BHARATHIDASAN UNIVERSITY

(Re-accredited with 'A' Grade by NAAC)

CENTRE FOR DISTANCE EDUCATION

PALKALAIPERUR, TIRUCHIRAPPALLI – 24

M.B.A.,

THIRD SEMESTER

CORE PAPER

CORE COURSE - XIV

LEGAL ASPECTS OF BUSINESS

Syllabus Revised from 2017 onwards

CORE COURSE - XIV
LEGAL ASPECTS OF BUSINESS

(Syllabus)

Objective

To provide a basic understanding of various statutory provisions that confronts business managers while taking decisions.

Unit I

The Indian Contract Act, 1872

Introduction – Definition of contract – agreement – offer – acceptance – consideration capacity to contract – contingent contract – Quasi contract – performance – Discharge – Remedies to breach of contract.

Unit II

Partnership- essentials of partnership, Rights and duties of partner, types of partners. Dissolution of partnership.

Sale of Goods Act: Sale and Agreement to sell, Conditions and Warrantees, Transfer of property, Finder of goods, Performance of contract of sale, Rights of an unpaid seller.

Unit III

Contract of Agency- Essentials of Contract of Agency – Creation of Agency – Kinds of Agents – Comparison Between an Agent and Servant – Comparison Between an Agent and Independent Contractor – Relationship of Principal and Agent – Duties of an Agent – Rights of an Agent – Duties and Rights of the Principal – Delegation of authority by an Agent – Sub Agent – Position of Principal and Agent in relation to third Parties – Termination of Agency.

Unit IV

Company – Formation – Memorandum – Articles – Prospective Shares – debentures – Directors – appointment – Powers and duties. Meetings – Proceedings – Management – Accounts – audit – oppression & mismanagement – winding up.

Unit V

The Consumer Protection Act, 1986; Object – Rights of Consumers –Important Terms-Consumer Complaint - Consumer Protection Councils – Redressal Machinery – District Forum – State Commission - National Commission. Cyber Law -Need for Cyber laws – Cyber law In India – Information Technology Act – 2000 – Defining Cyber Crime – Types of Cyber Crimes – Preventing of Computer Crime.

Recommended Text books

1. Business legislation for management M.C. Kuchal and Deepa Prakash, Vikas Publish House PVT Ltd.,
2. Legal aspects of Business, Ravinder kumar, Cengage learning.
3. Business law, Sathish B, Matur Tata Mcgraw Hill.
4. Business law, D. Chandra Bose, PHI learning PVT Ltd.,
5. Legal aspects of Business by Akhileshwar Pathak. Tata Mcgraw Hill.
6. Legal aspects of Business by kubendran.

Suggested Readings

1. Law of Business contracts in India by Sairam Bhat, Sage, www. sagepublications.com
2. Company law, Ashok K Bagrial Vikas publishing House.
3. Business Law, chandra Bose, PHI learning India PVT Ltd.

Unit-l

Law of Contracts

Objectives:

1. Understand meaning of the terms ‘agreement’ and ‘contract’ and note the distinction between the two.
2. Note the essential elements of contract.
3. Be clear about various types of contracts.
4. Understand the concept of offer and acceptance and rules of communication.
5. To know the capacity of persons to enter into contract.
6. To understand the role of “Consideration” in contracts
7. To know all about how contracts can be discharged and the remedies for breach of contract.
8. To understand the special contracts.

The Indian Contract Act 1872

The Indian contract act was enacted in the year 1872. The Act deals with

1. The general principles of the law of contracts:

The definition of contract, capacity to enter into contracts, free consent, consideration, discharge of contracts and the remedies for breach of a contract.

2. Special Contracts:

Contract of Indemnity and Guarantee, Contract of Bailment and Pledge, and Contract of Agency.

Lesson-1

CONTRACTS

Section 2 (h) of the Act states that “an agreement enforceable by law is a contract".

Contract = Agreement + enforcement by law

Agreement:

Sec.2 (e) defines an Agreement as "every promise and every set of premises forming consideration for each other”.

Promise:

Sec.2 (b) Defines <u>Promise</u> as follows:

“When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. Proposal when accepted becomes a promise"

An offer / proposal when accepted becomes a “Promise”. An agreement consists of an offer by one party and its acceptance by the other. A person cannot enter into an agreement with himself.

Agreement = offer + Acceptance

For an agreement to be regarded as a Contract. It must give rise to a legal obligation. Social, moral or – religious agreements do not create any legal obliga**tion (Balfour Vs. Balfour).**

There can be an agreement only when they understand the same thing in the same manner. The minds of the parties should meet (consensus an item / Identity of Minds).

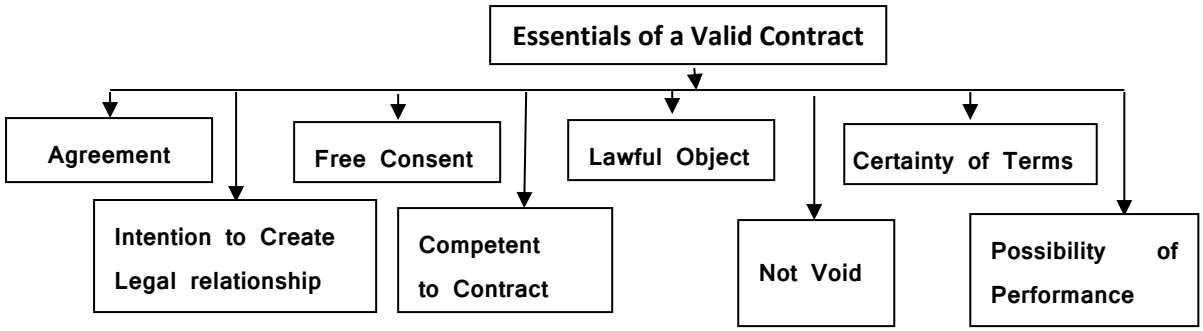
DISTINCTION BETWEEN AN AGREEMENT AND A CONTRACT

Agreement	Contract
1. An offer and its acceptance constitute an agreement. 2. Every agreement is not a contract.	An agreement and its enforceability constitute a contract. All contracts are agreements.

Essential Elements of a valid contract:

The following are the Essential Elements 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. "The following essential elements must coexist in order to make a valid contract.



A Valid Contract is a Contract, which binds both the parties to it. Both the parties have rights and obligations under a Valid Contract. The essential ingredients of a valid contract are as follows.

S. No.	Description	Section Number
1.	Two competent parties	Sections 11 and 12
2.	Valid offer	
3.	Valid acceptance	Sections 4 to 7
4.	Lawful consideration	Sections 2(d) and 25
5.	Free and voluntary consent	Sections 15 and 19A

Essential Ingredients of a Valid Contract

Agreement

An agreement is composed of two elements – offer and acceptance. The party making the offer is known as the **"offeror"** and the party to whom the offer is made is known as the **"offeree".** It is important that they must agree to the same thing and in the same sense. In other words, there must be **"consensus-ad-idem".**

Example:

A has 2 houses, one in Mumbai and the other in Chennai. He has offered to sell one house to B.B accepts the offer with the idea of purchasing the house in Mumbai, while A was intending to sell the house in Chennai. There is no identity of minds. So the agreement is void.

Intention to Create Legal Relationship

There must be an intention among the parties to create a legal relationship. If there is no such intention, then there is no contract. In case of social agreements, generally, there is no intention to create legal relationship and, therefore, there is no contract.

Example

Balfour Vs Balfour

A husband agreed to pay 30 pounds to his wife every month while he was abroad. As he failed .to pay the promised amount, his wife sued him for the recovery of the amount. Held, she could not recover it as it was a social agreement and the parties did not intend to create legal relations.

Free Consent

For a contract to be valid, it is essential that there must be free and genuine consent of the parties to the contract. Consent is said to be free when it is not caused by coercion, undue influence, fraud, misrepresentation or mistake. A contract without free consent is voidable. The consent of parties must be genuine. The term 'consent' means parties to a contract must agree upon the same thing in the same sense. i.e. there should be consensus-ad idem. In such cases, the contract becomes voidable at the option of the party whose consent is not free.

Example

A threatened to shoot B if he (B) does not lend him Rs. 2,000 and B agreed to it, Here the agreement is entered into under coercion and hence voidable at the option of B.

Competence to Contract

The parties to a contract must have capacity (legal ability) to, make valid contract. In every case there must be assent the parties. The assent presupposes a free, fair, and serious exercise of the reasoning faculty. If, therefore either of the parties to an agreement is deprived of the use of his understanding or if he be deemed by law not be have attained it; there can be no such agreement which shall bind him. Section 11 of the Indian Contract Act specifies that every person is competent to contract provided,

a) He is of the' age of majority according to the law to which he is subject, and

b) He is of sound mind and

c) He not disqualified from contracting by any law to which he is subject.

In other words (a) a minor, (b) a person of unsound mind (a person of unsound mind can enter into a contract during his lucid intervals) and (c) a person disqualified from contracting by any law to which he' is subject, (e.g an alien enemy, foreign Sovereigns and accredited representatives of a foreign state; insolvents and convicts are, not competent to contract.

Lawful Consideration

An agreement' must' be supported 'by, consideration. Consideration means something in return'. Consideration may be an act (doing something) or forbearance not doing something) or a promise to do or not to do something.

a) The consideration may be **past, present or future.**

b) Consideration must be **real**

c) The consideration should also be **lawful.**

The consideration is considered lawful unless it is forbidden by law, or is fraudulent, or involves or' implies injury to the person or property of another, or is immoral, or is opposed to public policy.

"Lawful consideration is an essential element of a valid contract. Consideration is' a technical word meaning thereby quid pro quo i.e. something in return. It must result. in the benefit to one party and detriment to the other party or detriment to both.

Example

A agrees to, sell his books to B for Rs. 100, B .promises to pay Rs. 100 in consideration for A's promise to sell his books and A's, promise to sell the books is the consideration for B's promise to pay Rs. 100.

Lawful Object

The object or purpose of the agreement must be lawful. It should not be immoral or illegal or opposed to public policy. If it suffers from any legal flaw, it is not enforceable.

Example

If A rents out a house for use as a' gambling den, the agreement is an agreement expressly or impliedly prohibited by law.

The agreement must not be one which the law declares to be either illegal or void. A void agreement is one, which is without any legal effects. Illegal agreement is an agreement expressly or impliedly prohibited by law.

Example

Agreements in restraint of trade, marriage, legal proceedings etc, are void agreements. Those agreements prohibited by the Indian Penal Code Eg. Threat to commit murder or publishing defamatory statements or agreements, which are opposed, to public policy are illegal in nature.

Agreement not Explicitly Declared Void

The agreement must not have been expressly declared void under the contract Act. Sections 24 to 30 specify certain types of agreements, which have been expressly declared void. They include agreements in restraint of marriage, agreements in restraint of legal proceedings, agreements in restraint of trade and agreements by way of wager.

Certainty of Terms

Section 29 of the Contract Act provides that agreements, the meaning of which is not certain or capable of being made certain, are void. Thus, to make a valid contract, it is absolutely essential that its terms must be clear and **not vague** or uncertain. .

Example

P agreed to sell 10 tons of oil to Q. It is not clear what kind of oil is intended to be sold. Therefore, this agreement is not valid on the ground of uncertainty. If, however, the meaning of the agreement could be made certain from the circumstances of the case, it will be treated as a valid contract.

Possibility of Performance

The agreement must be capable of being performed. An agreement to do an impossible thing or act cannot be enforced.

Example

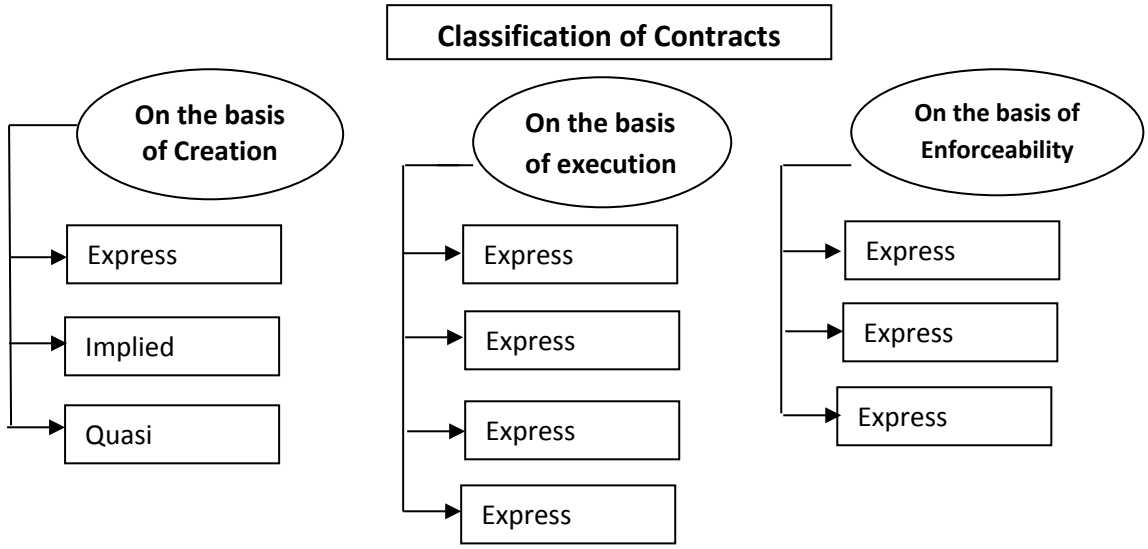
A agrees with B to discover treasure by magic. It is not enforceable.

Compliance with Legal Formalities

An agreement may be oral or written. Where the agreement is to be in writing, it must comply with the necessary legal formalities as to writing, registration and attestation, or otherwise, it is not enforceable.

Example

Time barred debt, a promissory note with inadequate stamps



On the basis of creation

Express

A contract made in writing or by word of mouth.

Example

A writes to B, "I am willing to sell my house for Rs. 12 Lakhs". B accepts the offer by telegram. It is an express contract.

Implied

A contract inferred from the conduct of the parties or circumstances of the case.

Example

A, takes a seat in a bus. There is an implied contract that he will pay the prescribed fare for taking him to the destination.

Quasi

In such a contract, the rights and obligations arise not by an agreement but by operation of law. .

Example

A trader, by mistake left certain goods in X's house. X treated the goods as his own and consumed them. X is bound to pay for the goods even though he had not asked for them.

On the basis of Execution

Executed Contract

A contract where both the parties have fulfilled their respective obligations.

Example

A agreed to buy a fridge from B for cash. A pays the cash and B delivers the Fridge. It is an executed contract.

On the basis of execution, contracts may also be classified as Unilateral Contracts

A contract where, at the time of formation, only one party has to perform his part of the obligations (the other bas already executed his part)

Example

X permits a porter to carry luggage upto his railway compartment. A Contract comes into existence as soon as the luggage is lifted and placed in the compartment. As the porter has already performed his obligation, it is now X's turn to fulfil his obligation viz., paying the charges.

Bilateral Contract

A contract where, at the time of formation, the obligations of both the parties are outstanding. It is similar to Executory Contract.

Example

P agrees to sell his next sugarcane harvest to a local sugar mill Y Ltd, who promises to pay the price after delivered. This is a bilateral Contract. .

On the basis or enforceability

Void Contract

It is a contract without any legal effect and cannot be enforced in a court of Law. Section 2 (i) defines a void contract as "a contract which ceases to be enforceable by law becomes void when it ceases to be enforceable".

Example

Where both parties to an agreement are under a. mistake of fact (Section 20), when the. consideration or object of an agreement is unlawful, (Section 23), an agreement made without consideration, (Section 25), agreement in restraint of marriage (Section 26), trade (Section 27), legal proceedings (Section 28), agreement by way of wager (Section 30) are instances of void contract.

A Void Contract is a nullity. It is not a contract at all. Both the parties do not have right or obligation under a Void Contract. In other words, both the parties can ignore the contract as not binding upon them.

A contract may be void from the inception itself. This is called Contract Void abinitio (from the beginning). This is a contract, which has not come into existence at all.

Example

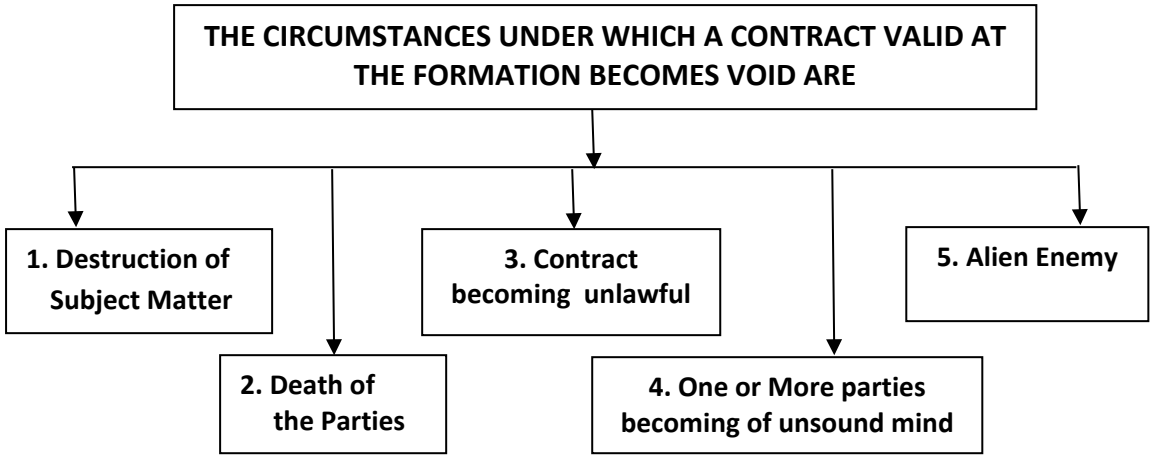
Contract with a minor
Contract without consideration
Unlawful agreements.

There may be contracts, which are valid at the beginning but subsequently "become void". This happens on account of circumstances beyond the control of both the parties. The circumstances should not be due to the fault of either of the parties. The circumstances should not be self-induced. This is known as Supervening Impossibility (Section 56).

Lesson -2

Valid, Void, Voidable Contracts

Void Contract



Circumstances by which a contract becomes void are as follows:

Destruction of subject matter

A contract becomes void if the subject matter is destroyed after the agreement but before the performance. As stated earlier, the parties should not be at fault. If the subject matter did not exist even at the time of entering into the agreement, unknown to both the parties, the contract is void ab-initio **(Section 20).**

Death of parties

If a-party to .a contract dies the contract does not die. The obligation will devolve upon the legal representatives unless there is a contrary INTENTION (Section 37). However, if personal skill is involved, the contract will die with the person himself. The maxim is "Actio Personalis Moritur Cum Persona". Personal cause of action dies with the person himself.

One or more of the parties becoming of unsound mind

If a party is of unsound mind he is disqualified from entering into a contract. A party should be of sound mind to enter into a contract. Subsequently. If he becomes of unsound mind, the contract becomes void A and, B contract to marry each other. But by the time fixed for the marriage. A goes mad, the contract becomes void.

In the above illustration the performance of the marriage by itself is not impossible. B can still marry A. But it is impracticable So, impossibility does not mean the performance is virtually impossible. It is used in the sense that it is impracticable,

Enemy Alien

Alien means a national of a foreign country. Friendly alien and, enemy alien denote the relationship of our country with the country to which the foreigner belongs. A penon cannot enter into a contract with an enemy alien. However, person may enter into a contract with a friendly alien. If the country to which he belongs wages war with our country he becomes enemy alien. Now the contract becomes void

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. "Thus, a voidable Contract is one which can be set aside or repudiated at the option of the aggrieved party. Until it is set aside or avoided by the party entitled to do so, it remains a valid contract.

As per section 2(i) an agreement which is enforceable by law at the option of one or more of the parties but not at the option of the other or others is a voidable contract".

Example

A Contract brought about as a result of Coercion, Undue Influence, Fraud or misrepresentation would be voidable at the option of the person whose consent was caused by anyone of these factors.

Factors affecting consent

A contract is voidable at the option of the party whose consent has been affected. There are four factors by which consent can be affected. They are -

Factors Affecting Consent

S. No.	Description	Section Number
1.	Coercion	Sections 15 and 19
2.	Undue Influence	Sections 16 and 19A
3.	Fraud.	Sections 17 and 19
4.	Misrepresentation.	Sections 18 and 19

However, it is only an **OPTION** to the party whose consent, has been affected Until the party exercises his option, the contract is **BINDING** upon him. So, a Voidable Contract is essentially a Valid Contract until it has been rescinded (set. aside).

The party whose consent has been affected should exercise his option and rescind the contract either - .

(l) Within a reasonable time or

(2) Before a third party acquires title to the goods.

In the case of a Void Contract, third parties cannot have title to the goods. But in the case of Voidable Contract, a third party who takes the goods in good faith and before the contract has been rescinded win get valid title to the goods. Section 178A of the Contract Act and Section 29 of the sale of Goods Act refer.

Illegal or unlawful contracts

The word 'illegal' means contrary to law. They are contracts opposed to statutory law or public morals. They are void ab-initio. An illegal contract is not only void between the immediate parties but also invalidates collateral transactions.

As per Section 23, an agreement is unlawful illegal, the consideration or object of which

(1) is forbidden by law;

(2) defeats the provisions of any law;

(3) is fraudulent;

(4) involves or implies injury to the person or property of another; and

(5) the Court regards it as immoral, or opposed to public policy.

Example

A agrees to pay Rs. 1 Lakh to B, if B kills C. This is an illegal agreement because its object is unlawful (forbidden by law)

DIFFERENCE BETWEEN VOID AND ILLEGAL AGREEMENT

Void Agreement	Illegal agreement
1. A void agreement is not necessarily illegal	All illegal agreements are void
2. Agreements collateral to void agreements are valid	Agreements collateral to illegal agreements are also valid
3. The benefit received has to be restored to the other party	The money advanced or thing given cannot be claimed back

DIFFERENCE BETWEEN VOID AND VOIDABLE CONTRACTS

DISTINCTION	VOID CONTRACTS	VOIDABLE CONTRACTS
1. Enforceability	It is not enforceable at the instance or desire of either party.	It is enforceable at the instance of the party entitled to avoid it.
2. Third Party Rights	A third party who purchased goods, which have been the subject matter of a void contract, will acquire no title to it.	A party who purchased goods under a voidable contract acquires a good title, provided the sale takes place before the contract is avoided.
3. Compensation	No questions of non-performance arises, as the contract is not enforceable.	The aggrieved party is entitled to compensation for loss suffered on account of cancellation of the contract.

Lesson - 3

Proposal/Offer & Acceptance

Definition: Sec.2 (a)

"When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of the other to such act or abstinence he is said to make a proposal".

From the above definition of proposal, the following features emerge: -

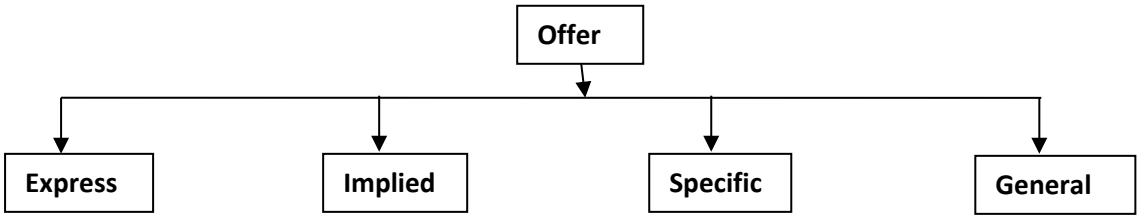
It must be an expression of willingness to do or to abstain from doing something - Thus, it may involve a 'positive act' or an abstinence' (refrain from doing).

