fault in the telephone, there will be no contract.

The offeree must make sure that his acceptance is received, heard and understood by the offeror; otherwise there is no contract. In case of a contract over telephone the question of revocation does not arise because an offer is made and accepted at the same time.

SHORT ANSWER QUESTIONS

1. How is an offer made?
2. What is a general offer?
3. What is a public offer?
4. Is invitation to make an offer the same thing as an offer?
5. Distinguish between an offer and a quotation.
6. Who can accept an offer?
7. Can acceptance of an offer be implied from the silence of the offer?
8. When is communication of offer complete?
9. When is communication of acceptance complete as against the acceptor?
10. When is communication of revocation complete?
11. What happens if an offer is not accepted according to the mode prescribed?

TEST QUESTIONS

1. Define the term offer. Explain the legal rules regarding a valid offer.
2. An invitation to offer is not an offer. Explain the statement.
3. What is an offer? How is an offer revoked?
4. Define the term acceptance. What are the essentials of a valid acceptance?
5. Discuss the law relating to communication of offer, acceptance and revocation.
6. Define offer and acceptance. When is offer and acceptance deemed to be complete if made through post?
7. State the rules relating to offer and acceptance made by letters sent through the post and their revocation.
8. How is an offer complete? How and when can an offer be revoked?
9. What is the effect of delay of letter of acceptance in transit?

03

CONSIDERATION AND OBJECT

Meaning and Definition

Consideration is one of the essentials of valid contract. An agreement without consideration is void. A consideration is what a promisor demands for his promise. An agreement is enforceable when both the parties take something and give something. The something given or taken is called consideration.

Pollock says, "The consideration is the price for which the promise of the other is bought and the promise thus given for value is enforceable."

Lush J defines, "A valuable consideration may consist of some right, interest, profit or benefit accruing to one party and some forbearance, detriment, loss or responsibility given, suffered or undertaken by other".

Justice Patterson defines, "The consideration means something which is of some value in the eye of law. It may be some benefit to the plaintiff or some detriment to the defendant."

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

EXAMPLES

a. A agrees to sell his house for Rs. 10 Lac to B. For A the consideration is Rs.10 Lac. For B consideration is house.

b. A promises to repair B's car and B promises to pay Rs. 1 Lac. The promise of one party is the consideration for the other party.

c. A promises not to sue his debtor B and B promises to pay additional 1 Lac. The abstinence of A is the consideration for B's promise to pay.

d. A promises to paint a picture for B and B promises to teach him for a month. The promise of one party is the consideration for the other.

Essentials of Valid Consideration

The essentials or legal rules of a valid consideration are as under:

1. Desire of Promisor

For a valid consideration, the act or abstinence which forms the consideration must be done at the desire of the promisor. It means that any act

performed at the desire of third party or without the desire of the promisor cannot be a consideration. Similarly, the act done voluntarily does not create a valid consideration. The promisor need not necessarily get any benefit; the third party may also get benefit from the contract.

EXAMPLES

a. A saved B's house from fire. B did not ask for help. A cannot demand payment for his services because he acted voluntarily.

b. B promised to pay a commission on goods sold in his market if D constructed a market in that area. Later, the collector requested D to construct the market and D constructed the market on his request. D demanded commission from B. Held, the promise was not enforceable because the market was not constructed at the desire of B. (Durga Prasad vs. Baldeo)[1]

2. Promisee or other Person

A consideration may move from the promisee or any other person. It means a person can sue on a contract; even if the consideration for the promise moved from a third party.

EXAMPLE

A gifted property to her daughter R on the condition that she would pay certain amount annually to A's brother C. R promised to pay the amount to her uncle C. Later, R refused to pay. C sued. Held, C could recover the amount as the consideration had moved from A to C. (Chinnaya vs. Ramayya)[2]

3. Act, Abstinence or Promise

The consideration may be a positive or a negative act. Sometimes a return promise also forms consideration.

a. Act

A consideration may be an act, i.e. doing of something. In this sense, consideration is in positive form.

EXAMPLE

P agrees to construct A's house for Rs. 10 Lac. A's promise to pay Rs. 10 Lac is the consideration for P's promise of constructing the house.

b. Abstinence

Abstinence means refraining from doing something. In this sense consideration is in negative form.

EXAMPLE

1(1881) 3 All 221

2 2(1882) 4 Mad 137

A promises not to sue B if B pays him additional Rs. 5,000. The abstinence of A is the consideration for B's payment.

c. Promise

For a valid consideration, there must be a promise from both sides. It means that there must be a promise by one party against the promise of other party.

EXAMPLE

A agree to sell his horse to B for Rs. 30,000. B's promise to pay Rs. 30,000 is the consideration for A's promise. A's promise to sell the horse is the consideration for B's promise.

4. Past, Present or Future

The consideration may be past, present or future. It means that consideration is an act which has been done or is in progress or is promised to be done in future.

a. Past Consideration

When the consideration is given before the formation of agreement, it is called a past consideration. It is not a valid consideration. When an act is done voluntarily without any promise for compensation, it is a past consideration and the person doing the act gets no compensation. But if promise is made to compensate a person who has rendered some services, then past consideration is a valid consideration.

EXAMPLES

a. B found A's lost purse and gave it to him. B cannot demand payment for his services due to past consideration.

b. A teaches B at his request in January, and in February B promises to pay A Rs. 2,000 for his services. The service of A is past consideration.

c. A lawyer gave up his practice and served as manager at the request of landlord. The landlord promised to pay pension. It was held that there was valid past consideration. (Shiv Saran vs. Kesho Prasad)[3]

b. Present Consideration

When consideration is given immediately by one party to another at the time of contract, it is called present consideration. The act creating the consideration is completely performed.

EXAMPLE

A sells a book to B and B pays price immediately. It is a case of present consideration.

c. Future Consideration

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[3] (42-1.c.122

When the consideration on both sides is to move at a future date, it is called future consideration. It consists of promises and each promise is a consideration for the other party. In future consideration, the liability is outstanding on both sides.

EXAMPLE

X promises to deliver a car to Y after a week, and Y promises to pay the price at the time of delivery. The consideration is future.

5. Not necessarily Adequate

It is not necessary that the consideration is equal in value to the promise. The law insists on the presence of consideration and not on its adequacy. The parties are free to decide the value of consideration. However, inadequate consideration may create a doubt about the free consent of the parties. But if the consent is proved to be free, inadequate consideration is valid.

EXAMPLE

A agrees to sell his car worth Rs. 2 lac for Rs. 50,000 and his consent is free. The contract is valid.

6. Real and Competent

It is necessary that the consideration is real and competent. A consideration is not considered valid if it is physically impossible, illegal, uncertain or unreal.

a. Physically Impossible

A promise to do something which is physically impossible.

EXAMPLE

A promises to put life in B's dead brother and B promises to pay him Rs. 1 Lac.

b. Legally Impossible

A promise to do something which is illegal.

EXAMPLE

A promises to pay Rs. 1 Lac to B on his promise to beat C.

c. Uncertain Consideration

A promise to do something which is uncertain.

EXAMPLE

A employs B for a certain work and promises to pay a reasonable amount.

d. Unreal Consideration

Consideration is unreal if it consists of a promise to perform a duty which a person is already responsible to perform under a law.

EXAMPLE

C was summoned to give evidence in court for G. G promised to pay some amount. G refused to pay. C sued. Held, that consideration was unreal as it was C's duty to give evidence. (Collins vs. Godefroy)[4]

Exceptions to Consideration

According to law, agreement without consideration is void. Following are the agreements which are valid even without consideration:

1. Natural Love and Affection

The agreement which is expressed in writing and registered under the law and is made on account of natural love and affection between the parties standing in a near relation to each other is enforceable even if there is no consideration. The contract without consideration shall be valid if following conditions are satisfied: (Sec. 25)

a. The contract is in writing.

b. The contract is registered.

c. The contract is made on account of natural love and affection.

d. There must be near relation between the parties to the contract.

EXAMPLES

a. A promises to give Rs. 1000 to B for no consideration. It is a void agreement.

b. F, on account of natural love and affection, promises to give Rs. 1 Lac to his son S. F puts it in writing and gets it registered. S can enforce it.

c. B, due to dispute with his wife R, promised on a registered document to pay some amount. Later, B refused to pay. R sued for recovery. It was held that agreement was void because it was not based on natural love and affection. (Rajlakhi Devi vs. Bhootnath)[5]

2. Voluntary Compensation

If a promise is made to compensate, wholly or in part, a person who has voluntarily done something for the promisor, is enforceable even though without consideration. In other words, a promise to pay for a past voluntarily service is binding. This is an exception to the principle that past consideration is no consideration. For this exception, the following points should be noted: (Sec. 25(2))

a. The services were rendered voluntarily for the promisor.

b. The promisor must be in existence at the time the services were rendered.

c. The intention of the promisor should be to compensate the promisee.

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[4] (1831) IB & Ad 950

[5] (1900(4 CWN 488

d. The services rendered must be legal.

EXAMPLES

a. A finds B's purse and returns it to him. B promises to give A Rs. 500. This is a contract.

b. A saves B from drowning in the river and B promises to pay Rs. 10,000 to A. This is a valid contract.

3. Time-Barred Debt

A debt becomes time-barred if it is not claimed for a period of three years from the date it becomes due. Where there is an agreement, made in writing and signed by the debtor to pay wholly or in part a time-barred debt, the agreement is valid even though it is not supported by any consideration. Such an agreement is valid if the following conditions are fulfilled. (Sec. 25(3))

a. The debt must be time-barred.

b. The promisor himself must be liable for the debt.

c. There must be an express promise to pay a time-barred debt.

d. The promise must be in writing and signed by the debtor or his agent.

EXAMPLE

A owes B Rs. 1000, but the debt becomes barred. A signs a written promise to pay B Rs. 500 on account of the debt. It is a contract.

4. Completed Gift

A gift does not require consideration in order to be valid. Any gift given will be valid between the donor and donee even though without consideration. There need not be natural love and affection or nearness of relationship between the donor and donee. The gift must be complete, and it is said to be completed when possession is given to the donee by the donor. (Sec. 25 Explanation 1)

EXAMPLE

A gifted a watch to B on his birthday. Later, A cannot get his watch back on the ground that there was no consideration for him.

5. Contract of Agency

Consideration is not necessary to create an agency. Generally, an agent gets commission for his services. If the agent promises to perform any act for his principal without charging any commission, the agreement is valid even without consideration. (Sec. 185)

EXAMPLE

A promises to sell B's house on his behalf. An agreement between A and B is valid even without consideration.

6. Remission by Promisee

When a person agrees to receive less than what is due, it is known as remission. If a creditor agrees to give up a part of his claim, there is no need of

consideration for such an agreement. Similarly, an agreement to extend time for performance of a contract need not be supported by consideration. (Sec. 63)

EXAMPLE

A owes B 5,000 rupees. A pays Rs. 2,000 to B and B accepts it in full satisfaction of the whole debt. The whole debt is discharged.

Doctrine of Privity of Contract

Privity of contract means relationship existing between the parties who have entered into agreement. There are two consequences of the doctrine of privity of contract.

1. A person who is not a party to a contract cannot sue upon it even though the contract is for his benefit and he provided consideration.

EXAMPLE

X owes Rs. 1 Lac to Y. X sells his house to B for Rs. 1 Lac and asks B to pay to Y. B fails to pay. Y cannot sue B because he is not a party to the contract.

2. A contract cannot confer rights or impose obligations arising under it on any person other than the parties to it.

EXAMPLE

Dunlop sold tyres to D, on the condition that he will not sell the tyres to the public below Dunlop's list price. D sold tyres to S on this condition. S sold them below the list price. It was held that the Dunlops could not sue S as he was a stranger to the contract. (Dunlop Tyres Co. vs. Selfridges Ltd.)

Stranger to Contract

A person who is not a party to the contract is called stranger to the contract. A stranger to the contract cannot sue because he has no privity of contract. The above rule is subject to the following exceptions:

1. Trust

In case of trust, the beneficiary can sue to enforce his rights under the trust although he is not a party to the contract.

EXAMPLES

a. A transfers some property to B under trust for the benefit of M. M. can enforce the agreement. (M. K. Ropai vs John)[6]

b. An addressee of an insured article can sue the Post Office in case of loss because on receipt of article, the Post Office becomes trustee for the addressee. (Amir Ullah vs. Central Government)[7]

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[6] (1915) Ac 847

[7] (1965) AIR Kar 203

2. Agreements relating to Immovable Property

Owner of a property may be entitled to certain rights and obligations created by an agreement affecting the property. When a person purchases such property with the notice of rights and obligations of the owner, he is bound by those rights and obligations although he is not a party to the original agreement.

EXAMPLE

A buys a house through HBFC loan. A sells the house to X without returning the loan to HBFC. HBFC can sue X.

3. Family Settlements

Where provision is made for the marriage, partition or other family arrangements for the benefit of any member of a family, such member though not party to the agreements, can enforce the agreements.

EXAMPLE

On a partition of joint property, two brothers agreed to pay Rs. 300 to their mother for her maintenance. Held, she was entitled to recover. (Shuppu vs. Ammal)[8]

4. Agent

Where a person acts as agent for his principal, the principal can sue on a contract although he is not a party to a contract.

EXAMPLE

A appoints B as his agent to sell goods. B sells goods to X. X can sue A for defective goods though there is no direct contract between A and X.

5. Assignment

In assignment of rights under a contract in favour of a third party voluntarily or by operation of law, the assignee can enforce the contract.

EXAMPLE

A assigned his insurance policy in favour of his wife. The wife can enforce it although she is not a party to the contract.

Unlawful Considerations and Objects

For the valid agreement, the object and consideration of an agreement must be lawful. If the consideration or object of a contract is unlawful the agreement is illegal and therefore void.

The words 'object' and 'consideration' are different from each other. The word object means purpose. While the consideration means the price for which the promise of the other is taken. Sometimes the object of a contract may be illegal though its consideration is lawful.

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[8] (1910) 33 MAD 2

EXAMPLE

A takes a house from B on rent. It is lawful. If A wants to store illegal arms in the house, the agreement is unlawful due to unlawful object.

According to section 23 the consideration or object of an agreement is unlawful in the following cases:

1. Forbidden by Law

If the consideration or object of an agreement is forbidden by law, the agreement is unlawful and void. An act is forbidden by law:

a. When it is punishable by the Criminal Law of the country, or

b. When it is prohibited by special act of legislature.

EXAMPLES

a. B and C agree to divide the goods obtained by theft. The agreement is unlawful.

b. The sale of liquor without license is illegal and so void.

c. Agreement to sell above the price fixed by the law is illegal and void. (Sita Ram vs. Kunj Lal)[9]

2. Defeats Provisions of Law

If the object or consideration of an agreement is of such a nature that if permitted it would defeat the provisions of any law, then it is considered illegal. Such objects or considerations may not be directly forbidden by law but they will indirectly violate law.

EXAMPLE

A fails to pay his loan to HBFC. A's house is sold for recovery of debt. According to law, A is prohibited from purchasing his house. A asks B to purchase the house and transfer it back to him. The agreement is void.

3. Fraudulent

If the object or consideration of an agreement is to defraud others, then it is considered unlawful and void. Where the parties agree to commit a fraud on a third person, the agreement is illegal.

EXAMPLES

a. A promises to pay Rs. 20,000 to B, on Bs' promise to commit fraud on C. The agreement is illegal and void.

b. A is the agent of X. A agrees to sell the land to his friend B, at a lesser price without knowledge of his principal. The agreement between A and B is void as it is fraud by A against X.

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[9] (1963)AIR All 206

4. Involves Injury to Person or Property

If the object or consideration of agreement is to cause an injury to a person or property of another, then it is illegal and also void. Injury means criminal or wrongful harm.

EXAMPLES

a. An agreement to put certain property on fire is unlawful and void.

b. An agreement to commit an assault or to beat a man is held unlawful and void. (Allen vs. Rescous)[10]

5. Court regards as Immoral

If the consideration or object of an agreement is such that the court regards it as immoral, the consideration is void. Immoral means acts which are against the moral values and also prohibited by law.

EXAMPLE

A married woman was given money to obtain divorce from her husband and then marry the lender. Woman refused to take divorce. Held, the agreement was immoral and the lender could not recover the money. (Bai vijli vs. Hamda Nagar)[11]

6. Court considers it against Public Policy

An agreement which is harmful for the welfare of the society or the state is against the public policy. If the court considers the object or consideration of an agreement as opposed to public policy, then the agreement is unlawful.

An agreement which leads to corruption, injustice or immorality is considered to be against the public policy. The following agreements are held to be against public policy:

EXAMPLES

a. The agreements to give money to induce a person to give false evidence.

b. The agreements to influence judges.

c. The agreements with an alien enemy.

d. The agreements which disturb the friendly relations of the state.

e. The agreements the purpose of which is to influence over the officers of justice.

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[10] (2 Lev 174)

[11] (1885) 10 Bom. 152

SHORT ANSWER QUESTIONS

1. What is consideration?
2. At whose desire should consideration move?
3. Can consideration move from a stranger?
4. Can a stranger to a contract sue?
5. Is past consideration valid?
6. Need consideration be enough?
7. Consideration must be real and not illusory. What does this mean?
8. Is consideration essential to support a contract?
9. Does nearness of relationship mean natural love and affection?
10. Is a promise to compensate a person who has voluntarily done something for the promisor enforceable?
11. Is promise to pay a time-barred debt enforceable?

TEST QUESTIONS

1. Define consideration. What are the rules regarding a valid consideration?
2. Explain the term consideration and state the exceptions to the rule - `No consideration, no contract'.
3. Insufficiency of consideration is immaterial; but an agreement without consideration is void. Explain.
4. A stranger to the consideration can sue but a stranger to contract cannot sue'. Explain.
5. What are the situations in which a contract is valid even without consideration?
6. Agreements made without consideration are void. Explain fully.
7. In what cases the object and consideration of an agreement are unlawful under the Contract Act? Explain with examples.
8. What do you understand by an illegal agreement? What is the effect of illegal agreement on collateral transaction?
9. Which objects and considerations are lawful?

04

CAPACITY OF PARTIES

The contracting parties must be competent to contract. Every person is competent to contract who is of the age of majority, has sound mind, and is not disqualified from contracting by any law. A minor, person of unsound mind and person disqualified by law are incompetent to contract. (Sec.11)

MINOR

Minor is a person who has not attained 18 years of age. According to Majority Act, 1875, where a guardian of minor's person or property is appointed or court of wards take charge of minor's property, a minor will attain the age of majority after 21 years.

Nature of Minor's Agreements

The law regarding minor's agreements is explained as under:

1. Void Agreement

An agreement with minor is void. A minor is not liable to perform any act which he has promised because he does not possess the capacity to judge what is good or bad for him. A minor cannot be compelled to pay back the money received by him under the agreement. An agreement with a minor does not create legal rights and duties.

EXAMPLES

a. A, a minor sold his shop to B. The amount was paid to A but the sale deed could not be registered as A was minor. On a suit by B, it was held that as A was minor, so agreement was void ab-initio and the amount was not recoverable. (Shiam Lal vs. Ram Piary)[1]

b. D, a minor mortgaged his house in favour of M to secure a loan of Rs. 20000. D received Rs. 8000. M filed a suit for recovery of money and sale of mortgaged property in case of default. Held that the agreement with minor was void so M cannot recover the money or sell the minor's mortgaged property. (Mohori Bibi vs. Dharmo Das Gosh)[2]

2. Minor and Ratification

Ratification means act of confirming or approving. An agreement made by a minor cannot be confirmed by him on attaining the age of majority because an

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[1] (1910) 32 All 25

[2] (1903) ILR 30. Cal 539

agreement which is void from the beginning cannot be made valid by subsequent confirmation.

EXAMPLE

M, a minor borrowed some money and wrote a pronote for it. On attaining majority, M wrote a second pronote to settle the first note. It was held that the second pronote was void for want of consideration. (Suraj Narain vs. Sukhu Ahir)[3]

3. Minor and Estoppel

The rule of estoppel does not apply to a minor. It means that a minor is not estopped from pleading his infancy in order to avoid a contract, even if he has entered into an agreement by falsely representing that he was of full age. In other words, where a minor represents fraudulently that he is of full age and induces another to enter into a contract with him, he is not bound by the contract.

EXAMPLE

M, a minor fraudulently shows that he is of full age and contracts with N to sell his house. M refuses to perform the contract on the ground that he is a minor. N cannot sue M. (Sadiq Ali Khan vs. Jai Kishore)[4]

4. Minor and Repayment

A minor cannot be compelled to repay the money received by him under an agreement. If anything is recoverable from minor out of the proceeds of the contract made by fraudulently showing that he was of full age, the court may compel the minor to return the amount to the other party when the minor himself brings a suit against the other party. But, if the minor loses the property or money, he cannot be made responsible to restore.

EXAMPLES

a. M, a minor got Rs. 17,500 as advance and promised to sell the land. Later, M refused to perform the contract. The court ordered the minor to refund the amount. (Khan Gull vs. Labha Singh)[5]

b. A minor sold a house for Rs. 50,000 showing that he is an adult. Later, he sued to cancel the sale on the ground of minority. The court ordered the minor to return the money received by him. (Jager Nath Singh vs. Lalta Prasad)[6]

5. Minor and Necessaries

A person who supplies necessaries to a minor or anyone whom the minor is bound to support, can recover reasonable value of such goods from the

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[3] (1928) ILR 51All 164

[4] (1928) 30 Bom Lr 1342 (PC)

[5] (1928) Lah 609

[6] (1909) 31 All 21

property of a minor. If a minor owns no property, the supplier cannot recover the price of necessaries.

The necessary article depends upon the status and circumstances of the minor. If the minor already possesses a necessary at the time when necessary is supplied to him, the supplier cannot recover value of that necessary. (Sec. 68)

EXAMPLES

a. C supplied necessaries of life to B, a minor. C can recover value from B's property.

b. C supplies necessaries to the wife and children of B, a minor. C can recover expenses from B's property.

c. C supplied a coat with diamond buttons to a minor. C cannot recover the price of coat.

d. A minor purchased 11 coats. He had sufficient clothes at that time. It was held that the coats were not necessaries of life and minor was not liable to pay for them. (Nash vs. Inman)[7]

6. Agreement on behalf of Minor

A contract made on behalf of a minor by his guardian is binding on the minor. It can be enforced against the minor provided the contract is within the authority of the guardian and for benefit of the minor.

EXAMPLE

A contract of sale of immovable property by the guardian of minor for the minor's benefit may be enforced by either party to the contract. (Gujoba Tulsiram vs. Nilkanth)[8]

7. Minor as Beneficiary

A minor is capable of accepting benefit. Any contract is valid which is for the benefit of a minor and under which the minor is not required to bear any obligation. The minority of one party to a contract does not affect the other party's liability.

EXAMPLES

a. A, a minor advanced some amount to B. B mortgaged his property in favour of A. A can enforce the mortgage if B does not repay the money. (Raghva Chariar vs. Srinivasa)[9]

b. A, a minor delivered some goods under an agreement to P. P refused to make the payment. The court held that minor could recover the price. (Abdul Gafar vs. Piare Lal)[10]

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[7] (1908) 2 KB,1.

[8] (1958) AIR Bom 202

[9] (1917) 40 Mad 308(FB)

8. Minor as Agent

A minor can act as an agent. If a minor works as an agent, he can make his principal responsible to third parties for his acts. But he cannot be held personally liable for negligence or breach of duty.

EXAMPLE

A appoints M, a minor as his agent to sell his house. M makes an agreement with B to sell A's house. The agreement is valid.

9. Minor as Partner

A minor cannot become a partner of a firm. He can be admitted only in the benefits of the firm through his guardian with the consent of all the partners. Minor can only inspect the accounts of a firm but not the books. He cannot participate in the management of the firm. The minor's liability is limited to his investment in the business.

EXAMPLE

A, B, and C are partners in a firm. In order to make M, a minor a partner, they make a contract with X who is the guardian of M. M can be admitted to the benefits of firm.

10. Surety for Minor

When an adult stands surety for a minor in a contract of guarantee, the adult is liable under the contract but the minor is not answerable. The adult is responsible because there is direct contract between adult and the third party.

EXAMPLE

M, a minor makes a contract with X. S stands surety for M. The contract is valid.

11. Minor as Member of Company

A minor cannot directly buy shares of a company because he is not competent to contract. If parents of a minor are shareholders in a company, the company can transfer shares in favor of a minor upon the death of parents.

EXAMPLE

D holds shares in a company. D dies and leaves M, a minor as his legal representative. The company is bound to transfer the shares to M.

12. Minor and Insolvency

A minor cannot be declared insolvent. A minor is not personally liable even for necessaries supplied to him. Only the minor's property is liable. The payment cannot be recovered if he has no property. (Sec. 68)

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[10] (1935) 16 Lah 1.

EXAMPLE

M, a minor buys medicines from X. M has no property. M cannot be held liable for payment. He cannot be declared insolvent.

13. Contract by Minor and Adult

Where a minor and an adult jointly enter into a contract with another person, the minor has no liability. But the contract as a whole can be enforced against the adult.

EXAMPLES

a. M, a minor and A jointly make an agreement with X to purchase a car. The agreement is valid.

b. A minor and adult jointly agreed to pay some amount and executed a bond. The court held that adult was liable but minor was not liable. (Jamna Bai vs. Vasanta Rao)[11]

14. Liability of Minor's Parents

The parents of a minor are not liable for agreements made by the minor even if the agreement is for the purchase of necessaries. The parents are liable if the minor acts as an agent of the parents.

EXAMPLE

F sends his son M, a minor to buy goods from S. M buys goods from S. F is liable for payment.

15. Minor and Negotiable Instruments

A minor can make, draw, endorse and deliver bill of exchange, promissory note and cheque to bind other parties except himself. He himself is not liable but all other parties to the instrument are liable in their respective capacities.

EXAMPLES

a. M, a minor draws a bill of exchange on A. A accepts the bill. M endorses it to C. The bill is valid.

b. X draws a bill on Y, a minor. Y accepts the bill. The bill is invalid.

PERSON OF UNSOUND MIND

For a valid contract, it is necessary that each party to the contract must have a `sound mind'. (Sec. 11)

Sound Mind

Section 12 states that: "A person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his

[11] 11(1916) 39 Mad 409 PC

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

It means that a person must be able to understand the nature of contract. He should be able to make a rational judgment that whether the contract is profitable or not. A person who is temporarily of unsound mind cannot make a contract during such period. However, he can make a contract when he becomes of sound mind. A person may become of unsound mind due to idiocy, insanity, drunkenness, hypnotism, old age, etc.

EXAMPLES

a. A, a sane man who becomes temporary insane due to drug overdose, sells his scooter to B. The agreement is void.

b. S agreed to sell property worth Rs. 25,000 for Rs. 7,000. His mother proved that he was an idiot by birth. The agreement was held to be void. (Inder Singh vs. Parmeshwardhari Singh)[12]

Effect on Agreement

An agreement by a person of unsound mind is void but he can get benefit under it. However, the person who supplies necessaries to a person of unsound mind or anyone whom he is legally bound to support, can recover reasonable value of those necessaries from the property of such person. If the person of unsound mind owns no property, then the supplier cannot recover. (Sec 68)

Burden of Proof

If a person is usually of sound mind, the burden of proving that he was of unsound mind at the time of contract lies on the person who challenges the validity of contract.

If a person is usually of unsound mind, the burden of proving that he was of sound mind at the time of contract lies on the person who affirms it.

DISQUALIFIED PERSON

The following persons are disqualified from contracting: (Sec. 11)

1. Joint Stock Company

Joint Stock Company cannot enter into a contract outside the powers given to the company by its Memorandum of Association or by the provisions of the Companies Ordinance.

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[12] (1957) AIR Pat 491

EXAMPLE

XYZ Co. makes an agreement with A to sell some property which the company is not authorized by its Memorandum of Association, the agreement is void.

2. Diplomatic Agent

The diplomatic agent means the staff of the diplomatic mission of a foreign country in Pakistan. No proceeding in any Court shall lie against a diplomatic agent except in the following case:

a. Any private immovable property situated in Pakistan.
b. If he acts as an executor, administrator and heir as a private person.
c. Any professional or commercial activity that he exercised outside his official functions.

EXAMPLE

E, a diplomat got a house on rent from M on behalf of the country to which he belongs. M sued for recovery of arrears of rent. It was held that no action can be brought against him. (Engelke vs. musman)[13]

3. Alien Enemy

An alien means a citizen of a foreign country. An alien whose country is at peace with Pakistan is an alien friend. A contract with an alien friend is valid. An alien whose country is at war with Pakistan is an alien enemy. A contract with an alien enemy is illegal.

EXAMPLE

Y contracts to buy goods from X, a citizen of India without the permission of Pakistan Government. The contract is illegal and void.

4. Insolvent

An insolvent person cannot enter into a contract with anyone regarding his property which is in the control of official receiver. After the order of discharge, he can enter into a contract.

EXAMPLE

C, an insolvent, promises to sell his car to B. The agreement is void.

5. Convict

A convict is a person who has been imprisoned by a court of law. During the period of sentence, he is incapable of entering into a contract. However, he can enter into a contract while on parole or through Commission. He becomes capable of making a contract when the sentence of imprisonment expires.

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13 (1928) A.C.433

EXAMPLE

W, during imprisonment, enters into an agreement with S to sell his land. The agreement is void.

SHORT ANSWER QUESTIONS

1. When is a person competent to contract?
2. When does a minor attain the age of majority?
3. Can a minor plead minority when he has misrepresented his age?
4. Can a minor be declared insolvent?
5. Can a minor act as an agent?
6. When is a person said to be of unsound mind?
7. Can you enter into a contract with an alien enemy?
8. Can you sue a foreign sovereign in our law courts?

TEST QUESTIONS

1. What do you understand by capacity to contract? What is the nature of agreement made by persons incompetent to contract?
2. Discuss the provisions of law relating to minor's agreements.
3. Discuss the law relating to validity of contracts by minor.
4. Is the minor's contract void or voidable? Can the guardian of a minor make a contract for the minor?
5. Discuss the law relating to contract by person of unsound mind.
6. Define unsound mind. When is a person of unsound mind liable for necessaries?
7. What are necessaries? When is a minor liable on a contract for necessaries?

05

FREE CONSENT

Consent

An agreement is valid when it is made with free consent of the parties. According to Section 13, two or more persons are said to consent when they agree upon the same thing in the same sense.

Definition of Free Consent

According to Section 14, consent is said to be free when it is not caused by coercion, undue influence, fraud, misrepresentation, or mistake.

In other words, when the consent is obtained by coercion, undue influence, misrepresentation or fraud, the contract is voidable at the option of the aggrieved party. Consent is not free when it is obtained by the following means:

COERCION

Definition

Section 15 defines coercion as, "Coercion is the committing or threatening to commit any act forbidden by the Pakistan Penal Code, or the unlawful detaining or threatening to detain any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement."

The Explanation to the Section states that, "It is immaterial whether the Pakistan Penal Code is or is not in force in the place where the coercion is employed." The above definition can be analyzed as follows:

1. Commit or threat to commit

If a person commits or threatens to commit any act which is forbidden by the Pakistan Penal Code to compel the other party to enter into a contract, is a contract made under coercion.

EXAMPLES

a. W threatens to shoot M, if he does not give his house on rent. M agrees. The consent of M is obtained by coercion.

b. A widow was threatened to adopt a boy otherwise her husband's dead body would not be allowed to be removed for cremation. The widow adopted the boy and later applied for cancellation of adoption. Held, that agreement was not binding. (Ranganayakamma vs. Alwarsetti)[1]

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[1] (1889) 13 Mad 244

2. Detain or threat to detain Property

If a person unlawfully detains or threatens to detain the property of another person to compel him to enter into an agreement, the agreement is voidable at the option of aggrieved party.

EXAMPLES

a. An agent refused to hand over the account books to the new agent unless the principal released him from all liabilities. The principal gave a release deed. It was held that the release deed was given under coercion. (Muthia vs. Karuppan)[2]

b. The government threatened to seize the property of A to recover the fine due from B, the son of A. A paid the fine. It was held that fine was recovered by coercion. (Bansraj vs. Secy. of State)[3]

3. Threat to Third Party

The threats may be directed against third persons who are near relatives of the person making the contract. Thus, a threat to injure one's parents, child, husband, wife, brother, etc. is considered as coercion. Coercion need not be exercised only by the contracting party; it can be exercised by any person related to that party.

EXAMPLES

a. C threatens to kidnap B's son if he does not give him Rs. 2 Lac. B agrees. The agreement is made by coercion.

b. D threatens to shoot B if he does not lend his house to C. B agrees. B's consent is obtained by coercion.

4. Enforcement of Pakistan Penal Code

It does not matter whether Pakistan Penal Code, 1860 is or is not in force in the place where the coercion is employed. If the suit is filed in Pakistan, the provisions of PPC will apply.

EXAMPLE

C forced B to enter into an agreement on a ship near Jeddah. Afterwards, B sued C for breach of contract at Karachi High Court. C has employed coercion although Pakistan Penal Code was not in force at Jeddah.

Effects of Coercion

The effect of coercion is as under: (Sec. 19 & 72)

1. The contract is voidable at the option of the party whose consent is obtained by coercion.

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[2] (1927) 50 Mad 786

[3] (1939) A WR 247

2. When the aggrieved party decides to cancel the contract, he must return the benefit received from the other party.
3. The other party to whom money was paid or anything delivered under coercion must repay or return it.
4. If the aggrieved party does not decide to cancel the contract, it remains a valid contract.

Burden of Proof

The burden of proof that coercion was used lies on the party who wants to cancel the contract. He has to prove that he would not have entered into a contract, if the coercion had not been used.

UNDUE INFLUENCE

Definition

The term undue influence means the unfair use of one's superior power in order to obtain the consent of person who is in a weaker position. It is described under section 16 (1 & 2) as follows:

1. Section. 16(1)

It defines undue influence as, "A contract is said to be induced by undue influence where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other." It is further explained as follows:

a. Position to Dominate

In order to prove undue influence the relations existing between the parties should be such that one of them must be in a position to dominate the will of the other party. The person in a superior position may obtain the consent of other party.

EXAMPLE

U, a spiritual adviser induced his follower M, to gift him his property to secure benefits in the next world. It was held that gift was obtained by undue influence as U was in a position to dominate. (Mannu Singh vs. Umadat Pandey)[4]

b. Unfair Advantage

In order to prove undue influence, it is necessary that the party who is in a dominating position must have used his position to obtain an unfair advantage from the other party.

EXAMPLE

A, having advanced money to his son B, obtains a bond for an amount greater than the sum advanced by misuse of parental influence. A obtains unfair advantage.

4(1890) 12 All 523

2. Section 16(2)

A person is deemed to be in a position to dominate the will of another as follows:

1. Where he holds a real or apparent authority over the other.
2. Where he stands in a fiduciary relation to the other.
3. Where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, mental or bodily distress, etc.

It is further explained as under:

a. Real or Apparent Authority

A person in authority can dominate the will of the person over whom the authority is held. The authority may be real or apparent. For example, authority of income tax officer over an assessee, authority of police officer over an accused person.

EXAMPLE

A, a police officer bought a property worth Rs. 1 Lac for Rs. 5,000 from B, an accused under his custody. Later, B sued to cancel the contract. A is in a position to dominate the will of B.

b. Fiduciary Relation

Fiduciary relation is a relationship of mutual trust and confidence. It exists in case of father and son, guardian and minor, advocate and client, doctor and patient, religious adviser and follower, etc.

EXAMPLE

An illiterate elderly woman made a deed of gift of her whole property to her nephew who managed her estate. The deed was cancelled on the ground of undue influence. (I Gariah vs. Shaikh Allie Bin Omar)[5]

c. Mental Distress

A person is said to be in distress when his mental capacity is temporarily or permanently affected. It may be due to old age, mental or physical illness, etc. Such a person is easily persuaded to give consent to a contract which may be unfavourable to him.

EXAMPLE

A moneylender gave a loan at 100% interest to a needy widow. It was held that undue influence was used and the court reduced the interest to 24%. (Rannee Annapurni vs. Swaminatha)[6]

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5 (1929) AC 127

6 (1910) 34 Mad 7

Presumption of Undue Influence

It is presumed that the dominating person has exercised undue influence in these cases: father and son, guardian and minor, doctor and patient, advocate and client, trustee and beneficiary, spiritual adviser and follower, teacher and student, master and servant.

Burden of Proof

In these cases, the burden of proof lies on the dominating person. He can disprove the presumption by arguing that;

1. The facts were fully disclosed.
2. The price was enough.
3. The dominated party was in a position to receive independent advice.
4. The dominated party gave his free consent.

No Presumption of Undue Influence

It is not presumed that the dominating person has used undue influence in these cases: husband and wife, landlord and tenant, creditor and debtor, principal and agent, mother and daughter.

Burden of Proof

In these cases, the weaker party will prove that undue influence has been exercised over him.

Effect of Undue Influence

The effects of under influence are as follows: (Sec. 19A)

1. The agreement is voidable at the option of the party whose consent was taken by under influence.
2. The court may direct the aggrieved party to refund the benefit or cancel the contract
3. If the aggrieved party does not cancel the contract, it remains a valid contract.

Contract with Pardahnashin Lady

A Pardahnashin lady is one who is illiterate, ignorant and observes complete seclusion (pardah) according to the custom of her family. If a lady keeps her face covered but transacts her own business, collects rents from her tenants and deals with persons who are not members of her family, then she cannot be regarded as pardahnashin. There is a presumption of undue influence in a contract with a pardahnashin lady. Such lady can avoid contract on the plea of undue influence.

EXAMPLE

A lady appeared before the Registrar for registration of certain documents and gave evidence in a suit. The court held that she could not be treated as a pardahnashin lady. (Shaik Ismail vs. Amir Bibi)[7]

Burden of Proof

In case of contract with pardahnashin lady, it is the duty of other party to prove that no undue influence was applied by him. In order to disprove the undue influence, the other party must satisfy the court that:

1. The terms and conditions of the contract were fully explained to her.
2. She was aware of the results of the contract.
3. She was free to get independent advice regarding the contract.
4. She gave her free consent to execute the contract.

DIFFERENCE BETWEEN COERCION AND UNDUE INFLUENCE

The following are points of difference between the two.

Coercion	Undue Influence
1. Nature Coercion is a physical threat to property or person	Undue influence is a mental or moral threat
2. Illegal & Unfair Coercion involves doing or threatening to do an illegal act.	In undue influence the act may not be illegal, it may be unfair.
3. Penal Action In coercion, penal action is also taken against guilty party.	In undue influence, no penal action is taken against guilty party.
4. Parties Coercion may be exercised by or against the party to the agreement. It may also be exercised by or against some third party	Undue influence must be exercised by or against the party to the agreement
5. Relationship For coercion no specific relationship between the parties is necessary	For undue influence there must be a specific relationship between the parties.
6. Refund of Benefit In coercion the aggrieved party has to	In undue influence, the court may direct the aggrieved party to refund the

[7] (1902) 4 Bom LR 146

refund the benefit, received from the other party	benefit, received from the other party.
7. Effect	
In coercion, the contract is voidable at the option of aggrieved party.	In undue influence, the contract is voidable or the court may cancel or enforce it in a modified form.
8. Punishment	
It involves criminal liability.	It does not involve criminal liability.

FRAUD

The term fraud includes all acts committed by a party to induce the other party to enter into a contract with an intention to deceive.

Definition

Section 17 states, "Fraud means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent or to induce him to enter into the contract:

1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true.
2. The active concealment of a fact by one having knowledge of the fact.
3. A promise made without any intention of performing it.
4. Any other act fitted to deceive.
5. Any such act or omission as the law specially declares to be fraudulent."

As per section 17, there is fraud in the following cases:

1. False Statement

When a party to the contract makes a false statement intentionally, he can be held liable for fraud. If a person honestly believes his statement to be true, he cannot be held liable for fraud.

EXAMPLES

a. A tells B, knowing to be false, that his factory produces 500 pounds of butter per day. B agrees to buy. A is guilty of fraud.

b. A knows that his watch has been made in Pakistan but tells B that it has been made in Japan. B buys the watch. A is guilty of fraud.

2. Active Concealment

When the party to the contract conceals material facts essential to the contract, which he is under an obligation to disclose to the other party before

entering into a contract, he is guilty of fraud. The seller is bound to disclose to the buyer about the faults in the goods he is selling.

EXAMPLE

A sells his house to B. The house has cracked walls. A fills it up to conceal the defect. B cannot find the defect. A is guilty of fraud.

3. Intentional Non-performance

When a person enters into a contract with no intention to perform his part of promise, it is considered an act of fraud.

EXAMPLES

a. X purchases goods from Y on credit without any intention of paying as he is about to be declared insolvent. X is guilty of fraud.

b. B, knowing that he has no money, takes a meal in a hotel with an intention of slipping away. B is guilty of fraud.

4. Intention to Deceive

Act fitted to deceive means any act which is done with the intention of committing fraud. It includes all cases which are not covered by other clauses. A person can adopt different methods to deceive the other party. Therefore, it is difficult to explain all the methods under the definition of fraud.

EXAMPLE

A company issued prospectus containing a statement that company paid dividend between 2001 and 2007. In fact, the company suffered losses in those years and paid dividend out of secret reserves. The company is guilty of fraud.

5. Act or Omission

In certain cases, it is obligatory to disclose relevant facts to the other party. Under section 55 of the Transfer of Property Act, the seller is bound to disclose to the buyer all material defects about the property. If a person does not disclose the relevant facts, he is guilty of fraud.

EXAMPLE

A sold his house to B for Rs. 1 Lac. The house was mortgaged with C for Rs. 10,000. A did not inform B about it. Later, C claimed Rs. 10,000 from B. B can avoid the contract as A is guilty of fraud by silence.

Essentials of Fraud

The following are essentials of fraud:

1. The representation must be false.
2. The representation must relate to a fact.
3. The representation was made to induce the other party to contract.
4. The representation was made with the knowledge of its being false.

5. The representation was made before formation of the contract.
6. The other party must have relied upon the representation.
7. The other party was deceived by the fraud.
8. The other party must have suffered a loss.

Effect of Fraud

The following remedies are available to the aggrieved party:

1. He can avoid the contract.
2. He can sue for damages.
3. He can ask for specific performance and restoration

Burden of Proof

The burden of proof that fraud was committed lies on the party who wants to set aside the contract on basis of fraud.

Silence as Fraud

Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is in itself equivalent to speech. (Sec. 17 Explanation)

Exception

The following are exceptions to the above mentioned rule:

1. Duty to Speak

When there is duty to speak and the person does not say the thing he is bound to say, it is an act of fraud. But there is no obligation to disclose the thing which is already known to the other party.

EXAMPLE

A sells his horse to his son S. The horse is sick. A does not tell S about the health of horse. S can avoid the contract because A was bound to tell S about the health of horse.

2. Silence is equivalent to Speech

When the circumstances are such that silence is in itself equivalent to speech, there is no fraud.

EXAMPLE

B says to A, "if you do not deny it, I shall assume that horse is healthy." A says nothing. Here A's silence is equivalent to speech. If the horse is unhealthy, A's silence amounts to fraud.

MISREPRESENTATION

Misrepresentation means an innocent misstatement of fact about the contract, made by one party to induce the other party to enter into a contract.

Definition

According to Section 18, misrepresentation includes:

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

There is misrepresentation in the following cases:

1. Unwarranted Positive Assertion

The positive assertion means an absolute, full and clear statement of a fact. There is misrepresentation when a person makes a clear statement of facts about the contract without any reasonable justification, believing it to be true though it is not true.

EXAMPLES

a. A tells B that my land produces 4000 kg of wheat per acre. A believes it to be true. B buys it. Later, it appears that the land produces 1000 kg of wheat per acre. This is a misrepresentation.

b. A sold a mine to M and told certain facts about the mine which were incorrect. A believed them to be true. Later, M discovered the real facts. This is a misrepresentation (Sheffield Nickel Co. vs. Unvin)[8]

2. Breach of Duty

A person commits breach of duty when it brings advantage to him and loss to the other party. Breach of duty will be considered misrepresentation if it is done without any intention to deceive the other party. It includes all those cases where one party is under legal obligation to disclose all material facts to the other party.

EXAMPLE

A told B that the monthly sale of his business was Rs. 50,000 before the contract was signed. The sales decreased to Rs.25000. A did not inform B about the decrease in sales. Held, that there was misrepresentation. (With vs. O'Flanagan)[9]

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[8] (1867) LR 2 HL 149

[9] (1936) CH 575

3. Induce Mistake

If a party to an agreement induces the other party, although innocently, to commit a mistake as to the nature or quality of subject matter of the agreement, he becomes guilty of misrepresentation.

EXAMPLE

The seller told the buyer that the motorcycle was free from defects. But there was an inbuilt defect in it. The buyer purchased the motorcycle. There is a misrepresentation.

Essentials of Misrepresentation

The following conditions are necessary to prove misrepresentation:

1. It must be made innocently and the person making it honestly believes it to be true.
2. It must relate to the fact essential to the contract. Mere expression of opinion is not misrepresentation.
3. The statement made must be untrue.
4. It must induce the other party to enter into a contract.
5. It must be made without any desire to deceive the other party.
6. The other party must suffer a loss.
7. The other party cannot discover the truth by ordinary diligence.

Effects of Misrepresentation

The following remedies are available to aggrieved party:

1. He can rescind the contract.
2. He can accept the contract and ask the other party for restoration.

The aggrieved party loses the rights in the following cases:

1. If consent was given with the knowledge of misrepresentation.
2. If third party has acquired rights in the subject matter of contract in good faith and for value.
3. If the aggrieved party could discover the truth with ordinary diligence.

Burden of Proof

The burden of proof that misrepresentation was used lies on the party who wants to set aside the contract on ground of misrepresentation.

Contracts of Utmost Good Faith

The following contracts are the contracts of utmost good faith:

1. Fiduciary Relationship

Fiduciary relationship means a relationship of trust and confidence. Such a relationship is supposed to exist in these cases i.e. father and son, guardian

and minor, doctor and patient, etc. In such cases, the person having the dominating position must make full disclosure of facts essential to the contract.

2. Contract of Insurance

Contract of Insurance is a contract in which the insured knows more about the subject matter of the contract than the insurer. Thus, it is the duty of the insured to disclose all material facts which might influence the insurance company to enter into the contract or in fixing the amount of premium. The concealment or misstatement of a material fact will render the contract voidable.

3. Contract of Purchase of Shares

The promoters and directors, who issue the prospectus of a company to invite the public to buy shares and debentures, possess information which is not available to the general public. They must disclose all facts regarding the company so that the investors have complete information while making an investment.

4. Contract of Sale of Land

In case of contract for sale of land, the seller is bound to disclose all material defects in the property which are within his knowledge. These are the defects about which the buyer is not aware of and which the buyer cannot discover with ordinary diligence.

5. Contract of Partnership

In case of Partnership, it is the duty of a partner to provide true accounts and full information of all matters regarding the partnership firm to rest of the partners.

6. Contract of Guarantee

According to Section 143, any guarantee which the creditor obtains by remaining silent as to material circumstances is invalid. A creditor must disclose all material facts to the surety.

7. Contract of Marriage Engagement

Every material fact must be disclosed by both parties to a contract of marriage otherwise the aggrieved party is justified in breaking off the marriage engagement.

8. Contract of Family Settlements

When members of a family make arrangements for the settlement of the family property, each member of the family must make full disclosure of every material fact within his knowledge.

DIFFERENCE BETWEEN FRAUD AND MISREPRESENTATION

The following are points of difference between the two:

Fraud	Misrepresentation
1. Intention	
In case of fraud, the party makes a	In case of misrepresentation, there is

false statement with an intention to deceive the other party.	no intention to deceive the other party
2. Belief In case of fraud, the person making the suggestion does not believe it to be true.	In case of misrepresentation, the person making the suggestion believes it to be true.
3. Damages In fraud, the aggrieved party can avoid contract and claim damages.	In misrepresentation the aggrieved party can avoid contract and cannot claim damages.
4. Offence Fraud may amount to an offence of cheating. It is a criminal act.	Misrepresentation does not amount to a offence of cheating. It is not a criminal act.
5.Truth In case of fraud, the aggrieved party can avoid contract even if it had the means to discover the truth with ordinary diligence.	In case of misrepresentation, the aggrieved party cannot avoid contract if it had means to discover the truth with ordinary diligence.

Loss of Right of Cancellation

Right of cancellation or rescission is lost in the following cases:

1. Affirmation

After becoming aware of his right to rescind, if the aggrieved party confirms the transaction either by express words or by an act, the right of rescission is lost.

EXAMPLE

B purchases shares on the faith of a misleading prospectus of S Company. B becomes aware of its falsity but accepts the dividends paid by company. B cannot avoid the contract.

2. Restitution not Possible

The right to rescission is lost, if the aggrieved party is not in a position to restore the benefits obtained by him under the contract, i.e. the subject matter of the contract has been consumed or destroyed.

EXAMPLE

B buys apples from C by fraud. B eats all the apples. C cannot avoid the contract.

3. Lapse of Time

If the aggrieved party fails to reject the contact within reasonable time on discovering the false representation or on becoming aware of the fraud, the right of rescission is lost.

EXAMPLE

X buys a T.V. from Y by fraud. Despite knowledge of the fraud, Y does not reject the contract. Y loses his right to avoid the contract after a reasonable time.

4. Rights of Third Party

The right of rescission is lost, if the third party acting in good faith has acquired the rights in the subject matter of the contract.

EXAMPLE

A buys a watch from B by fraud, and sells it to C. C buys the watch in good faith. B's right to cancel the contract is lost since C gets rights in the subject matter of the contract.

MISTAKE

When the parties give their consent under any mistake, there is no agreement. It means that there should be consensus ad-idem. Mistake can be divided into two types: (1) mistake of fact and (2) mistake of law

MISTAKE OF FACT

Mistake of fact may be (1) bilateral mistake (2) unilateral mistake.

1. Bilateral Mistake

According to Section 20, where both the parties to an agreement are under a mistake as to the matter of fact essential to the agreement, there is a bilateral mistake and the agreement is void. Explanation of section 20 states that "an erroneous opinion as to the value of the thing which forms the subject matter of the agreement is not to be deemed a mistake of fact." The following conditions must be fulfilled to avoid a contract:

a. There must be a mistake as to the formation of contract.
b. The mistake must made by both the parties.
c. It must be a mistake of fact and not a judgment or opinion.
d. It must be about a fact essential to the agreement.

EXAMPLES

a. A contracts B to sell his car. Both the parties think it is in A's garage. The car was stolen before the agreement. The agreement is void.
b. A buys a car from B for Rs. 4 Lac. Later, A discovers that the actual value is Rs. 2 Lac. A cannot avoid the contract.

A bilateral mistake may be of the following types:

a. Existence of Subject matter

The parties may be mistaken as to the existence of subject matter. If both the parties believe the subject matter of contract to be in existence at the time of contract, but in fact it is not in existence, there is no contract.

EXAMPLES

a. A agrees to buy a horse from B. It turns out that the horse was dead at the time of bargain but neither party was aware of this fact. The agreement is void.

b. H was employed to sell C's cargo which was being transported by sea. H sold the cargo. Later, it was discovered that the cargo had been damaged and sold at the nearest port. The buyer rejected the contract and sued for damages. H was held not liable. (Couturier vs. Hastie)[10]

b. Identity of Subject matter

When there is a mutual mistake as to the identity of the subject matter, the agreement is void. When one party has one thing in mind while the other has another thing, there is no consensus ad idem and no contract.

EXAMPLES

a. A agrees to buy a transformer from B. A thinks he is buying a 1-phase transformer while B thinks he is selling a 3-phase transformer. There is no contract.

b. W agreed to buy cotton from R. The cotton was to arrive on ship named P. Two ships of that name were sailing, one in October and other in December. W meant the former ship but R meant the latter. It was held that there was no contract. (Raffles vs. Wichelhaus)[11]

c. Ownership of Subject matter

Parties to a contract are under a mistake as to the ownership of subject matter, if unknown to both the parties, the buyer is already the owner of the subject matter of contract.

EXAMPLE

A agreed to take a fishery from B on lease. Both parties believed that B was the owner. Later, it was discovered that the fishery belonged to A. Held, that the agreement was void. (Cooper vs Pahibbs)[12]

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10 (1856) 5 HLC 673

11 (1864) 2 H&C 906

12 (1867) LR 2 HL 149

d. Quantity of Subject matter

There is no contract if there is difference between the quantity sold or purchased. If both the parties are under a mistake as to the quantity of the subject matter, the agreement is void.

EXAMPLE

P examined 50 rifles in a shop. Later, P sent an order by telegraph, "Send three rifles". H, the clerk, by mistake read the message as "Send the rifles". H sent 50 rifles. P accepted 3 and returned 47 rifles. H filed a suit for damages. It was held that there was no contract. (Henkel vs. Pope)[13]

e. Quality of Subject matter

When both the parties are under a mistake regarding the quality of subject matter, the agreement is void.

EXAMPLE

C contracts to sell B a horse which both parties believe to be a race horse. Later, it turns out to be a cart horse. The agreement is void.

f. Possibility of Performance

The agreement is void where there is a bilateral mistake as to the possibility of performance. In other words, where the parties to an agreement believe that the agreement is capable of performance but in fact it is not, the agreement is void.

EXAMPLE

A and B, believing themselves to be married, made a separation agreement in which A agreed to pay B £1 every week. Later, it was discovered that they were not validly married. B claimed the promised payment. It was held that the agreement was void. (Galloway vs. Galloway)14

2. Unilateral Mistake

When only one party is at a mistake regarding the terms of the agreement, it is called a unilateral mistake. Section 22 states that "a contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact." The effect of unilateral mistake on contracts is as follows:

a. Valid Contract

If a person makes a wrong contract due to his own negligence or carelessness, he himself is responsible and cannot avoid the contract. A unilateral mistake has no effect on the contract and the contract remains valid.

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13 (1870) LR 6 EX 7

14 (1914) 30 TLR 531

EXAMPLES

a. X buys rice from Y, thinking that the rice is old. However, the rice is new. X cannot avoid the contract.

b. The government auctioned the right of fishery. A offered the highest bid thinking that the right was being sold for 3 years but in fact it was for only 1 year. A cannot avoid the contract. (A. A. Singh vs. Union of India)[15]

b. Voidable Contract

If the unilateral mistake is caused by fraud or misrepresentation etc, on the part of the other party, the contract is voidable and can be avoided by the aggrieved party.

EXAMPLE

A sold a house to B. The house had cracked walls. A tried to conceal the defect but B discovered it. A is guilty of fraud. B can avoid the contract.

c. Void Agreement

A void agreement is not enforceable by law. In the following cases, no contract will arise under a unilateral mistake:

i. Identity of Party

When the intention of the party is to enter into a contract with a particular person, but by mistake the party enters into a contract with another person, the agreement is void. When the intention of the party is not to enter into a contract with a particular person, but by mistake the party enters into a contract with that particular person, the agreement is void

EXAMPLES

a. A wants to contract with B but makes a contract with C, believing him to be B. The contract is void.

b. B, the director of a theater, gave instructions that no ticket should be sold to S who was critic of the plays. S got a ticket through his friend. S went to the theater but was refused admission. S filed a suit for damages. It was held that there was no contract because the theater company never wanted to contract with S. (Said vs. Butt)[16]

ii. Nature of Contract

When one of the parties to a contract without any fault of his own, is made to commit a mistake as to the nature of contract, the agreement is void.

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[15] (1970) AIR Mani 16

[16] (1920) 3 KB 497

EXAMPLE

M, an old illiterate man of poor sight, was induced to sign a bill of exchange falsely representing that it was a guarantee. It was held that M was not liable. (Foster vs. Mackinnon)[17]

MISTAKE OF LAW

Mistake of law may be (1) mistake of Pakistani law or (2) mistake of foreign law.

1. Pakistani Law

If there is a mistake of law of the country, the contract is binding because every one is supposed to know the law of his country. Therefore, the mistake of Pakistani Law does not affect the validity of the contract. A contract is not voidable because it was caused by a mistake as to any law in force in Pakistan. Sec (21)

EXAMPLES

a. A and B make a contract which is based on erroneous belief that a particular debt is barred by Pakistani Law of limitation. The contract is valid.
b. If someone is caught traveling without ticket in a bus, he cannot be excused on the ground that he was not aware that the ticket is necessary for the journey.

2. Foreign Law

A mistake as to a law not in force in Pakistan (a foreign law) has the same effect as a mistake of fact. The law of foreign country requires to be proved in Pakistani courts as ordinary facts and such mistake makes the contract void. (Sec. 21)

EXAMPLE

A, a Pakistani, agrees to sell a particular medicine to B, a foreign national. The law of that country has banned the sale and purchase of that particular medicine. This is a mistake and the agreement is void.

SHORT ANSWER QUESTIONS

1. When is consent said to be free?
2. What happens if free consent in a contract is missing?
3. Can a contract be avoided if there is a mistake of law?
4. 'Ignorance of law is no excuse'; Explain.

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[17] (1869)LR 4 CP 704

5. What is the effect on a contract of a bilateral mistake relating to a matter of fact?
6. What is misrepresentation?
7. What are consequences of fraud?
8. When is a party said to be in a position to dominate the will of another?
9. What relationships raise the presumption of undue influence?
10. What has the plaintiff to prove in an action to avoid a contract on the ground of undue influence?
11. How is a contract affected by undue influence?
12. What is coercion?

TEST QUESTIONS

1. When is consent said to be free? What is the effect of such consent on the formation of contract?
2. What is coercion? What is its effect on a contract?
3. When is contract said to be induced by undue influence. What is the effect of undue influence on a contract?
4. Define Fraud and explain its effect on an agreement.
5. Define the term misrepresentation. What is its effect on a contract?
6. "Mere silence as to facts is not fraud." Explain with illustrations.
7. What are contracts of utmost good faith? Give at least four examples of such contracts.
8. Distinguish between
   a. Coercion and undue influence
   b. Misrepresentation and fraud
9. Discuss the law relating to the effect of mistake on contract.
10. A contract caused by unilateral mistake may be valid, voidable or void. Explain.
11. Write note on pardahnashin women.
12. What is a bilateral mistake? What are the various kinds of bilateral mistake?

06

VOID AGREEMENT

Void Agreement

An agreement not enforceable by law is called a void agreement. A void agreement does not give rise to any legal consequences and is void ab-initio (from the beginning). (Sec. 2 (g))

An agreement, in order to become a valid contract, must not be one of those that are 'expressly declared' to be void by the law. The agreements that are expressly declared to be void are as follows: (Sec. 10)

1. Agreement in Restraint of Marriage

Every agreement in restraint of the marriage of any person other than a minor is void. It means that any agreement which prevents a person from marrying is void. Thus, if a Muslim having two living wives promises any of his wives not to marry again, then the agreement is void. A promise to marry a particular person is not considered restraint of marriage. (Sec. 26)

EXAMPLES

a. A agrees with B that she will not marry C. It is a void agreement.

b. A promises his father F that he will marry B. It is a valid contract.

c. P promised to marry L only and to pay Rs. 2000 to L if he married someone else. Later, P married X. Held, L could not recover the sum as the agreement was in restraint of marriage. (Lowe vs. Peers)[1]

2. Agreement in Restraint of Trade

Every agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void. An agreement that interferes with a person's right to engage in any lawful trade, occupation or profession is called an 'agreement in restraint of lawful business'. Every person has a right to carry on any lawful trade, business or profession. (Sec. 27)

EXAMPLE

An agreement in which one party agrees to close his business against the promise of the other party to pay some amount is void, as it is an agreement in restraint of lawful business. (Madhub Chander vs. Rajkumar)[2]

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1 (1768) Burse 225

2 (1874)14 BLR 76

Exceptions

Following are the exceptions to agreements in restraint of trade:

a. Sale of Goodwill

The seller of goodwill of a business may agree with the buyer on the following conditions:

1. He can be restrained from carrying on a similar business.
2. The restraint will continue till the buyer carries on the business.
3. The restraint will be restricted to specified local limits.
4. The limits must be reasonable in the eye of the courts.

EXAMPLES

a. A sells his bakery to B with goodwill of Rs. 1 lac and agrees not to open a bakery anywhere in Pakistan. The agreement is unreasonable and so void.

b. C sells his business of imitation jewelry in London to D and promises that for two years he will not deal in (a) imitation jewelry in UK, (b) real jewelry in UK and (c) real or imitation jewelry in UK, France, USA, Russian or Spain. The first promise is held valid. The remaining promises are held void as they are unreasonable. (Goldsoll vs. Goldman)[3]

b. Partner's Agreement

The following agreements are not considered in restraint of trade:

1. A partner may agree not to carry on a business similar to that of a partnership while he is a partner.
2. A retiring partner may agree with other partners that he will not carry on a similar business within a specified period or specified local limits.
3. In anticipation of dissolution of the firm, the partners may agree that some or all of them will not carry on a similar business within a specified period or specified local limits.
4. On the sale of goodwill, any partner may agree with the buyer not to carry on similar business within a specified period or specified local limits.

EXAMPLE

A joins the firm of B and C, who deal in spare parts at The Mall, Lahore. A agrees that after leaving the firm, he will not carry on similar business at The Mall for 2 years. The restraint is enforceable as it is reasonable.

c. Trade Combinations

An agreement between businessmen to regulate prices, output, etc. is not in restraint of trade and therefore, valid. But a trade combination which creates monopoly and is against the public interest is void.

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[3] (1915)1 Ch 292

EXAMPLES

a. An agreement between two firms to avoid competition is void because it creates monopoly and is against public interest. (Jai Ram vs. Kahna Ram)[4]

b. An agreement between ice manufacturing companies not to sell ice below a stated price is valid.

d. Service Contract

In a service agreement, a person while in service with another may be prevented from accepting jobs elsewhere during the period covered by the agreement.

EXAMPLE

A Chartered Accountant employed in a company may be debarred from private practice during the duration of service. (Magan Lal vs. Ambica Mills Ltd.)[5]

3. Agreement in Restraint of Legal Proceedings

Every agreement by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may enforce his rights, is void to that extent. (Sec. 28)

It means an agreement which prohibits a person from taking judicial proceedings in respect to any right arising from a contract is void. Similarly, an agreement which reduces the period of limitation prescribed by law of limitation is void because the object is to defeat the provisions of law.

EXAMPLE

a. A agrees to sell sugar to B and both agree that in case of breach of contract by any party, none of them would go to the court. The agreement is void.

b. A gives Rs. 1 Lac to B as loan for 1 year and agrees that if B fails to return the loan, A must sue within 2 years otherwise B will not be liable. The agreement is void.

Exceptions

The following are exceptions to the above rule:

1. The parties may agree that in case of dispute among the parties, the dispute will be referred to arbitration.
2. The parties may agree that neither party shall appeal against the lower court's decision.
3. The parties may agree to select one of the two courts which are equally competent to try the lawsuit.

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[4] (1931) 53 All 316

[5] (1964) AIR Guj 216

EXAMPLES

a. A sells 50 clocks to B. Both agree that any dispute will be referred for arbitration and not to the court. It is a valid agreement.

b. A sells sports goods from Sialkot to B in Lahore. In case of dispute, they may sue in the Sialkot's court or Lahore's court. Both agree that they will sue in Lahore's court. The agreement is valid.

4. Uncertain Agreement

Section (29) states that "Agreements, the meaning of which is not certain, or capable of being made certain, are void". It means that the terms of an agreement must be clear, complete and certain. The ambiguity may be regarding existence, quality, quantity, price or title of the subject matter of the agreement.

EXAMPLES

a. A agrees to sell 100 litres of oil to B. It is not clear what kind of oil is to be sold. The agreement is void because of uncertainty.

b. A agrees to sell his horse to B for Rs. 500 or Rs. 700. It is not clear which is the sale price. The agreement is void.

5. Wagering Agreement

Wager means a bet. A wager is an agreement to pay money or money's worth on the happening or non-happening of a future event. Each party has equal chance to win or lose the bet. The parties should have no interest in the agreement other than the betting amount.

Essential of Wager

The essentials of a wagering agreement are as follows:

1. There must be a promise to pay money or money's worth.
2. The promise depends on happening or non happening of an event.
3. The event must be uncertain. If one party has control over the happening of the event, the transaction is not a wager.
4. One party is to win and other is to lose. If one party wins but other does not lose, it is not a wagering agreement.
5. The party should have no interest in the event.
6. The parties should have interest in the betting amount only.

EXAMPLE

A and B agree that if it rains today, A will pay Rs. 100 to B. If it does not rain, B will pay Rs. 100 to A. It is a wagering agreement.

Nature of Wagering Agreement

Wagering agreements are void. In case of breach of such agreement, nothing can be recovered through court. (Sec. 30)

Exception

An agreement to contribute to the payment of a prize of the value of Rs. 500 or more, to the winners of any horse race is valid.