Example

- ***Positive Act:*** 'A' offers to sell his car to 'B' for Rs. 1,00,000
- ***Abstinence:*** 'A' offers not to file a suit against 'B' if the latter pays 'A' the outstanding amount of' Rs. 1,00,000.

1. It must be made to another person. There can be no 'proposal' by a person to himself
2. It must be made with a view to obtain the assent of that other person to such act or abstinence, Thus, a mere **Statement of intention is not a proposal.**
3. The offer must be definite
4. The offer must be communicated to the offeree.
5. The person making the offer is called the **'offeror'** or the **'preposer'** and the person to whom it is made is called the 'offeree'.

Kinds of Offer



Express / implied

An offer, which is expressed by words, written or spoken, is called an express offer. An offer expressed by conduct is an **'implied offer'.**

Example

Express Offer: 'A' offers to' sell his car to 'B' for Rs.1,00,000.

Implied Offer: When a transport company runs a' bus on a particular route, it is an implied offer from Transport Company to carry passengers for a certain fare.

Specific / General

An offer made to a specific person or a particular group of persons is called a Specific offer. It can be accepted only by that person or that 'particular group to whom it is made.

Example

'A' offered to buy certain goods from 'B'. The offer is to a definite person 'B' Therefore, a purchase from 'X' instead of 'B', will not' give rise to a valid contract (Boulton Vs Jones) .

An offer made to the world at large or public in general is a general offer. It can be accepted by anyone who fulfils the terms of the offer (Carlill Vs Carbolic Smoke Ball Co).

Classification of Offer

(a) General Offer

It is an offer made to the public in general and hence anyone can accept and do the desired act. In Carlill V. Carbolic Smoke Ball Co.. (1893), the Court accepted that an offer could be made to the world at large. Section 8 of the Indian Contract Act points out that the performance of the conditions of a proposal is an acceptance to any number of proposals. Where a general offer is of continuing nature, it will be open for acceptance to any number of persons until it is retracted.

(b) Specific Offer

When offer is made to a definite person, it is known as specific offer and only that specified person can accept such offers. (Bottom V. Johns)

(c) Cross Offers

When two parties exchange identical offers in ignorance at the time of each other's offer, the offers. are called Cross offers. There is not a binding contract in such a case, as one's offer cannot be construed as acceptance by other. (Tin (v) Haffmen & Co. 1873)

(d) Counter Offer

When the offeree offers to qualified acceptance of the offer subject to modifications and variations in the terms 'of original offer, he .is-said to have made a counter offer. Counter - offer amounts to rejection of the original offer. (Hyde (v) Wrench 1840).

(e) Standing, open or Continuing Offer

An offer, allowed to remain open for acceptance over a period of time, is known as a standing, open or continuing offer. Tender for supply of goods is a kind of standing offer.

Characteristics of a Valid Offer

1. **The terms of the offer must be certain. The terms shall not be ambiguous, that is capable of more than one meaning.**

Illustration

A has two scooters. He offers to sell to B one of them. B accepts the offer: It does not result in a contract to sell either of them.

Section 29 - illustration

(a) A agrees to sell to B• one hundred tons of oil. There is nothing in the agreement to show which kind of oil is meant. .The contract is void for uncertainty.

(b) A is a dealer in coconut oil ONLY. Now, the nature of A's trade affords an indication as to which kind of oil is meant. The terms are capable of being made certain. A has entered into an agreement with B to sell one hundred tons of coconut oil.

2. **A mere supply of information do not amount to an offer and cannot result in a contract even if acted upon.**

Harvey Vs. Facey

Bumper Hall pen is the name of a land. A telegraphed to B. "Will you sell us Bumper Hall Pen? Quote the lowest price". B telegraphed to A "Lowest price for Bumper Hall Pen 900 pounds". A telegraphed to B, "We agree to buy Bumper Hall Pen for 900pounds asked by you"

A contended that this exchange of telegrams constituted an offer and acceptance thereby resulting in a contract. .

The court negated that contention and held that there was no contract. A by his first telegram asked two questions namely (1) as to the lowest price and (2) the willingness of B to sell. B by his telegram only quoted the lowest price. He had not expressed his willingness to sell. He merely supplied information.

3. An offer must be distinguished from an invitation to an offer (invitation to treat)

A makes an offer to B. If B is interested he may accept the offer. Offer accepted results in a contract.

A invites an offer from B. B makes the offer. A may or may not accept the offer. With the result, there may or may not be a contract.

Goods ‘displayed in a shop window are not offers for sale. They are only invitations to an offer for sale. They are only invitation to an offer to buy. The customer makes the offer to buy. The shop-keeper may or may not accept the offer. With the result, the shopkeeper is not bound to sell the goods.

In Fisher Vs Bell, flick-knife was displayed in a shop-window. The Court held that it was not an offer for sale and hence was not an offence:

4. An offer must be communicated to the offeree.

Lalman vs. Gowri Dutt

Facts - G sent L to search for his missing nephew. Subsequently, G announced a reward for the finder. Meanwhile L brought the nephew. L was not aware of the announcement when it was made. L claimed the reward.

Held **- L** was not entitled for the reward. The Court observed as follows: A person who does an act in ignorance of an offer cannot say either that there was a consensus between himself and the offeror or that his act was done in relation to the offer.

GENERAL OFFER

This is an offer made to the world at large and not to a particular person. It may be made to a class of persons also.

Carlill V s. Carbolic Smoke, Ball Co.

Facts

A Company introduced a new drug as a preventive for influenza fever. The Company advertised offering to pay a reward of1 00 pounds to any person who used their drug according to their directions .and yet contracted influenza. The advertisement also added that a sum of 1000 pounds had been deposited with their bankers to show their sincerity in the matter. Mrs. Carlill used the drug according to their directions and yet' Contracted influenza, She claimed the reward. ' .-

‘The company contended that it could not have entered into a contract with the whole world. The Court negatives the contention and held that a company did not enter into a contract with the whole world, which obviously the company was not capable of. The company had only made an offer to the whole 'world, which, the company was capable of.

This is known as General offer or offers made to the world at large. The company entered into a Contract with, such person or persons who fulfilled the conditions of the offer - namely using the drug according to their directions and, yet contracted influenza. The company was bound to them.

The company again contended that acceptance had not been communicated to the company. The court negatived this contention also and observed as follows

Acceptance must be communicated to the offeror, It is true in advertisement cases also. However there are certain advertisement cases where notice of communication of acceptance may be dispensed with. This depends upon the inherent nature of the advertisement. Suppose a dog is lost, and the owner. of the dog advertises offering to pay reward for the finder. One cannot expect the finder to sit down and write a note to the advertiser stating that he is accepting the offer and he is going to search for the dog. The moment the dog is found there is a contract between the finder and the owner of the dog. So, in such cases, fulfilment of the conditions of the offer is acceptance. Thus, in such cases notice of communication of acceptance is not necessary

Rules as to offer

a. The offer must be capable of creating legal relations

A social invitation, even if it is accepted, does not create legal relations because it is not so intended. An offer, therefore, must be such as would result in a valid contract when it is not accepted.

b. The offer must be certain, definite and not vague

If the terms of an offer are vague or indefinite, its acceptance cannot create any contractual relationship. Thus, where A offers to sell B a 100 quintals of oil, there is nothing whatever to show what kind of oil was intended. The offer is not capable of being. accepted. for want of certainty. But if. the agreement contains a machinery for ascertaining a vague term, the agreement is not void on the ground of its being Vague. If in the above example, A is a dealer in coconut oil only, it shall constitute a valid offer since the nature of A's trade affords an indication as to which oil is being offered,

c. The offer must be expressed or implied.

d. The offer must be distinguished from in an invitation to offer.

e. An offer may be specific or general.

f. The Offer must be communicated

An offer, to be complete, must be communicated to the person to whom it is made. Unless an offer is communicated, there can be no acceptance by it. An acceptance of an offer, importance of the offer, is not acceptance and does not create any right on the acceptor

g. The offer must be made with a view to obtaining the consent of the offeree.

h. An offer may be conditional.

i. The, offer should not contain terms the non-compliance of which would amount to acceptance. Thus, a man cannot say that if acceptance were communicated by a certain time the offer would be considered as accepted. .

ESSENTIALS OF A VALID OFFER

Offer must intend to create legal relations

A valid offer must intend to create legal relations, It is so- because the very purpose of entering into an agreement is to make it enforceable in a court of law, An offer to perform, social, religious or moral acts without any intention of creating legal relations will not be a valid offer, (Balfour Vs. Balfour)

Terms of Offer must be certain, definite and not vague

The terms and conditions of 'the offer must be certain and unambiguous. Otherwise it would not be a valid offer. As per Sec. 29. “Agreements, the meaning of which is not certain, or capable of being made certain, are void”.

Example

'A' offers 'B' lavish entertainment, if 'B' does a particular work for him. It is not an offer as. it is vague and uncertain. .

GuttingVs Lyn

'L' purchased a horse from 'G' and he promised to buy another or pay 45 pounds if the horse proved luckily. He did neither. 'G' sued him. It was held invalid.

The offer must be distinguished from a mere declaration of intention

Sometimes a person may make a statement without any intention of creating a binding obligation. Such statement or declaration only indicates that he is willing to negotiate and an offer will be made or invited in future. .

Example

An auctioneer advertised in a newspaper that a sale of office furniture would be held on a certain date. A person, with the intention to buy furniture came from a distant. place for the auction but the auction was cancelled. He cannot file a suit against the auctioneer for his loss of time and expenses because the advertisement was merely a declaration of intention to hold auction. (Harris Vs. Lickerson) . .

Offer must be distinguished from an invitation to offer

An invitation ·to offer is not an offer. It is an invitation to the other party to make an offer. It shows the person's Willingness to have negotiations with him. But he is not bound to accept the offer when the other party makes it.

The following are only “invitation to offer" and not "offers":

a. price list of goods for sale;
b.Quotations of lowest prices;
c.An advertisement inviting tenders;
d.Railway time – table;
e.Prospectus issued by Company;
f. Display of goods with price tags attached.

The offer must be communicated

An offer is effective only when it is communicated to the person to whom it is made. This is true of specific as well as general offers: The communication may be express or implied. An acceptance of an offer, in ignorance of the offer, is no acceptance at all.

Lalman Shukla Vs.Gouri Dutt

'G' sent his servant 'L' to trace his lost nephew. When the servant had left, 'G' announced a reward of Rs. 500 to anyone who traced the boy. 'L' found the boy and brought him home. 'L' was not entitled to the reward because he did not know about the offer when he found the missing boy.

Offer must be made with the view to obtaining the assent

An 'offer to do or not to do must be made with the view to obtain the consent or assent of the other party. Mere enquiry is not an offer.

Example

Quote the lowest price for Bumper Hall Pen. offer should not contain any term the non-compliance of which would amount to acceptance

While making the offer the offeror cannot say that if the offer is not accepted before a certain date it will be presumed to have been accepted. Unless the offeree sends his reply, no contract will arise.

Example

'A' writes to 'B' "I shall sell my car for Rs. 96,000. If I do not receive a rep1y in a week, I shall assume that you have accepted the offer". If' 'B'does not reply, it shall not imply that he has accepted the offer. Hence, there will be no contract.

Special terms or conditions in an offer must also be communicated

The offeror is free to lay down any terms and conditions in his offer and if the other party accepts the offer then he would be bound by those terms and conditions. The important point is that if there are some special terms and conditions they should also be duly communicated

Cross Offers & Counter Offers

a. Cross Offers

Identical offers made by person in ignorance of each other are known as cross offers. They do not make a contract.

Example

'H' wrote to 'T' offering to sell 800 tons of iron at 69s. On the same day 'T' wrote 'H' offering to buy 800 tons at 69s. This is a cross offer .and hence does not constitute a contract.

b. Counter Offer

Conditional Qualified acceptance is not a valid acceptance. It is a counter offer, which may be accepted or rejected.

Lapse of an Offer or how long does an offer remain open?

An offer should be accepted while it is alive and effective. The rules are:

1. Stipulated length of time

An offer remains open till, the stipulated length of time. An acceptance made after the stipulated length of time does not bind the' offeror. On September 1st, A .makes an offer to 'B' the offer to remain open till September 15th. B accepts the offer on September 16th. Such an acceptance is not binding upon A.

2. Death' of the Offerer - Section 6 (4)

If the offeror dies after making an offer the offeree may accept the offer before he comes to know about the death of the offeror. Such an acceptance is binding upon the legal representatives of the offeror.

Note: If personal skill' is involved, the offer will die with the person himself.

Mode of Acceptance

(a) Silence can never amount to acceptance

Brogden Vs. Metropolitain Railway Co.

Facts

Brogden was supplying. coal to the' railway company. There was no formal agreement. Subsequently, the parties decided to enter into a proper contract. Accordingly, the Agent of the railway company sent a draft agreement to Brogden. Brogden made certain material alterations in the draft agreement (including the name of an arbitrator) and sent it to the agent of the railway company. “The agent marked” **APPROVED**" on the draft and kept it inside his drawer. Coal was being supplied on the terms of the draft agreement. Subsequently, when a dispute arose, Brogden claimed that there was no contract by which be was bound.

The court observed that, "Mere mental acceptance does not amount to an acceptance" It is not enough if a person makes up his mind to accept.

However, in the above case, the court held that the subsequent conduct of the parties namely - supplying coal on the same terms of the agreement showed that there was a contract by which the parties were bound Silence cannot be **PRESCRIBED** as a mode of acceptance. This was held in another case viz., Felthouse Vs. Bindley.

3. Felthouse Vs. Bindley

Facts

Feethouse wrote to his nephew offering to buy his horse for 30-l5-O Adding. "If I do not hear anymore about him, I shall take the horse mine at pounds 30-15-0. The nephew did not reply. However, the nephew instructed his auctioneer Bindley to keep the horse out of sale as it was sold to Felthouse Bindley. Sold the horse by mistake. Felthouse sude Bindley. For conversion.

Held

B was not liable In the above case silence was prescribed as the mode of acceptance which is not valid in law. Acceptance not being valid the sale was not completed. Sale not having been completed. Felthouse did not become the owner of the horse. Hence B was not liable for conversion.

Different mode of acceptance: Section 7 (2)

Suppose the offeror prescribes a particular mode of acceptance. But, the acceptor accepts in a different mode. Is such an acceptance binding upon the offeror? Within a reasonable time, the offeror shall INSIST upon the acceptor that he shall accept in the prescribed mode and not otherwise. But if the offeror fails to insist so, he accepts the acceptance in the different mode. In other words, he is bound by the acceptance in the different mode. .

4. Acceptance to be unqualified

Acceptance should be unqualified and unconditional. If the offeree varies the terms of the offer and accepts it, the offeror is not bound by the acceptance.

4 (a) Offer lapses by a counter offer

Illustration

A writes, to B offering to sell his scooter for Rs. 10,000. B writes to A asking him whether he will sell it for Rs. 9,000. B again writes to A accepting to buy the scooter for Rs. 10,000.

In the above illustration B writes two letters. The first letter of B amounts to a counter offer. The effect of the Counter offer is offer by A lapses. Hence when B communicated his acceptance through his second letter there is no' offer at all. It is not binding upon A. With the result, there is NO contract.

Suppose B through his first letter asked A about the condition of the scooter. It does not amount a counter offer. Counter offer should be on the terms of the offer itself A mere enquiry does not amount to a counter offer

4 (b) A counter offer should be distinguished from a cross offer

On 1st September 1993, A at Madras posted a letter to B at Bangalore offering to all his scooter for Rs. 9,000. On the same day, 'B posted a letter to A offering to buy his scooter for Rs.9,000. There is NO Contract.

In the above illustration, one offer cannot be construed as the acceptance of the other. Acceptance can be made only in relation to an offer. Cross-offers DO NOT results in a contract.

5. Express Revocation

An offer lapses by the offeror expressly revoking the offer and communicating the revocation to the offeree.

valid revocation can be made only before a contract comes into existence.

5.a) **In <u>Bolton Partners Vs Lambert</u>** the managing director of a company, purporting to act as agent on the Company's behalf but without having authority to do so, accepted an offer by the defendant. The defendant then withdrew his 'offer but the company ratified the manager's, acceptance.

It was held that the defendant was bound. The ratification related back to the time of agent's acceptance and so prevented the defendant's subsequent acceptance.

5. b) On 1st September 1993, A purports to act on behalf of B without authority of B. On 2nd September 1993, B ratifies i.e. adopts the act of A. The 'act comes into effect from 1st September 1993 and not from 2nd September 1993.

6. Implied Revocation

An offer lapses by the offeror doing an act, which is inconsistent with the continuance of the offer.

Dickinson Vs. Dodds

On 10th June 1874, Dodds made an offer to Dickinson to sell his land for 800 pounds, stating that the' offer would remain open till 9 A.M. on June 12th. On 11th June Dodds sold the land to a third person. Dickinson accepted the offer before 9 A.M. on the June.

Held

There was no contract, since the offer lapsed on the 11th itself '.

ACCEPTANCE

DEFINITION: Sec. 2 (b)

'Acceptance' is an expression by the offeror of his willingness to be bound by the terms of the offer. Section 2 (b) of the Act defines the term '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. 'A' offers to sell his car to, 'B' for Rs. 1,00,000 and 'B' agrees to buy the same for Rs. 1,00,000. This is an acceptance of 'A's offer by 'B'.

Meaning

A proposal or offer is said to have been accepted when the person to whom the proposal is made signifies his assent to the proposal to do or not to do something.

Only the person 'to whom it is, made can accept a specific offer. A general offer can be accepted by anyone who has knowledge of it and who fulfils the terms of the offer.

"Acceptance is to an offer what a lighted match is to a train of gunpowder". It produces something which cannot be recalled or undone". This is a quotation from Sir William P. Anson whose book is a masterpiece on English Law of Contract.

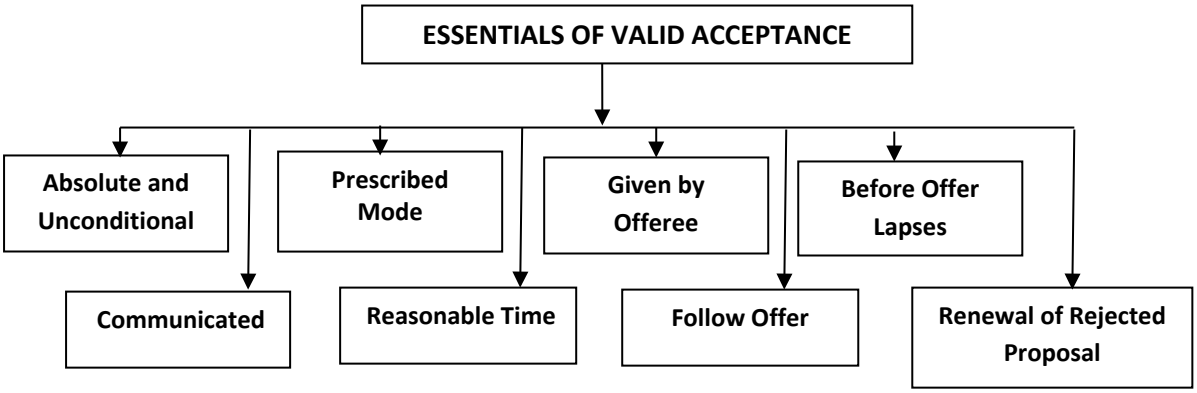
In the above quotation offer is compared to a train of gunpowder, Acceptance is compared to a lighted match.

Gunpowder by itself is inert. But, if a lighted match is applied to the gunpowder. it explodes. Only smoke and debris are left. We cannot make gunpowder out of the smoke and debris. Something happens which cannot be recalled or undone.

Similarly, offer by itself does not create any relationship. But when an offer is accepted a contractual relationship arises between the parties.

If the train of gunpowder is withdrawn before the application of lighted match, nothing happens. Similarly, if the offer is revoked i.e. withdrawn before it is accepted, it does not result in a contract.

Again, if the train of gunpowder has been laid for too long and so has become damp, the application of lighted match may not produce any result. Similarly, if an offer has lapsed by efflux of time and acceptance made after the lapse of the offer does not result in a Contract.



The acceptance of an offer, to be effective, must fulfil certain conditions, these are …

1. Acceptance must be absolute and unconditional

The acceptance must be absolute and unqualified. It must correspond with all the terms of the offer. Even a slight deviation would make the acceptance invalid. Similarly, conditional or qualified acceptance is no acceptance. It will only be a counter offer, which may be accepted or rejected by the offeror.

Example

H offered to sell his property to W for 1000 pounds. W in reply, made an offer for 950 pounds. H refused the offer. Later W wrote to him accepting the price of 1000 pounds. It was held that no contract was made between the parties and that a counter offer is no acceptance of the original offer. (Hyde Vs. Wrench),Further an offer must be accepted in toto. If only part of it is accepted, it would not be a valid acceptance.

2. Acceptance must be communicated

Communication may be oral, in writing or even be implied from the conduct of the acceptor. Mere desire to accept a proposal is not acceptance. Uncommunicated or mental acceptance is not valid acceptance. The person who has authority to accept should communicate acceptance. Silence does not amount to acceptance.

Example

(a) F offered to buy his nephew's horse for 30 pounds saying, "it I hear no more about it, I shall consider the horse as' mine". B did not reply but told his auctioneer not to sell the horse as it was sold to his uncle. The auctioneer by mistake sold it to a third party. F sued B. It was held that since there was no comniunication of acceptance, F was not the owner of the horse and B was not liable for conversion. Mere silence cannot be regarded as acceptance of the offer. (Felthouse Vs. Bindley)

(b) M offered to sell his land to N for 280. N replied purporting 10 accept and enclosed 80, promising to pay the balance of 200 by monthly instalments of 50 each. Held that N could not enforce acceptance because his acceptance was not an unqualified one. (Neale vs. Merret (I 930) W.N. 189)

(c) A offers to sell his house to B for Rs. 1000. B replied, "I can pay Rs. 800 for it". The offer of A is rejected by B as the acceptance is unqualified. However, B subsequently changes his mind and is prepared to pay Rs. 1000. This will also be treated as a counter offer and it is up to A whether to accept the same or not. (Union of India v. Bahulal AIR 1968 Bombay 294)

(d) However, a mere variation in the language which does not involve any difference in substance 'would not make the acceptance ineffective (Heyworth vs. Knight (1864) 144 ER 120).

3. Acceptance must be in the mode prescribed

If the offeror prescribes the mode or manner .of acceptance, the acceptance must be made in the mode prescribed. Otherwise; the offeror may within a reasonable time after the acceptance is communicated to him, insist that the acceptance be in the mode prescribed. If he does not inform the offeree to this effect he is deemed to have accepted the acceptance. If no mode is prescribed, acceptance may be by usual or reasonable mode.

4. Acceptance must be within a reasonable time

If the offeror has prescribed the time within which the offer must be accepted, then it must be accepted within the prescribed time. If no time is prescribed, it must be accepted within a reasonable time (Ramsgate Victoria Hotel co.Vs. Montefiore).