Collateral Agreement

All agreements knowingly made to further or assist the entering into, effecting or carrying out or to secure or guarantee the performance of any wagering agreement are also void.

Suit for Recovery

No suit can be filed in a court of law to recover the sum of money paid or payable, commission, brokerage, fee or reward claimed or claimable in respect of any void agreement.

6. Agreement Contingent on Impossible Events

Contingent agreements to do or not to do anything if an impossible event happens, are void whether the impossibility of the event is known or not to the parties to the agreement at the time of formation. (Sec. 36)

EXAMPLES

a. A agrees to pay Rs. 1000 to B if he can run at 500 kilometres per hour. The agreement is void.

b. A agrees to pay Rs. 1000 to B if he marries A's daughter, C. C is not alive at the time of the agreement. The agreement is void.

7. Agreement to do Impossible Acts

An agreement to do an act impossible in itself is void. (Sec 56, Para 1)

EXAMPLES

A agrees with B that he will discover gold by magic. The agreement is void.

Special Cases

1. Commercial Transactions

An agreement where delivery of goods is to be given or taken at a future date is a valid contract. But an agreement where the difference in the market price in future and the agreed price at present is to be paid is a wagering agreement.

2. Insurance Contract

Insurance contracts are valid contracts even though the payment of money depends on the happening of a future uncertain event. It differs from wagering agreement because it has an insurable interest that is based on scientific calculation of risk and is beneficial to the public.

3. Lottery

A lottery is a game of chance. The lottery business is a wagering transaction. Such a business is illegal. If the lottery is authorized by the

Government, the person conducting the lottery will not be guilty of a criminal offence.

4. Crossword Puzzles

Where prizes depend upon chance, it is a lottery and therefore a wagering transaction. But if prizes depend upon skill or intelligence, it is a valid transaction.

SHORT ANSWER QUESTIONS

1. What is agreement in restraint of marriage?
2. What is agreement in restraint of trade?
3. An agreement in restraint of trade is void. What are its exceptions?
4. Are service contracts covered by agreements in restraint of trade?
5. What is the nature of wagering agreements?

TEST QUESTIONS

1. Discuss briefly expressly declared void agreements under the Contract Act.
2. Discuss the law relating to agreements in restraint of marriage, and uncertain agreements.
3. "An agreement in restraint of trade is void." Discuss the statement giving exceptions to it, if any.
4. What is a wager? What are its essentials? Is there any exception to wagering agreement?
5. Which agreements are considered as agreements in restraint of legal proceedings? State exceptions, if any.

07

CONTIGENT AND QUASI CONTRACTS

CONTINGENT CONTRACT

Definition

A contingent contract is a contract to do or not to do something if some event, collateral to such contract, does or does not happen. (Sec. 31)

Collateral Event

The collateral event means a connected event. The collateral event is not the part of the consideration but in fact, a part of the contract.

EXAMPLES

a. A contracts to pay Rs. 1000 to B, if B marries C. It is a contingent contract.

b. A promises to give a loan of Rs. 1000 to B, if he is elected the president of a particular association. It is a contingent contract.

Performance of Contingent Contracts

The rules of performance of contingent contracts are as under:

1. Happening of Event

Contingent contracts to do or not to do anything if an uncertain future event happens, cannot be enforced by law unless and until that event has happened. (Sec 32)

In other words, a contingent contract dependent on the happening of a future event cannot be enforced by law until that event has happened. If the event becomes impossible, the contract becomes void.

EXAMPLES

a. A contracts to pay a sum of money to B, if B marries C. C dies before getting married to B. The contract becomes void.

b. A makes a contract to sell a horse to B, if C refuses to buy it. The contract cannot be enforced by law unless C refuses to buy the horse.

2. Non-Happening of Event

Contingent contracts to do or not to do anything if an uncertain future event does not happen, can be enforced when the happening of that event becomes impossible, and not before. (Sec 33)

The enforceability depends upon the impossibility of the contingent event. Until the event becomes impossible, the contract cannot be enforced.

EXAMPLE

A agrees to pay a sum of money to B, if a certain ship does not return. The ship is sunk. The contract becomes enforceable when the ship is sunk.

3. Depending on Future Conduct

If the future event on which a contract is contingent is the way in which a person will act at an unspecified time, the event shall be considered to become impossible when such person does anything which renders it impossible that he should so act within any definite time, or otherwise than under further contingencies. (Sec 34)

Thus, the future conduct of any person is considered impossible if it becomes impossible to perform it in the given circumstances.

EXAMPLE

A agrees to pay a sum of money to B, if B marries C. Later, C marries D. The marriage of B to C will be considered impossible although it is possible that D may die and C may marry B afterwards.

4. Happening of Event within Fixed Time

Contingent contracts to do or not to do anything if a specified uncertain event happens within a fixed time become void if, at the expiration of the time fixed, such event has not happened, or if, before the time fixed, such event becomes impossible. (Sec 35(1))

It means that a contract contingent on the happening of an event within a fixed time becomes void if the time fixed expires and the event does not happen or the event becomes impossible before the time expires.

EXAMPLE

A promises to pay a sum of money to B, if a certain ship returns within a year. The contract becomes enforceable if the ship returns within a year and becomes void if the ship sinks within a year.

5. Non-Happening of Event within Fixed Time

Contingent contracts to do or not to do anything, if a specified uncertain event does not happen within a fixed time, may be enforced by law when the time fixed has expired and such event has not happened, or before the time fixed has expired, if it becomes certain that such event will not happen. (Sec 35(2))

If performance of a contract depends on the non-happening of an event within a specified time, its performance cannot be demanded if the event does not happen or its happening becomes impossible before the expiry of that time.

EXAMPLE

A promises to pay a sum of money to B, if a certain ship does not return within a year. The contract may be enforced if the ship does not return within a year or sinks within a year.

6. Happening of Impossible Event

Contingent agreements to do or not to do anything if an impossible event happens, are void, whether the impossibility of the event is known or not to the parties to the agreement at the time of formation. (Sec. 36)

In means that if the performance of contract is made dependent on an event which is already impossible, the contract becomes void whether or not the fact is known to the parties.

EXAMPLES

a. A agrees to pay Rs. 1000 to B, if he can run at 500 kilometers per hour. The agreement is void.

b. A agrees to pay Rs. 1000 to B, if B marries A's daughter C. C was dead at the time of the agreement. The agreement is void.

DIFFERENCE BETWEEN CONTINGENT AND WAGERING AGREEMENT

The main points of distinction between the two are as under:

Contingent	Wagering
1. Validity	
It is a valid contract.	It is absolutely void.
2. Interest	
The parties have real interest in the occurrence or non-occurrence of the event.	The parties are not interested in the occurrence of the event except for the winning or losing the bet amount.
3. Uncertain Event	
The future uncertain event is merely collateral.	The uncertain event is the sole determining factor.

QUASI CONTRACT

Meaning

Quasi contract arises under some special circumstances. It is an obligation imposed by law upon a person for the benefit of another even in the absence of a contract. It is based on the principle of equity and justice. It states that nobody shall be allowed to become rich at the cost of another. Sometimes, law requires that a particular person must perform some obligations. Such obligations are called quasi contracts. They are also called constructive contracts.

Kinds of Quasi Contracts

The following are different kinds of contracts:

1. Supply of Necessaries

If a person, incapable of entering into a contract or anyone whom he is legally bound to support, is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person. The following points must be noted: (Sec 68)

a. The person to whom the necessaries are supplied is incapable of entering into a contract, i.e. minor, person of unsound mind.

b. The other person has supplied him or anyone whom he is legally bound to support with necessaries suited to his condition of life.

c. The things supplied must be necessaries and not luxuries.

d. Incompetent person's property is liable to pay only a reasonable price and not the contract price

e. The price of the goods or services supplied can be recovered out of property of incompetent person if he has any. He is not personally liable.

f. The incompetent person must not have such necessaries.

EXAMPLES

a. A supplies B, a minor with necessaries suitable to his condition in life. A is entitled to recover from B's property.

b. A supplies necessaries of life to the wife and children of an insane person B. A is entitled to recover from B's property.

2. Payment by Interested Person

A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other. The following points must be noted: (Sec 69)

a. A person should be interested in payment to protect his own interest.

b. A person himself should not be legally bound to pay.

c. Another person should be legally bound to pay.

d. A person should make the payment to another person.

EXAMPLES

a. A pays arrears of rent of B to avoid a dispute between B and his landlord. A cannot recover from B as he has no interest in payment.

b. B imported goods and stored in A's warehouse without paying the custom duty. The custom authorities recovered custom duty from A. A can recover from B. (Brook's Wharf vs. Goodman Bros.)[1]

3. Compensation for Non-Gratuitous Acts

Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefits thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered. The following points must be noted: (Sec 70)

a. The person has lawfully done or delivered something to the other.

b. It is done by a person who is not interested to act gratuitously.

c. The other person has enjoyed the benefits of goods or services.

EXAMPLES

a. A saves B's property from fire. A is not entitled to compensation from B if the circumstances show that he intended to act gratuitously.

b. A, a coolie takes the luggage of B at the railway station without asking. B does not object to it. A can get payment.

4. Finder of Goods

A person who finds goods belonging to another, and takes them into his custody, is subject to the same responsibility as a bailee. (Sec 71)

Duties of Finder of Goods

The following are the duties of finder of goods:

1. He must try to find out the true owner of the goods.
2. He must not use the goods for his purpose.
3. He must return the goods to true owner.
4. He must take reasonable care of the goods.

Rights of Finder of Goods

The following are rights of finder of goods:

1. He can retain the goods against everybody except the owner.
2. He can receive from the owner all expenses incurred by him for preserving the goods or finding the true owner.
3. He can refuse to return the goods to the owner until all expenses are paid.
4. He can sue the owner to recover any reward which the owner might have offered for the return of goods.
5. He can retain the goods until he gets the reward from owner.

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[1] (1937) 1.K.B. 534

6. He can sue for recovery of damages if anyone deprives him of the possession of the goods.
7. He can sell the goods in the following situations:
   a. When goods are perishable.
   b. When lawful charges of the finder amounts to 2/3rd of its value.
   c. When the owner is found but refuses to pay lawful charges.
   d. When the owner cannot be found out with reasonable diligence.

EXAMPLE

X, a guest found a diamond ring at the birth party of Y. X told Y and other guests about it. X could not find the owner. X can retain the ring.

5. Mistake or Under Coercion

A person to whom money has been paid or anything delivered, by mistake or under coercion, must repay or return it to the person who paid it by mistake or under coercion. (Sec. 72)

If one party by mistake or under coercion pays money to another party which is not due by contract or otherwise, that money must be repaid.

EXAMPLES

a. A and B jointly borrow Rs. 1000 from C. A alone pays the amount to C. B, not knowing that A has paid the amount, also pays Rs. 1000 to C. C must repay the amount to B.
b. A paid some money to B by mistake which was due to C. A can recover his money from B.

SHORT ANSWER QUESTIONS

1. What is a contingent contract?
2. What are the characteristics of a contingent contract?
3. Name the quasi contracts?

TEST QUESTIONS

1. Define the term contingent contract. Discuss the rules relating to the performance of contingent contracts.
2. Distinguish between a contingent contract and a wagering agreement. What are the rules relating to contingent contracts?
3. What are quasi-contracts? Explains the quasi-contracts.

4. Write a short note on Quasi-contracts.
5. State the quasi-contracts recognized under the Contract Act 1872.
6. There are certain relations resembling those created by a contract. Explain giving examples.
7. Discuss the rights and duties of a finder of goods.

08

PERFORMANCE OF CONTRACTS

1. Performance of Contract means the fulfillment of legal obligations created under the contract by both the promisor and promisee. When a contract is duly performed by both the parties, the contract comes to an end. The rules regarding the performance of contracts are as under:

PERFORMANCE OF SINGLE PROMISE

2. A single promise is that promise in which there is one promisor and one promisee.

Demand for Performance

3. In a single promise, the rules to demand performance are as under:

1. Promisee

4. It is only the promisee who can demand performance of the contract. A person cannot acquire rights under a contract to which he is not a party. A third party cannot demand performance of the contract even though it was made for his benefit.

EXAMPLE

A promises B that A will pay Rs. 500 to C. A did not pay to C. Only B can demand performance from A. C cannot demand performance from A.

2. Legal representative

5. In case of death of the promisee, his legal representatives can demand performance of a contract unless a contrary intention appears form the contract or the contract is of a personal nature.

EXAMPLES

a. A bought rice from B. B died before the recovery of payment. Legal representatives of B can demand performance.

b. X promises to paint a picture for Y on a specified day. Y dies before that day. Legal representatives of Y cannot demand performance of promise from X.

3. Third Party

6. A third party can also demand the performance of contract in some exceptional cases, for example, beneficiary in case of a trust, assignee of contract etc.

7.

8.

EXAMPLE

9. A transfers property to B under trust for the benefit of M. M can demand the performance of contract from B.

Performance of Contract

A contract must be performed as under:

1. Promisor

10. A contract must be performed by the promisor himself. In case of contract involving personal skill or taste, the promisor himself must perform the contract. In case of death or disablement of a promisor, the contract will be discharged. (Sec. 40 Para 1)

EXAMPLE

A promises to paint a picture for B. A must perform the contract himself.

2. Agent

11. In a contract where no personal skill is involved, the promisor may employ a competent person to perform the contract. In a contract to sell goods, the promisor can appoint an agent to perform the contract. [Sec. 40 Para 2)

EXAMPLE

12. A promises to sell goods to B. A can appoint his agent for performance of contract.

3. Legal Representatives

13. If the promisor dies before performance, his legal representatives become liable to perform the contract. In a contract involving personal skill, the legal representatives of a deceased promisor are not bound to perform the contract. But in a contract of impersonal nature, the legal representatives are bound to perform the contract. Legal representatives are liable to the extent of the estate of the deceased received by them. They are not personally liable. (Sec. 37)

EXAMPLES

a. A promises to deliver goods to B on 1st May on payment of Rs. 1000. A dies before that day. Legal representatives of A are bound to deliver the goods to B, and B is bound to pay Rs. 1000 to legal representatives of A.

b. A promises to paint a picture for B on a certain day. A dies before that day. The contract cannot be enforced against the legal representatives of A.

4. Third Person

14. When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor. (Sec. 41)

15.

16.

EXAMPLE

17. A borrows Rs. 2 Lac from B and promises to repay within a month. C, the father of A, pays Rs. 2 Lac to B. A is discharged from his liability.

PERFORMANCE OF JOINT PROMISE

18. In a joint promise, two or more persons enter into a joint agreement with one or more persons. The rules regarding demand for performance and performance of contract are as follows:

Demand for Performance

19. The rules for demand of performance are as under:

1. Promisee

20. When a promise is made with several persons jointly, then in the absence of any agreement to the contrary, all the promisees jointly can demand performance and a single promisee cannot demand performance. (Sec. 45)

EXAMPLE

21. A borrows Rs. 2 Lac from B and C. Only B and C can demand the performance jointly.

2. Legal representatives

22. In case of death of any promisee, the legal representatives of deceased person jointly with surviving promisees can demand performance. When all promisees are dead, the legal representatives of all jointly can demand performance. (Sec. 45)

EXAMPLE

23. A borrows Rs. 5 Lac from B and C. If B dies, B's legal representative and C jointly can demand performance. If C dies, C's legal representatives and B jointly can demand performance.

Performance of Contract

The rules regarding performance of contract are as under:

1. All Promisors Perform

24. When two or more persons make a joint promise, then, unless a contrary intention appears from the contract, all such persons must jointly fulfill the promise. When any one of the joint promisors dies, his legal representatives must fulfill the promise jointly with the surviving promisors. On the death of all the original promisors, the legal representatives of all of them jointly must fulfill the promise. (Sec 42)

25.

26.

27.

EXAMPLE

28. A B & C jointly promise to pay Rs. 3,000 to D. A B & C must contribute Rs. 1,000 each. If A dies, then legal representatives of A are liable to pay Rs. 1,000 along with B & C.

2. Any one of Promisors Perform

29. Although the joint promisors are required to perform the promise jointly but the promisee may compel any one of the joint promisors to perform the promise. In case of death of original debtor, the promisee must bring the suit against all the heirs of the debtors. [Sec. 43 Para 1)

EXAMPLE

30. A, B and C jointly promise to pay D, Rs. 3000. D may compel either A or B or C or any two or all of them to pay.

3. Promisor may demand Contribution

31. If one of the joint promisors is compelled to perform the whole contract, he may compel every other joint promisor to contribute equally to the performance of contract unless a contrary intention appears from the contract. (Sec. 43 Para 2)

EXAMPLE

32. A, B and C jointly promise to pay D, Rs. 3000. If A is compelled to pay the entire amount of Rs. 3000, he can recover Rs. 1000 each from B and C.

4. Default in Contribution

33. If any one of the joint promisors makes a default in making contribution, if any, the remaining joint promisors must bear the loss arising out of such default in equal shares. (Sec. 43 Para 3)

EXAMPLE

34. A, B and C are under a joint promise to pay Rs. 3000 to D. If C is unable to pay anything, then A and B must pay Rs. 1500 each.

5. Release of one Promisor

35. In case of a joint promise, if one of the joint promisors is released from his liability by the promisee, his liability to the promisee ceases but his liability to the other promisors to contribute does not cease. (Sec. 44)

EXAMPLE

36. A, B and C are under a joint promise to pay Rs. 3000 to X. X releases C from liability. A and B remain liable to pay to X. C is not released from the liability to A and B. A and B can recover from C.

37.

38.

Assignment of Contract

39. Assignment means transfer. Assignment of contract means transfer of contractual rights and liabilities to a third party. It may occur by (i) the act of parties or (ii) the operation of law.

1. Assignments by Act of parties

40. It is subject to the following rules:

a. Contractual liabilities

41. This is subject to the following rules:

42. Contract involving personal skill or qualification cannot be assigned e.g. painting of picture by a painter. Thus, it is the state where one party cannot delegate the act of performance to another. (Sec. 40)

43. A promisor cannot assign his liabilities under a contract. In other words, a promisee cannot be compelled to accept a third person to perform the promise, e.g. A owes Rs. 100 to B and B owes the same amount to C. B cannot ask C to recover from A.

b. Contractual rights

44. This is subject to the following rules:

45. The rights and benefits cannot be assigned if they are of personal nature.

46. An actionable claim can be assigned only by an instrument in righting. Notice of such assignment must also be given to the debtor.

2. Assignment by Operation of Law

47. This may take place in any of the following circumstances:

a. Death

48. Upon the death of a party to the contract, his rights and liabilities are assigned to his heirs. But when the personal skill is involved, the contractual relations come to an end on the death of promisor.

b. Insolvency

49. In case of a party to the contract being declared insolvent, his rights and liabilities under the contract are assigned to the official receiver or assignee as the case may be.

Reciprocal Promise

50. Promises which form the consideration for each other are called reciprocal promises. In other words, a contract consists of reciprocal promises when one party makes a promise in consideration of a similar promise made by the other party. (Sec. 2 (f))

51.

Rules of performance

52. The rules of performance of reciprocal promises are the following: (Sec. 51-58)

1. Mutual and Concurrent

53. Where the two promises are to be performed simultaneously, they are called mutual and concurrent. In case of such promise, the promisor need not perform his promise unless the promisee is ready to perform his reciprocal promise.

EXAMPLE

A agreed to deliver goods to B at a price to be paid by B on delivery. A need not deliver the goods unless B is ready to pay on delivery and B need not pay unless A is ready to deliver goods on payment.

2. Mutual and Independent

54. Where one party has to perform his promise independently without waiting for the performance by other party, they are called mutual and independent. Such promises must be performed in the order fixed by the contract. Where the order is not expressly fixed, they must be performed in that order which the nature of the transaction requires.

EXAMPLE

A agreed to build a house for B at a fixed price. A's promise to build the house must be performed before B's promise to pay for it.

3. Prevention of Performance

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

EXAMPLE

56. B agrees to execute certain work for A for Rs. 1000. B is ready to do the work but A prevents him from doing so. The contract becomes voidable at the option of B.

4. Conditional and Dependent

57. When the performance of the promise by one party depends on the prior performance of the promise by the other party, the promises are conditional and dependent

58. If the promisor who is required to perform his promise in the first place, fails to perform it, such promisor cannot claim the performance of the reciprocal promise and must make compensation to the other party for any loss which such other party may sustain by the non-performance of the contract.

EXAMPLE

A promises to sell 100 bales of cotton to B, to be delivered next day. B promises to pay within a month. A does not deliver the bales of cotton. B's promise to pay need not be performed and A must make compensation.

5. Legal and Illegal Promises

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

EXAMPLE

60. A agrees to sell a house to B for Rs. 100,000. If B uses it as a gambling house, he shall pay A Rs. 500,000. The first promise is a contract and the second promise is a void agreement.

6. Alternative promise

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

EXAMPLE

62. A agrees to pay Rs.1 Lac to B for which B shall deliver either rice or opium. It is a valid contract as to rice and illegal agreement as to opium.

Time and Place of Performance

63. The rules regarding time and place of performance of a contract are as follows:

1. Within Reasonable Time

64. Where by the contract, a promisor is to perform his promise without application by the promise and no time for performance is specified, the engagement must be performed within a reasonable time. (Sec. 46)

EXAMPLE

65. A promises to deliver goods at B's house on Ist March before 1:00 P.M. A delivers goods before time. A has performed the contract.

2. Within Specified Time

66. When a promise is to be performed on a certain day and the promisor has undertaken to perform it without application by the promisee, the promisor may perform it at any time during the usual hours of business on such day and place at which the promise ought to be performed. (Sec. 47)

67.

EXAMPLE

68. A promises to deliver goods at B's warehouse on 1st January. A brings the goods to B's warehouse but after the usual hours of business. Thus, the goods are not received. A has not performed his promise.

3. Proper Time and Place

69. When a promise is to be performed on a certain day and promisor has not undertaken to perform it without application by the promisee, it is the duty of the promisee to apply for performance at a proper place and within the usual hours of business. (Sec. 48)

EXAMPLE

70. A promises to deliver 1000 kg of jute to B on 1st May. B agrees to specify the place of delivery later. B must apply to A to decide a reasonable place for performance of contract.

4. Reasonable Place

71. When a promise is to be performed without application by the promisee and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise and to perform it at such place. (Sec. 49)

EXAMPLE

72. A agreed to deliver rice to B on 1st June but no place was fixed for delivery. A must ask B for the place of delivery of rice.

5. Prescribed by Promisee

73. The performance of any promise may be made in any manner or at any time which the promisee prescribes or sanctions. (Sec. 50)

EXAMPLE

A owes B Rs. 100. B agrees to send A, a note for Rs. 100 by post. The debt is discharged as soon as B sends the note by post to A.

Time is of the Essence of Contract

74. 'Time is of the essence of contract' means that the time is an essential element of contract and the concerned parties must perform their promise within specified time. The following are the rules in this regard: (Sec.55)

1. Time is of the Essence of Contract

75. When time is of the essence of contract and the promisor fails to perform within the fixed time, the contract becomes voidable at the option of the promisee. The promise may revoke the contract and sue for the breach.

76.

77.

EXAMPLE

78. X agreed to deliver 20 books to Y on 12th May, 2011. X failed to deliver by that time. The contract is voidable at the option of Y.

2. Time is not of the Essence of Contract

79. When time is not of the essence of the contract and promisor fails to perform within the fixed time, the contract remains valid and the promisee will have to accept the delayed performance. The promisee can claim compensation for any loss due to delay in performance. The delay should be reasonable otherwise it will become voidable at the option of promisee.

EXAMPLE

80. A promises to deliver a car to B on 1st May. A delivers it on 9th May. B will have to accept the delivery. B can claim damages only.

3. Acceptance of Delayed Performance

81. When the promisee accepts the delayed performance instead of avoiding the contract, he cannot afterwards claim compensation for any loss caused by the delay unless at the time of accepting the delayed performance, he gives notice to the promisor of his intention to do so.

EXAMPLE

82. M promises to supply bricks to N on 4th May. M delivers on 8th May. N accepts the delayed delivery. Later, N cannot claim damages.

Appropriation of Payment

83. Appropriation of payment means application of payment to a particular debt. The following are rules in this regard: (Sec. 59-61)

1. Appropriation by Debtor

84. Where the debtor states that the payment made by him should be applied to discharge a particular debt, the creditor must apply the payment in the discharge of that specific debt. Where the debtor does not express his intention, the law will gather his intention from the circumstances attending the payment and accordingly the payment shall be applied.

EXAMPLES

a. A owes B, among other debts, Rs. 1000 upon a pronote which is due on 1st June. A owes B no other debt of that amount. On 1st June, A pays Rs. 1000 to B. The payment will apply to the discharge of the pronote.

b. A owes to B, among other debts, a sum of Rs. 567. B writes to A and demands payment of this sum. A sends Rs. 567. This payment will apply to the discharge of debt of which B had demanded payment.

2. Appropriation by Creditor

85. If there is no indication by the debtor regarding appropriation, then the creditor has the option to apply the payment to any debt lawfully due from the debtor, irrespective of the question of limitation. But the creditor cannot apply the payment to a disputed debt.

EXAMPLE

86. A owes several debts to B; one of them of Rs. 1 Lac is time-barred. A sends Rs. 2 Lac to B without indicating the debt which is to be appropriated. B may appropriate Rs. 1 Lac against the time-barred debt.

3. Appropriation by Law

87. Where neither the debtor nor creditor makes any appropriation, then according to law, it has to be applied in discharge of the earlier debt in the order of time. If the debts are of equal standing, the payment shall be applied in discharge of each proportionately.

EXAMPLE

88. A owes B, two debts of Rs. 2 Lac each which are time-barred and another debt of Rs. 4 Lac. A sends Rs. 2 Lac to B. It will be appropriated against the two debts of Rs.2 Lac each.

4. Appropriation towards Interest

89. If a payment is made without expressly stating whether it is towards interest or principal, payment will first apply towards the interest and then the principal amount.

EXAMPLE

90. A owes B, Rs. 1 Lac as principal amount and Rs. 20,000 as interest. A sends 20,000 to B. B can apply it towards interest.

Contracts Need Not be Performed

91. The following are the provisions in this regard: (Sec.62-67)

1. Termination by Agreement

92. If parties to a contract agree to Novation, Rescission or Alteration, the original contract need not be performed. In such cases, the original contract disappears and is substituted by a new contract.

EXAMPLE

93. A promised to supply certain goods to B, six months after date. By that time, the goods go out of fashion. A & B mutually cancel the contract. A need not perform the contract.

94.

95.

2. Remission by Promisee

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

EXAMPLE

97. A owes Rs. 2 Lac to B. A pays Rs. 1 Lac and B accepts them in full satisfaction of his claim on A. A need not pay the remaining Rs. 1 Lac.

3. Voidable Contract

98. When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained, in which he is a promisor.

EXAMPLE

99. A promises to buy a car from B by coercion. B can avoid the contract. If B rejects the contract, A need not pay the price to B.

4. Refusal to Accept Performance

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

EXAMPLE

101. A agrees to repair B's house. B neglects or refuses to point out the wall of his house which needs repair. A is excused for the non-performance of the contract if it is caused by such neglect or refusal.

102.

SHORT ANSWER QUESTIONS

103.

104. What is meant by performance of a contract?

105. Give two examples of contracts which need not be performed.

106. Can a contract involving the exercise of personal skill be performed by any person other than the promisor?

107. What are reciprocal promises?

108. What are mutual and concurrent reciprocal promises?

109. When is time the essence of contract?

110. What is meant by assignment of a contract?

111.

112.

TEST QUESTIONS

1. What do you understand by performance of a contract? State rules regarding demand for performance and performance of contracts?
2. State with illustrations the provisions of the Contract Act relating to the performance of joint rights and liabilities.
3. What are reciprocal promises? Explain the rules of performance of reciprocal promises.
4. Discuss the law relating to assignment of contracts.
5. Discuss the rules regarding time and place of performance.
6. State the rules relating to appropriation of payment made by debtor to his credit.
7. Discuss the circumstances under which a contract need not be performed

09

DISCHARGE OF CONTRACT

When the rights and obligations arising out of a contract come to an end, the contract is said to be discharged or terminated. A contract may be discharged in any of the following modes:

(1) Performance (2) Agreement (3) Subsequent impossibility (4) Lapse of time (5) Operation of law (6) Breach of contract

1. Discharge by Performance

Performance is the natural mode of discharge of contract. When the parties to a contract perform their promises, the contract is discharged. If only one of the several parties performs the promise, he alone is discharged. Performance may be (a) actual performance or (b) tender

a. Actual Performance

When both parties to a contract fulfill the obligations according to the terms and conditions of the contract, it is called actual performance of the contract and the contract comes to an end. (Sec. 37)

EXAMPLE

A agrees to sell his watch to B for Rs. 400. A delivers the watch to B and B makes the payment. This is actual performance of contract.

b. Tender

It is also known as offer of performance or attempted performance. When one of the parties to the contract offers to perform the contract but the other party does not accept it, there is a tender. It is not an actual performance but is equivalent to actual performance. In offer of performance, the promisor is excused from performance and is entitled to sue the promisee for damages. (Sec. 38)

EXAMPLE

A agrees to sell his book to B for Rs. 500. A offers to deliver the book but B does not accept it. This is offer of performance.

Essentials of Valid Tender

A valid tender must fulfill the following conditions:

1. It must be unconditional. It must be made in accordance with the terms of the contract, e.g. A is a debtor of company B. A offers to pay if share are allotted to him at par. It is not a valid tender.

2. It must be made at proper time and proper place, e.g. A is tenant of B. A offers him rent at a marriage party. B is not bound to accept as it is not at a proper place.
3. It must be of the whole obligation. An offer to perform a promise in part is not a valid tender, e.g. A is a debtor of B. A offers to pay in installments to B. It is not a valid tender.
4. If the tender relates to delivery of goods, the promisee must be given opportunity to check that the goods are according to the contract, e.g. A delivers the goods to B at 2 P.M. and does not give him a time for inspection. It is not a valid tender.
5. It must be made by a person who is able to perform the promise, e.g. a tender by minor is not a valid tender.
6. It must be made to the promisee or his agent, e.g. A was liable to return the goods to B or his agent C. But A returns the goods to X. It is not a valid tender.
7. If there are several joint promisees, a tender to any one of them is valid, e.g. A gets the chairs on rent from XYZ jointly. A can return the chairs to any one of them.
8. In case of tender of money, exact amount should be tendered, e.g. tendering cheque of Rs. 100 to a bus conductor for a ticket of Rs. 5 is not a valid tender.

Effect of refusal

In case of refusal to accept offer of performance, the contract is deemed to have been performed by the promisor and a suit can be filed against the promisee for breach of contract. (Sec. 38)

2. Discharge by Agreement

A contract is discharged by agreement in the following ways:

a. Novation

Novation of contract means replacement of an existing contract by a new contract. The new contract may be formed between the same parties or between new parties. Thus, an old contract is discharged and a new contract comes into existence.

EXAMPLES

a. A owed to B and B to C. A's debt to B is cancelled and C accepts A as his debtor. It is novation.
b. A owes B, Rs. 10,000. A mortgaged his estate to B for the debt of Rs. 10,000. This is a new contract and terminates the old one.

b. Alteration

Alteration of a contract takes place when one or more of the terms of contract are changed. If alteration in contract is made with the consent of all the parties, the original contract is discharged and a new contract takes its place. In case of alteration, the parties remain the same and only the terms of contract are changed. (Sec. 62)

EXAMPLE

A agrees to supply salt to B on 1st Feb. Later, A and B agree to change the date of delivery to 1st March. It is alteration of contract.

c. Rescission

The rescission means cancellation of contract by mutual consent. A contract may be cancelled by agreement between the parties at any time before it is discharged by performance. The cancellation of agreement releases the parties from their obligations. (Sec. 62)

EXAMPLE

A promises to deliver goods to B on a certain date. Before the date of performance, A and B agree that the contract will not be performed. The contract is rescinded.

d. Remission

Remission means the acceptance of lesser fulfillment of a promise that was made. It is an act of promisee discharging the obligations of another either wholly or partly. Thus, contract may be discharged by remission of performance or extension of time, etc. (Sec. 63).

EXAMPLES

a. A owes B, Rs. 5,000. B agrees to accept Rs. 2,000 in full satisfaction of his claim. The whole debt is discharged.

b. Government decided to recover only 40% of debt. Later, the Government cannot recover more than 40% of debt. (Hari Chand Madangopal vs. State of Punjab)[1]

e. Waiver

Waiver means the intentional abandonment of a right which a person is entitled to under a contract. When a party waives his right under the contract, the other party is released from his obligations. In case of waiver, neither an agreement nor consideration is necessary.

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[1] 2(1973) SC 381

EXAMPLE

A promises to make a shirt for B and B afterwards forbids him to do so. The contract is terminated by waiver.

3. Discharge by Subsequent Impossibility

Initial Impossibility

An agreement to perform an impossible act is void ab-initio. It means agreement which is obviously impossible cannot be binding, e.g. an agreement to discover treasure by magic is void agreement. (Sec. 56)

Subsequent Impossibility

A contract capable to be performed after formation becomes impossible, or unlawful and as a result void. It means that subsequent impossibility or illegality will make the contract void and the contract will be discharged. A contract will remain valid, if the party to a contract feels difficulty in performing the contract. This is known as the Doctrine of Frustration or Doctrine of Supervening Impossibility. (Sec. 56)

The following factors make the contract void:

a. Destruction of Subject matter

When the subject matter of a contract after the formation of a contract is destroyed without the fault of the promisor or promisee, the contract is discharged.

EXAMPLES

a. C lent his hall to T for concerts. The hall was destroyed by fire before the first concert. The contract becomes void. (Taylor vs. Caldwell)[2]

b. C contracted to sell potatoes to H but failed to supply as the crop was destroyed by a pest. The contract was held to be discharged. (Howell vs. Coupland)[3]

b. Failure of Purpose

Where the formation of a contract depends upon happening of a certain event and if that event does not happen, the contract is discharged. When there is change in certain things which are necessary for performance, the contract becomes void on the grounds of impossibility of performance.

EXAMPLES

a. A contracts to hire a room at a hotel to attend a seminar to be held on a particular date. The seminar is postponed. The contract is discharged.

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[2] (1863) 32 LJQB 164

[3] (1876) 1 All Er 112

b. H hired a room from K to see the coronation of king. The coronation was cancelled due to the king's illness. K sued for rent. It was held that H need not pay the rent. (Krell vs. Henry)[4]

c. Death or Personal Incapacity

Where the performance of a contract depends upon the personal skill or qualification or existence of a particular person, the contract is discharged on the illness, incapacity or death of that person.

EXAMPLES

a. A and B contract to marry each other. A dies before the time fixed for the marriage. The contract becomes void.

b. An artist agreed to sing on particular date but fell ill and could not sing. Held, that the contract was discharged. (Robinson vs. Davison)[5]

d. Change of Law

Sometimes, contracts which are lawful when made become unlawful due to change in law. Subsequently, such contracts become impossible to be performed. A subsequent change in law may render the contract illegal and the contract is deemed to be discharged.

EXAMPLES

a. A promise to sell wheat to B. Before delivery of wheat, the government banned the sale of wheat by private traders. The contract was discharged.

b. There was a contract for sale of trees of a forest. Later, it was discharged when the State of Rajasthan forbade the cutting of trees in that area. (Man Singh vs. Khazan Singh)

e. Declaration of War

A contract entered into with an alien enemy during the war is void ab-initio. A contract entered into before the commencement of war remains suspended during the war. However, such contract may be revived after the war is over, if the nature of the contract so permits.

EXAMPLE

A contracts to carry cargo for B at a foreign port. Later, A's government declares war against the country where the port is situated. The contract becomes void.

4. Discharge by Lapse of Time

The Limitation Act, 1908 states that in case of breech of contract, legal action should be taken within a specified period. If the contract is not performed

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[4] (19130) 2 KB 740

[5] (1871) LR 6 Ex 269

and no legal action is taken by the promisee within the period of limitation, he is debarred from enforcing the contract. Lapse of time terminates a contract. The period of limitation for simple contract is 3 years. If 3 years expire and creditors fail to file a suit to recover their amount, the debtor is discharged form his liabilities.

EXAMPLE

A owed Rs. 5000 to B. The last date for repayment of the loan expired but B did not sue A until 3 years. B lost the rights to recover.

5. Discharge by Operation of Law

A contract terminates by operation of law in the following cases:

a. Insolvency

Where the court declares a person as insolvent, the rights and duties of such person are transferred to the official receiver. After the order of the court, such person is discharged from his liabilities.

EXAMPLE

A promises to sell his car to B for Rs. 2 Lac. Before the performance of the contract, A is declared insolvent by court. The contract is discharged.

b. Merger

Merger takes place when an inferior right available to a party merges into a superior right available to the same party under another contract. As a result, the former contract stands discharged automatically.

EXAMPLE

Where a part-time lecturer is made full time lecturer, the contract of part time lectureship is discharged by merger.

c. Material Alteration

Material alteration means a change which affects the rights, liabilities and legal position of the parties to a contract. If the contract is contained in a written document and one party alters its material particulars without the consent of the other party, the contract is discharged.

EXAMPLE

A executes a pro-note in favour of B for Rs. 300. B exceeds the amount from Rs. 300 to 3,000 by alteration. A may refuse to pay Rs. 300.

6. Discharge by Breach of Contract

The breech of contract means the failure of party to perform his obligations. When a party fails to perform the contract, there is a breach of contract. It discharges the aggrieved party from performing his obligations. It may be (1) actual breach (2) anticipatory breach.

a. Actual Breach

Actual breach of contract occurs when a party fails to perform the contract when the performance is due. Actual breach of contract can occur in the following two ways:

(i) On due date of performance

If a party fails to perform the contract on the due date of performance, it is an actual breach of contract. If time is not the essence of contract, the guilty party may later perform the contract after paying compensation for delayed performance.

EXAMPLE

A agrees to deliver 5 bags of wheat on 1st March. He does not deliver the wheat on that day. This is an actual breach of contract.

(ii) During the course of performance

If a party has performed a part of the contact but refuses to perform the remaining part of the contract, it is an actual breach of contract.

EXAMPLE

A agreed to deliver 500 shoes to B. The shoes were to be delivered in installments. After 200 shoes had been delivered, B declared that no more shoes were required. B has committed an actual breach of contract.

b. Anticipatory Breach

Anticipatory breach of contract occurs when a party declares his intention not to perform the contract before the due date of performance. Anticipatory breach may happen in the following ways:

(i) Express Breach

In express breach, a party to the contract communicates to the other party, his intention not to perform the contract before the due date of performance.

EXAMPLE

A agrees to supply wheat to B on Ist July. On 15th June, A informs B that he will not supply the wheat. This is express breach of contract.

(ii) Implied Breach

In implied breach, a party to the contract does an act which makes the performance of the contract impossible.

EXAMPLE

A promises to sell his horse to B on 1st June. Before that date, A sells the same horse to C. This is implied breach of contract.

Effects of Anticipatory Breach

In anticipatory breach, the promisee gets the following rights:

1. The promisee is excused from performance.
2. He may treat the contract as rescinded and sue the other party for damages immediately.
3. He may ignore the conduct of promisor and wait for the time of performance and then sue the promisor.

EXAMPLE

A employs B as a clerk and the service is to start from 1st June. On 20th May, A informs B that his services are not required. B may sue A for damages before 1st June. (M.S & I Co. vs. N B & Co.)[6]

SHORT ANSWER QUESTIONS

1. Name the ways by which a contract may be terminated?
2. What is novation?
3. What is meant by alteration?
4. What is the distinction between novation and alteration?
5. When does discharge of contract by rescission take place?
6. Can a person remit a part of his claim?
7. When does merger take place?
8. When does a contract terminate by operation of law?
9. What do you understand by anticipatory breach pf contract?
10. What is supervening impossibility?

TEST QUESTIONS

1. What are the various ways in which a contract may be discharged?
2. What is tender? State the essentials of a valid tender. Discuss the effect of refusal to accept a valid tender.
3. Discuss the law relating to discharge of contract by agreement.
4. What is meant by supervening impossibility? What is the effect of supervening impossibility on the performance of contract?
5. What do you understand by anticipatory breach of contract? Explain the effect of an anticipatory breach.
6. Explain (i) Discharge by lapse of time (ii) Operation of law

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[6] (1884) 9 APP Cas 434

10

REMEDIES FOR BREACH OF CONTRACT

When a party breaks the contract by refusing to perform his promise, the breach of contract takes place. The following remedies are available to the aggrieved party against the guilty party in case of breach of contract:

1. Suit for Rescission

Rescission means cancellation of a contract. When one party breaks the contract, the other party is released from his obligation under the contract. If the aggrieved party wants to sue the guilty party for damages for breach of contract, he must sue for rescission of the contract. When the court grants rescission, the aggrieved party is free from his obligations and becomes entitled to compensation. (Sec. 75)

EXAMPLES

a. A contracts to supply cement to B on 15th April. B agrees to pay the price on receipt of goods. A does not supply on due date. B is discharge from liability to pay. B can rescind and claim damages.

b. A pledges ornaments to B and gets a loan. A does not return the loan to B. B may rescind the contract and refuse to return the ornaments.

2. Suit for Damages

The aggrieved party may sue for damages in case of breach of contact. Damages are a monetary compensation allowed to the aggrieved party for the loss suffered by him as a result of the breach of contract. In case of breach of contract, the aggrieved party can claim the following kinds of damages: (Sec .73)

Kinds of Damages

The damages may be of the following five kinds:

a. Ordinary Damages

These are also called general damages. When a contract is broken, the aggrieved party can recover ordinary damages from the guilty party. Ordinary damages are usually assessed on the basis of actual loss. In a contract of sale of goods, the damages payable are the difference between the contract price and the market price at the date of breach. (Sec. 73)

EXAMPLES

a. A contracts to pay Rs. 1 Lac to B on 1st January. A could not pay on that day. As a result, B is totally ruined. A is liable to pay B only principal sum and interest on it

b. H delivered the shaft to B, a carrier, to take it to the manufacturer as a pattern for a new one. H did not tell B that delay would result in loss of profits. The delivery of shaft was delayed and the mill remained closed for a long period. H sued B for loss of profits. Held, that B was not liable for loss of profits. The ordinary damages were awarded. (Hadley vs. Baxendale)[1]

b. Special Damages

Special damages arise under some special circumstances. These damages include indirect loss which may arise due to breach of contract. The parties must be aware of the loss which may arise from the breach of contract. The notice to this effect must have been given to the other party otherwise he is not responsible for special damages. Subsequent knowledge of special circumstances will not create special liability on guilty party. (Sec. 73)

EXAMPLES

a. A contracts C to buy 1 ton of iron for Rs. 80,000. A also contracts to sell B, 1 ton iron for Rs. 1 lac. A informs C about the purpose of contract. C fails to supply. As a result, A cannot supply to B. C is liable for loss of profit which A would have earned from B.

b. S delivered his samples to NWR Co. for exhibition at New Castle. He wrote on consignment "must be at New Castle on Monday certain". Due to negligence, the goods reached after the show. The NWR Co. was aware of the object of carrying the goods. Held, S could claim special damages. (Simpson vs. London & N.W Railway)[2]

c. Exemplary Damages

Exemplary damages are awarded to punish the guilty party for the breach of contract. The breach of contract results in monetary loss to the aggrieved party and causes disappointment. Exemplary damages have no place in law of contract and are not recoverable. These are awarded in the following cases:

1. In case of breach of a contract to marry, the amount of damage depends upon the extent of injury to the feelings of the party.
2. In case of dishonour of cheque by a bank when there are sufficient funds to the credit of the customer. According to rule, the smaller the cheque dishonoured, the greater the damage.

EXAMPLE

OS Bank promised to give loan to W for a trip to California by crediting his account. Bank failed to do so and W's cheque was dishonoured. The court allowed exemplary damages for the emotional distress. (Westesen vs. Olathe State Bank)

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1 (1854) 9 Ex 341

2 (1876) 1 QB 274

d. Liquidated Damages

When parties to a contract fix the amount of damages for the breach of contract at the time of formation of contract, such damages are called liquidated damages. Where a sum is agreed in the contract to be paid by the defaulting party in case of breach of contract, the court will allow the reasonable damages not exceeding the amount already agreed. If the actual loss is more than the agreed amount, damages will be payable to the agreed amount. (Sec. 74)

EXAMPLE

A contracts to pay Rs. 20,000 as damages to B, if he fails to pay Rs. 5 Lac on a given day. A fails to pay on that day. B can recover damages not exceeding Rs. 20,000.

e. Nominal Damages

Nominal damages are neither awarded to compensate the aggrieved party nor to punish the guilty party. When the aggrieved party suffers no loss, the court may award nominal damages in recognition of his right. The court has discretion in this case. The court may refuse to award damages.

EXAMPLES

a. A promises to sell cement to B for Rs. 200 per bag. A does not supply. At the time of breach, the market rate of cement is the same. B is entitled to nominal damages.

b. S contracted to buy a Hillman car from a car dealer C but later refused to buy. C sold the same car to another customer and suffered no loss. C sued for loss of profit. Held, he could recover nominal damages. (Charter vs. Sullivan)

3. Suit upon Quantum Meruit

The term quantum meruit means payment in proportion to the work done or reasonable value of work done. When a person has done some work under a contract and the other party cancels the contract or an event happens which makes the performance of contract impossible; such party can claim remuneration for the work already done. The right to claim for quantum meruit arises when the original contract is discharged. The aggrieved party may sue for quantum meruit in the following cases:

a. When an agreement becomes subsequently void.

b. When there is a promise to render services but no agreement about remuneration.

c. Where something is done without any intention to do so gratuitously.

d. When the contract is divisible.

e. When the completion of the contract is prevented by the other party.

f. When a divisible work is performed badly.

EXAMPLES

a. B contracts to build a three storey house for A. When one storey is complete, A stops B from work. B can get compensation for work done.

b. C was employed as Managing Director in a company. After 3 months it was found that the directors were not authorized to appoint him. C sued for remuneration. Held, C could recover for the work done. (Craven Ellis vs. Canon Ltd.)[3]

4. Suit for Specific Performance

Specific performance means the actual carrying out of the contract by a party. In some cases where the damages are not an adequate remedy, the court may direct the guilty party to fulfil the contract. The aggrieved party can sue for specific performance in the following cases:

a. When compensation in money is not an adequate remedy.

b. When it is difficult to calculate the actual damages.

c. When compensation in money cannot be obtained.

Specific performance is not granted in the followings cases:

a. When damages are an adequate remedy.

b. When the court cannot supervise the execution of contract e.g. construction contract.

c. When the contract involves personal skill, taste and qualification.

EXAMPLES

a. A agrees to sell his plot to C, who wants to erect a mill. A commits breach. On the suit of C, A is directed by the court to perform the contract.

b. A agrees to sell B his painting but commits breach. B cannot sue for damages. A shall be ordered to make specific performance to B.

5. Suit for Injunction

Injunction is an order of a court, restraining a person from doing something which he promised not to do. It is a mode of securing specific performance in the negative form. It is a preventive relief. It is a discretionary remedy of the court. It is appropriate in cases of anticipatory breach of contract.

EXAMPLES

a. W agreed to sing at Lu's theatre and for no one else. Afterwards, W contracted Z to sing at another theatre and refused to sing for Lu. Held, W could be restrained by injunction from singing for Z. (Lumly vs. Wagner)[4]

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[3] (1936) 2 KB 403

[4] (1852) De GM & Co. 604

b. G agreed to take the supply of electricity only from M Co. G was, restrained by an injunction from buying electricity from any other company. (Metropolitan Electric Supply Co. vs. Ginder)[5]

SHORT QUESTIONS

1. What is specific performance?
2. When does the court refuse to grant specific performance in case of breach of contract by one of parties?
3. What is meant by injunction?
4. When does a right to sue on quantum meruit arise?
5. Define damages as a remedy for breach of contract?
6. What are ordinary damages?
7. When can a plaintiff recover special damages in case of breach of contract?
8. What are exemplary damages?
9. What are liquidated damages?

TEST QUESTIONS

1. What remedies are available to an aggrieved party on the breach of contract?
2. Explain the different kinds of damages.
3. What is meant by suing on quantum meruit? Under what circumstances a claim on a quantum meruit arises?
4. Write a detailed note on suit for damages.
5. When can an aggrieved party file a suit for specific performance and for an injunction? Explain.

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[5] (1901) 2 CH 792

11

INDEMNITY AND GUARANTEE

CONTRACT OF INDEMNITY

Definition and Nature

The term indemnity means to compensate or make good the loss. Section 124 states that, "A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself or by the conduct of any other person is called a contract of indemnity."

The person who promises to make good the loss is called the indemnifier (promisor). The person whose loss is to be made good is called the indemnity holder or indemnified (promisee).

A contract of indemnity is made to protect the promisee against an anticipated loss. It depends upon the happening of loss. Contract of insurance is an example of indemnity.

EXAMPLES

a. A parked his cycle at a cycle stand. A lost the token issued by B. B refused to return the cycle. To get his cycle, A promised to compensate B against any loss he may suffer if any other person claims the cycle from B.

b. A contracts to indemnify B against the result of any proceedings which C may take against B for certain sum of Rs. 2 lac. It is a contract of indemnity.

Essentials of Contract of Indemnity

Following are the essentials of a valid contract of indemnity:

1. It must contain all the essentials of a valid contract.
2. It is a contract between two parties. One person promises to save the other from any loss which he may suffer.
3. The loss may be caused by the conduct of the promisor himself or any other person.
4. The contract of indemnity may be expressed or implied.

Rights of Indemnity Holder

The following are rights of indemnity holder: (Sec. 125)

1. He can recover all damages which he may be compelled to pay in respect of any suit filed against him.
2. He can recover expenses in respect of any suit filed by him with the authority of indemnifier.

3. He can recover all expenses which he might have paid as a result of any compromise which was made with the consent of indemnifier.

Rights of Indemnifier

There is no provision in the law about the rights of indemnifier. However, the rights of indemnifier are the same as the rights of a guarantor. It is a principle of law that where one person has agreed to indemnify another, his rights will be similar to the rights of guarantor.

CONTRACT OF GUARANTEE

Definition

Section 126 states, "A contract of guarantee is a contract to perform the promise or discharge the liability of a third person in case of his default."

A contract of guarantee is made to enable a person to get loans, goods on credit, employment etc. It may be oral or written. It is a promise to perform the promise of the other, on his failure to do so.

The person who gives the guarantee is called the surety or guarantor. The person to whom the guarantee is given is called the creditor. The person in respect of whose default the guarantee is given is called the principal debtor

EXAMPLES

a. A requests B to lend Rs. 5 Lac to C. A guarantees that if C fails to return the loan, A will pay to B. This is a contract of guarantee.
b. On the request of B, A promises to the employer of B that if B commits a fraud, A shall be liable. This is a contract of guarantee.

Essentials

The following are essential features of contract of guarantee:

1. Tripartite Contract

It is an agreement between the principal debtor, creditor and surety. Three separate contracts exist among them. In a tripartite contract, the liability of the surety arises if the promise by principal debtor is not fulfilled.

In a contract of guarantee, the principal debtor is liable and the surety becomes liable on the default of principal debtor. The principal contract exists between the principal debtor and creditor and the secondary contract exists between the creditor and surety.

EXAMPLE

X takes a loan of Rs. 5000 from Y on the guarantee of Z. The agreement between X and Y is the principal contract and the contract between Y and Z is a contract of a guarantee. The liability of Z will arise if X fails to repay the loan.

2. Consideration

Like other contracts, a contract of guarantee must fulfill essentials of a valid contract. It must be supported by some consideration. It is not necessary that there is direct consideration between the surety and creditor. The consideration received by the principal debtor is sufficient for the surety. (Sec.127)

EXAMPLES

a. A sells goods on credit to B on C's guarantee. C's promise to guarantee is the consideration for A's promise to sell the goods.

b. A sells goods to B. X requests A not to sue B for a week, and promises to pay if B does not pay. It is consideration for X's promise.

3. Misrepresentation

A guarantee obtained by means of misrepresentation made by the creditor, or with his knowledge and assent, concerning the material part of a transaction is invalid. If the consent of surety is obtained by misrepresentation, the surety will be discharged from his liability. (Sec.142)

EXAMPLE

H was invited, to give a guarantee for the honesty of L's servant. L had previously dismissed his servant for dishonesty but did not disclose this fact to H. Later, the servant committed embezzlement. H was held not liable. (LGO Co. vs. Holloway)[1]

4. Concealment

Any guarantee which the creditor obtains by means of keeping silence to material circumstances is invalid. The expression 'keeping silence' means intentional concealment of the facts. The creditor should disclose to the surety the facts which are likely to affect the surety's liability. (Sec.143)

EXAMPLE

A employs B to recover money. B misappropriates the money. Later, A asks C for surety. C being unaware of B's previous record gives guarantee for B. B again misappropriates. C's guarantee is invalid because A concealed the facts.

5. Writing not Necessary

It is not necessary that the contract of guarantee be in writing. The contract may be either oral or written. It may be express or implied from the conduct of parties. (Sec.126)

EXAMPLE

A sells and delivers goods to B on the verbal guarantee of C. It is a valid guarantee.

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[1] (1912) 2 KB 72

DIFFERENCE BETWEEN INDEMNITY AND GUARANTEE

The following are the points of distinction between the two:

Indemnity	Guarantee
1. Number of Parties In a contract of Indemnity, there are two parties: indemnifier and indemnity holder.	In a contract of guarantee, there are three parties: creditor, principal debtor and surety.
2. Number of contract In indemnity, there is one contract between indemnifier and indemnified.	In guarantee ,there are three contracts i.e. between creditor and principal debtor, creditor and surety and surety and principal debtor.
3. Nature of Liability The liability of indemnifier is primary and independent.	The liability of surety is secondary. Surety is liable if principal debtor fails to perform his promise.
4. Request In a contract of indemnity, the indemnifier promises without the request of the debtor.	In a contract of guarantee, the surety gives the guarantee on the request of debtor.
5. Existence of Liability In a contract of indemnity, the liability of the indemnifier arises on the happening of event.	In a contract of guarantee, the liability already exists and its performance is guaranteed by surety.
6. Filing of Suit In a contract of indemnity, the indemnifier cannot sue the third party for loss in his own name. He can sue if the claim is assigned in his favour.	In a contract of guarantee, the surety after paying to creditor can sue principal debtor in his own name.
7. Purpose A contract of indemnity is for reimbursement of loss.	A contract of guarantee is for security of a debt or performance of promise.

Surety's Liability

Extent of Surety's Liability

The liability of surety is co-extensive with that of the principal debtor unless it is otherwise provided by the contract. The phrase 'co-extensive with that of principal debtor' shows the quantum of the surety's liability. It means that the liability of a surety is the same as that of a principal debtor unless there is a

contract to the contrary. The surety's liability can be made less than that of the principal debtor but never greater. (Sec.128)

EXAMPLE

A guarantees to B for the payment of a bill accepted by C. The bill is dishonoured. A is liable for the payment.

Nature of surety's liability

The following are rules regarding the nature of surety's liability:

1. The liability of surety is secondary. It arises on the default of principal debtor.
2. The liability of surety arises immediately on the default of principal debtor; unless there is a provision in the contract that creditor must file a suit against principal debtor or give notice of default to surety.
3. Where a creditor holds securities from principal debtor for his debt, the creditor should first sue the surety before resorting to securities unless agreed otherwise.
4. The surety is not liable where the creditor has obtained guarantee by misrepresentation.
5. The law does not treat the principal debtor and surety as one person. It is not necessary that surety will be liable only if principal debtor is liable.
6. The discharge of principal debtor by operation of law does not discharge the surety, e.g. material alteration.
7. Liability of surety does not come to an end on the death of principal debtor.

Kinds of Guarantee

The following are different kinds of guarantee:

1. Simple guarantee

A guarantee which extends to a single debt or transaction is called ordinary, simple or specific guarantee. It comes to an end as soon as the liability under the transaction ends.

EXAMPLE

G guarantees K for the payment of 5 bags of wheat purchased by C. C makes the payment. Later, C again purchases 5 bags of wheat but did not pay. K sued G. Held, G's guarantee is specific guarantee and G is not liable. (Kyk vs. Groves)[2]

2. Continuing guarantee

A guarantee which extends to a series of transactions is called continuing guarantee. In other words, a guarantee which covers a number of transactions over a period of time is called continuing guarantee. It is like a standing offer

2 (1829) 6 BING 276

which is accepted by the creditor every time a subsequent transaction takes place. (Sec.129)

EXAMPLES

D guarantees C for B's purchases from C to the extent of Rs. 5,000 for the next one year. This is a continuing guarantee.

Rights of Surety

A surety has the following rights:

1. Rights against creditor

The surety has the following rights against the creditor:

a. Right to Securities

At the time of payment, the surety can demand the securities which creditor has received from principal debtor at the time of creation of contract, whether surety is aware of such securities or not. If creditor by negligence loses any security held by him, the surety is discharged to that extent from the payment of guaranteed sum. But if security is lost due to unavoidable act, the surety would not be discharged. (Sec.141)

EXAMPLE

C gives a loan of Rs. 2 Lac to B on the guarantee of X. C also pledges B's car. B fails to pay the loan and X pays Rs. 2 Lac to C. X can get the car from C.

b. Right to Claim Set-off

If the principal debtor has some claims against the creditor, the debtor can ask for adjustment of his debts to the extent of his claims. If creditor sues surety for repayment, the surety can claim set off, if any, which principal debtors had against creditor.

EXAMPLE

A supplies furniture worth Rs. 2 Lac to B on the guarantee of C. B claims that some furniture is defective and refuses to pay Rs. 20,000. C can ask for adjustment of Rs. 20,000.

2. Rights against Principal Debtor

The surety has following rights against principal debtor:

a. Right of Subrogation

When surety has paid the guaranteed debt on default of principal debtor, he is entitled to all the rights which creditor had against the principal debtor. The surety is entitled to all the remedies which are available to creditor against principal debtor. (Sec.140)

EXAMPLE

X borrowed money from Y on the guarantee of W and mortgaged his house to Y. X failed to pay and W paid. Now, W can enforce the mortgage of the house against X.

b. Right of indemnity

In every contract of guarantee, there is an implied promise by principal debtor to indemnify the surety. The surety is entitled to recover from principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully. (Sec 145)

EXAMPLE

B owes Rs. 1 Lac to C, and A is the surety. B fails to pay. C demands payment from A. A refuses to pay. C sues A for the money. A defends the suit on reasonable grounds but loses and pays debts with cost of suits. A can recover the whole amount from B.

3. Rights against Co-sureties

Where a debt is guaranteed by more than one surety, they are called co-sureties. In such a case, all the sureties are liable to make the payment to creditor according to the agreement among them. If there is no agreement and one of the co-sureties is compelled to pay the entire debt, he has a right to contribution from the co-sureties. Following are the rules in this regard: (Sec.146-147)

a. Similar amount

When there are sureties for the same debt and the principal debtor has committed a default, each party is liable to contribute equally to the extent of the default.

EXAMPLE

A, B and C are sureties to D for the sum of Rs. 3000 lent to E. E makes default in payment. A, B and C are liable to pay Rs. 1000 each. If C becomes insolvent and only pays Rs. 500, then A and B will contribute equally.

b. Different amount

When there are sureties for the same debt for different sums, they are bound to contribute equally subject to the limit fixed by their guarantee. They will not contribute proportionately.

EXAMPLES

A, B and C are sureties for D. A, B and C guarantee for Rs. 10,000, 20,000 and 40,000 respectively.

a. If D makes default in payment to the extent of Rs. 30,000 then liability of A, B and C is Rs. 10,000 each.

b. If D makes default to the extent of Rs. 40,000 then liability of A is Rs. 10,000, B is Rs. 15,000 and C is Rs. 15,000.

c. If D makes default to the extent of Rs. 70,000 then A, B and C will pay Rs. 10,000, Rs. 20,000 and Rs. 40,000 respectively.

Discharge of Surety from Liability

A surety is discharged from his liability in the following ways:

1. Notice of Revocation

A specific guarantee can be revoked by notice if the liability has not arisen. But a continuing guarantee may be revoked anytime by the surety as to future transactions by giving a notice to the creditor. The surety remains liable for transactions entered into prior to the notice. (Sec. 130)

EXAMPLE

A lends B a certain sum on the guarantee of C. C cannot revoke the guarantee. But if A has not yet given the sum to B, then C may revoke the guarantee by giving a notice.

2. Death of Surety

In specific guarantee, the surety is not discharged from liability on his death if the liability has already occurred. But in a continuing guarantee, the death of surety discharges him from liability regarding the transactions which take place after his death, unless there is a contract to the contrary. The estate of deceased surety will remain liable for past transactions. (Sec. 131)

EXAMPLE

A sells goods to B for Rs. 1 Lac. C guarantees payment. A delivers goods worth Rs. 50,000. Later, C dies. C's property is liable up to Rs. 50,000.

3. Change in Terms of Contract

When any change is made in the terms of the contract by principal debtor and creditor without the surety's consent, the surety stands discharged with respect to transactions subsequent to the change. (Sec. 133)

EXAMPLE

M contracts to lend Rs.1 Lac to N on 1st March. S guarantees payment. M pays the amount on 1 Jan. S is discharged from his liability.

4. Release or discharge of Principal Debtor

The surety is discharged by any contract between the creditor and principal debtor by which principal debtor is released, or by an act or omission of the creditor which discharges the principal debtor. (Sec.134)

EXAMPLES

a. A contracts to build a house for B. C guarantees for the performance. If B releases A from the performances of the contract, the surety is discharged.

b. A contracts to build house for B. B is liable to supply wood. C guarantees A's performance of the contract. B fails to supply the wood. C is discharged from his liability.

5. Arrangement without Surety's consent

Where the creditor, without the consent of surety, makes an arrangement with principal debtor for composition or promises to give him time or not to sue him, the surety will be discharged. (Sec.135)

Where a contract to give time to principal debtor is made by the creditor with a third person and not with principal debtor, the surety is not discharged. (Sec.136)

EXAMPLES

a. P purchased a car from C on guarantee of S. C gave P more time for payment. Held, the giving of time to P for payment discharged S from his liability. (M.M Showroom Ltd vs. Newman)[3]

b. A lends Rs. 10 Lac to B for 1 year on the guarantee of C. A promises X, a friend of B, to give more time to B to return the loan. C is not discharged from his liability.

6. Creditor's act or omission

If the creditor does any act which is inconsistent with rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety against the principal debtor is thereby impaired, the surety is discharged. (Sec.139)

EXAMPLES

a. B contracts to build a ship for C for Rs. 90 Lac to be paid by installments as the work reaches certain stages. A guarantees C for B's performance. Without telling A, C prepays the last two installments to B. A is discharged by this prepayment.

b. A employs B as a cashier on the guarantee of M. A promises to count the cash at least once a month. A does not count the cash. B commits fraud. M is not liable to A.

7. Loss of Security

If the creditor loses or without the consent of the surety, parts with the security given by the principal debtor against the debt, the surety is discharged

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[3] 1929 2K B 626

from liability to the extent of the value of security. If the security is lost due to an act of God, the surety will not be discharged. (Sec 141)

EXAMPLE

A advances Rs. 2 Lac to B on the guarantee of X. A gets an additional security of Rs. 50,000 by pledge of B's car. A cancels the pledge and returns the car. B becomes insolvent. X is discharged from the liability to the extent of value of car.

8. Invalidation of Contract of Guarantee

A surety is discharged from liability when the contract of guarantee (between creditor and surety) is invalid. A contract of guarantee is invalid in the following cases: (Sec.142-144)

a. Where the guarantee is obtained by misrepresentation.
b. Where the guarantee is obtained by concealment of material facts.
c. Where guarantee is obtained under the impression that co-sureties will join and if, no body joins.
d. Where it lacks some essentials of a valid contract, e.g. surety is incompetent to contract or the object is illegal.

EXAMPLES

a. A employs B as a clerk. B commits fraud. Later, A asks C for guarantee without informing C about B's previous conduct. C gives guarantee for B's conduct. B again commits fraud. The guarantee is invalid.
b. B signed a guarantee under the impression that three other persons would also sign it. One of them died without signing. The guarantee is not enforceable. (NP Bank of England vs. Brackenbury)[4]

SHORT ANSWER QUESTIONS

1. Define a contract of indemnity?
2. How many parties are there in a contract of indemnity?
3. What are the rights of an indemnity holder when sued?
4. What are the rights of an indemnifier?
5. What is a contract of guarantee?
6. What are the parties in a contract of guarantee?
7. How many contracts are there in a contract of guarantee?
8. Can a minor be a principal debtor in a contract of guarantee?

4 (1906) 22 TLR 792

9. What are the different kinds of guarantee?
10. What is specific guarantee?
11. What is a continuing guarantee?
12. What is the nature of surety's liability?

TEST QUESTIONS

1. Define a contract of indemnity. What are the rights of an indemnity-holder?
2. What is a contract of guarantee? What are its special features?
3. Distinguish between a contract of guarantee and a contract of indemnity.
4. Discuss the nature and extent of surety's liability.
5. What is a continuing guarantee? When and how is it revoked?
6. Explain the rights of a surety against:-
   a. The creditor,
   b. The principal debtor
   c. The co-sureties
7. When is surety discharged from his liability?

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BAILMENT AND PLEDGE

CONTRACT OF BAILMENT

Meaning and Definition

The word bailment is derived from the French word 'baillier' which means to deliver. According to Section 148, "A bailment is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them."

A bailment is the voluntary transfer of the possession of goods by the owner to another person, under a contract that such other person shall hold them or return them to the owner or deliver them according to his order.

A bailment arises when one person transfers possession of goods to another person on condition that he will return them after the accomplishment of purpose. If a person already in possession of the goods of another person, contracts to hold them, he becomes the bailee and the owner becomes the bailor.

The person delivering the goods is called the bailor. The person to whom the goods are delivered is called the bailee.

EXAMPLES

a. A delivers a piece of cloth to B to make a suit. This is a contract of bailment between A and B.

b. A sells goods to B who leaves them in the possession of A. A becomes the bailee and B becomes the bailor.

Essential Features

The following are essential features of a bailment:

1. Contract

A bailment is based on a contract between the bailor and bailee. The delivery of goods should be made for some purpose and when the purpose is accomplished, the goods shall be returned to the bailor. There is no bailment if the goods are delivered without any contract i.e. by mistake.

EXAMPLES

a. A gives a piece of cloth to T, a tailor, to make a suit. This is a contract of bailment between A and T.

b. B's stolen ornaments were recovered by the police. Later, they disappeared from police custody. Held, the state was liable. (Basava vs. State of Mysore)[1]

2. Specific Purpose

The bailment of goods must be made for a specific purpose. When the goods are delivered by mistake without any purpose, there is no contract. When the purpose is accomplished, the goods will be returned to the bailor or disposed of according to the directions of the bailor.

EXAMPLE

A gives his watch to B for repair. This is a bailment.

3. Delivery of Goods

The bailment is the delivery of moveable goods from one person to another. Mere custody of goods does not create a relationship of bailor and bailee. A servant who receives the goods from his master to take them to a third person only gets the custody. The possession of goods remains with the master so the servant cannot be called a bailee.

EXAMPLES

a. A buys a T.V. from B. A asks B to keep the T.V. with him for an hour, so that A may buy other goods from the market. B is now holding the T.V as a bailee.

b. U entered a restaurant for dinner. H, the waiter, took his coat and hung it on a hook. Later, the coat was missing. The owner of the restaurant was held liable. (Ultzen vs. Nicols)[2]

4. No Change of Ownership

Under a bailment, only the possession of goods passes from the owner to the other person and not the ownership. Mere custody of goods without possession is not bailment, e.g. a servant holding his master's goods. If there is a change of ownership, the transaction may be a sale or exchange but not bailment.

EXAMPLE

A delivers his car to B for repair. The possession of car transfers from A to B but ownership remains with A.

5. Return of Same Goods

When the purpose is accomplished, the goods must be returned in the original form or in changed form or disposed according to the directions of bailor. If the bailee has an option of paying money or of returning different property, there is no bailment. The deposit of money with a bank is not a bailment because

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1 (1977) 4 SCC 358

2 (1894) 1 QB 92

there is no obligation to return the same money. However, notes or goods deposited in a locker are a bailment.

EXAMPLES

a. A lends his cycle to B for a week. B is liable to return the same cycle.

b. X gives the goods to Daewoo Transport to carry them from Lahore to Multan. This is a bailment.

Kinds of Bailment

Bailment is classified according to benefit and reward as under:

1. Benefit

According to benefit, bailment can be grouped into three classes:

a. For benefit of Bailor

It is a bailment in which goods are delivered by the bailor to the bailee only for the exclusive benefit of the bailor himself, e.g. A delivered ornaments for safe custody to B, his neighbor, without any charges. It is a bailment for the benefit of bailor only.

b. For benefit of Bailee

It is a bailment where goods are delivered to the bailee to be used without any compensation, e.g. A borrows B's pen to use in the examination hall. The bailment is for the sole benefit of A, the bailee.

c. For benefit of Bailor and Bailee

It is a bailment where the goods are delivered for mutual benefit of both the bailor and bailee, e.g. A delivers his car to B, a mechanic for repair. It is for the benefit of both bailor and bailee.

2. Reward

Bailment is classified into two classes according to reward:

a. Bailment without Reward

It is bailment in which neither the bailor nor the bailee is entitled to any remuneration. It is also called gratuitous bailment, e.g. lending a book to a friend, depositing goods for safe custody without any charges etc.

b. Bailment for Reward

It is a bailment where either the bailor or the bailee is entitled to remuneration. It is also called non-gratuitous bailment, e.g. car lent for hire, cloth given for tailoring on charges etc.

Duties of Bailor

A bailor is the person who delivers the goods. The duties of a bailor are as follows:

1. Duty to Disclose Faults

A gratuitous bailor is bound to disclose to the bailee all those faults in the goods bailed which are known to him and if he fails to do so, he will be liable to pay such damages to the bailee arising from such faults. (Sec 150)

A non-gratuitous bailor is responsible for all defects in the goods bailed whether he is aware of the defects or not. If he does not disclose the faults to the bailee, he will be liable for damages arising due to those faults.

EXAMPLES

a. A lends a horse, which he knows to be vicious, to B. A does not disclose the fact that the horse is vicious. B is thrown from the horse and gets injured. A is responsible for the damages.

b. A hires a carriage from B. The carriage is unsafe and B is not aware of it. A gets injured. B is responsible to A for the injury.

c. R hired a motorboat from D for a holiday on river Thames. The boat caught fire and R could not put out the fire, as the fire-fighting equipment was out of order. R was injured. Held, D was liable. (Read vs. Dean)[3]

2. Duty to Repay Necessary Expenses

In case of gratuitous bailment, where goods are to be kept or to be carried by the bailee for the bailor, it is the duty of the bailor to repay all the necessary expenses incurred by the bailee for the purpose of bailment. In case of non-gratuitous bailment, the bailor is not liable to bear the ordinary expenses. (Sec. 158)

EXAMPLE

A delivers a horse to B for safe custody. The horse becomes sick and B spends Rs. 500 on medical care and Rs. 200 on feeding the horse. A is liable to pay Rs. 700 to B.

3. Duty to Repay Extra-Ordinary Expenses

In all kinds of bailment, the bailor must bear the extra-ordinary expenses, if any, incurred by the bailee regarding the goods bailed. (Sec. 158)

EXAMPLE

B hires a horse from A. The horse becomes sick. B spends Rs. 500 on medical care and Rs. 200 on feeding the horse. A is liable to pay to B, Rs. 500 i.e. the extra-ordinary expenses only.

4. Duty to Indemnify for Demanding Back

If the bailor who has sent goods gratuitously for specified time, asks the bailee to return the goods before the specified time, he must indemnify the bailee

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(19149) 1 KB 188

for the loss caused to him in excess of the benefit already enjoyed by the bailee from such goods. (Sec. 159)

EXAMPLE

A gives a cycle to B gratuitously for 3 months. B spends Rs. 200 on its repair. If A asks for the return of cycle after 1 month, he is liable to compensate B for expenses incurred by him in excess of the benefit enjoyed by B.

5. Duty to Indemnify for Defective Title

Where the title of the bailor to the goods is defective and as a result the bailee suffers a loss, the bailor is responsible to indemnify the bailee for such loss. (Sec.164)

EXAMPLE

A gives his neighbour's scooter to B for use without the neighbor's permission. The neighbour sues B and receives compensation. A is bound to indemnify B for losses.

6. Duty to Receive Back Goods

It is duty of the bailor to receive back the goods when the bailee returns them after the accomplishment of the purpose of bailment. If the bailor refuses to receive the goods at proper time, the bailee can claim compensation for all necessary expenses incurred for safe custody of goods. (Sec.160)

EXAMPLE

A bails his cow to B for feeding for 2 months. A does not take his cow back after 2 months. B has to spend more money on feeding the cow. A is liable to compensate B.

Rights of Bailee

The rights of bailee are as under:

1. Right to Claim Damages

In case of bailment without reward, the bailee is entitled to know the faults in the goods bailed to him of which the bailor is aware. A bailee has a right to claim compensation from the bailor for any damages arising directly from such faults in the goods bailed. However, in case of bailment for reward, the bailee is entitled to claim compensation for even those faults of which bailor was unaware. (Sec. 150)

EXAMPLE

A lends a horse to B which he knows to be vicious but does not disclose this fact to B. B is thrown from the horse and gets injured. A is responsible to B for the injuries sustained.

2. Right to Recover Expenses

The bailee can recover all necessary expenses incurred by him for the purpose of the bailment from the bailor. It includes compensation for any loss caused to him due to any defect in the bailor's title and lawful charges for providing services. The bailee has a right to claim expenses incurred for safe custody of the goods if the bailor has wrongfully refused to take delivery after the term of bailment. (Sec 158)

EXAMPLE

A delivers his horse to B for safe custody. The horse becomes sick and B's spends Rs. 200 on medical care. B can recover Rs. 200 from A.

3. Right to Deliver Goods

When the goods are bailed by several joint owners, the bailee has a right to deliver them back to, or according to the directions of, one joint owner without the consent of all unless there is an agreement to the contrary. (Sec 165)

EXAMPLE

A B & C jointly bail a car to X for 5 days. X can return the car to any one of them.

4. Right to Compensation

If the bailor has no right to bail the goods or to receive them back or to give directions regarding them and as a result, the bailee suffers a loss, the bailee is entitled to receive such loss from bailor. (Sec.164)

If the bailor has no title to the goods and the bailee, in good faith, delivers them back to, or according to the directions of the bailor, the bailee is not responsible to the owner in respect of such delivery. (Sec. 166)

EXAMPLES

a. A bails X's scooter to B without his permission. X sues B and receives compensation. B can recover such compensation from A.

b. A bails the scooter of his friend, C to B with his permission. B has a right to return the scooter to A. B is not liable to C.

5. Right to Stop Delivery

If a person other than the bailor claims the goods bailed, the bailee may apply to the court to stop the delivery of goods to the bailor and to decide the title to the goods (Sec.167).

EXAMPLE

A bails goods to B. X claims that he is the owner of those goods and demands from B. B can stop the delivery of goods to A and request the court to decide about the ownership of goods.

6. Right to Sue

If a third person wrongfully deprives the bailee of the use or possession of the goods bailed, or causes injury to the goods, the bailee is entitled to sue such third person. The bailor can also bring a suit against such third person in respect of such goods bailed. (Sec. 180)

EXAMPLE

A gave a piece of cloth to T, a tailor, to make a suit. M forcefully took the coat from T. A or T can file a suit against M.

7. Right of Lien

Lien means the right to retain the possession of property or goods belonging to another until some debt or claim are paid. A bailee has the right to retain that particular property in respect of which he has rendered some services and his charges are due but if the bailee does not complete the work within the agreed time or reasonable time, he will not be entitled to any lien. (Sec 170)

EXAMPLES

a. A delivers a rough diamond to B, a jeweler, for cutting and polishing. B can retain the diamond till he is paid for the services.

b. A gives his watch to B for repair. B promises A to deliver the watch next day but takes more time to repair. B cannot retain the watch.

Duties of Bailee

The duties of bailee are as follows:

1. Duty to take Reasonable Care

In all cases of bailment, the bailee is bound to take care of the goods bailed to him as a man of ordinary prudence under similar circumstances takes care of his own goods of the same description. If the bailee does not take care of the goods bailed and the goods are damaged by his negligence, he is responsible for the loss even if the bailment is gratuitous.

In the absence of any special contract, the bailee is not responsible for the loss, destruction or deterioration of the goods bailed if he has taken care of them. The bailee is bound to take reasonable steps to recover the goods if they get stolen. (Sec 152)

EXAMPLES

a. A sends some ornaments to B, a goldsmith. B keeps them in a locked safe. The ornaments are stolen. B is not liable for loss.

b. A bails car to B. B forgets to lock up the car. The car is stolen. B is liable.

c. C bails some cattle to H. Cattle were stolen from H's custody without his fault. H did not inform the owner or the police to recover them. H was held liable. (Coldman vs. Hill)[4]

2. Duty not to make Unauthorized Use

The bailee must use the goods according to the terms of bailment. If the bailee makes an unauthorized use of the goods, he is liable to compensate to the bailor for any damage arising to the goods (Sec. 154)

EXAMPLES

a. A lends a horse to B for his own riding only. B allows C to ride the horse. C rides with care but the horse falls and C gets injured. B is liable to compensate A.

b. A lent is car to B for private use only. B used the car as taxi. The bailment is voidable at the option of A.

3. Duty not to Mix Goods

If goods are mixed with the consent of the bailor, there is no breach of duty and the bailor and bailee shall have an interest in the goods, according to their respective shares in the mixture thus produced. (Sec. 155)

If the bailee, without the consent of the bailor, mixes his own goods in such a manner that it is possible to separate, the bailee is bound to bear the expenses of separation and the loss. (Sec. 156)

If the bailee, without the consent of bailor, mixes his own goods in such a manner that goods cannot be separated, the bailee must compensate the bailor for his loss. (Sec. 157)

EXAMPLES

a. A bails 100 bales of cotton to B bearing a particular mark. Without A's consent, B mixes the bales with his own bales which bear a different mark. A can get his bales back and B is bound to bear the expenses of separation.

b. A bails high quality flour to B. Without A's consent, B mixes the flour with low quality flour of his own. B must compensate A for the loss.

4. Duty to Return Goods

It is the duty of bailee to return or deliver, according to the bailor's directions, the goods bailed, without demand, as soon as the time for which they were bailed has expired or the purpose for which they were bailed has been accomplished. When the bailee fails to return the goods at the proper time, he is responsible to the bailor for any loss of the goods from that time. (Sec 160-161)

(1919) 1 KB 443

EXAMPLES

a. A hires a horse from B for a month. A does not return the horse on the due date. The horse dies after the period of bailment without any fault on A's part. A is liable for the loss.

b. S & Co. delivered books to S & S for binding. They asked to return the books in a week but S&S failed to return within the specified period. A fire broke out and the books were burnt. Held, S & S were liable. (Shaw & Co. vs. Symmons & Sons)

5. Duty to Return Increase

In the absence of any contract to the contrary, the bailee is bound to deliver to the bailor any natural increase or profit which may have accrued from the goods bailed. (Sec 163)

EXAMPLE

A leaves a cow in the custody of B for care. The cow gives birth to a calf. B is bound to deliver the calf as well as the cow to A.

Rights of Bailor

The rights of the bailor are as under:

1. Right to Claim Damages

The bailor can recover damages from the bailee if any damage to the goods bailed is caused due to the bailee's negligence. (Sec 151)

The bailor can claim compensation for any damage arising due to unauthorized use of the goods bailed by the bailee. He can also claim compensation for any loss which may arise due to unauthorized mixing of goods bailed with the bailee's own goods. (Sec 154)

EXAMPLE

A bailed some goods to B. B did not keep the goods under the lock. The goods were stolen. A can recover the loss from B.

2. Right to Demand Return of Goods

The bailor can demand the return of the goods bailed as soon as the purpose of bailment is accomplished. If the bailee makes default in returning the goods at the proper time and place, the bailor is entitled to compensation arising from such situation. (Sec. 160)

When the goods are lent gratuitously, the bailor can demand the return of the goods at any time even before the specified period. (Sec. 159)

EXAMPLE

A gives a car to B on rent for 5 days. A can demand the return of car after 5 days. If B does not return the car after 5 days, A can claim damages.

3. Right to Claim Increase

The bailor is entitled to claim any increase or profit which may have accrued from the goods bailed. (Sec. 163)

EXAMPLE

A bailed a cow to B for safe custody. The cow gave birth to a calf. A can demand the cow along with the calf.

4. Right to Terminate Bailment

The bailor has a right to terminate the bailment if the bailee does any act which is against the terms of the contract though the term of bailment has not expired or the purpose of bailment has not been accomplished. (Sec. 153)

EXAMPLE

A gives a horse to B for his own riding. B drives the horse in carriage. A can terminate the contract.

5. Right to Sue

The bailor may sue the bailee for the breach of contract if the goods are not returned or disposed of as directed by the bailor. The bailor can take action for negligence when the bailee is guilty of such conduct. The bailor may also sue the third party who damaged or took the bailed goods from the bailee's possession. (Sec.180)

EXAMPLES

a. A gives his T.V. to B for repair. X gets the possession of T.V. from B. A can sue X.

b. A gave a piece of wood to B, a carpenter to make tables. B did not take proper care. A fire broke out and destroyed the wood. A can sue B for loss.

Termination of Bailment

A contract of bailment terminates under the following circumstances:

1. Expiry of Time

When the contract of bailment is made for a specified period of time, the bailment terminates after the expiry of that specified time period.

EXAMPLE

A stores B's oranges in the cold storage for a month. After 1 month, the bailment terminates.

2. Accomplishment of Purpose

If the contract of bailment is made for a specific purpose, the bailment terminates as soon as the purpose is accomplished.

EXAMPLE

M gives his radio to N for repair. N repairs and returns the radio. The bailment is over.

3. Unauthorized Use

If the bailee does any act which is against the terms of bailment, the bailment may be terminated by the bailor even though the term of bailment has not expired or the purpose of bailment has not been accomplished. (Sec 153)

EXAMPLE

A bails a car to B for 5 days for his personal use. B allows his friend, X to use the car. A can terminate bailment before 5 days.

4. On Death

A gratuitous bailment is terminated by the death of either the bailor or the bailee. (Sec 162)

EXAMPLE

M borrows a book from his friend, N for 10 days. M dies. The bailment terminates.

5. Termination by Bailor

A gratuitous bailment can be terminated by the bailor at any time, even before the specified time if the termination causes no loss to the bailee. In case the bailee suffers a loss due to termination, the bailor is liable for loss. (Sec 159)

EXAMPLE

S lends a book to T for one month. S can demand return of book before the expiry of bailment period.

6. Destruction of Subject matter

A bailment is terminated when the subject matter of the bailment is destroyed or due to change in its nature, it becomes incapable of use for the purpose of bailment.

EXAMPLE

A delivered a horse to B for safe custody for 2 months. After 1 month, the horse died. The bailment is terminated.

Finder of Lost Goods

A person, who finds goods belonging to another and takes them into his own custody, is subject to the same responsibility as a bailee.

The finder of lost goods is not liable to take possession of such goods. But when he takes the possession of the lost goods, he becomes responsible for the goods like a bailee in a gratuitous bailment. The finder of lost goods has a right to retain the goods against all except the real owner. (Sec 71)

Duties of Finder

The duties of a finder of lost goods are as under:

1. Duty to find Owner

It is duty of the finder to undertake reasonable efforts to find out the real owner of the goods. If the goods are of high value, he should give an advertisement in a newspaper. If the finder fails to perform his duty of finding the real owner, he will be held liable.

2. Duty to take Reasonable Care

A finder must take reasonable care of the goods as a man of ordinary prudence, under similar circumstances, takes care of his own goods of the same description. If, in spite of reasonable care, the goods are lost or destroyed, he is not liable for any loss.

3. Duty not to use Goods

The finder must not use the goods found for his own purpose. If he uses the goods for his own purpose, he is liable for any loss or damage.

4. Duty not to mix Goods

The finder must not mix the goods found with his own goods. If he mixes the goods, he is liable for any loss or damage.

Rights of Finder

The rights of finder of lost goods are as under:

1. Right to Retain

A finder has the right to retain possession of the goods against everyone except the real owner. The finder never becomes the owner of the goods. The ownership will always remain with the real owner and the finder only enjoys the right to retain possession of goods.

2. Right of Lien

A finder can retain the goods for compensation for effort and expense incurred by him to preserve the goods and to find out the real owner. But he has no right to sue the real owner to recover such expenses because he incurred those expenses voluntarily and not at the request of the real owner. (Sec. 168)

3. Right to Sue Third Person

The finder can sue any third person who deprives him of the right to retain possession of the goods.

4. Right to Sue for Reward

If the real owner has offered some reward for the return of lost goods, the finder can sue the real owner for such a reward. The finder has the right to retain the lost goods for reward offered by the owner for return of the goods. (Sec 168)

5. Right of Sale

The finder can sell the goods in the following cases: (Sec.169)

a. When finder fails to find out the true owner with reasonable diligence.
b. When the real owner refuses to pay the lawful charges to the finder.
c. When goods are perishing or losing greater part of its value.
d. When lawful charges of the finder become two-thirds of the value of goods.

PLEDGE OR PAWN

Definition

The bailment of goods as security for payment of a debt or performance of a promise is called pledge. (Sec 172)

The bailor in this case is called pawnor or pledger. The bailee is called pawnee or pledgee. A pledge is a special kind of bailment. Under a pledge, one person transfers the possession of goods to another in order to secure the payment of debt or the performance of a promise. In case of pledge, the goods are deposited as security to get a loan. If there is no transfer of possession of goods, there is no pledge.

EXAMPLE

A borrows Rs. 1000 from B and gives his watch as security for payment of the debt. The bailment of watch is called a pledge.

Essentials of Pledge

The essentials of a pledge are as under:

1. Movable Property

A pledge only involves the movable property. This includes different goods, valuables, documents for title e.g. railway receipt, bills of lading etc.

EXAMPLE

A gives his car to B as a security and borrows Rs. 1 Lac as loan. This is a pledge between A & B.

2. Limited Interest

When a person pledges goods in which he has only limited interest, the pledge is valid to the extent of that interest only.

EXAMPLE

A gives his T.V to B for repair. A does not pay Rs. 500 as repair charges. B pledges the T.V with X to borrow Rs. 900. A pledge with X is valid up to Rs. 500.

3. Transfer of Possession

Under a pledge, only the possession of goods is transferred by the pawnor to the pawnee.

EXAMPLE

C pledges ornaments with B and gets a loan of Rs. 1 Lac. The possession of ornaments transfers from C to B.

4. No Transfer of Ownership

Under a pledge, the ownership of goods remains with the pawnor. Only the possession of goods is transferred and not the title thereto.

EXAMPLE

M pledges his car with N and gets a loan of Rs. 2 Lac. The ownership of car remains with M.

5. Not Mere Custody

The person having the custody of goods cannot pledge them. For example, a servant in control of his master's goods cannot make a valid pledge of them.

EXAMPLE

T puts some goods in the custody of his servant, S. S pledges the goods with B. It is not a valid pledge.

Rights of Pledgee

The rights of pledgee are as follows:

1. Right to Retain

The pledgee can retain the goods pledged until his dues are paid. He can retain them for payment of debt or performance of promise for interest due on the debt and all necessary expenses incurred by him for the preservation of goods. (Sec 173)

EXAMPLE

A borrows Rs. 2 Lac from B and pledges his diamond ring. If A does not return the loan, B can retain the ring.

2. Right to Retain for Other Debts

When the pledgee lends advances to the same pledgor after the date of the pledge, it shall be presumed that the right to retain over the pledged goods extends even to the subsequent advances. This presumption can be disproved by a contract to the contrary. (Sec 174)

EXAMPLE

M borrows Rs. 4 Lac from N on 1st March and pledges his car. On 1st June, M borrows another sum of Rs. 3 Lac from N. M repays the first debt in full. N can retain the car against his claim for second loan.

3. Right to Extraordinary Expenses

The pledgee has the right to recover from the pledger, extra-ordinary expenses incurred by him for the preservation of the goods pledged. But he cannot retain the goods if such expenses are not paid. He only has the right to sue the pledgor for recovery of such extra-ordinary expenses. (Sec. 175)

EXAMPLE

S pledges his horse with T. The horse falls sick and T spends some expenses on his treatment. T can sue S to recover expenses.

4. Right to Sue and Sell

If the pledgor makes default in the payment of the debt or performance of the promise, the pledgee may sell the goods pledged after giving to the pledgor, a reasonable notice of his intention to sell. The following points must be noted in this regard:

a. The reasonable notice is necessary. A sale of goods without notice is void.
b. The pledgee cannot sell the goods to himself. If he does so, such sale is void. The pledgor can recover the goods on payment.
c. If the proceeds of sale are less than the amount due, he can recover the balance from the pledgor but if there is surplus, he must return it to the pledgor. (Sec.176)

EXAMPLE

A lends Rs. 5 Lac for 6 months to B and B pledges his car with A. B fails to pay. A can sell B's car to recover his loan after giving a reasonable notice.

Duties of Pledgee

The duties of pledgee are as follows:

1. To take reasonable care of the goods pledged.
2. Not to make any unauthorized use of the goods pledged.
3. Not to mix the goods pledged with his own goods.
4. Not to do any act inconsistent with the terms of contract.
5. To return the goods pledged on receipt of his full dues.
6. To deliver any accretion to the goods pledged.

Rights of Pledgor

The rights of pledgor are as under:

1. Right to Redèem

If the pledgee makes an unauthorized sale, e.g. without giving a reasonable notice, the pledgor can file a suit for redemption of goods, treating the sale as void after depositing the dues with the court. (Sec 177)

2. Right to Claim Damages

If the pledgee mixes the goods pledged with his own goods or converts them into other forms, the pledgor has the right to claim damages.

3. Right to Claim Increase

The pledgor has the right to receive the pledged goods back along with accretion, if any, on making the full payment on stipulated date.

4. Right to Redeem the Debt

A pledger, who makes default in payment of debt at the stipulated date, has a right to redeem the debt at any subsequent time before the actual sale of goods pledged. (Sec 177)

Duties of Pledgor

The duties of pledgor are as follows:

1. Duty to Compensate

It is the duty of pledgor to compensate the pledgee for the extra-ordinary expenses incurred by him. (Sec 175)

2. Duty to Complete

It is the duty of pledgor to meet his obligation on stipulated date and comply with the terms of contract.

DIFFERENCE BETWEEN PLEDGE AND BAILMENT

The following are points of different between pledge and bailment:

Pledge	Bailment
1. Purpose	
In pledge, the goods are delivered as a security for a loan or for the performance of the promise.	In bailment, the goods are delivered for repairs and safe custody etc.
2. Rights	
In pledge, the pledgee has a right of sale of the pledged goods on default after giving a notice to the pledgor.	In bailment, the bailee has no such right of sale. He can retain the goods or sue for the dues.
3. Use of Goods	
In pledge, the pledgee has no right of using the goods pledged.	In bailment, there is no such restriction if the nature of transaction so requires.
4. Return of goods	
In pledge the pledgee is not bound to	In bailment without reward the bailee is

return the goods delivered unless the | bound to return the goods on demand

debit is repaid or promise performed	by the bailor.
5. Lien	
In pledge, lien can be exercised even for non-payment of interest.	In bailment, lien can be exercised only for the labour and skill spent.

Pledge by Non-Owners

The owners of goods can make a valid pledge but a pledge made by non-owners is also valid in the following cases:

1. Mercantile Agent

Mercantile agent is a person who is authorized by the owner to buy or sell goods or to raise money on the security of goods. The pledge made by a mercantile agent is valid if the following conditions are satisfied: (Sec 178)

a. Mercantile agent must be in possession of the goods or the documents of title to goods, e.g. railway receipt.
b. Possession of goods must be with the consent of real owner.
c. Mercantile agent must make the pledge in the ordinary course of his business as mercantile agent.
d. The pawnee acts in good faith and does not have any notice that the pawnor has no authority to pledge.

EXAMPLE

A French company sent to their London agents certain pictures for exhibition only but the agents pledged them. The pledge was held to be valid. (Moddi vs. Pall Mall Deposit & Forwarding Co.)[5]

2. Possession under Voidable Contract

A person having possession of goods under a voidable contract can make a valid pledge of the goods, provided the contract has not been rescinded before the contract of pledge and he has acted in good faith and without notice of the pledgor's defect of title. (Sec 178-A)

EXAMPLE

A purchased a ring from P and gave a fake cheque. Before the discovery of fraud, the ring was pledged with B. The pledge was held to be valid. (Phillips vs. Brooks Ltd.)[6]

3. Pledgor with Limited Interest

Where a person pledges goods in which he has only a limited interest, the pledge is valid to the extent of that interest. Thus, a person having a lien over the goods may pledge them to the extent of his interest. (Sec 179)

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[5]

5 (1917)33 TLR 306
6 (1919) 2 KB 243

EXAMPLE

A delivers cloth to B to make a suit and agrees to pay Rs. 150 as sewing charges. B pledges the suit with C for Rs. 300. The pledge is valid up to Rs. 150. A can recover the suit on payment of Rs. 150 to C.

4. Seller in Possession after Sale

A seller, in possession after sale, is no more the owner of the goods but a pledge created by him will be valid, provided the pawnee acted in good faith and without notice of previous sale. The original buyer can obtain damages from the seller but cannot recover the goods from the pledgee. (Sec. 30(1) Sale of Goods Act)

EXAMPLE

B buys goods from A and pays for them, but leaves them in the possession of A. A pledges the goods with C who is not aware of the sale. The pledge is valid.

5. Buyer in Possession before Sale

Where a buyer who has agreed to buy, obtains the possession of goods with the seller's consent before the payment of price, pledges these goods to a pawnee who takes them in good faith and without notice of the seller's right of lien or any other right of seller, the pledge is valid. [Sec 30(2) Sale of Goods Act]

EXAMPLE

A agrees to buy a car from B if his mechanic approves. A obtains possession of the car and pledges it with X. The pledge is valid.

6. Pledge by Co-Owners

When there are several joint owners of goods, one of the co-owners who has sole possession of goods with the consent of the others, can make a valid pledge of the goods.

EXAMPLE

A and B jointly own a car. A keeps the car with himself with B's consent. A pledges it with X. B never gave his consent for such pledge. The pledge is valid.

SHORT ANSWER QUESTIONS

1. What is bailment?
2. Who is bailor?
3. Who is bailee?
4. Is deposit of money a bailment?

5. How many kinds of bailment are there?

6. What is a gratuitous bailment?
7. What is bailment for reward?
8. Is the bailee bound to return any accretion to the goods bailed?
9. What is the position of finder of goods?
10. Can a finder of goods retain the goods in his possession?
11. When can a finder of goods sell them?
12. What is pledge?

TEST QUESTIONS

1. Define a contract of bailment. What are its essentials?
2. Discuss the rights and duties of a bailor.
3. What are the rights and duties of a bailee?
4. When a bailment terminates?
5. Define pledge and state the rights and duties of pawnor and pawnee.
6. Define pledge and distinguish between pledge and bailment.
7. What are the duties and rights of a finder of goods?
8. When will a pledge by a non-owner of the goods valid?

13

CONTRACT OF AGENCY

Agent and Principal

"An agent is a person employed to do any act for another or to represent another in dealings with third persons. The person for whom such act is done or who is so represented is called the principal." (Sec. 182)

A person who acts on behalf of another person is called an agent. The person who authorizes another person to act is called a principal. The contract which creates the relationship of principal and agent is called an agency. The agent is authorized to create a contract between his principal and a third party. After entering into a contract, the agent drops out and ceases to be a party to the contract and the contract binds the principal and third party.

EXAMPLE

C appoints B to buy 10 bags of sugar on his behalf. C is the principal and B is the agent. The contract between the two is agency

Essentials of Agency

The essentials of agency are as follows:

1. Agreement

The relationship of agency is the result of an agreement between the principal and agent. The contract of agency may be express or implied from the conduct of the parties.

2. Who can be Principal

Any person, who is of the age of majority according to law to which he is subject and who is of sound mind, may employ an agent. (Sec.183)

3. Who can be Agent

Any person may become an agent. It means that a minor or a person of unsound mind can be appointed as an agent. A minor as agent can bind the principal to the third parties. But a minor is not himself liable to his principal. (Sec. 184)

4. Consideration not Necessary

In order to create an agency, the consideration is not necessary. Consideration may or may not exist in an agency. The fact that principal has agreed to be represented by the agent is consideration for principal to support the contact. (Sec. 185)

5. Intention

The agent must have intention to act on behalf of the principal. When the agent enters into a contract for himself, then the principal is not liable. The principal is liable only when the agent contracts with the intention to act on behalf of the principal.

Test of Agency

Agency exists whenever a person can bind another by acts done on his behalf. When this power does not exist, the relationship is not that of agency.

Purpose of Agency

An agency is created to perform any act which the principal himself can lawfully do. The object of agency should not be criminal in nature or against public policy. There are certain acts which must be performed by a person himself and cannot be delegated to an agent.

General Rules of Agency

The following are rules regarding agency:

1. Whatever a person competent to contract can do himself, he can do through an agent except for the acts involving personal skill, e.g. painting
2. The acts of the agent are the acts of the principal. It means he who acts through an agent acts himself.

Kinds of Agents

The following are various kinds of agents:

1. General Agent

A general agent is appointed to perform all acts in connection with a particular business, e.g. person appointed as general manager is a general agent. A general agent can do any lawful acts regarding that business.

2. Special Agent

A special agent is appointed to perform a particular act in a particular transaction, e.g. person is appointed to purchase a particular house. Special agent has the authority only to do that particular act. His authority comes to an end when the act is performed by him.

3. Universal Agent

A universal agent is the person whose authority is unlimited. He enjoys powers to transact every kind of business on behalf of his principal. A universal agent is authorized by the principal to perform all acts that can be delegated to him. He has more powers than those enjoyed by general or special agent.

4. Mercantile Agent

A mercantile agent is the person who has authority to sell or buy goods or

to raise money on the security of goods. Mercantile agent is generally appointed

by a manufacturer or a seller to assist in the sale of goods. He does not take title to the goods. He assists in the transfer of title from a seller to a buyer.

5. Factor

A factor is an agent to whom goods are provided for sale. He usually sells the goods in his own name without disclosing to the principal. He may sell on credit. He can receive payments and issue valid receipts. He is entitled to pledge the goods in his possession. He has general lien on the goods.

6. Commission Agent

Commission agent buys or sells goods in his own name for his principal on the best possible terms. He receives commission for his services. Commission agent may or may not have possession of goods.

7. Del Credere Agent

Del credere agent is an agent who, in consideration of an extra remuneration called the Del credere commission, gives guarantee to his principal that third persons with whom he enters into contract shall perform their obligations. Del credere agent undertakes to bear the risk of bad debts on credit sales made by him.

8. Broker

A broker is an agent who negotiates and makes contracts between the principal and third party. A broker does not have the possession and control of goods. He cannot act in his own name. The commission a broker receives for his services is called brokerage.

9. Auctioneer

An auctioneer is an agent who is appointed to sell goods to the highest bidder at a public sale. He gets commission for his services. He acts as an agent of the buyer as well as of the owner. An auctioneer has no authority to sell goods using private contacts.

10. Indenter

An indenter is an agent one who buys or sells goods on behalf of his principal. The indenter buys goods from foreign countries. He gets commission for services.

11. Banker

The relationship between a banker and customer is that of a creditor and a debtor. However, when the banker buys or sells securities, collects cheques, pays dividends etc. on behalf of his customer, he acts as an agent.

12. Advocate

An advocate can also act as an agent. He does not buy or sell goods but appears before the court on behalf of his principal. He also performs other acts on behalf of his client.

Creation of Agency

A contract of agency may be created in any of the following ways:

1. Agency by Express Agreement

Generally, an agency is created by an express agreement. When an agency is created by words spoken or written, it is called express agency. The usual form of a written contract of agency is the power of attorney on stamped paper which gives the authority to the agent to act on behalf of the principal. (Sec. 186)

EXAMPLES

A appoints B as his agent to sell his house. It is an express agency. A writes a power of attorney in favour of B authorizing him to sell his plot. It is written express agency.

2. Agency by Implied Agreement

It arises when there is no express agreement appointing a person as an agent. An implied agency arises from conduct, situation or relationship of the parties. (Sec. 187)

EXAMPLES

a. X & Y are brothers. X lives in Lahore and Y in Multan. Y, with the knowledge of X, gives his land on lease. He collects the rent and remits to X. Y is the implied agent of X.

b. M allowed her son to drive a car for her and promised to pay expenses of maintenance. The son caused an accident and injured his wife. Held, the wife could sue the mother as the son was an implied agent of the mother. (Smith vs. Mose)[1]

An implied agency may be of the following types:

a. Agency by Estoppel

Estoppel means to prevent a person from denying a fact. When a person by his conduct or statement induces others to believe that a certain person is his agent, he is stopped from subsequently denying it.

When an agent has without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or obligations if he has by his words or conduct induced such third persons to

[1] (1940) 1 KB 424

believe that such acts and obligations were within the scope of the agent's authority. (Sec. 237)

EXAMPLES

a. A tells B in the presence of P that he is P's agent. P does not object to the statement and remains quite. Later, B enters into a contract with A thinking that A is P's agent. P is bound by this contract.

b. P terminated the services of his agent A. No notice to this effect was given by P. Subsequently, A purchased some goods from T on behalf of P. It was held that P was liable to pay the price to T. (Truman v. Loder)[2]

b. Agency by Holding Out

The principal is bound by the acts of the agent if, on an earlier occasion, he made other persons to believe that the person doing some acts on his behalf is doing with authority. But if an agent has a limited authority, the principal is not bound for his acts beyond that authority.

EXAMPLE

B is a servant of A. B buys goods on credit from C and A pays for them regularly. B buys the goods from C on credit for personal use. A is liable to C for payment.

c. Agency by Necessity

Agency by necessity gives an authority to a person to act as an agent for another without any consent of other person. The person can act as an agent under the following conditions:

(i) There must be a real necessity for acting on behalf of the principal.

(ii) It must be impossible to get the principal's instructions.

(iii) The agent should act bonafide in the interests of the principal.

Generally, the agency by necessity arises in the following cases:

(i) When the agent exceeds his authority bonafide in an emergency.

(ii) When the carrier of goods does anything to protect the goods in an emergency.

(iii) When a husband improperly leaves his wife without providing proper means for her substance.

EXAMPLES

a. A asks B to deliver fruits to a store in Karachi. B finds that the fruits are perishing and sells them at Multan. The sale is binding on the principal.

b. S & Co. consigned butter to a railway Co. It was delayed in transit. Being perishable, the company sold the butter. S & Co. was held bound by the sale. (Sims & Co. vs. Midland Rly. Co.)[3]

[2] (1840)9 LJ QP 165

3. Agency by Ratification

Agency by ratification arises where a person acts on behalf of another without his authority and his act is accepted by the latter. If his act is not accepted, there is no agency.

Where acts are done by one person on behalf of another but without his knowledge or authority, he may elect to ratify or disown such acts. If he ratifies the acts, the same effect will follow as if they have been performed by his authority. (Sec. 196)

EXAMPLES

a. A buys 5 bags of wheat without the authority of B. B ratifies A's act. A becomes his agent.

b. A bought goods on behalf of P above the price authorized by P. P objected to purchase but sold the goods. Held, he had ratified the purchase by selling the goods. (Cornwal vs Wilson) [4]

4. Agency by Operation of Law

An agency arises by operation of law. Under Partnership Act, every partner is an agent of the firm and the act of a partner to carry on business of the firm binds the firm. Similarly, under Companies Act, the directors are the agents of the company.

EXAMPLE

D, the director of a company, contracts S to buy machinery for the company. D acts as an agent of the company so the company is liable for D's acts as a principal.

Duties of Agent

An agent has the following duties towards the principal:

1. Duty to Follow Directions or Customs

The agent is bound to conduct the business of agency according to the directions of the principal. If the principal does not give any directions, then he should follow the custom of trade. If he does not act according to the prevailing customs of trade, he will be liable for any loss sustained by the principal. (Sec. 211)

EXAMPLES

a. P, the principal, instructs his agent A to insure the goods. A neglects to do so. A is liable to compensate P if the goods get damaged.

[3] (1913)4 KB 103
[4] (1750) 1 VES SEN 509

b. A works as an agent for B's business in which it is the custom of trade to invest at an interest, the money which is in hand. A omits to do so. A must compensate B for the interest usually obtained by such investments.

2. Duty to Work with Reasonable Skill

The agent must act with reasonable skill and diligence. Reasonable skill means skill that can be possessed by the ordinary man. If the agent does not work with reasonable skill and diligence, be must compensate his principal in respect of loss arising there from. (Sec. 212)

EXAMPLES

a. A, an agent, sells goods on credit to B without making proper enquiry about solvency of B. B is insolvent at the time of sale. A must compensate his principal for loss.

b. A, in England, directs his agent B in Karachi to send cotton by a certain ship. B omits to do so. The price of cotton rises. B is bound to pay A, the profit which he might have earned.

3. Duty to Render Accounts

An agent is bound to render proper accounts to his principal on demand. It is the duty of an agent to keep true accounts regarding all the property or money belonging to his principal. He should also produce them to his principal on demand. (Sec 213)

EXAMPLE

P sends goods to his agent A to sell on credit. A must keep proper accounts of sale and render to P on his demand.

4. Duty to Communicate

It is the duty of an agent, in case of difficulty, to use reasonable diligence in communicating with his principal and in seeking to obtain his instructions. (Sec 214)

But if it is impossible to get instructions from the principal, the agent can act on his own in the interests of his principal.

EXAMPLE

P sends goods to his agent A in Karachi for the purpose of export. A finds that some goods are damaged. A must inform P and get instructions in this regard.

5. Duty on Termination of Agency

When an agency terminates due to the death or insanity of principal, the agent must take reasonable steps for the protection of interests of the legal representatives of late principal. (Sec. 209)

EXAMPLE

Y, an agent, sells the goods of his principal P to X on credit. P dies. The agency terminates. Y must collect and remit the amount to legal representatives of P.

6. Duty not to Deal on his Own Account

If an agent deals on his own account in the business of agency without obtaining proper permission of his principal, the principal may reject the transaction. If it appears that any material fact has been concealed from him by the agent and he has earned any profit, the principal may claim such profit. (Sec. 215)

EXAMPLE

A directs his agent B to buy a certain house. B buys it for himself. A can cancel the contract.

7. Duty not to make Secret Profit

An agent should not make any secret profit out of the agency. If the agent earns any secret profit, the principal can recover it from the agent. Moreover, the principal may refuse to pay commission and terminate the agency. The agent can, however, deduct all money due to himself in respect of his remuneration and other expenses, if any. (Sec. 216-217)

EXAMPLE

P directs his agent A to buy a certain land. A buys the land and receives secret commission. A is liable to pay the secret commission to P.

8. Duty to Pay Sums Received

Any amount which an agent receives on behalf of the principal must be paid to the principal. However, an agent can deduct from it his expenses and remuneration regarding business of the agency. (Sec.218)

EXAMPLE

A appointed B to collect rents from X. B collected the rents and incurred Rs. 200 as traveling expenses. B must remit the amount to A after deducting his traveling expenses.

9. Duty not to Delegate Authority

An agent must perform the work of agency himself. An agent must not delegate his authority to another person. However, the following are some exceptions to this rule: (Sec. 190)

a. When the principal has permitted to delegate authority.

b. When by ordinary custom of trade, a sub-agent can be appointed.

c. When the nature of agency makes it necessary to appoint a sub-agent.

d. When an emergency arises which permits delegation of authority.

EXAMPLE

P appoints A as his agent to buy a certain house. A delegates the authority to X to buy a house for P. A is not authorized to delegate authority to X.

Rights of Agent

The following are rights of an agent:

1. Right to Retain

An agent has the right to retain his principal's money until his claims in respect of remuneration, advances or reasonable expenses incurred by him in conducting the business of agency. The right can be exercised on any sums received on account of the principal in the business of agency. (Sec.127)

EXAMPE

P employs A to sell some old furniture and agrees to pay him Rs. 200 as commission. A sells the furniture for Rs. 2,000. A can retain Rs. 200 as his commission and pay the balance to P.

2. Right to receive Remuneration

An agent is entitled to receive the agreed remuneration. In the absence of an agreement, an agent is entitled to a reasonable remuneration according to the custom or usage. If an agent is guilty of misconduct, he is not entitled to any remuneration. (Sec. 219)

EXAMPLE

P employs A to recover Rs. 1 Lac from T. Due to A's misconduct, the money is not recovered. A is not entitled to any remuneration.

3. Right of Lien

An agent can retain goods, documents and other property whether movable or immovable of the principal until the amount due to him for commission, services and expenses has been paid to him. This right is subject to a contract between the principal and agent. (Sec. 221)

EXAMPLE

P employs A to sell 100 books. A sells 50 books. P becomes insolvent. The official receiver of P claims the remaining 50 books from A. A can refuse to give the books until he receives his commission.

4. Right to be indemnified for lawful acts

An agent has the right to be indemnified against the consequences of all lawful acts done by him in exercise of the authority conferred upon him. However, an agent cannot claim indemnity in respect of the acts which are apparently unlawful or criminal. (Sec. 222)

EXAMPLE

A employs B to beat C and agrees to indemnify him against the consequences of the act. B beats C and has to pay damages to C for such act. A is not liable to indemnify B.

5. Right to be indemnified for acts in good faith

Where one person employs another to do an act, and the agent does the act in good faith, the employer is liable to indemnify the agent against the consequences of that act though it causes an injury to the rights of third persons. (Sec. 223)

EXAMPLE

B, at the request of A, sells goods which A has no right to sell. B does not know this and sends the money to A. Afterwards C, the true owner of the goods, sues B and recovers the money. A is liable to indemnify B.

6. Right to Compensation for Injury

An agent has the right to be compensated for injuries sustained by him due to the principal's neglect or want of skill. Thus, where the principal keeps any dangerous premises and the agent meets accident, the principal is liable to pay compensation to the agent. (Sec. 225)

EXAMPLE

A employs B as a mason for building a house. A puts up the scaffolding himself. The scaffolding is unskillfully put up. As a result, B falls and gets injured. A must make compensation to B.

7. Right of Stoppage of Goods

An agent has the right to stop the goods in transit to the principal like an unpaid seller, if he has bought the goods with his own money and the principal has become insolvent. (Sec. 228)

EXAMPLE

A buys goods for his principal P with his own money. A delivers the goods to carrier for transmission to P. Afterwards, A comes to know that P has become insolvent. A can stop the goods in transit.

Rights of Principal

The rights of a principal against the agent are as follows:

1. Right to Recover Damages

If the principal suffers any loss, he has the right to recover from his agent. The agent is liable for loss if he does not act according to the directions of his principal and does not follow the customs of trade. The agent is also liable if he does not perform his duties with skill, care or diligence. (Sec. 211)

EXAMPLE

P asks his agent A to sell goods on cash basis. A sells goods on credit and the amount becomes irrecoverable. P can recover the amount from A.

2. Right to Obtain Secret Profit

If the agent, without the knowledge and consent of principal, makes any secret profits out of agency, the principal has a right to recover them from the agent. In such a case, the agent loses his right of commission. (Sec. 217)

EXAMPLE

P asks his agent A to sell his house. A sells the house for Rs. 10 Lac but tells P that he sold it for Rs. 8 Lac. P can recover the balance from A.

3. Right to Refuse to Indemnify Agent

If the principal shows that agent has acted as a principal himself and not as agent, he has a right to refuse to indemnify the agent against the loss suffered by the agent in such transaction.

EXAMPLE

P directs his agent A to buy a certain plot from X for him. A makes an agreement with X for himself and pays Rs. 1 Lac as advance. X becomes insolvent. A has to suffer a loss. P can refuse to compensate A.

Duties of Principal

The duties of a principal against the agent are as follows:

1. Duty to Indemnify for Lawful Acts

The principal is bound to indemnify the agent against the consequences of lawful acts done by such agent in exercise of authority conferred upon him (Sec. 222)

EXAMPLE

Y, on the direction of his principal P, sells goods to X on credit. X does not pay. Y sues X but is compelled to pay damages. P must indemnify Y.

2. Duty to Indemnify for Acts in Good Faith

When one person employs another to do an act, and the agent does the act in good faith, the principal is liable to indemnify the agent against the consequences of the act though it causes an injury to the rights of the third person. (Sec. 223)

EXAMPLE

P employs an agent A to buy a car from M. A buys the car from M which

belongs to W. Afterwards, W recovers the car from A. P is liable to indemnify A.

3. Duty to Indemnify for Injury by Principal's Neglect

The principal must make compensation to his agent in respect of injury caused to such agent by the principal's neglect or want of skill (Sec. 225)

EXAMPLE

P employs M, a mason, to build a house. P puts up the scaffolding unskillfully. As a result, M falls down and gets injured. P is liable to compensate M.

4. Duty to pay Remunerations and Dues

It is the duty of the principal to pay the agent all of his dues, remuneration or commission and also to reimburse all expenses incurred by him in case of his authority.

EXAMPLE

C, an agent, spent Rs. 500 while performing his duties for B. B is liable to pay such expenses to C.

Termination of Agency

An agency may be terminated in any of the following ways:

1. Agreement

The agency can be terminated at any time by a mutual agreement between the principal and his agent. Therefore, the authority of an agent terminates when the principal and the agent agree to terminate it. (Sec 201)

EXAMPLE

P employs A as his agent for 5 months. P and A with the mutual consent can terminate the agency before the expiry of 5 months.

2. Revocation by Principal

The principal can revoke the authority of his agent at any time before the agent has exercised his authority. In continuous agency, the principal can revoke the authority of his agent for future. It cannot be revoked with regard to the acts already done by the agent. In order to revoke the authority for future, a reasonable notice should be given to the agent. If reasonable notice is not given, the principal will be liable to compensate the agent for damages. (Sec 201)

EXAMPLE

P employs A to rent out his house. Afterwards, P rents the house to himself. This is a revocation of A's authority.

3. Revocation by Agent

The agency can be terminated by the agent because a person cannot be

compelled to work as an agent. But the agent must give a reasonable notice of

revocation to the principal; otherwise he will be liable to compensate the principal for any loss resulting thereby. (Sec. 201)

EXAMPLE

A is appointed as an agent of P for 1 year. After 6 months, A can terminate the agency by giving a reasonable notice to P.

4. Completion of Business

The agency comes to an end automatically when the business of agency is completed. When an agency is formed for the purpose of sale of particular property, the agency terminates on the completion of the sale. (Sec 201)

EXAMPLE

P appoints A as his agent to sell his house. A sells the house. The agency is terminated.

5. Expiry of Time

If the agent is appointed for a fixed period of time, the agency comes to an end on the expiry of fixed period even though the business of agency may not have been completed.

EXAMPLE

A is appointed as an agent for 1 year by P. The agency terminates after the expiry of 1 year.

6. Death of Principal or Agent

The agency terminates automatically on the death of the principal or the agent. On the death of the principal or agent, the agency is automatically terminated because a person cannot act on behalf of a non-existent person. (Sec.201)

EXAMPLE

P appoints A as his agent for 1 year. If either P or A dies, the agency terminates.

7. Insanity of Principal or Agent

The agency terminates automatically when the principal or the agent becomes of an unsound mind. The agent cannot act for a person of unsound mind. (Sec. 201)

EXAMPLE

P appoints A as his agent for 1 year. If either P or A becomes insane, the agency terminates.

8. Insolvency of Principal

The agency is terminated by the insolvency of the principal. Since an agent is a mere connecting link with the third parties, his insolvency may not terminate the agency in some cases. (Sec. 201)

EXAMPLE

P appoints A as an agent for 2 years. P becomes insolvent after 6 months. The agency comes to an end.

9. Destruction of Subject matter

The agency terminates on the destruction of subject matter of the contract of agency.

EXAMPLE

P appoints A to sell his horse. The horse died before A could sell it. The agency comes to an end.

10. On becoming Alien Enemy

If the principal and his agent are nationals of two different countries and a war breaks out between the two countries, the contract of agency is terminated.

EXAMPLE

M is appointed as an agent by P for 1 year. M lives in India and P lives in Pakistan. War breaks out between the two countries. The agency terminates.

11. Change of Law

If a change in the law makes the agency or the performance of the authorized act illegal, the authority of the agent is terminated when he comes to know of the change.

EXAMPLE

S sells the toys manufactured by P. The government declares that the toys are dangerous and puts a ban on them. S's authority terminates when he comes to know about this ban.

SHORT ANSWER QUESTIONS

1. Define an agent?
2. Who is a principal?
3. Is consideration needed in a contract of agency?
4. What is the test of agency?
5. Can an agent bind the principal by his acts?

6. Who can appoint an agent?

7. Who can be appointed as an agent?
8. Can a person of unsound mind be appointed as an agent?
9. Who is Del credere agent?
10. Who is a general agent?
11. Who is special agent?
12. What is an agency of necessity?
13. What is agency by Estoppel?
14. What is agency by ratification?

TEST QUESTIONS

1. What is a contract of agency? What are the essentials of a contract of agency?
2. Define the terms agent and Principal. Discuss the general rules of Agency. What is the test of agency?
3. Who is an agent? Can a minor be appointed as an agent.
4. What are the different kinds of agents?
5. Briefly explain the various modes by which an agency may be created.
6. What are the rights of the principal against the agent?
7. What are the rights and duties of an agent towards his principal?
8. Discuss the various modes by which an agency may be terminated.

14

CONTRACT OF SALE OF GOODS

Sale of Goods Act

The law relating to sale of goods is contained in the Sale of Goods Act, 1930. This law came into force on 1st July, 1930. The act contains 66 sections and extends to the whole of Pakistan.

Definition of Contract of Sale

Section 4(1) of the Sale of Goods Act defines a contract of sale of goods as "A contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price".

In other words, a contract to transfer the ownership of goods from the seller to the buyer is known as contract of sale.

Essentials of Contract of Sale

The following are essentials of a contract of sale of goods:

1. Contract

Contract means an agreement enforceable by law. All the essentials of a valid contract should also be present in a contract of sale like capacity of parties, free consent, legality of object, etc. It may be verbal or in writing. It may be express or implied.

2. Two Parties

There should be two parties to a contract of sale, i.e. buyer and seller. One person cannot act as a buyer and seller because a person cannot buy his own goods and similarly a person cannot sell his goods to himself.

However, the owner of one part can sell his share to the owner of other part. Similarly, a partner may buy the goods from the firm in which he is a partner and vice-versa.

EXAMPLES

a. A sells his computer to B for Rs. 40,000. A is the seller and B is the buyer.

b. A and B jointly own a computer. A sells his share to B. B becomes the sole owner of the computer.

3. Transfer of Property

The transfer of property is an essential of the contract of sale. Here, property means ownership. A mere transfer of possession of the goods cannot

be termed as sale. In order to constitute a contract of sale, the seller must either transfer or agree to transfer the property (ownership) in the goods to the buyer.

EXAMPLE

A sells his car to B for Rs. 80,000. The ownership and possession of the car will transfer from A to B.

4. Goods

The subject matter of the contract of sale must be goods. According to section 2(7), "Goods means every kind of movable property other than actionable claims and money; and includes electricity, water, gas, stock and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale."

Every movable property is regarded as goods. The trees, fruits, vegetables etc. are regarded as goods because they can be separated from the land.

An actionable claim means a debt or a claim for money which a person may have against another and which can be recovered by filing a suit. Money is not regarded as goods. However, old coins are treated as goods.

EXAMPLE

A sells his car to M for Rs. 3 Lac. It is a contract of sale because the subject matter of contract i.e. car is a moveable thing.

5. Price

The consideration in a contract of sale must be the price. When goods are sold or exchanged for other goods, the transaction is barter and not a contract of sale of goods. If goods are sold partly for goods and partly for price, it is a contract of sale. (Sec.2 (10))

EXAMPLES

a. A sells his chair to B for Rs. 2,000. It is a contract of sale.
b. X sells his horse to B against B's promise to give 100 ton of wheat. It is not a contract of sale.

6. Sale and Agreement to Sell

The term contract of sale includes both sale and an agreement to sell. When the property in the goods is transferred from the seller to the buyer at the time of formation of contract, the contract is called a sale.

Where under a contract of sale the transfer of ownership in the goods is to be transferred from seller to buyer at some future date, the contract is called an agreement to sell.

EXAMPLES

a. A buys a book from S and pays the whole price on a counter. It is a sale.

b. A agree to buy B's car for Rs 2 Lac if his mechanic approves the car. It is an agreement to sell.

7. Other Formalities

There is no specific procedure to make a contract of sale. All essentials of a valid contract should be there in a contract of sale like capacity of the parties, free consent, legality of object etc. (Sec. 5)

EXAMPLE

C verbally promises to sell his radio to B. It is a contract of sale if parties are competent to contract, their consent is free and all essentials of contract have been fulfilled.

DIFFERENCE BETWEEN SALE & AGREEMENT TO SELL

The following are points of difference between the two:

Sale	Agreement to Sell
1. Transfer of Property	
In sale, the ownership passes to the buyer immediately at the time of contract. The seller ceases to be the owner and the buyer becomes the owner immediately.	In agreement to sell, the ownership does not pass to the buyer at the time of contract. The ownership transfers at a certain future date.
2. Type of Goods	
A sale can only be in case of existing and specific goods	An agreement to sell is mostly in case of future and contingent goods
3. Nature of Rights	
In sale, the buyer becomes the owner of the goods and gets the rights against the goods. If the seller refuses to deliver the goods, the buyer may sue for recovery of goods.	In an agreement to sell, the buyer does not get the rights against the goods. He gets the rights against the seller. He can sue for damages and not for recovery of goods.
4. Risk of Loss	
In sale, the ownership in the goods passes from seller to buyer. If the goods destroy the buyer suffers the loss even though the goods are in the possession of seller.	In an agreement to sell, the ownership in the goods does not pass from seller to the buyer. If the goods destroy the seller suffers a loss even though the goods are in the possession of the buyer.
5. Consequences of Breach	
In sale, if the buyer fails to pay the price of the goods, the seller can sue for the price, even though the goods are in the possession of seller.	In agreement to sell, if the buyer fails to pay the price the seller can sue for damages and not for price, even though the goods are in the possession

of buyer.

6. Right of Resale	
In sale, the ownership transfers to the buyer so the seller cannot resell the goods, even though the goods are in the possession of seller. If the seller sells the goods, the new buyer having knowledge of the previous sale does not get a title to the goods.	In an agreement to sell, the ownership remains with the seller so he can resell those goods to the new buyer. The new buyer gets a good title to the goods, despite the knowledge of previous sale. The original buyer can sue for breach of contract only.
7. Insolvency of Buyer	
In sale, if the buyer becomes insolvent before payment, his legal representatives can demand delivery of the goods from the seller. If the price of the goods is still unpaid, the seller can claim the price of the goods proportionately.	In an agreement to sell, if the buyer becomes insolvent, before payment, the seller can refuse to sell the goods until the price is paid by the legal representative of the buyer.
8. Insolvency of Seller	
In sale, if the seller becomes insolvent, the buyer can recover the goods from Official Receiver because the ownership of goods is with the buyer.	In agreement to sell, if the buyer has paid the price and the seller becomes insolvent, he can recover the price proportionately. He cannot get the goods as the ownership of the goods is with the seller.
9. Nature of Contract	
A sale is an executed contract because the ownership passes from seller to the buyer.	An agreement to sell is an executory contract because the ownership is to pass in future.

Kinds of Goods

The following are the kinds of goods:

1. Existing Goods

The goods which are owned or possessed by the seller at the time of contract of sale are called existing goods. In other words, the goods which are physically in existence and in seller's possession at the time of contract are called existing goods. (Sec. 6(1))

These goods can be divided into following kinds:

a. Specific Goods

The goods identified and agreed upon at the time of contract of sale are called specific goods. In other words, these are the goods which can be clearly identified and recognized as separate things at the time of contract. These may be called ascertained goods. (Sec. 2(14))

EXAMPLE

X owns many cows and promises to sell one of them. If one cow is singled out, the contract is for specific goods.

b. Unascertained Goods

The goods which are not identified and agreed upon at the time when a contract of sale is made are called unascertained goods. These goods are not definite and specific. The seller in case of contract of the sale of unascertained goods has the option to supply any goods of the kind contracted for.

EXAMPLE

A has 100 bags of sugar. A promises to sell 10 bags of sugar out of them. It is a contract of unascertained goods.

2. Future Goods

The goods which a seller does not possess at the time of contract but which will be manufactured, produced or acquired by the seller after making the contract of sale are called future goods. The seller can only make an agreement to sell the future goods. (Sec. 2(6))

EXAMPLE

X agrees to sell to Y all the mangoes which will be produced in his farm next year. It is a contract of sale of future goods.

3. Contingent Goods

The goods which are not in existence at the time of contract of sale are called contingent goods. In contract of contingent goods, the ownership does not pass to the buyer at the time of contract. A contract of sale of contingent goods is enforceable when the event happens on which its performance depends. If the event does not happen, the contract becomes void. (Sec. 2(6))

EXAMPLE

A agrees to sell to B a rare painting if he is able to purchase it from its present owner. This is a contract of sale of contingent goods.

Destruction of Goods

The following may be the causes of destruction of goods:

1. Damage to goods in which the goods have lost their commercial value e.g. when cement is spoiled by water.
2. Loss of goods by theft.
3. When goods are lawfully confiscated by the government.

The effects of destruction of goods are as follows:

1. Perishing before Formation of Contract

When specific goods are the subject matter of contract of sale and they,

without the knowledge of the seller, perish at or before the time of the contract,

the contract is void. In other words, if the goods spoil at the time of the contract, the agreement is void. (Sec. 7)

When specific goods are the subject matter of a contract and only part of the goods are destroyed, the effect of perishing depends upon the nature of contract. If the contract is divisible, it will not become void and the part of goods available in good condition must be accepted by the buyer. If the contract is indivisible and a part of the goods has perished, the contract becomes void.

EXAMPLES

a. A agrees to sell 100 bags of sugar which are in transit by ship. On arrival of the ship, A discovers that the sugar is spoiled. The contract becomes void.

b. A sold 10 bags of basmati rice to B. It was found that the basmati rice was mixed with inferior quality of rice. The contract is void.

2. Perishing before Sale but after Agreement to sell

When there is an agreement to sell specific goods and subsequently the goods perish without any fault on part of the seller or buyer, the contract becomes void and the parties are not liable for performance. (Sec. 8)

If only part of the goods agreed to be sold are perished, the contract becomes void if it is indivisible. If the contract is divisible, the contract remains valid as regards to the part available in good condition.

EXAMPLES

a. A took a horse for 8 days on condition that if found suitable the bargain would complete. The horse died on the 3rd day without the fault of any party. Held, the contract became void and the seller would bear the loss. (Elphick vs. Barnes)[1]

b. A agrees to sell to B, 1 ton of rice and 1 ton of wheat which are to be produced in his field. The crop of rice gets destroyed .A can sell wheat to B as it is a divisible part of the contract. B is bound to accept the wheat.

3. Perishing of Future and Contingent Goods

A contract of sale of future and contingent goods is an agreement to sell. The destruction of future and contingent goods makes the contract void.

EXAMPLE

C agreed to sell to H, 200 tons of potatoes to be grown on C's land. C sowed potatoes but a disease attacked the crop and he could deliver only 10 tons. The contract was held to be void. (Howell vs. Couplan)[2]

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[1]

2 (1880) 5 CPD 321
(1876) 1 QBD 258

Fixation of Price

The money consideration for sale of goods is known as price. Price is an essential element in every contract of sale of goods. A valid sale cannot take place without a price. The price should be paid or promised to be paid in legal tender money of Pakistan i.e. Rupees, unless otherwise agreed.

Modes of Fixing Price

According to section 9, the price may be fixed by the following modes:

1. Parties

It is the most common mode of fixing the price. The parties are free to fix any price. The price may be stated in a contract by the parties to the contract.

EXAMPLE

A agrees to sell his car to B for Rs. 5 Lac. Here, the price is fixed in the contract itself.

2. Agreed Manner

The price may be fixed in a manner agreed upon in a contract. It may be the price prevailing on any particular date or price to be fixed by a third person.

EXAMPLE

A agrees to sell 100 shares of W company to B at the market rate prevailing on the 20th day after deal. It is a valid contract of sale.

3. Course of Dealings

When price is neither expressed in the contract nor any manner of fixing the price is agreed, the price is determined during the course of dealings between the parties.

EXAMPLE

A agrees to buy 100 shares of W company from B. In general course of dealings, the accepted price of shares is the price prevailing on the date of contract. It is the price prevailing in the stock market on the date of sale.

4. Reasonable Price

If the price is not capable of being fixed by any of the above modes, the buyer is bound to pay to the seller a reasonable price. The amount of reasonable price depends upon the circumstances of each case.

EXAMPLE

A orders B to supply 100 kg of sugar without fixing the price. Price of sugar in the market on day of order will be considered as reasonable price. B must supply sugar to A at this market rate.

SHORT ANSWER QUESTIONS

1. What is a sale?
2. What is an agreement to sell?
3. Define the term goods?
4. How many types of goods are there?
5. How can you classify the existing goods?
6. What are specific goods?
7. What are future goods?
8. What are contingent goods?