5. Acceptance must be given only by the offeree

An offer made to a particular person cart be validly accepted by him alone. An offer made to a class of persons can be accepted by any member of that class. An offer made to the world at large can be accepted by any person who had knowledge of it

6. Acceptance must be after an offer

There can be no acceptance without an offer. The acceptor must be aware of the proposal at the time of acceptance. Thus, acceptance must always succeed the offer.

7. Acceptance must be given before the offer lapses or is revoked

The offer must exist at the time of acceptance. If an offer has lapsed or has been revoked, subsequent acceptance will have no effect.

8. A proposal once rejected cannot be accepted unless it is renewed

An offer once rejected cannot be accepted unless a fresh offer is made (Hyde Vs. wrench).

9. Mere silence is not acceptance

Acceptance may be expressed or implied. Acceptance must be given after knowing about the offer. The person to whom the proposal is made must give acceptance.

10. Acceptance by conduct

The assent means that acceptance has been signified either in writing or by word of mouth or by performance of some act. Therefore, when a person performs the act intended by the proposer as the consideration for the promise offered by him, the performance of the act constitutes acceptance. For example, when a tradesman receives an order from a customer and executes the order by sending the goods, the customer's order for goods constitutes the offer, which has been accepted by the tradesman subsequently by sending the goods. It is a case of acceptance by conduct Section 8 provides that the performance of condition or conditions of a proposal or the acceptance of any consideration for a reciprocal promise, which may be offered with a proposal, constitutes an acceptance of the proposal.

COMMUNICATION OF AN OFFER AND ACCEPTANCE: SEC. 4

Unless an offer is communicated it cannot be accepted. Similarly, an acceptance, which is not communicated, does not create any legal relations.

When the contracting parties are face to face, there is no problem regarding communication because there is instantaneous communication of the offer and its acceptance. The problem arises when parties are at a distance from each other and they have to do it through post. In such a situation, it is very important for us to know the exact time when communication of the offer and acceptance is complete because as soon as the communication is complete the parties lose the right of withdrawal or revocation.

Communication of Offer

The communication of an offer is complete when it comes to the knowledge of the person to whom it is made i.e., when the letter containing the offer reaches the offeree."

Example

X of Chennai sends a letter by post to Y of Kolkata offering to sell his house for Rs. 15 Lakhs. The letter is posted on May 15 and this letter reaches Y on May 17. The communication of the offer is completed on May 17.

Communication of Acceptance

The completion of communication of acceptance has two aspects, viz-

a) As against the proposer

b) As. against the acceptor

The communication of acceptance is complete, as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor, but it shall be complete as against the acceptor, only when it comes to the knowledge of the proposer.

Example

P proposes, by letter, to sell a house to Q at a certain price. Q accepts P's proposal by a letter sent by post. The communication of acceptance is complete.

a) As against P, when the letter is posted by Q;

b) As against Q, when the letter is received by P

The aforesaid rules essentially fix timings for revocation of offer arid acceptance. Accordingly, an offer can be revoked till a duly addressed letter of acceptance is put in the

course of transmission and not thereafter. It is immaterial whether the letter of acceptance reaches the other party or is lost in transit. The acceptance can however be revoked till the letter of acceptance actually reaches the offeror and he learns of its contents.

Section 3 prescribes, two modes of communication, namely: (1) by any act or (2) by omission, intending thereby to communicate to the other or which has the effect of communicating it to the other. The first met hod would include any conduct and words whether written or oral. Written words would include letters, telegrams, telex messages, advertisements, etc. Oral words would include telephone messages. Any conduct would include positive acts or signs so that the other person understands what the person acting or making signs means to say or convey. The second method omission would exclude silence hut include such conduct or forbearance on one's part that the other person takes it as his willingness or assent. There are other means as well, e.g., if you as the owner, deliver the goods to me as the buyer thereof at a certain price, this transaction will be understood by everyone as acceptance by act or conduct, unless there is an indication to the contrary. Similarly, you do not require any words to explain the intent with which you Step into a ferry boat on the Hooghly river or a tram car or public bus or drop a coin into a weighing machine and the like. These are instances of communication by conduct.

A mere mental but unilateral act of assent in one's own mind does not tantamount of communication, since it cannot have the effect of communicating it to the other. This is why where a resolution passed by a bank to sell land to A remained uncommunicated to A, it was held that there was no communication, and hence no contract (Central Bank Yeotmal Vs. Vyankatesh (1949) A. Nag. 286)

Communication of special conditions

Such a situation arises where a contract for the conveyance of the passengers, for the carriage or custody of goods, etc., is made by the delivery to the passengers or owner of a ticket containing special conditions limiting the undertaker's liability Y, and nothing more is done to invite the attention to those conditions. Suppose you are travelling by air From Delhi to Calcutta Special conditions are printed in small letters and are displayed in bold letters in airlines offices but nobody cares to read them such communication deemed to have been impliedly, accepted. (Mukal Data a vs Indian Airlines)

REVOCATION OF OFFER AND ACCEPTANCE: SEC. 5

The term revocation simply means ‘taking back' or ‘withdrawing’.

1. Revocation of Offer

A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards. Hence, an offer can be revoked at any time before the letter of acceptance has been posted.

Under Section 5, a proposal may be revoked any time before the communication of its acceptance is complete as against the proposer. An acceptance may be revoked at any time before the communication of acceptance is complete as against the acceptor.

2. Revocation of proposal otherwise than by communication:

A proposal may be revoked not only by the communication of the notice of revocation by the proposer or by his authorised agent to the other party but also:

a). By lapse of time fixed for acceptance or lapse of reasonable time, if no time for acceptance has been specified [section 6(2)].

A proposer is not bound to keep his proposal open indefinitely the reason being that it would amount to a promise without consideration, and such a promise is unenforceable.

In the case of Ramsgate Victorian Hotel Co Vs Montefiore, it was held that a person who applied for shares in a company in June was not bound by an allotment made in November. This case was followed in India in 1934 in the case of India Cooperative Navigation and Trading Co. Ltd.Vs. Padamsey Prem Ji

b). By the failure of the acceptor to fulfil a condition precedent to acceptance

Section 6 of the Act contains the law on this subject. A proposal can also revoked by the failure of the acceptor to fulfil a condition precedent to the acceptance. For example, A proposes to B " I can sell my house to you for Rs.2, 000 provided you lease out your land to me". If B refuses to lease out the land, the offer would be revoked. A condition precedent is a condition, which prevents an obligation such as executing a certain document, or depositing certain amount as earnest money. Failure to satisfy any such condition shall make a proposal lapsed.

c). By the death or insanity of the proposer.

Death or insanity of the proposer operates as the revocation of the proposal only if the fact of death or in sanity has come to the knowledge of the acceptor.

There is a distinction between the revocation of the proposal and the rejection of the proposal by the person to whom it is made. A counter offer, proposing different terms, amounts to a rejection For instance, A says to B, "I can sell my house to you for Rs, 1,000". B replies, "I can purchase it for 800". The offer of A would be deemed to have, been rejected by B. Suppose B subsequently changes his mind and wants to pay, Rs.1,000 even then no contract would come into existence since the original offer of A will be deemed to have lapsed.

3. When communication is complete (Section 4)

The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made. Suppose, from Madras you have offered to sell your TV set to me at Delhi. The communication of your offer will be complete when I receive your letter.

4. Communication of performance

At times, the conditions of the proposal may include a term requiring the offeree to communicate the performance to the offeror. In such a case, mere performance without communication will not amount to an acceptance of the proposal. But in the absence of such a term being included, mere performance of an act specified by the proposer will constitute acceptance. The leading case on this point is Carlill vs. Carbolic Smokeball Co.

The case lays down three important principles, which are as follows:

(i) An offer, to be capable of acceptance, must contain a definite promise by the offeror that he, would be bound provided the terms specified by him are accepted

(ii) An offer may be made either to a particular person or to the public at large and

(iii) If an offer is made in the form of a promise in return for an act, the, performance of that act, even without any communication thereof, is to be treated as an acceptance of the offe.

Lesson-4
CONSIDERATION

What is Consideration?

MEANING: SEC 2 (d)

The term 'consideration' is used in the sense of **'quid pro quo'** means 'something' in return

The Act defines consideration as 'when at the desire of the promisor, the promisee or any other person has done or abstained from doing, does or abstains from doing, or ptomises to do or promises to abstain from doing something, such act or abstinence or promise is caued consideration for the promise',

Consideration consists of 'BENEFIT' to the promisor. It may consist of a 'DETRIMENT' to the promisee. The detriment may be a loss or responsibility to the promisee. But not necessarily.

A gives a promise to B. A is the promisor. B is the promisee. A is **bound** by the promise: B can enforce the promise.

The promisor is not bound by the promise and the promisee cannot enforce the promise, unless the promisee has given **some** in **RETURN** for the promise. This something given in **return** for the promise is called CONSIDERATION.

Where a person gives up something which but for the promise he is free not to give up or where a person does not give up something which but for the promise he is free to give up, It is called' detriment' in Law.

Kedarnath vs Gorie Mohamed. The plaintiff was the vice chairman of the Municipality. The defendant agreed to subscribe Rs.100 to a fund for the construction of a town hall. The plaintiff entered into a contract with a contractor for the construction of town hall. The defendant failed to pay Rs.100 as agreed.

The plaintiff filed a suit against the defendant for the recovery of Rs.100.

Held, the plaintiff was entitled to recover because the plaintiff has suffered a detriment.

To be, more simple, when, at the desire of the promisor, the promisee or any other person.

(l) Has done something or has abstained from doing something.

(2) Does something or abstains from doing something

(3) Promises to do something or promises to abstain from doing something.

Such act, abstinence or promise is called **CONSIDERATION,** Consideration consists of an act, abstinence, or a promise. Consideration moves from the promisee, at the desire of the promisor. A voluntary act or abstinence by the promisee does not amount to consideration.

This Section includes all the three tenses namely - past, present and future, Hence, consideration maybe past, present or future.

The Section includes the words "or any other person". Hence, consideration need riot necessarily move from the promisee only. It may move from a third party to the contract at the desire of the promisor.

Chinnaya VS. Ramaya

An old lady transferred a property through a registered deed in favour of her daughter. There was a stipulation in the deed that her daughter should pay a sum of money as annuity to the old lady's brother. The daughter (the defendant) executed an agreement in favour of the old lady's brother (the plaintiff) to pay the annuity. She failed to pay the annuity. The plaintiff sued the defendant to recover the annuity.

The defendant contended that was no consideration from the plaintiff. The court negatived the contention and held that the plaintiff was entitled, to succeed, as consideration has moved from the old lady.

A stranger to consideration may sue but not a stranger to a contract. A contract binds only the parties to it. Both the parties have right or obligation under a contract. Third parties are neither bound nor can they enforce the contract. This is known as PRIVITY of contract.

A and B are parties to a contract: Consideration may move from C, a third party to the contract at the desire of A. So, in this illustration B is a party to the contract but he is a stranger to consideration C is a stranger to the contract even though he has furnished consideration. So, B may enforce the contract but not C.

However, there are some exceptions to the rule "A stranger to a contract cannot sue"

L Kwaja Mohd. vs. HussainiBegum

A's father and her father-in-law entered into an agreement whereby, the father-in- law should pay some pocket money to A. After the death of her father, A sought to enforce the agreement against her father-in-law. The father-in-law contended that he was not bound since A was a third party to the agreement. The court negatived the contention and held that the father-in-law was bound even though A was a third party to the agreement.

2. Trust

The person who creates a trust iscalled author or founder of the trust. The persons who are appointed or nominated to administer the trust is called the trustees. The persons for whose benefit the trust is created is called beneficiaries (cesti-qui-trust). The beneficiary can sue the trustee in his own name even though the beneficiary is not a party to the trust -deed.

3. Family Arrangements

There may be a partition among the male members of a family. A provision may be made for the marriage expenses of an unmarried daughter. The unmarried daughter may enforce this provision against the male members even though she is not a party to the partition deed.

CONTRACT WITHOUT CONSIDERATION IS VOID

A contract without consideration is void. "Nundum pactum Non Oritur Actio". However, there are some exceptions to this rule. **(Section 25)**

1). It should be an agreement between parties standing in near relationship. The agreement should have been made out of natural love and affection. The agreement should be in writing and registered. If all the three conditions are fulfilled the agreement will be a valid contract even though it is not supported by consideration.

Rajlukhy vs. Bhootnath: A husband executed a registered document in favour. on his wife whereby he agreed to pay her for separate residence and maintenance. In that agreement they referred to the quarrels, which they had.

Held, in the absence of consideration the agreement was void.

Note

Three conditions namely

(1) Parties standing in near relationship,

(2) Natural love and affection, and

(3) Writing and registration are required only when the agreement is not supported by consideration.

2). A promise to compensate a person, (wholly or in. part) who has already done something VOLUNTARILY for the promisor is a valid contract, eventhough the promise is not supported by consideration.

Illustration

A finds B's purse and gives it to him. B promises to give A Rs. 50. This is a contract. In this illustration A has found the purse voluntarily. Hence, his act is not consideration for B's promise. Nevertheless, it comes under the above, exception. Hence, this promise is a valid contract, even though not supported by consideration.

3). A promise to compensate a person who has already done something voluntarily for the promisor, which the promisor was. legally compellable to do is a valid' contract, even though the promise is not supported by consideration.

Illustration

A supports B's infant son. B Promises to pay A's expenses in doing so. This is a contract. In the above illustration, A has done an act which B was legally compellable to do. A has done this act voluntarily. Hence, the act is not consideration for B's promise. Nevertheless, it comes under the above exception. Hence, the promise is a valid contract even though the promise is not supported by consideration.

4). A promise in **WRITING** to pay a time barred debt is a valid contract even though it is not supported by consideration.

Illustration

A borrows a sum of Rs. l,000 from B and executes a promissory note in favour of B. Three years have expired. Now the debt is barred by the Limitation Act. B cannot sue A on the promissory note. Now A makes a promise to B which A puts in writing to pay the time barred debt wholly or in part. This promise is a valid contract. B can now sue A on the promise in writing.

A promise to pay a time barred debt shall be valid if

(a) The promise to put in writing

(b) Signed by the debtor or his agent and'

(c) Relates to a debt which the creditor might have enforced payment of but for the law of limitation.

5. Under Section 185 of the Contract Act, no consideration is necessary to CREATE an agency.

An agency cannot be **enforced** unless there is consideration.

ADEQUACY OF CONSIDERATION

Section 25 - Explanation 11

Consideration need not be adequate. It means the promise given and the consideration taken in return need not necessarily be equal.

A contract is a bargain made between two parties. The courts are not concerned about the bargain made between two Parties. The parties are free to make their own bargain. The courts cannot identify themselves with the parties and make a bargain for them.

However, the above rule holds good only when the consent of the promisor is freely given. Suppose, the consent has been affected by one four vitiating factors (namely Coercion, Undue Influence, Fraud, Misrepresentation) then the question before the court will be whether the consent was so affected or whether it was freely given. In determining that question the court may take into account the inadequacy of consideration.

Illustrations:

(A) A has a scooter worth Rs.10,000. A agrees to sell this scooter to B for Rs.100. A's consent was freely given. The agreement is a valid contract despite the inadequacy of consideration.

(B) A has a scooter worth RS.10,000. A' agrees to sell the scooter to B for Rs.100, A's consent was affected. A denies that his consent was freely given. A file a suit against B to rescind the contract. Now, the court should take into account the inadequacy of consideration in determining the question whether the consent was so affected or whether it was freely given.

1. Agreements should be in writing and registered

An agreement made without consideration is valid if it is -

(a) Expressed in writing;

(b) Registered (under the law for the time being in force for registration of documents);

(c) Made on account of natural love and affection; and

(d) Between parties standing in a near relation to each other.

Example

An elder brother, on account of natural love and affection, promised to pay the debts of his younger brother. The agreement was put to writing and was registered. Held, the agreement is valid. (Venkataswamy Vs. Rangaswamy)

2. Completed Gifts

The rules ‘no consideration, no contract’ does .not apply to completed gifts. Completed gifts mean gifts made and ~accepted.

3. Bailment

A bailment even though without reward is valid. Thus, where 'A' lends his book to 'B' for reading and return B is under a legal obligation to return the same after reading.

4. Agency

For 'creation' of an agency no consideration is required. However, if' no consideration has passed to the agent, he is only a gratuitous agent and is not bound to do the work entrusted to him. But if he begins the work, he must do it to the satisfaction of his principal. An agency cannot be 'enforced' unless there is consideration.

5. Remission by the promisee of performance of the promise

A creditor can agree to give up a part of his claim and there need be no consideration for the agreement. Similarly, an agreement to extend time for performance of a contract need not be supported by consideration.

6. Contract under seal

A contract under seal is enforceable even without consideration. Contract under seal means a contract, which is in writing, signed, sealed and delivered to the other party.

Lesson - 5

CAPACITY OF PARTIES

Who are competent to enter into a contract?

a) Section 11 Every person is competent to enter into a contract-

(1) If he has attained the age of majority according to the law to which he is subject.

(2) Who is of sound mind, and

(3) Is not disqualified by any law for the time being in force.

MEANING (SEC. 11)

'Capacity to Contract', means competency of the parties to enter into a valid contract.

Sec.10 requires parties to be competent to contract. Sec. 11 lays down that "every person is competent to contract who is of the age of majority according to the law to which he is subject and who is of sound mind and is not disqualified from contracting by any law to which he is subject.

Thus a person is incompetent to contract under the following circumstances

(1) If he is a minor;

(2) If he is of unsound mind;

(3) If he is disqualified from contracting by any law to which he is subject.

Reasons for incapacity diagram overleaf.

(b) Alien Enemy

An alien means a citizen of a foreign country. During ordinary or peace times an alien is entitled to enter into contracts and enforce them. But in times of war he becomes an alien enemy and loses his capacity to contract.

(i) Contracts made before the war:

These contracts may either be suspended or dissolved. Contracts will be dissolved if they are against the public policy or if their performance would help the enemy.

(ii) Contracts made during the war:

During the continuance of war, an alien enemy can neither 'contract with an Indian citizen' nor can he sue in an Indian court. He can sue in an Indian court only after receiving permission from the central government.

(c) Convicts

A convict is one who is found guilty and imprisoned. A convict, while undergoing imprisonment, is incapable of entering into a contract. The inability, however, comes to an end on the expiry of the sentence. .

(d) Corporation

A corporation is an artificial person created by law. It has separate legal existence. It can have property in its own name. It can enter into contracts. It can sue and be sued. However, it has no physical existence. So it cannot make certain contracts. It also cannot enter into contracts beyond its powers, which are limited by the Memorandum of Association and the statute.

(e) Insolvent person

An insolvent person is incompetent to contract until he obtains a certificate of discharge.

2. Incapacity arising from mental deficiency

A minor suffers from mental deficiency. He is not competent to contract. His contracts are void. However, contracts for necessaries supplied to him are enforceable against him.

3. Incapacity arising from unsound mind

Persons of unsound mind have no contractual capacity. It means –

1) Lack of capacity to understand the terms of the contract.

2) Inability to form rational judgement and realise its effects.

A person who is usually of unsound mind but occasionally of sound mind may make the contract when he is of sound mind. A lunatic may enter into a contract during lucid intervals. The status of a drunkard is the same as that of a lunatic.

Example

Idiots, lunatics and drunkards are considered persons of unsound mind and contracts made by them are generally void.

CONTRACTS BY A MINOR

Law protects the minor against his own inexperience and the improper designs of those advanced in years **"The judges are his counsellors, the Jury are his servant and the law is his guardian".**

For the purpose of entering upto contract, a person should have attained the age of majority according to the law by which he is governed.

A person domiciled in India attains the age of majority on the completion of 18 years. However, if a court to the person or property of a minor has appointed a guardian the age of majority for such minor shall be completion of 21 years.

The Act has given a privileged position to the minor. Minors bind others but are never bound by others. He cannot be held personally liable for any of his Wrongs. The following govern agreements made with a minor.

1. ***Void***

A minor is not competent to contract. Hence an agreement with a minor is void ab-initio. It is a, nullity. The question whether a contract with a minor is void or voidable arose in the Privy Council case of Mohori Bibi vs. Dharmnadas Ghose.

Facts of the case

A minor executed a mortgage for a sum of Rs.20,000 on which he took an advance of Rs.8,000. Later on, the minor sought to set aside the mortgage on the ground of minority.

The mortgagee contended that since a contract with a minor is voidable, the minor should refund the advance taken by him.

The Privy Council negated the contention and held that a contract with a minor is void ab-initio. Being a void contract the minor cannot be asked to refund the advance taken by him. Otherwise the court will be giving effect to a contract, which never came into existence.

Under Section 65, when a contract becomes void or is discovered to be void, the person who received any advantage shall refund the advantage. But the Privy Council' held in the above case that Section 65 does not apply to a minor's contract.

He who deals with a minor does it at his own risk.

In Raj Rani vs. Prem Adib, A film producer entered into an agreement with the father of a minor girl that the minor girl should act in his film. On a breach of the agreement the minor sued the producer through her father as her guardian. The court held that the agreement was void. The consideration was a promise by the minor to act in the film. Since in law a minor cannot make a promise there was no consideration.

2. No ratification possible

Since a contract by a minor is absolutely void he cannot ratify contracts entered into by him as a minor even after he has attained majority. There can be no ratification of a contract void ab-initio, because ratification acts retrospectively.

A minor cannot ratify the contract, which he entered into during minority after he attains majority. The reason is that ratification acts retrospectively.

Arumugam vs. Duraisinga

A minor borrowed money from the plaintiff. On attaining majority, the minor executed a promissory note in favour of the plaintiff in respect of the aforesaid sum. The plaintiff filed a suit against the defendant on the promissory note. The court held that the plaintiff could not succeed on two grounds.

(a) Ratification of a minor's contract is not possible.

(b) The promissory note was not supported by consideration.

3. No estoppel against a minor

A minor is not bound by his misrepresentations. But if a minor enters into a contract by fraudulently representing he to be a major, he cannot be prevented from pleading minority as defence. The rule of estoppel cannot be applied against a minor.

4. Restitution of goods and property acquired fraudulently

If a minor obtains property or goods on credit by fraud, the court will order or, equitable consideration to return the property to the trader. If the property cannot be traced or is destroyed, the trader cannot get a decree against the minor as restitution stops when repayment begins. Restitution is possible and permissible only when the property is in the possession of the minor. Restitution means return or restoration of the benefit received under the agreement.

5. Enforceability of contracts by a minor

A minor cannot be a promisor but he can be a promisee or beneficiary. He can enforce contracts, which are beneficial to a minor.

6. Minor and insolvency

A minor cannot be declared insolvent, as he is not personally liable even for the necessities of life supplied to him

7. Minor and partnership

A minor cannot be a partner in a firm since partnership arises on the basis of a contract. He can, however, be. admitted to the benefits of partnership. His liability is limited to the extent of his interest in the firm.

8. Minor and agency

A minor can be appointed as an agent. The principal will be responsible to third parties for the acts of his minor agent. However the principal cannot hold the minor agent personally liable for any wrongful acts.

9. Minor and negotiable instruments

A minor can draw, deliver and endorse negotiable instruments without being, liable.

10. Minor as a member of a company

A minor cannot become a member of a company, as he is incompetent to contract. He cannot purchase shares in the company. Where he inherits shares, the name of the guardian will be entered in the Register of Members.