TEST QUESTIONS

1. Define contract of sale of goods Discuss its characteristics.
2. Distinguish between sale and agreement to sell.
3. Define the term goods. What are the different types of goods?
4. What is meant by destruction of goods? What is its effect on a contract of sale?
5. Define the term price. What are the various modes of fixing the price?
6. State the effect of perishing of goods before sale but after agreement to sell.

15

CONDITIONS AND WARRANTIES

A contract of sale of goods contains various terms or stipulations regarding the quality, price, mode of payment, delivery of goods, time of performance and place where the goods are to be sent. The major terms of contract are called conditions and the minor terms of contract are called warranties.

Definition of Condition

Condition is a stipulation essential to the main purpose of the contract, the breach of which gives rise to a right to treat the contract as repudiated. (Sec. 12(2))

A condition is essential for the main purpose of the contract. Condition is a stipulation that forms the basis of contract of sale. Its non-fulfillment causes irreparable loss to the aggrieved party. In case of violation of condition, the aggrieved party has the right to cancel the contract.

EXAMPLES

a. C contracts to deliver 100 Royal fans to B. But C delivers Climax fans. It is a breach of condition. B can accept or reject them and claim damages.

b. B asked M, a car dealer, to suggest him a car for touring purpose. M suggested Buggatti car. B purchased the car and found it unfit. Held, it was breach of condition. B could return the car. (Baldray vs. Marshall)[1]

Definition of Warranty

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

In other words, a warrantee is not essential for the main purpose of the contract. It is subsidiary or collateral to the main purpose of contract. The breach of warranty gives the aggrieved party the right to recover damages only but not to cancel the contract.

EXAMPLE

C promises to deliver 100 fans to B at his office. But C delivers the fans at his home. It is a breach of warranty. B cannot cancel the contract. B can claim damages only.

[1] (1925) I K.B. 260

DIFFERENCE BETWEEN CONDITION AND WARRANTY

The following are points of difference between condition and warranty:

Condition	Warranty
1. Value	
A condition is a stipulation essential to the main purpose of the contract.	A warranty is a stipulation not essential to the main purpose of the contract
2. Basis	
It forms the basis of a contract and goes direct to the root of the contract.	It does not form the basis of a contract and does not go direct to the root of the contract.
3. Breach	
The breach of a condition gives the aggrieved party the right to reject the contract.	The breach of warranty does not give the aggrieved party a right to reject the contract.
4.Treatment	
A breach of condition may be treated as a breach of warranty.	A breach of warranty cannot be treated as a breach of condition
5. Option	
In breach of condition, the aggrieved party has an option to claim damages instead of rejecting the contract.	In breach of warranty, the aggrieved party has no option to reject the contract. He can only claim damages.

Condition treated as Warranty

A breach of condition is treated as a breach of warranty under the following cases:

1. Option of buyer

The breach of condition by the seller gives the right to the buyer to reject the goods and cancel the contract, but he is not bound to do so. The buyer may treat the breach of condition as a breach of warranty and accept the goods and claim damages. (Sec. 13(1))

EXAMPLE

C agrees to supply first grade sugar to B but supplies second grade sugar. B can reject it. B may accept the second grade sugar and claim damages

2. Acceptance by Buyer

When the buyer has accepted the goods, he cannot reject them but can claim damages. If the buyer has accepted only part of the goods and the contract is indivisible, he will have to accept the remaining part also. But in a divisible contract, the buyer can reject the remaining goods, if he has accepted only part thereof. (Sec. 13(2))

EXAMPLE

J contracted to sell horns to R. The horns were delivered in 19 boxes by installments. R accepted 1 box and rejected others being dented. J sued for the price for all horns. Held, that R could reject. (Jackson vs. Rotax Motor Car Co.)[2]

Express and Implied Conditions and Warranties

The conditions and warranties which are included in the contract are called express conditions and warranties. The conditions and warranties which are not included in the contract but the law presumes their existence in the contract are called implied conditions and warranties.

Implied Conditions

Unless otherwise agreed, the law includes the following conditions in a contract of sale of goods:

1. Condition of Title

In case of sale, the implied condition is that the seller has a right to sell the goods. In case of agreement to sell, the implied condition is that the seller will have a right to sell the goods at the time when the ownership is to pass from the seller to the buyer. Therefore, it is presumed that the seller has a valid title to the goods in every contract of sale. If the seller's title proves to be defective, the buyer can reject the goods and recover his price. (Sec. 14 (a))

EXAMPLES

R purchased a car from D. After few months, the police took away the car as it was stolen. R sued D to recover the price. Held, that R can recover the price. (Rowland vs. Dival)[3]

2. Sale by Description

In a contract of sale of goods by description, it is an implied condition that the goods shall correspond with the description. If the goods are not according to the description, the buyer can reject the goods. If the seller supplies different goods, the buyer is not bound to accept such goods. (Sec. 15)

EXAMPLES

a. C advertised a car for sale as Corolla, 1990 model. B after buying the car, discovered that it is of an earlier model. B can return the car.

b. S contracted to supply new Singer car to A. The car supplied had run some mileage. It was held that there was a breach of condition and A could reject the car. (Andrew Bros vs. Singer & Co.)[4]

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2 (1910) 2 KB 927

3

4 (1923) 2 KB 500
(1934) 1 KB 17

3. Sale by Sample

In case of contract of sale by sample, the goods must be supplied according to the sample agreed. A contract of sale by sample is subject to the following conditions: (Sec. 17)

a. The bulk shall correspond with the sample in quality.

b. The buyer shall have reasonable opportunity to compare the bulk with the sample.

c. The goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

EXAMPLE

There was sale by sample of two parcels of wheat. The seller showed the bulk of one parcel but not the other. It was held that the buyer could cancel the contract. (Lorymer vs. Smith)[5]

4. Sale by Sample and Description

When the goods are sold by sample as well as by description, there is an implied condition that the bulk of the goods shall correspond with the sample and the description. If the goods supplied correspond only with the sample and not with the description or vice versa, the buyer can reject the goods. (Sec. 15)

EXAMPLE

N agreed to sell foreign refined grape oil to G. The oil supplied corresponded with the sample but was mixed with hemp oil. Held, that the oil was not in accordance with the description so the buyer could reject. (Nichol vs. Godts)[6]

5. Condition of Fitness or Quality

Where the buyer informs to the seller about the particular purpose for which the goods are required, there is an implied condition that the goods shall be reasonably fit for such purpose. This condition applies if the following requirements are satisfied:

a. The buyer should inform the seller about the purpose of goods.

b. The buyer should rely on the seller's skill or judgment.

c. The seller's business must be to sell goods of that type. [Sec. 16(1)]

EXAMPLE

A enters into an agreement with B to buy 100 oil filters to be used for Suzuki cars. The oil filters were unfit. A can reject them.

[5] (1822) 1 B&C 1.
[6] (1854) 10 EX 191

6. Condition of Merchantability

The term merchantable means that the goods must be fit for the purpose for which they are generally used. When goods are bought by description from seller who deals in goods of that description whether he is the manufacturer or producer or not, there is an implied condition that the goods shall be of merchantable quality. The goods must be free from hidden defects. (Sec.16 (2))

EXAMPLES

a. C purchases a black yarn from B, a dealer in yarn. C finds it to be damaged by ants. It is a breach of condition. C can to reject it.

b. M bought a bottle of wine from F. When M tried to open the bottle, a piece of it broke off and injured him. Held that the bottle was not of merchantable quality.(Morelli vs. Fitch & Gibbons)[7]

7. Condition by Custom

An implied condition as to quality or fitness for a particular purpose may be annexed by the usage of trade. In some cases, the purpose for which the goods are required may be ascertained from the acts and conduct of the parties to the sale, or from the nature of description of the article purchased. (Sec.16 (3))

EXAMPLE

X sold goods by auction to Y. In a sale by auction, there was a custom to declare any fault in the goods. Goods were sold without declaration. Goods were found damaged. Held, Y could reject the goods.

8. Condition of Wholesomeness

Wholesomeness means beneficial for health. This condition applies only in contract of sale of eatables and provisions. In such cases, the goods supplied must be merchantable and wholesome. It means that the goods must be fit for consumption.

EXAMPLES

a. F bought milk from A, a dairy owner. The milk contained germs of typhoid fever. On drinking the milk, F's wife developed typhoid fever and died. A was held liable in damages. (Frost vs. Ayles bury Dairy Co. Ltd.)[8]

b. C bought a bun containing a stone which broke C's tooth. Held, C could recover damages. (Cheproniere vs. Mason)[9]

Implied Warranties

Unless otherwise agreed, the law includes the following warranties into a contract of sale of goods:

[7] (1928) 2 K.B. 636
[8] 8(1905) 21 LTR 633
[9] 9(1905) 21 LTR 633

1. Quiet Possession

It is an implied warranty to the buyer that he shall have the possession and enjoyment of the goods sold to him without disturbance from the seller or any other person. If the buyer is disturbed in the enjoyment of the goods due to the seller's defective title, he can claim damages from the seller. (Sec. 14 (b))

EXAMPLE

M purchased a second hand typewriter from B. M spent money on its repair and used it for some months. The typewriter was found to be stolen and M had to return it to its true owner. Held, M could recover damages and price. (Mason vs. Burningham)[10]

2. Freedom from Encumbrances

It is implied warranty on the part of seller that the goods shall be free from encumbrance in favour of any third party. The warranty will not apply where such encumbrances are declared to the buyer when the contract is made. If the possession of the buyer is disturbed due to such charge in favour of third party, he can claim damages. (Sec.14 (c))

EXAMPLE

A pledges his car with B and promises to give its possession the next day. A sells his car to X. B tells X about the pledge affair. X pays the amount of pledge to B. X can recover compensation from A.

3. Usage of Trade

An implied warranty as to quality or fitness for a particular purpose may be annexed by the usage of trade. (Sec. 16 (3))

EXAMPLE

Shahalam market offers to pay damages on the fading of colour of cloth. Every seller of cloth of that market is bound by this warranty.

4. Disclosure of Dangerous Goods

The implied warranty on the part of the seller is that if the goods are of dangerous nature, he will warn the ignorant buyer about the probable danger. In case of breach of this warranty, the buyer is entitled to claim compensation for the injury caused to him.

EXAMPLE

C purchased a tin of disinfectant powder from A. A knew that if tin is not opened with special care, it could be dangerous but told nothing to C. C opened the tin in the normal way and as a result the powder flew into his eyes and caused injury. A was held liable (Clarke vs. Army & Navy Coop. Ltd.)[11]

10
11 (1949) 2 KB 545
(1963) 1 KB 155

Doctrine of Caveat Emptor

Caveat emptor means let the buyer beware. According to this principle, it is the duty of the buyer to be careful while purchasing goods of his requirement. The buyer must examine the goods thoroughly. He should ensure that the goods are suitable for his purpose. If the goods prove to be defective or do not suit his purpose, the buyer cannot hold the seller liable. If the buyer at the time of purchase depends upon his own skill and makes a bad choice, he must blame himself for this mistake.

According to Section 16(a), the seller is under an obligation to inform the buyer of any defect in the goods sold at the time of contract except in a case where the defect is obviously known to the buyer. It means that if the defects are in the knowledge of seller, he must inform to the buyer about those defects provided those defects are not obvious. But if the defects are obvious, the seller is not bound to inform to the buyer.

EXAMPLE

A purchases a horse from B. A needs the horse for riding but he does not mention it to B. The horse is not suitable for riding. A cannot reject the horse.

Exceptions

The doctrine of Caveat Emptor is subject to the following exceptions:

1. Purchase by Description

When the goods are purchased by description, the doctrine of caveat emptor does not apply if the goods do not correspond with the description. (Sec 15)

EXAMPLE

V sold a reaping machine to W, describing that it is 1 year old. W found it to be 2 years old. W could return it as it does not correspond with description.

2. Purchase by Samples and Description

When the goods are bought by sample as well as by description and the bulk of the goods do not correspond both with the sample or with the description, the buyer is entitled to reject the goods. (Sec. 15)

EXAMPLE

C sells an air filter to B saying that it is genuine and fit for a Corolla car. B finds that it is fit for Corolla car but not genuine. B can reject it.

3. Fitness for Purpose

The doctrine of Caveat Emptor does not apply when the buyer informs the seller about particular purpose for which he needs the goods and relies upon the seller's skill and judgment. The seller must supply the goods which shall be fit for the buyer's purpose. [Sec 16(1)]

for the buyer's purpose. [Sec 16(1)]

EXAMPLE

C tells B, a car dealer, that he needs a car for touring purpose. B sells a car which is not made for touring purpose. It is a breach of condition.

4. Merchantable Quality

When the goods are bought by description from a seller who deals in goods of that description, there is an implied condition that the goods shall be of merchantable quality. But if the buyer has examined the goods, there is no implied condition as regards defects which such examination ought to have revealed (Sec. 16(2))

EXAMPLE

A bought milk from B, a dairyman. It was contaminated by germs. A's wife got infected and died after drinking the milk. B was held liable for damages.

5. Usage of Trade

When the trade usage attaches an implied condition or warranty as to the quality or fitness and the seller deviates from that condition or warranty, the principle of Caveat Emptor does not apply. (Sec 16(3))

EXAMPLE

A purchase a hot water bottle from B, a retail chemist. When A's wife opened the bottle, it burst and injured her. The proper use of bottle was known to B. B was liable for damages. (Priest vs. Last)

6. Purchase by Sample

When the goods are bought by sample, the principle of Caveat Emptor does not apply if the bulk does not correspond with the sample or if the buyer is not provided an opportunity to compare the goods with the sample. (Sec 17)

EXAMPLE

X buys oil filter from Y by showing a sample. The oil filter does not correspond with a sample. X can return it.

7. Consent by Fraud

When the seller intentionally makes a wrong statement to the buyer and the buyer relies on it or when the seller actively conceals the defects in the goods which could not be discovered on reasonable examination, the principle of Caveat Emptor does not apply. (Sec.17 of Contract Act)

EXAMPLE

A knows that his watch is made in Pakistan. In order to sell his watch, A tells B that it is made in Switzerland. B buys the watch. B can reject the contract.

8. Consent by Misrepresentation

When the seller makes a misrepresentation and the buyer relies on it, the

doctrine of Caveat Emptor does not apply. Such contract is voidable at the option of the buyer. (Sec.18 of contract Act)

EXAMPLE

A, while selling his horse to B, declares that the horse is sound. B buys it and finds the horse to be unsound. B can reject the contract

SHORT ANSWER QUESTIONS

1. Define condition in a contract of sale.
2. What is a warranty in a contract of sale?
3. What is implied condition as to title on the part of the seller?
4. What is the implied condition in the case of sale by sample?
5. What is implied condition in the case of sale by description?
6. What do you understand by implied warranty of quite possession?
7. Explain implied warranty of freedom from encumbrances.

TEST QUESTIONS

1. Define and distinguish between condition and warranty. Under what circumstances a breach of condition is to be treated as a breach of warranty?
2. Define the term warranty? State the warranties implied in a contract of sale of goods.
3. What is implied condition? State the conditions implied in a contract of sale of goods.
4. Explain briefly the implied conditions and warranties in a contract of sale of goods.

16

TRANSFER OF PROPERTY

The phrase transfer of property in the goods means transfer of ownership of the goods. On transfer of property in goods, the buyer becomes the owner of the goods and acquires all the rights held by the seller in respect of the goods sold. The rules regarding transfer of property in goods are as under:

1. Unascertained Goods

Ascertainment is the process by which the goods are identified and separated. When there is a contract for the sale of unascertained or future goods, the property in the goods does not pass to the buyer until the goods are ascertained. (Sec. 18)

EXAMPLE

A agrees to sell 100 kg of rice to B, out of the rice stored in a godown. B becomes the owner when 100 kg of rice will be separated from the rest.

2. Intention of Parties

In contract of sale of specific or ascertained goods, the ownership transfers when the parties intend to transfer it. It depends on the terms of the contact. It may transfer at the time of the contract or when the goods are delivered or when the payment is made. (Sec.19)

EXAMPLE

X sells a book to B on cash basis. B becomes the owner when he makes the payment.

3. Goods in deliverable State

When there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer as soon as the contract is made, and it is immaterial whether the time of payment of the price or the time of delivery of goods or both is postponed. (Sec 20)

EXAMPLE

B offers to sell his horse to A. The horse will be delivered on the stated day and price will be paid at the time of delivery. A accepts the offer. A becomes the owner when the offer is accepted.

4. Goods to be put in Deliverable State

The expression 'put the goods into deliverable state' means doing an act

like polishing, packing, loading or giving a finished shape to the goods etc. Where there is a contract for the sale of specific goods and the seller is bound to

do something to the goods for the purpose of putting them into a deliverable state, the ownership does not pass until such thing is done and the buyer has notice thereof. (Sec 21)

EXAMPLE

a. S sells a scooter to B for Rs. 50,000. B pays at the time of contract. But contract requires S to paint the scooter in gray colour. B will become the owner when the scooter is painted and B has notice of it.

b. A machine weighing 30 tons and fixed in a concrete floor was sold. A part of the machine was damaged while being removed. Held, the buyer could refuse to take the machine as it was not in a deliverable state. (Underwood vs. BC Cement Syndicate)[1]

5. Goods to be measured

When there is a contract for the sale of specific goods in a deliverable state but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act is done and the buyer has notice thereof. (Sec 22)

EXAMPLE

Z sold 289 bales of goatskins to F. Before Z could count them, the bales were destroyed by fire. Held, the loss fell on Z because the ownership had not transferred to F. (Zagury vs. Furnell)[2]

6. Unconditional appropriation

When there is a contract for the sale of unascertained or future goods by description, the property in the goods passes to the buyer when goods of that description in deliverable state are unconditionally appropriated to the contract, either by the seller with assent of the buyer or by the buyer with assent of the seller. (Sec. 23(1))

EXAMPLE

T bought 20 bags of sugar from R. R filled up 20 bags. T took delivery of 4 bags and promised to take the rest later. T failed to collect the remaining and R sued for price. Held, the ownership had passed to the buyer. (Rhode vs. Thwaites)[3]

7. Delivery to Carrier

The seller is deemed to have appropriated the goods when he delivers the goods to a carrier for transmission to the buyer. The delivery of goods to a carrier is considered the delivery to the buyer and the ownership at once

1 211 RR. 704
2 (1809) 2 Camo 240
3 (1827) 6 B&C 388

transfers to the buyer. The term appropriation involves separating, weighing, measuring, counting or similar acts. (Sec. 23(2))

EXAMPLE

B buys a fridge from A, a shopkeeper. When A handovers the fridge to the carrier, the ownership transfers to B.

8. Goods delivered on Approval

When the goods are delivered to the buyer on approval or `on sale or return' or other similar terms, the property therein passes to the buyer:

a. When he gives his acceptance to the seller or does any other act adopting the transaction.

b. If he does not give his acceptance to the seller but retains the goods without giving notice of rejection beyond the time fixed for the return of goods, or if no time has been fixed beyond a reasonable time. (Sec. 24)

EXAMPLES

a. A sends jewelry to B on terms of sale or return. The jewelry becomes B's property when B retains them.

b. B delivered a horse to E on terms of sale or return within 8 days. The horse died on the 3rd day without any fault of E. Held, B was to bear the loss as the horse was still his property. (Elphick vs. Barnes)[4]

Sale by Non-Owner

Generally, only the owner of the goods can sell the goods. If the seller is not the owner of the goods, the buyer cannot become the true owner even though he has paid value for the goods. This protects the true owner of the goods. The maxim 'nemo dat quod non habet' means that no one can transfer a better title that he himself possesses.

EXAMPE

C steals a radio and sells it to B. B buys it without notice that C is not the true owner. The true owner can recover it from B.

Exceptions

The following are cases under which a non-owner can sell the goods and the buyer becomes the true owner of those goods:

1. Person not the Owner

When the owner of the goods, by his words or conduct or act or omission, causes the buyer to believe that the seller has the authority to sell them, he cannot afterwards deny the seller's authority to sell. The buyer in such a case gets a better title than the seller. (Sec 27 para 1)

[4] (1880) 5 CPD 321

EXAMPLES

a. C sold his father's car in his presence to B. His father did not object. Later, father cannot deny his son's authority to sell. The sale is valid.

b. M, owner of a wagon, allowed his employee K to have his name painted on it. M wanted to show the public that the wagon belonged to K. C purchased the wagon from K in good faith. C gets a good title. (O' Connor vs. Clark)[5]

2. Mercantile Agent

When a mercantile agent is, with the consent of the owner, in possession of goods or documents of title to goods, any sale made by him in the ordinary course of business shall be valid provided the buyer acts in good faith and without notice that the seller had no authority to sell. (Provisio to Sec 27)

EXAMPLES

F gave his car to a mercantile agent for sale at a stated price. The agent sold the car to S below the stated price. S resold the car to K. Held, S transferred a good title to K and F was not entitled to recover the car. (Folks vs. King)[6]

3. Joint Owner

When one of the joint owners, having possession of the goods by permission of the co-owner, sells the goods, a buyer gets a good title to the goods provided the buyer buys them in good faith and without notice that the seller's title was defective at the time of contract. (Sec. 28)

EXAMPLE

A, B and C are three brothers. They jointly own a cow. B and C leave the cow for look after in A's possession. A sells the cow to D. D gets a good title.

4. Possession in Voidable Contract

When a person has obtained possession of the goods under a voidable contract and sells them before the contract has been cancelled, the buyer of such goods acquires a good title provided the buyer acts in good faith and without notice of the seller's defect of title. (Sec.29)

EXAMPLE

A buys a horse from B by fraud. A sells the horse to C before cancellation of contract by B. C gets a good title.

5. Seller in Possession after Sale

When a person has sold goods but continues to be in possession of them or of the documents of title thereto, he may sell them to a third person and if such person obtains delivery thereof in good faith and without notice of the previous

[5] (.....170 Pa St 318

[6] (1923) 1 KB 282

sale, he gets a good title to them although the property in the goods has passed to the first buyer. (Sec. 30(1))

EXAMPLE

B buys goods from A but leaves those goods with A. A fraudulently sells the goods to C. C gets a good title to the goods.

6. Buyer in Possession before Sale

When the buyer obtains possession of the goods before the property in such goods has passed to him with the consent of the seller, he may sell them to a third person and if such person obtains delivery of the goods in good faith and without notice of any lien of the original seller, he will get a good title. (Sec 30(2)]

EXAMPLE

A agreed to buy a car if his advocate approved. A obtained possession of a car and sold it to B. But the advocate disapproved. It was held that the buyer has got a good title. (Marten vs Whale)[7]

7. Unpaid Seller

When an unpaid seller who has a right of lien or stoppage in transit, resells the goods, the buyer gets a good title to the goods as against the original buyer in spite of the fact that no notice of resale has been given to the original buyer. [Sec 54(3)]

EXAMPLE

A sells a sofa set to B for Rs. 10,000. B pays Rs. 4,000 as advance and promises to pay the remaining balance at the time of delivery. B does not pay the balance for several days. A sells the sofa set to C. C gets a good title.

8. Finder of Lost Goods

A finder of lost goods can sell the goods under certain circumstances and the buyer will get a good title. (Sec 169)

EXAMPLE

A finds a lost horse. The horse falls sick. A spends Rs. 1,000 on treatment. B, the owner of the horse, refuses to pay to A. A sells the horse to Z. Z gets a good title.

9. Pledgee

A pledgee can sell the goods under certain circumstances and the buyer will get a goods title. (Sec 176)

EXAMPLE

X pledges his tractor to Y and borrows Rs. 5 Lac. X does not pay the loan. Y sells the tractor to Z. Z gets a good title.

[7] (1917) 2 Kb 480

10. Exceptions under other Acts

A non-owner can transfer a better title in the following cases:

a. In case of insolvency of individuals and companies, the official receiver can convey a better title to the buyer.

b. In case of negotiable instruments, the holder in due course gets a better title than that of transferor.

EXAMPLES

a. A becomes insolvent. B, the official receiver of A, sells some goods of A to X. X gets a good title to goods.

b. A steals a bill of B and endorses the same to X under the circumstances which make X, a holder in due course. X gets a good title.

SHORT ANSWER QUESTIONS

1. What is meant by the term property in goods?
2. When does the property in goods pass from the seller to the buyer in case of unascertained goods?
3. What is meant by deliverable state?
4. Does the time of payment of price or the time of delivery of goods prevent the passing of property in goods from the seller to buyer?
5. Where there is a contract for the sale of specific goods in a deliverable state, but the seller is yet to weigh the goods in order to ascertain price, when does property in goods pass to the buyer?
6. Who is a mercantile agent?
7. When can one of the several joint owners sell the goods?

TEST QUESTIONS

1. State the rules regarding the passing of property from a seller to a buyer in a contract for the sale of goods.
2. What are the rules regarding transfer of property from seller to a buyer in a contract for the sale of unascertained and future goods?
3. A seller cannot convey a better title to the buyer than he himself has. Discuss this rule of law and point out the exceptions.

17

PERFORMANCE OF CONTRACT OF SALE

Introduction

The performance of contract of sale means the performance of respective duties of the seller and buyer as per the terms of the contract. The parties to a contract should include the terms in their contract regarding time, place of delivery, modes of delivery, payment of price, etc. If the contract is silent in this regard, the rules contained in the Sale of Goods Act apply. (Sec.31)

Delivery of Goods

Delivery means 'a voluntary transfer of possession from one person to another.' (Sec. 2 (2))

EXAMPLE

B steals goods from A. There is no delivery of goods from A to B though possession is transferred.

Modes of Delivery

Delivery of goods may be made in any of the following ways:

1. Actual Delivery

When the goods are physically handed over by the seller or his agent to the buyer or his agent, the delivery is called actual delivery.

EXAMPLE

A sells a car to B. A hands over the car to B. It is an actual delivery.

2. Symbolic Delivery

When a bulk of the goods is sold, it is not possible to give actual delivery of the goods. In such a case, the control over the goods is transferred by symbolic delivery.

EXAMPLE

A sells to B certain goods which are stored in a locked godown. A hands over the key of the godown to B. It is a symbolic delivery.

3. Constructive Delivery

A constructive delivery occurs when change in the possession of goods takes place without any change in the actual custody of the goods.

EXAMPLE

X sells to Y cement lying in Z's godown. X orders Z to transfer the cement to Y. Z transfers the cement in his books to Y. This is a constructive delivery.

Rules of Delivery of Goods

The rules regarding delivery of goods are as follows:

1. Duty of Seller and Buyer

It is duty of the seller to deliver the goods and of the buyer to accept and pay for the goods according to the terms of contract of sale. (Sec.31)

EXAMPLE

A sells a cycle to B for Rs. 4000. It is the duty of A to deliver the cycle to B. B is responsible to pay the price to A.

2. Delivery and Payment

Unless otherwise agreed, the seller shall be ready to deliver the goods to the buyer in exchange for the price and the buyer shall be ready to pay the price in exchange for possession of goods simultaneously. (Sec. 32)

EXAMPLE

A sells sugar to B for Rs. 20,000. A shall deliver the sugar when B is ready to pay the price. B shall pay when A delivers the sugar.

3. Mode of Delivery

Delivery of goods sold may be made by any of the ways on which the parties agree. It may be actual, symbolic or constructive. (Sec. 33)

EXAMPLE

A sells cement to B and permits him to take it from A's godown. The removal of cement from A's godown is a delivery.

4. Effect of Part Delivery

When the part delivery is made in progress of the whole delivery, it is treated as delivery of the whole. The ownership in the whole of the goods passes to the buyer. But when the part delivery is made with the intention of separating it from the whole, it is not treated as delivery of the whole. The ownership of the whole quantity does not transfer to the buyer. (Sec. 34)

EXAMPLES

a. A sells 100 bales of cotton to B and gets the price. B takes delivery of 50 bales. It will be treated as the delivery of whole.

b. S sold 5 bales of cotton to B. B received 1 bale and paid for it but refused to accept the remaining 4 bales. Held, it was a part delivery. (Mitchell Reid Co. vs. Balder Dass)[1]

5. Demand of Delivery

Apart from any express contract, the seller is not bound to deliver the goods to the buyer unless the buyer applies for delivery. (Sec. 35)

EXAMPLE

A sells a car to B. A is not bound to deliver unless B requests for delivery.

6. Place of Delivery

The goods must be delivered at the specified place stated in a contract. If no place of delivery is mentioned in the contract, the following rules will apply:

a. In case of sale, the goods are to be delivered at the place where they are at the time of the sale.

b. In case of agreement to sell, the goods are to be delivered at the place where they are at the time of the agreement to sell.

c. In the case of future goods, the goods are to be delivered at the place where they are manufactured or produced. (Sec. 36(1))

EXAMPLE

A contracts B to supply bricks at 22 Mall Road. A is bound to supply at 22 Mall Road where parties made the contract.

7. Time of Delivery

When time for delivery of goods is specified in the contract, the goods must be delivered accordingly. But when no time is fixed in the contract, the goods must be delivered within a reasonable time. The reasonable time depends upon the circumstance of each case. (Sec 36(2))

EXAMPLE

A promises to sell and deliver the wheat to B within 5 days. A is bound to supply within 5 days otherwise he is guilty of breach of contract.

8. Possession by Third Party

When the goods at the time of sale are in the possession of a third person, there is no delivery by the seller to the buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf. (Sec. 36(3))

[1] (1888) 15 Cal 11

EXAMPLE

A stored his goods in B's godown. A sells goods to X and gives him a receipt to take delivery from B. B gives the goods to X. This is delivery of goods to buyer.

9. Expenses of Delivery

Unless otherwise agreed, the expenses of putting the goods into deliverable state shall be borne by the seller. [Sec. 36(5)]

EXAMPLE

A sells a computer to B. A will bear the expenses of packing the computer.

10. Wrong Delivery

A seller is responsible to deliver the goods to the buyer in accordance with the terms of the contract. In case of wrong delivery, the buyer can reject the goods. It may be either short delivery, excess delivery or mixed delivery. (Sec. 37)

EXAMPLE

A buys 40 bottles of Pepsi from B. B sends 30 bottles A may reject the whole or accept 30 and ask for the rest.

11. Installment Deliveries

Unless otherwise agreed, the buyer of goods is not bound to accept the delivery of goods in instalments. (Sec. 38)

EXAMPLE

S bought from R, 25 tons of pepper by March/April shipment. R supplied 20 tons in March and 5 tons in September. Held, S is not bound to accept in installments. (Reuter vs. Sala)[2]

12. Delivery to Carrier

When the seller delivers the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is deemed to be a delivery of the goods to the buyer. (Sec. 39)

EXAMPLE

A sells a T.V. to B. A hands over the T.V. to the carrier to be delivered to B. It means the delivery has been made to B.

13. Delivery at Distant Place

When the seller of goods agrees to deliver at his own risk at a place other than that where they are when sold, the buyer shall nevertheless, unless otherwise agreed, take any risk of deterioration in goods necessarily incident to

[2] (1879) 48 LJ 492.

the course of transit. The risk for extraordinary or unusual deterioration shall be borne by the seller. (Sec.40)

EXAMPLE

A delivers iron to B from Karachi to Sialkot in normal conditions. The iron gets rusted. B cannot reject it.

14. Examining the Goods

When the seller delivers the goods to the buyer, he is bound to give a reasonable opportunity to the buyer to examine the goods for the purpose of ascertaining whether they are in accordance with the contract (Sec. 41)

EXAMPLE

A supplies bricks to B. A is bound to give some time to B to check whether the bricks are according to the contract.

15. Acceptance of Delivery

The buyer is deemed to have accepted the goods in the following circumstances: (Sec. 42).

a. When he informs the seller that he has accepted the goods.
b. When he does any act, in relation to the goods, which shows that he has accepted them.
c. When, after the lapse of a reasonable time, he retains the goods without intimating the seller that he has rejected them.

EXAMPLES

a. A sells and delivers wheat to B. B informs A that he has accepted the goods.
b. A buys rice from B and takes delivery from B. A does not reject. It means that A has accepted the rice after a reasonable time.

16. Rejection of Goods

When goods are delivered to the buyer and he refuses to accept them, having the right to do so, he is not bound to return them to the seller. He should only inform the seller about his rejection. (Sec.43)

EXAMPLE

A supplies wrong goods to B. B rejects the goods and does not return.

17. Refusal to take Delivery

When the seller is ready to deliver the goods and requests the buyer to take delivery, and the buyer does not take delivery of goods within reasonable time, the buyer is liable to the seller for any loss arising due to the refusal. (Sec. 44)

EXAMPLE

C sells and delivers a car to S. S refuses to take delivery. C sells the car to X and suffers a loss. He is entitled to claim damages from S. (Charter vs. Sullivan)

Rights of Buyer

The following are the rights of a buyer:

1. Right to take Delivery

It is a right of the buyer to take delivery of the goods according to the terms of the contract.

2. Right to Reject

If the seller sends to the buyer a larger or smaller quantity of goods against the contract, the buyer may reject or accept the whole or accept some and reject the rest. He can refuse to accept the goods in installments.

3. Right to Notice of Insurance

When goods are sent by the seller to the buyer via sea route, the buyer has a right to be informed by the seller so that he may get the goods insured.

4. Right to Examine

The buyer has a right to examine the goods which he has not previously examined before he accepts them.

5. Right to Sue for Damages

When the seller refuses to deliver the goods to the buyer, the buyer may sue the seller for damages caused by non-delivery.

6. Right to Sue for Price

If the buyer has paid the price and the goods are not delivered, he can recover the amount.

7. Right to Sue for Performance

The buyer may sue the seller for specific performance of the contract. If the goods are specific, the court may order for the performance of the contract.

8. Right to Sue for Breach of Warranty

When there is a breach of warranty by the seller, the buyer cannot reject the goods. He can sue for damages only.

9. Right to Cancel the Contract

When the seller cancels the contract before the date of delivery, the buyer may cancel the contract or wait for the date of delivery.

10. Right to Sue for Interest

When there is a breach of contract on the part of seller, the buyer has a right to claim interest on the amount.

Duties of the Buyer

The following are duties of the buyer:

1. Duty to Accept Goods

It is the duty of the buyer to accept the goods and pay for them according to the terms of the contract.

2. Duty to Apply for Delivery

It is the duty of the buyer to apply for delivery of the goods.

3. Duty to Demand delivery

It is the duty of the buyer to demand for the delivery of goods at a reasonable time.

4. Duty to take Risk of Deterioration

When the seller agrees to deliver the goods at his own risk at a place other than where they are when sold, the buyer shall take a risk of deterioration in the goods.

5. Duty to Inform Seller

It is the duty of the buyer to inform the seller if he refuses to accept the goods.

6. Duty to take Delivery

It is the duty of the buyer to take delivery of the goods within a reasonable time.

7. Duty to Pay Price

When the ownership in goods passes to the buyer, it is the duty of the buyer to pay the price according to the contract.

8. Duty to Pay for Damages

When the buyer refuses to accept and pay for the goods, he will have to compensate the seller for the damages for non-acceptance.

SHORT ANSWER QUESTIONS

1. What is meant by delivery?
2. What is symbolic delivery?
3. Unless otherwise agreed, delivery of goods and payment of price are concurrent conditions. What does it mean?
4. What is the effect of part delivery of goods as regards passing of property of such goods?
5. Is the seller bound to deliver the

5. Is the seller bound to deliver the goods to the buyer without application?
6. Who is to bear expenses of delivery of goods?

7. What is the effect of delivery of wrong quantity of goods?
8. It is a buyer bound to accept delivery of goods by installments?

TEST QUESTIONS

1. Define the term delivery and discuss the rules relating to delivery of goods in a contract of sale.
2. What are the rights and duties of the buyer in respect of the sale of goods?
3. It is the duty of the seller to deliver the goods and of buyer to accept and pay for them in accordance with the term of agreement? Explain.

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RIGHTS OF UNPAID SELLER

Definition of Unpaid Seller

The seller of goods is deemed to be an unpaid seller in the following circumstances:

1. When the whole of the price has not been paid or tendered, or
2. When a bill of exchange or other negotiable instrument has been received as a conditional payment and it has been dishonoured.

The term seller includes any person who is in the position of a seller, e.g. an agent of the seller. [Sec 45)

Features of Unpaid Seller

The following are the features of unpaid seller:

1. He must sell goods on cash basis and must be unpaid.
2. If he sells the goods on credit, he is not an unpaid seller during the period of credit.
3. If the term of credit has expired and the price has not been paid.
4. He must be unpaid wholly or partly. If a part of the price remains unpaid, he is an unpaid seller.
5. When the price is paid in the form of negotiable instrument and it is dishonoured.
6. If the price is offered by the buyer and the seller refuses to accept it, the seller cannot be called unpaid seller.

EXAMPLES

a. A sells goods to B on 5 months credit. A is not an unpaid seller. But if B becomes insolvent after 2 months, A becomes an unpaid seller.

b. A sells goods to B for Rs. 5,000. B has paid Rs 3,000 and the remaining are to be paid. A is an unpaid seller.

c. A sells 50 books to B. A gets a cheque for payment. The cheque is dishonoured. A is an unpaid seller.

d. A sells a car to B. B offers the payment. A refuses to accept payment. A is not an unpaid seller.

Rights of Unpaid Seller

An unpaid seller has the following rights:

1. Rights against Goods

An unpaid seller has the following rights:

a. Right of Lien

The right of lien means the right to retain the possession of goods until the full price is received. An unpaid seller can exercise his right of lien in the following cases: (Sec 47-49)

1. When the goods are sold for cash and not on credit.
2. When the goods are sold on credit but the term of credit has expired.
3. When the buyer becomes insolvent, even if the period of credit has not been expired.

The others rules regarding lien are as under:

1. It can be exercised when the goods are in possession of seller as agent or bailee of the buyer.
2. It can be exercised even if the documents of title have been delivered to the buyer.
3. It can be exercised for price and not for other expenses.
4. If seller delivers some goods to the buyer, he can exercise his right of lien on the remainder.
5. If the seller delivers the goods under the circumstances which show that he has agreed to waive the lien, he cannot retain the remainder.
6. The seller can exercise a right of lien even though he has obtained a decree for price of the goods.

The unpaid seller loses his right of lien in the following cases:

1. When he delivers the goods to a carrier or other bailee for transmission to the buyer.
2. When the buyer or his agent lawfully obtains possession of the goods.
3. When the seller waives his right of lien on goods.
4. The right of lien once lost will not restore even if the buyer delivers the goods to the seller for any particular purpose.
5. When the buyer further sells the goods and the seller agrees.

EXAMPLE

E sold and delivered a refrigerator to J. It was not functioning properly so J delivered it back to E for repairs. It was held that E could not exercise his lien over the refrigerator. (Eduljee vs. John Bros.)[1]

[1] (19134) AIR Nag 249

b. Right of Stoppage of Goods in Transit

The right of stoppage in transit means the right of stopping the goods while they are in transit and to take possession until the price is paid. The unpaid seller can stop the goods in transit in the following cases: (Sec 50-52)

1. When the buyer becomes insolvent.
2. When the goods are still in transit.
3. When the seller has the right of stopping the goods.
4. When the ownership has already been passed to the buyer.

The seller cannot stop the goods in transit in the following cases:

1. When the buyer or his agent takes delivery of the goods after the goods have reached at the destination.
2. When the buyer or his agent takes delivery of the goods before the goods have reached at the destination.
3. When the buyer requests the carrier to carry the goods to a new destination after the goods have reached at the original destination.
4. When the carrier wrongfully refuses to deliver the goods to the buyer or his agent.
5. When some of the goods have been delivered to the buyer or his agent under the circumstances which show that there is an agreement to give up possession of the whole of the goods.

EXAMPLE

A sells 20 bags of cement to B. A delivers the cement to a carrier to carry them to B. Later, A gets a news that B has becomes insolvent. A can stop the delivery.

c. Right of Resale

The unpaid seller can resell the goods in following cases: (Sec. 46-54)

1. When the goods are of perishable nature.
2. When there is provision regarding the right of sale in the contract.
3. When the seller gives a notice to the buyer of his intention to resell and the buyer does not pay within a reasonable time, he can:
   i. Recover loss on resale of the goods.
   ii. Retain any surplus on resale of goods.

   If the seller resells without giving notice to the buyer, he cannot:

   i. Recover any loss on resale of the goods.
   ii. Retain any surplus on the resale of the goods.

EXAMPLES

a. X sells vegetables to Y on credit. Y does not pay. X can resell to any other person.

b. M sells 100 blankets to N and gives him one week for payment. N does not pay. M can resell those blankets to any other person.

2. Rights against Buyer

The unpaid seller has the following rights against the buyer:

a. Price

When the ownership in goods has passed to the buyer and the buyer refuses to pay the price according to the terms of the contract, the seller can sue the buyer for price irrespective of the delivery of goods. (Sec 55)

EXAMPLE

A sells the goods to B. B refuses to pay. A can sue for the price.

b. Damages for Non-acceptance

When the buyer refuses to accept and pay for the goods, the seller may sue him for damages for non-acceptance. The seller can recover damages only. He cannot recover the full price. (Sec. 56)

EXAMPLE

A sells the goods to B. B refuses to take the goods and pay the price. A can sue B to compel him to take the goods.

c. Special Damages and Interest

The seller can sue the buyer for special damages when the parties are aware of such damages at the time of contract The unpaid seller can recover interest at a reasonable rate on the total unpaid price of goods from the time it was due until it is paid. (Sec. 61)

EXAMPLE

X sells some goods to Y. Y does not pay the price. X can sue for damages and interest if the parties are aware of such circumstances.

Buyer's Rights against Seller

The buyer has following rights against the seller for breach of contract:

1. Damages for Non-delivery

Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may sue the seller for damages for non-delivery. (Sec. 57)

EXAMPLE

A sells iron to B at Rs. 50,000 per ton. A does not supply the iron. The

price increases to Rs. 60,000 per ton. B can sue for damages.

2. Suit for Specific Performance

When there is a breach of contract for the sale of specific goods, the buyer may file a suit for specific performance. This remedy is granted only when damages would not be an adequate remedy. It is granted when subject matter of the contract is rare goods, e.g. picture by a dead painter. (Sec. 58)

EXAMPLE

A promises to sell B, a rare painting. Later, A refuses to give the painting. B can sue for specific performance.

3. Damages for Breach of Warranty

When there is a breach of warranty by the seller, the buyer is entitled to sue for damages if he has paid the price to the seller. But if the buyer has not yet paid the price, he may ask the seller for a reasonable reduction in the price. (Sec. 59)

EXAMPLE

A promises to sell and deliver tables to B on 1st March, 2005. But A delivers on 10th March. B can claim damages.

4. Cancellation and Damages for Breach of Condition

When there is a breach of condition by the seller, the buyer can avoid the contract and claim damages. [Sec. 12(2)]

EXAMPLE

A promises to sell Sony T.V to B. But A sends Sharp T.V. B can avoid the contract and claim damages.

5. Recovery of Price with Interest

If the buyer has already paid the price to the seller and the seller does not deliver the goods to the buyer, he can sue the seller for refund of the price and interest at a reasonable rate. (Sec. 61)

EXAMPLE

X agrees to buy a fridge from Y and makes payment in advance. Y does not supply. X can sue for refund of price and interest on that amount.

Auction Sale

Auction sale is a public sale where different buyers come to buy the goods. The goods are sold to the highest bidder. A person may himself sell his own goods by auction or he may appoint an agent called auctioneer to conduct the sale on his behalf.

Rules Regarding Auction Sale

The following are the rules regarding auction sale: (Sec.64)

1. Goods in Lots

When the goods are put up for sale in lots, each lot is prima-facie deemed to be the subject of a separate contract of sale. (Sec. 64(1))

2. Completion of Sale

The sale is said to be complete when the auctioneer announces its completion by fall of the hammer or in any other customary manner. (Sec. 64(2))

3. Withdrawal of Bid

Until such announcement is made, any bidder may retract from his bid as he is not bound till the sale is complete. (Sec. 64(2))

4. Right of Seller to Bid

The seller or any other person on his behalf can bid at the auction, provided such a right to bid has been expressly reserved at the time of notifying the auction sale but if the right is not expressly reserved, then such bidding may be treated as fraudulent by the buyer. (Sec. 64(3))

5. Pretended Bid

If the seller makes use of the pretended bids to raise the price, the sale is voidable at the option of the buyer. (Sec. 64(6))

6. Reserve Price

The sale may be notified to be subject to a reserved price. If the highest bid is less than that price, the auctioneer may refuse to accept the bid.

7. Agreement not to Bid

An agreement between intending buyers not to bid against each other is not illegal. When a group of persons agree to prevent competition between them at an auction and decide that only one of them will bid, it is not an illegal act.

8. Seller's Right

The auctioneer can refuse to sell goods on credit and accept payment by means of negotiable instrument.

9. Advertisement of Auction

An advertisement of an auction is only an invitation to offer and can be cancelled any time without any public notice.

SHORT ANSWER QUESTIONS

1. Who is unpaid seller?
2. What are the rights of an unpaid seller?
3. When can an unpaid seller lose his lien on the goods?
4. When can an unpaid seller exercise his right of lien?
5. When can an unpaid seller apply his right of stoppage in transit?
6. When goods are to be deemed in transit?
7. Can the reminder of the goods be stopped in transit when a part delivery has been made?
8. When can an unpaid seller resell the goods?

TEST QUESTIONS

1. Who is an unpaid seller of goods and what are his rights against the goods?
2. Has the seller any remedy against the buyer personally?
3. Define unpaid seller. What are his rights under the sale of Goods Act?
4. What is meant by an unpaid seller? Explain the nature of the right of lien and the right of stoppage in transit of an unpaid seller.
5. Discuss the remedies available to buyer against the seller for breach of contract.
6. State the rules regarding sale by auction.

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NATURE OF NEGOTIABLE INSTRUMENT

Introduction

The Negotiable Instruments Act, 1881 deals with the promissory note, bill of exchange and cheques. It came into force on 1st March, 1882. (Sec. 1 (A))

Definition

The word 'negotiable' means transferable by delivery and the word 'instrument' means a written document which creates a right in favour of some person. Negotiable Instrument is a piece of paper which entitles a person to a sum of money mentioned in it and which is freely transferable from one person to another. (Sec. 13)

Characteristics

The characteristics of negotiable instruments are as follows:

1. Freely Transferable

The right of ownership in these instruments can be transferred from one person to another easily. If the instrument is payable to bearer, the property in negotiable instrument is transferred to the transferee by delivery. If instrument is payable to order, the property in negotiable instrument transfers by endorsement and delivery.

2. Rights of Holder

A holder of negotiable instrument has a right to recover the money from the person liable on the instrument. The holder can recover this amount himself or transfer his right to another person. The transferee can sue the person liable in his own name in case of dishonor. The holder of the instrument need not give notice of transfer to the party liable.

3. Better Title

A person taking the negotiable instrument in good faith without negligence and for value trusting it bonafide becomes holder in due course. He gets the instrument free from all defects. He is not affected by any defect of title of the transferor or any prior party. A holder in due course gets a better title even the title of the transferor might be defective.

4. Promise or Order

A negotiable instrument contains an unconditional promise or order to

pay. In case of promissory note the debtor promises to pay a certain sum of money to the holder of the instrument. In case of bill of exchange and cheque

the creditors orders his debtor to pay a certain sum of money to the holder of the instruments.

5. Certain Amount

In the negotiable instruments, the promise or order is made for the payment of certain amount. The person liable to pay on the instrument must pay certain amount of money and not anything else. It can call for payment in currency but cannot ask for payment in goods, etc. (Sec. 5 Para 3)

6. Presumptions

Certain presumptions of law apply to all negotiable instruments such as consideration, date, time of acceptance, stamp, and holder in due course. Therefore it is not necessary for the party entitled to receive money on the instrument to prove the validity of his claim. (Sec.118-119)

7. In writing

A negotiable instrument must be in writing. An oral promise or order to pay money cannot be called negotiable instrument.

Negotiable Instrument

Few examples of negotiable instruments are bills of exchange, promissory notes, cheques, dividend warrants, share warrants, bearer debentures, government circular notes, banks drafts etc.

Non-negotiable Instrument

Few examples of non-negotiable instruments are money orders, postal orders, fixed deposit receipt, share certificates, carrier receipts, bill of lading, etc.

PROMISSORY NOTE

Definition

"A promissory note is an instrument in writing (not being a bank note or a currency note) containing an unconditional undertaking, signed by the maker, to pay on demand or at a fixed or determinable future time a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument." (Sec. 4)

The person who promises to pay is called maker. (i.e. debtor).The person to whom payment is to be made is called payee (i.e. creditor).

SPECIMEN OF A PRO-NOTE

Rs. 5,000 Lahore, 2nd August 2010

Three months after date, I promise to pay to Mr. Muhammad Aslam or order the sum of rupees five thousand for value received.

To, Muhammad Aslam
22-A, Garden Town
Lahore

Stamp
Sd/
Hamid Khan

Essentials

The following are essentials of promissory note:

1. In Writing

A promissory note must be in writing. A verbal promise to pay is not a promissory note. The writing may be on any paper or book. It may be written in pen or pencil. It may be printed or typed.

EXAMPLES

A signs the instruments in the following terms:

a. I promise to pay B or order Rs. 500.

b. I acknowledge myself to be indebted to B in Rs. 1,000, to be paid on demand, for value received.

The above instruments are valid promissory notes.

2. Promise to Pay

There must be a promise or undertaking to pay. A mere acknowledgement of debt without a clear promise to pay is not a promissory note.

EXAMPLES

A signs the instruments in the following terms:

a. I am liable to pay to B, Rs. 500.

b. I have taken from B, Rs. 500 and I am accountable to him for the same with interest.

c. Mr. X, I.O.U. (I owe you) Rs. 2000.

The above instruments are not valid notes.

3. Unconditional Promise

It must contain unconditional promise to pay. The promise must not depend upon the happening of some uncertain event. It must be absolute. If it contains a conditional promise, it is not a valid promissory note.

EXAMPLES

A signs the instruments in the following terms:

a. I promise to pay B Rs. 500 seven days after my marriage with C.

b. I promise to pay B Rs. 7000 as soon as I can.

c. I promise to pay B Rs. 500 on D's death provided D leaves me enough to pay that sum.

The above instruments are valid

The above instruments are not valid notes.

4. Signed by Maker

It is necessary that the maker must sign the promissory note. The signature may be in any part of the instrument and not necessarily at the bottom. When the maker is illiterate, his thumb impression is sufficient.

EXAMPLE

A writes the instrument but does not sign thereon: "I promise to pay B Rs. 5,000." The note is not a valid promissory note.

5. Certain Maker

The instrument must indicate who is liable to pay. When there are more than one makers, they may be liable jointly or jointly and individually. But alternative promisors are not allowed.

EXAMPLES

a. A note in the form "I promise to pay to X Rs. 10,000" and signed by M or also N is not a valid note.

b. A note in the form "I, X, promise to pay to Z Rs. 500" and signed by X or also Y is a good note as against X only

6. Certain Payee

The payee of a promissory note must be a certain person. The payee's name can be indicated by his official designation. It may be made payable to two or more payees jointly. It can be made payable in the alternative to one of the two, or some of several payees. (Sec 13(2))

EXAMPLES

a. A promissory note payable to the manager of bank or the principal of a college is regarded as payable to a certain person.

b. A signs the note as "I promise to pay a sum of Rs. 5000 to X or Y" is a valid note because payee is considered a certain person.

7. Certain Sum

It is necessary that the sum of money promised to be payable must be certain and definite. If the amount to be paid is uncertain, the instruments will be not be a valid promissory note.

EXAMPLE

A note in the form "I promise to pay B Rs. 500 and all fines according to rules" is not a valid promissory note.

8. Pakistani Currency

A promissory note containing a promise to pay a certain amount in foreign currency is not a valid promissory note. For a valid note, it must contain a

currency is not a valid promissory note. For a valid note, it must contain a promise to pay a certain amount in Pakistani currency.

EXAMPLE

A note signed by A, "I promise to pay B Rs. 500 on 1st January next" is a valid note.

9. Other Formalities

Some other formalities are also necessary:

a. The place should be mentioned where it is made.
b. The date should be mentioned on which it is made.
c. The promise to pay must be for lawful consideration.
d. It must be properly stamped under the Stamp Act.
e. It is necessary to cancel all the stamps affixed on the note.

Important Points

The following points regarding promissory note are important:

1. A note payable "only to a particular person" is valid even though it is not a negotiable instrument as it restricts its transferability.
2. A promissory note cannot be originally made "payable to bearer", because State Bank of Pakistan prohibits the issue of such promissory note.
3. It can be drawn `payable to order' originally
4. On endorsement in blank it can become "payable to bearer" or "payable to bearer on demand" subsequently.
5. A bank note or a currency note is not a pronote as it is money itself.

BILL OF EXCHANGE

Definition

"A bill of exchange is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay on demand or at a fixed or determinable future time a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument." (Sec. 5)

The person who makes the bill is called the drawer. The person who is directed to pay is called the drawee. The person to whom the payment is made is called the payee

SPECIMEN OF A BILL OF EXCHANGE

Rs. 6,000 Lahore, 2nd August 2010

Three months after date, pay to C or order the sum of Rs. Six thousand only for value received.

Accepted
Amin

To Amin
123, Muslim Town
Lahore

Stamp
Sd/
Bashir

The drawer or the payee in case of endorsement is called the `holder'. The holder must present the bill to the drawee for his acceptance. When the drawee accepts the bill, by writing the words `accepted' and signs it, he is called the `acceptor'.

If the bill is drawn `Pay to me or my order', the drawer also becomes the payee. A `drawee' may also become the `payee' when bill is subsequently endorsed in favour of the `drawee'. Similarly, when one draws a bill upon him, the drawer will become the drawee also. But in this case the holder may treat it as a bill or as a note.

Essentials

The following are the essentials of a bill of exchange:

1. In writing

A bill of exchange must be in writing. A verbal order to pay cannot be called bill of exchange. The law does not explain about writing. In practice, the bill of exchange is written on stamped paper or on form. It is written in ink. It may be printed or typed.

EXAMPLE

A draws a bill on B as: "Pay Rs.5000 to X or order". It is a valid bill.

2. Unconditional Order

The language used in a bill should convey an order to pay. The order to pay must not depend upon the happening of an event. It must be unconditional.

EXAMPLES

a. A draws a bill on B, as "Pay Rs. 5000 to C as early as possible." It is not a valid bill.

b. A draws a bill on B, as "Pay Rs.5000 to C or order." It is a valid bill as it is unconditional.

c. A draws a bill on B, as "Mr. X please let the bearer have Rs.500 and obliged". It is not a valid bill as it contains a request and not an order.

It is not a valid bill as it contains a request and not an order.

3. Signed by Drawer

It must be signed by the drawer. The signature may be in any part of the instrument and not necessarily at the bottom. If the drawer is illiterate his thumb impression is sufficient.

EXAMPLE

A draws a billon B "Pay Rs.10000 to X or order" but does not sign thereon. It is not a valid bill.

4. Certain Drawee

The drawee of a bill of exchange must be a certain person. The name of the drawee must be mentioned in the bill. If the bill does not mention the name of the drawee it is not a valid bill.

EXAMPLE

X draws a bill as: "Pay Rs. 10000 to Y or order." It does not mention the name of the drawee so it is not a valid bill.

5. Certain Payee

The payee of a bill must also be a certain person. The payee's name can be indicated by his official designation only. A bill may be made payable to two or more payees jointly or it may be made payable in the alternative to one of two, or one or some of several payees. (Sec.13 (2))

EXAMPLES

A draws the bill as under:

a. Pay Rs.50000 to principal of Hailey College of Commerce.

b. Pay Rs.60000 to X or Y

c. Pay Rs.50000 to M and N.

The above bills are valid.

6. Certain Sum

It is also essential that the sum payable must be certain and definite. If the amount ordered to be paid is uncertain, the instrument cannot be called a valid bill of exchange.

EXAMPLES

a. M draws a bill on N as, "Pay to X Rs.20000 and all the other sums due to him." It is not a valid bill.

b. M draws a bill on N as, "Pay to X Rs.30000 on 1st June 2001." It is a valid bill.

7. Pakistani Currency

It is necessary that the payment must be made in Pakistani currency and not in foreign currency, notes or other articles. If the bill contains an order to pay money and something in addition to money, it cannot be called a bill.

EXAMPLE

A draws a bill on B as: "Pay Rs. 50000 and deliver 100 bags of wheat to X." It is not a valid bill.

8. Other Formalities

Other formalities like date, place, attestation, consideration, etc., are usually mentioned in the bill but they are not essential in law. However, it is necessary that a bill must be affixed with the necessary stamp.

Important Points

The following points regarding bill must be noted:

a. A bill of exchange directing to pay "only to a particular person" is valid. But it is not negotiable instrument according to the definition because its transferability is restricted.

b. A bill can be originally drawn "payable to bearer" but it must be payable otherwise than on demand. (say, three months after date). In other words, a bill cannot be drawn "payable to bearer on demand"

c. A bill drawn "payable on demand" must be made "payable to order".

DIFFERENCE BETWEEN PRONOTE AND A BILL OF EXCHANGE

The points of difference between the two are as follows.

Promissory Note	Bill of Exchange
1. Number of Parties	
In a promissory note, there are two parties, the maker and the payee.	In a bill of exchange there may be three parties, the drawer, the drawee and the payee.
2. Maker and Payee	
In a promissory note the maker cannot be the payee because the same person cannot be the promisor and the promisee.	In a bill the drawer and payee may be the same person when it is drawn 'Pay to me or my order'.
3. Promise and Order	
In a promissory note there is a promise to make the payment.	In a bill of exchange there is an order to make the payment.
4. Nature of Liability	
The liability of maker of a promissory note is primary.	The liability of a maker of a bill of exchange is secondary. The drawer is

exchange is secondary. The drawer is liable when the acceptor does not

	honour the bill of exchange.
5. Maker's Position The maker of a promissory note stands in immediate relation with the payee.	The drawer of a bill stands in an immediate relation with the drawee and the drawee with payee.
6. Liability of Drawer The maker of a promissory note is debtor and he promises to pay.	The drawer of a bill of exchange is the creditor and he directs the drawee to pay.
7. Payable to Bearer A promissory note cannot be drawn payable to bearer.	A bill of exchange can be drawn payable to bearer but it is not drawn payable to bearer on demand.
8. Acceptance A promissory note needs no acceptance as it is signed by the person who is liable to pay.	A bill of exchange needs acceptance by the drawee before it is presented for payment.
9. Notice of Dishonour In case of a dishonour of a note there is a no need to give a notice of dishonour to the maker.	In case of dishonour of a bill of exchange, there is a need to give notice to all prior parties.
10. Payable to Maker A promissory note cannot be made payable to the maker himself.	A bill of exchange can be made payable to the maker himself as one person may become the drawer and payee or drawee and payee.
11. Copies A promissory note cannot be drawn in sets.	A foreign bill of exchange can be drawn in sets.
12. Protest A promissory note need not be protested.	A, foreign bill of exchange must be protested for dishonour.
13. Certain Provisions The provisions relating to presentment for acceptance, and acceptance for honour are not applicable in promissory note.	The provisions relating to presentment for acceptance, and acceptance for honour are applicable in bill of exchange.

CHEQUE

Definition

"A cheque is a bill of exchange drawn on a specified bank and not expressed to be payable otherwise than on demand." (Sect. 6)

The person who draws the cheque is called drawer. The bank on which the cheque is drawn is called drawee. The person to whom the cheque is made payable is called payee.

Essentials

The following are essentials of a cheque:

1. In writing

The cheque must be in writing. Cheques which are printed or made out on a typewriter are also valid. Banks discourage this practice because such cheques can easily be altered. Customers should be encouraged to draw cheques in ink. Cheques prepared in lead pencil are returned unpaid.

EXAMPLES

A draws a cheque in the following terms:

a. Pay X or bearer Rs. 500.

b. Pay X Rs. 500.

The above cheques are valid.

2. Unconditional Order

It must contain an order to pay unconditionally. If the bank is ordered to pay upon the condition of payee's signing the receipt, then the instrument is a conditional order and thus not a cheque.

EXAMPLES

a. A draws a cheque "Pay C Rs. 300." It is a valid cheque.

b. A draws a cheque "Pay C Rs. 400, if you can." It is not a valid cheque as it is conditional.

3. Signed by Drawer

A cheque will be valid only if it is signed by the account holder or by someone who is authorized to sign on his behalf.

EXAMPLE

A draws a cheque but does not sign thereon. "Pay M, Rs. 500." It is not a valid cheque.

4. Payable on Demand

A cheque is always drawn payable on demand. The cheque must be valid

A cheque is always drawn payable on demand. The demand should be made within a reasonable time. In Pakistan the cheques must be presented within six month from the date of issue.

EXAMPLE

A draws a cheque on 1st June, 2003 as: "Pay X Rs. 500." It is valid till six months.

5. Certain Sum

The amount mentioned in the cheque should be certain. There should be no element of doubt. In practice, banks return the cheque if the amount in words and figures differs.

EXAMPLE

A draws a cheque as: "Pay N Rs.500 and some amount according to his needs." It is not a valid cheque.

6. Payable to Bearer or Order

The drawer of a cheque can make it payable to the bearer or any specified person. If the customer marks cheque "Pay cash or order" the bank may treat it valid and payable to bearer.

EXAMPLES

A draws a cheque as under:

a. "Pay M Rs. 500." It is a valid cheque.

b. "Pay N or bearer Rs. 500." It is a valid cheque.

SPECIMEN OF A CHEQUE

Cheque No.:5755433	Date: 02.08.2010
HABIB BANK LIMITED New University Campus Br., Lahore	Account No. 13133-8
Pay Amjad	or Bearer
Rupees Thirty Thousand only	
Rs.	30.000/=
Signature	

DIFFERENCE BETWEEN CHEQUE AND BILL OF EXCHANGE

Following are the points of difference between the cheque and bill.

Cheque	Bill of Exchange
1. Drawee A cheque is always drawn on a bank,	A bill of exchange is drawn on a person, and a bank
2. Payable on Demand A cheque is drawn payable on demand	A bill of exchange is drawn payable on demand or on the expiry of a certain

	demand or on the expiry of a certain period or sight.

3. Payable to Bearer on Demand A cheque drawn `payable to bearer on demand' is valid.	A bill of exchange drawn `payable to bearer on demand' is not valid.
4. Acceptance A cheque does not require acceptance by the drawee before payment.	A bill of exchange requires acceptance by the drawee before payment.
5. Grace Days A cheque is payable on demand. There is no question of allowing grace days.	A bill of exchange is drawn payable after a certain period Three grace days are allowed in calculating the maturity date
6. Stamp A cheque does not require any stamp.	A bill of exchange requires stamp according to the Stamp Act.
7. Crossing A cheque is crossed for the purpose of safety.	A bill of exchange is not crossed.
8. Noting or Protest In cheque there is no need of noting and protest.	In bill of exchange, there is need of noting and protest.
9. Stopping the Payment The payment of a cheque can be stopped by the drawer.	The payment of bill of exchange cannot be stopped by the drawer.
10. Notice of Dishonour The notice of dishonour is not required in cheque.	The notice of dishonour is required in bill of exchange.

Types of Cheque

The cheque may be divided in the following two types:

1. Open Cheque

An open cheque is payable at the counter of the bank on the presentation of the cheque. It need not be presented through a bank account. It has two kinds.

a. Bearer Cheque

In a bearer cheque the paying bank need not check the authenticity of the holder of the cheque. There is a great risk involved in this case. If this cheque goes into wrong hands, he may get the payment from the bank unless its payment has already been stopped.

b. Order Cheque

It is also payable at the counter of the bank. It is paid by the bank after being satisfied about the true identity of the holder of the cheque.

2. Crossed Cheque

It is not payable at the counter. Its payment is made only through the collecting bank of a customer. The collecting bank credits the proceeds of the cheque to the account of the payee. The crossing provides protection to the holder of the cheque.

Crossing of a Cheque

Meaning

A cheque is said to be crossed when two parallel transverse lines are drawn on the left upper corner of the cheque.

Purpose

The purpose of the crossing is to give a direction to the bank not to pay the cheque across the counter but to pay it only to a bank.

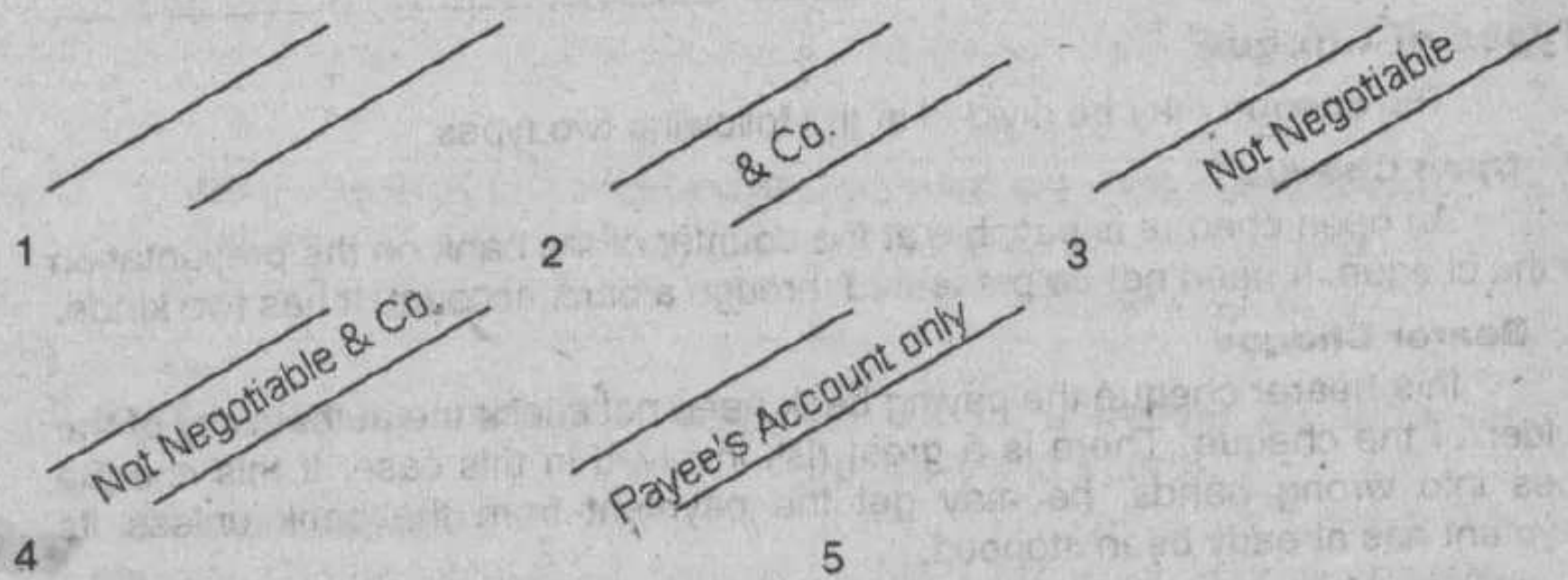
Types

There are two types of crossing:

1. General Crossing

Where a cheque bears across its face an addition of the words "and company" or any abbreviation thereof, between the two parallel transverse lines, or of two parallel transverse lines simply, either with or without the words "not negotiable," that addition shall be deemed a crossing, and the cheque shall be deemed to be crossed generally. (Sec. 123)

Where a cheque is crossed generally, the bank on whom it is drawn shall not pay it otherwise than to the bank. A general crossing can be made as follows: (Sec.126)

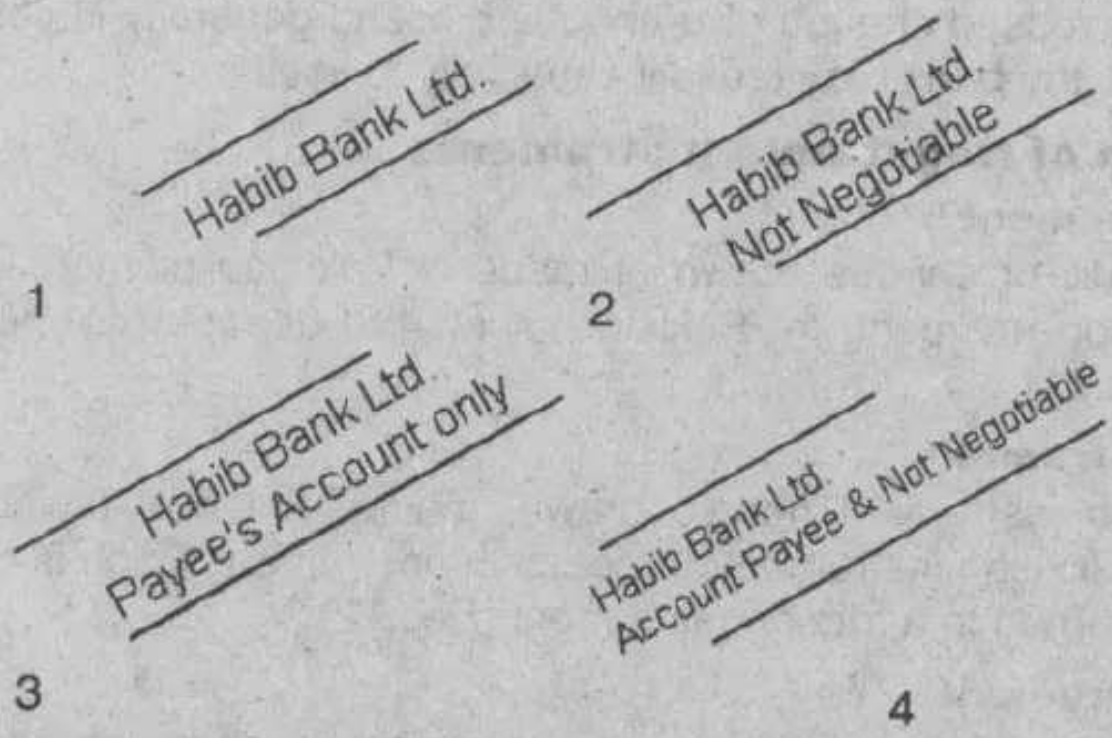


2. Special Crossing

2. Special Crossing

Where a cheque bears across its face an addition of the name of a bank, either with or without the words "not negotiable" that an addition shall be deemed

a crossing, and the cheque shall be deemed to be crossed specially and to be crossed that bank. Thus, where a cheque is crossed specially the bank on whom it is drawn shall not pay it otherwise than to the bank to whom it is crossed or his agent for collection. The special crossing can be made as follows: (Sec. 124)



Account Payee Crossing

In this type of crossing the words 'account payee' or 'payee's account only' or 'A/c payee' is added to the general or special crossing. It has the following effects. (Sec. 123 (A))

1. It becomes non-transferable.
2. It becomes the duty of the collecting bank to credit the proceeds of the cheque only to the account of the payee named in the cheque.

Not Negotiable Crossing

A cheque marked with the words 'not negotiable' can be transferred by payee. The transferee will get the same rights, as regards payment, as the transferor had. But the transferee will not get the rights of a holder in due course.

A person taking a cheque crossed generally or specially, bearing in either case the words `not negotiable', shall not have, and shall not be capable of giving, a better title to the cheque than that which the person from whom he took it had. (Sec.130)

The object of `not negotiable' crossing is to provide protection to the holder or drawer of a cheque because even if such cheque goes to wrong hands the true owner will not lose his claim.

Who May Cross a Cheque?

The following may cross a cheque: (Sec.125)

1. Where a cheque is uncrossed, the holder may cross it generally or specially.
2. Where a cheque is crossed generally, the holder may cross it specially.

3. Where a cheque is crossed generally, or specially, the holder may add the words `not negotiable'.
4. Where a cheque is crossed specially, the bank to which it is crossed may again cross it especially, to another bank or his agent for collection.
5. When an uncrossed cheque or a cheque crossed generally is sent to a bank for collection, the bank may cross it especially to itself.

Classification of Negotiable Instruments

1. Inland instrument

A note, bill or cheque drawn or made in Pakistan payable in, or drawn upon any person resident in Pakistan shall be deemed to be an inland instrument. (Sec.11)

2. Foreign Instrument

Any such instrument not so drawn, made, or made payable shall be deemed to be a foreign instrument. It means an instrument which is not an inland instrument is deemed to a foreign instrument (Sec.12)

3. Bearer Instrument

A negotiable instrument is payable to bearer which is expressed to be so payable or on which the only or last endorsement is an endorsement in blank. When an instrument is payable to bearer, the holder of it is entitled to receive the payment. (Sec.13)

4. Order Instrument

A note, bill, or cheque is payable to order which is expressed to be so payable or which is expressed to be payable to a particular person and does not contain words, prohibiting transfer or indicating an intention that it shall not be transferable (Sec. 13(1))

5. Ambiguous Instrument.

An instrument which cannot be clearly identified either as promissory note or as bill of exchange is an ambiguous instrument. It is a faulty instrument. Its holder may treat it as a bill of exchange or promissory note, for example, when in a bill the drawer and the drawee are the same persons. (Sec. 17)

6. Difference in Figures and words

If the amount undertaken or ordered to be paid is stated differently in figures and in words, the amount stated in words shall be the amount undertaken or ordered to be paid provided that if the words are ambiguous or uncertain, the amount may be ascertained by referring to the figures. (Sec.18)

7. Instrument payable on demand

A note or bill is payable on demand (a) where it is expressed to be so or to be payable at sight or on presentment or (b) where no time for payment is specified in it or (c) where the note or bill accepted or indorsed after it is over

due, as regards the person accepting or indorsing it The expressions, 'at sight' and 'presentment' means on demand. (Sec.19)

8. Inchoate Instrument

It is an incomplete instrument. A person signs and delivers to another, a blank or incomplete stamped instrument and authorizes the other person to convert it into negotiable instrument by filling the blanks. When the instrument is filled up, the signer becomes liable on the instrument. The signer is liable to the amount specified therein but not exceeding the amount covered by the stamp. But no person other than a holder in due course shall recover from the person delivering the instrument anything in excess of the amount intended to be paid by him. (Sec. 20)

9. Time Instrument

A time instrument means the instrument in which time for payment is mentioned. A note or bill is a time instrument when it is expressed to be payable (a) after a specified period (b) on a specific day (c) after sight (d) on the happing of event which is certain to happen.

The expression 'after sight' means (a) in a note, after presentment for sight (b) in a bill, after acceptance or noting for non-acceptance or protest for non-acceptance. A cheque cannot be a time instrument because the cheque is always payable on demand. (Sec.21)

10. Fictitious Bill

A fictitious bill is a bill in which the name of the drawer or the payee or both is fictitious. When both the drawer and payee of a bill are fictitious persons, the acceptor is liable to holder in due course if the holder in due course can show that the signature of the supposed drawer and that of the first indorser (payee) are in the same handwriting. (Sec. 42)

11. Accommodation Bill

An accommodation bill means a bill which is drawn and accepted without consideration. The accommodated party cannot, after he has paid the amount of the bill, recover the amount from any party who became a party to the bill for his accommodation. The holder in due course may recover the amount of such bill from any prior party. The party accommodating is called the accommodation Party. The party accommodated is called the accommodated Party. (Sec. 43)

12. Undated Bill

When the date of a bill is not mentioned and where the date of the acceptance of a bill, payable at a fixed period after sight is omitted, any holder may insert the true date of issue or acceptance as the case may be and

may insert the true date of issue or acceptance as the case may be and such insertion is valid. The instrument cannot be considered invalid merely because it is undated.

13. Bank Draft

It is an order issued by one bank to another bank or to its branch to pay a specified sum of money to a specified person or his order. It is a negotiable instrument like a cheque. Its payment cannot be stopped. It is also known as demand draft

14. Bills in Sets

Bill of exchange drawn in parts is called bills in sets. Some provisions relating to bills in sets are (a) each part must be numbered(b) each part must contain a provision that it shall continue to be payable only so long as the other parts remain unpaid (c) each part must contain reference to the other parts (d) each part must be signed and delivered by drawer (e) all the parts of the whole set need not be accepted(f) when a person accepts or indorses different parts of the bill in favour of different persons, he and the subsequent endorsers of each part are liable on such parts as a it were a separate bill (g) as between holders in due course of different parts of the same set, he who first acquired title to his part is entitled to the other parts and the money represented by the bill (Sec. 132-133)

15. Documentary Bill

When documents relating to the goods represented by the bill, e.g., bill of lading or railway receipt, marine insurance policy etc. are attached to a bill, the bill is called a documentary bill.

16. Clean Bill

When no documents of title relating to the goods and other documents are attached to the bill, it is called a clean bill.

17. Trade Bill

A bill may be trade bill or accommodation bill. When a bill is drawn, accepted, or endorsed for consideration, it is called a trade bill

18. Escrow

When a negotiable instrument is endorsed and delivered conditionally or for a special purpose only, e.g., as collateral security or for safe custody, and not for the purpose of transferring absolutely property therein, is called an 'Escrow'. In this case, the property in the instrument does not pass to the endorsee. The liability to pay in case of an escrow does not arise if conditions agreed upon are not fulfilled or the purpose for which the instrument was delivered is not satisfied. It does not affect rights of a holder in due course. (Sec.46)

Maturity of Negotiable Instrument

Maturity means the date on which the payment of instrument falls due.

The instrument payable on demand becomes payable immediately. The cheque is always payable on demand so there is no question of its maturity. An instrument which is not payable on demand becomes mature on the third day

after the day on which it is expressed to be payable. These 3 days are called Days of Grace.

Calculation of date of maturity

The maturity of a bill or note is calculated as under. (Sec.23-25)

1. If a note or bill is payable at stated number of months after date or after sight, or after a certain event, it becomes payable after 3 days of the corresponding date of the month after the stated number of months.
2. If the month in which the period terminates has no corresponding day, it becomes mature on the last day of the month.
3. The day on which the bill or note is drawn, or presented for acceptance, or sight, or the day on which the event happens, is excluded
4. When the day on which a note or bill is at maturity is a holiday, the instrument is deemed to be due on the next preceding business day
5. The expression 'public holiday' includes Sundays, and any other day declared by the Federal Government, by notification in the Official Gazette to be public holiday.

EXAMPLES

a. A bill, dated 30 January 2005 is made payable 1 month after date. The date of maturity falls on 3rd March 2005.
b. A bill, dated 31 July 2005 is made payable 2 months after date. The bill is at maturity on 3 October 2005.
c. A bill payable 30 days after sight is presented for sight on Ist March 2005. It falls due on 3 April 2005.
d. A bill, dated 11th January 2005, is payable 3 months after date. It falls due on 14th April 2005, which happens to be a Sunday. As such it will due on 13th April 2005, i.e. the preceding business day

Payment in Due Course

Payment in due course" means payment in accordance with the apparent tenor of the instrument in good faith and without negligence to any person in possession thereof under circumstances which do not afford a reasonable ground for believing that he is not entitled to receive payment of the amount therein mentioned. For a payment in due course the following conditions must be fulfilled: (Sec.10)

1. Apparent Tenor

The payment must be in accordance with the apparent tenor of the instrument. A payment made

instrument. A payment before maturity cannot be called a payment in due course. Thus, if a bill is paid before the last day of grace and is subsequently indorsed over, it is valid in the hands of holder in due course and the acceptor will be liable to pay again on the instrument. Similarly, a payment by a bank of a

post dated cheque before the date mentioned therein cannot be called as payment in due course.

2. Good Faith and Without Negligence

The payment must be made in good faith and without negligence. It must be made under the honest belief that the person demanding payment is legally entitled to it. The payer must not be guilty of any negligence in making payment. If the payer makes payments, without making necessary inquiry in case of suspicious circumstances, such payment cannot be called payment in due course.

3. Holder of Instrument

The payment must be made to a person in possession of the instruments who is entitled to receive payment. A payment without requiring production of the instrument is not a payment in due course. The payer must see the instrument before payment. He must also obtain the instrument on payment.

4. Legal Tender Money

The payment must be made in money only, unless the holder agrees to accept payment in any other medium or by cheque or draft.

SHORT ANSWER QUESTIONS

1. Define a promissory note?
2. Can a promissory note be made payable to the bearer on demand?
3. What is a bill of exchange?
4. How many parties are there in a bill of exchange?
5. What is a cheque?
6. How many types of cheques are there?
7. What is an open cheque?
8. What is a crossed cheque?
9. Who may cross a cheque?
10. What is the advantage of crossing a cheque?
11. What is an inchoate instrument?
12. What are foreign instruments?
13. What is an accommodation bill?
14. What is documentary bill?

TEST QUESTIONS

1. Define the term negotiable instrument. What are its essential characteristics?
2. Define a promissory note and also state its essential ingredients.
3. What is a bill of exchange? What are its essential elements and how does it differ from a promissory note.
4. Define a cheque. How does it differ from a bill of exchange?
5. What is meant by the term `crossing of a cheque'? What are the various types of crossing
6. What is the effect of crossing a cheque? Who can cross a cheque? What is the difference between `General' and Special crossing
7. What payment on a negotiable instrument is said to be payment in due course
8. Explain the following:
   - (a) Bills in Sets
   - (b) Accommodation Bill
   - (c) Fictitious Bill
   - (d) Documentary Bill

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PARTIES TO NEGOTIABLE INSTRUMENT

HOLDER

Definition

The holder of a promissory note, bill of exchange or cheque means the payee or endorsee who is in possession of it or the bearer thereof but it does not include a beneficial owner claiming though a benamidar. (Sec.8)

When the note, bill or cheque is lost and not found again, or is destroyed, the person in possession of it or the bearer thereof at the time of such loss or destruction shall be considered its holder.

Conditions

To be a holder, a person must satisfy the following conditions:

1. Entitled to Possess

In order to become holder the person must have a legal right to possess. The person must be named in the instrument as the payee or the endorsee or the bearer, if it is bearer instrument. However, the heir of a deceased holder is also a holder though he is not a payee, endorsee or bearer thereof. Thus a thief, or a finder or an endorsee under forged endorsement cannot become holder though he possesses the instrument.

2. Entitled to Receive the Amount

In order to become holder, the person must have the right to receive the amount of the instrument and give a valid discharge to the payer. Thus, one may be the bearer or the payee or endorsee but he may not be the holder if a court prohibits him from receiving the amount. For example, in case of a pro-note payable to A or order, A keeps the note with B, for safe custody. B will not become the holder although the instrument is in his possession.

3. Entitled to Negotiate

In order to become holder, the person must have the right to negotiate it further according to the law. (Sec. 57-B))

4. Entitled to Sue

In order to become holder, the person must also be entitled to sue on such instrument in his own name. If the person responsible to make payment refuses to pay, the person to become holder must have a right to sue in his own name for the payment. (Sec. 57-B)

HOLDER IN DUE COURSE

Holder in due course means any person who for consideration becomes the possessor of a promissory note, bill of exchange or cheque if payable to

bearer, or the payee or endorsee thereof, if payable to order, before it became overdue, without notice that the title of the person from whom he derived his own title was defective. (Sec. 9)

The title of a person to a promissory note, bill of exchange or cheque is defective when he is not entitled to receive the amount due thereon (Sec. 58)

Conditions

To become a holder in due course, the following conditions must satisfy:

1. Holder

He must be entitled to the possession of the instrument in his own name under a legal title. He must have a legal right to recover the amount from the parties liable to make payment.

2. Lawful Consideration

He must be the holder of the instrument against consideration. Consideration, however, need not be adequate. A person who gets instrument by way of gift cannot become holder in due course due to lack of consideration. The consideration must also be lawful.

3. Holder before Maturity

The holder who gets a negotiable instrument after its maturity cannot become holder in due course. But an accommodation bill can be negotiated after maturity to holder in due course. (Sec. 59)

4. Complete and Regular

In order to become a holder in due course, the instrument must be complete in all respects. If the instrument contains any alteration, which has not been confirmed by the drawer through signature, the possessor cannot become holder in due course. The possessor will not become a holder in due course if it is incomplete, e.g. not properly stamped.

5. Holder in Good Faith

He must get the instrument in good faith under the belief that the title of the transferor is not defective. He must find out the exact position of the transferor's title. He must take the instrument without any negligence. If he does not make proper enquiries at the time of taking instrument, he cannot be called a holder in due course.

Privileges

A holder in due course enjoys the following privileges:

1. Better Title

A holder in due course gets a better title than that of the transferor. Any defence on the part of the person liable that the instrument has been lost

obtained by offence or fraud or for an unlawful consideration cannot be pleaded against a holder in due course. (Sec. 58)

EXAMPLE

P obtains an instrument by fraud, he cannot sue. If P transfers it to R under circumstances which make R a holder in due course, R can sue. The drawee can defend on the basis of fraud against P but not against R.

2. Transfer of Good Title

A holder in due course transfers a good title to subsequent holders. Once an instrument passes through the hands of a holder in due course it becomes free from all defects. When somebody gets instrument from holder in due course, he can recover the amount from all prior parties provided he is not a party to the fraud. (Sec. 53)

EXAMPLE

A bearer cheque is stolen by A, who gives it to B, a holder in due course. B can receive the payment.

3. Incomplete Stamped Instrument

In case of incomplete stamped instrument, if the original payee fills more amount than he was authorized, he cannot recover the whole amount. But if the same instrument is transferred to the holder in due course, he can claim the whole amount provided it is covered by the stamp affixed thereon. (Sec. 20)

EXAMPLE

A signs and delivers a blank promissory note to B and asks him to fill in Rs. 500. B fills in Rs. 1000 the amount being covered by the stamp on the note; C acquires the note as a holder in due course. C can recover Rs. 1000 from A.

4. Prior Parties

A holder in due course holds the negotiable instrument free from any defect of title of prior parties, and free from defences available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon. (Sec. 53-A)

EXAMPLE

A draws and B accepts the bill payable to C or order. C endorses it to D and D to E, a holder in due course. E can recover the amount from A, B, C or D.

5. Fictitious Bill

The holder in due course is entitled to payment from the acceptor if he can show that the signature of the drawer and that of the first endorser are in the same handwriting. If the holder knows that the drawer's name is fictitious, he is not a holder in due course. The acceptor of a bill cannot as against a holder in due course say that the other parties to the bill were fictitious. (Sec. 42)

EXAMPLE

A draws a bill on B, payable to F, a fictitious person. B accepts and returns to A. A endorses to C by signing as F. C endorses to X, a holder in due course. X can recover from B by showing that the signatures of drawer and first indorser are in the same handwriting.

6. Instrument without Consideration

A contract made without consideration is void. But if a negotiable instrument goes into the hands of holder in due course, he is entitled to recover the amount on it, from any of the prior parties thereof. (Sec. 43)

7. Conditional Instrument

When a negotiable instrument is delivered to a person for security or safe custody, and not with the object of transferring ownership, the ownership in the instrument does not pass to the transferee. If such an instrument is negotiated to a holder in due course, the parties liable on the instrument shall remain liable to him. (Sec. 46)

EXAMPLE

A does not transfer the ownership of bill to B but delivers it for safe custody. B endorses to X, a holder in due course. It is valid bill in the hands of X.

8. Validity of Instrument

The maker of a promissory note and the drawer of a bill of exchange or cheque and the acceptor of a bill cannot in a suit thereon by a holder in due course, deny the validity of the instrument as originally made or drawn. (Sec. 120)

EXAMPLE

A bought a car from B and issued him a note. A felt that B got his consent by fraud. The note reached X, a holder in due course who claimed payment. A cannot refuse payment on the ground that contract was made by fraud.

9. Payee's Incapacity to Indorse

The maker of a note and acceptor of a bill payable to order cannot, in a suit by a holder in due course, deny the payee's capacity at the date of the note or bill to endorse it. A holder in due course can claim payment in his own name despite the payee's incapacity to endorse. (Sec. 121)

EXAMPLE

A draws a bill on B and endorses it to C, a person of unsound mind. C endorses to E, a holder in due course. In a suit by E, B cannot say that endorser was insane.

10. Capacity of Prior Parties

No endorser of a negotiable instrument shall, in a suit thereon by a subsequent holder, be permitted to deny the signature or capacity to contract of any prior party to the instrument (Sec. 122).

EXAMPLE

A, a minor draws a bill on B and endorses to C. C endorses to X, a holder in due course. In a suit by X, B cannot say that drawer is a minor.

in due course. In a suit by X, B cannot say that drawer is a minor.

JOINT HOLDERS

When in a bill there are several payees or endorsees, all of them are joint holders and none of them can alone negotiate or sue on it. All of them must join

to negotiate or sue on it. If one of them is dead, all the legal representatives of the deceased must join with the surviving payee or endorsee to negotiate the instrument or sue on it.

DRAWEE IN CASE OF NEED

Sometimes the name of an alternative drawee may be mentioned in a bill of exchange. Such a person will accept the bill, if the original drawee does not accept it or refuses to pay after acceptance. Such an alternative drawee is known as a `drawee in case of need'. If such a drawee is mentioned, a bill dishonoured by the actual drawee must be presented to alternative drawee before the drawer can be made liable. (Sec. 7)

ACCEPTOR FOR HONOUR

When a bill of exchange has been noted or protested for non-acceptance or for better security, and any person not being a party already liable thereon may, with the consent of the holder, by writing on the bill, accept the same for the honour of any party thereto. Such person is called an "acceptor for honour. The purpose of such acceptance is to save the honour of any party liable and to save the prestige of the drawer. A person desiring to accept for honour must declare that he accepts under protest. (Sec. 108-109)

Capacity of Parties

The position of different persons is as follows: (Sec. 26-29)

1. Minor

A minor can draw, endorse, deliver and negotiate a negotiable instrument so as to bind the other parties except himself. Minor may be a payee but not a party liable on it.

2. Insolvent

An insolvent cannot draw, make, accept or endorse a negotiable instrument. If he endorses a negotiable instrument under which he is a payee to a holder in due course, then the holder in due course can recover from all parties except the insolvent. An insolvent cannot sue on the instrument as his property comes in the possession of official receiver.

3. Person of unsound mind

A person of unsound mind is not liable upon a negotiable instrument to which he is a party, and as such a bill or note executed by a person of unsound mind is void as against him even in the hands of holder in due course while the other parties remain liable on it.

4. Joint Stock Company

A company can draw, accept, or endorse a negotiable instrument if it is authorized to do so by its Memorandum of Association. If it exceeds its powers, it

would be void and it will not be liable to even a holder in due course.

5. Partner

A partner acting in the firm name may bind the firm by the making drawing, accepting, endorsing or negotiating a negotiable instrument to the extent authorized by law relating to partnership for the time being in force.

6. Agent

An agent can draw, accept and endorse a negotiable instrument on behalf of his principal with the express authority taken from principal. An agent must sign the instrument indicating that he is signing on behalf of his principal otherwise he would be personally liable.

7. Legal representative

A legal representative of a deceased person who signs the negotiable instrument is personally liable thereon unless he expressly limits his liability to the extent of the assets recovered by him as such. He may avoid personal liability by writing the words "without recourse to me personally" against the estate of the deceased only.

Liabilities of Parties

The following is nature of the liabilities of various parties:

1. Drawer

The drawer of a bill of exchange or cheque is bound, in case of dishonour by the drawee or acceptor thereof, to compensate the holder, provided due notice of dishonour has been given to or received by him. (Sec. 30)

2. Drawee of cheque

The bank must honour the cheque of the drawer provided he has in his hands sufficient funds of the drawer. If the bank refuses to make payment without sufficient cause being shown, he must compensate the drawer for any loss or damage caused by such default. (Sec. 31)

3. Maker of note and acceptor of bill

The maker of a promissory note is bound to pay the amount of the instrument at maturity according to the apparent tenor of the note. As soon as he signs the note and delivers it, he becomes liable to the payee or the holder. He is the debtor and his liability is primary. The acceptor of a bill of exchange at or after maturity is bound to pay the amount thereof to the holder on demand. In default of such payment the maker or acceptor is bound to compensate any party to the note or bill for any loss or damage sustained by him and caused by such default. (Sec. 32)

4. Indorser

The indorser of a negotiable instrument must compensate the holder for any loss or damage caused to him by dishonour under the following conditions:

(Sec. 35)

a. If there is no contract to the contrary.

b. If the instruments are endorsed and delivered before maturity.

c. If the endorser does not exclude his own liability or makes conditional his own liability.

d. If due notice of dishonour is given to or received by such endorser.

5. Prior parties to a holder in due course

Every prior party to a negotiable instrument is liable thereon to a holder in due course until the instrument is dully satisfied. The prior party means the maker or drawer, the acceptor and all the intervening endorsers. It means the liability of the prior parties is joint and several. The holder in due course may recover the amount from one party or from all of them jointly. (Sec. 36)

6. Maker, drawer and acceptor as principals

The maker of a promissory note or cheque, the drawer of a bill of exchange until acceptance, and the acceptor are, in the absence of a contract to the contrary, respectively, liable thereon as principal debtors, and the other parties thereto are liable thereon as sureties for the maker, drawer or acceptor, as the case may be. (Sec. 37)

7. Prior party to subsequent party

As between the parties so liable as sureties, each prior party is, in the absence of contract to the contrary also liable thereon as a principal debtor in respect of each subsequent party. (Sec. 38)

8. Accommodation party

An accommodation party is liable on a negotiable instrument to a holder in due course, notwithstanding that when such holder took the instruments he knew such party to be an accommodation party. An accommodation party, if he was paid the amount thereof, can recover such amount from the party accommodated. (Sec. 38-A)

9. Suretyship

When a holder of an accepted bill of exchange enters into a contract with the acceptor to release him from liability, the sureties (principal debtors and the endorsers) will be discharged unless the holder has expressly reserved his right against them. (Sec. 39)

SHORT ANSWER QUESTIONS

1. Define holder.
2. Define holder in due course.
3. What conditions a person must satisfy to become a holder in due course?

4. Explain drawee in case of need.
5. What is the liability of drawer of a negotiable instrument?
6. What is the liability of maker of note and acceptor of bill?
7. What is the liability of endorser?

TEST QUESTIONS

1. Explain the term holder
2. Explain the term holder in due course.
3. Explain the privileges of a holder in due course under the Negotiable Instruments Act, 1881.
4. Write notes on the following (a) Drawee in case of need (b) Acceptor for honour
5. Discuss the liabilities of parties to negotiable instruments.

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PRESENTMENT OF NEGOTIABLE INSTRUMENT

Presentment means presenting a negotiable instrument for acceptance, sight or payment before acceptor, maker, drawee or other party liable thereon by the holder. There are three kinds of presentment.

1. Presentment for Acceptance
2. Presentment for Sight
3. Presentment for Payment

PRESENTMENT FOR ACCEPTANCE

Presentment for acceptance is necessary only in case of bill of exchange. It does not apply to a cheque or a pronote. The following bills need not be presented for acceptance:

1. A bill payable on demand.
2. A bill payable on the expiry of certain period after date.
3. A bill payable on the date of happening of a certain event.

However, the following bills must be presented for acceptance:

1. A bill payable at a specified period 'after sight' must be presented to the drawee for sight or acceptance to fix the maturity date of the bill.
2. A bill in which there is an express stipulation that it shall be presented for acceptance before presentment for payment. (Sec. 61)

Acceptance

Acceptance means acknowledgment of the sum mentioned in a bill by the drawee or any other person on his behalf. The drawee is not liable on the bill unless the bill is presented to him for acceptance and he actually accepts it. The drawee gives his consent in writing to the bill by signing it. He writes the word `accepted' and delivers back to the holder.

Essentials of valid Acceptance

The following are essentials of a valid acceptance:

1. It must be in writing.
2. It must be signed by the drawee or his agent.
3. It must appear on the bill.

4. The accepted bill must be delivered to the holder.

Types of Acceptance

The following are two types of acceptance:

1. General Acceptance

When the drawee accepts the liability to pay the amount mentioned in the bill in full without any condition, the acceptance is called general or absolute. The acceptor may mention the bank where payment shall be made and it does not amount to condition.

2. Qualified Acceptance

When the drawee accepts the bill subject to some condition, it is called conditional or qualified acceptance. For example, acceptance for an amount less than that mentioned in the bill or for a longer period than that specified in the bill is conditional acceptance.

The holder may refuse to take a qualified acceptance and treat the bill as dishonoured and sue the drawer. The holder may accept the qualified acceptance. If he accepts such qualified acceptance, without the consent of the prior parties, the prior parties are discharged from their liability. (Sec. 131-I)

Who May Present

Any one of the following can present the bill for acceptance:

1. The holder himself.
2. The authorized agent of holder.
3. The endorsee in case of endorsement.

Who May Accept

Any one of the following can accept the bill:

1. The drawee or his authorized agent.
2. All the drawees where there are several drawees. If some drawees are authorized to accept, then their acceptance is enough.
3. The legal representative in case the drawee is dead.
4. The official receiver in case the drawee has become insolvent.
5. The drawee in case of need if the original drawee refuses to accept.
6. An acceptor for honor i.e. any person who accepts the bill for the honor of any party liable on it.

Time of Presentment

The rules for time of presentment for acceptance are: (Sec. 61)

1. It must be presented on a business day within business hours.
2. It must be presented within a reasonable time if no time is specified.
3. It must be presented within that period specified in the bill.

Place of Presentment

If a particular place is specified in the bill, it must be presented for acceptance at that place. If at such a place the drawee cannot be found after

reasonable search on the due date for presentment, the bill is dishonoured. If no place is mentioned in the bill, it may be presented at the usual place of business of the drawee or his residence. (Sec. 61)

Presentment for Acceptance Necessary

A bill of exchange in order to fix the acceptor with liability must be presented for acceptance before it is presented for payment. (Sec.131-F)

Presentment for Acceptance Unnecessary

In the following cases, presentment for acceptance is unnecessary:

1. When the drawee is dead or insolvent, the instrument may be presented to the legal heirs or assignee.
2. When the drawee is a fictitious person.
3. When the drawee is incapable to contract.
4. When the drawee cannot be found after reasonable search.
5. When the presentment is irregular, acceptance has been refused on some other ground. (Sec. 131-G)

Effect of Non-Presentment

When presentment for acceptance is necessary and the holder commits default in making such presentment, all the parties thereon are discharged from their liability to such holder. (Sec. 61)

PRESENTMENT FOR SIGHT

Presentment for sight is necessary in case of note which is made payable at a certain period after sight to ascertain the maturity. The rules in this case are as under: (Sec. 62)

1. The expression after sight on a note means that the payment cannot be demanded till it is shown to the maker.
2. Where a note is made payable after sight, it is necessary to present it for sight in order to fix its maturity.
3. If the maker is not found, after reasonable search, presentment is excused and the instrument is treated as dishonored.
4. The presentment should be made during business hours on a business day.
5. In case of default in such presentation no party thereto is liable thereon to the person making such default.

PRESENTMENT FOR PAYMENT

The promissory note, bill of exchange and cheque must be presented for

payment to the maker, acceptor or drawee respectively by or on behalf of the holder. On default of such presentment the maker, acceptor or drawee, as the case may be, is not liable to pay. The rules regarding presentment for payment are as follows: (Sec. 64)

1. Hours of Presentment

It must be presented for payment during usual hours of business and if payable at a bank, during the usual banking hours. (Sec. 65)

2. Instruments payable after date or sight

A note or a bill of exchange made payable at a specified period after date or sight thereof must be presented for payment at maturity. (Sec.66)

3. Promissory note payable by Installments

A promissory note payable by installments must be presented for payment on the third day after the date fixed for payment of each installment. If any installment is not paid on such presentment, it has same effect as non-payment of a note at maturity. (Sec. 67)

4. Place of Presentment

a. If a bill is made or accepted at a specified place, it must be presented at that place for payment. (Sec. 68)

b. If a bill or note is drawn or accepted payable at a specified place, it must be presented for payment at the place in order to charge the maker or drawer thereof. (Sec. 69)

c. If the instrument does not indicate the place of payment, it must be presented at the place of business (if any) or at the usual residence of the maker, drawee or acceptor, as the case may be. (Sec. 70)

d. If the party liable for payment has no place of business or fixed residence or no specified place for presentment, the presentment can be made to him in person wherever he can be found. (Sec. 71)

5. Presentment of Cheque

a. In order to charge the drawer, a cheque must be presented at the bank upon which it is drawn before the relation between the drawer and his bank has been altered to the prejudice of the drawer. (Sec.72)

b. A cheque must be presented within a reasonable time after its issue in order to charge any person except the drawer. (Sec. 73)

c. Where the holder does not present the cheque within a reasonable time and the drawer suffers damage due to delay, the drawer will be discharged to the extent of such damage. (Sec. 84)

6. Instrument payable on demand

A negotiable instrument payable on demand must be presented for payment within a reasonable time after it is received by the holder. (Sec.74)

7. Agent, Legal representative or Assignee

Presentment for acceptance or payment may be made to the duly authorized agent of the drawee, maker or acceptor, as the case may be. Where the drawee, maker, or acceptor has died or has become insolvent, presentment

may be made to his legal representative or assignee as the case may be. (Sec. 75)

8. Excuse for delay in presentment

Delay in presentment for acceptance or payment is excused if the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, presentment must be made within a reasonable time. (Sec. 75-A)

9. Right of Holder

When a bill of exchange is dishonoured by non-acceptance, an immediate right of recourse against the drawer and endorser accrues to the holder, and no presentment for payment is necessary (Sec. 131-H)

Presentment for Payment unnecessary

The presentment of a negotiable instrument for payment is not necessary in the following cases and it is treated as dishonoured: (Sec. 76):

1. When the maker, drawee or the acceptor intentionally prevents the presentment of the instrument.
2. When the instrument is payable at the payer's place of business and he closes a place of business during the usual business hours.
3. When the instrument is payable at a specified place, the payer or his agent do not attend such place during the usual business hours.
4. When the instrument is not payable at any specified place and the payer cannot after due search be found.
5. When there is promise to pay notwithstanding non-presentment.
6. When the payer waives the presentment and promises to pay even though no presentment is made.
7. When the drawer could not suffer damage for want of presentment.
8. When the bill is dishonoured by non-acceptance.
9. When the drawee is a fictitious person.
10. When the drawer and the drawee is the same person.
11. When it is impossible to present the instrument.

Payment for honour

A payment is a payment for honour under the following conditions: (Sec. 113)

1. The bill must be dishonored for non-payment

1. The bill must be dishonored for non-payment.
2. The bill must be noted and protested for non-payment
3. The person paying or his agent must declare before the Notary Public the party for whose honour he pays.

4. The declaration to pay must be recorded by the Notary Public.
5. The payment for honour must be made for the honor of any party liable to pay on the bill
6. The payment for honour may be made by any person who is already not liable on the bill.

Rights of Payer for honour

Any person making payment for honour is entitled to all the rights in respect of the bill, of the holder at the time of such payment. He may recover from the party for whose honour he pays all sums so paid with interest thereon and all expenses properly incurred in making such payment. (Sec. 114)

SHORT ANSWER QUESTIONS

1. Mention the purposes of presentment of negotiable instrument.
2. What are the modes of acceptance?
3. Who can present?
4. Who can accept?
5. What are the rules regarding presentment of cheque?
6. Write note on payment of honor.

TEST QUESTIONS

1. Discuss the rules regarding `presentment for acceptance' of a negotiable instrument. State the circumstances under which such presentment is excused.
2. What is presentment? When is presentment for payment unnecessary in negotiable instruments?
3. Define acceptance. What are different types of acceptance?
4. Who can present and who can accept a bill of exchange.

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NEGOTIATION OF NEGOTIABLE INSTRUMENT

Introduction

Negotiation of an instrument is the process by which the ownership of the instrument is transferred from one person to another. The holder of the instrument does not wait for maturity but transfers it to his creditor to clear his debts. A negotiable instrument may be transferred by (1) negotiation or (2) assignment

1. Transfer by Negotiation

When a promissory note, bill of exchange or cheque is transferred to any person, so as to constitute that person the holder thereof, the instrument is said to be negotiated. As a result of negotiation, the holder will be entitled to receive the amount and sue for recovery. Only handing over of the instrument to a servant for safe custody is not negotiation. It must be transferred with the intention to pass title to the transferee. (Sec. 14)

Modes of Negotiation

There are two ways of negotiating a negotiable instrument:

a. Negotiation by Delivery

A negotiable instrument payable to bearer can only be transferred by delivery. It does not require the signature of the transferor. (Sec. 47)

b. Negotiation by Endorsement and Delivery

A negotiable instrument payable to order can be negotiated by the holder by endorsement and delivery. The holder must sign his name on the instrument for the purpose of negotiation and deliver it to the transferee. (Sec. 48)

2. Transfer by Assignment

The ownership of the instrument may be transferred by 'assignment' by written and registered document in accordance with the Transfer of Property Act.

DIFFERENCE BETWEEN NEGOTIATION AND ASSIGNMENT

The points of difference are stated below:

Negotiation	Assignment
1. Formalities	
Negotiation requires mere delivery of a bearer instrument and endorsement and delivery of an order instrument.	Assignment requires a written document signed by the transferor irrespective whether the instrument is

	bearer or order.
2. Notice of Transfer	
In negotiation a notice of transfer of debt is not required to be given to the debtor.	In assignment, a notice of transfer of debt is required to be given to the debtor.
3. Title	
In negotiation the transferee takes the negotiable instrument free from all defects in the title of the previous transferors.	In assignment, the assignee takes the instrument subject to the defects in the title of transferor.
4. Consideration	
Consideration is always presumed in the case of transfer by negotiation.	There is no such presumption in the case of transfer by assignment.
5. Sue	
In negotiation a transferee can sue the party in his own name.	In assignment an assignee cannot sue the party in his own name.

Who may Negotiate

Every maker, drawer, payee or endorsee, and where there are several makers, drawers, payees, or endorsees, all of them jointly may negotiate an instrument, provided the negotiability of such instrument has not been restricted by the express words used in instrument. Only the lawful possessor can negotiate the instrument (Sec. 51.)

Duration of Negotiability

The negotiable instruments can be negotiated by any person until payment. However, the maker, drawee or acceptor can negotiate it until maturity. (Sec. 60)

ENDORSEMENT

Definition

The process of transferring an instrument is called endorsement. An endorsement means signing the negotiable instrument on the back or face thereof or on a slip of paper (called allonge) annexed thereto for the purpose of negotiation.

The person making the endorsement is called an endorser and the person to whom the instrument is indorsed is called the endorsee

Essentials of Valid Endorsement

Following are the essentials of valid endorsement:

1. It must be signed by the endorser

1. It must be signed by the endorser.
2. It must be made by the maker or holder of the instrument.
3. It must be on the back or face of the instrument or on a slip of paper annexed thereto, such a slip is called allonge.

4. It must be made in ink. An endorsement in pencil or by rubber stamp is invalid.
5. If the endorser is illiterate person, he may indorse the instrument by affixing his thumb impression thereon.
6. In case of endorsement by affixing thumb impression, it should be attested by somebody.
7. It must be made with the intention of transferring the instrument to a third person to give him a right to recover money.
8. The intention must be clearly expressed thereon.
9. It must be completed by the delivery of the instrument.

Effect of Endorsement

When a negotiable instrument is indorsed and delivered to the endorser, the ownership of the instrument and the right of further negotiation passes to the endorsee. (Sec. 50)

Kinds of Endorsement

The endorsement may be of the following six kinds:-

1. Blank Endorsement

When the endorser signs his name only and does not specify the name of the endorsee, the endorsement is said to be in blank. This makes the instrument transferable by delivery and it becomes payable to bearer. It is also called general endorsement. (Sec. 16 & 54)

EXAMPLE

A bill is payable to X. X signs and endorses it without mentioning the name of any endorsee. It is a blank endorsement.

2. Full Endorsement

If the endorser, in addition to his signature, also adds a direction to pay the amount mentioned in the instrument to, or to the order of a specified person, the endorsement is said to be in full or special endorsement (Sec. 16)

EXAMPLE

B makes endorsement by writing the words, 'pay to A or order' and signs it, it is a full endorsement.

3. Partial Endorsement

A negotiable instrument cannot be indorsed for a part of the amount due on the instrument. In other words, a partial endorsement, which transfers the right to receive only a part payment of the amount due on the instrument, is

invalid. Where an instrument has been partly paid, it can be negotiated for the balance provided the fact of part payment is noted on the instruments. (Sec. 56)

EXAMPLES

a. A holds a bill for Rs. 5000 and endorses it in favour of B for Rs.2000 and in favour of C for Rs. 3000 is partial and invalid.

b. The maker of a note for Rs. 10000 pays Rs. 7000 and the fact is noted on the instruments. The holder can negotiate the note for the balance.

4. Restrictive Endorsement

When endorser by express words prohibits the endorsee from further negotiating the instrument or restricts the endorsee to deal with the instrument as directed by the endorser is called restrictive endorsement. (Sec. 50)

EXAMPLE

B the holder of the bill makes an endorsement on the bill saying 'pay C only' it is a restrictive endorsement, as C cannot negotiate the bill further.

5. Conditional Endorsement

If the endorser of negotiable instrument by express words in the endorsement, makes his liability dependent on the happening of a specified event, although such event may never happen, such endorsement is called a conditional endorsement (Sec. 52)

In conditional endorsement the liability of the endorser arises only upon the happening of the event specified. If such event does not happen in specified time, the liability of endorser comes to an end. The endorsee cannot claim payment from prior parties. He can claim payment from the original party on maturity.

EXAMPLE

A, the holder of the bill, makes an endorsement on the bill saying 'Pay B or order when B qualifies B. Com.'

6. Sans Recourse Endorsement

All parties to a negotiable instrument are liable to the endorsee. However, when the endorser expressly excludes his own liability on the negotiable instrument to the endorsee or any subsequent holder in case of dishonour of the instrument, the endorsement is known as sans recourse endorsement. (Sec. 52)

EXAMPLES

a. 'Pay X or order sans recourse.'

b. 'Pay B or order at his own risk.'

7. Facultative Endorsement

When the endorser expressly gives up some of his rights under the negotiable instrument, the endorsement is called facultative endorsement.

In this case the endorsee is relieved of his duty to give notice of his dishonour to the endorser. The endorser remains liable to endorsee for non payment, even though no notice of dishonour has been given to him.

EXAMPLE

'Pay X or order, notice of dishonour waived' is a facultative endorsement.

Negotiation Back

Negotiation back is a process under which an endorser becomes its holder before its maturity. He has no remedy against the intermediate parties to whom he was previously liable. (Sec. 52 P-2)

Instruments obtained by Unlawful Means

1. Lost instrument

When the holder of a negotiable instrument loses it, the finder gets no title to it. The finder cannot lawfully transfer it. The owner can recover it from the finder. But if the instrument is transferable by delivery, a holder obtaining it from the finder in good faith for consideration and before maturity can recover payment from all the parties. If the instrument is transferable by endorsement, the finder cannot negotiate it except by forging the endorsement.

2. Stolen instrument

The position of thief of an instrument is the same as that of a finder of lost instrument. The thief is open to criminal prosecution. A thief gets no title to an instrument. If he receives payment on it, the holder can sue him for the recovery of the amount. But if an instrument payable to bearer is stolen and is transferred to a holder in due course, the owner must suffer.

3. Instrument obtained by fraud

A person who obtains an instrument by fraud, undue influence or coercion, he is not entitled to claim payment as his title is defective. But if such an instrument passes into the hands of a holder in due course the plea of fraud cannot be used against him.

4. Instruments obtained for an unlawful consideration

An instrument given for an illegal consideration is void and does not convey a valid title to the holder. He cannot enforce payment against any party thereto. But if such an instrument passes in the hands of a holder in due course, he obtains a good title.

5. Forged instrument

A forged instrument is that on which the signature of drawer, maker or

acceptor is forged. A forged endorsement is regarded as no endorsement. It is ineffective and its holder cannot recover the amount due on it. It does not confer any right or create any liability. If the holder of forged instrument obtains payment on such instrument, the person making the payment can recover the amount.

6. Forged endorsement

If an endorsement is forged, the endorsee acquires no title to the instrument even if he is a bonafide purchaser. While, if the instrument is a bearer instrument or has been endorsed in blank and there is a forged endorsement, the holder gets a good title because holder derives title by delivery and not by endorsement.

7. Instruments without consideration

A negotiable instrument made, drawn, accepted, endorsed or transferred without consideration, creates no obligation of payment between the parties to the transaction. But if the instrument is transferred to a holder for consideration, such holder can recover the amount due from the transferor for consideration or any prior party. (Sec. 43)

SHORT ANSWER QUESTIONS

1. When is a negotiable instrument said to be negotiated?
2. Who can negotiate an instrument?
3. What is meant by endorsement?
4. What are the essentials of a valid endorsement?
5. What is a blank endorsement?
6. What is a special endorsement?
7. What is a conditional endorsement?
8. What is negotiation back?
9. How is an instrument payable to bearer negotiated?
10. What is the effect of endorsing a bill of exchange?

TEST QUESTION

1. Explain clearly what is meant by negotiation. State the difference between negotiation and assignment?
2. What is an endorsement? Explain the different kinds of endorsement?
3. Discuss the rules regarding negotiation of a lost instrument, a forged instrument, an instrument obtained by fraud, or for unlawful consideration.

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DISHONOUR OF NEGOTIABLE INSTRUMENT

A negotiable instrument is said to be dishonoured when the drawee refuses to accept it or to make payment. A negotiable instrument may be dishonoured by (1) non-acceptance or (2) non-payment.

Dishonour by Non-Acceptance

A bill is treated as dishonoured in any of the following cases:

1. When the drawee does not accept the bill within 48 hours from the time of presentment for acceptance.
2. When one or more drawees refuse to accept the bill.
3. When presentment is unnecessary and the bill is not accepted.
4. When the drawee is incompetent to contract.
5. When the drawee gives the conditional acceptance.
6. When the drawee is a fictitious person.
7. When the drawee cannot be found after reasonable search (Sec. 61)
8. When a drawee in case of need is named in a bill, the bill is deemed to be dishonoured when it is dishonoured by such drawee. (Sec. 115)

Dishonour by Non-Payment

A note, bill or cheque is dishonoured due to non payment in the following cases:

1. When a promissory note is properly presented to its maker for payment, and he fails to make the payment.
2. When a bill of exchange after its acceptance is properly presented to the acceptor for payment, and he fails to make the payment.
3. When a cheque is presented to the bank for a payment and it fails to make payment.
4. When presentment of negotiable instrument is not required and it remains unpaid on maturity.

Consequences of Dishonour

Following are the consequences of dishonour of negotiable instrument:

1. The holder becomes entitled to sue the parties liable to pay thereon.
2. The drawer of the cheque, maker of note, acceptor and drawer of bill and all endorsers are liable to a holder in due course.

3. The holder must give a notice of dishonour to all parties to sue.

Notice of Dishonour

When a negotiable instrument is dishonoured by non-acceptance or by non-payment, the holder of the instrument must give a notice of dishonour to all the prior parties to make them liable on the instrument. If he does not give this notice, all the prior parties other than the maker or acceptor are discharged of their liability. (Sec. 93)

Notice by Whom

The following persons must give notice of dishonour (Sec. 93, 95):

1. The holder of the instrument
2. The authorized agent of the holder
3. The party who is liable on the instrument.
4. The party receiving the notice of dishonour to all prior parties.

Notice to Whom

The notice of dishonour must be given to the following: (Sec.94-97)

1. To all parties except the maker of a note, acceptor of bill or drawee of a cheque.
2. To the authorized agent of the party.
3. To any one of the person if several persons are jointly liable.
4. To legal representative if a person liable dies.
5. To official assignee if the person liable is declared insolvent.

Mode of Notice

1. The notice of dishonour may be oral or in writing.
2. It may be sent by post.
3. It may be in any form but it must inform the party to whom it is given that the instrument has been dishonoured. (Sec. 94)

Reasonable time

A notice of dishonour must be given within a reasonable time. The term reasonable time depends upon the nature of the instrument, the usual course of dealings, the distance between parties and nature of communication. In calculating reasonable time public holidays should be excluded (Sec. 105-106)

Place of Notice

The place of business or (if such party has no place of business) the

The place of business or (if such party has no place of business) the residence of party is the place where the notice is to be given. If the person sending the notice does not know the address of the person to whom the notice is to be given, he must try to find out his address. But if the party after due search is not traceable, notice of dishonour is dispensed with.

Notice of Dishonour Unnecessary

The notice of dishonour is unnecessary in the following cases: (Sec. 98)

1. When an endorser writes at the time of endorsement, no notice of dishonour is required.
2. When the drawer of a cheque has stopped the payment of a cheque.
3. When the party charged could not suffer any damage for want of notice of dishonour.
4. When the party entitled to notice could not be found.
5. When the drawer also happens to be the acceptor.
6. In case of promissory note which is not negotiable.
7. The party entitled to notice promises to pay unconditionally
8. When the notice could not be given due to unavoidable circumstances.

Noting

When a note or a bill has been dishonoured by non-acceptance or non-payment, the holder may cause such dishonour to be noted by a Notary Public upon the instrument, or upon a paper attached thereto. For this the holder takes the bill or note to the Notary Public who makes a demand for acceptance or payment upon the drawee or acceptor or maker formally and on his refusal to do so notes the same on the bill or note. Thus, Noting is the authentic and official proof of presentment and dishonour of a negotiable instrument. Noting does not require in case of dishonour of a cheque because, the bank while refusing payments returns the cheque giving reasons in writing for the dishonour of the same. Such a cheque itself acts as a proof of dishonour. It contains the fact of dishonour, the date of dishonour, the reasons for dishonour the notary's charges and notary's signature. (Sec. 99)

Protest

Protest is a formal certificate of dishonour issued by the notary public to the holder of the bill or note, on his demand. Noting is merely a record of dishonour on the instrument itself. It is a proof that a bill or note was presented for acceptance, payment or for better security but was dishonoured. The notary public cannot grant protest unless presentment is made by himself or by his agent. The advantage of protest is that the court on proof of the protest shall presume the fact of dishonour. The following are the contents of protest. (Sec. 100)

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

2. The name of the person for whom and against whom the instrument has been protested;
3. The fact and reasons for dishonour.

4. The time and place of demand and dishonour;
5. The signature of the notary public;
6. In acceptance for honour or payment for honour the names of the person by whom it is accepted or paid.

Protest for Better Security

When the acceptor of a bill becomes insolvent, the holder need not wait till maturity of the bill. He may demand better security to ensure its payment on due date. If on demand by the holder, the acceptor refuses to give better security, the bill may be treated as dishonoured. But the suit may be filed only after maturity. Such certificate is called a protest for better security. (Sec. 100)

Compensation for Dishonor

Following are the rules for determining compensation: (Sec. 117)

1. The holder is entitled to the amount due upon the instrument, together with the expenses incurred in presenting, noting and protesting it.
2. Where the person charged resides at place, different from that at which the instrument was payable, the holder is entitled to receive the sum at the current rate of exchange between the two places.
3. An endorser who has paid the amount can get the amount with interest at 6 % per annum from the date of payment until realization together with expenses caused by dishonour and non payment.
4. When the person charged and endorser reside at the different places the endorser is entitled to receive such sum at the current rate of exchange between two places.
5. A party is entitled to compensation may draw bill upon the party liable to compensate him payable at sight or on demand, for the amount due to him with all expenses properly incurred by him.

Dishonestly issuing Cheque

Whoever dishonestly issues a cheque towards re-payment of a loan or fulfillment of an obligation which is dishonoured on presentation, shall be punishable with imprisonment which may extend to three years, or with fine, or with both, unless he can establish, for which the burden of proof shall rest on him, that he had made arrangements with his bank to ensure that the cheque would be honoured and that the bank was at fault in not honoring the cheque. (Sec. 489-F-PPC Act 1860)

Discharge of Parties from Liability

The maker, acceptor or endorser respectively of a negotiable instrument

The maker, acceptor or endorser respectively of a negotiable instrument is discharged from liability in the following ways.

1. Cancellation

When the holder of a negotiable instrument cancels the name of any of the party liable on the instrument to discharge him from liability, such party and all subsequent endorsers are discharged from liability. (Sec. 82 (a))

2. Release

If the holder of an instrument releases any party, the party so released is discharged from liability. (Sec. 82 (b))

3. Payment

When a party liable on the instrument makes the payment in due course at the maturity, all the parties to the instrument stand discharged. (Sec. 82 (c))

4. Allowing Drawee

If the holder of a bill allows the drawee more than 48 hours, excluding public holidays, to consider about the acceptance, all previous parties not consenting to such allowance are discharged from liability to the holder. (Sec. 83)

5. Delay in Presentment of Cheque

If the holder of a cheque fails to present it for payment within reasonable time of its issue, and in the meanwhile the bank fails causing damage to the drawer, the drawer is discharged from liability as against the holder. (Sec. 84(1))

6. Cheque Payable to Order

When a cheque payable to order purports to be endorsed by or on behalf of the payee, the bank is discharged by payment in due course. When a cheque is originally expressed to be payable to bearer, the drawee is discharged by payment in due course to the bearer, thereof notwithstanding that any such endorsement purports to restrict or exclude further negotiation. (Sec. 85)

7. Draft by one Bank on another

Where a demand draft is drawn by one office of the bank upon another office of the same bank, for a sum of money payable to order, the bank is discharged by payment in due course. (Sec. 85 (A))

8. Accepting Qualified Acceptance

If the holder of a bill agrees to qualified acceptance without the consent of prior parties, all the prior parties are discharged from liability. (Sec. 86)

9. Operation of Law

A party may be discharged from his liability on a negotiable instrument by operation of law. For example, when a person is declared insolvent, his liability remains restricted to the value of his estate.

10. Material Alteration

A material alteration of a negotiable instrument renders the same void against persons who were parties thereto before such alteration, unless they have consented to the alteration. (Sec. 87)

11. Payment of Altered Instrument

Where a negotiable instrument has been materially altered but does not appear to have been so altered, or where a cheque is presented for payment which does not at the time of presentation appear to be crossed, payment on such an instrument discharges the party liable provided he makes payment according to the apparent tenor of the instrument and in due course. Such a payment cannot be questioned even if it is proved that the instrument has been altered or that the cheque was originally crossed. (Sec. 89)

12. Notice of Dishonour

If the holder of the instrument fails to give notice of dishonour to the party liable on the instrument, such party is discharged from liability. However, this rule does not apply to the maker, acceptor or the drawee of a note, bill or cheque respectively.

13. Non-presentment for Acceptance

When presentment of bill for acceptance is necessary and the holder commits default in making such presentment, all the parties thereon are discharged from liability to the holder who makes such default. (Sec. 61)

SHORT ANWSER QUESTIONS

1. What is noting?
2. What is protest?
3. What are the contents of the protest?
4. What is protest for better security?
5. What is penalty for bouncing of cheque?

TEST QUESTIONS

1. When maker, acceptor or endorser of a negotiable instrument is discharged from his liability.
2. In what different ways may a negotiable instrument be dishonoured?
3. How and when should a notice be served on a bill being dishonoured by either non-acceptance or non-payment?
4. What is meant by dishonour by non-acceptance and non-payment?

5. What are the rules for determining the amount of compensation payable in case of dishonour of the instrument?
6. What is a notice of dishonour? To whom and by whom such notice is given?

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BANKER AND CUSTOMER

Banker

A banker means a person transacting the business of accepting, for the purpose of lending or investment, of deposits of money from the public repayable on demand or otherwise, and withdrawable by the cheque, draft, order or otherwise, and includes any Post Office Saving Bank. (Sec. 3-B)

Customer

The term customer of bank is not defined anywhere. A person who has an account in a bank is said to be a customer of the bank.

Rights and obligation of Banker

The following are rights and obligations of the banker:

1. The banker must honour cheques drawn by the customer.
2. The banker having sufficient funds of the drawer in his hands must pay the cheque. In default of such payment, the banker must compensate the drawer for any loss.
3. The banker must collect cheques and draft on behalf of the customer.
4. The banker is bound to act according to directions of the customers.
5. The banker must keep records of all the transactions of the customer.
6. The bank must not disclose the customer's account and his affairs.
7. The bank has general lien. The banker can retain the goods and securities of the customer for all the dues of the banker.
8. The banker can claim from the customer the incidental charges etc.
9. When the customer has two or more accounts in the bank, the banker can set off the debt items from the credit items when payable.

Protection to Paying Banker

The rules regarding protection are as follows:

1. Protection in Order Cheques

The paying banker shall be discharged from liability if he makes payment

of an order cheque to the payee or the apparent endorsee thereof in good faith and without negligence even though subsequently it may turn out that such an endorsement was forged. (Sec. 85-1)

2. Protection in Bearer Cheques

Where a cheque is originally payable to bearer, the banker is discharged if he makes the payment in due course to the bearer of the cheque. Such protection is available also when the endorsement restricts further endorsement appears on such cheque. (Sec. 85-2)

3. Protection in Drafts

A draft, that is an order to pay money drawn by one office of a bank upon another office of the same bank for a sum of money payable to order on demand, purports to be endorsed by or on behalf of the payee, the bank is discharged by the payment in due course. (Sec. 85-A)

4. No Protection in Forged Signature

A banker is not protected even by a payment in due course if the drawer's signature is forged. He cannot debit the customer's account with such payment and will have to bear the loss.

Protection to Collecting Banker

A collecting banker is one who receives the payment of a crossed cheque on behalf of his customer. If the collecting banker has collected a cheque on behalf of a person whose title to the cheque was defective, he would not be liable to the true owner, provided he proves that: (Sec.131)

1. He acted in good faith and without negligence;
2. The cheque was already crossed before it reached his hands;
3. He received the payment on behalf of a customer only;
4. The cheque must be crossed generally or specially to himself.

Banker Must Dishonour Cheque

The bank is bound to dishonour the cheque in the following cases:

1. Customer Countermands Payment

When the customer issues instructions to the bank not to honour a particular cheque issued by him, the banker is bound to comply with such instructions. The countermand order must, be given well in time so that the banker may not make payment of the cheque.

2. Garnishee Order

Garnishee order is an order of the court by which the court attaches the

balance of the customer's account. On receipt of such order, the banker cannot make payment out of such account. A customer in case of garnishee order cannot operate the account.

3. Death, Insolvency or Insanity of Customer

When the banker receives a notice that the customer has died or become insolvent or insane his authority to draw cheques terminates and the banker must not honour the cheques.

4. Notice of Assignment

When a customer assigns the money of his account to some other person or for any other particular thing and gives notice to the banker, the banker must not make payment from his account.

5. Defective Title

When the banker becomes aware of the defective title of the person presenting the cheque, the banker must refuse to honour the cheque.

6. Loss of Cheque

When the customer has informed the banker about the loss of his cheque, the banker must not honour the same if some person who happens to come in possession thereof makes its presentment.

7. Irregular Cheque

When there is material alteration in the cheque or the signature of the drawer does not tally with the specimen signature kept in the bank, the banker is not bound to honour the cheque.

8. Closing of Account

On receipt of the notice for closing the account from the customer, the banker must not honour cheques against such closed account.

Banker May Dishonour Cheque

The bank may dishonour the cheques in the following cases:

1. When the cheque is post-dated e.g. when a cheque of 10th August 2009 is presented on 5th August 2009.
2. When the balance in the customer's account is insufficient to meet the cheque and there is no overdraft arrangement.
3. When the funds of the customer are set aside for some special purpose and the fund are not available for payment.
4. When the cheque is not properly presented, for example, it is presented after banking hours etc.
5. A cheque must be presented for payment within 6 months from the date of its

issue. If a cheque a presented after 6 months, the banker may refuse payment.

6. When the amount of a cheque is different in words and figures, etc.

7. If the bank has a general lien on the customer's funds and there are no funds available after the exercise of its lien to honour the cheque.
8. When the cheque is mutilated.
9. When the customer's signature does not tally with his specimen signature.

SHORT ANSWER QUESTIONS

1. What is a banker?
2. What is meant by the term banker?
3. When does the person become a customer of a bank?
4. Name three cases when a banker may dishonour his customer's cheque.
5. Name three cases when a banker must dishonour his customer's cheque.
6. What is a garnishee order?

TEST QUESTIONS

1. What are the rights and obligations of the banker?
2. Discuss the law relating to the protection granted to the collecting banker
3. Explain the cases in which a banker may refuse to honour a customer's cheque.
4. Explain the cases in which a banker must refuse to honour a customer's cheque
5. Discuss the law relating to the protection granted to the paying banker.

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CARRIAGE OF GOODS BY LAND

Introduction

The law relating to carriage of goods may be studied under three heads: (1) Carriage by Land (2) Carriage by Sea (3) Carriage by Air. The law relating to carriage of goods by land is contained in (1) The Common Carriers Act, 1865 and (2) The Railways Act, 1890.

Contract of Carriage

A contract whereby a person or company agrees to carry goods or people from one place to another in return of payment is called a contract of carriage.

Definition of Carrier

The party or person who carries goods or passengers for payment whether by land, air or sea is called the Carrier.

Kinds of Carrier

The carrier may be of the following three kinds:

COMMON CARRIER

Definition

The Carriers Act, 1865 defines a Common Carrier as "any individual, firm or company (other than the government) engaged in the business of transporting for hire, goods from place to place, by land or inland navigation, for all persons indiscriminately."

A common carrier is one who undertakes to carry goods for hire to transport from one place to another the goods of anyone willing to employ him. A person who reserves the right of accepting or rejecting the offers of goods for carriage is not a common carrier.

Features

The following are features of common carrier:

1. Common Carrier

A common carrier may be an individual, firm or a company excluding Government. Thus, Railways being owned by the Government cannot be called as common carrier although the Railways are engaged in transporting goods.

Similarly post office is not a common carrier. It is not the agent of sender. It has its own separate Act.