11. Position of minor's parents s

The parents can be held liable for contract of their minor children only when they are acting as agents.

12. Minor's liability

A minor is liable for the necessities supplied to him or his dependants. The liability of a minor for necessities supplied to him is only quasi-contractual and not contractual. A minor is not personally liable. Only his estate or property is liable.

13. Minor and guardian

A contract entered into by a guardian on behalf of minor is binding on the minor provided it is beneficial to him. However, the' guardian' cannot sell immovable property on behalf of the minor without the permission of the Court.

14. Minor's liability for tort (civil wrong)

Minors are liable for negligently causing injury or damage to property that does not belong to them.

15. No specific performance

The court will never direct specific performance of an agreement with a minor. It being void.

Lesson-6

FRAUD, MISREPRESENTATION, COERCION, UNDUE INFLUENCE & MISTAKE

Fraudulent Representation

Even when a minor fraudulently represents his age, he can still plead infancy and set aside the contract. The rule of estoppels does not lie against a minor.

Thus the law protects a minor. But the law does not empower a minor to cheat men. Thus in the case of fraudulent representation, the courts have granted certain reliefs.

Suppose a minor falsely represents his age and induces another to sell goods to him. The seller cannot file a suit against the minor for the price of the goods. However the seller can recover the goods from the minor. Provided the goods can be traced "IN SPECIE"

However money taken by a minor as a loan, by falsely representing his age cannot be recovered. This is the meaning of the maxim "Restitution stops where payment begins". (Leslie vs Sheill)

A minor is liable in tort (civil wrong). But a contract cannot be converted into a tort for the purpose of tiling a suit against a minor for fraud. An action Ex-Contractur cannot be converted into an action Ex-delicto (Leslie vs Sheill).

Meaning Of Minor's Contract

When we say that a minor cannot enter into a contract we mean that a minor cannot be saddled with an obligation. But a minor can always take a benefit under a contract. Under the Transfer of Property Act, a minor cannot be a transferor in all kinds of transfers. But a minor can be a transferee in all kinds of transfers except in the case of a lease.

Raghavachari vs Srinivasa

A mortgage was executed in favour of a minor who has advanced the mortgage money. A full Bench of the Madras High Court held that the minor could enforce the mortgage.

Under Section 30 of the Partnership Act a minor cannot become a partner in a firm. But a minor can be admitted to the benefits of partnership with the consent of all the partners for the time being.

Necessaries

A person who supplies necessaries to a minor is entitled to be reimbursed from the Property of such minor. What are necessaries depend upon-

(1) The status of the minor
(2) His actual need at the time of supply, and
(3) The goods already supplied

FREE CONSENT

According to Section 13,"two or more persons are said to have consented when they agree upon the same thing in the same sense; (Consensus-ad-idem). Consequently, when parties to a contract makes some fundamental error as to the nature of' the transaction, or as to the person dealt with or as to the subject - matter of the agreement, it cannot be said that they have agreed upon the same thing in the same sense. And if they do not agree in the same sense, there cannot be consent. A contract cannot arise in the absence of consent. This point was considered in the well known English case of Cundy Vs Lindsay.

There one Blenkarn in placing orders for goods with Cundy closely imitated the address and signature of another well-known firm. Known as Blenkiron & Co. Thinking that the order came from Blenkiron & Co. Cundy sent the goods to Blenkarn who, in his turn sold them to Lindsay. Cundy on discover in his mistake brought a suit against Lindsay for the recovery of goods. The House of Lords that as Cundy thought that he was dealing with Blenkiron & Co and knew nothing of Blenkarn and had no intention of dealing with him, there were no contract either void or voidable held it and Blenkern acquired no title and hence the suit was decreed against Lindsay. The so-called agreement between Cundy and Blenkarn was declared void on the ground that there was no consent.

Similarly, if two persons enter into an apparent contract concerning a particular person or shop and it turns out that each of them, misled by similarity of name, had a different person or shop in his mind no contract would exist between. them as they were not ad idem, i.e. of the same mind. Again ambiguity in the terms of an agreement or an error as to the nature of any transaction or as to the subject matter of any agreement may prevent the formation of any contract on the ground of absence of consent. In practice however, such cases of fundamental error are difficult to distinguish from cases of mutual mistakes, which make an agreement void. In the case of' fundamental error, there is really no consent whereas in the case of mistake, there is no real consent.

WHAT IS COERCION

Section 15 Coercion consists of the following acts: -

(1) Committing or threatening to commit an act forbidden under the Indian Penal Code, and

2) The unlawful detaining or threatening to detain any property.

One party with a view to obtain the consent of the other party to a contract does the above acts. The acts complained of need not be directed against a party to the contract. The acts may be directed against a third party with a view to obtain the consent of the party to the contract

Illustration: A is the father of B. C may threaten B to get the consent of A to a contract.

COERCION IS EXTRA – TERRITORIAL

It is, immaterial whether Indian Penal Code is or is not in force at the time or place where, coercion was employed. An act may be .a Crime in Indian. It may not be a crime in another country. There it may be a civil Wrong.

A and B- are Indian Citizens. They go to Singapore on a holiday trip. There they enter into a contract. Thae contract has to be performed in India. A does not an act against b to cause him to enter into the contract. The act is not a crime under the laws of Singapore, But it isan officer under the Indian Penal code. Since the contract has to be performed in India has employed coercion.

It is not the place, which determines whether coercion has been employed, or not. It is the act Supposed the act had been committed on the territory of India would it amount to an offence under the Indian Penal Code? If the answer is in the affirmative then coercion has been employed. Thus coercion is extra-territorial.

Where husband obtained a release deed, from his wife and son under a threat of committing suicide, the transaction was set-aside. on the ground of coercion, suicide being forbidden by the Indian Penal Code. (Amiraju vs Seshamma (1917) 41 Mad 33)

A person to whom money has been paid or anything delivered under coercion, must reply or return it (Section 71)

UNDUE INFLUENCE

Section 16 Undue Influence is a subtle form of coercion. Coercion is directed against the body of a person. Undue Influence is directed against the mind of a person

The requirements for the existence of Undue Influence are

(1) One person is in a position to dominate the will of another person.

(2) He exercises that position, and

(3) Thereby he gains unfair advantage over the other person

Undue Influence may exist between any two parties so long one person is in a position to dominate the will of another. However there are certain relationships and circumstances where it may be presumed that one person is in a position to dominate the will of another.

A person is deemed to be in a position to dominate the wi1l of another-

(1) Where has holds real or apparent authority over the other?

(2) Where he stands in a fiduciary relation to the other. (Fiduciary relation means position of active confidence-where one person reposes confidence in another, which shall not be abused by the other).

Example

Parent and Child: Doctor and Patient; Lawyer and client; Teacher and Taught; Spiritual advisor and disciple.

(3) Where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of –

(i) Age
(ii) Illness
(iii) Mental distress or
(iv) Bodily distress

The incapacity of parties may arise due to -

(1) Status;

(2) Mental deficiency;

(3) Unsoundness of mind.

Examples

1. A father, by reason of his authority over the son can dominate the will of the son. For the same reason the husband can dominate the will of the wife.
2. Again by reason of fiduciary relationship, a solicitor can dominate the will of his client and
3. A trustee can dominate the will of the beneficiary.
4. Similarly a person whose mental capacity is affected by age, illness or distress may be a prey to undue influence. For instance, a doctor is deemed to be in a position to dominate the will of his patient enfeebled by protracted illness.

The essential ingredients under this provision are

i) One of the contracting parties dominates the will of another, or has a real or apparent authority over the other, or stands in a fiduciary position to the other. That means one party is dominating the other party,

ii) The dominating party has taken an unfair advantage over the weaker party.

Burden of proof [(Section 16 (3)]

In the case of a contract, say betw.een the father and the son, if the contract is unfair to the son and on that ground the son wants to avoid the contract: The father must prove that the contract was not induced by undue influence. That is to say, the burden of proof lies on the stronger party to establish that the bargain is not unconscionable. The stronger party must act in good faith, and see that the weaker party gets independent advice before entering into the contract.

Undue influence in money-lending operations

In money lending operations, a debtor sometimes may agree to pay a very high rate of interest at the instance of the creditor. In a case like this, the Court on the ground of undue influence very often reduces the rate of the interest.

Thus, where a poor widow borrowed Rs. 1,500 from a money lender at 100 per cent interest per annum for filing a suit to establish her right to maintenance, The High Court of Madras reduced the rate to 24 per cent. As between parties on an equal footing, the court will not hold a bargain to be unconscionable merely on the ground of high interest. Only where the lender is in a position to dominate the will of the borrower, the relief is granted on the ground of undue influence.

Proof of the undue influence

The Court while dealing with cases of undue influence will take four questions into consideration viz.

(1) Whether the transaction is righteous, i.e, whether it is an act, which a right- minded person could be expected to carry out;

(2) Whether it manifests so much improvidence as to suggest to idea that the donor was not master of himself and not in a state of mind to sit and weigh as to what he was doing.

(3) Whether it was a matter requiring counsel from a legal advisor

(4) Whether intention of making the gift originated with the donor (Mohammed Buksh vs Husseini Bibi (1928) Venkatrama Aiyar vs Krishammal (1927)

Fraud and Misrepresentation -Section 17, 18 and 19

What is Representation?

Before the parties enter into a contract there would have been a stage when they would have done the preliminary bargaining. This is the negotiation stage. At this stage one party may make certain statements to the other party. These statements are made to induce the other party to enter into a contract. These statements are not meant to be embodied as the terms of the contract. Nevertheless, the purpose is to affect the inclination of the other party to enter into the contract. Such statements are called **"representations"** in law.

If a party makes a representation honestly believing it to be true. Which later on turns out to be false it is called “misrepresentation” (Section 18).

If a party makes a representation knowing it to be false and makes it with the intent to deceive the other party, it is called “fraud”. (Section 17)

In both cases, the contract is **voidable** at the option of the party whose consent has been affected. In the case of fraud, the affected party can not only **rescind** the contract but also claim damages in action for deceit.

FRAUD

What is Fraud?

(1) The suggestion, as to a fact of 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 or belief of the fact.

(3) A promise made without 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.

A false suggestion amounting to fraud may be illustrated thus. The Director of a Company issued a prospectus containing a statement of facts, which were false to his Knowledge. It was held that a person, who had taken the shares on the faith of the prospectus, could repudiate the contract on the ground of fraud; the following is an instance of active concealment. B, having discovered a vein of ore on the estate of A, adopts means to conceal the existence of the ore from A and A, through ignorance agrees to sell the estate to B at a price which was admittedly an under valuation.

The contract would be voidable at the option of A on the ground of fraud. Similarly, the buying of goods with the intention of not paying the price is therefore a fraud.

Certain acts and omissions have been specifically declared to be fraudulent by various Acts. For example, under Section 5 of the transfer, of property Act, the seller of immovable property is required to "disclose to the buyer any material defect in the property to be sold and non-disclosure amounts to fraud. Any other act, fitted to deceive, also will constitute fraud.

SILENCE AS FRAUD

Mere silence does not amount to fraud except in **TWO** cases

(1) Where it is the duty of a person to speak but he is discreetly silent. This may arise when one party is in fiduciary relationship with another. (E.g ., Insurance contract)

(2) Where silence is, in itself, equivalent to speech.

Mere silence amounting to fraud:

Mere silence as to facts likely to affect the willingness of a person to enter into a contract is no, fraud, but where it is the duty of a person to speak, or his silence is equivalent to speech, silence amounts to fraud. In contract of fire insurance, contract between person standing in fiduciary relationship and in various other types of contracts there are special duties of disclosure amounts to fraud. These are known as contract uberrimae fidei where a fraud entities the injured party to avoid the contract. Thus in a marine insurance policy, if the goods are over-valued and the fact of over-valuation is not disclosed to the underwriters, the policy is liable to be set aside on the ground of fraud. Similarly, an insurer will not be bound by the policy issued by him where he is misinformed as regards insurance policies previously taken out by the insured.

MIS-REPESENTATION

What is Mis-representation? (Section 18)

(l) Any breach of duty committed without The positive assertion of a fact, which is not true even though, the person who makes the statement believes it to the true.

(2) Any breach of duty committed without an intent to deceive which gains an advantage to the Person committing it. Under this head comes negligent statement.

(3) Causing, however innocently, a party to an agreement to make a mistake as to the subject matter of an agreement.

Where a person asserts something, which is not true, though he believes it to be true, his assertion amounts to misrepresentation. Misrepresentation may be either innocent or without reasonable ground. Misrepresentation is a misstatement of facts by one, which misleads the other two, consequently can avoid the contract. For example A makes a positive statement to B that C will be made the director of a company. A makes the statement on information derived, not directly from C but from M.B. applies for shares on the faith of the statement, which turns out to be false. The statement amounts to misrepresentation, because the information received second-hand did not warrant A to make the positive statement to B [Section 18 (1)] "This sub-section pre-supposes:

(a) That the represent or owes a duty to the re presentee in respect of the statement;

(b) that the represent or makes a statement negligent or fraudulent or innocent;

(c) that the representee is misled to his prejudice; and

(d) that the representor gains an advantage.

Even in an innocent statement which causes a party to make a mistake as to the substance of the thing which is the subject-matter of the agreement may amount to misrepresentation [Section (18 (3)] For example, A charter a ship, described in the charter party as not being more than 2,800 tons, but the ship turns out to be a vessel of 3.405 tons. A can avoid the contract on the ground of misrepresentation.

CHARACTERISTICS OF FRAUD AND MIS-REPRESENTATION

(1) There should have been a representation. The general principle of contract is one party is net bound to disclose all the material factors known to him, which will, enable the ether party to enter into a contract. Each party shall make up his own mind. Each party shall form his own judgment. This principle is known as ***"CAVEAT EMPTOR".***

However, there is a class of contracts where one party is bound to make a disclosure of all the material facts known to him, which will enable the other party to enter into a contract. Failure, to disclose in such class of contracts will materially affect the contract. This class of contracts is known as ***"CONTRACTS UBERRIMAE FIDEI'*** this literally means contracts requiring utmost good faith. Eig. Contracts of Insurance.

(2) The representation should relate to a fact and not to an opinion.

Illustration

A tells B, "My house is a lucky house" B buys the house. The house proves to be unlucky for him. He cannot set aside the sale on the ground of misrepresentation.

(3) Mere existence of fraud or misrepresentation does not render a contract voidable. The party upon whom fraud was exercised or to whom the misrepresentation was made must establish.

(i) That there was fraud / misrepresentation and

(ii) That his consent was AFFECTED on account of fraud / misrepresentation. If inspire of fraud, the party has taken independent judgment, the contract cannot be set aside

(4) In the case of misrepresentation or where silence amounts of fraud, If the affected party had the means of discovering the truth with ordinary diligence, the contract cannot be set aside.

Difference between Coercion and Undue influence

Coercion	Undue influence
(a) It involves physical force or theat. The aggrieved party is compelled to make the contract against his will.	It involves moral or mental pressure. The aggrieved party believes that he or she would make the contract.
(b) It involves committing or threatening to commit an act forbidden by Indian Penal code for detaining or threatening to detain property of another person.	No such illegal act is committed or a threat is given.
(c) It is not necessary that there most be some sort of relationship between the parties.	Some sort of relationship between the parties is absolutely necessary.
(d) Coercion need not proceed from the promisor not it need be directed against the promisor	Undue influence is always exercised between parties to the contract.
(e) The contract is voidable at the option of the party whose consent has been obtained by coerction.	Where the consent is induced by undue influence, the contract is either voidable or the court may set it aside or enforce it in a modified form
(f) In case of coercion where the contract is rescinded by the aggrieved party, as per Section 64, any benefit received has to be restored back to the other party.	The court has the discretion to direct the aggrieved party to return the benefit in whole or in part or not to give any such directions.

MISTAKE

Sections 20, 21 and 22.-Mistake may be of

(i) Law, and ii) Fact.

Mistake of Law can be-

(i) Of Foreign Law, and ii) Of Indian Law.

Mistake of Foreign Law is treated as a mistake of fact.

Mistake of law of land is NOT an excuse to set aside a contract. "Ignorantia Juris Non Excusat" Ignorance of law is no excuse.

Mistake of fact may be-

(i) Unilateral and ii) Bilateral

If both parties are under a mistake of fact essential to the agreement and unknown to both the parties, the contract is void.

Section 20 – Illustration

(a) A agrees to sell to B a specific cargo goods supposed to be on its way from England to Bombay. It turns out that, before the day of the bargain, the ship conveying the cargo had been cast away and the goods lost. Neither party was aware of these facts. The agreement is void.

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

Mistake As to identity of party Contracted with

Boulton vs. Jones

A bought a hosepipe business from B. B owed a debt to C. C was not aware that the business bad changed hands. C placed an order with B for some pipe4s, the price to be set off against the debt. A supplied the pipes to C, A sued C for the price.

Held, C was not liable C wanted to deal with B and not with A.

Cundy VS. Lindsay

One Blenkarn imitating the signature of Blenkiron induced Lindsay to supply goods to him Blenkarn sold the goods to Cundy, who paid for them; Lindsay sued Cundy for the recovery of the goods.

Note: This is a leading case and a turning point in the law of contract. If it is, a mere case of fraud, the contract is only voidable. So, Cundy will get title, to the goods. If it is a mistake as to the identity of party then Cundy will not get title to the goods.

The Court held Lindsay could recover the goods from Cundy. This was not a mere case of fraud. This was a case as to identity of party contracted with. The court observed as follows "Of him he never thought"

"About him he never knew". "With him he never intended to deal". So, there was no de-facto contract, which could be impeached on the ground of fraud. This was a case where the contract never came into existence. Hence a third party (Cundy) could not get title to the goods. With the result, Lindsay could recover the goods from Cundy.

Philips vs. Brooks

A man called north entered a jeweller's shop and selected some jewels. When he took out his cheque book. the shopkeeper asked him to identify himself North identified himself as Sir George Bulluogh. North signed the cheque as Sir. George Bullough. North pledged the jewels with a pawnbroker. The cheque was dishonored .

The shopkeeper sought to-recover the jewels from the pawnbroker.

Held, the shopkeeper could not recover. The shopkeeper did not make any mistake as to the identity of the party to be contracted with. He wanted to enter into a contract with the person who appeared before him in flesh and blood. The fact that a dishonoured cheque was given rendered the contract voidable, so, a third party (pawn broker) who took the goods in good faith, without notice of defect in title and before the contract has been rescinded acquired valid title to the goods.

Lewis vs. Avery

L advertised his car for sale. X agreed to buy the car from L for 450 pounds. X introduced himself as Richard Green, a film star. He produced a pass to Pinewood Studios as proof of his identity. He signed the cheque as R A. Green. X sold the car to A, a bonafide purchaser. The cheque was dishonoured. L Sued A for the recovery of the car. L could not succeed. The court held that A could retain the car.

The mistake must be as to an essential fact. Whether the fact is essential or not depends on whether a reasonable man would regard the fact as an essential in the circumstances, A mere wrong opinion as to the value is not an essential fact. For instance A and B both believe that a particular kind of rice is being sold in the market at Rs.1,780 per quintal and A sells rice of that kind to B at Rs.1780/- per quintal. But, in fact, the market price was Rs.1,900. The contract is valid.

Mistake render the agreement void, neither party can enforce the contract against the other.

UNILATERAL MISTAKE

This is a mistake of fact made by one party only. 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.

Haji Abdul Rahman Allarakhia Vs The Bombay and Persia Steam Navigation Co.

The plaintiffs chartered a steamer from the defendants to sail from Jedda on10th August 1892 i.e. fifteen days after the Haj in order to convey pilgrims returning to Bombay. Actually the fifteenth day was 19th July 1892. On finding out the mistake, the plaintiff sued the defendant for rectification of the agreement. The court held that there could be no rectification since the plaintiff made the mistake only. So far as the defendants were concerned they entered into the Contract for 10th August only.

If only one party is under a mistake of fact, he cannot set aside the contract. However there are exceptions to this rule.

MISTAKE AS TO NATURE OF TRANSACTION

Foster vs Mckinnon

A blind man was induced to sign a bill of exchange. It was represented to him that it was only a guarantee. **Held,** the blind man was not liable on the bill of exchange. The Court observed that his mind did not accompany his signature. This defence is known as plea of "non est factum" which means, "This is not my deed".

Saunders Vs. Anglia Building Society (also known as Gallie vs. Lee).

Mrs. G, an aged lady wanted to transfer her property by way of gift in favour of her nephew. Lee prepared the deed transferring the property in his own name. At the time of signing the document, the spectacles of Mrs. G were broken.

She signed the deed. Lee mortgaged the property to a building society for 3,000 pounds. Lee absconded. Mrs. G. Sued the society for a declaration that the mortgage was void and not binding upon her.

Held, Mrs. G was bound, as she was negligent. The plea of non est factum (ie. This is not my deed) was not available to Mrs. G.

Lesson - 7

UNLAWFUL ACREEMENTS, CONTIGENT CONTRACTS & QUASI CONTRACTS

UNLAWFUL AGREEMENTS

Section 23

An unlawful agreement is an agreement the object or the consideration of which is unlawful. An unlawful agreement is void.

An object or consideration is unlawful-

(1) If it is forbidden by law, or

(2) If it is of such a nature that, if permitted it would defeat the provisions of law, or

(3) If it is fraudulent, or

(4) If it involves or implies injury to the person or property of another.

(5) If the Court regards it as immoral, or opposed to public policy.

The following agreements are opposed to public policy:-

(1) Marriage brokerage agreements. These are agreements to procure marriage for a reward

(2) Trading with enemy.

(3) Stifling prosecution. This is agreement not to prosecute a party who has committed a crime.

(4) Champerty and maintenance. Maintenance occurs where person having no interest in the subject matter of litigation encourages another to take civil action against a third party as for example by giving financial assistance. Champerty is same as maintenance but the assistance is given to share the damages recovered.

Under the English Law such agreements are illegal and void. However in India they are not void unless they are against public policy.

(5) Interference with the course of justice.

(6) Agreements which tend to create interest against duty. For example an agreement entered into with a public servant, which imposes an obligation upon the public servant inconsistent with his duty.

(7) Sale of public office. This tends to the prejudice of public service.

Unlawful agreements are void. The courts will not entertain a cause of action based upon illegality.

(1) *Ex Turpi Causa Non Oritur Actio.* Out of an illegal act no cause of action arises

(2) In *Pari Delicto potiorest Conditio defendantis.* In cases of equal guilt, the condition of defendant is better.

A void agreement may not be illegal. But an illegal agreement is void.A collateral agreement to a void agreement may be enforced. But, a collateral Agreement to an illegal agreement is also tainted with illegality and hence cannot be enforced.

Partly legal and partly illegal:

Suppose one part of a contract is legal and the other part is illegal, Will the Courts give effect to the legal part and ignore the legal part? Here, there are two rules.

1. Physical Separation

The legal part should be capable of being separated from the illegal part at least physically this is Known as Blue Pencil rule.

2. Meaning of its own

The legal part should have a meaning of its own. In other words, the legal part should be capable of giving a meaning and construction without taking the aid of the illegal part. If the above two conditions are satisfied, then the courts will give effect to the legal part and ignore the illegal part.

Under Section 24

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

Under section 58

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

OTHER VOID AGREEMENTS

Section 26

An agreement in restraint of marriage of any person other than a minor is void.