2. For Hire

A common carrier is one who is engaged in the business of transporting goods for hire. It means that anyone who carries goods occasionally or free of charge is not a common carrier. Similarly a carrier who carries passenger is not a common carrier.

3. Regular Business

A common carrier carries goods as a regular business to earn money. If a carrier carries goods occasionally, it is not a common carrier.

4. Inland Navigation

The carriage must be made by land or inland navigation (waterways). By the term inland navigation means the carriage of goods by boats, steamers that sail in canals and rivers.

5. All Persons Indiscriminately

A common carrier is bound to carry the goods of any person who offers his goods for carriage and pays for the service, without any discrimination. If a carrier reserves the right to reject an offer even if there is accommodation in the carriage and the offeror is ready to pay the freight, he is not a common carrier.

Exceptions

A common carrier is one who is bound to carry the goods of any person who employs him. However, a common carrier can refuse to carry goods in the following circumstances:

1. If the vehicle is already full.
2. If goods are of such nature which he does not carry.
3. If goods are of dangerous nature and may result some extra-ordinary risk.
4. If the destination to which the goods are to be transported is not on his normal route.
5. If reasonable charges for the carriage are not paid.
6. If goods are not properly packed.
7. If goods are offered at an unreasonable hour.
8. If the consigner refuses to disclose the nature of goods offered for carriage.

PRIVATE CARRIER

A private carrier is one who does not make general offer but carries goods occasionally. He carries goods for a particular person on some terms mutually agreed upon. He is not bound to carry goods for all indiscriminately. He can accept or reject the offer for carriage of goods. In other words, when a person does the work of carrying, not as a regular business but as a casual

contractor or reserves the right to accept or to reject the goods offered at his own discretion, he is a private carrier. The Common Carriers Act, 1865 does not

govern him. His position is that of a bailee. He is therefore, governed by the Contract Act, 1872.

DIFFERENCE BETWEEN COMMON CARRIER & PRIVATE CARRIER

The following are points of difference between the two:

Common Carrier	Private Carrier
1. Act	
The Common Carriers Act, 1865, governs a common carrier.	A private carrier is governed by the contract Act, 1872.
2. Persons	
A Common Carrier carries the goods of all persons indiscriminately.	A Private Carrier carries the goods of a particular person on some special terms mutually agreed upon.
3. Regular Business	
A common carrier carries the goods as a regular business.	A private carrier carries the goods as a casual occupation and not as a regular business.
4. Rejection of Offer	
A common carrier cannot reject the offer of goods for carriage. He can reject the offer only under some special circumstances.	A Private carrier can reject the offer of carriage of goods without any reason.
5. Damages	
If the common carrier refuses to carry goods without any sufficient reason, he can be sued and made liable for damages.	A private carrier cannot be sued for damages on his refusal to carry the goods.
6. Hire	
A common carrier carries the goods for hire.	A private carrier may carry the goods for hire or free of charge.
7. Terms	
A common carrier has fixed terms of carriage of goods.	A private carrier determines the terms of carriage of goods through negotiation.

Rights of Common Carrier

The following are the rights of common carrier:

1. Remuneration

A common carrier is entitled to the agreed charges for his work. If charges have not been agreed, he is entitled to reasonable charges for his services. He can demand payment of hire in advance and if he is not paid, he

may refuse to carry.

2. Retain Goods

He has a right to retain the goods and refuse delivery thereof until his charges of hire are paid. If no charges are paid he can exercise particular lien over the goods. The lien cannot be enforced if the carrier has agreed to give credit.

3. Sue others

The carrier has a special right regarding the goods delivered to him for carriage. He can file a suit against any person who wrongfully deprives him of goods or injures him.

4. Recover Expenses

If it is necessary to incur some expenses for the safety of goods from extra ordinary dangers such as flood, the carrier ought to incur it. He can recover such expenses from the owner.

5. Recover Damages

He can recover damages from the consignor if the goods are of dangerous nature or not properly packed and the carrier suffers injury there from. He can recover damages if such damages cause any damage to vehicle, etc.

6. Sell Goods

On refusal to accept delivery of the goods by the consignee, the carrier would be entitled to take such steps as may be deemed reasonable in the circumstances of the case. He can even sell the goods if the same are of perishable nature or store them in a warehouse if the condition of the goods may so allow. In that case he can recover warehouse expenses etc. from the consignor.

7. Give Concession

He has a right to give some concession to any person. However, he cannot charge an unreasonable payment from any customer.

8. Refuse to Carry Goods

He has a right to refuse to carry the goods under certain circumstances. He can refuse to carry the dangerous nature of goods. He can also refuse to carry goods which he does not normally carry.

9. Limit his Liability

A common carrier has a right to limit his liability by entering into a special contract under certain circumstances.

Duties of Common Carrier

The following are duties of a common carrier:

1. Receive Goods

A common carrier is bound to receive for carriage all goods offered, provided he has convenience to carry them, and the goods are of a proper kind, and the employer is ready to pay reasonable hire.

2. Carry Goods

A common carrier is bound to carry goods of all persons who employ him for the carriage of goods. He can refuse to carry the goods under certain circumstances. If he refuses to carry the goods of a person in cases other than those discussed above, he is liable for damages

3. Follow Route

A common carrier is bound to carry goods delivered to him for carriage by his usual route, which may or may not be his shortest route. He can, however, deviate from the ordinary route if that becomes necessary for the safe carriage of the goods.

4. Deliver Goods

The carrier must deliver the goods at the agreed time or where, no time is fixed, within a reasonable time. He should use reasonable diligence to avoid delay. He is not responsible for causes of delay beyond his control.

5. Carry Goods Safely

He must carry the goods with reasonable care. It is the duty of common carrier to ensure their safety during the carriage and until delivery. He is responsible to the owner for safe and sound delivery.

6. Provide Suitable Carrier

It is also his duty to load the goods properly in the vehicle so that the goods may be carried to the destination safely.

7. Deliver at Proper Place

He must deliver the goods to the consignee. He is not bound to deliver the goods at the house of the consignee unless; an agreement to that effect has been made. If no place is mentioned he must deliver the goods at the customary place of consignment.

8. Right Person

It is the duty of a common carrier to use reasonable care to deliver the goods to right person in accordance with the usual course of business.

9. Obey Instructions

When the goods are in transit, the carrier is bound to obey the instructions of the consignor as to alteration of delivery.

Liabilities of Common Carrier

1. Under English Common Law

According to the English Common Law, a common carrier is liable as an insurer of the goods. He is liable for damages to the goods whether he is negligent or not. He is not responsible under the following circumstances:

a. Act of God

The Common carrier is not liable for losses due to an act of God. Usually the lost caused by lightening, earthquake, flood etc. are due to an act of God.

b. Enemies of State

The carrier is not liable for losses caused by enemies of the state. The enemies of the state mean alien enemies at war with Pakistan. It does not include losses due to thieves, strike etc.

c. Inherent Defect

The common carrier is not liable for losses arising from inherent defects e.g. evaporation of liquid material, perishing of fruits and vegetables, disease in animals.

d. Defective Packing

The carrier is not liable if the loss arises due to defective packing of goods.

e. Fraud or Fault of Consignor

If the consignor is guilty of fraud, the carrier is not liable for any loss. He is also not liable for damages arising from the faults of the consignor or his agent.

2. Under Carrier Act, 1865

The liability of a Common Carrier is similar to that of a bailee. The carrier is liable only if the loss occurs due to his fault or negligence. If he is not negligent, he is not liable. The goods for the purpose of the carrier's liability are classified into two categories namely scheduled goods and non-scheduled goods.

a. Scheduled Goods

The scheduled goods are those which include valuable goods such as gold, silver, precious stones, currency, title deeds etc. The carrier cannot be held liable in spite of negligence on his part, if the consignor has not declared the value and description of such goods. But when the consignor discloses the description and value of the scheduled goods, the carrier will be liable for their loss. He cannot limit his liability even by any special-agreement.

b. Non-scheduled Goods

The goods not included in list are called non-scheduled goods. The common carrier is not liable for any loss or damage to such goods unless it is proved that there was negligence on the part of the common carrier. The

common carrier, can limit his liability by a special agreement with the consignor. Such a liability can be increased by an agreement.

c. Criminal Act

The carrier is always liable for loss or damage to the goods caused by any criminal act of the carrier himself, his servant or agent and for unlawful acts or misfeasance i.e. he converts the goods to his own, use or knowingly delivers the goods to a wrong person. Such a liability cannot be avoided by a special agreement with the consignor.

RAILWAYS AS CARRIER

Railway is owned and run by the Government so it is not a Common Carrier. The carriage of goods by railways is governed by Railways Act, 1890.

Definition of Railway

According to the section 3 of the Railways Act 1890 the word "Railway" means a railway or any portion of a railway for the public carriage of passengers, animals or goods. Railways may transport goods in freight trains or in passenger trains.

Forwarding Note

Every consignor of goods or animals has to prepare a note called forwarding note or consignment note. It contains the description of goods, number of packages, weight, names and addresses of the consignor and consignee, liability of the railway and freight paid or freight to pay. In freight paid, the freight is paid by consignor. In freight to pay, the consignee has to pay the freight. The terms and conditions under which the goods are transported are printed on the back of the note. (Sec. 72)

Railway Receipt (R/R)

On submission of the forwarding note to the railway 'parcel office' the consignor is given a receipt acknowledging the goods with an undertaking to carry them in accordance with the terms and conditions given on the back of the forwarding note. It is a document of title to the goods. The consignor is required to send R/R to the consignee, so that he can take the delivery of the goods.

Duties of Railway Administration

The following are the duties of railway administration:

1. Provide Facilities

It is the duty of railway administration to provide all reasonable facilities for the receiving, forwarding and delivering of traffic without unreasonable delay.

2. Treat Equally

It is the duty of railway administration not to give any undue or unreasonable preference or advantage to or in favour of, any particular person or any particular description of traffic, in any respect whatsoever or subject to

any particular person or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

3. Follow Directions

It is the duty of railway administration to follow directions of Federal Government for transport of goods in the public interest. The railway is bound to carry goods of every person who pays freight and follow the regulations regarding packing etc; without unreasonable delay and any partiality.

Liabilities of Railway Administration

1. Railway's Risk

If the consignment is at 'railway's risk' the railway is responsible for any loss, destruction in transit arising from any cause except (a) act of God (b) act of war (c) act of enemies (d) arrest, restraint, or seizure under legal process (e) orders or restrictions imposed by Federal or Provincial Government (f) act or omission or negligence of the consignor or the consignee (g) natural deterioration or wastage in the bulk or weight in the goods (h) hidden defects in the goods (i) fire, explosion and any unforeseen risk. (Sec. 73)

2. Owner's Risk

If the goods are carried by the railway at 'owner's risk' it is not liable for any loss, or damage of goods unless it is proved that such loss or damage was due to negligence or mishandling by the railway or its servants. (Sec. 74)

3. Delay or Detention in Transit

A railway is not responsible for loss, destruction, damage or deterioration of animals or goods caused by delay or detention unless it is proved that delay or detention was not due to negligence or misconduct of railway. (Sec. 76)

4. Wrong Delivery

Where railway delivers the goods or animals in good faith to the person who produces the original railway receipt, it shall not be liable on the ground that such person is not legally entitled or receipt is forged or defective.

5. Termination of Transit

Transit terminates on the expiry of the free time allowed for unloading the good. The liability of railway administration during seven days after the termination of transit is the same as that of a bailee under contract Act.

6. Carriage of Animals

According to Railways (Amendment) Act, 1995 in case of animals, the liability of railway administration for loss or damage etc, shall not exceed Rs.

50,000 per elephant, Rs. 10,000 per horse, Rs. 15,000 per mule or horned cattle or camel or Rs. 1000 per dog, donkey goat, pig, sheep or other animal or bird.

The railway may accept a higher liability if the consignor declares a higher value in the forwarding note and pays a higher freight. The railway shall not be

responsible for any damage arising from fright or restiveness of the animal. (Sec. 73)

7. Carriage of Passenger's Luggage

A railway is not liable for the personal luggage of a passenger which has not been booked and which the passenger takes with him at his own risk. (Sec. 74)

8. Articles of Special Value

When the valuable articles mentioned in the second schedule are contained in any parcel and the value of such articles exceed Rs. 10,000, the railway shall not be responsible for the loss, destruction etc, unless the person delivering has declared the value and contents in the forwarding note and has paid a higher freight.

When any package or parcel of which the value has been declared, the compensation for loss shall not exceed the value so declared. A railway administration may, before accepting any parcel or package, examine the parcel. (Amendment Act, 1995 (Sec. 75)

9. Accident of Passenger

If a passenger dies or is injured as a result of railway accident, the railway shall be liable to pay Rs. 1, 00,000 to the heirs of the deceased and Rs. 10,000 to the injured passenger. [Railways Amendment Act, 1995, (Sec. 82 (a))

10. Accident of Person other than Passenger

If a person other than passenger dies or is injured as a result of railway accident, the railway shall be liable to pay Rs. 1,00,000 to the heirs of the deceased and Rs. 10,000 to the injured, if the accident is proved to have occurred due to railway's negligence. (Sec. 82 (a))

11. Goods Falsely Described

A railway shall not be responsible for the loss, destruction or deterioration of any goods which have been falsely declared and if the loss, destruction or deterioration is in any way occasioned by the false declaration. (Sec. 58, 78)

12. Notification of Claims

A person shall not be entitled to a refund of an overcharge in respect of animals or goods carried by railway or to compensation for the loss, destruction or deterioration of animals or goods unless his claim has been made in writing within six months from the date of the delivery of the animals or goods. (Sec. 77)

SHORT ANSWER QUESTIONS

1. Who is common carrier?
2. Who is a private carrier?
3. When can a common carrier refuse to carry goods for anyone?
4. Write a note on general responsibility of a as a carrier.

TEST QUESTIONS

1. Define the term common carrier Distinguish between a common carrier and a private carrier.
2. What are the duties of a common carrier?
3. What are the rights and liabilities of common carrier?
4. Discuss the duties and liabilities of railway administration as a carrier.
5. Define the term common carrier. What are its features?

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CARRIAGE OF GOODS BY SEA

Introduction

The law relating to the carriage of goods by sea is contained in Bill of Lading Act, 1856 and Carriage of Goods by Sea Act, 1925.

Contract of Affreightment

The contract to carry goods by sea is called a contract of affreightment. The consignor and ship owner are the two parties to the contract. The consideration paid for the carriage is called freight. The contract of affreightment may be incorporated in a formal document containing the terms of the agreement. Such a document is called charter party.

Charter Party

A charter party is an agreement in writing for the purpose of hiring of the whole ship or a part thereof for the purpose of carriage of goods. The person who hires the ship is called the charterer.

Kinds of Charter Party

The following are the kinds of charter party

1. Voyage Charter Party

When the ship is chartered for a particular voyage is called voyage charter party. A voyage charter is a contract to carry goods on a particular voyage on a freight calculated according to the quantity of cargo.

2. Time Charter Party

When the ship is chartered for a particular period, irrespective of the number of voyages, it may have to undertake is called time charter party.

3. Charter by demise

In such a case, the charterer becomes for the time being the owner of the ship. The captain and crew of the ship come under the control of the charterer. The owner of the ship gets the stipulated hire. He gets back the ship when the charter party comes to an end.

Clauses of Charter Party

The following are the importance clauses in a charter party

The following are the importance clauses in a charter party.

1. Names of parties and Ship

This clause deals with the name, description of the parties and the name of the ship.

2. Class of Charter Party

This clause deals with the terms for which this ship is hired.

3. Class of Ship

This clause deals with the description of the ship as belonging to a particular class.

4. Now at

This clause indicates where the ship is at the time, the charter party is made. It also indicates when the ship will arrive at the port of dispatch.

5. Seaworthiness and Fitness

This clause amounts to a express warranty of seaworthiness. It is usually stated as, "That at the date of the commencement of the voyage, the ship shall be tight, staunch and strong, and in every way fitted for the voyage."

6. Port of Loading

This clause specifies the port of loading of the ship. The ship owner has to bring the ship to the port of loading and has to inform the charterer of the readiness of the ship to load.

7. Full and Complete Cargo

The charterer is liable to pay freight for the full capacity of the ship whether it is fully used or not.

8. Lay days and Demurrage

Lay days are the days allowed for loading and unloading the ship. The charter party fixes the number of lay days. If the charterer does not complete the loading and unloading within the lay days, he is liable for damages called demurrage.

9. Law of Merchandise

The charterer agrees to carry lawful goods. The goods loaded must be lawful at the port of dispatch and port of discharge.

10. Payment of Freight

Freight is the consideration paid or agreed to be paid by the charterer for hiring the ship for carriage of goods between certain ports. This is a very important clause as it lays down when and how and to whom the freight is payable.

11. Shipowner's Lien

The ship owner has alien on the goods he carries for the freight and demurrage due to him, and therefore, he can refuse to deliver the cargo till the amount due is paid.

12. Cesser Clause

According to this clause, the liability of the charterer ceases as soon as the goods are loaded on board the ship

13. Excepted Perils Clause

This clause shows various classes of risks for which the ship owner is not liable if a loss arises due to these risks. These risks may arise due to unavoidable circumstances.

14. Delivery of Goods in Usual Manner

The ship owner shall place the cargo on the rail of the ship and in such a position that the consignee can take delivery of it. The consignee or the charterer is bound to provide appliances for taking delivery.

Implied Warranties

The following are implied warranties of a charter party:

1. The ship is at the commencement of the voyage fit to encounter the ordinary risks of the sea during the voyage.
2. The ship shall be ready to commence the voyage with diligence.
3. The ship shall not deviate from the agreed route except for good cause, such as, safety of the ship, and human life.
4. The shipper shall not include in his cargo illegal, contraband and dangerous goods.

Effects of Breach

The effects of any breach of the terms are as follows:

1. If any breach of terms is discovered before the commencement of the voyage, the aggrieved party may cancel the contract and claim damages.
2. If any breach of terms comes to the knowledge after the voyage has begun, the aggrieved party can claim damages.
3. In case of deviation of the ship from the agreed route, the shipowner would not be covered by the excepted perils clause.

Mate's Receipt

When the goods are delivered to a ship for carriage, a receipt called mate's receipt is issued by the mate of the ship. It is an acknowledgement that goods have been received on board the ship. It is a provisional receipt which is subsequently exchanged for a regular bill of lading.

Bill of Lading

A bill of lading is a document issued by master of the ship or the ship owner or other agent in exchange of mate's receipt after the goods are placed on board the ship.

Contents of Bill of Lading

Contents of Bill of Lading

A bill of lading contains the following:

1. It must be stamped and signed by the ship owner or his agent
2. The leading marks necessary for the identification of the goods.

3. The number of packages or pieces, quantity or weight in writing by the shipper.
4. The statement about the condition of the goods.
5. The name of the ship, port of shipment, port of delivery and the person to whom delivery is to be made.
6. Accepted perils clause.
7. Amount of freight.

Kinds of Bill of Lading

The following are the kinds of the bill of lading.

1. Clean Bill of Lading

When it is stated in a bill of lading that the goods are in good order and condition, the bill is said to be a clean bill of lading

2. Qualified Bill of Lading

When it is stated in bill of lading that the goods received are in a bad condition, it is called qualified bill of lading

3. Through Bill of Lading

When the cargo covered by a bill of lading is to be carried partly by sea and partly by land and freight has been charged for sea and land transportation, the bill of lading is called through bill of lading.

Features of Bill of Lading

A bill of lading has the following particular features:

1. It is an acknowledgement of the receipt of the goods on the board the ship.
2. It contains the terms and conditions of the carriage of goods.
3. It is a document of title of the goods. It enables the holder to obtain delivery of the goods.
4. It is a semi negotiable instrument. It can be transferred freely by endorsement and delivery.

DIFFERENCE BETWEEN BILL OF LADING & CHARTER PARTY

Following are the points of difference between the two:

Bill of Lading	Charter Party
1. A bill of lading is an evidence of the receipt of the goods on board the ship.	A charter party is a contract relating to the hiring of the ship.
2. A bill of lading is a document of	A charter party is not a document of

title to the goods.	title to the goods
3. A bill of lading is transferable by endorsement and delivery.	A charter party is not transferable.
4. A bill of lading is always for a	A charter party may be for a particular

particular destination.	voyage or for a particular time.
5. A bill of lading does not amount to a lease of the ship	A charter party may amount to a lease of the ship.
6. A bill of lading is drawn in two or three sets.	A charter party is not drawn in sets.
7. In bill of lading, freight is generally paid in advance.	In charter party, freight is paid after safe delivery at port.
8. A bill of lading may or may not be stamped.	A charter party is necessarily stamped.

Duties of Carrier by Sea

The following are duties of the carrier by sea:

1. The carrier shall be bound, before and at the beginning of the voyage to exercise due diligence to:
   a. Make the ship seaworthy.
   b. Properly man, equip and supply the ship.
   c. Make the holds, refrigerating and cool chambers and all other parts of the ship fit and safe for reception, carriage and preservation.
2. The carrier must carefully load, handle, stow, carry, keep, care for and discharge the goods carried.
3. After receiving the goods the carrier must, issue a bill of lading.

Liabilities of Carrier by Sea

The liabilities of a carrier of goods by sea are as under:

1. A ship owner is liable for the loss arising from his negligence, provided in the Act.
2. A ship owner cannot limit his liability arising from his negligence.
3. The carrier shall not be liable unless the nature and value of the goods are declared by the shipper before shipment in the bill of lading.
4. The carrier shall not be liable for any damage to the goods if the nature or value has been misstated by the shipper in the bill of lading.
5. If the dangerous goods are loaded without the consent of the carrier, they can be landed at any place and no compensation shall be paid to the shipper.
6. The carrier shall be discharged from all liability for loss unless suit is brought within one year after delivery of the goods.
7. The carrier is not responsible for loss due to unavoidable circumstances.

Right of Stoppage in Transit

The shipping company is not required to deliver the goods to the holder of the Bill of Lading if the consignor, in exercise of his right of stoppage in transit, gives instructions not to deliver the goods.

Maritime lien

A maritime lien is a claim on a ship, cargo and the freight in respect of services rendered to them. Law on the subject gives this right to all persons who render some service to save the ship or cargo in time of danger. They can recover their charges from the ship owner or cargo-owner. Until such charges are cleared, the ship is not allowed to leave harbour and court may order for sale of the ship or cargo in favour of the holders of maritime lien.

Bottomry Bond

When a ship needs urgent repairs during voyage, it becomes unavoidable for the captain to borrow money for such repairs on the security of the ship and cargo. When the master raises the money on the security of the ship and cargo, the contract is called Bottomry Bond.

Respondentia Bond

When the captain of a ship raises money on the security of cargo only, the contract is called Respondentia Bond. The special quality of these bonds is that such loan would be payable only when the ship reaches destination safely.

Jettison

Jettison means to throw out. Goods may be jettisoned during a voyage in order to save the ship from sinking. Goods may also be jettisoned if they are dangerous.

Salvage

When some persons save a ship or its appliances or cargo or capture by enemies or loss from any other cause, they become entitled to a reward. The reward is called salvage.

Primage

The charterer gives some extra remuneration to the captain of the ship for his care and diligence. It is called primage.

Barratry

Barratry means willful act of damages done by the crew as a result of fight with the captain, the ship owner or among themselves.

Demurrage

If the loading or unloading is not completed within the lay days agreed upon, the carrier is entitled to damages. Such damages are called demurrage.

SHORT ANSWER QUESTIONS

1. Define charter party.
2. Name kinds of charter party
3. Mention five clauses of a charter party.
4. Name kinds of bill of lading.
5. What is ship-owner's lien?
6. What is a mate's receipt?
7. Explain Jettison and Salvage.
8. Explain barratry and primage.

TEST QUESTIONS

1. What is a charter party? What are the clauses of a charter party?
2. Define a contract of affreightment. If any one of them were broken, what would be the legal consequences?
3. What is Bill of lading and what are its characteristics? Differentiate between bill of lading and charter party.
4. What are the duties and liabilities of a carrier under the Carriage of Goods by Sea Act, 1925?
5. Write short note on: (a) Ship Owner's Lien (b) Maritime Lien (c) Bottomry Bond

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CARRIAGE OF GOODS BY AIR

Introduction

The law on the subject is contained in Carriage by Air Act, 1934. This Act contains two schedules. Schedule 1 contains the Warsaw Convention Rules. Schedule 2 covers the Hague Protocol.

High Contracting Party

It means the Governments of all countries which are signatory to the Warsaw Convention Rules. Pakistan is a signatory to Warsaw Convention and is a High Contracting party.

International Carriage

This expression means any carriage in which the place of departure and the place of destination are located within the territorial jurisdictions of the Two High Contracting Parties or within the jurisdiction of a Single High Contracting Party, if there is an agreed stop over within the territory of another State even if that State may not be a High Contracting Party.

Documents of Carriage

Following documents of carriage are to be issued when goods and passengers are intended to be carried by air:

Passenger Ticket

A passenger ticket contains the following particulars

1. The place and date of issue.
2. The place of departure and destination.
3. The agreed stopping places.
4. The name and addresses of the carrier or carriers.
5. A statement that the carriage is subject to the rules contained in this schedule.

Luggage Ticket

For the carriage of registered luggage the carrier delivers a luggage ticket to the passenger. It contains following particulars:

1. The place and date of issue.
2. The time of departure and of destination.
3. The name and address of the carrier.
4. The number of passenger ticket.

5. The statement that the carriage is subject to rules.
6. The number and weight of the packages.
7. The value as declared by the passenger of the baggage booked.
8. A statement that the delivery will be made to the bearer of the ticket.

Air Way Bill (Air Consignment Note)

The following are some important points regarding Air Way bill:

1. Every carrier of cargo has a right to get air waybill.
2. The airway bill shall be made in three original parts.
3. The first part shall be for the carrier, the second part for the consignee and the third for consignor.
4. The carrier has the right to get airway bills for each package separately.

Contents of Airway Bill

It contains the following particulars:

1. The place and date of its execution.
2. The place of departure and destination.
3. The agreed stopping places.
4. The name and address of the consignor.
5. The name and address of the first carrier.
6. The name and address of the consignee.
7. The nature of goods.
8. The number of packages, method of packing and the particular numbers upon them.
9. The weight, quantity and volume of goods.
10. The condition of the goods and of the packing.
11. The freight, date and place of payment and person who is to pay.
12. If the goods are sent for payment on delivery, the price of the goods.
13. The amount of the value declared.
14. The number of the parts of the air consignment note.
15. The documents handed to the carrier to accompany the note.
16. The time fixed for completion of the carriage and route to be followed.
17. A statement that the carriage is subject to the rules about liability.

Right of Disposition of Consignor

The consignor has the right to dispose of the cargo by withdrawing it at the airport of departure or destination or by stopping it in the course of its journey on any landing or by calling for it to be delivered at the place of destination or in

the course of journey to a person other than the consignee named in the airway bill.

Rights of Consignee

The following are the rights of consignee:

1. Unless otherwise agreed, the consignee has the right to receive notice from the carrier as soon as the cargo arrives at the place of destination.
2. The consignee can get delivery on the payment of charges.
3. In case of loss the consignee may enforce his rights.

Liabilities of Carrier

The Carrier by air is liable to pay damages in the following cases:

1. The carrier is liable to pay damages in case of death or wounding of a passenger or in the embarkation or disembarkation.
2. The carrier is liable for damage to any registered baggage or cargo during the carriage.
3. The carrier is responsible for damage by delay in case of passengers, baggage or cargo.

However, the carrier is not liable for damages if it is proved that all the necessary measures were taken to avoid the same and such damage was caused by the neglect of the passenger himself.

Procedure for Realizing Damages

The following is the procedure of realizing damages:

1. The person must complain about damages within 3 days from the date of receipt of baggage and 7 days in the case of cargo.
2. In case of delay, complaint must be made within 21 days from the date on which the baggage or cargo was delivered to the carrier.
3. Every such complaint must be made in writing within the stated periods.
4. The suit for damages may be filed in the case of death or injury to the passenger and in case of loss or damage to the baggage or cargo, against the last carrier who performed the carriage.

SHORT ANSWER QUESTIONS

1. What is high contracting party?

1. What is high contracting party?
2. Mention the contents of passenger ticket.
3. What are the contents of luggage ticket?
4. Mention five contents of Airway bill.

TEST QUESTIONS

1. What documents of carriage are to be issued when goods and passengers are carried by air under the First Schedule to the Carriage by Air Act 1934?
2. What is the amount of damages that can be imposed under the First Schedule to the Carriage by Air Act 1934?

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INDUSTRIAL RELATIONS

Industrial Relations Act, 2008

The law relating to industrial relations is contained in the Industrial Relations Act, 2008. It extends to the whole of Pakistan. It consists of 89 sections and 1 schedule. (Sec.1)

Application of Act

According to Section I (3) the Industrial Relations Act applies to all persons employed in any establishment or industry except those employed in:

1. Police, Defence Services of Pakistan, installations or services connected with Armed Forces of Pakistan including an Ordinance factory maintained by Federal Government.
2. Administration of State other than those employed as workmen by Railways and Pakistan Post.
3. Member of security staff of Pakistan International Airlines or drawing wages in pay group not lower than group V.
4. Pakistan Security Printing Corporation or the Security Papers Limited.
5. Establishment or Institution for the treatment or care of sick, infirm, destitute and mentally unfit persons excluding those run on commercial basis.
6. Watch and Ward, Security or Fire Service staff of oil refinery, an airport or seaport.
7. Security or Fire Service Staff of an establishment engaged in production, transmission or distribution of natural gas or liquefied petroleum gas.

DEFINITIONS

The definitions of important terms are as under: (Sec.2)

1. **Arbitrator:** A person appointed as such under section 47.
2. **Award:** Award means the determination by any Labour Court, Arbitrator, or an Appellate Court of any industrial dispute or any matter relating thereto and includes an interim award.
3. **Collective Bargaining Agent:** The trade union of workmen which under

section 24 is the agent of the workmen in the establishment or, as the case may be, industry in the matter of collective bargaining.

4. Collective Bargaining Unit: Those workers or class of workers of an employer in one or more establishments falling within the same class of industry

whose terms and conditions on employment are or could appropriately be the subject of collective bargaining together.

5. Commission: Commission means the National Industrial Relations Commission constituted under section 25.

6. Conciliation Proceedings: Conciliation proceedings mean any proceedings before a Conciliator.

7. Conciliator: Conciliator means

A person appointed as such under sub-section (2) of section 43 in respect of disputes which National Industrial Relations Commission is competent to adjudicate and determine

In respect of other disputes, a person appointed as such under sub-section (1) of that section.

8. Employer: Employer in relation to an establishment means any person or body of persons, whether incorporated or not, who or which employs workmen in an establishment under a contract of employment and includes:

a. An heir, successor or assign, as the case may be, of such person or body as aforesaid.
b. Any person responsible for management, supervision and control of the establishment.
c. In relation to an establishment run by or under authority of any department of the Federal Government or a Provincial Government, the authority appointed in this behalf or where no authority is so appointed, the head of the department.
d. In relation to an establishment run by or on behalf of local authority, the officer appointed in this behalf, or where no officer is so appointed, the chief executive officer of that authority.
e. In relation to any other establishment, the proprietor of such establishment and every director, manager, secretary, agent or officer or person concerned with the management of the affairs thereof.

9. Establishment: Establishment means any office, firm, factory, society, undertaking, company, shop, premises or enterprise which employs workmen directly or through a contractor for the purpose of carrying on any business or industry and includes all its departments and branches, whether situated in the same place or in different places except in section 30 includes a collective

bargaining unit, if any, constituted by any establishment or group of establishments.

10. Executive: Executive means the body, by whatever name called, to which the management of the affairs of a trade union is entrusted by its constitution.

11. Illegal Lock Out: A lock-out declared, commenced or continued otherwise than in accordance with the provisions of this Act.

12. Illegal Strike: Illegal strike means a strike declared, commenced or continues otherwise than in accordance with the provisions of this Act.

13. Industrial Dispute: Industrial dispute means any dispute or difference between employers and employers, employers and workmen or between workmen and workmen which is concerned with (a) the employment or non-employment or the terms of employment or the conditions of work, and (b) is not in respect of the enforcement of any right guaranteed or accrued to him by or under any law, other than this Act, or any award or settlement for the time being in force.

14. Industry: Industry means any business, trade, manufacture, calling, service, employment or occupation of producing goods or services for sale, excluding those set-up for charitable purposes.

15. Inspector: Means an inspector appointed under this Act.

16. Labour Court: Means a Labour Court appointed under section 52.

17. Lock out: Lock out means (a) the closing of a place of employment or part of such place or (b) the suspension of work, wholly or partly by an employer or (c) refusal, absolute or conditional by an employer to continue to employ any number of workmen employed by him; where such closing, suspension or refusal occurs in connection with an industrial dispute or is intended for the purpose of compelling workmen employed to accept certain terms and conditions of or affecting employment.

18. Officer: Officer in relation to a trade union means any member of the executive thereof but does not include an auditor or legal advisor.

19. Organization: Means an organization of workers or of employees for furthering and defending the interests of workers or of employees.

20. Prescribed: Means prescribed by rules.

21. Public Utility Service: Means any of the services specified in the schedule.

22. Registered Trade Union: Means a trade union registered under this act.

23. Registrar: Means a registrar of trade unions appointed under section 14.

24. Rules: Means rules made under this Act.

25. Settlement: Settlement means a settlement arrived at in the course of a conciliation proceedings, and includes (a) an agreement between an employer, the collective bargaining agent or workmen, as the case may be, arrived at otherwise than in the course of such proceedings (b) where the agreement is in writing and has been signed by the parties thereto in such manner and may be

prescribed and a copy thereof has been sent to the Provisional Government, the Conciliator and such other persons as may be prescribed.

26. Strike: Strike means cessation of work by a body of persons employed in any establishment acting in combination or a concerted refusal or refusal under a common understanding of any number of persons who have been so employed to continue to work or to accept employment.

27. Trade Union: Trade union means any combination of workermen or employees formed primarily for the purpose of regulating the relations between workmen and employers, or workmen or workmen or employers and employers, or for imposing restrictive conditions on the conduct of any trade or business and includes a federation of two or more trade unions.

28. Tribunal: Means a Labour Appellate Tribunal constituted under section 55.

29. Worker and Workman: Worker and workman means person not falling within the definition of employer (a) who is employed in an establishment or industry for hire or reward either directly or through a contractor, whether the terms of employment be express or implied, and (b) for the purpose of any proceeding under this Act in relation to an industrial dispute includes a person who has been dismissed, discharged, retrenched, laid-off or otherwise removed from employment in connection with or as a consequence of that dispute (c) or whose dismissal, discharge, retrenchment, lay-off, or removal has led to that dispute but does not include any person who is employed mainly in a managerial or administrative capacity.

TRADE UNIONS AND FREEDOM OF ASSOCIATION

The following are rules in this respect: (Sec. 3)

1. The workers shall have a right to establish and to join international association according to their own choice without previous authorization. However, a worker cannot become a member of more than one trade union at any one time. If any worker joins another union, his earlier membership shall automatically cancel.
2. The employers have the right to establish and join international association according to their own choice without previous authorization.
3. Every trade union and employers association shall frame its own constitution and rules to elect its representatives to organize its administration and activities and to formulate its programs.
4. The workers and employers organizations shall have the right to establish

and join federations and confederations and any such organization, federation or confederation shall have the right to affiliate with international organizations and confederations of workers and employers organizations.

Registration of Trade Union

Any trade union may apply to the Registrar for registration under the signatures of its President and Secretary. (Sec. 4)

Requirements for Application

The application for registration shall be made to the Registrar and shall be accompanied by: (Sec.5)

1. A statement showing:
   a. The name of the trade union and the address of its head office.
   b. The date of formation of the union.
   c. The titles, names, ages, addresses and occupations of the officers of the trade union.
   d. The statement of total paid membership.
   e. The name of establishment, group of establishments or the industry, as the case may be, to which the trade union relates along with a statement of the total number of workers employed therein.
   f. The names and addresses of the registered trade unions in the establishment, group of establishments or industry, as the case may be, to which the trade union relates
   g. In case the application is made by a federation of trade unions, the names, addresses and registration number of member unions.
2. Three copies of the constitution of the trade union together with a copy of the resolution by the members of the trade union adopting such constitution bearing the signatures of the Chairman of the meeting.
3. A copy of the resolution by the members of the trade union authorizing its President and the Secretary to apply for its Registration.
4. In case of federation of trade unions, a copy of the resolution from each of the constituent unions agreeing to become a member of a federation.

Requirements for Registration

A trade union shall not be entitled to registration unless the constitution thereof provide for the following matters.

1. The name and address of the trade union.
2. The objects for which the trade union has been formed.
3. The purposes for which the general funds of the union shall be utilized.

4. The number of persons forming the executive which shall not exceed the prescribed limit and shall include not less than seventy-five percent from amongst the workmen actually engaged or employed in the establishment or establishments or the industry for which the trade union has been formed.

5. The conditions under which a member shall be entitled to any benefit assured by the constitution of the trade union and under which any fine or forfeiture may be imposed on him.
6. The maintenance of a list of the members of the trade union and of adequate facilities for the inspection thereof by the officers and members of the trade union.
7. The manner in which the constitution shall be amended, varied or rescinded.
8. The safe custody of funds of the trade union, its annual audit, the manner of audit and adequate facilities for inspection of the account books by the officers and members of trade union.
9. The manner in which the trade union may be dissolved.
10. The manner of election of officers by the general body of the trade union and the term not exceeding 2 years, for which an officer may hold office upon his election or re-election.
11. The procedure for expressing no confidence in any officer of the trade union
12. The meetings of the executives and of the general body of the trade union, so that the executive shall meet at least once in every 3 months and general body at least once every year. (Sec. 6(1))

Entitlement to Registration

A trade union of workmen shall not be entitled to registration:

1. Unless all its members are workmen actually employed in the establishment or industry with which the trade union is connected;
2. Where there are two or more registered trade unions in the establishment, group of establishments or industry with which trade union is connected unless it has its members not less then one–fifth of the total number of workmen employed in such establishment, group of establishments or industry, as the case may be. (Sec. 6(2))

Disqualification of Member and Officer

A person shall be disqualified from being elected or from being officer of a trade union who has been convicted of an offence under section 78 or heinous offence of Pakistan Penal Code Act 1860. (Sec.7)

Maintenance of Register

Every registered trade union shall maintain the following registers.

1. A register of members showing particulars of subscriptions paid by each

member.

2. An accounts book showing receipt and expenditure
3. A minute book for recording the proceedings of meetings (Sec 8).

Registration of Trade Union

1. The Registrar on being satisfied that a trade union has fulfilled all the requirements of this Act, shall register the trade union and issue a certificate of registration within 15 days from the date of receipt of the application. If the Registrar finds any deficiency in the application, he shall communicate in writing his objections to the trade union within 15 days from the receipt of the application and the union shall reply within 15 days of receipt of the objections.
2. When the objections have been fulfilled, the Registrar shall register the trade union and issue a registration certificate within 3 days. If the objections are not met, the Registrar may reject the application.
3. If the application is rejected or the Registrar delays the disposal of application beyond 15 days or does not issue a certificate of Registration within 3 days, the trade union may appeal to the labour court, who may pass an order directing the registrar to register the trade union and issue a certificate of registration or may dismiss the appeal.
4. Every alteration made in the constitution of a registered trade union and every change of its officers shall be notified by registered post by the trade union to the Registrar within 15 days of such change.
5. The Registrar may refuse to register such change or alteration if it is in any contravention of the provisions of the Act, or of is in violation of the constitution of the trade union.
6. Every inclusion or exclusion of any constituent unit of a federation of trade unions shall be notified by registered post by the federation to the Registrar within 15 days of such inclusion or exclusion.
7. If there is a dispute in relation to change of officers of a trade union or any trade union is agreed by the refusal of the Registrar, any officer or member of the trade union may apply or appeal to the labour court who shall within 7 days pass an order directing the Registrar to register the change or alteration in the constitution or in the officers of trade union or direct the Registrar to hold fresh elections of the union.(Sec.9)

Certificate of Registration

The Registrar on registering a trade union shall issue a certificate of registration which shall be conclusive evidence that trade union has been duly registered under this Act. (Sec. 11)

Cancellation of Registration

The registration of the trade union is cancelled by the labour court or Registrar.

1. Cancellation by Labour Court

The Labour Court shall cancel the registration of trade union upon complaint in writing by the Registrar on the following grounds. (Sec.12)

a. If the trade union has contravened or has been registered in contravention of any of the provisions of this Act or the rules;

b. If the trade union has violated any of the provisions of its constitution;

c. If the trade union has made in its constitution any provision which is inconsistence with this Act or the rules.

d. If disqualified person has been elected as an officer of the trade union

2. Cancellation by Registrar

The registration of trade union is cancelled by the Registrar if he finds that any trade union has dissolved itself or has ceased to exist.

3. Appeal against Cancellation of Registration

Any trade union aggrieved by an order passed: (Sec.13)

a. By the Labour Court may appeal to the Labour Appellate Tribunal within 30 days.

b. By the Registrar may appeal to the Labour Court within 30 days.

Registrar

A Provincial Government may, appoint as many persons as it considers necessary to be Registrars of trade unions. If it appoints more then one Registrar, it shall specify the area within which such Registrar shall exercise and perform the powers and functions under the Act. (Sec. 14)

Powers and Functions of Registrar

The powers and functions of Registrar are as under. (Sec. 15)

1. To register the trade union and maintain a register for that purpose.
2. To lodge or authorize any person to lodge complaints with the labour court or Commission for action, prosecution, against trade unions, employers, workers or other persons for any alleged offence or any unfair labour practice, violation of Act or expending the funds of union against its constitution.
3. To determine collective bargaining agent in an establishment.
4. To inspect the accounts and records of the register trade unions.

5. To investigate or hold inquiry in the affairs of the trade unions either himself or through any officer.
6. To perform other functions and exercise powers as may be prescribed.

Unfair Labour Practices on part of Employers

No employer or trade union of employers and no person acting on behalf of either shall: (Sec.17 (1))

1. Impose any condition in a contract of employment seeking to restrain the right of a person who is a party to such contract to join a trade union or continue his membership of a trade union.
2. Refuse to employ or refuse to continue to employ any person on the ground that such person is, or is not a member or officer of a trade union.
3. Discriminate against any person in regard to any employment, promotion, condition of employment or working condition on the ground that such person is, or is not, a member or officer of a trade union.
4. Dismiss, discharge, remove from employment or transfer or threaten to dismiss, discharge or remove from employment or transfer a workman or injure or threaten to injure him in respect of his employment by reason that the workman:
5. Is or proposes to become, or seeks to persuade any other person to become, a member or officer of a trade union; or
6. Participate in the promotion, formation or activities of a trade union.
7. Induce any person to refrain from becoming, or to cease to be a member or officer of a trade union, by conferring or offering to confer any advantage on, or by procuring or offering to procure any advantage for such person or any other person.
8. Compel or attempt to compel any officer of a collective bargaining agent to arrive at a settlement by using intimidation, coercion, pressure, threat, confinement to a place, physical injury, disconnection of water, power or telephone facilities and such other methods.
9. Interfere with or in any way influence the balloting provided for in Sec. 24.
10. Recruit any new workman during the period of notice of strike under section 44 or during the currency of a strike which is not illegal except where the Conciliator having been satisfied that complete cessation of work is likely to cause serious damage to the machinery or installation has permitted temporary employment of a limited number of workmen in the section where the damage is likely to occur.
11. Close down the whole of the establishment in contravention of Industrial and

Commercial Employment (Standing Orders) Ordinance 1968.

12. Commence, continue, instigate or incite others to take part in, or expend or supply money or otherwise act in furtherance or support of, an illegal lockout.

Unfair Labour Practices on part of Workmen

No workmen or other person or trade union of workmen shall: (Sec. 18(1))

1. Persuade a workman to join or refrain from joining a trade union during working hours.
2. Intimidate any person to become, or refrain from becoming, or to continue to be, or to cease to be a member or officer of a trade union.
3. Induce any person to refrain from becoming, or cease to be a member or officer of a trade union, by intimidating or conferring or offering to confer any advantage on, or by procuring or offering to procure any advantage for such person or any other person.
4. Compel or attempt to compel the employer to accept any demand by using intimidation, coercion, pressure, threat, confinement to, or ouster from, a place, dispossession, assault, physical injury, disconnection of telephone, water or power facilities or such other methods.
5. Commence, continue, instigate or incite others to take part in, or expend or supply money or otherwise act in furtherance or support of, an illegal strike or a go-slow.

In clause (e) the expression go-slow means an organized, deliberate and purposeful slowing down of normal output, or the deterioration of the normal quality of work by a body of workmen acting a concerted manner, but does not include the slowing down of normal output, or the deterioration of the normal quality of work which is due to mechanical defect, breakdown of machinery, failure or defect in power supply or in the

Interfere with a ballot held under section 24 by the exercise of undue influence, intimidation, impersonation or bribery through its executive or through any person acting on its behalf. (Sec. 18(2))

Penalty for Unfair Labour Practices

Every person responsible for unfair labour practice on the part of employer shall be punishable with fine which may extend to Rs. 30,000. Any person responsible for unfair labour practice on the part of workmen shall be liable to a fine which may extend to Rs. 20,000. (Sec. 72)

Rights and Privileges

The registered trade unions and its members shall have the following

rights and privileges:

1. Incorporation

Every registered trade union shall be a body corporate by the name under which it is registered. It shall have perpetual successions and a common seal. It

can buy movable and immovable property. It can contract, sue and be sued. (Sec. 16)

2. Immunity from Criminal Suit

No officer or member of registered trade union or collective bargaining agent shall be liable to punishment under Pakistan Penal Code, in respect of any agreement made between the members for the purpose of furthering any such object of the trade union as is specified in Sec 6 unless the agreement is an agreement to commit an offense. (Sec. 19)

3. Immunity from Civil Suit

No suit or other legal proceeding shall be maintainable in any civil court against any registered trade union, CBA, officer or member thereof in respect of any act done in contemplation or furtherance of an industrial dispute to which the trade union is a party on the ground that such act induces some other person to break a contract of employment, or that it is an interference with the trade, business or employment of some other person or with the right of some other person to dispose of his capital or his labour as he wills. (Sec. 20(1))

A trade union shall not be liable in any suit or other legal proceeding in any civil court in respect of any tortuous act done in good faith in contemplation or furtherance of an industrial dispute by an agent of a trade union if it is proved that such person acted without knowledge of, or contrary to express instructions given by, the executive of the trade union. (Sec. 20(2))

4. Enforceability of Agreement

An agreement between the members of a trade union shall not be void or voidable by reason only that any of the objects of the agreement is in restraint of trade. The civil court is not entitled to entertain any legal proceedings for the purpose of enforcing or recovering damages for breech of any agreement concerning the conditions on which any members of a trade union shall or not shall sell their goods, transact business, work, employ or be employed. (Sec. 21)

Registration of Federation of Trade Union

Any two or more registered unions belonging to an industry may, if their respective general bodies so resolved, constitute a federation by executing an instument of federation and apply to the Registrar for the registration of the federation.

The trade union of workmen shall not join a federation which comprises a

trade union of employers; nor shall a trade union of employers join a federation which comprises of a trade union of workmen. (Sec. 22(1))

An instrument of federation shall provide for the procedure to be followed by he federated trade unions and the rights and liabilities of the federation and the federated trade union. (Sec. 22(2))

An application for registration of federation of trade unions shall be signed by the President of all trade unions or by the officers authorized in this behalf and shall be accompanied by three copies of the instrument of federation. (Sec. 22(3))

The provisions of the act namely 1, 2, 3 of section 22 with necessary modifications apply to a federation of trade unions as they apply to a trade union. (Sec. 22(4))

COLLECTIVE BARGAINING AGENT

The collective bargaining agent is determined as follows: (Sec. 24)

One union

Where there is only one registered trade union in an establishment or group of establishments, and if its members are not less than one-third of the total number of workmen employed in such establishment, upon the application of such trade union, the Registrar shall certify that trade union to be the collective bargaining agent.

More unions

Where there are more than one registered trade unions in an establishment or group of establishment, the Registrar shall upon an application by one-fifth of the total number of workmen employed in such establishment or group of establishment or by the employer or the Government, hold within 15 days a secret ballot to determine a collective bargaining agent.

The Registrar may, in the case of a large establishment having its branches in more than one town, hold the secret ballot within 30 days from the making of the application.

The registrar shall not entertain any application in case of seasonal factory unless such application is made during the month in which the number of workmen employed in such factory in a year is usually the maximum.

Procedure of Election

The procedure for determination of collective bargaining agent is as under:

1. Notice to Union

On receipt of an application the Registrar shall, by notice in writing call upon every registered trade union in the establishment or group of establishment

upon every registered trade union in the establishment or group of establishment to which the application relates.

a. To indicate whether it desires to be a contestant in the secret ballot to be held for determining the CBA.

b. If it so desires, to submit within the time specified in a notice, a list of its members showing, in respect of each member, his parentage, age, section or

department and the place in which he is employed, ticket number, date of becoming a member.

c. If union is a federation of trade unions, a list of its affiliated trade unions together with a list of members of each such trade union showing in respect of each such member, the said particulars.

2. List of Workers

Every employer shall, submit a list of its workmen in the establishment excluding those whose period of employment is less than 3 months and showing, in respect of each workman, his parentage, age, the section or department and the place in which he is employed, his ticket number and date of employment.

3. Verification

Every employer shall provide facilities to the Registrar for verification of the list submitted by him and the trade union.

4. List of Voters

The Registrar shall prepare a list of voters who are members of any contesting trade union. He shall send a certified copy of list of voters to each of contesting trade unions at least 4 days prior to the date of poll.

5. Entitlement to Vote

Every workman who is a member of any of the contesting trade unions and whose name appears in the list of voters shall be entitled to vote.

6. Facilities for polling

Every employer shall provide facilities in his establishment for the conduct of the poll. He shall not interfere and influence the voting.

No person shall canvass for vote within a radius of 50 meters of the polling station.

7. Conduct of Poll

For the purpose of conducting a poll, the Registrar shall:

a. Fix the date of the poll and intimate to the contesting trade unions and to every employer.

b. Seal the ballot boxes in the presence of the representatives of the contesting trade unions to receive the ballot papers on the date of poll.

c. Conduct the poll at the polling station at which the representatives of the unions shall have the rights to be present.

d. Open the ballot boxes and count the votes after the conclusion of the poll in the presence of the representatives of the trade unions.

8. Certification of CBA

The Registrar shall certify the trade union which has received the highest number of votes to be the collective bargaining agent

A trade union shall not be certified to be the collective bargaining agent unless the number of votes received by it is not less than one-third of the total number of workmen employed in such establishment.

If a trade union does not secure such number of votes in first poll, a second poll shall be held between the two trade unions which secure the highest number of votes in the first poll and the trade union which secures a majority of the votes cast at the second poll shall be certified to be the collective bargaining agent.

If the number of votes secured by two or more trade unions securing the highest numbers of votes is equal, further poll shall be held between them until one of them secures a majority of the votes cast at such further poll.

If no trade union indicates that it desires to be a contestant in the secret ballot, the Registrar shall certify the trade union which has made the application to be the CBA, if its members are one-fifth of the total number of workmen employed in such establishment.

When a collective bargaining agent is determined, no application is entertained within a period of 2 years from the date of such certification, except where the registration of such trade union is cancelled before the expiry of that period.

Rights and Duties of CBA

A CBA shall be entitled: (Sec. 24(13))

1. To undertake collective bargaining with the employer regarding matters of employment, non-employment, the term of employment or conditions of work other than matters which relate to the enforcement of any right, guaranteed, secured, award or settlement secured by workman under any other law.
2. To represent any workman in any proceedings.
3. To give notice of and declare a strike under the rules.
4. To nominate workmen on the Boards of Trustees of any welfare institutions, Provident Funds and Workers Participation Fund.
5. To nominate Shop Steward to create a link between the workers and employers.
6. To nominate representatives of the management committee

6. To nominate representatives of the management committee.
7. To appoint auditors to audit the accounts of the company from workers point of view.

NATIONAL INDUSTRTIAL RELATIONS COMMISSION

Constitution

1. The Federal Government shall constitute a National Industrial Relations Commission consisting of not more than 7 members, including the Chairman. The Chairman and the members are appointed by the Federal Government.
2. The qualification for appointment as Chairman and Member of the Commission shall be determined by the Federal Government.
3. The Chairman and the members are appointed by the Federal Government
4. Two of the members shall be appointed to advise the Chairman, one to represent the employers and other to represent the industry-wise trade unions, federations of such trade unions and federations at the national level.
5. The Chairman may co-opt some workers belonging to federations at the national level. (Sec. 25)

Functions and Powers

Following are the functions and the powers of the Commission:

1. To promote formation of trade unions of workers within the same industry whether in establishments within a Province or in more than one province and federations of such trade unions.
2. To promote the formation of federations at the national level.
3. To adjudicate and determine industrial dispute to which an industry-wise trade union or a federation of such trade unions is a party and which is not confined to matters of purely local nature and any other industrial dispute which is, in the opinion of the Federal Government, of national importance and is referred to it by that Government.
4. To register industry-wise trade unions, federations of such trade unions and federations at the national level.
5. To determine the collective bargaining agents amongst industry-wise trade unions, federations and federations at the national level.
6. To try offences punishable under section 72 other than subsection 1 and 6 thereof and any other section in so far as they relate to employers or workers in relation to an industry-wise trade union, a federation of trade union, a federation at the national level or officers of such union or federation.
7. To deal with cases of unfair labour practices on the part of the employers

workers, trade unions of either of them or persons acting on behalf of them whether committed individually or collectively and to take measures calculated to prevent an employer or workman from committing an unfair labour practice.

8. To advise Government, industry-wise trade unions and federations in respect to the education of workers in the essentials of trade unionism, including

education in respect of their rights and obligations and to secure the provision of facilities required therefore. To apportion the cost thereof between the provincial and federal Governments, industry-wise trade unions, federations of such trade unions and federations at the national level and the employers in such manner that may be considered equitable by the Commission.

9. To exercise other powers and functions, as Federal Government may by notification in the Official Gazette, assign to it from time to time.
10. The Commission may, on the application of a party, or of its own motion, (a) initiate prosecution, trial or proceedings, or take action, with regard to any matter relating to its functions, (b) withdraw from a labour court any application, proceedings or appeal relating to unfair labour practice or (c) grant such relief as it may deem fit including interim injunction.
11. The Commission may on the application of the party or on its own motion, withdraw, any case of unfair labour practice from the Labour Courts
12. To deal the unfair labour practice of which the Commission is seized, the Commission may.
13. Proceed directly with the case
14. Ask the Registrar to enquire into it and submit a report.
15. Refer the case to labour court for report or for disposal.
16. The Commission shall have power to punish any person who obstructs its process and disobeys its orders and directions.
17. The Commission for the purpose of an investigation or inquiry may authorize its chairman or any member to enter any building, factory, etc. and inspect, interrogate and report.

Finality of Order

The order passed by the Commission or any of its Benches shall not be called in question in any court, and such orders, decision, judgment or sentence passed by the Commission shall be final. (Sec. 29)

Check off

If a collective bargaining agent so requests, the employer of the workmen who are members of a trade union, shall deduct from the wages of the workman such amounts as subscription to the funds of the trade union with the approval of workmen made in the demand statement provided by the trade union.

An employer after deducting the wages shall, within 15 days deposit the amount in the account of the trade union. A collective bargaining agent shall maintain with any national bank of Pakistan or with a post office saving bank an account for this purpose.

The employer shall provide facilities to the collective bargaining agent for ascertaining whether deductions from the wages of its members are being made according to rule. (Sec. 32)

Shop Steward

The shop steward is employed in every establishment in which 50 or more workmen are employed. He is nominated by collective bargaining agent from workers in a shop, section or department of the establishment. If there is no collective bargaining agent in the establishment, he is elected at a secret ballot. The employer shall provide all facilities for the holding of the ballot. He shall not interfere in the election. He shall hold office for period of one year. Any dispute arising from election of a shop steward shall be referred to the Registrar and his decision is final. The following are the functions of the shop steward:

1. He acts as a link between the workers and employer.
2. He assists in improving the physical working conditions and production work in the shop, section, or department.
3. He helps workers in settlement of their problems regarding work and individual grievance. (Sec. 33)

Workers Participation in Management

In every factory employing 50 persons or more there shall be elected or nominated workers' representatives to participate to the extent of 50 percent in the management of the factory. At least one workers' representative shall be elected or nominated to participate in the management of such factory. For determining the number of workers' representatives fractions equal to, or greater than one-half shall be regarded as one and lesser fractions shall be ignored.

The workers' representative must be employed in the same factory. They are nominated by collective bargaining agent in the factory. If there is no collective bargaining agent in the factory, they are elected at a secret ballot by simple majority by all workmen employed. They shall hold office for a period of 2 years. They shall participate in all meetings of the management committee and all matters relating to management except commercial and financial transaction. The management shall not take any decision in the following matters without the advice in writing of the workers' representative.

1. Framing of services rules and policy about promotion and discipline of workers
2. Changing physical working conditions in the factory

3. In-service training of workers
4. Recreation and welfare of workers
5. Regulation of daily working hours and breaks
6. Preparation of leave schedule

7. Matters relating to the order and conduct of workers within the factory.

The workers' representatives may give advice in writing about the above mentioned matters and the management shall convene a meeting within 2 weeks of the receipt of advice to discuss with them.

The management shall give reply to the workers' representatives within 6 weeks of the receipt of their advice. The management shall not reject the worker's advice except by the person holing the highest position in the management.

If the advice is rejected by the management, the matter may within 15 days be taken up by CBA in the works council for bilateral negotiation. (Sec. 34)

Joint Management Board

Every company which owns or manages a factory, and in every factory which is not so owned or managed, and which employs 50 persons or more, the management shall set up a joint management board in which the workers' participation shall be to the extent of 30 percent.

The employer's representatives on the joint management board shall be from amongst the directors or senior executives and the workers' representatives shall be employed in the factory. The joint management board shall look after the following matters:

1. Improvement in production, productivity and efficiency.
2. Fixation of job and piece rates.
3. Planned regrouping or transfer of workers
4. Laying down the principles of remuneration and introduction of new remuneration methods.
5. Provision of minimum facilities for workers employed through contractors that are not covered by the laws relating to welfare of workers.

The joint management board may collect information about the working of the company or factory from its management. (Sec. 35)

Inspector

The provincial government shall appoint inspectors for ensuring compliance with the provisions of section 34 and 35. The powers are as under (Sec. 36):

1. He may at all reasonable hours enter on any premises and examine any register, document and take on the spot any evidence of any person and

exercise others powers of inspection.

2. He may collect the information from the management for the discharge of his functions.
3. He may report in writing to the registrar.

Works Council

In every establishment in which 50 persons or more workmen are employed or were employed on any day in the preceding 12 months, the employer shall constitute a Works Council consisting of representative of employers and workmen. The number of the representatives of workmen is not less than the number of the representatives of the employer.

In the establishment where there are one or more trade unions the collective bargaining agent shall nominate the representatives of workmen. Where there is no collective bargaining agent, representatives shall be chosen from amongst the workmen engaged in the establishment. The Works Council shall deal with the following matters:

1. To promote measures for securing and preserving good relations between employer and workmen.
2. To improve production, productivity and efficiency.
3. To endeavor to maintain continuous sympathy between the employer and the workmen.
4. To promote settlement of differences and disputes through bilateral negotiations.
5. To promote security of employment for the workmen and conditions of safety, health and job satisfaction in their work.
6. To take measures for facilitating good and harmonious working conditions in the establishment; to provide educational facilities for children of workmen in secretarial and accounting procedures and to promote their absorption in these departments of the establishment.
7. To discuss any other matter of mutual interest to promote better labour-management relations. (Sec. 39, 40)

Settlement of differences and industrial disputes

Negotiations

Following is the procedures for settlement of industrial disputes.

1. If at any time an employer or a collective bargaining agent finds that an industrial dispute has arisen or is likely to arise, the employer or, as the case may be, the collective bargaining agent may communicate his views in writing either to the works council or to the other party. Where the views are communicated to the works council, a copy of the communication shall be

sent to the other party.

2. On receipt of the communication the works council or the party receiving it shall try to settle the dispute by bilateral negotiations within 10 days or within further period as may be agreed upon by the parties. If the parties reach a settlement, a memorandum of settlement shall be recorded in writing and

signed by both the parties and a copy thereof shall be forwarded to the Conciliator and other authorities.

Where a settlement is not reached between the employer and collective bargaining agent or if the views of the employer or CBA have been communicated to the works council there is a failure of bilateral negotiations in the works council, the employer or the collective bargaining agent may, within 7 days from the end of the period serve on the other party to the dispute a notice of lock-out or strike as the case may be. (Sec. 42)

Conciliation

Where a party to an industrial dispute serves a notice of strike or lock-out, it shall send a copy of the notice to the conciliator who shall proceed to conciliate in the dispute and to the labour court. The conciliator shall call a meeting of the parties to the dispute for the purpose of settlement.

The parties to a dispute shall be represented before the conciliator by persons nominated by them and authorized to negotiate and enter into an agreement binding on the parties. The conciliator may call the employer or any officer of a trade union by a notice in writing.

The conciliator shall prescribe and suggest to either party to the dispute such concessions or modification in its demand to reach at the settlement.

If a settlement of the dispute or of any matter in dispute is arrived at, the conciliator shall send a report to the provincial Government together with the memorandum of settlement signed by the parties. If no settlement is arrived at within the period of notice of strike or lock-out, the conciliation proceedings may be continued for such further period as may be agreed upon by the parties. (Sec. 46)

Arbitration

If the conciliation fails, the Conciliator shall try to persuade the parties to agree to refer the dispute to an arbitrator. If the parties agree, they shall make a request in writing for reference of dispute to an arbitrator agreed upon by them. The arbitrator to whom a dispute is referred may be from the panel maintained by a Provincial Government or any other person agreed upon by the parties.

The arbitrator shall give his award within 30 days from the date on which the dispute is referred to him or such further period as may be agreed upon by the parties to the dispute. The arbitrator shall forward copy of the award to the parties and to the Provincial Government to be published in the official Gazette.

The award of the arbitrator shall be final and no appeal shall lie against it. It shall be valid for a period not exceeding two years as may be fixed by the arbitrator. (Sec. 47)

STRIKE AND LOCK-OUT

If no settlement is arrived at as a result of conciliation, and the parties do not agree to refer their dispute to an arbitrator, the workmen on a 14 days notice to the employers may go on strike. Similarly, the employer may declare a lock out on the expiry of period of notice or upon a declaration by the conciliator that conciliation proceedings have failed, whichever is the later.

The party raising a dispute may at any time, either before or after the commencement of a strike or lock-out, apply to the labour court for adjudication of dispute. If a strike or lock-out lasts for more than 30 days, the Federal Government, if it relates to a dispute which the Commission is competent to adjudicate and determine and the Provincial Government, if it relates to ay other dispute, may by order in writing, prohibit the strike or lock-out.

The Federal Government may, with respect to a strike or lock-out relating to a dispute which the commission is competent to adjudicate and determine and the Provincial Government, with the approval of Federal Government, may by order in writing, prohibit a strike or lock-out at any time before the expiry of 30 days, if it is satisfied that the strike or lock-out is causing hardship to community and is against the national interest.

In any case in which the Federal Government or Provincial Government prohibits a strike or lock-out, it shall refer the dispute to the Commission or labour Court, as the case may be.

The Commission or the Labour Court, as the case may be, after hearing both the parties shall make award within 30 days. They may make an interim award. The award of the Commission or the Labour Court, as the case may be, shall be valid for a period specified in the award but shall not be for more than 2 years. (Sec. 48)

The Federal Government in case of strike or lock-out regarding an industrial dispute of national importance or an industrial dispute in respect of any of the public utility services may by order in writing, prohibit a strike or lock-out at any time before or after the commencement of strike or lock-out. (Sec.49)

LABOUR COURT

Constitution

A Provincial Government in consultation may establish the required number of labour courts in the Province. The establishment of the Labour Courts is notified in the Officials Gazette, indicating their territorial jurisdiction. A labour

court shall consist of one Presiding Officer appointed by a Provincial Government. A person shall not be qualified for appointment as Presiding Officer unless he has been, or is, a District Judge or an Additional District Judge. The Provincial Government of Balochistan may, after consultation with the Federal

Government, appoint any person not so qualified to be the presiding officer of a labour court.

Functions

A labour court shall have the following functions.

1. It shall adjudicate and determine an industrial dispute referred to it.
2. It shall enquire into and adjudicate any matter relating to implementation or violation of a settlement which is referred to it by the Provincial Government.
3. It shall try offences under this Act and all other offences under any other law specified in this behalf by the Provincial Government.
4. It shall exercise and perform such other powers and functions which are assigned to it under this Act or any other law. (Sec. 52)

Procedure and Powers

The labour court shall follow a summary procedure provided under Code of Criminal Procedure, 1898. In the matter of an industrial dispute, it is deemed to be a civil court. It has the following powers: (Sec. 53):

1. Enforce the attendance of any person and examine him on oath.
2. Compel the production of documents and material objects.
3. Issue commissions for the examination of witnesses or documents.

Award and Decision

The award or decision of the Labour Court shall be given in writing and delivered in the open court. Two copies of the award or decision shall be sent to the Provincial Government. If the federal government is a party to a dispute, 2 copies of the award or decision shall be forwarded to the government as well. The provincial Government shall within a period of 1 month from the receipt of the copies of the award or decision, publish it in the official Gazette.

Any party agreed by an award or decision of labour court shall be final in some cases. However, in some cases, the award or decision or sentence passed by the labour court may prefer an appeal to the Labour Appellate Tribunal within 30 days of the delivery or passing thereof and the decision of the tribunal in such appeal will be final. (Sec. 54)

LABOUR APPELLATE TRIBUNAL

Constitution

The provincial Government may, by notification in the official gazette,

constitute as many tribunals consisting of one member as it may consider necessary and, where it constitutes more than one tribunal, shall specify in the notification, the territorial limits within which or the class of cases in relation to which, each one of them shall exercise jurisdiction under this Act. The member of tribunal shall be person who is or has been a judge or an additional judge of a

High Court, and shall be appointed on such terms and conditions as government may determine.

Functions and Powers

Following are the functions and powers of a tribunal:

1. The tribunal may, on appeal, confirm, set aside, vary or modify the award or decision or a sentence passed by labour court. The tribunal shall give its decision within 60 days.
2. The tribunal may, on its own motion at any time, call for the record of any case or proceedings under this Act in which a labour court has passed an order for the purpose of satisfying itself as to the correctness, legality or propriety of such order and may pass such order as it thinks fit.
3. No order shall be passed revising or modifying any order adversely affecting any person without giving such person an opportunity of being heard.
4. The tribunal shall follow such procedure as may be prescribed.
5. The tribunal can punish for contempt of its authority or that of any labour court.
6. Any person convicted and sentenced by tribunal to imprisonment for any period or to pay a fine exceeding 50 thousand rupees may prefer an appeal to the high court.
7. A tribunal, on its own motion or on application of a party transfer an application or proceeding from one labour court to the other labour court.
8. If in an appeal preferred to it against the order of a labour court directing the reinstatement of a workman, the tribunal makes an order staying the operation of an order of a labour court, the tribunal shall decide shall such appeal within 30 days. If such appeal is not decided within the period before said, the order of the tribunal shall vacated on the expiration of that period. (Sec. 55)

ILLEGAL STRIKES AND LOCK-OUTS

A strike or lock out shall be illegal if:

1. It is declared, commenced or continued without giving notice to the other party to a dispute, or before the date of strike or lock-out specified in such a notice, or in contravention of section 36.
2. It is declared, commenced or continued by a Collective Bargaining Agent who has not been registered.

3. A lock out is declared by an employer before the expiry of period of notice of lock-out.
4. A settlement or award is in existence on any matter, a lock out or strike declared on the same issue shall be illegal. (Sec. 63)

SHORT ANSWER QUESTIONS

1. Mention the five requirements for application for registration of trade union.
2. Mention the five acts which are considered unfair labour practice on the part of employer.
3. Mention the five acts which are considered unfair labour practice on the part of worker.
4. What are the functions of Joint Works Council?
5. What are the functions of Shop Steward?
6. What are the five function of Registrar?
7. What are the five functions of National Industrial Relation Commission?

TEST QUESTIONS

1. Define the following terms: (a) Arbitrator (b) Award (c) Conciliator (d) Employer (e) Industrial dispute (f) Worker
2. What are the requirements of application for registration of trade union?
3. What are the different provisions which the constitution of a trade union must contain?
4. Enlist unfair labour practices on the part of an employer and workmen,
5. Define Collective Bargaining Agent. How is it determined?
6. What are rights and duties of collective bargaining agent?
7. How National Industrial Relations Commission is constituted? What are its functions and powers?
8. How a Labour Court is constituted? What are its functions and powers?
9. Define and differentiate between strike and lock-out. When do they become illegal according to Industrial Relation Ordinance.
10. What are the rights and duties of employer's and workmen under Schedule II?
11. Explain about the constitution, powers and functions of labour appellate tribunal?

29

LABOUR IN FACTORIES

Factories Act, 1934

The law relating to workers employed in factories is contained in Factories Act, 1934. It extends to the whole of Pakistan. It consists of 82 sections.

Definitions

Section 2 defines the different terms as follows:

1. **Adolescent:** Adolescent means a person who has completed his 15th but has not completed his 17th year.
2. **Adult:** Adult means a person who has completed his 17th year.
3. **Child:** Child means a person who has not completed his 15th year.
4. **Day:** Day means a period of 24 hours beginning at mid-night.
5. **Week:** Week means a period of 7 days beginning at mid-night on Saturday night.
6. **Power:** Power means electrical energy, and any other form of energy which is mechanically transmitted and is not generated by human or animal agency.
7. **Manufacturing Process:** Manufacturing process means any process for making, altering, repairing, ornamenting, finishing or packing, or otherwise treating any article or substance with a view to its use, sale, transport, delivery or disposal, or for pumping oil, water or sewage or for generating and transmitting power.
8. ***Worker:*** Worker means a person employed directly or through an agency whether for wages or not, in any manufacturing process, or in cleaning any part of the machinery or premises used for a manufacturing process, or in any other kind to work whatsoever, incidental to or connected with the subject of the manufacturing process, but does not include any person solely employed in a clerical capacity in any room or place where no manufacturing process is being carried on.

9. Factory: Factory means any premises including the precincts thereof, whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on or is ordinarily carried on whether with or without the aid of power but does not include mine, subject to the operation of the Mines Act, 1923.

10. Machinery: Machinery includes all plants whereby power is generated, transformed, transmitted or applied.

11. Occupier: Occupier of a factory means the person who has ultimate control over the affairs of the factory and where the affairs of a factory are entrusted to a managing agent; such agent shall be deemed to be the occupier of the factory.

12. Relay & Shift: Where work of the same kind is carried out by two or more sets of workers working during different periods of the day, each of such sets is called a relay and the period or periods for which it works is called a shift.

13. Prescribed: Prescribed means prescribed rules made by the Provincial Government under this Act.

Seasonal Factory

A factory which is exclusively engaged in the manufacturing process of cotton ginning, cotton or cotton jute pressing, the decortication of groundnuts, the manufacture of coffee, indigo, lac, rubber, sugar (including gur) or tea or any of the aforesaid processes, is a seasonal factory. (Sec. 4)

Powers of Provincial Government

The Provincial Government has the following powers: (Sec. 4-8)

1. It may declare any factory in which manufacturing process ordinarily carries on for more than 180 days in a year, not to be a seasonal factory.
2. It may declare any specified factory in which manufacturing process ordinarily continues for more than 180 days in a year and cannot be carried on except during particular season or at times dependent on the irregular action of natural forces, to be a seasonal factory.
3. It may declare that some provisions of the Act shall not apply to any place wherein a manufacturing process carries on whether with or without the use of power whenever 5 or more workers are working or have worked therein on any day of the 12 months immediately preceding.
4. It may direct that the different department or branches of a specified factory shall be treated as separate factories.
5. When it is satisfied that, as a result of change of occupier or in the manufacturing process, the number of workers for the time being is less than 20 and is not likely to be 20 or more during the ensuing 12 months, it may exempt such factory from operation of this Act.

exempt such factory from operation of this Act.

6. Sections 14, 15(1)(b), 16-18, 21-23, 25, and 33-Q(3) shall not apply to any factory wherein not more than 19 workers are working or were working on any one day of the 12 months immediately preceding.
7. It may exempt any factory from some provisions of this Act for such period as it may think fit in case of public emergency.

Notice to Inspector

The occupier of a factory must, at least 15 days before the work begins in any seasonal factory, send to the inspector a written notice containing the following particulars:

1. The name and situation of factory.
2. The address to which communication relating to factory must be sent.
3. The nature of manufacturing process to be carried on.
4. The nature and amount of power to be used.
5. The name of the person who shall be the manager.
6. The other particulars as may be prescribed.

Inspection Staff

The Provincial Government is authorized to appoint the Inspector, Chief inspector and Additional inspectors. Every District Magistrate works as an Inspector of factory for his district. The Inspector can exercise his powers within his district. No person can act as Inspector or Chief Inspector if he is or becomes directly or indirectly interested in a factory or in any process or business carried on therein or in any patent or machinery connected therewith. The powers of inspector are as under: (Sec. 10-11)

1. He can enter with assistants any place which is used as a factory or by the existing circumstances can be deemed to be a factory.
2. He can examine the premises, plant, and of any prescribed registers.
3. He can take on the spot or otherwise such evidence of any person as may be necessary.
4. He can exercise such other powers as may be necessary for the purposes of the Act.

Certifying Surgeons

The Provincial Government may appoint a registered medical practitioner as a certifying surgeons for the local limits as may be assigned to them. The cerifying surgeon may delegate his powers to another registered medical practitioner for issuing certificates of fitness for employment for three months only. Following are the duties of certifying surgeons: (Sec.12)

1. The examination and certification of young persons.
2. The examination of persons engaged in factories in dangerous occupations

or processes.

3. Medical supervision of cases of illness due to the nature of manufacturing process, conditions of work, change in manufacturing process or in the substance used therein.

Health of Workers

The Factories Act provides the following provisions in this respect:

1. Cleanliness

Every factory shall be kept clean and free from effluvia arising from any drain, privy or other nuisance. Dirt and refuse shall be removed daily by effective methods. Work rooms must be cleaned at least once every week. Drainage shall be provided. Inside walls, partitions, ceilings, tops of rooms, passages and staircases must be repainted at least once in 5 years and cleaned at least once in 14 months. There must be white-washing at least once in 14 months. (Sec.13)

2. Disposal of Water and Effluents

Effective measures shall be made for the disposal of wastes and effluents resulting from the manufacturing process carried on in the factory. The provincial government may make rules prescribing the arrangements to be made in this respect. (Sec.14)

3. Ventilation and Temperature

Proper arrangement should be made for adequate ventilation by circulation of fresh air. The temperature must be kept at a comfortable level. Hot parts of machines must be separated and insulated. The provincial government may make certain standards in this respect. (Sec.15)

4. Dust and Fumes

If the manufacturing process creates dust or fumes, steps must be taken so that they are not inhaled or accumulated. The exhaust fumes of internal combustion engines must be conducted outside factory. (Sec.16)

5. Artificial Humidification

The water used for this purpose must be pure. It must be taken from some source of drinking water. The provincial government can frame rules in this case. (Sec.17)

6. Overcrowding

In a factory no workroom should be overcrowded to an extent injurious to the health of the workmen. In factories existing before the commencement of Labour Laws (Amendment) Ordinance 1972, there must be at least 350 cubic feet of space for every worker. After this law there must be at least 500 cubic feet of space. In calculating the space, no account shall be taken of a space which is

more than 14 feet above the level of the floor of the room. (Sec. 18)

7. Lighting

Sufficient and suitable lighting, natural or artificial or both are required to be provided and maintained. In case of a failure of an ordinary electric system, emergency lighting at special points in work room and passages are required to

be maintained in such a manner that these will function automatically. Glazed windows and sky lights must be kept clean. Steps shall be taken to prevent formation of shadows and glare that can cause accidents (Sec.19)

8. Drinking Water

Suitable points conveniently situated for all workers employed in a factory, are required to be provided and maintained for sufficient supply of wholesome drinking water. In every factory where more than 250 workers are ordinarily employed, provision shall be made for cooling the drinking water during the hot weather. (Sec.20)

9. Latrines and Urinals

Sufficient latrines and urinals are required to be provided separately for males and females. These should be adequately lighted, ventilated and are required to be maintained in a clean and sanitary condition at all times with suitable detergent or disinfectant or with both. The floors and internal walls of these shall, up to a height of 3 feet be finished to provide a smooth impervious surface. (Sec.21)

10. Spittoons

Sufficient number of spittoons is required to be provided at convenient places and should be maintained with clean and hygienic conditions. The provincial government may make rules prescribing the type and the number of spittoons to be provided and their location in any factory. (Sec.22)

11. Precautions against Contagious or Infectious Diseases

The factory doctor will ensure that each worker in a factory is not suffering from any contagious or infectious disease. The fee of examination of workers shall be borne by the occupier of the factory. If a worker is found to be suffering from any such disease, he shall not be appointed on work till he is declared free of such disease. (Sec.23)

12. Vaccination and Inoculation

Each worker in a factory is required to be vaccinated and inoculated against such diseases. The expenses of such vaccination and inoculation shall be borne by the occupier of the factory. (Sec.23-A)

13. Provision of Canteen

In a factory where more than 250 workers are employed, the employer must provide an adequate canteen for the use of the workers. Rules regarding

must provide an adequate canteen for the use of the worker. Rules may be framed regarding the food served, its management etc. (Sec.24)

14. Welfare Officer

In a factory where not less than 500 workers are employed, the manager shall employ such number of welfare officers, having such qualifications as may be prescribed. (Sec.24-A)

Safety of Workers

The various provisions regarding safety are as under:

1. Precautions against Fire

Every factory must provide exits for escape in case of fire. The doors of the factory shall not be locked, while the factory is in operation and all doors must open outwards. Alarms shall be ready to warn workers in case of fire. (Sec.25)

2. Fencing of Machinery

All dangerous type of machines shall be fenced so as to ensure safety of the workers working on such machines. Every screw, bolt, shaft, spindle wheel and pinion, and all spur toothed and friction gearing in motion shall be securedly fenced. (Sec.26)

3. Machinery in Motion

While machinery is in motion, an examination can only be carried out by a trained male adult worker, wearing tight fitting clothing. The name of such a worker has been recorded in the register (Sec.27)

4. Employment on Dangerous Machine

A child or adolescent shall not be allowed to work on a machine specified as dangerous by the Provincial Government, unless he has been fully instructed and is under supervision of a person with thorough knowledge and experience of the machine (Sec.28)

5. Cutting of Power

There shall be suitable striking gear or other mechanical appliances to be used for moving driving belts to and from fast and loose pulleys, which form part of the transmission machinery. There shall also be maintained and used in every workroom some efficient means of cutting off the power promptly from the running machinery. (Sec.29)

6. Self Acting Machine

In any factory traversing part of a self acting machine and the material carried on it, shall not be allowed to run within a distance of 18 inches from any

carried on it, shall not be allowed to run within a distance of 18 inches from any fixed structure, if the space over which it runs is a space over which a person is liable to pass. (Sec. 30)

7. Casing of New Machinery

Every set screw, bolt or key on any revolving shaft, spindle, wheel or pinion shall be sunk, encased or guarded to prevent danger. (Sec.31)

8. Cotton Openers

No women or child is allowed to be employed in any part of a factory for pressing cotton in which a cotton opener is at work. They are allowed where the delivery end is separated by a partition wall from the feed end which is upto the roof and there is no door opening in the partition wall. (Sec. 32)

9. Cranes and Lifting Machinery

All parts of cranes and other lifting machines must be of good construction and be properly maintained. They must be thoroughly examined at least once a year and must not be overloaded. The crane must be at a specified distance from the wheel track of the crane. (Sec.33)

10. Hoists and Lifts

Every hoist and lift shall be of good mechanical construction, sound material and adequate strength and properly maintained. They must be examined once in every six months. Every hositway and liftway shall be sufficiently protected by an enclosure fitted with gates. Every such gate will be fitted with interlocking or other efficient device. (Sec.33-A)

11. Revolving Machinery

Where grinding is carried on, the maximum safe working speed of revolving machinery connected therewith must be notified. Steps must be taken to see the safe speed is not exceeded. (Sec.33-B)

12. Pressure Plant

Where any operation is carried on at a pressure higher than the atmospheric pressure, steps must be taken to ensure that the safe working pressure is not exceeded. (Sec.33-C)

13. Floor, Stairs and Mean of access

All floors, steps, stairs, passage and gangways shall be of sound construction and properly maintained. Handrails shall be provided where necessary. Safe means of access shall be provided to the place where the worker will carry on any work (Sec.33-D)

14. Pits and Sumps

Pits, sumps, opening in floor etc. must be securely covered or fenced. (Sec.33-E)

15. Excessive Weights

In any factory a person shall not be allowed to lift or move any load so heavy as to be likely to cause him injury. The Provincial Government may make rules prescribing maximum weights that may be lifted, carried or moved by adult man, adolescent and children employed in factories or in any process carried on in a factory. (Sec. 33-F)

16. Protection of Eyes

In every factory effective screens or suitable goggles should be provided for the protection of persons employed on any manufacturing process or in the immediate vicinity of the process if such a process involves of injury to the eyes. The worker is required to use protective devices provided for them. (Sec.33-G)

17. Specification of defective parts

If any building, machinery or plant is in a dangerous condition, the inspector can ask for holding of tests to determine the strength and quality of any specified part. He can ask to adopt measures to make them safe. (Sec. 33-H)

18. Safety of Building

If the inspector thinks that any building, machinery, plant or manufacturing process is in such a condition that it is dangerous to health and safety of workers, he may order the manager specifying the measures to be adopted. (Sec. 33-I)

19. Framing of Rules

The provincial government may make rules providing for the use of further devices and measures for security of workers. (Sec. 33-J)

20. Precautions against Fumes

No person shall be allowed to enter any chamber, tank, pipe, etc where dangerous fumes are likely to be present, unless it is provided with manhole or other means of going out. In such a space no portable electric light of more than 24 volts shall be used. Only a lamp or a light of flame-proof construction can be used in such places. (Sec. 33-K)

21. Explosive or Inflammable gas

Where a manufacturing process produces inflammable gas, dust, fume, etc. steps must be taken to enclose the machine concerned and prevent the accumulation of substances and exclude all possible sources of ignition. Extra precautionary measures are to be taken where such substances are worked upon at greater than the atmospheric pressure. (Sec. 33-L)

22. Prohibition of Children

The provincial government may make rules prohibiting the admission to any specified class of factories or specified parts thereof, of children who cannot be lawfully employed therein. (Sec. 33-M)

23. Notice of Accidents

Where in any factory an accident occurs which causes death or injury whereby any person injured is prevented from resuming his work during 48 hours, the manager of the factory shall give notice thereof to the concerned authorities. (Sec. 33-N)

24. Appeals

When an inspector gives any order in writing to the manager or occupier of a factory, they can make an appeal against such order within 30 days to the Provincial Government or Authority appointed in this behalf. The authority may suspend the order or impose some conditions. (Sec. 33-P)

25. Shelters for Rest

The Provincial Government may make rules requiring that in any factory wherein more than 150 workers are ordinarily employed, an adequate shelter of prescribed standard shall be provided for use of the workers during periods of rest. In a specified factory wherein more than 50 women are ordinarily employed a suitable room for the use of children under the age of 6 years be provided. The Provincial Government may make rules regarding certificate of stability and hazardous operations. The Provincial Government may make rules requiring the occupiers or managers of factories to maintain first aid appliances and provide for their proper custody and use. (Sec. 33-Q)

Working Hours

1. Daily hours

A worker may be required to work in a factory for not more than 9 hours in a day. However a male adult worker may work for 10 hours a day in seasonal factory. (Sec.36)

2. Weekly hours

A worker in a factory shall not be allowed to work for more than 48 hours in a week. If it is seasonal factory, the worker shall not be allowed to work for more than 50 hours in a week. If for technical reasons, a work continues throughout the day, a worker may be allowed to work for 56 hours in a week (Sec.34)

3. Intervals for rest

The periods of work of adult workers in a factory during each day shall be so fixed either:

a. That no period shall exceed six hours and that no worker shall work for more than six hours before he has had an interval for rest of at least one hour, or

b. That no period shall exceed five hours and that no worker shall work for more than five hours before he has had an interval for rest

than five hours before he has had an interval for rest of at least half an hour before he has at least two such intervals. (Sec.37)

4. Spread

The period of works of an adult workers in a factory shall be so arranged that inclusive of his interval for rest under section 37, they shall not spread over more than 12 hours or where the factory is seasonal one, 11 and a half hours in any day, except with the permission of Provincial Government (Sec.38)

5. Double employment

An adult worker shall not be allowed to work in any factory on any day on which he has already been working in any other factory except under specified circumstance. (Sec. 48)

6. Overtime Work

If a worker in a non seasonal factory has worked for more then 9 hours in a day, or more than 48 hours in a week, he shall be entitled to overtime pay at the rate twice his ordinary rate of pay.

If a worker in a seasonal factory works for more than 9 hours in any day or for more than 50 hours in any week, he shall be entitled to overtime at the rate twice his ordinary rate of pay. (Sec.47)

Child Workers

Working hours

a. A child or adolescent shall not be allowed to work in a factory for more than 5 hours in any day.
b. The hours of work of a child shall be so arranged that they should not spread over more than seven and a half hours in any day.
c. No child or adolescent, shall be allowed to work in a factory except between 6 a.m. and 7 p.m. (Sec. 54)
d. The Provincial Government may, in respect of any class of factory vary those limits to any span of 13 hours between 5 a.m. and 7:30 p.m.
e. The rules given under Section 35 regarding weekly holiday shall also apply to child workers.
f. No child shall be allowed to work in any factory on any day on which he has already been working in another factory.
g. A child or an adolescent, in spite of attaining the required age, cannot be allowed to work in a factory without obtaining a fitness certificate from a certifying surgeon. (Sec.52)
h. Where children are employed in a factory the manager of that factory shall maintain a register of child workers showing the name, age of each child, nature of his work, group in which he is included, and the number of his certificates of fitness.

i. Child workers and adolescent workers are not allowed to perform double duty. They are not allowed to work at a place where cotton opener is at work. They cannot oil or clean the machines while they are in motion. They are not allowed to work on dangerous machines.

j. No child who has not completed his 14th year shall be allowed to work in any factory.

Women Workers

Following provisions are relating to women workers.

1. Machinery in Motion

Women shall not be allowed to clean, lubricate or adjust any part of the machinery while in motion, or work between moving parts, or between moving and fixed parts of machinery in motion. Sec.27 (2)

2. Cotton Openers

Women shall not be employed in any part of the factory for pressing cotton in which a cotton opener is at work. However they are allowed if the cotton openers are located on different sides. (Sec.32)

3. Suitable Room

Where more than 50 women workers are ordinarily employed there shall be provided a suitable room for use of children less than 6 years of age. Sec.33-2(Q)

4. Working Hours

A woman shall not be allowed or required to work for more than 9 hours in a day and no exemption in this respect will be granted. (Sec.36)

5. Working Time

A woman shall not be allowed to work except between 6 a.m. and 10 p.m. in 2 shifts provided that transport is provided. However, the Provincial Government may allow to work between 5 a.m. and 7.p.m. in special cases. (Sec.45)

Holidays with Pay

Following provisions are relating to holidays:

1. Annual Holidays

Every worker who has completed a period of 12 month's continuous service in a factory shall be allowed, during subsequent period of 12 months holidays for a period of fourteen consecutive days. (Sec. 49 (B))

2. Casual Leave

Every worker shall be entitled to casual leave with full pay for ten days in a year. (Sec.49 (H))

3. Sick Leave

Every worker shall be entitled to sixteen days sick leave on half average pay in a year. (Sec. 49 (H))

4. Festival Holidays

Every worker shall be allowed holidays with pay and on all days declared by the Provincial Government to be festival holidays. A worker may be required

to work on any festival holiday but one day's additional compensatory holiday with full pay and a substitute holiday shall be allowed to him in accordance with the provisions of Sec. 35. (Sec. 49 (1))

5. Compensatory Holidays

Where a worker is deprived of any of the weekly holidays, he shall be allowed, as soon as circumstances permit, compensatory holidays of equal number to the holidays so lost. (Sec.35-A)

Penalty and Procedure

The violation of Factories Act, 1934 imposes the following penalty. The manager and the occupier of the factory shall be punishable with the fine which may extend to Rs. 500. However, if both the manger and occupier are convicted, the aggregate of the fine in respect of in the same contravention shall not exceed this amount.

However, there are enhanced penalties in certain cases after previous conviction and relating to others members. (Sec.60-75)

Display of Factory Notice

All notices under the Act must be displayed in English and in the language understood by the majority of the workers employed therein. These notices must be displayed in a conspicuous place at or near the main entrance of the factory and must be maintained in a clean and legible condition. (Sec.76)

Others powers of Provincial Government

The Provincial Government may make rules requiring occupier or managers of the factories to submit such returns occasional or periodicals as required. No suit, prosecution or other legal proceedings shall lie against any person who works in good faith. (Sec.77-82)

SHORT ANSWER QUESTIONS

1. Mention five powers of inspector.
2. Mention five duties of inspector
3. Enlist the provisions of Factories Act relating to health of worker.
4. Enlist the provision of Factories Act relating to safety of workers

4. Enlist the provision of Factories Act relating to safety of workers.
5. Enlist the provisions of Factories Act relating to welfare of the worker.

TEST QUESTIONS

1. Define the following terms.
   a. Adolescent
   b. Power
   c. Manufacturing process
   d. Worker
   e. Factory
2. How an inspector is appointed? What are the powers and duties of inspector?
3. What are the provisions of Factories Act relating to health of workers?
4. Enlist the different provisions regarding safety and welfare of workers.
5. What are the provisions of Factories Act, 1934, about working hours of adults, children and women?
6. Explain the rules regarding holidays with pay.

30

INDUSTRIAL & COMMERCIAL EMPLOYMENT

Application of Ordinance

This ordinance may be called Industrial and Commercial Employment (Standing Orders) Ordinance, 1968. It applies to the whole of Pakistan.

It applies to every industrial establishment or commercial establishment wherein 20 or more workmen employed directly or through any other person whether on behalf of himself or any other person, or were so employed on any day during the preceding 12 months.

This Ordinance does not apply to industrial and commercial establishments run by the Federal or Provincial Governments where statutory rules of service, conduct or discipline are applicable to the workmen employed therein.

It further provides that provisions of Standing Orders 10(B) 11, 12(6) 12(8) and 15 are applicable to those industrial establishment where the workmen employed are 50 or more in number. (Sec.1)

Definitions

The different definitions are as follows: (Sec.2)

1. Collective Agreement

Collective agreement means an agreement in writing, intended to specify the conditions of employment and entered into between (a) one or more employers on the one hand and (b) one or more trade unions or (c) where there is no trade union, the duly authorized representatives of workmen on the other.

2. Commercial Establishment

Commercial establishment means (a) an establishment in which the business of advertising, commission or forwarding is conducted or (b) which is a commercial agency and (c) includes a clerical department of a factory or (d) of any industrial or commercial undertaking, the office establishment of a person who for the purpose of fulfilling a contract with the owner of any commercial

establishment or industrial establishment, employs workmen (e) a unit of joint stock company, an insurance company, a banking company or a bank, a broker's office or stock exchange, a club, a hotel, a restaurant or an eating house, a cinema or theater and (f) such other establishment or class thereof, as Government may, by notification in the Official Gazette declare to be a commercial establishment for the purposes of this Ordinance. (Sec. 2 (b))

3. Construction Industry

Construction industry means an industry engaged in the construction, reconstruction, maintenance, repair, alteration, or demolition of:

1. Any building, railway or tramway.
2. Harbour, dock or pier.
3. Canal, inland waterway, road, tunnel, bridge, dam, viaduct, sewer, drain, water work or well.
4. Telegraphic or telephonic installation, electrical undertaking.
5. Gas work or other work of construction as well as preparation for, or laying the foundation of, any such work or structure.

4. Employer

Employer means the owner of an industrial or commercial establishment to which this Ordinance for the time being applies and includes:

1. In a factory, the person named as manager of the factory.
2. In any industrial establishment under the control of any department of the Federal or Provincial Government, the authority appointed by such Government in this behalf or where no such authority is so appointed, the head of the department.
3. In any other industrial or commercial establishment, any person responsible to the owner for the supervision and control of such establishment.

5. Go Slow

Go slow means an organized, deliberate and purposeful slowing down of normal output of work by a body of workers in a concerted manner and which is not due to any mechanical defect, break-down of machinery, failure or defect in power supply or in the supply of normal materials and spare parts of machinery.

6. Industrial Establishment

Industrial establishment means:

1. An industrial establishment as defined in the Payment of Wages Act, 1936.
2. A factory as defined in Factories Act, 1934.
3. A railway as defined in Railways Act, 1890.
4. The establishment of contractor who directly or indirectly employs workmen in connection with the execution of a contract to which he is a party and

includes the premises in which, or the site at which, any process connected with such execution is carried on.

5. The establishment of a person who directly or indirectly employs workmen in connection with any construction industry.

7. Workman

Workman means any person employed in any industrial or commercial establishment to do any skilled or unskilled, manual or clerical work for hire or reward.

Enforcement of Standing Orders

In every industrial or commercial establishment, conditions of the employment of workmen and other related matters must be regulated according to the Standing Orders. (Sec.3)

Modification of Standing Orders

The Standing Orders may be modified by collective agreement but such modification shall not diminish any right or benefit available to workmen under this Ordinance. (Sec.4)

Posting of Standing Orders

The text of Standing Orders shall be posted by employer in English and Urdu and in the language understood by the majority of the workmen on special boards near the main entrance of the establishment. (Sec.5)

Inspector

The Government may by notification in the official Gazette, appoint inspector for this purpose. The inspector may at all reasonable hours enter in any premises and make such examination of any register or document relating to the maintenance or enforcement of the Standing Orders. He can take evidence of any person on the spot and exercise others powers of inspection. Every inspector shall be deemed to be public servant. (Sec.6)

Penalties and procedure

1. An employer who modifies the Standing Orders otherwise than in accordance with section 4 shall be punishable with fine according to law.
2. An employer who does any act in contravention of the Standing Orders shall be punishable with fine according to law.
3. Whoever contravenes any of the provisions of this Ordinance shall be punishable with fine according to law.
4. Whoever having been convicted of any offence punishable again commits such offence shall be liable to double punishment.

5. No prosecution for an offence be instituted except by or with the permission of inspector.
6. No court other than a labour court shall try any offence under this Ordinance. (Sec.7)

Power to exempt

Government may exempt any industrial or commercial establishment or class of such establishments from all or any of the provisions of this Ordinance. (Sec.8)

Protection

This Ordinance shall not affect any law, custom, usage, award or agreement enforced before the promulgation of this Ordinance if these provide better conditions of employment than those provided in the Standing Orders. (Sec.9)

Standing Orders (Section 2(g))

The different standing orders are as under:

Classification of workmen (S.O.1)

The following are the classifications of workmen:

1. Permanent

A permanent workman is a workman who has been engaged on work of permanent nature likely to last for more than 9 months and has satisfactorily completed a probationary period of 3 months in the same or another occupation in the industrial or commercial establishment, and includes a badli who has been employed for a continuous period of 3 months or for 183 days during any period of 12 consecutive months, including breaks due to sickness, accident, leave, lock-out, strike (not being an illegal lock-out or strike) or involuntary closure of the establishment (and includes a badli who has been employed for a continuous period of 3 months or for 183 days during any period of 12 consecutive months)

2. Probationer

A probationer is a workman who is provisionally employed to fill a permanent vacancy in a post and has not completed 3 months service therein. If a permanent workman is employed as a probationer in a higher post he may, at any time during the probationary period of three months, be reverted to his old permanent post.

3. Badli

A badli is a workman who is appointed in the post of permanent workman or probationer who is temporarily absent.

4. Temporary

A temporary workman is a workman who has been engaged for work which is of an essentially temporary nature likely to be finished within a period not exceeding nine months.

5. Apprentice

An apprentice is a person who is an apprentice within the meaning of the Apprenticeship Ordinance, 1962.

6. Contract worker

A contract worker means a workman who works on contract basis for a specific period of remuneration to be calculated on piece rate basis.

Tickets (S.O.2)

A permanent workman shall be given a permanent ticket and a departmental ticket showing the workman's number. He shall show it to any person authorized to inspect it. A badli shall be given a badli card on which shall be entered the days he works. A temporary workman is given a temporary card. An apprentice is given an apprentice card. These cards signify the status of the workmen.

Terms and Conditions (S.O.2-A)

Every workman at the time of his appointment, transfer or promotion shall be given an order in writing showing the terms and conditions of his service.

Working Time (S.O.3)

The periods and hours of work shall be exhibited in Urdu and in principal language of the workmen on the notice board near the main entrance and at the timekeeper's office.

Holidays and Pay Days (S.O.4)

The days observed as holidays and pay days shall be exhibited on the notice board.

Wage Rates (S.O.5)

The rates of wages payable to all classes of workmen and for all classes of work shall be displayed on the notice board.

Shift Working (S.O.6)

The rules are as under:

1. The employer can order to start the work in more than one shift in a department or any section of a department.
2. The workmen can be transferred from one shift to another.

3. The shift working can be discontinued only after giving one month's prior notice.
4. The permanent workmen can be discharged keeping in view their length of service. The workmen with shorter term of service shall be discharged first.
5. If the shift working is restarted, the discharged workmen shall be reemployed.

6. Preference shall be given to those who have the longer term of service.

Attendance and Late Coming (S.O.7)

All workmen shall be at work at the establishment at the time fixed and notified under Order. Workman attending late shall be liable to deduction from their wages.

Leave (S.O.8)

Holidays and leaves with pay shall be allowed to workmen under the law. All other holidays according to law, contract, custom and usage are also allowed to workmen. A workman who desires to obtain leave applies to the employer who shall grant or refuse to grant the leave.

Payment of Wages (S.O.10)

All workmen shall be paid wages on a working day before the expiry of the 7th day after the last day of the wage period, in respect of which the wages are payable. Unclaimed wages shall be paid by the employer on any unclaimed wages pay day in each week, which shall be notified on the notice board.

Group Incentive Scheme (S.O 10-A)

In every factory where 50 or more worker are employed, there shall be introduced a group incentive scheme for the workers. The incentive shall be in the form of additional wages or additional leave with wages or both for workmen whose production exceeds an average.

Compulsory Group Insurance (S.O 10-B)

The employer shall have the entire permanent workmen employed by him insured against risks of natural death and disability and death and injury due to contingencies not covered by others laws. The employer shall be responsible for the payment of premium and other arrangements. If the employer fails to arrange for insurance, he shall be liable to pay compensation to the heirs of workmen like an insurance company.

Payment of Bonus (S.O 10-C)

Every employer making profit in any year shall pay (for that year within three months of the closing of that year) to the workmen who have been in his employment in that year for a continues period of not less than 90 days, a bonus in addition to the wages payable to such workers.

Stoppage of Work (S.O 11)

The employer has the right to stop the working for some period of any section or sections, without notice due to causes beyond his control. In case of stoppage of work the workmen affected shall be informed. They will also be informed when work will be resumed and whether they are to remain or leave their place of work. The workmen shall not be required to remain for more than 2

hours after the commencement of the stoppage.

If the period of detention does not exceed 1 hour, the workmen so detained shall not be paid for the period of detention. If the period of detention exceeds 1 hour, the detained workmen shall be entitled to receive wages for the whole of the time during which they are detained as a result of stoppage.

Lay Off (S.O.11-3)

The employer can lay off the workers on a account of reasons mentioned in standing orders. Such laid off workers shall be paid wages according to the rules.

Closure of Establishment (S.O 11-A)

The employer is not allowed to terminate the employment of more than 50 percent of the workmen or to close down the whole establishment without permission of the labour court except under some special circumstances.

Termination of Employment (S.O 12)

The employment of a permanent workman other than misconduct is terminated by giving one month's notice, either by the workman or by the employer. And in lieu of such notice one month's wages being average wages of the last three months shall be payable.

The employment of a temporary workman, a probationer or a badli may be terminated either by the workmen or by the employer, without giving any notice or any wages in lieu thereof.

The services of workmen shall not be terminated except by an order in writing which shall state the reasons for the action taken.

When the services of workmen are terminated, the wages earned by them and their other dues shall be paid before the expiry of the second working day from the day on which their services are terminated.

Procedure of Retrenchment (S.O.13)

Where any workman is to be retrenched and he belongs to a particular category of workmen, the employer shall retrench the workman who is the last person employed in that category.

Re-employment of retrenched workmen (S.O 14)

In case of re-employment within one year, the employer can offer re-

employment to the retrenched worker according to his seniority.

Construction Workers (S.O.14-A)

Where any workman is retrenched or discharged engaged in the construction industry due to completion, cessation, discontinuance of work, he shall be given preference for employment within one year. If such a worker is reemployed within one month, he shall be deemed to have been in continuous

service but no wages shall be paid to him for this period of interruption.

Punishments (S.O.15)

A worker shall be punished or fined according to law.

Eviction from residential accommodation (S.O 16)

When a workman retires or resigns, or is retrenched, discharged or dismissed, or whose services have been terminated; he shall vacate the residential accommodation provided by his employer within a period of two months.

If a workman whose services have been terminated, fails to vacate any residential premises within the specified period, the employer may lodge a complaint with a concerned magistrate. The magistrate on hearing the parties may decide the case and issue an order of eviction, giving the workman a reasonable time to vacate the premises. He may order a police officer to evict such workman.

Certificate of termination of service (S.O 19)

Every permanent workman shall be entitled to a service certificate at the time of his dismissal, discharged, retrenchment or retirement from service.

Liability of employer (S.O 20)

Employer shall be personally responsible for following the Standing Orders whether the workman has been employed by him or contractor.

SHORT ANSWER QUESTIONS

1. Explain the provisions of Standing Order 10 regarding payment of wages.
2. Explain the rules regarding payment of bonus under S.O.10.(c)

TEST QUESTIONS

1. Define the terms. (a) Collective agreement. (b) Commercial establishment (c) Go-slow (d) Industrial establishment
2. What is the classification of workmen under Industrial and Commercial

Employment (Standing Orders) ordinance, 1968?

3. Write short note on (a) Shift Working (b) Payment of bonus (c) Termination of employment (d) Procedure of retrenchment.
4. Describe the procedure of termination of employment under industrial and commercial ordinance, 1968.

31

PAYMENT OF WAGES

Application of Act

The law relating to payment of wages is contained in Payment of Wages Act 1936. It applies to whole of Pakistan.

The Act applies to the payment of wages to persons employed in any factory and to persons employed (otherwise than in a factory) upon any railway by a railway administration either directly or through a subcontractor, by a person fulfilling a contract with a railway administration.

The Provincial Government may, after giving a three months' notice by notification in the Official Gazette, extend the provisions of the Act or any of them to the payment of wages to any class of persons employed in an industrial establishment or any class or group of industrial establishments.

It does not apply in case of workmen who get monthly wages exceeding Rs.6000 (Sec.1)

Definitions

The definitions of important terms are as under: (Sec. 2)

1. Factory

Factory means a factory as defined in clause (J) of Section 2 of the Factories Act, 1934.

2. Industrial establishment

Industrial establishment means (a) any tramway or motor omnibus service, dock, wharf or jetty, inland steam-vessel, mine, quarry or oil-field, plantation, workshop or other establishment in which articles are produced, adapted or manufactured with a view to their use, transport or sale and (b) establishment of a contractor who directly or indirectly, employs persons to do any skilled or unskilled manual or clerical labour for hire or reward in connection with execution of a contract to which he is a party and includes the premises in which, or the site at which, any process connected with such execution is carried on.

3. Plantation

Plantation means any estate which is maintained for the purpose of growing cinchona, rubber, coffee or tea and on which 25 or more persons are employed for that purpose.

4. Railway Administration

Railway administration has the meaning assigned to it Section 3 (6) of the Railways Act, 1890.

5. Wages

Wages means all remuneration capable of being expressed in terms of money which would, if the terms of the contract of employment, express or implied were fulfilled, be payable whether conditionally upon the regular attendance, good work or conduct or other behaviour of the person employed or otherwise, to a person employed in respect of his employment or of work done in such employment and includes any bonus or other additional remuneration of the nature aforesaid which would be so payable and any sum payable to such person by reason of the termination of his employment; but does not include:

a. The value of house accommodation, supply of light, water, medical attendance or other amenity or of any service excluded by general or special order of the Provincial Government.
b. Any contribution paid by the employer to any pension fund or provident fund.
c. Any traveling allowance or value of traveling concession.
d. Any sum paid to employed person to defray special expenses entailed on him by the nature of his employment.
e. Any gratuity payable on discharge.

Responsibility of Payment of Wages

Every employer including a contractor shall be responsible for the payment to persons employed by him of all wages. In the case of persons employed otherwise than by a contractor, the following persons are responsible for payment of wages. (Sec. 3)

1. In factories, the person named as the manager.
2. In industrial establishments, the person responsible for the supervision and control of the industrial establishment.
3. In railways, the person nominated by railways in this behalf.

Wage periods

The person responsible for the payment of wages shall fix the periods in respect of which, wages shall be payable. However, no wage period shall exceed one month. (Sec. 4)

one month. (Sec. 4)

Time of payment

Following are the rules regarding time of payment of wages: (Sec.5)

1. In railway, factory or industrial establishment employing less than 1000 persons, wages shall be paid before the expiry of the 7th day after the last day of the wage period in respect of which the wages are payable.

2. In all other factories or industrial establishments wages must be paid before the expiry of the 10th day from the last day of the wage period.
3. Where the employment of any person is terminated, his wages shall be paid before the expiry of the 2nd working day from the day on which his employment is terminated.
4. The Provincial Government may exempt persons employed in a railway (otherwise than in a factory) from operation of this law.
5. All payment of wages shall be made on a working day.

Medium of Payment

All wages shall be paid in current coin or currency notes or in both.

Deductions from wages

The following deductions can be made from the wages: (Sec.7-13)

1. Fines

The rules with regard to fine are as under:-

a. Fine can be imposed on the employee for acts or omissions which are specified in a list approved by Provincial Government or the prescribed authority.
b. A list of fine must be exhibited in the place of work in a prescribed manner.
c. The employee must be given an opportunity to show cause before any fine is imposed.
d. The total amount of fine imposed in any one wage-period must not exceed 3% of the wages payable.
e. No fine shall be imposed on a person who is under the age of 15 years.
f. No fine imposed can be recovered from wages in installments or after the expiry of 60 days from the day on which it was imposed.
g. Every fine shall be deemed to have been imposed on the day of act or emission for which it was imposed.
h. All fines and recoveries shall be recorded in a register to be kept by the person responsible for the payment of wages.
i. Fine recovered shall be spent on the welfare of the employees.

2. Absence from Duty

A person is deemed to be absent from duty if he is physically present

within the premises of his duty but not attending to his job. Deductions from wages are permitted for absence from duty.

The ratio between the amount of such deductions and the wages payable must not exceed the ratio between the period of absence and the wage-period.

It is however provided that subject to the rules made in this behalf by the provincial government if 10 or more employed persons acting in concert absent

themselves without due notice and without reasonable cause, such deduction from any such person may include such amount not exceeding his wages for 8 days as may be due to the employer in lieu of notice. (Sec. 9)

3. Damage or Loss

A deduction shall not exceed the amount of the damage or loss caused to the employer by the neglect or default of the employed person. Such deductions can be made only after giving an opportunity of showing cause against deduction to the worker. All deductions and realizations must be recorded in a register to be kept by the person responsible for the payment of wages. (Sec. 10)

4. Services Rendered

A deduction shall not be made from the wages of an employed person unless the house accommodation, amenity or service supplied has been accepted by him as a term of employment or otherwise. Such deduction must not exceed the value of accommodation, amenity or service supplied. The Provincial government may impose certain conditions in this respect.

5. Advances and Overpayment of Wages

Deductions can be made for recovery of advances or adjustment of overpayment of wages subject to the following conditions. The deduction of any advance given before employment must be made from the first payment of wages in respect of complete wage period. But an advance for traveling expenses cannot be deducted. Similarly recovery of advances of wages not already earned shall be subject to any rules made by the Provincial Government. (Sec. 12)

6. Cooperative Societies and Insurance scheme

Deductions may be made for payments to cooperative societies approved by the Provincial Government or to a scheme of insurance maintained by Pakistan Post office. (Sec. 13)

7. Income Tax

Employer is permitted to deduct income tax payable by an employed person.

8. Orders of Court

If any deduction is directed by court for example, in execution of a decree against the employed person, it must be done.

9. Provident fund

Deductions

Deductions may be made of the contributions payable by the employed person to the provident fund under Provident Funds Act, 1925.

10. Written authorization

Deductions, made with written authorization of the employed person, in furtherance of any war savings scheme approved by Provincial Government for

the purchase of securities of the Government of Pakistan or the Government of UK.

SHORT ANSWER QUESTIONS

1. Explain the rules regarding time of payment of wages under Payment of Wages Act, 1936
2. Enlist the five deductions which can be made from the wages of workers.

TEST QUESTIONS

1. Define the following terms according to the Payment of Wages Act, 1936. (a) Factory (b) Industrial establishment (c) Wages
2. What are the rules with regard to the responsibility for payment of wages?
3. Enlist the deductions, which can be made from the wages of workers.
4. Explain the deductions for fines and absence from the duty under Payment of Wages, Act, 1936.

32

WORKMEN'S COMPENSATION

Workmen's Compensation Act, 1923

The law relating to workmen's compensation is contained in workmen's compensation Act, 1923. It extends to the whole of Pakistan. It consists of 35 sections and four schedules.

Definitions

The different terms are as follows. (Sec.2)

1. Minor

A person who has not attained the age of 15 years is a minor.

2. Adult

A person who has attained the age of 15 years is adult.

3. Dependant

Dependants mean any of the following relatives of a deceased workman:

a. A widow, minor legitimate son, unmarried legitimate daughter and widowed mother.

b. If wholly or in part dependant on the earnings of the workman at the time of his death: widower; a parent other than widowed mother; minor illegitimate son; unmarried illegitimate daughter; or a daughter legitimate or illegitimate if married and a minor or if widowed and a minor; minor brother; an unmarried or widowed sister; widowed daughter in-law; minor child of a deceased son and minor child of a deceased daughter where no parent of the child is alive, or where no parent of workman is alive, a paternal grandparent.

4. Employer

Employer includes:

a. A body of persons whether incorporated or not.

b. A managing agent of an employer.

c. The legal representative of deceased employer.

d. A person to whom the services of the workman are temporarily lent or let-out

while the workman is working for him.

5. Managing agent

Managing agent means any person appointed or acting as the representative of another person for the purpose of carrying on such other persons trade or business but does not include an individual manager subordinate to an employer.

Partial Disablement

It has the following two types:

1. Temporary Partial Disablement

Temporary partial disablement means, where the disablement is of a temporary nature, such disablement as reduces the earning capacity of a workman in any employment in which he was engaged at the time of the accident resulting in the disablement.

2. Permanent Partial Disablement

Where the disablement is of a permanent nature such disablement as reduces his earning capacity in every employment which he was capable of undertaking at that time; provided that every injury specified in Schedule 1 shall be deemed to result in permanent partial disablement.

Total Disablement

It has the following two types:

1. Temporary Total Disablement

Temporary total disablement means such disablement of a temporary nature which incapacitates a workman for all work which he was capable of performing at the time of accident resulting in such disablement.

2. Permanent Total Disablement

Permanent total disablement shall be deemed to result from the permanent total loss of the sight of both eyes or from any combination of injuries specified in Schedule 1 where the aggregate percentage of the loss of earning capacity, as specified in that Schedule against those injuries, amounts to 100 percent.

Wages

Wages includes any privilege or benefit which is capable of being estimated in money, other than a traveling allowance or the value of any traveling concession or a contribution paid by the employer of a workman towards any pension or a provident fund or a sum paid to workman to cover any special expenses entailed on him by the nature of his employment.

Workman

Workman means:

1. Any person who is employed on monthly wages not exceeding Rs. 6,000 as

specified in Schedule II.

2. A railway servant as defined in Railways Act 1890, not permanently employed in any administrative, district or sub divisional office of the railway.

The following persons are not to be deemed as workmen:

1. A person whose employment is of a casual nature and who is employed otherwise than for the purpose of the employer's trade or business.

2. A person working in the capacity of a member of navel, military or air force.

Employers Liability for Compensation

The following are rules regarding workmen's compensation: (Sec.3)

1. Employer liable for Compensation

The employer is liable to pay compensation to a workman if personal injury is caused to a workman by accident arising out of and in course of employment. The employer is also liable to pay compensation if the workman contracts any of the occupational diseases specified in Schedule III of the Act.

a. Accident arising Out of employment

An accident arising out of employment means that there must be some relation between the injury and the accident and the work done in the course of employment. In order to prove that injury arose out of employment two conditions must be fulfilled.

i. Injury must have resulted from some risk incidental to the duties of the service, or inherent in the nature of condition of employment.

ii. At the time of injury worker must have been engaged in the business of the employer and must not be engaged in any work for his personal benefit.

b. Accident arising in Course of employment

It refers to the time during which employment continues. It covers whole of the time a workman is carrying out the duties required of him as incidental to his service. It includes not only the time when he is doing the work but also the time he is at place where he would not be but for his employment.

c. Occupational Diseases

Workers employed in certain occupations are exposed to certain diseases which are inherent in these occupations. Occupational disease shall be deemed to be an injury by accident unless the contrary is proved and it shall be deemed to have arisen out of, and the course of, the employment.

2. Employer not liable for Compensation

The employer is not liable for compensation in the following cases.

a. When the injury does not result in the total or partial disablement for a period exceeding 4 days.

b. When the injury, not resulting in death caused by an accident which is directly attributable to:

c. The workman having been at the time of accident under the influence of drinks or drug.

d. The willful disobedience of the workman to an express order or rules framed for securing safety.

e. The willful removal or disregard by the workman of any safety guard or other device which he knew to have been provided for securing safety.

Amount of Compensation

The amount of compensation payable to a workman depends on the nature of the injury and the amount of average monthly wages of the workman. The amount of compensation shall be as follows: (Sec.4)

1. Death

Where death results from an injury to a workman who is in receipt of monthly wages not exceeding to Rs.6000 the amount of compensation payable to heirs be Rs.100,000 as specified in column 10 of schedule IV.

2. Permanent Total Disablement

Where permanent total disablement results from an injury to a workman drawing Rs.6000 per month as wages, the amount of compensation payable shall be Rs.100,000 as specified in schedule IV.

3. Permanent Partial Disablement

Where permanent partial disablement results from the specified in schedule 1, compensation will be calculated on the basis of percentage of loss of earning capacity as laid down therein. In case of an injury not specified in schedule1, such percentage of compensation payable in case of permanent total disablement as is proportionate to the loss of earning capacity permanently caused by the injury.

4. Temporary Disablement

Where temporary disablement, whether total or partial results from injury arising out of and in course of employment, the workman drawing wages up to Rs.6000 p.m. irrespective of being adult or minor, compensation payable shall be ½ of the monthly wages during the period of disablement or a period of one year from the date of injury whichever is less.

Thereafter only in case of chronic disease, 1/3 of the monthly wages during the period of temporary disablement or for a period of 5 years from the date of injury whichever is less.

Distribution of compensation

The following are rules regarding distribution of compensation. (Sec. 8)

1. Compensation for death and lump sum amount due to a woman or person under legal disability must be deposited with the Commissioner.
2. In case of deceased workman, an employer may make to any dependant

advances on account of compensation not exceeding an aggregate of Rs. 100.

3. If compensation to be payable not less than Rs. 10 may be deposited with the commissioner.
4. The receipt of the commissioner shall be sufficient discharge in respect of any compensation deposited with him.

5. After the deposit of compensation the commissioner shall deduct the cost of workman's funeral expenses to an amount not exceeding Rs. 25 and pay the same to the person who has incurred such expenses.
6. The commissioner may call upon the dependants to appear before him for the distribution of the compensation.
7. If the commissioner is satisfied that no dependant exists, he shall repay the balance of money to the employer.
8. The commissioner shall on the application by the employer; furnish a statement showing the details of disbursements made.
9. The compensation money will be distributed among the dependants in such proportions as the commissioner thinks fit. He may pay the whole to one person.
10. Except in case of a women or a person under legal disability the compensation will be paid to the person entitled thereto.
11. The money payable to women or a person under legal disability may be invested or other wise dealt with as the commissioner thinks fit.
12. The orders of the commissioner regarding the distribution of compensation may be varied later if necessary.
13. Notice must be given to the parties affected.
14. If the commissioner varies an order on the ground that the compensation has been obtained by fraud or other improper means by any person the amount may be recovered from him.

SCHEDULE 1

(SEC.2 (1) AND 4)

List of injuries deemed to result in permanent total disablement.

S. No.	Description of Injuries	Percentage of loss of earning capacity
1	Loss of both hands or amputation at higher sites.	100
2	Loss of a hand and a foot.	100
3	Double amputation through leg or thigh or amputation through leg or thigh on one side and loss of other foot.	100
4	Loss of sight to such an extent as to render the claimant unable to perform any work for which eye-sight is essential.	100
5	Very severe facial disfigurement.	100
6	Absolute deafness.	100
List of injuries deemed to result in permanent total disablement		
	Amputations cases- upper limbs (either arms)	
1	Amputation through shoulder joint.	90
2	Amputation below shoulder with stump less than 8 from tip of acromion.	30
3	Amputation from 8 from tip of acromion to less than 4 belour tip of olecranon.	70
4	Loss of hand or of the thumb and four fingers of one hand or amputation from 4 below tip of olecranon.	60
5	Loss of thumb.	30
6	Loss of thumb and its metacarpal bone.	40
7	Loss of four fingers of one hand.	50
8	Loss of three fingers of one hand.	30
9	Loss of two fingers of one hand.	20
10	Loss of terminal phalanx of thumb.	20
	Amputations cases- lower limbs	
11	Amputation of both feet resulting in end-bearing stumps	90

11	Amputation of both feet resulting in end-bearing stumps.	50
12	Amputation through both feet proximal to the metatarsophalangeal joint.	80
13	Loss of all toes of both feet through the metatarsophalangeal joint.	40
14	Loss of all toes of both feet proximal to the proximal inter phalangeal joint.	30

15	Loss of all toes of both feet distal to the proximal interphalangeal joint.	20
16	Amputation at hip.	90
17	Amputation below hip with stump not exceeding 5" in length measured from tip of greater trochanter.	80
18	Amputation below hip with stump exceeding 5" in length measured from tip of greater trochanter but not beyond middle thigh.	70
19	Amputation below middle thigh to 3" below knee.	60
20	Amputation below knee with stump exceeding 3" but not exceeding 5".	50
21	Amputation below knee with stump exceeding 5 ".	40
22	Amputation of one foot resulting in end-bearing.	30
23	Amputation through one foot proximal to the metatarso-phalangeal joint.	30
24	Loss of all toes of one foot through the metatarso-phalangeal joint	20
	Others Injuries	
25	Loss of one eye, without complications, the other being normal.	40
26	Loss of vision of one eye without complications or disfigurement of eyeball, the other being normal.	30
	Fingers of right/left hand index finger	
27	Whole	14
28	Two phalanges	11
29	One phalanx	9
30	Guillotine amputation of tip without loss of bone	5
31	Middle finger	12
32	Two phalanges	9
33	One phalanx	7
34	Guillotine amputation of tip without loss of bone	4
35	Ring or little finger	7
36	Two phalanges	6
37	One phalanx	5
38	Guillotine amputation of tip without loss of bone	

38	Guillotine amputation of tip without loss of bone	2
	Toes of right or left foot great toe	
39	Through metatarso-phalangeal joint.	14
40	Part, with some loss of bone	3
	Any other toe	
41	Through metatarso-phalangeal joint	3
42	Part, with some loss of bone	1

	Two toes of one foot, excluding great toe.	
43	Through metatarso-phalangeal; joint.	5
44	Part, with some loss of bone	2
	Three toes of one foot, excluding great toe	
45	Through metatarso-phalangeal joint.	6
46	Part, with some loss of bone	3
	Four toes of one foot, excluding great toe	
47	Through metatarso-phalangeal joint.	9
48	Part, with some loss of bone	3

SCHEDULE IV

(SECTION 4)

Compensation payable in certain cases:

Monthly wages of the workman injured		Amount of compensation for		Half monthly payment as compensation for temporary disablement
		Death	Permanent total disablement	
1		2	3	4
More than	but not more than			
Rs.	Rs.	Rs.	Rs.	
0	6,000	250,000	250,000	½ of the monthly wages during the period of disablement or a period of one year, reckoned from the date of injury, whichever is less and thereafter only in case of chronic lung diseases 1/3 of the monthly wages during the period of disablement or for a period

				of 5 years, reckoned from the date of injury, whichever is less.

SHORT ANWSER QUESTIONS

1. What is partial disablement?
2. What is total disablement?
3. Define the term employer under the workmen compensation Act. 1923

TEST QUESTIONS

1. Explain the rules regarding employer's liability for compensation.
2. Mention the circumstances under which the employer is not liable for compensation.
3. Explain the law about amount of compensation payable to workman?
4. Explain the rules regarding the distribution of amount of compensation?
5. Define the following terms under Workmen's Compensation Act.
   a. Dependent
   b. Partial disablement
   c. Total disablement
   d. Workman

33

SOCIAL SECURITY

Provincial Employees Social Security Ordinance, 1965

The law relating to employees social security is contained in Provincial Employees Social Security Ordinance, 1965. It extends to the whole of Pakistan. It has 82 sections. It applies only to those areas, classes of persons, industries or establishments, which are notified by the Government.

Definitions

The different terms are as follows: (Sec.2)

1. Appointed Day

Appointed day means the day on which the Social Security Ordinance is applied to any area, class of persons, industries, establishments and benefits.

2. Confinement

Confinement means the labour resulting in the issue of a living child, or labour after 26 weeks of pregnancy resulting in the issue of a child, whether alive or dead.

3. Contribution

Contribution means the sum of money payable to the institution by an employer in respect of an employee in accordance with the provisions of this Ordinance.

4. Dependent

Dependent means the wife or wives or a needy invalid husband, dependent parents, and any unmarried children under the age of twenty one years dependent upon the secured person.

5. Disablement

Disablement means a condition caused by an employment injury which has permanently reduced or is likely to reduce permanently, a secured person's earning capacity, provided such condition is certified by a medical practitioner authorized for the purpose. Disablement may be minor, partial or total as follows:

a. Disablement is minor when the loss of earning capacity is less than 20 percent.

b. Disablement is partial when the loss of earning capacity is between 21 to 60 percent.

c. Disablement is total when loss of earning capacity is in excess of 60 percent.

6. Domestic Servant

Domestic Servant means any person working whole-time in connection with the work of any household for any consideration, whether in cash or in kind.

7. Employee

Employee means any person employed whether directly or through any other person for wages or otherwise to do any skilled or unskilled, supervisory, clerical, manual or other work in or in connection with the affairs of an industry or establishment under a contract of service or apprenticeship whether written or oral, expressed or implied but does not include:

a. Persons in the service of State, Armed Forces, Police and Railways.

b. Persons employed in Defence organizations or Railway administration.

c. Persons in service of local council, municipal committee, cantonment board or local authority.

d. Any person in the service of his father, mother, wife, son, daughter or husband.

e. Any person employed on wages exceeding Rs.10,000 per month.

8. Employer

Employer means in the case of works executed or undertakings carried on by any contractor or licensee on behalf of the State, the contractor or licensee working for the State, and in every other case the owner of the industry, business undertaking or establishment in which an employee works and includes an agent, manager or representative of owner.

9. Employment Injury

Employment injury means a personal injury to a secured person caused by an accident or by specified occupational disease arising out of and in course of employment.

10. Industry

Industry means any business, trade, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft, industrial occupation or avocation of workman.

11. Secured Person

Secured person means a person in respect of whom contributions are payable under the Social Security Ordinance.

12. Sickness

Sickness means a condition which requires medical treatment or necessitates abstention from work on medical grounds.

13. Wages

Wages means remuneration for service paid or payable in cash or in kind to a secured person, not being less than remuneration based on the minimum

rates of wages declared under the Minimum Wages Ordinance, 1961 without taking account of deductions for any purpose, under a contract of service or apprenticeship. Wages include any dearness allowance, cost of living allowance, payment for authorized leave, illegal lock-out and illegal strike and do not include payment for overtime, payment for special expenses, any gratuity and general bonus.

SOCIAL SECURITY INSTITUTION

Establishment

The Government has established an Employees Social Security Institution. The institution is a body corporate. It has a common seal and perpetual succession. It has the power to acquire, hold and dispose of property both moveable and immoveable. It can sue and be sued by its own name. It has its own funds. It can incur expenditures where necessary. (Sec.3)

Management

The management of the institution will be governed by a Governing Body with the assistance of Commissioner. The general body may exercise all powers and do all acts which may be exercised or done by the institution. The Institution is bound to follow the instructions of the Government on the question of policy. (Sec.4)

Governing Body

The governing body of the institution shall consist of members appointed by the government. (Sec.5)

1. Chairman must be a person who is or has been a judge of High Court, or senior officer of Government not below the rank of Commissioner or Secretary to the Government.
2. Four persons will represent government, one each from department of labour, industries, health and finance.
3. Three persons will represent employers.
4. Three persons will represent secured persons.
5. One medical advisor will be ex-officio officer.

The representative of employers and secured persons will be chosen from a list of names submitted by the organizations of employers and employees. The Government shall select first members before the completion of lists and

formation of rules. A member shall hold office for 3 years from the date on which his appointment is made.

Powers and Functions

The powers and functions of the governing body are as under: (Sec.6)

1. To direct and supervise the affairs of the institution.

2. To approve the budget estimates, audited accounts and annual reports of the institution for submission to Government.
3. To call for any information or direct any research to be made for the furtherance of the objects of this ordinance.

Meetings

The rules regarding meetings are as under: (Sec.7)

1. The meetings of the general body shall be held according to the regulations made in this behalf.
2. To constitute a quorum at a meeting, the number of members shall be 5.
3. Each member shall have one vote. The Chairman shall have a casting vote.
4. The Chairman shall preside over the meetings. In the absence of chairman a person elected by the members shall preside over the meeting.

Authentication of orders

All orders and decisions of the Governing Body shall be authenticated by the signature of the Chairman or of such other Member as may have been authorized by the Governing Body in writing for the purpose. (Sec.8)

Supersession of Governing Body

The Government can supersede the governing body if it fails to perform the duties imposed upon it. The Government shall, before supersession, give an opportunity to the Governing Body to explain its position. The government upon supersession of governing body shall constitute another governing body by appointing new members. (Sec.9)

Amount and payment of Contribution

The rules of payment of contribution are as under: (Sec.20)

1. The employer shall be responsible for payment of contribution where he employs workmen directly or indirectly but not more than 6 percent.
2. No contribution shall be payable on wages which are in excess of Rs. 400 per day or Rs. 10,000 per month.
3. The employee cannot deduct or recover his contribution from the employee's wages under any secret agreement.
4. The amount of contribution payable shall be calculated to the nearest

4. The amount of contribution payable shall be calculated according to the regulations.
5. Where the mode of payment of remuneration whether in cash or in kind, makes it difficult to determine the amount of wages for computing the contribution, the Commissioner may determine such wages.
6. In case of construction work the owner of building shall guarantee the payment of contributions by the contractor.

7. In case of work done by contractor on behalf of Government, the contractor will deposit the contribution with institution. If he fails, the authority shall deduct such amount before any payment is made to him.
8. Under self assessment scheme an employer may pay to the institution a contribution of Rs. 360 per month per secured employee.
9. Every employee secured in respect of whom the employer pays contribution shall be liable to pay Rs.20 per month through his employer.

Records of Contribution

The employer is required to maintain records showing the payment of contribution. The employer is also required to file a return, on the basis of such records. (Sec.21)

Checking of Records

The authorized officers have the following powers: (Sec.22)

1. To ask any employer to provide any information.
2. To enter any premises occupied by any employer and require any person found incharge thereof to produce and allow him to examine accounts, books and other documents.
3. To ask any person incharge of the promises to provide documents about employment of persons and payment of wages.
4. To examine the incharge and secured persons.

Unpaid Contribution and Recovery of contribution

Under the following situations the contribution payable by the employer can be increased: (Sec.23)

1. If employer fails to pay the contribution on due date the amount shall be increased by a prescribed percentage. The amount of increase shall in no case exceed 50 % of the amount due.
2. When the employer does not observe the safety and hygienic rules the Commissioner shall increase the rate of contribution by an order in writing. But this increase shall not be more than 20 %.

Social Security Benefits

Social Security Benefits

The following Social Security benefits are available to the secured persons:

1. Sickness Benefit

A secured person who is certified by authorized medical practitioner to be incapable of attending to his work due to sickness shall be entitled to receive sickness benefit at the prescribed rate provided the contribution in respect of him was paid or payable for at least 90 days during 6 calendar months immediately preceding his incapacity to work. A secured person shall be entitled to receive

sickness benefit through out the period of sickness. During a continuous period of 365 days such benefit shall not be allowed for a period exceeding:

a. 365 days if he has been suffering form T.B or Cancer

b. 121 days if he has been suffering from any other disease.