Section 27

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

However a seller of goodwill of a business may agree with the buyer to refrain from carrying on a similar business. The restraint must be reasonable, The limits shall be Specified.

Further, under the partnership Act, the partners may agree not to carry on business other than that of the firm.

Section 28

An agreement by which a party to a contract is restrained from enforcing his right under the contract through a Court of Law is void.

However, parties may agree to refer their dispute to arbitration.

Section 29

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

CONTINGENT CONTRACTS

Section 31 to 36

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

In a contingent contract, the event upon which the performance of the contract depends shall be **collateral** to the contract.

RULES RELATING TO CONTINGENT CONTRACTS:

1. Event happening

It is a Contingent Contract, the performance of which depends upon the happening of an event. The contract can be enforced only if the event happens. If the event becomes impossible, the contract becomes void.

2. Event NOT happening

It is a contingent contract, the performance of which depends upon an event NOT happening. The Contract can be enforced only when it becomes certain that the event can never happen. In other words the event should become impossible.

3. Happening within a specified time

It is a contingent contract the performance of which depends upon an event happening within a specified time. If the time has expired and the event has not happened, the contract becomes void. Further if before the expiry of the specified time the event becomes impossible, the contract becomes void.

4. NOT happening within a specified time

This is a Contingent Contract the performance of which depends upon an event NOT happening within a specified time. The contract can be enforced only if the time has expired and the event has not happened or if the event becomes impossible within the specified time.

5. Event is behaviour of a person within an unspecified time

This Contingent Contract the performance of which depends upon how a person will act at an unspecified time. The contract becomes void when such person does anything which renders it impossible that he should so act within any definite time, or otherwise than under further contingency.

Section 34

Illustration

A agrees to pay B a sum of money if B marries C. C marries D. The marriage of B to C is now impossible. The contract becomes void. It is possible that D may die and that C may afterwards marry B. Even then the contract becomes void because it is a further contingency.

6. Impossible event

This is a Contingent Contract the performance of which depends upon the happening of an impossible event. Since an impossible event can never happen the contract is void ab-initio. It is not necessary that the impossibility of the event should be known to the parties to the agreement at the time when it is made.

AGREEMENTS BY WAY OF WAGER

Section 30

- Wager is not defined under the Contract Act. Section 30 gives the effect of wager.
- Wager has been described in **Carlill vs. Carbolic Smoke Ball Co.**
- A wager is a bet. It is a promise to pay money or money's worth if some uncertain event does or does not happen.
- There can be two sides to a bet. Both parties should have the chance of winning the bet. If one party can always win and can never lose, then, it is not a wager.
- The uncertainty resides in the minds of parties taking the bet and not in the event itself. Thus two parties can -take abet about the height of a tower, about a match which is already over, about their relative weights.
- The parties shall not have an interest in the subject matter of the bet other than the stake money.
- In a wager each' party back their knowledge, skin, luck and judgement against that of the other.
- An agreement by way of wager is: void, Being a void- agreement, collateral agreement is not affected.
- In the State of Maharashtra, Wager IS illegal. So, III that State, Collateral agreements will be affected.

Since a wager is void, the winner cannot recover the stake-money from the loser or from the person entrusted with .the stake-money by filing a suit in a court.

QUASI - CONTRACT

Sections 66 to 72 - Development or Quasi Contract under the English Law

The earliest form of law was a person couldn't claim a right-unless there is a remedy for it. The maxim was "*Ubi remedium ibi jus"* which means, "Where there is aremedy, there is a right". Subsequently the maxim becomes *"Ubi jus remedium"* which means, "Where there is a right: there is a remedy".

The earliest civil actions were either in contract or in Tort (civil wrong). However certain cases came up before the Courts, which could neither fit in contract nor in Tort.' Such cases were labelled as quasi-contracts.

Two illustrations are given below

(1) A and B are twin brothers who look alike. C owes money to A By mistake C pays the money to B. A can recover the money from B. This is a quasi-contractual obligation upon B.

(2) B has not committed a tort. B has not entered into a contract with A. Nevertheless, B is bound to pay the money to A.

(3) A and B jointly owe money to C. A pays the money to C. Not knowing this B over again pays the money to C. C is bound to repay the money to B. A quasi-contractual right is a right to receive money. This right does not arise out of an agreement. In that respect,' it resembles a ton. But the right is personal i.e. a *Jus-in- personam* and not a *Jus-in-rem* (i.e. a right which can be exercised against the whole world) In that respect, it resembles a contract.

The two theories

(1) The Orthodox Theory is implied contract.theory. Under this theory, the law implies as if a contract has been entered into.

(2) But the modern radical theory is unjust enrichment theory. Under this theory,

no person shall enrich himself unjustly.

Sections 68 to72 of the Indian Contract Act speak of quasi contracts as "Certain relations resembling those created by contract"

Section 68: A person who supplies necessaries to another person who is incompetent to enter into a contract is entitled to be reimbursed from the property of such incompetent person.

Section 69: A person who is interested in the payment of money which another is bound by law to pay and who therefore pays it, is entitled to be reimbursed by the other.

Illustration

The landlord (owner) is bound to pay the property tax to the corporation. If the landlord commits default in the payment of the tax, it can be recovered under the occupier's liability. Being interested in the payment of the tax, if the tenant pays the tax to the corporation, he is entitled to be reimbursed by the landlord.

Section 70

The requirements are

(1) One person LAWFULLY does anything for another person OR LAWFULLY delivers goods to another person.

(2) In both cases be does not intend to do so gratuitously and

(3) The other person enjoys the benefit of the services or goods.

Now, the latter person is bound.

(1) To make compensation to the former person in respect of the services rendered of the services rendered or goods delivered or

(2) To restore the thing so done or delivered.

This is on the principle that no person shall enrich himself unjustly. Suppose a trader leaves a bottle of jam on my doorstep, If I keep the jam on my shelf, I need not pay for it. But, if I eat the Jam I am bound to pay for it.

Note

(1) The thing should have been LAWFULLY done or delivered

(2) The other party should have the opportunity of refusing it.

Section 71(Responsibility of finder of goods): Under Section 71 of the Act, a person who finds goods belonging to another and takes them into his custody is subject to the same responsibility as a bailee.

Section 72 (Liability for money paid or things delivered by mistake or under coercion): At fast Section 72 of the Indian Contract Act, 1872 provides that a person to whom money has been paid or anything delivered by mistake or under coercion must repay or return it.

Example

A railway company refuses to deliver certain goods to the consignee, except upon the payment of illegal charge for carriage. The consignee pays the sum charged to obtain the goods to he is estimated recover so much of the charges as was illegal excessive.

Sethkanhaya Lal vs. National Bank of India

A had obtained a decree against B. A obtains an attachment of C's property in execution of the decree. C paid the sum under protest.

Held, C could recover the sum as money paid under coercion within the meaning of this Section.

JOINT LIABILITY

Section 43

All joint promises are joint and several. There are three rules regarding this. Suppose two or more persons make a joint promise to a promisee

1. The promisee may **COMPEL** any one of the joint promisor to perform the **WHOLE** of the promise. This is subject to **EXPRESS** agreement to the contrary.
2. Each of the joint promisor may COMPEL every other joint promisor to contribute equally with himself to the performance of the promise. This is subject to a contrary INTENTION in the contract. Contribution means sharing of the obligation.
3. If any joint promisor makes default in such contribution, the remaining joint promisor/s shall bear the loss arising from such default in equal shares.

Illustration

A, B and C jointly promise to pay D a sum of Rs. 3,000. A becomes an insolvent. His assets are sufficient to pay one-haIf of these debts.

Can D Compel C to pay bthe entire amount of Rs.3,000?

How much A's estate and B are liable to contribute?

Answer: D can compel C to pay the entire sum Of Rs. 3,000. This is subject to an express agreement to the contrary. Since, A is insolvent, his estate is liable. C is entitled to receive from A's estate Rs.500 (i,e. Rs.1,000/2). C is entitled to receive from B Rs.1,250 (i.e 1000+ (500/2).

APPROPRIATION OF PAYMENT
Sections·59, 60 and 61

There are THREE rules regarding this. Appropriation arises when a debtor owes several distinct debts to creditor. When the debtor makes a payment to the creditor the Question arises as to towards which debt the creditor shall appropriate?

1. If the debtor gives express intimation that the payment is to be applied to the discharge of some particular debt, the creditor has no discretion. The creditor, shall appropriate accordingly, this rule applies even when the payment is made under circumstances implying that the payment is to be applied to the discharge of some particular debt. (This rule is called as clayton's Rule)
2. If the debtor has omitted to intimate and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it .at his discretion to any debt, including a time - barred debt. Limitation applies only when the creditor files a suit against his debtor for his recovery of the debt. But, when the debtor makes payment the question of limitation does not arise.
3. Where neither party makes any appropriation, the payment shall be applied in discharge of the debts in the order of time, including time - barred debts.

Lesson - 8

DISCHARGE OF CONTRACTS

Discharge of Contract means the end of a contractual relationship. Two parties enter into a contract. Their relationship may come to an end either by-

(l) Act of parties or (2) Operation of law

Discharge of contract takes place in the following circumstances:

1. By performance: If parties to a contract- perform their respective obligations. their contractual relationship comes to' an end. When a party to a contract has refused to perform or disabled himself from performing his promise in its entirety the other party may put an end to the contract unless he has signified, by words or conduct, his acquiescence in its continuance

2. By mutual consent: Since a contract is made by an agreement between two parties, the parties may agree to put an end to their relationship.

3. By waive: Waiver occurs when a party to a Contract gives up his right under a contract. Waiver may be express or implied in the conduct of the party waiving his right.

4. By novation: Novation may take place in three ways

(a) The parties to a contract may agree to substitute a NEW contract in the place of a subsisting contract. The subsisting contract is discharged. They can enforce only the new contract

(b) A party to a contract may agree to take a lesser sum for a larger sum, The contract for, the larger sum comes to an end. This is in effect a variation in the terms of the contract.

Illustration: A owes a sum of Rs. 1,000. to B. B agrees to take Rs. 900 from A instead of Rs. l,000. The old debt for Rs. 1,000. is extinguished. B can sue A only for Rs. 900 and not for Rs. 1,000.

(c) One of the parties may agree to take the obligation from another. This requires the concurrence of all the three persons.

Illustration: A and B are parties to a contract. A agrees to take obligation from C instead of from B. C agrees to it; now B is discharged. A can enforce the contract and not against B.

5. By supervening impossibility

This has already been explained under the circumstances when a contract "BECOMES VOID". However a summary is given below

A contract becomes -void when the' performance becomes impossible. The impossibility should not be self imposed. It should-not be due to the fault of the parties to the contract. Under the English Law', this is known as doctrine of Frustration. A Contract is frustrated by the disappearance of the foundation of the contract. 'Again impossibility does not mean that the performance is virtually impossible. It maybe impracticable.

Commercial Impossibility is not the impossibility contemplated under this provision

Illustration:-

A agrees to sell 1000 units 'to B at the rate of Rs. 10 per unit. Meanwhile the market price rises. A he has to procure the article at Rs. 15 per unit. So if he supplies to B at Rs.10 per- unit he will incur a heavy loss. This is commercial impossibility. This is not supervening impossibility, which discharges a contract. Supervening impossibility excuses the parties from performing their obligations. Commercial impossibility does not excuse the parties from performing their obligations.

As explained earlier, a contract becomes void in the following circumstances

(1) Destruction of the subject matter after the agreement but before the performance.

(2) Death of a party and where personal skill is involved

(3) Contract becoming unlawful.

(4) One of the parties becoming of unsound mind.

(5) A contract with a friendly alien when he becomes an enemy alien.

6. Discharge by Breach

It is not strictly correct to say that a contract is discharged by the breach of it. Discharge puts an end to their relationship. But when a party to a contract breaks his obligation, a right of action is conferred upon the other party. The injured party may, if he chooses absolve himself from the performance of his obligation. He may also insist on the performance of the contract.

Lesson - 9

REMEDIES FOR A BREACH OF CONTRACTS

The party who suffers from a breach of contract has the following remedies:

(1) Specific performance

(2) Injunction

(3) Suit for damages, and

(4) Quantum meruit

The specific Relief Act governs specific performance and injunction. An order for specific performance is an order enforcing the' contract breaker to fulfill his obligation on the terms of the contract itself. In many cases, the remedy will be worse than the disease itself. Thus if you have engaged A to sing at your wedding reception and if he refuses to sing, you cannot get an order from the court that he shall sing at your wedding reception. You may regret for having gone to the Court. He may sing in the way in which HE wants and not in the way in which YOU want.

The courts will not order specific performance in the following cases:

(1) Where courts cannot supervise or do not have control over the manner in which the contract has to be performed.

(2) Where the contract runs into minute details.

(3) where monetary compensation is an adequate relief.

INJUNCTION

This is an order of restraint. This order is to enforce and EXPRESS NEGATIVE stipulation in a contract. A negative contract is one whereby one party covenants NOT to do something. An injunction may be granted to restrain the breach of a negative stipulation in a contract even though the court would not order specific performance of the positive stipulations contained in the same contract.

Illustration

A agrees to sing at B's theatre on a particular day and further agrees NOT to sing elsewhere on that day. A refuses to sing at B's theatre on that day.

The above contract contains two covenants namely

(1) Positive and (2) negative. To sing at B's theatre is the positive covenant. Not to sing elsewhere is a negative covenant.

Positive covenant cannot be specifically enforced. B can only file a suit against A for damages.

Negative covenant can be specifically enforced. B can be restrained from singing elsewhere on that day. This is an order of injunction.

LAW RELATING TO DAMAGES

Sections 73 and 74:-

The purpose of awarding damages is to restore the parties to a position where they would have been if the contract had been performed and not where they would have been if they never, made the contract further when parties enter into a contract. They contemplate the performance and not the breach of it. Hence, damages are assessed as on the date of the performance.

The foundation for the modem law of damages was laid down in the case of **Hadley vs. Baxendale**

The plaintiff was the owner of a mill. The defendant was a carrier. The plaintiffs mill stopped owing to-the breakage of a crankshaft. He entrusted the broken shaft with, the defendant to be delivered to the maker as a pattern for a new one. The only information given to him was that the plaintiff was the owner of the mill and the broken shaft was a part of the machinery.

Due to some neglect on the part, of the defendant, the delivery of the shaft was delayed with the result the mill remained idle. The plaintiff lost profit, which he would otherwise have made. The question before the 'court was whether the plaintiff was entitled for the loss of profit also?

The court laid down TWO rules. This statement of the law is generally known as the rule in **Hadley vs. Baxendale.** This rule is incorporated in Section 73 of the 'The Indian Contract Act'.

Damages are recoverable in two cases

1. When they arise naturally In the usual course of things, and
2. When they are Such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. Applying the two rules mentioned above, the court held in the above case, that the plaintiff could not recover the loss of profit. The first rule speaks of compensation for any loss or damage caused to the aggrieved party, which naturally arose in the usual course of things from such breach. This is the actual loss caused to the plaintiff the test is an objective test.

The Second rule speaks of loss or damage, which the parties KNEW, when they made the contract is likely to result from the breach of it. Here, the test is subjective.

According to Sir William Anson both branches of the rule is the same: "Recovery depends on foresee ability."

The measure of damages is not affected by motive or the manner of the breach. Thus in **Addis Vs. Gramaphone Co. Ltd.** an employee was wrongfully dismissed from service in a harsh and humiliating manner. Held the employee could recover damages representing his wages and commission he would have earned but for the Wrongful dismissal and not anything for his injured feelings or for his difficulty to obtain a new employment. Damages can be recovered for substantial inconvenience of discomfort resulting from such breach.

Hobbs London and South Western Railway Co.

The plaintiff with his wife and children had to travel from Wimbledon to Hampton Court. They took a train from Wimbledon, which transported them to Esher. They had to walk several miles on a drizzling wet night to reach their destination.

The plaintiff could recover the sum of 8 pounds to compensate for inconvenience. The plaintiff could not recover for the medical expenses of his wife, who caught a cold, as this consequence you too remote.

Damages for loss of reputation or mental agony may be recovered in the following two cases:

(1) Where a bank refuses to honour a cheque without any valid reason even though the customer has sufficient funds in the bank.

(2) Breach of promise to marry

The law is concerned with the immediate consequence and not with the remote consequence. Hence compensation will not be. Given for any remote or indirect loss caused by a breach of contract.

In estimating the loss, the means of remedying the inconvenience shall be taken into account the aggrieved party shall not aggravate the loss. On the contrary, he should take steps to mitigate the loss.

Where a quasi-contractual obligation arises but has not been discharged the damages are assessed as if a Contract had been entered and such contract had been broken.

PENALTY AND LIQUIDATED DAMAGES

English Law makes a distinction between penalty and liquidated damages. Penalty is in the nature of a punishment. Provision as to penalty may act as a deterrent to the potential contract- breaker. Liquidated damages are damages, which can be ascertained with reasonable certainty.

Under Section 74 of the Indian Contract Act, the parties to a Contract may name a sum to be paid in the event of the breach of the contract. When such sum is so named

(1) The court will award reasonable compensation not exceeding the amount so named.

(2) Actual damage need not be proved.

A stipulation to pay enhanced rate of interest in case of default can be classified into two heads.

(i) To pay enhanced rate of interest from the date of the BOND is **always a** penalty.

(ii) To pay from the date of the DEFAULT **<u>may not</u> be** a penalty

A stipulation to pay **COMPOUND** interest in case of default does not amount to a penalty if the rate of interest is **same** as that of simple interest. If the rate of compound interest is **greater** than that of simple interest, it is a penalty.

A withdrawal of a concession in case of default is not a penalty. Thus repayment of a loan by installments is only a concession granted to a debtor.

QUANTUM MERUIT

The term literally means "As much as earned" The requirements for the application of this principle are as follows:-

(1) It should be a contract for the payment of a lumpsum.

(2) The contract should be non-severable, *(A non severable contract is a contract which should be perfomed in its entirety Part -performance will not satisfy the parties)*

(3) One party should have fulfilled part of his obligation.

(4) The other party should have repudiated the contract.

(5) The first party should not be at fault. He should be ready and willing to perform the rest of his obligation.

Under the above circumstances, if the first party claims for the value of work done, it is a ***Claim on Quantum Meruit***

ANTICIPATORY BREACH

This arises when one party to a contract RENOUNCES the contract BEFORE the due date of performance. Now, the question arises whether the other party may treat the RENUCIATION as BREACH and file a suit immediately or wait till the date of performance and then file the suit.

Hochester vs. D' La' tour

On April 12th defendant-touring company engaged the services of the plaintiff the tour to commence from June 1st. On May 11th the defendant informed die plaintiff that his services were no longer required, the plaintiff filed a suit against the defendant immediately after May 11th. The defendant contended that the plaintiff ought to have waited till June. 1st i.e. the due date of performance and then filed the suit. The court negatived the contention and observed as follows.

"A contract is a contract from the time it is made and not when performance is due". The contractual relationship arises from the date of the agreement itself and not from the date of performance. When parties enter into a contract they have two rights:-

(l) To enforce the performance on the due date.

(2) To keep the relationship alive till the due date.

So, if one party renounces the contract before the due date of performance, he snaps the contractual relationship. The other party MAY treat the renunciation as a bream and file a suit immediately. He need not wait till the due date of performance.

However it is only an option. If he waits till the due date of performance, he keeps the contract alive for the benefit of both the parties. The other party may change his mind and perform the contract on the due date. But he may suffer a disadvantage. If a supervening impossibility occurs between the date of renunciation and the date of performance, the contract will be discharged. The other party will be excused from performing his obligation on the due date of performance.

Frost vs. Knight

A promised to marry B after the lifetime of B's father. During the life time of B's father A refused to marry B. B filed a suit against A for breach of-promise. A contended that she ought to have waited till the lifetime of her father and then filed the suit The court negatived the contention following the case of **Hoehester vs. D' La Tour,** and held that B was entitled to succeed.

In an anticipatory breach, damages are assessed as on the date of the performance, subject however to circumstances that shall be taken into account in mitigating the loss.

Lesson -10
INDEMNITY AND GUARANTEE

CONTRACT OF INDEMNITY

Section 124 A contract of indemnity has two parties namely,

(1) Indemnifier, and (2) Indemnified.

The indemnifier promises to save the indemnified from Joss Caused to him by the Conduct of the indemnifier himself or by the conduct of any other person.

CONTRACT OF GUARANTEE

Definition – Section 126 - There are three parties in a contract of guarantee namely:-

(1) Creditor

(2) Principal debtor, and

(3) Surety

The surety agrees with the creditor to discharge the liability of the principal debtor in case of his default.

Anything done or any promise made by the creditor to-the principal debtor at the desire of the surety is consideration for a contract of guarantee.

Illustration

A owes Rs.100 to B. C agrees with B that he shall pay the amount. This is not a contract of guarantee. Further the agreement will be void unless it is supported by consideration. A is a customer. B is a shopkeeper C. tells, B. "Please supply goods to A. If he does not pay, I shall pay". This is a contract of guarantee.

Section 128 The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.

The liability of' the principal debtor is primary. The liability of the surety is Secondary. However their liabilities arise simultaneously. When the principal debtor commits default, the surety becomes liable. The creditor may file a suit against the surety in the first instance without exhausting his remedies against the principal debtor. Even if he gets a decree against both the principal debtor and the surety, he can execute the decree against the surety.

Even if the contract between the creditor and the principal debtor is voidable and therefore set aside by the principal debtor, the surety will not be discharged from liability. The mere fact that the contract between the creditor and the principal debtor is void docs not discharges a surety (For example if the principal debtor is a minor).

Even if the principal debtor is adjudged an insolvent, the surety is not discharged.

However, there can be an agreement between the creditor and the surety that the creditor should proceed against the principal debtor, before proceeding against the surety.

CONTINUNING GUARANTEE

Sections 129, 130 and 131

A continuing guarantee is a guarantee, which extends to a series of transactions. The guarantee should be to a series of transaction. A employs B as his cashier. C gives guarantee to A. for B's fidelity. This is NOT a continuing guarantee, In a continuing guarantee a fresh liability shall. Accrue from time to time. A is the landlord of B. B is the tenant. C gives guarantee to A for the payment of monthly rents by B. This is a. continuing guarantee.

REVOCATION OF CONTINUING GUARANTEE

Since, in a continuing guarantee a fresh liability accrues from time to time a continuing guarantee-may be REVOKED in respect of future transactions.

(1) Notice

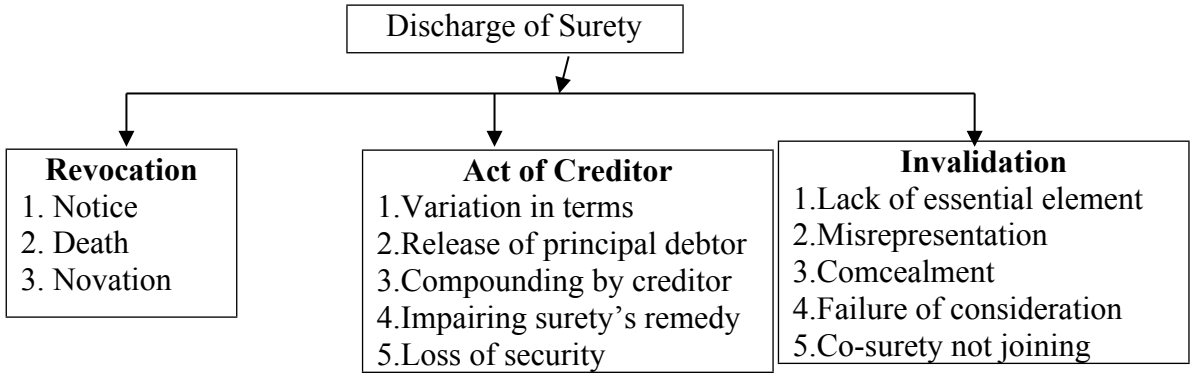
A continuing guarantee may be revoked by the surety, in respect of future transactions by giving notice to the creator.