No benefit shall be given for first 2 days of sickness if such sickness does not within 15 days follow the previous period of sickness for which he received such benefit. (Sec.35)

2. Maternity Benefit

A secured person is entitled to receive this benefit at the prescribed rate provided contribution in respect of her was paid or payable for not less than 160 days during the 12 calendar months immediately preceding the expected date of her confinement. This benefit is payable for all days on which she does not work during the period of 12 weeks of which not more than 6 weeks shall precede the expected date of confinement. (Sec.36)

3. Death Grant

On the death of secured person, the person entitled to receive such benefit shall be entitled to death grant which will be equal to the daily rate of sickness benefit multiplied by 30 subject to minimum of Rs. 1500. (Sec.37)

4. Iddat Benefit

Where the husband of a secured woman dies, she shall be entitled to receive Iddat benefit equal to the daily rate of her wages during the period of her Iddat.

Provided that a secured woman being a seasonal employee shall be entitled to receive iddat benefit in the same manner and to the same extent notwithstanding termination of seasonal employment during the period of her iddat. It is further provided that employer shall not refuse leave for the period of iddat. (Sec.37)

5. Medical Care during sickness and maternity

A secured person and his dependants shall be entitled to medical care according to the regulations. The secured woman shall also be entitled to pre-natal confinement and post-natal medical care if she is entitled to such benefit if during the 6 calendar months immediately preceding her claim, contributions in

respect of her were paid or payable for not less than 90 days. (Sec.38)

6. Medical Care of dependents

Where secured person dies other than due to any employment injury, his dependents shall subject to regulations be entitled to medical care for 1 year from the date of death of the secured person, if deceased secured person had been in continuous employment of an establishment for not less than 12 months immediately preceding his death.

Where the deceased secured person was a seasonal employee, his dependents shall be entitled to medical care for 6 months form the date of death of such person if the deceased has been in employment for not less than 6 months during 2 continuous seasons immediately preceding his death. (Sec.38)

7. Injury Benefit

A secured person is entitled to receive injury benefit. The secured shall receive this benefit from the day he suffers employment injury. This benefit is payable for a maximum period of 180 days. The rate for the time being announced is 60% of the daily rate of wages. (Sec.39)

8. Disablement Pension

A secured person who sustains total or partial disablement shall be entitled, after the expiry of his entitlement to injury benefit, to receive disablement pension. Disablement pension shall terminate with the death of the secured person or when disablement ceases. The disablement pension shall be payable for life if the same has been paid for 5 years. (Sec.40)

9. Disablement Gratuity

The secured person sustaining minor disablement shall be entitled to disablement gratuity according to the rules. If a secured person receiving this pension ceases to suffer from total or partial disablement but continues to suffer from minor disablement, he shall on the termination of disablement pension, be entitled to disablement gratuity. (Sec.41)

10. Survivor's Pension

Survivor's pension is payable to each of the dependents according to the rule subject to the maximum of rate of total disablement pension which was payable to deceased person. Survivor's pension shall terminate upon the death of survivor, upon the remarriage of survivor widow and upon the attaining 16 years of age of dependent child. When the deceased person does not leave a widow or needy widower the survivor's pension shall be payable to the dependent father or mother, if they are alive, at the rate of equal to 1/5th of the rate of total disablement pension. (Sec.42)

Amendment by Punjab Government

If the deceased person does not leave a dependant, a survivor's pension

shall be payable for life to a dependant father, and if he is not alive to a dependant mother, and if she is not alive to dependant brothers and sisters in equal shares, at a rate equal to one–half of the rate of total disablement pension to which the secured person was or would have been entitled. Survivor's pension shall terminate:

1. Upon the death of the survivor.
2. Where the survivor is a widow, upon her remarriage.

3. Where the survivor is a dependant child, upon his attaining the age of 21 years. Such age limit shall not apply to dependent unmarried daughters. (Sec.2-A)

SHORT ANSWER QUESTIONS

1. What are the functions of general body of Social Security Institution?
2. Mention eight social security benefits available to secured person

TEST QUESTIONS

1. Define the following terms under Employees Social Security Ordinance, 1965.
   a. Disablement
   b. Employee
   c. Employment injury
   d. Secured Person
   e. Wages.
2. What are the various provisions of law relating to Social Security Institution?
3. Explain the different provisions of law regarding contribution.
4. What are the different Social Security benefits available to secured persons?

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LAW OF PARTNERSHIP

Law of Partnership

The law of partnership is contained in the Partnership Act, 1932 which came into force on 1st October 1932. It extends to whole of Pakistan. (Sec. 3)

Meaning and Definition

A partnership is a voluntary association of two or more persons who contribute money, property, time and skill to carry on business for profit and to share the losses of the business.

Some definitions of partnership are as under:

USA Partnership law: "An association of two or more persons who carry on as co-owners, a business for profits."

Dr. William R. Spriegel: "Partnership has two or more members, each of whom is responsible for obligation of the partnership. Each of the partners may bind the others and the assets of partners may be taken for the debts of the partnership."

Kimball and Kimball: "A partnership is a group of men who have joined capital or services for the prosecuting of some business."

Prof. Haney: "Partnership is the relation existing between persons to make contracts who agree to carry on a lawful business with a view to private gain."

Partnership Act Sec. 4: "Partnership is the relation between persons who have agreed to share the profits of a business carried on by all or any one of them acting for all."

Characteristics

The following are characteristics or features of partnership:

1. Legal Entity

A partnership has no separate legal entity apart from its members. It

means that the partnership and partners are not separate from one another. The rights and liabilities of the firm are considered the rights and liabilities of the partners. If any of the partners dies, retires or becomes insane, the partnership comes to an end.

2. Agreement

A partnership is the result of an agreement between two or more persons. An agreement may be written or oral. Only the persons who are competent to

contract can form a partnership. On the death of father who was a partner in a firm, the son can claim share in the partnership property but cannot become a partner unless he enters into an agreement with the other partners.

3. Number of Partners

At least 2 persons are required to form a partnership. The Partnership Act does not mention any maximum limit of persons who can be partners in a partnership firm. According to Section 14 of Companies Ordinance, 1984 a partnership consisting of more than 20 persons cannot be formed.

4. Existence of Business

In order to form a partnership, the partners must agree to carry on a certain business. If the purpose is something other than business, it cannot be called a partnership. Therefore, where there is no business, there is no partnership.

5. Sharing of Profits

The agreement between the partners must be to share the profits of a business. The profit will be distributed among the partners according to their agreement. If there is no agreement regarding the distribution of profit, it will be equally distributed among the partners. The partners will share the loss according to the agreed ratio. Some partners may agree to bear all the losses of the business.

6. Mutual Agency

The business must be carried on by all the partners or any of them acting for all the partners. Each partner acts as an agent of the other partners of the firm. Again, each partner acts as a principal also because he binds himself to the activities of other partners. It means that the contract of agency exists among partners.

7. Unlimited Liability

The liability of all the partners is unlimited. All the partners are individually and collectively responsible for the debts of the business. It means that if there is any loss and the business sources are insufficient to satisfy the claims of the creditors, the private assets of the partners can be sold to satisfy the claims of creditors.

8. Capital

8. Capital

Generally, the capital for the partnership firm is provided by all the partners. It is not necessary that all the partners contribute equal amount of capital. Capital is contributed according to the partnership agreement. A person without contributing any capital may become a partner on the basis of his ability, skill, knowledge or experience.

9. Utmost Faith

A partnership is based on mutual confidence and trust of the partners. The partners must be fair and honest with each other. They must disclose all facts and provide true accounts relating to the business to each other. They must not make any secret profit or involve in any activity which could harm the interests of other partners.

10. Management

According to law, every partner can participate in the conduct and management of the partnership firm. Usually, the management work is divided among the partners according to their experience, ability and knowledge. In practice, the senior partner exercises overall supervision over the firm.

11. Control

Since a partnership is formed by an agreement, its control depends on the terms of the agreement. Where all the partners take an active part in the conduct of the business, the control remains with all of them and major decisions are taken with the consent of all the partners. Otherwise, control may be given to one or more partners under the agreement.

12. Transfer of Ownership

Usually, the partnership deed includes provisions regarding transfer of ownership of partners. If there are no such provisions in the partnership deed, a partner cannot transfer his ownership in the partnership to an outsider without the consent of all other partners. Thus, the share in a partnership is not freely transferable.

13. Duration

The partnership continues as long as the partners are willing to run the business. It comes to an end on the death, insanity or insolvency of any of the partners. However, if the remaining partners agree to continue the business and make a new agreement, the firm will not dissolve.

Advantages

The following are important advantages of partnership:

1. Easy Formation

The partnership can be formed easily because no complicated legal

The partnership can be formed easily because no complicated legal formalities are required for its formation. The registration of firm is not compulsory. The cost of formation of partnership is small and process can be completed quickly.

2. Larger Capital

In sole proprietorship, the amount of capital is limited to the personal and borrowing capacity of one individual. But in case of partnership, there are more persons who can easily collect huge amount of capital. If the present partners are

not in a position to supply the needed capital, the amount can be borrowed. Moreover, the capital can also be increased by admitting new partners.

3. Better Management

In sole proprietorship, it is difficult for sole proprietor to manage the business effectively. But in case of partnership, the partners may perform those duties for which they are more suitable. In case of important matters all the partners can get together and decide. This ensures more efficiency and increase profits.

4. High Credit Standing

In sole proprietorship, the sole proprietor due to unlimited liability enjoys high credit standing. In case of partnership the liability of all the members is also unlimited. It means that in case of loss the personal assets of all the partners can be held liable to meet the claims of the creditors, so the financial institutions give loans without fear.

5. More Participation

All the partners work hard to make the partnership firm successful. They know that in case of failure of business, they will have to bear the loss. Moreover, if the resources of business are not enough to meet the loss, their personal assets shall be utilized to satisfy the claims of the creditors. Thus, all the partners participate in business activities.

6. Skilled Employees

In sole proprietorship, it is difficult to employ skilled persons because they demand high salaries. But in case of partnership, the resources of the firm are larger, so the services of educated, experienced and skilled persons can be obtained. In addition, such persons can also be attracted by making them partners of the firms.

7. Public Relations

The partners personally look after the affairs of business, so they develop good relations with the employees and customers which are beneficial for the firm. Direct contact with customers helps to build trust and loyalty. The employees can be supervised more effectively when the partners show active interest in management.

8. Flexibility

8. Flexibility

A partnership is free from legal restrictions. It is formed by an agreement so the business can be changed easily. Its objects, membership and capital may be easily adjusted according to changes in the business conditions. But in case of company, a change in objects requires the sanction of Securities and Exchange Commission of Pakistan.

9. Decision Making

The interest of minority partner in a partnership is protected by law. In policy matters, all partners must agree. In ordinary affairs, a dissatisfied partner may withdraw his share and dissolve the firm. Thus, the minority partner enjoys the right of veto. In fact, the law gives each partner the right to be heard and consulted.

10. Protection of Minor Partner

In partnership, the interest of minor partner is properly protected. A minor partner enjoys special protection in a partnership firm. His liability is limited to the extent of his capital contribution. This protection is beneficial as the death or insanity of partner does not dissolve the firm if in his place his minor successor is taken as a partner.

11. Quick Decision

In partnership, quick decisions can be taken regarding business policies which enable a firm to take advantage of changing market conditions. The decisions can be taken quickly as compared to companies because fewer persons are to be consulted. Thus, the risk of missing out on business opportunities from delay in decision making is lesser in partnership as compared to a company.

12. Sharing of Risk

A partnership firm enjoys the advantage of sharing of risk. Each partner shares risk according to the terms established in the partnership agreement. The losses suffered by the firm are shared by all partners and the burden of loss on each partner is lesser as compared to sole proprietor.

13. Possibility of Expansion

A partnership is flexible in its business operations and expansion of business is easy. Firm can expand its business because of its larger resources, favorable credit standing and managerial ability. The business can be expanded by adding more partners in the firm. But in case of sole proprietorship, it is difficult to expand the business.

14. Business Secrets

The success of business depends on secrecy. It is possible in a

partnership to maintain secrecy. A partner having knowledge about the business secrets will suffer loss if he reveals those business secrets as the losses of the firm are shared by all the partners.

15. Spirit of Cooperation

The success of a partnership firm depends upon mutual trust, cooperation and confidence. Profits or losses of the firm are shared by all the partners. This

increases the spirit of cooperation among the partners because they know that minor differences may terminate the partnership.

16. Personal Supervision

The partners personally manage and supervise the business. The employees can be supervised more effectively when the partners show interest in management of firm. Thus, personal supervision of the partners leads to increased efficiency, reduced wastage and increased profits.

17. Easy Dissolution

The partnership can be dissolved very easily by mutual consent of the partners. Formal documents are not required as in case of a joint stock company. In case of partnership-at-will, a partner may dissolve the firm any time by giving a notice to other partners. The partners of unregistered firm can take the help of court for dissolution of firm.

Disadvantages

The following are disadvantages of partnership:

1. Unlimited Liability

The partners have unlimited liability with regard to debts of the business. Every partner is individually and jointly liable for all the debts of the firm. If the business suffers loss and the business assets are not enough to satisfy the claims of the creditors, the personal assets of all the partners can be utilized to clear the claims. If some partners become insolvent, the solvent partner has to bear all the losses.

2. Risk of Dissolution

In case of death, insolvency or insanity of a partner, the partnership is terminated. The remaining partners will have to make a new agreement if they want to continue with the business. The remaining partners can purchase the share of such partner or sell these shares to an outsider.

3. Possibility of Disagreement

A partnership is started by a group of persons having good relations. But with the passage of time, differences may develop among them resulting in dissolution of firm. The business decisions are made by consultations, discussions and voting among the partners. This may create distrust among the

partners resulting in the failure of the firm.

4. Limited Resources

In a joint stock company, there are thousands of shareholders and a large amount of capital can be gathered in order to expand the business. But in case of partnership, the maximum limit of members is 20 and large amount of capital cannot be raised easily. Moreover, a company can raise funds by issuing bonds and debentures which is not possible in firms.

5. No Transfer of Ownership

In a joint stock company, the shareholder can transfer his shares any time to any person. But in case of partnership, the partner cannot transfer his ownership to any other person without the consent of all the other partners. It is easy to invest in a partnership but difficult to withdraw.

6. Lack of Public Confidence

A partnership firm does not enjoy public confidence due to lack of marketing and publicity. The people have little knowledge about its activities because its accounts and reports are not published. The affairs of business are not legally controlled. As a result, people do not have a favourable opinion about partnership firms.

7. Lack of Authority

All the partners have independent decision making authority in the management. As a result, many types of problems may arise when there is no mutual trust, understanding and cooperation. Disagreement, opposition and misunderstanding among partners may result in dissolution of partnership.

8. Lack of Harmony

As all the partners have equal authority in the management of the firm, so every partner tries to impose his own decision which leads to misunderstanding, distrust and dispute. As a result, the harmony among partners is disturbed and the business is negatively affected.

9. Lack of Secrecy

Lack of secrecy may occur in a partnership because business secrets are known to all the partners. While in case of sole proprietorship, the secrets remain restricted to a single person. The business rivals may exploit this weakness if a partner is ready to reveal the secrets.

10. Authority of Partners

A partner acts as the agent of the firm and co-partners. He can bind the firm and co-partners by making agreements with outsiders. Thus, a dishonest, careless and incompetent partner may create problems for his co-partners and the firm.

11. Loss of Opportunities

The partnership may miss out on business opportunities due to delay in decision making. The consent of all the partners is necessary before bringing any change in the business. Differences among the partners also decrease the efficiency of the firm.

12. Possibility of Fraud

The registration of a firm is not compulsory. The governments do not regulate the formation or activities of business so there are chances of fraud. The

partners of unregistered firm can easily commit fraud against each other. So the partnership agreement should be in writing to decrease the possibility of fraud.

Test of Partnership

In order to determine the existence of partnership, the following must be proved:

1. There must be an agreement among the persons to be held as partners.
2. The agreement must be for doing some business.
3. The agreement must be to share the profits of a business.
4. There must be a relationship of principal and agent among the partners.
5. There must be an agreement to carry on the business by all or any of them acting for all.

Partner

Persons who have entered into partnership with one another are called individually partners. Generally, the word partner means a person who has agreed to share the profit of the business.

Firm

The persons who have entered into a partnership with one another are collectively called a firm.

Firm's Name

The name under which partners carry on their business is called the firm's name. The partners can choose any name for the firm according to the following rules: (Sec. 58)

1. The name must not be identical or similar to the name of an existing firm.
2. The name must not contain words 'Government', 'Jinnah', 'Quaid-e-Azam' or words showing the approval or patronage of the Federal Government or any Provincial Government, without the consent of the provincial government.
3. A firm name must not contain the name of `United Nations' or abbreviations of its subsidiary body without the sanction of the Secretary-General of the UNO.
4. A firm name must not contain the name of the `World Health Organization' or its abbreviations without the sanction of the Director-General of the

its abbreviations without the sanction of the Director-General of WHO.

5. A firm must not contain any word which may be declared by the Provincial Government as undesirable.

Ideal Partnership

The following are characteristic of ideal partnership:

1. Mutual Understanding

There must be mutual understanding and cooperation among the partners. Mutual trust is essential to effectively run a firm and to make it a

success. This is possible only when the partners entering into an agreement know each other for a long time.

2. Common Purpose

All the partners must act for the common benefit of the partnership firm. The partners must cooperate with each other and make joint efforts to achieve common objectives. The partners should not pursue individual or personal goals but focus on collective benefits of the partners.

3. Good Faith

All the partners in a firm should work in good faith. They should act with complete honesty, sincerity and integrity. The partners must not take any unfair advantage of each other. Every partner should fully participate in the management of the firm.

4. Sufficient Capital

The business needs capital for both long term and short term purposes. The partners can borrow capital from external sources like banks and financial institutions. The profits extracted from the business must not be too large. The profits should be reinvested in the business to achieve further growth and development.

5. Long Duration

The duration of partnership should be long. Only long-term partnerships can properly formulate and implement long term plans for the business. It takes time to understand the affairs of business so the short term partnerships rarely succeed. Expansion and growth strategies cannot be implemented in short term partnerships.

6. Number of Partners

The number of partners must be appropriate and suitable. If the number of partners is small, the firm will suffer from lack of capital resources. If the number of partners is large, there is possibility of disagreement and mistrust among the partners.

7. Written Agreement

In order to avoid misunderstanding and future disputes, there must be a

written agreement among the partners. The rights and duties of the partners must be included in the partnership deed. It should contain full details about capital, profit sharing and authority of each partner.

8. Registration

The registration of partnership is not compulsory. It is better to register a partnership as soon as it is formed. If a partnership is not registered, it cannot sue outsiders although the outsider can sue it.

Kind of Partners

The following are kinds of partners according to liability, participation in management, shares of profits, etc.

1. Active Partner

A partner who takes an active part in the management of firm is called active partner. He takes much interest in the affairs of the firm. Such a partner must give public notice of his retirement from the firm in order to free himself from liability. He is also called the working partner.

2. Sleeping Partner

One who does not take an active part in the management of the firm is called sleeping or dormant partner. Such partner brings only capital in the business. He is also liable to the creditors of the firm like other partners. He is not required to give notice to general public about his retirement from the firm because he is not known to the general public.

3. Nominal Partner

One who lends his name and reputation to the firm is called nominal partner. He does not invest in business. He does not take part in the management like other partners. He does not get share in profits. But, he is regarded as partner in the eye of law. He is liable to the outsiders for the debts of the firm.

4. Senior Partner

A partner who has a more investment in the firm and receives more profit is called senior partner. He plays a major role in the management of the business due to experience, age, capability and other skills.

5. Junior Partner

A junior partner is the opposite of a senior partner. Usually, he is a young man who has recently become a partner of the firm. He has a small investment in the business. Due to small investment and less experience, he receives a nominal share in the profits. He has no major role in decision-making.

6. Partner in Profits Only

He is a partner who shares the profits of a firm but is not liable for the losses. A sleeping partner may be a partner in profits only. He is equally liable to

the outsiders like other partners.

7. Secret Partner

A secret partner is a partner whose membership is kept secret from the outsiders. Secret partner takes an active part in management of the partnership firm. He is liable for the debts of the firm like other partners.

8. Minor Partner

A minor is a person who has not completed 18 years of age. The person who wants to enter into partnership must be competent to contract. As a minor is not competent to contract, so he cannot become a partner. But with the consent of all the partners he may be admitted to the benefits of partnership by an agreement with his guardian. The following points must be noted in this connection:

a. Position during Minority

The rights and liabilities of a minor during minority are as under:

i. He has a right to receive his agreed share of the property and profits of the firm.

ii. He can inspect and take copies of the accounts but not the books of the firm as they may contain business secrets.

iii. He is not personally liable for the debts. His liability is limited to the agreed share in profit and property of the firm.

iv. He cannot take part in the management of the business.

v. He has a right to sue other partners for his share in profit or property of the firm when he breaks his relation from the firm.

vi. He cannot be declared insolvent.

b. Position after Majority

The minor must decide within 6 months whether he will continue in the firm or leave it. These 6 months start on attaining majority or on knowing that he was admitted to the benefits of partnership, whichever date is later. He should give public notice about his decision. If he fails to do so, he will be considered a major partner.

c. Decision to Become Partner

If he decides to become a partner, his position will be as follows:

i. His rights and liabilities will be similar to those of a major partner.

ii. He becomes personally liable to third parties for the debts and obligations of the firm from the date of his admission to the benefits of partnership.

iii. His share of profits and property in the firm remains the same unless

iii. His share of profits and property in the firm remains the same unless changed by agreement.

d. Decision not to become Partner

If he decides not to become a partner, his position will be as follows:

i. His rights and liabilities continue to be those of a minor up to the date of giving public notice.

ii. He is not liable for the acts of the firm done after the date of his public notice.

iii. He has a right to sue the partners for his share of the property and profits in the firm.

DIFFERENCE BETWEEN PARTNERSHIP & CO-OWNERSHIP

Co-ownership refers to joint ownership of a property with no intention to carry on a business. The differences between the two are as follows:

Partnership	Co-Ownership
1. Agreement	
A partnership is a result of agreement.	A co-ownership is not necessarily the result of agreement. It may arise by operation of law.
2. Agency	
A partner is an agent of the firm. He can bind other partners for his acts.	A co-owner is not an agent of the business. He cannot bind the co-owners for his acts.
3. Lien	
A partner has a lien on the property of partnership for expenses incurred by him	A co-owner has no lien on the property of co-ownership for expenses spent by him.
4. Transfer of Interest	
A partner cannot transfer his share without the consent of all the partners.	A co-owner can transfer his interest without the consent of co-owners.
5. Common Interest	
In partnership there is a common interest.	In co-ownership there is no common interest.
6. Number of Members	
In a partnership the maximum limit of partners is 20.	In co-ownership there is no maximum limit of co-owners.
7. Business	
A partnership is always formed to carry on a business.	A co-ownership is not formed to carry on a business.
8. Partition	
A partner cannot sue for a division of	A co-owner can sue for division of

the property.	A co-owner can sue for division of property.
9. Refund	
If a partner spends some personal anount for the firm, he can recover.	If a partner spends some personal amount for co-ownership, he cannot recover.
10. Sharing of Profits	
In partnership sharing of profits and	In co-ownership sharing of profits and

losses is necessary.	losses is not necessary.
11. Regulation	
A Partnership is regulated by the Partnership Act, 1932.	A co-ownership is not regulated by any separate Act.

Formation of Partnership

There must be an agreement among the partners to form a partnership. The agreement may be in writing or oral. The following points must be considered before entering into an agreement of partnership:

1. The partners of a firm should be selected with care.
2. The object of the firm should be lawful.
3. The rights and duties of partners must be discussed in detail and in writing.
4. The partnership should be registered. If it is unregistered, it will create problems.

Partnership Deed

The partnership agreement in writing is called partnership deed. It is better to have a written agreement. The partnership deed generally contains the following provisions:

1. The name of the firm.
2. The names and addresses of all partners
3. The nature of business of the firm.
4. The town and place where the business will be carried on.
5. The amount of capital invested by each partner.
6. The duration of the partnership.
7. The ratio of sharing profits and losses.
8. The rate of interest, if any, allowed on capital.
9. The rate of interest on advances given by partners.
10. The rate of interest to be charged on drawings.
11. The amount, a partner can withdraw from the firm.
12. The amount of salary or commission payable to any partner for his services.

13. The circumstances under which a firm shall dissolve.
14. The rights, duties and liabilities of partners.
15. The method of valuation of goodwill.
16. The period of accounting year.
17. The rules regarding retirement, death and admission of a partner.
18. The methods of solving disputes among the partners and appointment of arbitrator.

19. Power of a partner to retire after giving notice.
20. The rules to determine amount due to deceased partner and manner of payment.
21. The rules of expulsion of partner from firm.
22. The keeping of proper books of accounts and preparation of accounts.
23. The restrictions on partners, if any.

Types of Partnership

The following are three types of partnership.

1. Partnership-at-Will

Where no provision is made in the agreement regarding the duration of the partnership, it is called partnership at will. Any partner can terminate it any time, by giving a notice of termination. A partnership is called partnership at-will under the following cases.

a. When a partnership is formed for unlimited period.
b. When a partnership firm is formed for limited period and it continues after the expiry of this period.
c. When a partnership firm is formed for a particular project and it continues after the completion of project.

2. Particular Partnership

When a partnership is formed to do a particular business or for a particular period, it is called a particular partnership. Such a partnership is dissolved immediately on the completion of the particular business, e.g. for working a coalmine or producing a film. (Sec. 8)

3. Limited Partnership

A limited partnership is regulated and controlled by Partnership Act 1907 of England. In Pakistan there is no limited partnership. The following are the features of limited partnership:

a. It is formed under Limited Partnership Act of 1907 of England.
b. Some partners may be with limited liability.
c. There is at least one partner with unlimited liability.

d. The firm must be registered.
e. A limited partner cannot take active part in the management of the firm.
f. The limited partner can inspect the books of the firm any time.
g. He can give suggestions and recommendations to other partners.
h. A new partner can be admitted to the partnership firm without the consent of the limited partner.

i. It cannot have more than 20 persons in ordinary type of business except banking where the maximum number should not exceed 10.

Registration of Firms

The registration of partnership is not compulsory. If the partners so desire they may get their firm registered. The registration of firm is only a proof of the existence of the firm. It does not provide any legal entity to the firm.

Procedure of Registration

The procedure of registration is as follows:

1. Submission of Application

An application in the prescribed form with the prescribed fee is submitted to the Registrar of Firms. The application must be signed by all the partners. The application must contain the following particulars:

a. The name of the firm.
b. The principal place of the firm.
c. The names of other places where the firm carries on business.
d. The names and addresses of the partners
e. The partner's date of joining the firm.
f. The duration of the firm, if any.

2. Certification

The Registrar examines the application and if he is satisfied with the application he registers the firm and enters its name in the Register of Firms. He then issues a certificate of registration. This completes the procedure of registration. (Sec. 59)

3. Change of Particulars

If any change takes place in any of the particulars given above, the Registrar must be informed. He will include the necessary changes in the Register of Firms.

4. Penalty for False Particulars

A person who provides false information to the Registrar shall be punishable with imprisonment, which may extend to three months, or with fine,or

with both. (Sec. 70)

Effects of Non-Registration

The effects of non-registration are as under:

1. Suit by Partner

A partner of an unregistered firm cannot file a suit against the firm or any partner of the firm to enforce any right arising from the contract. However, one partner can sue other partners for criminal act. Thus, if a partner steals the property of the firm any partner can file a suit.

2. Suit by Firm

An unregistered firm cannot file a suit against a third party for the enforcement of any right arising from a contract e.g. for the recovery of the price of goods supplied. But a suit can be filed for criminal acts against any responsible person.

3. Suit by Firm against Partner

The firm cannot sue any partner of the firm for the enforcement of any right arising from a contract.

4. Suit by Third Party

A third party can file a suit against the firm or its partner to enforce its rights. For example, a supplier can file a suit against the firm for the recovery of the price of the goods delivered to the firm.

5. No Claim for Adjustment

A firm cannot claim adjustment of the amount exceeding Rs. 100 payable and receivable by the firm. For example, a firm has to pay Rs. 500 to Mr. X who owes Rs. 800 to the firm, the firm cannot claim adjustment and enforce in the court.

Exceptions

However, the non-registration of a firm does not affect the following:

1. The third party can sue the firm for his rights.
2. The partners can sue for the dissolution of the firm.
3. The partners can sue for the accounts of a dissolved firm.
4. The partners can sue for the realization of the property of a dissolved firm
5. The dissolved firm can sue to recover damages for breach of contract
6. The firm and its partners can sue third party for adjustment of claim up to Rs. 100
7. The receiver can sue to realize the property of an insolvent partner.
8. The partners can refer a dispute to arbitrator
9. A partner can sue another partner for damages due to misconduct.
10. The firm may sue the third party to restrain from using patent right

10. The firm may sue the third party to restrain from using patent right.

Advantages of Registration

The following are advantages of a registered firm:

1. Advantages to Firm

a. The registered firm can sue any partner of the firm.

b. The registered firm can file a suit against the third party for the enforcement of rights arising from contract.

c. The registration increases the goodwill of the firm because the details about the firm are present with the Registrar which can be obtained in case of need.

d. The registered firm attracts large capital resources from the public.

e. The registered firm can claim adjustment from the third party.

f. The registered firm enjoys some concession in income tax.

2. Advantages to Partners

a. The partners of registered firm can sue in the court to settle their disputes.

b. The partners can sue the firm for their claims.

c. In registered firm, the new person has less doubt on becoming a partner because he knows that in dispute, he can take the help of court.

d. In case of a registered firm the persons who leave the firm cannot be held responsible for the firm's debts after their retirement from firm because the record of the Registrar of firms will show that they have left the firm.

3. Advantages to Creditors

a. The partners of a registered firm cannot deny the creditors from getting membership of the firm.

b. The creditors of the firm can hold all the partners liable for the payment of their debts due by the firm.

DIFFERENCE BETWEEN SOLE PROPRIETORSHIP AND PARTNERSHIP

Sole Proprietorship	Partnership
1. Act	
There is no separate Act to regulate the sole proprietorship	There is a separate partnership Act, 1932 to regulate the partnership
2. Formation	
It is very easy to form a sole proprietorship.	To form a partnership an agreement is required among the persons.
3. Profit	
In sole proprietorship a single person gets the whole profits.	In partnership all the partners share the profit.

4. Loss	
In sole proprietorship a single person bears the whole loss.	In partnership all the persons bears the loss.
5. Capital	
In sole proprietorship it is difficult to raise capital because a single person is to arrange.	In partnership it is easy to raise capital because all partners are to arrange.

6. Size	
In sole proprietorship the size of business operation is small.	In partnership the size of business operation is comparatively large.
7. Management	
A sole proprietorship is managed by a single person.	A partnership is managed by many persons.
8. Secrecy	
In sole proprietorship a single person can easily keep secrecy.	In partnership all partners know the secret so it difficult to keep secrecy.
9. Transfer of Interest	
A sole trader can easily transfer his interest.	A partner cannot easily transfer his interest. The consent of other partners is necessary.
10. Membership	
Only 1 person is required for sole proprietorship.	Minimum two and maximum twenty persons are required in a partnership.
11. Dissolution	
Its dissolution depends upon the decision of one person.	Its dissolution depends upon the agreement or the happening of certain events.
12. Suitability	
It is suitable for small scale business.	It is suitable for medium scale business.
13. Expansion	
In sole proprietorship the possibilities of expansion of business are less.	In partnership the possibilities of expansion of business are more.
14. Motivation	
In sole proprietorship the motivation is more because one person enjoys the whole profit.	In partnership the motivation is less because the many persons share the profit.

15. Extent of Managerial Skills	
A sole proprietorship has limited managerial skills.	A partnership has more managerial skills due to more people.
16. Business Secrets	
Full secrecy is maintained.	Secrecy is shared by the partners.
17. Quickness in Decision Making	
Quick decisions are taken due to	Decisions may take time because

independence of the sole proprietor.	many partners have to participate in decision making.

Rights of Partners

In the absence of an agreement between the partners, the Partnership Act provides the following rights:

1. Right to take Part in Business

Every partner can take part in the conduct of the business. However, it is not essential that each partner should participate in the conduct of business, but the right of participation should be available to each partner. (Sec. 12 (a))

2. Right to Express Opinion

Every partner has a right to express his opinion before any matter is decided. The ordinary matters of the business may be decided by a majority of the partners. But no change can be made in the nature of business without the consent of all the partners. (Sec. 12 (c))

3. Right to inspect Books

Every partner has a right to inspect and take copies of the books of the firm. However, a minor partner can inspect the account but not the books. (Sec. 12(d))

4. Right to Share Profits

Every partner has a right to share equally in the profits earned and is liable to contribute equally to the losses suffered by the firm. (Sec. 13 (b))

5. Right to Interest on Capital

Every partner can take interest on capital contributed by him. Interest shall be paid only out of profits. (Sec. 13 (c))

6. Right to Interest on Advances

Where a partner gives any advance for the business more than the amount of his capital, he can get interest thereon at the rate of 6% per annum. (Sec. 13 (d))

7. Right to be Indemnified

Every partner has the right to be indemnified by the firm in respect of payments made and liabilities incurred by him in the ordinary and proper conduct

of the business of the firm. (Sec. 13 (e))

8. Right to Act in Emergency

A partner has the right to act in emergency to protect the firm from loss. He can bind the firm by any act done in emergency provided he acts as a reasonable person. (Sec. 21)

9. Right to Give Consent

Every partner has a right to prevent the introduction of new partner unless he consents to that. (Sec. 31(1))

10. Right to Retire

A partner has a right to retire (a) with the consent of all the partners or (b) according to the agreement or (c) where the partnership is at will, by giving a notice to all the partners. (Sec. 32(1))

11. Right not to be Expelled

A partner cannot be expelled from a firm by any majority of partners provided the decision is made in good faith and there is a provision in the contract. (Sec. 33 (1))

12. Right to Carry on Competing Business

Every out going partner has a right to carry on a business similar to that of the firm subject to certain restrictions. (Sec. 36)

13. Right to Share in Profits or Interest

Every partner who leaves the firm due to any reason is entitled to claim any share according to the agreement. (Sec. 37)

14. Right to Bind other Partners

Every partner has the right to bind the other partners for the activities done by him for the firm

15. Right to Enforce

Every partner has a right to see that the property of the firm is used only for the purpose of the partnership.

Duties of Partners

According to Partnership Act, following are the duties of the partners:

1. Duty to Carry on Business

Every partner is bound to carry on the business of the firm to the common advantage. He must use his knowledge and skill for the benefit of the firm and not for his personal gain. (Sec. 9)

2. Duty to be Just and Faithful

It is the duty of every partner that he should be just and faithful to the

other partners. He must observe utmost good faith towards other partners of the firm. (Sec. 9)

3. Duty to Render Accounts

Every partner must render true and proper accounts to his co-partners. It means that each partner must be ready to explain the accounts of the firm and produce vouchers in support of the entries. (Sec. 9)

4. Duty to Provide Information

Every partner must give full information about the firm to his co-partners. A partner must not conceal any information concerning the firm from other partners. (Sec. 9)

5. Duty to Indemnify

Every partner is bound to indemnify the firm for any loss caused to it by his fraud in the conduct of the business of the firm. But where the partner acts bonafide, the loss caused is borne by the firm. (Sec. 10)

6. Duty to Attend Diligently

It is the duty of every partner to attend diligently to his duty in the conduct of the business of the firm. He must use his knowledge and skill to the common advantage of all the partners. (Sec. 12 (b))

7. Duty to Share Losses

Every partner shall bear the loss equally borne by the firm irrespective of their capital contribution. (Sec. 13 (b))

8. Duty to indemnify for willful Neglect

Every partner shall indemnify the firm for any loss caused to it by his willful neglect in the conduct of the business of the firm. (Sec. 13 (f))

9. Duty to Use Firm's Property for Firm

It is the duty of every partner of the firm to hold and use the property of the firm only for the purposes of the business of the firm. (Sec. 15)

10. Duty to Account for Personal Profits

If a partner gets any benefit without the consent of other partners from partnership business, he must account for it and pay it to the firm. (Sec. 16 (a))

11. Duty to Account for Profits

A partner must not carry on any business similar to that of the firm. If he does so he is bound to account for and pay to the firm all profits made by him in that business. (Sec. 16 (b))

12. Duty to be Liable Individually & Jointly

Every partner is liable, individually and jointly for all the acts of the firm done while he is a partner. (Sec. 25)

13. Duty not to Transfer Rights

A partner cannot transfer his rights and interest in the firm to an outsider to make him partner in the business without the consent of his co-partners. (Sec. 29)

Liabilities of Partners

The liabilities of partners can be divided into following three kinds:

1. Liability of Partner for Acts of Firm

Every partner is individually and jointly liable to third parties for all the acts of the firm. It means that if the assets of the firm are not sufficient to meet the claims of third parties, partners have to satisfy the remaining claims out of their personal property. (Sec. 25)

2. Liability of Firm for Wrongful Act

The firm is liable to the same extent as the partner for any loss or injury caused to third parties for the wrongful acts of a partner in the ordinary course of the business of the firm. (Sec. 26)

3. Liability of Firm for Misapplication

If any partner or the firm receives money or other property from a third person in the normal course of business and the same is misapplied, the firm will be liable to make good the loss. (Sec. 27)

4. Liability of Retiring Partner

Every retiring partner is liable for all such debts and liabilities of the firm which have been contracted before his retirement.

Implied Authority of Partner

The authority of partner to bind the firm by his acts is called implied authority. Under implied authority a partner can do the following. (Sec. 19 (1))

1. He can sell goods of the firm but cannot sell immovable property of the firm without the consent of other partners.
2. He can purchase goods for the firm on credit if it is necessary to carry on the business.
3. He can accept payment and issue receipts for them on behalf of the firm.
4. He can issue and accept cheques or other negotiable instruments on behalf of the firm.
5. He can defend any suit filed against the firm.
6. He can raise loan by mortgaging property of the firm.
7. He can employ staff to conduct the business of the firm.
8. He can settle accounts with persons dealing with the firm.

3. To settle accounts with persons dealing with the firm.

No Implied Authority

A partner cannot perform the following acts under implied authority unless there is usage or custom of trade: (Sec. 19 (2))

1. To submit a dispute relating to the business of the firm for arbitration.
2. To open a bank account on behalf of the firm in his own name.
3. To settle claims of the firm.
4. To withdraw any suit filed by the firm.

5. To admit any liability in a suit against the firm.
6. To by any immovable property for the firm.
7. To transfer immovable property of the firm.
8. To make an agreement with others on behalf of the firm.

Reconstitution of Firm

A partnership is reconstituted on following changes:

1. Admission of Partner

A new partner can be admitted into the partnership firm at any time with (a) the consent of all the old partners or (b) in accordance with the previous contract between the parties. The person who is so admitted is called incoming partner.

An incoming partner does not become liable for any act of the firm done prior to his admission as a partner. However, he may agree to be liable for obligations incurred by the firm prior to that date. He will have all rights of existing partners. (Sec. 31)

2. Retirement of Partner

A partner who retires from firm is called retiring or outgoing partner. A partner may retire from a firm (a) with the consent of all other partners, (b) in accordance with the agreement with other partners (c) where the partnership is at will, by giving notice in writing to all other partners of his intention to retire.

A retired partner continues to be liable for all the acts of the firm before the date of his retirement unless he is discharged from liability. A retired partner continues to be liable for any act done by him after retirement until a public notice is given of his retirement. (Sec. 32)

3. Expulsion of Partner

A partner may be expelled from a firm by majority of the partner only if:

a. The power to expel has been given by contract between the partners.
b. The power has been exercised by the majority of the partners in good faith for the benefit of the firm.

The partner who is being expelled must be given reasonable notice and

opportunity to explain his position and to remove the cause of his expulsion. If the expulsion is malafide the same is void and the irregularly expelled partner will not cease to be a partner. (Sec. 33)

4. Insolvency of Partner

Where a partner in a firm is adjudicated as insolvent, he ceases to be a partner on the date on which the order of adjudication is made. Where under a contract between the partners, the firm is not dissolved by the adjudication of a partner, the insolvent partner is not liable for any act of the firm and the firm is not

liable for any act of the insolvent done after the date on which the order of adjudication is made. (Sec. 34)

5. Death of Partner

Although on the death of a partner, a firm is dissolved but if the other partners so agree the firm may not be dissolved. Where a firm is not dissolved, the assets of a deceased partner are not liable for any act of the firm done after his death. His assets are liable only for liabilities undertaken during his lifetime. No public notice of death is required to relieve the deceased partner's assets from future liabilities. (Sec. 35)

Dissolution of Firm

The dissolution of a partnership is different from dissolution of a firm. When one partner dies, retires or becomes insolvent but the remaining partners continue the business, it is called dissolution of the partnership.

When the relationship between all the partners comes to an end and the business is closed, it is called dissolution of firm. It means that the dissolution of the firm includes the dissolution of partnership, but the dissolution of the partnership may or may not include the dissolution of the firm.

Grounds of Dissolution of Firm

A firm may be dissolved on any one of the following grounds:

1. Dissolution by Agreement

A firm may be dissolved with the consent of all the partners or in accordance with a contract between the partners. The agreement of the dissolution may be oral or in writing. The consent of majority is not enough to dissolve a partnership firm. (Sec. 40)

2. Compulsory Dissolution

Compulsory dissolution takes place under following circumstances:

a. When all the partners are declared insolvent.

b. When all except one of the partners are declared insolvent.

c. When the business of the firm becomes unlawful. (Sec. 41)

3. Contingent Dissolution

Subject to contract between the partners, a firm is dissolved on the happening of the following events: (Sec.42)

a. On the expiry of fixed period for which the firm was formed.
b. On the completion of the project for which the firm was formed.
c. On the death of a partner.
d. On the insolvency of any partner.
e. On the resignation of a partner.

4. Dissolution by Notice

When the partnership is at will, the firm may be dissolved by any partner giving notice in writing to all the other partners of his intention to dissolve the firm. A notice of dissolution once given cannot be withdrawn without the consent of other partners. The firm is dissolved from the date mentioned in the notice. If no date is mentioned, it dissolves from the date of the communication of the notice. (Sec. 43)

5. Dissolution by Court

The court decides about the dissolution of a firm if there is a difference of opinion between the partners regarding the dissolution. For example, when a partner has become insane, some of the partners are willing to continue while others are insisting on the dissolution of firm. The court may dissolve a firm on any of the following ground: (Sec. 44)

a. Insanity

When a person becomes insane, the court may allow dissolution.

b. Permanent Incapacity

When a partner becomes permanently incapable of performing his duties as a partner, the court may order dissolution of a firm.

c. Misconduct

When a partner is guilty of misconduct which is likely to adversely affect the reputation of the firm, the court may dissolve the firm. For example, a partner travels without ticket.

d. Breach of Agreement

When a partner commits breach of agreement relating to the management of the affairs of the firm, the court may dissolve the firm. Example taking away the books of accounts, using firm's money for private debts etc.

e. Transfer of Interest

When a partner transfers the whole of his interest in the firm to a third party without the consent of the other partners, the court may dissolve the firm.

f. Continuous Losses

When the business of a firm cannot be carried on except at a loss, the court may order for dissolution of the firm.

g. Just and equitable

When on any other ground, the court considers it just and equitable that the firm should be dissolved, the court may dissolve the firm. Example if partners are not on speaking terms with each other. (Sec. 44)

Consequences of Dissolution

The following are consequences of dissolution:

Rights of Partners on Dissolution

The following are rights of partner on dissolution of partnership firm:

1. Application of Property

On the dissolution of a firm, every partner is entitled to have the property of the firm sold and proceeds applied to repay outside debts and liabilities of the firm, and to distribute the surplus among the partners or their representatives in accordance with their rights. (Sec. 46)

2. Utilization of Assets

Where a firm is dissolved, the assets of the firm shall first be utilized to pay the debts of the firm; and if there is surplus, a share of partner shall be utilized to pay his private debts. Similarly private assets shall first be utilized to pay private debts and if there is surplus, to pay the debts of the firm if necessary. (Sec.49)

3. Personal profit

Sometimes on the dissolution of the firm, a partner buys the goodwill of the firm. In such case, he has the right to use the firm's name and earn personal profits.

4. Demand of premium

When a partner has paid premium on entering into the partnership for a fixed period, and the firm is dissolved before the expiration of that term, he shall be entitled to the refund of the premium for unexpired period. But he cannot demand premium if dissolution is caused due to the death of a partner, misconduct of the partner and under an agreement if there is no provision for the refund of the premium. (Sec. 51)

5. Agreement based on Fraud and Misrepresentation

If an agreement of partnership is based on fraud or misrepresentation, a partner can reject the contract. It has the following rights: (Sec. 52)

a. A lien on the surplus of the assets of the firm, after payment of the debts of the firm for any sum paid by him for the purchase of a share in the firm or capital contributed by him.

b. To be ranked as a creditor of the firm in respect of any payment made by him

towards the debts of the firm.

c. To be indemnified by the partners guilty of fraud or misrepresentation against all the debts of the firm.

6. Restraint from use of Firm's name or property

Each partner or his representative is entitled to restrain the other partners from carrying on a business in the name of the firm or from using the property of

the firm for their own benefit, until the affairs of the firm have been completely would up. (Sec. 53)

Liabilities of Partners on Dissolution

The following are liabilities of partners on dissolution:

1. Partners on Dissolution

The partners of the dissolved firm continue to be liable to third parties for all acts done in connection with the affairs of the firm until public notice is given of the dissolution. But the estate of a partner who dies or becomes insolvent or who retires but is not known to the outside world is not liable for acts done after the date on which he ceases to be a partner. (Sec. 45)

2. Continuing authority

After the dissolution the authority of each partner continues for the following: (Sec. 47)

a. To wind up the affairs of the firm.

b. To complete transactions begun but unfinished at the time of the dissolution.

Settlement of Accounts upon Dissolution

In the absence of any agreement between the partners, the following are modes of settlement of accounts after the dissolution of firm.

1. Sale of Goodwill

In settling the accounts of a firm after dissolution, the goodwill shall be included in the assets and it may be sold either separately or along with other property of the firm. (Sec. 55 (1))

2. Sharing of deficiency

If the assets of a firm are insufficient to pay the debts and liabilities of the firm, the losses of firm including deficiency of capital shall be paid: (Sec. 48(a))

a. First, out of profits.

b. Next out of capital, and

c. Lastly, if necessary, by the partners individually, in the proportion in which they were entitled to share profits.

3. Order of Application of Assets

The assets of a firm including any sums contributed by the partners to

The assets of a firm including any sums contributed by the partners to make up deficiency of capital shall be applied in the following manner and order:

a. In paying the debts of the firm to third parties.
b. In paying to each partner rateably what is due to him from the firm for advances as distinguished from capital.
c. In paying to each partner rateably what is due to him on account of capital
d. The surplus, if any, shall be divided among the partners in the proportions in which they were entitled to share profits. (Sec. 48)

TEST QUESTIONS

1. Define partnership. What are the essentials of a partnership?
2. Discuss the advantages of partnership
3. Discuss the disadvantages of partnership.
4. Discuss the various kinds of partners.
5. Can a minor be admitted to a partnership? What are his rights and liabilities?
6. An agreement is an essential of a partnership. It means that a minor cannot enter into an agreement. Discuss.
7. Distinguish between partnership and co-ownership.
8. What is the procedure for the registration of a firm?
9. Is registration of partnership firm compulsory? What is the procedure for the registration of a firm? What are the consequences of non-registration of a firm?
10. What are the different kinds of partnership?
11. What is a limited partnership? What are the advantages and disadvantages of a limited partnership?
12. What is a partnership deed? State its main contents.
13. Write short notes on the following:
    a. Partnership-at-will b. Limited partnership
14. Discuss the rights and duties of the partners.
15. What are the rights and liabilities of a retiring partner?
16. Discuss the liabilities of a new partner.
17. Discuss the rights and liabilities of an expelled partner.
18. What acts a partner can do under implied authority?
19. What acts a partner cannot do under implied authority?
20. What are the rights and duties of a partners after the reconstitution of a firm

21. Write notes on the following:
    a. Insolvency of a partner
    b. Death of a partner
22. What are the different modes in which a firm may be dissolved?
23. Distinguish between dissolution of firm and dissolution of partnership and discuss the grounds on which a firm may be dissolved by the court.
24. What are the rights and liabilities of partners on dissolution of a firm?
25. State the rules governing settlement of accounts of the firm

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LAW OF TRUST

Trusts Act, 1882

The rules relating to trusts are included in the Trusts Act, 1882. It came into force on 1st March, 1882 and extends to the whole of Pakistan. It deals with private trusts. It exempts public or religious charitable trusts from the operation of the Act. It does not discuss the rules of Islamic Law relating to Waqf.

Definitions

1. Trust

A trust is an obligation annexed to the ownership of the property and arising out of a confidence reposed in and accepted by the owner or declared and accepted by him, for the benefit of another and the owner. (Sec. 3)

2. Trustee

The person who accepts the confidence is called a trustee.

3. Settlor

The person who reposes or declares confidence is called author of the trust or settlor.

4. Beneficiary

The person for whose benefit the confidence is accepted is called the beneficiary.

5. Trust Property

The subject matter of the trust is called trust property.

6. Instrument of Trust

The instrument by which the trust is declared is called the instrument of

trust.

Classification of Trust

The following is classification of trusts:

1. Public or charitable
2. Private
3. Express: It is directly created in express words by the settlor.
4. Implied: It arises from the intention of the settlor.
5. Constructive: It arises by operation of equity.

6. For value
7. Voluntary
8. Executed: It is declared by the instrument of trust.
9. Executory: It comes into existence when the settlor gives direction for future conveyance.

Purpose of Trust

A trust may be created for lawful purpose. If the purpose is unlawful, it is void. The purpose is lawful unless: (Sec. 4)

1. It is fraudulent.
2. It is forbidden by law.
3. It is such that if permitted, it would defeat the provisions of any law.
4. It involves or implies any injury to the person or property of another.
5. It is regarded by the court as immoral.
6. It is regarded by the court as opposed to public policy.

Declaration of Trust

A trust regarding immoveable property is not valid unless it is declared by a non-testamentary instrument in writing signed by the author of the trust, or the trustee or by the will of the author or of the trustee and registered. Similarly a trust regarding moveable property is not valid unless it is declared as aforesaid or unless the ownership of property is transferred to the trustee. (Sec.5)

Creation of Trust

A trust is created when the author of the trust indicates with reasonable certainty by words or acts: (Sec.6)

1. An intention on his part to create it;
2. The purpose of the trust;
3. The beneficiary;
4. The trust property.

Who may Create a Trust

It may be created: (Sec.7)

1. By every person competent to contract.
2. With the permission of a principal civil court of original jurisdiction, by or on behalf of a minor.

Who may be Beneficiary

Every person capable of holding property may be a beneficiary. He is not bound to accept the interest under the trust. (Sec. 9)

Who may be Trustee

Every person capable of holding property may be a trustee. But, where the trust involves the exercise of discretion, it is necessary that he must be a person competent to contract. A minor can be appointed as trustee but he cannot be given the management. The minor can take control of trust on becoming competent to contract. (Sec. 10)

Duties of Trustee

The following are duties of the trustee.

1. Duty to Fulfill Purpose

A trustee is bound to fulfill the purpose of trust, and obey the directions of the author of the trust. However, a trustee is not bound to obey any direction which is impracticable, illegal or injurious to the beneficiaries. (Sec. 11)

2. Duty to Acquaint

A trustee is bound to acquaint himself with the nature and circumstances of the trust property. He should obtain the transfer of trust property to himself, where necessary. He must take out trust money invested in insufficient or hazardous security. (Sec.12)

3. Duty to Protect Title

A trustee is also bound to maintain and defend all such suits, and to take such steps which may be required for the preservation of trust property and the protection of title thereto. (Sec. 13)

4. Duty not to set Title adverse to Beneficiary

It is the duty of a trustee that he must not for himself or another set up or aid any title to trust property, adverse to the interest of the beneficiary. (Sec. 14)

5. Duty to Exercise Reasonable Care

A trustee is bound to exercise reasonable care in dealing with trust property as a man of ordinary prudence deals with such property as if it were his own. In spite of a reasonable care if the loss arises, he is not responsible. (Sec. 15)

6. Duty to Convert Perishable Property

A trustee is bound to convert the property which is perishable in nature into property of permanent and immediately profitable character unless intention is inferred by the instrument of trust. (Sec. 16)

7. Duty to be Impartial

Where there are more than one beneficiaries, the trustee is bound to be impartial and must not execute the trust for the advantage of one at the expense of another. Where discretionary power is with the trustee and he exercises this

power in good faith, the court has no jurisdiction to prevent him from exercising such discretion. (Sec. 17)

8. Duty to Prevent Waste

Where a trust is created for benefits of several persons in succession and the person who is in possession of trust property, commits any act which is destructive or permanently injurious thereto, the trustee is bound to take measure to prevent such act. (Sec. 18)

9. Duty to Maintain Accounts

A trustee is bound to keep clear and accurate accounts of trust property. He must be in a position to supply full and accurate information about the amount and state of trust property on the demand of beneficiary. (Sec. 19)

10. Duty to Invest

A trustee is bound to invest money in authorized securities He is not allowed to exercise same discretion in investing the money of the trust as if he were a person dealing with his own estate. (Sec. 20)

Liabilities of Trustee

The following are liabilities of trustee:

1. In case of breach of trust, the trustee is personally liable and after his death his estate is liable.
2. In case of any breach of trust, a trustee is liable to pay interest in addition to damages for breach of trust.
3. When there are more than one trustees, in case of breach of trust, all the trustees are jointly liability.
4. A trustee is not liable for the default of his predecessor or default of his co-trustees except under certain special circumstances.

Rights of Trustee

The following are rights of trustee:

1. Right of Possession

A trustee is entitled to the possession of the instrument of trust and all the documents of title relating solely to the trust property. (Sec. 21)

documents of title relating solely to the trust property. (Sec. 31)

2. Right of Reimbursement

A trustee is entitled to reimburse himself, out of the trust property, all expenses incurred by him in the execution of the trust, or the realization, preservation or benefit of the trust property, or the protection of the beneficiary. If he pays such expenses out of his own pocket, he can recover from the trust property. If the trust property fails, the trustee is entitled to recover from beneficiary. (Sec 32)

3. Right of Lien

If he pays out of his own pocket, he has lien on the trust property. Where a trustee has by mistake, made an over payment to the beneficiary, he may reimburse the trust property out of the beneficiary's interest. If such interest fail, the trustee is entitled to recover from the beneficiary personally, the amount of such over payment. (Sec. 32)

4. Right of Indemnity

He has a right to indemnity from the gainer by a breach of trust, except when he himself is guilty of fraud. The beneficiary or any other person who gains an advantage from a breach of trust must indemnify the trustee to the extent of amount actually received by him under the breach. (Sec 33)

5. Right to apply to Court

Any trustee may apply to the court for its opinion, advice or direction on any present questions regarding the management or administration of the trust property. (Sec. 34)

6. Right to settlement of Accounts

On completion of the duties as trustee to maintain the accounts, a trustee has right to have the accounts of his administration of trust property examined and settled. (Sec. 35)

Powers of Trustee

The following are powers of trustee.

1. Power to Sell

A trustee where empowered, may sell the trust property in lots by public auction or private contract. A trustee may exercise a reasonable discretion as to the time of effecting the sale or purchase. (Sec 37)

2. Power to Convey

A trustee has the power to convey or other wise dispose of the trust property. (Sec.39)

3. Power to vary Investments

A trustee may at his discretion, invest in any security and vary investment

A trustee may at his discretion, invest in any security and vary investmen for others of the same nature. But where beneficiary is competent to contract anc benefit is created for him for life, it is necessary to get the consent of such beneficiary prior to vary investment etc. (Sec 40)

4. Power to use Property of Minor

Where any property is held by trustee in trust for minor, such trustee may apply such property for his maintenance, education, advancement in life religious worship, marriage or funeral either the whole or any part of the income

of the property or property itself with permission of the civil court under whose jurisdiction this property is situated. (Sec. 41)

5. Power to give Receipts

Any trustee may give a receipt in writing for any money, securities or other moveable property payable, transferable or deliverable to him by reason or in the exercise of any trust or power.

6. Power to Compound

A trustee may compromise, compound, abandon, submit to arbitration or otherwise settle any debt, account or claim something whatever relating to trust. (Sec. 43)

Disabilities of trustee

The following are disabilities of trustee:

1. A trustee who has accepted the trust cannot afterwards renounce it. He can do so with the permission of the court or with the consent of beneficiary. or by a provision in the instruments of trust (Sec. 46)
2. A trustee cannot delegate his office to co trustee or to a stranger unless the instrument of trust so provides or delegation is in the regular course of business or it is necessary or with the consent of beneficiary. (Sec. 47)
3. When there are more than one trustees, all must join in the execution of the trust unless otherwise provided in the instrument of trust. (Sec. 48)
4. The court may control a discretionary power of trustee where the same is not exercised reasonably and in good faith. (Sec. 49)
5. A trustee cannot use trust property for own benefit or for any purpose not connected with the trust. (Sec. 51)
6. A trustee cannot purchase trust property for himself or as an agent for a third person. (Sec. 52)
7. A trustee must not buy or become mortgagee or lessee of the trust property without the permission of the court. (Sec.53)
8. A trustee whose duty is to invest money on mortgage or personal security must not invest it on a mortgage by or on the personal security of himself.

(Sec. 54)

Rights of Beneficiary

The following rights are available to the beneficiary:

1. Right to Rent and Profit

The beneficiary has a right to the rents and profits of the trust property, subject to the provisions of the instrument of the trust.(Sec. 55)

2. Right to Specific Execution

The beneficiary is entitled to have the intention of the author of trust specifically executed to the extent of his interest. (Sec. 56)

3. Right to transfer

The beneficiary has a right to require the trustee to transfer him the trust property if all beneficiaries are competent to contract and all of them agree. (Sec.56)

4. Right to Inspect

The beneficiary has a right to inspect and take the copies of the instrument of the trust, and also the other documents relevant to title of trust property, the accounts and vouchers etc. (Sec. 57)

5. Right to transfer Interest

The beneficiary if competent to contract, may transfer his interest but subject to the provisions of the law enforceable at that time but this debars married women to transfer or assign her beneficial interest during her marriage. (Sec.58)

6. Right to Sue for execution of Trust

A beneficiary has a right to sue for execution of the trust where all the trustees die or disclaim or are discharged. He has also such right when the execution of trust becomes impracticable. (Sec. 59)

7. Right to direct the Trustees

The beneficiary has the right that the trust property shall be properly protected, held and managed by proper persons and by a proper number of persons. (Sec. 60)

8. Right to compel to act

A beneficiary may compel his trustee to perform any particular act and to restrain from committing any breach of trust. (Sec. 61)

9. Right to proceed against Trustee

Where a trustee has wrongfully bought trust property, the beneficiary has

a right to have the property declared subject to the trust or retransferred by the trustee if it remains in his hands unsold. (Sec.62)

10. Right to follow Property

The beneficiary has right to follow trust property when it comes into the hands of a third person inconsistently with the trust. (Sec.63)

11. Right to reconvert Property

A beneficiary has a right to have the property converted to trust property where a trustee wrongfully sells the trust property and afterwards becomes the owner of such property. (Sec.65)

12. Right in blended Property

When the trustees wrongfully mingle the trust property with his own, the beneficiary is entitled to a charge on the whole fund for the amount due to him. (Sec.66)

Liabilities of Beneficiary

The beneficiary is liable if he (a) commits breach of trust (b) knowingly obtains any advantage without consent of beneficiaries (c) becomes aware of breach of trust and fails to proceed against trustee for such breach (d) conceals the facts relevant to breach (e) fails to take reasonable steps within rights and duties of beneficiary (f) deceives the trustee and induces him to commit a breach of trust.

Disabilities of Trustee

The following are disabilities of trustee:

1. Renunciation of Trust

A trustee cannot renounce his office after acceptance. After he has accepted it, he can renounce the trust only: (Sec.46)

a. With the permission of the principal Civil Court of the district.
b. With the consent of the beneficiary, if he be competent to contract.
c. If there is such special power reserved in the trust instrument.

2. Delegation of Office

He cannot delegate his office to another. He can delegate his authority: (Sec.47)

a. If the instrument so provides.
b. If the delegation is absolutely necessary.
c. If it is in ordinary course of business.

d. If the beneficiary is competent to contract and so consents.

3. Execution of Trust

Trustee cannot act singly. All co-trustees are required to join in the execution of the trust except where it is otherwise provided in the instrument of trust. (Sec.48)

4. Remuneration

He cannot charge remuneration for service. A trustee is not entitled to receive remuneration for his trouble, skill and loss of time in executing the trust, unless: (Sec. 50)

a. The instrument of trust allows it.
b. Express contract to that effect is entered into with the beneficiary.
c. The Court expressly allows it at the time of the trustee's acceptance of the office.

5. Use of Trust property

He cannot use trust property for his own purposes. He cannot deal with it for a purpose unconnected with the trust. (Sec.51)

6. Lending Trust property

Co-trustee should not lend trust property to one of himself even on mortgage or personal security. (Sec.54)

7. Purchase of Trust Property

He should not purchase the trust property or any interest therein for himself either directly or indirectly. (Sec.52, 53)

Vocation of Office of Trustee

The office of the trustee is vacated: (Sec.70-72)

1. By his death.
2. By his discharge from office which may arise:
   a. By extinction of the trust.
   b. By completion of his duties under the trust.
   c. By means as may be prescribed by the instrument of trust.
   d. By appointment under this Act of a new trustee in his place.
   e. By consent of the beneficiary or when there are more than one beneficiaries, all the beneficiaries being competent to contract.
   f. By the court to which a petition for his discharge is presented under this Act.

Extinction of Trust

A trust is extinguished under the following conditions: (Sec.77)

1. When its purpose is completely fulfilled.
2. When its purpose becomes unlawful.
3. When the fulfillment of its purpose becomes impossible by destruction of trust property.
4. When the trust being revocable, is expressly revoked.

Revocation of Trust

A trust may be revoked under following circumstances: (Sec.78)

1. Trust created by will, may be revoked at the pleasure of the author of the trust.
2. A Trust may revoke:
3. When all the beneficiaries are competent to contract with their consent.
4. When the trust has been declared by non-testamentary instrument or by words of mouth in exercise of power of revocation expressly reserved to the author of trust.
5. When the trust is for payment of debts of the author of trust, and has not been communicated to the creditors at the pleasure of the author of trust.

Appointment of New Trustee

A new trustee may be appointed in the following situations: (Sec.73)

1. Appointment on Death of Trustee

A new trustee may be appointed in the following circumstances:

(a) trustee dies (b) trustee appointed disclaims (c) trustee for more than 6 months is absent from country (d) trustee leaves the country for staying aboard (e) trustee is declared insolvent (f) trustee refuses or becomes unfit or incapable to act (g) trustee accepts inconsistent trust.

2. Appointment by Court

When any vacancy or disqualification occurs and it is impracticable to appoint a new trustee under section 73, the court on application of beneficiary may appoint a new trustee accordingly. (Sec74)

Who can appoint Trustee

A new trustee may be appointed in his place by;

1. The person nominated for that purpose by the instrument.
2. The author of the trust, if survives.
3. The surviving trustee or the legal representative of such last trustee.

4. The retiring trustee with the consent of court. (Sec. 73)

Rules of appointment

In appointing new trustee, court should consider the following: (Sec.74)

1. The wishes of the author of trust as expressed in the instrument.
2. The wishes of the person empowered to appoint a new trustee.
3. The question whether the appointment will promote or impede the execution of trust.

4. When there are more than one beneficiaries, court should consider the interests of all such beneficiaries.

Vesting of Trust Property

When the new trustee is appointed, all the trust property shall be vested in new trustee and he shall enjoy same powers, authorities and discretion and shall act as if he had been originally nominated a trustee by the author of the trust. (Sec.75)

TEST QUESTIONS

1. What is trust, how it is created?
2. Define trust, and explain its different classifications.
3. When purpose of trust is lawful?
4. Who may create trust and who may be the trustee and beneficiary?
5. What are the duties of a trustee under Trusts Act, 1882?
6. What are the rights and powers of trustees?
7. What are the rights of beneficiary under the Trusts Act, 1882?
8. What are the liabilities of trustees and beneficiaries?
9. How office of trustee is vacated?
10. Discuss conditions when trustee is discharged from his liability.
11. Discuss procedure of the appointment of new trustee.