(2) Death

The death of the surety operates- as a revocation of a continuing guarantee, so far as regards future transactions. This is subject to a contract between the creditor and the surety to the contrary.

DISCHARGE OF SURETY

1. Any variance in the terms of the contract between the principal debtor and creditor made without the surety's consent discharges the surety as to the transactions subsequent to the variance. **(Section 133)**
2. The surety is discharged by any contract between the creditor and the principal debtor by which the principal debtor is released. **(Section 134)**
3. The surety is discharged by any act or omission of the creditor the legal consequence of which is the discharge of the principal debtor. **(Section 134)**
4. A contract between the creditor and the principal debtor, by which the creditor makes a composition with the principal debtor, discharges the surety, unless the surety assents to such contract. **(Section 135)**



Illustrations

a) B owes two distinct debts to A. C gives guarantee to A, in respect of one debt only A and B agree, without the assent of C, to compound the other debt with this debt This composition discharges C.

b) A Contract between the creditor and the principal debtor, by which the creditor promises to give time to the principal debtor, discharges the surety, unless the surety assents to such contract.

c) A contract between the creditor and the principal debtor by which the creditor **PROMISES NOT TO SUE** the principal debtor discharges the surety, unless the surety assents to such contract.

However, under Section 137, Mere forbearance on the part of the creditor to SUE does discharge the surety. This is because the creditor is not bound to sue the principal debtor in the first instance. Section 135 speaks of a **Contract** between the creditor- and the principal debtor NOT TO SUE Hence, the discharge.

4. If the creditor **does any act, which is inconsistent with the rights of the surety,** and eventual remedy of the surety against the principal debtor is impaired the surety is discharged. **(Section. 139)**
5. If the creditor **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 impaired the surety is discharged. **(Section 139)**

Illustration

A puts M as apprentice to Band gives guarantee to B for M's is fidelity. B promises on his part that he will at least once a month see M make up the cash, B omits to see this done as promised and M embezzles. A is not liable to B on his guarantee.

CO-SURETIES

Section 144

Where a person gives a guarantee upon a contract that a creditor shall not act upon it until another person joined in it as co-surety, the guarantee is not valid if that other person does not join.

This is a general principle of contract. If a condition precedent fails, the contract itself fails.

Section 138

Where there are co-sureties, a release by the creditor of one of them does not discharge the others, Further, it does not free the surety so released from his responsibility to the other sureties.

A and B are co-sureties to C. C releases A This does not release B. Further, it does not free A from his responsibility to B.

Section 147

Co-sureties who are bound in different Sums are liable to pay equally as far as the limits of their respective obligations permit.

A, B and C are co-sureties bound for Rs. 10,000, Rs. 20,000 and Rs. 40,000 respectively. D is the principal debtor. E is the creditor-

(1) D commits a default for Rs.30,000. A, B and C are liable for Rs.10,000 respectively.

(2) D commits default for Rs.40,000. A is liable to Rs.10,000 (his limit) Balances should be divided by the other two. B is liable for Rs. 20,000 (his limit) C. is liable for Rs.20,000

Other Item

Section 132: A and B jointly enter into an agreement with C to undertake a liability A and B agree between themselves that one of them will be liable on the default of another. C is not a party to this agreement. So, C is not affected by agreement between A and B. C can enforce. The liability against A or B or both. This is on the principle of privities of contract.

Section 136 : The creditor makes a contract with a third person (and not. with the principal debtor" to give time to the principal debtor does not discharge a surety.

Section 140: When the principal debtor commits default and the surety performs the obligation, the surety is invested with all the rights, which the creditor has against the principal debtor. This is known as subrogation.

Section 141 : A surety is entitled to the benefit of every Security, which the creditor has against the principal debtor-at the time when the contract of guarantee was entered into. It is not necessary that the surety should be aware of the existence of such Security. If the creditor loses the Security, the Surety is discharged to the extent of the value of the Security.

Section 142 : A guarantee which has been obtained· by misrepresentation made by the creditor (or with his knowledge and assent) concerning a material part of the transaction -is invalid.

Section 143: Any guarantee which the creditor has obtained by means of keeping silence as to the material circumstances is invalid.

Section 145: In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety. The surety can recover from the principal debtor the sums he has rightfully paid under the guarantee.

Lesson – 11

CONTRACT OF BAILMENT

What is a BAILMENT?

You give a cloth to a tailor to stitch a dress for you. The tailor is the bailee. You are the bailor. You give gold to a goldsmith to make a jewel. The goldsmith is the bailee. You are the bailor.

You entrust a lorry transport with certain goods to be delivered to a. destination. The carrier is the bailee. You are the bailor.

Section 148 - Definition or bailment

(1) A bailment is the delivery of goods by one person to another,
(2) For some purpose,
(3) Upon a contract that,
(4) When the purpose is accomplished,
(5) The goods shall be returned
(6) Or otherwise disposed off, and
(7) According to the directions of the person delivering the goods.

Possession is an important element in bailment. Under Section 149, the delivery may be made by doing anything, which has the effect of putting the goods in the possession of the intended bailee.

Thus a servant assuming the custody of goods belonging to a guest makes his master a bailee.

Kaliaperumal vs. Visalakshmi.

A lady employed a goldsmith for the purpose of melting old jewellery and making new jewels. Every evening she would take back the half-made jewels and put them into a box. The box was kept in a room in the goldsmith's house. She locked the room and retained the key. The goods were stolen one night.

Held, the goldsmith was NOT responsible. Since at the time of the theft, he was not in possession of the goods.

Section150

The bailor is bound to disclose to the bailee faults in the goods bailed,
(1) Of which the bailor is aware and
(2) Which materially interface with the use of the goods or
(3) Expose the bailee to extraordinary risks,

lf the bailor does not make such disclosure, he is responsible to' the bailee for damage arising directly from such faults.

If the goods are bailed, for HIRE, the bailor, is responsible for such damage, whether he was or was NOT aware of the existence of such faults in the goods bailed.

Section 151

The bailee is bound to take as much care of the goods bailed to, him as a man of ordinary prudence would take care of his own goods under similar circumstances. If he takes care as aforesaid he will lilable for the loss destruction or deterioration of the goods bailed.

Section 152

If the bailee makes use of the goods, which is not according to the conditions of bailment, he shall make compensation to the bailor for any damage arising to the goods.

(1) From such use of the goods or (2) During such use of the goods.

Illustration

(1) A lends his scooter to B for his riding only. B allows C his friend to ride the scooter. C

meets with an accident. The scooter is damaged. B is liable to make compensation to A.

(2) A hires a scooter in Madras from B expressly to. go to Mahabalipuram. A rides with care, but goes to Sriperumpudur instead. There is an accident. The scooter is damaged. A is liable to make compensation to B.

MIXTURE OF GOODS BAILED

Section 155, 156 and 157 If the bailee with the consent of the bailor, mixes the goods of the bailor with his own goods, the bailor and the bailee shall have proportional interest in the resulting mixture.

Without Consent - Separable

The bailee without the consent of the bailor mixes the goods of the bailor with his own goods. The goods can be separated or divided. The property (ownership) in the goods remains with the bailor and bailee respectively. The bailee is bound to bear the expenses or separation or division, and any damage arising from such mixture.

Without Censent - Not Separable

Under this circumstance the bailee, without the consent of the bailor mixes the goods of the bailor with his own goods. The goods cannot be separated and delivered back to the bailor. Now so far the bailor is concerned, the goods .are lost. Hence the bailee shall make compensation to the bailor for the loss of the goods.

LENDER OF GOODS

Section 159

Suppose A lends an article to B for a specified time or purpose. If the loan was gratuitous, A may require the return of the article at anytime. However, A shall indemnify B if the loss to B exceeds the benefit be derived from the loan.

DUTY OF BAILEE TO RETURN GOODS

Section 160

It shall be the duty of the bailee to deliver back the goods bailed according to the bailor's directions, without demand soon after.

(1) The expiry of time of bailment or

(2) The purpose of bailment has been accomplished.

Section 161 If the goods are not delivered back as aforesaid, the bailee is responsible to the bailor for any loss, destruction or deterioration of the goods from that time.

Section 162 A gratuitous bailment is terminated by the death of the bailor or the bailee.

Section 163 The bailee is bound to the bailorany increase or profit which may have accrued from the goods bailed. This is subject to a contract to the contrary.

Illustration

A leaves a cow in the custody of B to be taken care of The cow delivers a calf B is bound to deliver the cow and the calf.

Section 164 Suppose the bailee suffers loss because the bailor was not entitled.

(1) To make the bailment or

(2) To receive back the goods or

(3) To give directions in respect of the goods. The bailor is responsible to the bailee for such loss

Section 165 A bailee who in good faith returns the goods to the bailor is not liable to the true owner of the goods. This happens when the bailor does not have title to the goods.

Section 167 Suppose a person other than the bailor claims the goods bailed he (i.e. the claimant) may apply to the court to stop delivery of the goods to the bailor and to decide the

title to the goods.

RIGHT OF FINDER OF LOST GOODS

Section 168 and 169:- The finder of goods has no right to sue the owner for compensation for trouble and expenses voluntarily incurred by him

(I) To preserve the goods, and

(2) To find out the owner.

However, he may retain the goods, if the owner has offered it reward for the return of the goods. If the owner cannot be found even after exercising reasonable diligence or if the owner refuses upon demand, to pay the lawful charges of the finder, the finder may sell the goods in the following two cases, namely:-

(1) When the thing is in danger of perishing or losing the greater parts of its value or

(2) When the lawful charges of the finder amount to two part of the value of its goods.

BAILEE'S LIEN

Sections 170 and 171

1. **Particular Lien**

This right arises when the bailee has rendered any service involving the exercise of labour or skill in respect of the goods bailed. The bailee has a right to retain SUCH goods until he receives the remuneration for the services rendered by him.

He may retain ONLY the goods in respect of which the charges are due. He shall NOT retain any other goods belonging to the bailor and which may be in the possession of the bailee. Hence this is known as particular lien. This is subject to a contract to the contrary.

2. **General Lien**

This right to retain ANY goods belonging to the bailor is available to Bankers, Factors, wharfingers, Advocates and Policy Brokers. They have a right to retain ANY goods bailed to them as a security for a general balance of account.

This is known as General Lien. This right is subject to a contract to the contrary.

Official Assignee of MadraS vs. Ramaswami

It was held, that a deposit of valuables with a banker to secure debts and advance to a customer, is subject to the banker's lien for the customer's general balance of account, unless there was an agreement to the contrary.

BAILMENT OF PLEDGES

A pledge is a bailment of goods as security for payment of a debt or performance of a promise. They bailor is called "the pawnor" or pledger and the bailee is called "the pawnee" or the pledgee.

The pawnee may retain the goods pledged

(1) For payment of the debt (2) For the interest, and

(3) For the necessary expenses incurred for the preservation of the goods pledged.

The pawnee shall not retain the goods pledged for any debt other than the debt for which the goods were pledged.

The pawnee is entitled to RECEIVE from the pawnor extra-ordinary expenses incurred by him for the preservation of the goods pledged.

Remedy No.1: He may file a suit against the pawnor for the recovery of the debt and also retain the goods pledged as a Collateral security.

Remedy No.2: He may sell the goods pledged, on giving the pawnor reasonable notice of the sale. If the proceeds of sale are less than amount due, the pawnor is liable to pay the balance. If

the proceeds are more, the pawnee shall pay over the surplus to the pawnor.

EXCEPTIONS TO NEMO DAT QUOD NON HABET

This maxim has already been explained. The exceptions under pledge are:

Exception No.1

Section178. Pledge by a Mercantile Agent.

The requirements are as follows:

(1) The mercantile agent should be in Possession of the goods with the consent of the owner.

(2) The mercantile agent should act in the ordinary course of business.

(3) The pawnee should act in good faith,

(4) The pawnee should not have notice (knowledge) the pawnor (Mercantile Agent) has no authority to pledge.

If the above conditions are fulfilled, the pledge will be valid against the owner, even if the mercantile agent exceeds or lacks authority.

Exception No.2

Pledge Under Avoidable Contract

The conditions to be fulfilled are-

(1) The pawnor should have obtained possession of the goods under a voidable contract.

(2) The contract .should not have been rescinded.

(3) The pawnee should take the goods in good faith.

(4) The pawnee should not have notice of the pawnor's defect of title.

Now, the pledge is valid,

Exception No. 3

Pledge By Seller Remaining In Possession The conditions to be fulfilled are -

(1) The seller should continue in possession of the goods after the sale of the goods,

(2) The seller should pledge the goods to a pawnee who should act in good faith.

(3) The pawnee should not have notice of the sale. Now the pledge is valid.

LIMITED INTEREST

A person having limited interest in the goods may make a valid pledge to that extent.

Tennination or Baile's Lien

A bailee's lien is terminated or lost in the following circumstances :-

1. Loss of possession 2. Refusal of tender 3. Agreement of parties
4. Satisfaction of the debt 5. Misuse of the goods

Difference between Pledge and Bailment

Aspects	Pledge	Bailment
1.Purpose	Is made for a specific purpose i.e. security for payment of debt or performance of a promise.	Can be for any purpose
2.Use of goods	A pawnee does not have the right to use	The bailee can use the goods bailed the goods as per the terms of contract
3.Lien	Lien can be exercised even for non-payment of interest	A bailee can exercise lien on the good bailed only for his labour and skie employed
4.Sale of goods	The pawnee can sell the goods after due notice to the pawnor	The bailee has no right of sale
5.Naure of	The pledge gets a special interest in	A bailee obtains a right of

interest in property	the goods. The general property remains in the pawnor	possession of the goods bailed

Lesson - 12
AGENCY

WHO IS AN AGENT?

An agent is a person employed to do any act for another or to represent another to bring him into legal relations with a third person. The person for whom' such act is done or who is so represented is caned the "principal"

Contractual capacity is not necessary to enable a person to act as an agent. A minor can be an agent. But a minor cannot incur any liability. A principal should be competent to enter into a contract.

The relationship of principal and agent may be created in and one of the following five ways which are

(l) By actual or implied authority given by the principal to the agent.

(2) By ratification.

(3) By estoppel i.e, by giving ostensible authority.

(4) By a legal presumption in the case of a married woman to bind her husband

(5) By an implication of law in cases of necessity.

KINDS OF AGENTS

1. Auctioneer

He is an agent to sell property at a public auction. He is primarily an agent for the sellers. He becomes the agent of the buyer also, when the property is knocked down.

2. Factor

A factor is an agent to whom goods are consigned for the purpose of sale. He is an agent with possession of the goods. He may sell the goods in his own name. He may give credit to the buyer receive the price and give a discharge to the buyer.

3. Broker

A broker is an agent employed to negotiate a contract between his principal and a third person.

4. Del Credre Agent

A *Del Credre* agent is employed for sale. He is responsible to the principal for payment of price by the buyer. He is entitled for extra remuneration for this purpose. consideration is not necessary to CREATE an agency. The authority of an agent may be expressed or implied.

HUSBAND AND WIFE

The liability of a husband for a wife's, debt depends on the principles of agency. This is a case of implied authority.

Here two circumstances may arise -

(1) Husband and wife living together:-

Now an implied agency to buy necessaries is presumed

(2) Husband and wife living separately:-

Now the implied agency is presumed only when she lives separately under circumstances, which would warrant her to live apart from her husband. Further, the wife should not have been provided with maintenance.

Extent of agent's authority

An agent having authority to do an act has authority to do every lawful thing, which is necessary in order to do such act. The same thing applies when an agent has authority to carry on a business. He has authority to do every lawful thing necessary for the purpose or usually done in the course of conducting such business.

In an emergency

An agent has authority in an emergency to- do all such acts for the purpose of protecting his principal from loss. He should act as a man of ordinary prudence win a under similar circumstances.

This is also a case of "agency of necessity". It must be known that

(1) The course taken was the only practicable one in the circumstances.

(2) He had no opportunity in the time available of communicating with his principle and

(3) He acted honestly in the interests of the principal.

Sub-agent and substituted agent

The maxim is *"Delegatus Non Potest Delegare",* it means a delegate cannot further delegate. An agent cannot lawfully employ another to perform acts which he has expressly or impliedly under taken to perform personally. There are two exceptions to this rule.

1) A sub-agent MAY be appointed if the ordinary custom of trade permits.

2) A sub-agent MUST be appointed if the nature of agency so requires.

Sub-Agent Properly Appointed

If a sub-agent is properly appointed the following are the consequences:-

(1) The principal is represented by the sub-agent as regards third persons.

(2) The principal is bound by and responsible for the acts of the sub-agent.

(3) The agent is responsible to the principal for the acts of the sub- agent.

(4) The sub-agent is responsible for his acts to the agent and not to the principal except in case of fraud or willful wrong

Sub-Agent Not Properly Appointed

Where an agent, without having authority to do so, has appointed a person to act as sub-agent, the following are the consequences:-

(1) The relationship between the agent and **SUCH PERSON** is that of principal and agent.

(2) The agent is responsible for the acts of such person both to the principal and to third persons.

(3) The principal is not represented by or responsible for the acts of such person.

(4) Such person is not responsible to the principal.

Substituted Agent

An agent may have an express or implied authority to name another person to act for the principal for a PART of the business of agency. When such person is so named, he is not a sub-agent but an agent (substituted agent) for such part of the business of the agency as is entrusted to him.

In selecting such (substituted) agent, the agent is bound to exercise the same amount of discretion as a man of ordinary prudence would exercise in his own case. If he does so, he is not responsible to the principal of the acts for negligence of the substituted agent.

Ratification - Agency By

Ratification means adopting another's act the two main principles of ratification are-

(1) Ratification acts retrospectively and

(2) Ratification must be as a whole.

Suppose a person purports to act on behalf of another without having authority to do so, the latter person is put to election (choice) He may either ratify the act or disown the act. If he ratifies them the same effects will follow as if his authority. Had performed them since, ratification relates back, the person who ratifies-must have, been-in existence when the act was done. Further, he should have been competent to enter into the contract. Since ratification, acts as a whole, a person cannot ratify, what is convenient to him' and disown the

rest. A transaction which is void ab-initio cannot be ratified. A person whose knowledge of the facts of the case is materially defective cannot make a valid ratification. Ratification may be expressed or implied in the conduct of the ratifier.

Illustration

A, without B's authority lends B's money to C. Afterwards B accepts interest on the money from C. B's conduct implies a ratification of the Joan. A ratification cannot be made subjecting a third person to damages or of terminating any' right or interest of a third person.

Bolton partners vs. Lambert

The managing director of a company, purporting to act on behalf of the company accepted an offer. The offer revoked the offer. Subsequently, the company ratified the acceptance of the managing director.

Held: there was a valid contract the ratification related back to acceptance. The revocation was not operative,

Note: A person cannot accept an offer subject to ratification, In such a case the ratification (so called) amounts to acceptance of the offer. Hence the offer or can revoke the offer before the so-called ratification.

Termination of Agency

An agency is terminated by

(1) The principal revoking his authority.
(2) The agent renouncing the business of agency.
(3) The completion of the business of agency.
(4) The death of principal or agent,
(5) The principal or agent becoming of unsound mind, and
(6) The principal being adjudicated an insolvent.

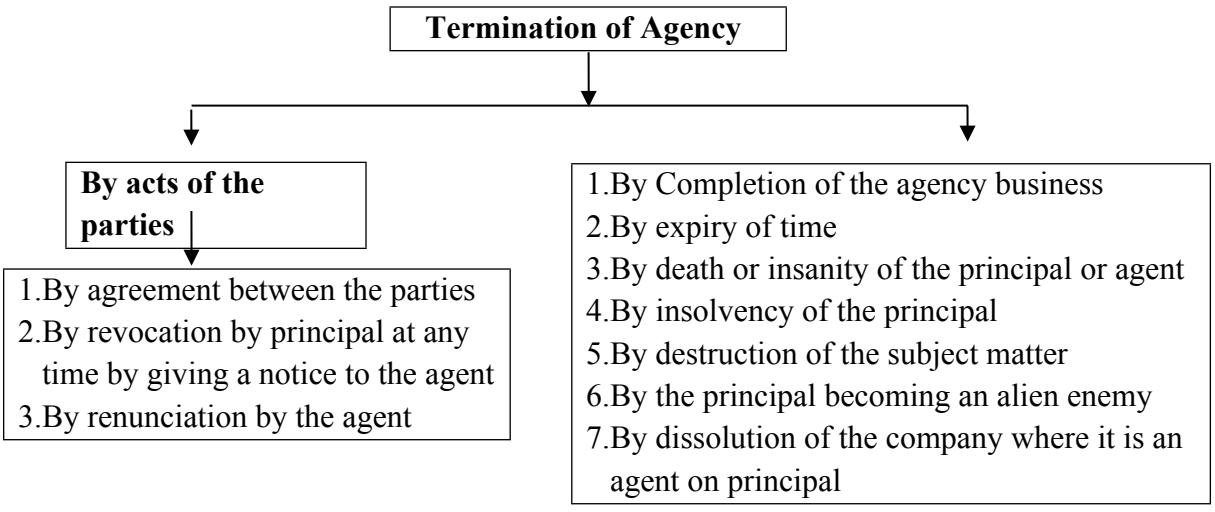
Agency Coupled With Interest

An agent may have an interest in the property which forms the subject matter of the agency. Such agency cannot be terminated to the **PREJUDICE** of such interest.

Illustration

A owes a debt to B. A appoints B as his agent to collect moneys due to A and empowers B to pay himself out of the proceeds. A cannot terminate the agency prejudicial to the interest of B. A can terminate the agency provided be discharges the debt due to B.

However, there may be an EXPRESS contract to be contrary.



On Revocation

The principal may revoke the authority given to his agent at any time before the authority has been exercised so as to bind the principal.

The principal cannot revoke the authority after the authority has been partly exercised in respect of such acts and obligations, which arise from acts already done in the agency.

There may be an express or implied contract that, the agency should be continued for any period of time in such a case:

(I) The principal must make compensation to the agent for any previous revocation without sufficient cause.

(2)The agent must make compensation to the principal for any previous renunciation without sufficient cause.

Reasonable notice must be given of such revocation or renunciation. Otherwise the damage thereby resulting must be made good -

(1) By the principal to the agent or

(2) By the agent to the principal, as the case may be revocation and renunciation may be expressed or implied in the conduct of the principal or agent respectively,

The termination of authority of an agent takes effect -

(1) so far as regards the agent when it becomes known to him, and

(2) so far as regards third persons when the termination becomes known to them. The termination of authority of an .agent causes the termination of the authority of all sub - agents appointed by him.

If an agency is terminated on account of the death or unsoundness of mind of the principal, the agent is bound to take, on behalf of the .legal representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him.

Agent's Duty to Principal

An agent is bound to conduct the business of the principal according to the directions given by the principal. Otherwise, if any loss is sustained he shall make good the loss to the principal. If any profit accrues, he shall account for it.

An agent is bound to conduct the business with as much skill as is generally possessed by persons engaged in similar business. He is bound to act with reasonable diligence arid to use such skill as the possesses. He shall make compensation to his principal in respect of direct consequences of his own neglect, want of skill or misconduct. However, he shall not be liable for indirect or remote consequences.

An agent is bound to render proper accounts to his principal on demand. In case of difficulty he shall seek to obtain instruction from his principal. If agent deals on his own account, without the consent of the principal and without acquainting the principal with material facts which have come to his knowledge, the principal may repudiate the transaction. If an agent deals on his own account without the knowledge of his principal, the principal is entitled to claim from the agent any resulting benefit.

An agent may retain out of any sums received in the business all moneys due to himself in respect of advances made or expense, properly incurred by him in conducting business, and also such remuneration as may be payable to him for acting as agents.

Payment for the performance of an act is due only on the completion of the act. However, an agent may detain moneys received by him on account of goods sold although the whole of the goods consigned to him for Sale may not have been sold or although the sale is

not complete. This is subject to a special contract to the contrary.

An agent who is guilty of misconduct is not entitled to any remuneration for that part of the business, which he has misconduct.

An agent is entitled to retain goods, papers and other property (movable or immovable) of the principal received by him, until the amount due to himself for commission, disbursements and, services in respect of the same has been paid or accounted for to him. This right of lien is subject to a contract to the contrary.

Principal's Duty to Agent

The employer of an agent is bound to indemnify him against the consequences of all LAWFUL acts done by such agent in exercise of the authority conferred upon him.

If the agent does the act, for which he has been employed, in good faith, the employer is liable to indemnify the agent against the consequences of that act although it causes any injury to the rights of third persons.

However, if he is employed to do a criminal act, the employer is not liable to the agent, even though the employer has made an express or an implied promise to indemnify the agent against the consequences of the act.

Illustration

A employees B to beat C A agrees to indemnity B against all consequences of the act B beats c and has to pay damages to him. A' is not liable to indemnity B for those damages.

The Principal must make compensate to his agent in respect of injury caused to his agent by the neglect or want of skill of the Principal.

Effect Of Agency On Contracts with third persons

Act of an agent is act of the principal so if an agent enters into a contract with a third person, the same legal consequences will follow as if the contract had been entered into by the principal himself with the third party.

Where an agent does more than he is authorized to do, two situations may arise-

(1) The part done within his authority can be separated from the part done beyond his authority. The part done within his authority only is binding as between him and his principal.

(2) The parts cannot be separated. The principal is not bound to recognize the entire transaction.

Agency By Estoppel - Ostensible Authority

Estoppel applies when the principal by his words or conduct induces a third person to believe a person acts under his authority. In fact the person acts without authority and has done acts or incurred obligation to the third person who has been induced by the principal by his representation. Now the principal is bound by such acts or obligations, as if the acts were done under his authority.

The principal is estopped from denying the authority of the agent to act on his behalf.

This is known as agency by estoppel. The .principal incurs liability by estoppels, even though the apparent agent had no real authority at all.

Undisclosed Principal

This may arise in two circumstances-

(1) An agent enters into a contract with a third person disclosing that be acts as an agent but does not disclose who is the principal.

(2) An agent enters into a contract with a third party not disclosing that he acts as an agent.

In such cases, the question will be to whom credit was given by the third person. An agent cannot personally enforce contracts entered into by him on behalf of the principal. Further, they do not bind him. This is subject to a contract to the contrary. Such a contract shall be presumed to exist in the following cases:

(1) Where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad.

(2) Where the agent does not disclose the name of his principal.

(3) Where the principal, though disclosed, cannot be sued,

If an agent makes a contract with a person who neither knows, none has reason to suspect that he is an agent his principal may require the performance of the contract. The other contracting party may enforce the contract against the principal.

However, if the principal discloses himself before the completion of the contract, the other contracting party may refuse to fulfill the contract. He has to show that he would not have entered into the contract.

(1) If he had known who was the principal or

(2) If he had known that agent was not a principal

Liability of a Pretended Agent

Suppose a person misrepresents to another that he is an agent and induces another to deal with him as such agent, If his alleged employer does not ratify his acts, he shall make compensation to the third person in respect of any loss or damage which the third person has incurred in the dealing.

Questions

1. Explain the essentials of a valid contract.
2. Describne the cilrcumstances under which a valid contract at the formation becomes void.
3. Detail the legal rules for valid acceptances.
4. When can an acceptance of an offer be revoked?
5. Who are competent to enter into a contract? – Enumerate.
6. Give a brief note an agreement by way of wager.
7. Give the circumstances under which a surety can be discharged.
8. Explain contract of bailment from all angles.
9. What are the exceptions for NEMO DAT QUAD NON HABET?

Unit - II

PART- A

THE INDIAN PARTNERSHIP ACT

Objectives

(a) To know about the nature of partnership registration of a firm.
(b) To understand-the kind of partners, minors as partners etc.
(c) To understand the duties of partners and their relationship to one another
(d) To know all about the dissolution of a firm.

PART-B

THE SALE OF GOODS ACT

Objectives

a) To know about the scope of sales of goods 'act.
b) To know all about the price conditions and warranties.
c) To understand how transfer of property takes place from the seller to the buyer.
d) To understand how transfer of title takes place. .
e) To know about the unpaid vendor's rights
f) To know about the remedies for breach of contracts etc.

PART - C

LAW ON INSURANCE

a) To know and understand, the meaning, concept and the general principles of Insurances.
b) To understand the life insurances system available. And its benefits.
c) To know an about fire insurances.
d) To understand what marine insurances is, what a marine insurances policy contains, perils involved in the voyage and how they are taken care of by the policy.

PART –A

THE INDIAN PARTNERSHIP ACT

Lesson -1

Partnership - Nature, Registration & Kinds

What is Partnership?

Sections 4, 5 & 6 Partnership, like a marriage, is. a relationship. This relationship is created by an agreement.

The essential ingredients or a partnership are as follows:

(1) It is an association of two or more persons.
(2) The persons enter into an agreement to carry on a business.
(3) The persons agree to share the profits of the business.
(4) The business is carried, on by all. or any of the persons acting for all

The persons are called individually as "partners". They are collectively "a firm". The name under which the business is carried on is called the "firm name"

A partnership is not created by registration, It, is not created by status. Every joint venture need not necessarily be a partnership. In a partnership, the- partners are self-employed. The partners participate in the business and not with the business. Ultimately, they may or may not make' a profit,' But when they agree to, carry on business;' their motive should be to make profit.

The relation of partners arises by an agreement and 'not from status. Thus a Hindu undivided family carrying on business as such is not a: partnership. In determining whether a group of persons is or is not a' firm or whether a person is or is not a partner in a firm 'we should 'consider the real relation between the persons as shown by all relevant facts taken together. Mere sharing of profit does not or itself make a partnership.

Illustrations

1. **A** lends money to b on condition that b shall pay interest and a share in the profit. A does not become a partner with b. Their relationship is that of creditor and debtor. The partners are self-employed. A partner is not a servant of a firm.
2. **B** is the servant of a. 'B's remuneration consists of pay and a share in the profit. B does not become a partner with A. A receipt of a share in the profit by a previous owner or a part owner of a business as consideration for the sale of the goodwill does net of itself makes the receiver a partner with the person carrying on the business.,

The receipt of share in the profit by the widow or child of a deceased partner, as annuity does not make the widow or the child a partner with the person carrying on the business.

Each partner is liable for the acts of the, firm as' well as for the acts of the other partners. Thus each partner is the agent of the firm as well as the other partners. so, their Relationship is that of principal and agent inter se. '

Registration of firms section 58 and 59

Unlike a company, Which is created by registration i,e., say by a process of law to a partnership is not created by registration. 'It is created by' an agreement. Hence registration is not compulsory for a partnership, However the consequences of non- registration are grave for the unregistered firm and its partners,

Stated briefly an unregistered firm or its partners cannot take the assistance of acivil court to .enforce a right arising out of a contract or conferred by the partnership 'act.

Registration is a condition precedent to file a suit

(I) By the partners against the firm.
(2) By the partners against the ether partners and
(3) By the firm against a third party.

If a firm is not registered

(a) The firm cannot file a suit against a third party to recover its dues.
(b) a partner of the unregistered firm cannot file a suit against the firm to recover his dues and
(c) a partner cannot file a suit against the other partners.

However a partner or an unregistered firm may file a suit for

(I) Dissolution of the firm
(2) For accounts when the firm is already dissolved and
(3) For his share in the assets of the dissolved firm.

An unregistered firm may enforce a right - not arising out of contract -. against a third party. (a suit for injunction against a person restraining the person from using the firm name, for infringement of right, to use a trade mark, patent right or copy- right). A partner of unregistered firm may apply to the court for reference to arbitration. .

Third parties are not affected whether a firm is registered or not. They can enforce their rights against -an unregistered firm represented by its partners. Even a registered firm is

not a legal person (like a company). Suppose, a third party has filed against an unregistered firm. *If* the unregistered firm has a set-off or a counter claim against the Third party, the unregistered firm cannot plead set-off or counter – claim.

Registration can be affected at any time even before filing a suit.

An unregistered firm filed a suit against a person. The suit was. dismissed on the ground of non- registration. The firm got itself registered and filed the same suit again.

Held, the action was maintainable and not barred ***by res judicata***. The first suit was dismissed on technical ground and not on merits.

How to Register?

A statement in the prescribed form and accompanied by the prescribed fee shall be sent to the registrar of firms, either through post or delivered in person. The statement shall give the following particulars

(1) The firm name,
(2) The place or principal place of the business of the firm.
(3) The names of other places where the firm carried on business.
(4) The date when each partner joined the firm.
(5) The names in full and permanent addresses of the partners, and
(6) The duration of the firm.

The statement shall be signed by all the partners or by their agents specially authorised in this behalf. Each person signing the statement shall verify it in the manner prescribed.

Minor as a Partner, Section 30

A minor cannot become a partner in a firm. But, with the consent of all the partners for the time being may be admitted to the benefits of partnership.

Leaning of "for the time being"

The consent of existing partners at the time of admission is required. Subsequent to admission, if a new partner joins the partnership, his consent is not required. Such minor has a right to such share of the property and of the profits of the firms as may be agreed upon. He may have access to and inspect and copy any of the accounts of the firm. Such minor's share is liable for the acts of the firm. But, such minor is not personally liable for the acts of the firm.

Such minor cannot sue the partners-

(1) For the account of the firm; (2) For his share in the property of the firm;
(3) For his share in the profits of the firm.

However, he may sue for the above three matters when he severs his connection with the firm, In such a suit, the partners may elect to dissolve the firm. At any time within SIX months of his attaining 'majority or of his obtaining knowledge of his admission, whichever is later) he may give a public notice of his election as to whether-or not he becomes a partner. If he fails' to give such notice, he' shall become a partner in the firm on the expiry of the aforesaid period of six months.

Where such person becomes a partner, the following are the consequences

(1) His rights and liabilities as a minor continue up to the date on which he becomes a partner.
(2) He becomes personally liable to third parties for all acts of the firm done since he was admitted to the benefits of partnership;
(3) His share in the property and profits of the firm shall be the share to which he was entitled as a minor.

Where such person elects not to become a partner the following consequences ensue

(a) His rights and liabilities sha1l continue to be those of a minor upto the date on which he gives the public notice.

(b) share shall not be liable for any acts of the firm done after the date of the notice.

(c) Since he severs. his connection with the firm he shall be entitled to sue the partners.

(i) For the accounts

(ii) For his share in the property and

(iii) For his share in the profits of the firm,

After attaining majority, he may be liable for holding himself out to be a partner,

Kinds of Partners

(1) **Actual Partner** is one who has agreed to become a partner.

(2) **Dormant or Sleeping Partner** one who is known to outsiders as partner: He is liableto a third party when this fact is discovered.

(3) **Nominal Partner** is one whose name is used as a partner even though he is not entitled to share in the profit. He is liable for all the acts of the firm.

(4) **Partner in Profit only** is one who is entitled to a share in the profit without being liable for the losses. He is liable to third parties for all acts of the firm. This is on the principle of privity of conduct. A and B may agree that B is entitled for profits and not liable for losses. C a third party is not affected by the agreement, he being not a party to the agreement.

(5) **Working Partner** is a partner who has special skill and knowledge to run the business and manage the affairs of the firm. The other partners are also liable for all the acts of the firm.

(6) **Sub-Partner** is a person who enters into an agreement with a partner for a share in the profit. A Sub partner is not a partner in the firm and hence has no right or liability in the firm.

(7) **Partner by Holding-Out - section 28:** This is also known as partner by estoppel. This rises when a person by words spoken or written or by conduct.

(i) Represents himself or

(ii) Knowingly permits himself to the represented to be a partner in a firm.

The representor is liable as a partner in that firm to anyone who has on the faith of such representation gives credit to the firm. It is not necessary that the representor should know that the representation has reached the person so giving credit. The creditor must have given credit to the firm relying upon the representation. The representor becomes personally liable to the creditor. By discharging the debt, he does not become a partner in the firm. He does not become an 'agent of the firm. He is not entitled to any rights against the firm.

8. **Partnership at Will**

If there is no provision in the partnership agreement -

(i) For the duration or

(ii) For the determination of the partnership, then the partnership is "partnership at will".

Lesson - 2

RELATIONS OF PARTNERS TO ONE ANOTHER & TO THIRD PARTIES

General Duties of Partners

Partners are bound -

(1) To carry on the business of the firm to the greatest common advantage;

(2) To be just and faithful to each other; and

(3) To render true accounts and full information of all things affecting the firm, to any partner or his legal representative.

Duty to indemnify

Every partner shall indemnify the.firm for any toss caused to it by his fraud in the conduct of the business of the firm.

Determination of Right and Duty by Contract

The mutual rights and duties of the partners may be determined by contract between the partners. This is subject to the provisions of the partnership act. They cannot contract out of mandatory provisions of this act.

Such contract may be express or implied by a course of dealing. Such contract may be varied by consent of all the partners. The consent may be express or implied by a course of dealing. They may enter into a contract not to carry on any business other than that of the firm.

Note - the words "any business" mean not only competing business but any other business also.

Conduct of Business

The following rights and duties are subject to contract between the partners

(1) Every partner has a right to take part in the Conduct of the business.

(2) Every partner is bound to attend diligently to his duties in the conduct of the business.

(3) Any difference arising to ordinary matters connected with the business may be decided by a majority of partners.

(4) Every partner shall have the right to express his opinion before the matter is decided.

(5) No change may be made in-the nature-of-the-business without the consent of all the partners and

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

Mutual Rights and Liabilities

The following mutual rights and liabilities are subject to contract between the partners-

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

(2) The partners are entitled to share the profits equally. They shall contribute equally to the losses incurred by the firm.

(3) A partner who is entitled for interest on the capital subscribed by him shall be paid only out of profits.

(4) A partner making an advance or payment for the purpose of the business, which is beyond the Capital he has agreed to subscribe is entitled to interest for such amount at 'six percent per annum

(5) The firm shall indemnify a partner in respect of payment made and liabilities by him.

(a) in the ordinary and proper conduct of the business and

(b) in the case of an emergency, in doing such act for the purpose of protecting the firm from loss.

(6) A partner shall indemnify the firm for any loss caused to the firm by his wilful neglect in the conduct of the business of the firm.

Property of the Firm- Section 14.

The property of the firm includes all property rights and interest in property

(i) Originally brought into the stock of the firm;

(ii) Acquired by purchase or otherwise

(a) By the firm,

(b) For the firm, and

(c) For the purposes and in the course of the business between the partners.

(iii) Goodwill of the business. The above is subject to contract between the partners.

(iv) Property, rights and interests in property acquired with money belonging to the firm are deemed to have been acquired for the firm.

This is subject to a contrary' intention.

Illustrations

(1) A and B are partners. A without the authority of B, buys railway shares in his own name with the moneys of the firm. The shares are partnership property.

(2) A and B are partners. A buys land with partnership moneys, for his sole benefit. Thereafter a debits himself in the firm book and becomes a debtor to the firm for that amount. The land is not partnership property, as there was a contrary intention.

The property of the firm shall be held and used by the partners exclusively for the firm for that amount.

This is subject to a contract between the partners. **(section 15)**

Personal Profits Earned by Partners (secret profit) Section 16

(I) A partner may have derived profit for himself

(a) From any transaction of the firm.

(b) From the use of the property of the firm

(c) From the use of business connection of the firm and

(d) From the use of the firm name.

In all the above cases he shall account for. that profit and pay it to the firm.

This is subject to a contract between the partners.

(2) If a partner carries on any business of the same nature as and competing with that of the firm, he shall account for it and pay to the firm all profits made by him in that business.
This is subject to a contract between the partners.

Change in the Firm- Section17

This section covers three instances

(1) A change in the constitution of the firm.

(2) Business carried on after the expiry of the term and

(3) Finn carrying on other adventures than for which it was constituted

In the case of no. 1 and no. 2 the mutual rights and duties remain the same. In the case of No. 3 also they remain the same, (however) as far as they may be consistent with the incidents of partnership at will.

Relation of Partners to Third Parties - Section 18

A partner is an agent of the firm for the purpose of the business of the firm. A partner can bind the firm by his acts. A partner transacts business for himself as principal and also as an agent for the other partners. There should be a binding contract of mutual agency.

Implied Authority

In an ordinary partnership a partner has implied authority to do the following acts so as to bind the firm.

(1) To sell goods of the firm.

(2) To purchase goods on account of the firm any goods necessary for the business of the firm,

(3) Receive payment of debts due to the firm and give receipts cr releases for them.

(4) Engage servants for the partnership business.

(5) Accept, make, and issue bills and other negotiable instruments in the name of the firm.

(6) Borrow money on the credit of the firm

(7) For the above said purpose pledge goods belonging to the firm and

(8) For the purpose in no. 6, make a mortgage by deposit of title deeds belonging to the firm.

Implied Authority Does Not Extend to Section 19

A partner does not have implied authority to do the following acts so as to bind the firm. In other words, a partner can do the following acts so as to bind a firm, provided he is expressly authorised to do so:

(1) Submit a dispute relating to the business of the firm to arbitration

(2) Open a bank account on behalf of the firm in his own name.

(3) Compromise or relinquish any claim or portion of a claim by the firm.

(4) Withdraw a suit or proceeding filed on behalf of the firm

(5) Admit any liability in a 'suit or proceeding against the firm.

(6) Acquire immovable property on behalf of the firm.

(7) Transfer immovable property belonging to the firm, and

Extension Section 20

The partners in a firm may enter into a contract between themselves to extend. or to restrict the implied authority of any partner. A third party is not affected by any such restriction unless he has notice of it.

Emergency Section 21

A partner has authority, in an emergency; to do such acts as may be necessary to protect the firm from loss.

Node Section 22

An act or instrument done or executed by a partner shall be done or executed in the firm name. If it is done or executed in any other manner, it should show the intention (expressly or impliedly) to bind the firm.

Admission Section 23

A partner's admission concerning the affairs of the firm is evidence against the firm.

Notice Section 24

Notice to a partner is notice' to the firm, except in case of fraud on the firm committed by or with the consent of the partner.

Liability Section 25

Every partner is jointly (with other partners) and severally liable for all acts of the firm done while he is a partner.

Wrongful Acts Section 26

The firm is liable for any injury or loss caused to a third party by a wrongful act of a partner, in the ordinary course of the business of the firm. This is known as vicarious liability.

Mis Application Section. 27

The firm is liable to make good the loss in the following two cases

(1) A partner, acting within his apparent authority, receives money or property from a third party and misapplies it, and

(2) A firm, in the course of its business receives money or property from a third party and the money or property is misapplied by any of its partners while it is in the custody of the firm.

Transfer of Interest Section 29

A partner may transfer -his interest to a third person, either absolutely or as a security. The transferee is not entitled -

(i) To interfere in the conduct of the business,

(ii) To require accounts, and

(iii) To inspect the books of the firm.

The transferee is entitled to receive the share of profits.. He shall accept the account of profits as agreed to .by the partners. Transfer of whole of his interest by a partner is a ground for dissolution of the firm through court. If the firm is dissolved, the transferee is entitled to receive the share of-the assets of the firm to which the transferor partner is entitled. Now, the transferee is entitled to an ·account from the date of dissolution.

Lesson - 3

INCOMING AND OUTGOING PARTNER

INCOMING AND OUTGOING PARTNER - SECTION 31

The consent of all the .existing partners is required, to introduce a person as a partner in a firm. This is subject to a contract between the partners.

Retirement Section 32

A partner may retire

(a) With the consent of all the other partners

(b) According to an express agreement entered into between the partners, and

(c) If the partnership is at will, by giving notice in writing to all the other partners of his intention to retire.

Discharge

A retiring partner may be discharged from any liability to any third party for acts of the firm done before his retirement by an agreement made by him with such third party and the partners of the reconstituted firm. Such agreement.may be implied by a course of dealing between such third party, after he had knowledge of the retirement and the reconstituted firm. The retiring partner and the partners continue to be liable to third parties until public notice is given of the retirement. A dormant' partner may retire without giving public notice.

Election - An illustration

A, B and C are partners in a firm, C retires. D is admitted as a new partner X deals with the firm. X bas no notice of the change. X may elect to make A, B, C liable or A, B, D liable. But he cannot make A, B, C, and D liable.

Expulsion Section 33

Power to expel a partner may be conferred by an express agreement. This power can be exercised by a majority of the partners. This power shall be exercised -

i) In good faith,

ii) With great care, and

iii) For the benefit of the firm

The partner sought to the expelled shall be given a reasonable opportunity to make his representation. A wrongful expulsion is wholly inoperative. The expelled partner may claim reinstatement in his rights.

Insolvency of a Partner Section 34

Where a partner in a firm is' adjudicated an insolvent he ceases to be a partner from the date of the order of adjudication. This is so whether the firm is dissolved or not.

Section 41

It deals with compulsory dissolution of a firm. If all the partners or all except one are adjudged insolvent.

Section 42

It deals with dissolution of a firm if one partner is adjudged an insolvent. This is subject to contract to the contrary. So, a firm may or may not be dissolved if one partner is adjudicated an insolvent. The firm is dissolved on the date of order of adjudication. This is subject to contract to the contrary.

Where the firm is not dissolved

(1) The estate of the insolvent partner is not liable for any act of the firm done after the date of the order of adjudication.

(2) The firm is not liable for any act of the insolvent done after the date of the order of adjudication.

Death Sections 35 & 42

The death of a partner results in the dissolution of the firm. This is subject to a contract to the contrary. Where the firm is not dissolved by the death of it a partner, the estate of the deceased partner is not liable for any act of the firm done after his death.

Out-Going Partner Rights - Section 36

An out-going partner may be one of the following

(1) A retired partner,

(2) An expelled partner, and

(3) A partner who is adjudged an insolvent and the partnership agreement provides for continuance of the firm.· Again an insolvent can take part in a business after he is discharged i.e. to say, freed from all his debts.

An Outgoing Partner may

(i) Carry on a business competing with that of the firm, and

(ii) Advertise such business.

However, subject to a contract to the contrary, he may not

(1) Use the firm name.

(2) Represent that he is carrying on the business of the firm (i.e. old firm) and

(3) Solicit the 'customers of the firm.

Agreement in Restraint of Trade

This provision over-rides section 27 of the Contract Act.

A partner may make an agreement. With his partners that on ceasing to be a partner he will not carry on any business similar to that of the firm

(1) Within a specified period or (2) Within specified local limits,

Such agreement shall be valid if the restrictions imposed are reasonable.

Right of Outgoing Partner to Share Profit.-Section 37

Sometimes it may happen that the capital of an outgoing partner or a' deceased partner may be left in the firm's business without any 'final settlement of accounts. The continuing partners or surviving partners 'may carry on the business with the property of the firm.

In that case the outgoing partner or the representative of the deceased partner has an option (subject to a contract to the contrary)

(1) He is entitled to such share of property made since he ceased to be a partner as may be attributable to the use of his share of the property of the firm or

(2) He is entitled to interest at the rate of six percent per annum on the amount of his share in the property of the firm.

If the surviving or continuing partner has an option to purchase the share of the· deceased or outgoing partner and if the option has been exercised, then the estate of the deceased partner or the outgoing partner is not entitled to any further share of profit.

Continuing Guarantee Section 38

A continuing guarantee given-

(1) To a firm or

(2) To a third party in respect of the transactions of the firm is revoked as to future transactions from the date of change in the constitution of the firm.

Lesson -4
DISSOLUTION OF A PARTNERSHIP FIRM

Dissolution of a Firm

Like a marriage, it is easy to create a partnership. But it may be difficult to dissolve it. The process may be slow and painful. Two persons may agree to carry on a business in partnership with enthusiasm, when a dispute arises they may agree to separate. Their agreement rests there. For, when dissolution commences, again there may be a dispute in the settlement-of accounts. .

Dissolution of Partnership / Firm (Section 39)

A distinction is ·drawn between the dissolution of a partnership and dissolution of a firm. The distinction lies in the demise of a firm.

The dissolution of partnership between all the partners of a firm is called the dissolution of the firm" Dissolution of partnership happens when some partners continue the business of the firm.

Illustration

A, B and C are partners in a firm called X & Co. C. dies. The death of coperates as dissolution of the firm, however this is subject to a contract between the partners. The partnership agreement may provide that death of a partner shall not have the effect of dissolving of a firm. In which case A and B will continue as partners in the firm X & Co.

Dissolution may take place by

(1) Act of parties, (2) Operation of law, and (3) Order of court

Modes of Dissolution

There are five modes of dissolution.

1. Mutual consent - Section 40

A firm is created by an agreement. Hence a firm may be dissolved -

(a) with the consent of all the partners, and

(b) in accordance with a contract between the partners

2. Compulsory -Section 41

A firm is dissolved

(1) By the adjudication of all the partners or of all the partners but one as insolvent (all except one. One person cannot constitute a partnership).

(2) By the business of the firm becoming unlawful

(3) It becomes unlawful to' carry on the business in partnership

Illustration

A and B are partners. B is a friendly alien. There is out-breaking of war. B becomes an enemy alien. The partnership is dissolved. .

Suppose a firm carries on two adventures. One adventure becomes unlawful. If it be can separated from .the other adventure (lawful), it' shall not cause the dissolution of the firm.

3. Contingency Section 42

The following Contingencies shall have the effect of dissolving a firm. However this is subject to a contract to the contrary. In other words the partnership agreement may provide that the following contingencies shall not have the effect of dissolving a firm. Otherwise the firm will be dissolved.

The contingencies are -

(1) Death of a partner,

(2) Adjudication of a partner as an insolvent,

(3) If constituted for a fixed term, by the expiry of that term, and

(4) If constituted to carry out one or more adventures on the completion of the adventures.

4. Duration at Will - Section 43

It the partnership is at will, the 'firm may be dissolved, by any partner, by giving a notice in writing to all the other partners of his intention to dissolve the firm. The firm is dissolved from the date mentioned in the notice as the date of dissolution. If no such date is mentioned, the firm is dissolved from the date of communication of the notice.

5. Dissolution by Court - Section 44.

The court may order the dissolution of a firm on any of the following grounds

a. Insanity

That a partner has become of unsound mind. The suit may be filed by the other partners or by the next friend (guardian) of the 'partner who has become of unsound mind.

b. Incapacity

That a partner has become in any way permanently incapable of performing his duties as a partner. Thus where a partner, is afflicted with a disease. But recovers before the trial of the suit, the court will not order dissolution.

c. Misconduct

That a partner is guilty of conduct, which is likely to affect prejudicially the carrying on of the business. The nature of the business shall be taken into account. The conduct need not be directly connected with· the business. The test is objective. Is' the conduct likely to affect the business of the firm? Is the question to be decided? .

d. Breach of Agreement

That a partner Wilfully or persistently commits breach of agreements relating to the management of the' affairs of the firm or the conduct of its business. A partner willfully failed to enter sums of money received into the accounts. This has happened several times. This was held to be a sufficient ground for dissolution.

e) Impracticable

That a partner conducts himself in matters relating to the business that it is not reasonably practicable for the other parties to carry or business in partnership with him.

f. Transfer of Interest

That a partner has in any way transferred the whole of his interest in the firm to a third party or allowed it to be sold in the recovery of land' revenue or has allowed his share to be attached in the execution of a decree.

Note on grounds 2 to 6 the suit may be filed by the other partner *Is* i.e. to say other than the offending partner.

g. Loss

That the business of the firm cannot be carried on except at a loss. Loss should be due, to an inherent defect in a business. It should not be due some special circumstances. Thus a partner could not attend to the business due to' illness. The firm was running at a loss during that period. The business could make profit if proper attention was given. Dissolution was not ordered. **Handyside vs. Campbell**, the suit may be filed by any partner.

h. Just and Equitable

On any other ground which renders it just and equitable that the firm should be dissolved. This ground shall not be read *ejusdem generis* (of the same kind) With the specific grounds (no. 1 to no. 1) this' is an indepeadent ground. The court may, in its discretion, order the dissolution of a firm when the court f`1 inds that it is not worthwhile to keep the firm alive. Thus in ***abbot* Vs. *Crump*** one partner was having intimacy with his co-partner's wire. 'This Was" held to be a fit ground for dissolution.

Liability, after dissolution - Section 45

Even after the dissolution, the partners continue to be liable as such to third parties for, any act done by them until public notice is given of the dissolution. The act done should have been act of the firm if done before the dissolution. Public notice is given by giving a notice the register of firms by publication in the official gazette and at least in one (regional language) newspaper circulating in the district where the firm has its principal place of business. The estate of deceased partner, an insolvent partner, a dormant partner is not-liable for acts done after the date on which he ceases to be a partner.

Winding up – Section 46

On the dissolution of a firm every partner or -his representative is entitled as against all the others (or their representatives)

(i) To have the property of the firm applied in payment of the debts and liabilities of the firm and

(7) To have the surplus distributed among the partners or their representatives according to their rights (representatives come into the picture in the case of death of a partner)

Continuation of Authority - Section 47

Even after dissolution, the authority of each partner to bind the firm and the other mutual rights and obligations of the partners continue.

(1) So far as may be necessary to windup the affairs of the firm and

(2) To complete the transactions begun but unfinished at the time of the dissolution. However the firm is in no case bound by the acts of a partner who has been adjudged an insolvent. But if a person represents himself or knowingly permits him to be represented as a partner of the insolvent, he will be liable of the acts of the insolvent.

Settlement of Accounts Section 48

In settling the, accounts of a firm after dissolution the rules should be observed.
This is subject to an agreement between the partners.

(1) Losses including deficiencies of capital sha1l be paid first out of profits, next out of capital and lastly if necessary by the partners individually in the proportions in which they were entitled to share profits.

(2) The assets of the firm, including any sums contributed by the partner to make up deficiencies of capital shall be application the following manner and order:

a) In paying the debts of the firm to third parties.

b) In paying to each partner ratably what is due to him from the firm for advances as distinguished from capital.

c) In paying to each partner ratably what is due to him on account of capital.

d) The residue, if any shall be divided among the partners in the proportion, in which they were entitled to share profits.

Case law

Sub-section (1) was explained by Joyce J. In Garner VS. Murray. One of the partners was unable to contribute his share of capital loss. The learned judge held that the other partners were net liable to make good his share so that his trustee is bankruptcy could not obtain any further assets in this way. Instead the loss will be borne by the solvent partners when the final distribution occurs.

Joint and separate debts - Section 49

This applies when there are joint debts due from the firm and also separate debts due from any partner. The property of the firm shall be applied in the first instance in payment of the debts of the firm. If there is any surplus, then the share of each 'partner shall be applied in payment of his separate debts or paid to him. The separate property of any partner shall be applied first in the payment of his separate debts and the surplus (if any) in the payment of the debts of the firm.

Personal profit after dissolution - Section 50

Regarding personal profits made by a partner during the active life of the firm, same rule applies to transactions undertaken by any .surviving partner or by the representatives of a deceased partner after the firm is' dissolved on account of the death of a partner and before the affairs have been completely wound up.

However, if on dissolution a partner has brought the goodwill of the firm, he may use the firm name even before the affairs of the firm have' been completely wound up.

Return of Premium -Section 51

This applies when

(1) A partner has paid a premium,

(2) The partnership is for a fixed term, and

(3) The firm is dissolved before the expiry of the term otherwise than by the death of a partner.

The partner who has paid the premium shall be entitled to repayment of the premium or such part of the premium as maybe reasonable.

Regard shall be had

(1) To the terms upon which he became a partner and

(2) The length of time during which he was a partner.

However, the partner will not be entitled for repayment in the following cases

(1) The dissolution is mainly due to his own misconduct or

(2) The dissolution is in pursuance of an agreement, which does not contain any provision for the return of the premium or' any part of it.

Rescission of Account of Fraud or Misrepresentation - Section 52

This arises when a contract creating partnership is rescinded on the ground of fraud or misrepresentation of one of the partners. Apart from any other right he may have, the partner who rescinds has the following rights -

1) A lien on a right of retention of the surplus of the assets of the firm remaining after the debts of the firm have been paid for any sum paid by 'him for the purchase' of a share in the firm and for any capital contributed by him;·
2) To rank as a creditor of the firm in respect of any payment made by him towards the debt of the firm and

3) To be indemnified by the partner/s guilty of the fraud or misrepresentation against all the debts of the firm.

Note: He cannot exercise these rights against third parties. It is no defence against a third" party that-he was fraudulently induced to become a partner.

Right of Restraint - Section 53

This applies after a firm is dissolved and before the affairs have been completely wound-up. Every partner or his representative may restrain any other partner or his representative from

(l) Carrying on a similar business in the firm name or

(2) From using any of the property of the firm for his own benefit.

This above provision is subject to a contract to the contrary.

This does not affect the right of a partner or his representative to use the firm name, if he has brought the goodwill of the firm.

Agreement in Restraint of Trade Section 54

This applies to an agreement made -

(1) Upon dissolution of the firm or

(2) In anticipation of the dissolution.

The partners may agree that all or some of them will not carry on a business similar to that of the firm-

(1) Within a specified period or

(2) Within specified local limits. Such agreements are valid if the restrictions imposed are reasonable.

Goodwill after Dissolution Sale - Section 55

In settling the accounts of the firm after dissolution, the goodwill shall be included in the assets. This is subject to a contract between the partners. It may be· sold either separately or along with other property of the firm.

Where the goodwill is sold after dissolution a partner may -

(1) carry on a business competing with that of the buyer and

(2) advertise such business,

However Subject to an agreement between him and the buyer he may not-

(1) Use the firm name,

(2) Represent him as carrying the business of the firm, and

(3) Solicit the customers (before dissolution) of the firm.

Upon the sale of goodwill of a firm any-partner may enter, into a agreement with the buyer that such partner shall not carry on any business similar to that of the firm, within a specified period or within specified local-limits, Such agreements are valid if the restrictions, imposed are reasonable.

Part- B

THE SALE OF GOODS ACT

Lessen - 1

Sale - What is it? Agreements to Sell

Scope of Sale of Goods Act

This act deals with only one kind of transfer namely "Sale". This act is not concerned with **"Exchange"** or hire - purchase or contract for labour.

Again the act deals with **"movable goods"**

Movable goods are every kind of movable property and includes

(1) Stocks and shares

(2) Growing crops grass; and

(3) Things attached to or under the contract of sale. Thus a coconut grove sold as such is immovable property. If the trees are cut and sold they are movable goods.

Goods shall be in existence on the date of sale. Future goods are goods to be manufactured or produced or acquired by the seller after the contract of sale is made. A sale of future goods will only amount to an agreement to sell as and when the goods come *into* existence.

An **'actionable claim'** is a claim for a debt and **'money'** are not goods. **"Specific goods" means** goods identified and agreed upon at the time a contract for 'sale is made. Thus I sell a cycle, a fridge or a 2- in-I player to you.

Suppose I have four cycles and agree to sell one cycle to you. You know that I will sell a cycle to you. This is specific. But you do not know which cycle I will sell. Now the goods are unascertained. If I keep one particular cycle apart, the goods are now ascertained.

Definition of Sale - Section 4

Under the. Sale of Goods Act, **'property'** means **'ownership'**. **'Sale'** means transfer of property in the goods for a price. The consideration for a sale is the price. However payment of price does not decide a sale. **Example** Credit sale. Again delivery of possession may be postponed.

Example: I sell my watch to you: You have become the owner of the watch. You tell me that you will take the watch after one week. Even then, the sale has taken place.

So, in a sale, price may be paid, promised to be paid, partly' paid & partly promised to be paid. You and I are joint owners of a cycle, having equal shares. I may sell my half share to you. Thus there can be a sale between one part owner and another.

The distinction between a sale and agreement to sell are as follows

S.No	Sale	Agreement
1	Transfer of property in the goods.	Transfer to take place at a future date or subject to the fulfilment of a condition.
2	Creates a *jus-in-rem* (a right which can be exercised against the whole world):	Creates a *jus-in-personam*
3	If the buyer fails to pay the price, the remedies available to the seller are- (i) Personal remedy namely suit for the price (ii) Remedy against the goods namely (a) Unpaid vendor's lien (b) Stoppage in transit (c)Limited right of resale	If the buyer refuses to accept the goods and pay the price the only remedy is personal Remedy namely a suit for damages.
4	If the seller commits a default, the buyer has' the following remedies: (a) Personal 'remedy i.e, suit for damages. (b) Remedy against the goods, Since the buyer has become the owner in most Cases, he can follow the goods in the hands of third	Under similar circumstances only personal remedy namely suit for damages' is available.
5	If the goods are lost or destroyed, since the buyer has become, the owner be should bear the loss	Since the seller continues to be the owner, should bear the loss
6	If the seller becomes an insolvent since the buyer has become the owner of the goods, the official assignee, is not entitled for the goods.	Since the seller Continues to be the owner A. is entitled for the goods.
7	If the buyer becomes an insolvent, since the buyer has become the owner, the O.A. is entitled for the goods.	Since the seller continues to be the owner, the O.A. is not entitled for the goods.

In an Agreement to Sell, the transfer of property in the goods -

(i) Is to take place at a future time or

(ii) Subject to the fulfillment of a condition.

An agreement to sell becomes a sale when the time elapses or when the condition is fulfilled. In a contract of labour no goods are sold. A hire-purchase agreement is not an agreement to sell or buy. It is not, a sale where price is paid by instalrnents.

In a Hire Purchase agreement possession of the goods is delivered to the hirer (ultimately, buyer). He pays hire charges, which is calculated on the price and interest. He pays the charges in installments, when he pays the last installment; he gets the option of buying the goods.

By the Hire Purchase agreement, he becomes the owner of the goods. However during the payment of installment he has an option to terminate the contract and return the goods.

How Sale is Made - Section 5

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

A contract of sale may be made in Writing or by word of mouth, or partly in writing and partly by word of mouth or may be implied from the conduct 'of the parties.

Goods Perishing

(i) Before Making the 'Contract

There is a contract for the sale of specific, goods. At the time when the contract was made, without the knowledge of the seller goods, have perished, or become so damaged as no longer match to their description. The Contract *is."void ob-initio".* Section, 8 = section 20 of the Contract Act.

(ii) After Agreement but Before Sale

There is an agreement to sell specific goods. Subsequently, before the sale (i:e. before the risk passes to the buyer) the goods, without the fault of the seller fail to answer to their description. The agreement is thereby avoided i.e. **"becomes void".**

Section 8 = section 56 of the Contract Act.

The Price Sections 9 and 10

The price may be fixed

(1) By the contract or

(2) May be left to be fixed in the manner thereby agreed or.

(3) May be determined by the course of dealing between the parties. Otherwise the buyer shall pay a reasonable price.

There may be an agreement between the seller and the buyer that the price is to be fixed by the valuation of a third party. If such third party cannot or does not make such valuation, the agreement is thereby avoided (becomes void) If the goods or part of the goods have been delivered to and appropriated by the buyer he shall pay a reasonable price. **If such third party is prevented from making the valuation**

(1) By the fault of the seller the buyer may file a suit against the seller for damages or

(2) By the fault of the buyer the seller may file a suit against the buyer for damages.

Lesson - 2

CONDITIONS AND WARRANTIES

Condition and Warranty - Sections 11 to 17 Time

Stipulations as to· time of payment are not deemed to be of the essence of the contract of sale. This is subject to a different intention. Whether any other stipulation as to time (for e.g. Delivery) is of the essence of the contract or not depends on the terms of the contract.

Definition - Section 12

In every contract of sale there will be certain stipulations. Some stipulations go to the root of the transaction. They are fundamental in character. They are called conditions. Condition is a stipulation essential for the main purpose of the contract. The breach of a condition gives rise to a right to the buyer to repudiate the contract and reject the goods. Warranty is also a stipulation. It. is not fundamental-in character; it is only collateral to the main purpose of the contract. The breach of a warranty gives rise to' a right to the buyer to claim damages. The buyer cannot repudiate the contract and reject the goods. Whether a stipulation in a contract of sale is a condition or a warranty depends upon the construction of the contract. A stipulation may be a condition though called a warranty in a contract.

Condition as a Warranty - Section 13

-This section consists of two parts. The first part is an option to' the buyer. The second part makes it compulsory for the buyer-

(1) The buyer may waive (give up) a condition and elect (choose) to treat a breach of the conditions as a breach of .warranty. In other words, when there is a breach of condition, the buyer 'may not repudiate the contract. He may claim damages retaining the goods.

(2) In the case' of a non-severable contract of sale, if the buyer has accepted the goods or part of the goods the buyer shall treat a breach of condition as a breach of warranty. A breach of condition (can only be) treated as a breach of warranty. He cannot repudiate the contract and reject the goods.

This is subject to a contract, express or implied, to that effect. A fulfillment of a condition or warranty may' be excused by law by reason of impossibility or otherwise.

Implied Conditions and Warranties - Sections 14 to 17

Even though the parties have not stated in so many words, the law implies that in every contract of sale there should be certain conditions and warranties.

Implied Warranties Sections 14 (b) & 14 (c)

Unless there is a different intention in every contract of sale, there is an implied warranty.

(1) That the buyer shall have and enjoy quiet possession of the goods.

(2) That the goods shall be free from any charge or encumbrance 'in favour of a third party not declared or known to the buyer before or at the time when the contract is made.

Implied Condition as to Title Section 14 (a)

Unless the circumstances are Such as to show a different intention:

There is an implied condition in a sale, that the seller has a right to sell the goods. In an agreement to sell, the implied condition is the seller will have a right to sell the goods at the time when property is to pass (i.e. when the sale takes place).

Niblett Vs. Confectioner's Materials Co.

A sold to B. tins of condensed milk, labelled "Nissly brand" This was an infringement of N company's trade mark. A had no right to sell in that brands name. This was a breach of a condition. A could either reject the goods or treat the breach of condition as a breach of warranty and claim damages.

Rowland vs. DivalI

A sold a car to B who used it for several months. Subsequently it was discovered that is was a stolen car. The car really belonged to C. Since A has no title to the car, he could not confer title .upon B. The title continued to vest with C and C. could recover the car from B. A had no right to sell the car. This was breach of an implied condition. Since B had, to surrender the car to C, he could treat the breach of condition as a breach of warranty and chum damages from A. The damages were held to be the price of the car, even though B used it for several months.

Difference between Condition and Warranty

S. No	Aspect	Condition	Warranty
1	Relationship to main purpose	It is essential to the main purpose of the contract	It is subsidiary to the main purpose of the Contract
2	Rights of the aggrieved party	Beach of condition gives the aggrieved party a right to repudiate the contractor and get damages	Breach of warranty gives the aggrieved party a right to claim damages only
3	Legal effect of breach	Breach of condition will affect the legality of the contract	Breach of warranty will not affect the legality of the contract
4	Treating condition as warranty	In certain circumstances a breach of condition may be treated as breach of warranty	A warranty can never become a condition.
5	Discharge on breach	In case of breach of condition the aggrieved party is free to discharge his promise	In case of breach of warranty the aggrieved party is not free to discharge his promise.

Sale by Sample - Sections 17

A contract of sale is a .contract for sale by sample where there is a. term in the contract, express or implied to that effect.

In the case of a contract of sale by sample there 1s an implied condition

1) That the bulk shall correspond with the sample in quality
2) That the buyer' shall have a reasonable opportunity of comparing the bulk with the sample in quality;

That the goods shall be free from any defect, rendering them unmerchantable which would not be apparent on reasonable examination of the sample.

Lorymer vs. Smith

A contracted to sell by sample two parcels of wheat one containing 700 bushels (old measure) and the other 1400 bushels. He-allowed inspection of the smaller parcel but refused inspection of the larger parcel. Held, the buyer was entitled to refuse to take any of the wheat.

The right to inspect may be excluded by the express terms of the contract. For e.g. a buyer may not be entitled to inspect before payment.

According to Lord Mac Naughten

"The offer of sample is to present to the eye the real meaning and intention of the parties with regard to the subject matter of the contract which owing to the imperfection of language, it may be different or impossible to express in words. The seller is not responsible for any patent defects i.e. to say which the buyer could have examined 'through naked eyes. However, the seller is responsible for any latent (hidden) defects".

Sale by Description - Section 15

This section consists of two parts. The first part deals with sale by description and the second part with sale by sample as well as by description. Sample is addressed to the eyes and description is addressed to the ears. Where the goods are sold by description it is an implied condition that the goods shall correspond with the description.

Thus if A sells rice to B, he cannot deliver wheat to B.

Illustration

A sells to B twelve bags of waste silk. There is an implied condition that the silk shall be such as is known in the market as "waste silk". Otherwise B is entitled to reject the goods.

Bowes VS. Shand

A agrees to sell to B rice to be shipped at Madras during the months of March and/or April about 300 tons by the ship named Rajesh of Cochin. Part of the cargo is shipped in Feburary and part in March. B may refuse to accept any of the rice, the goods not corresponding with description.

Package is a description Thus in **Jonnal Kasturchand vs. Hassan Ali Khanbhai** : A agreed to sell to B tea in chests containing 8 pounds of tea. A tendered chest containing 76 pounds of tea.

Held, B was entitled to reject the goods.

Sale by Sample and Description

If the sale is by sample as well as by description. It is not sufficient that the bulk, of the goods correspond with the sample. It shall correspond with the description also.

Otherwise it is a breach of an implied condition.

Illustrations

1. A sells to B Jawa sugar and shows him a sample of it. A delivers to B sugar which corresponds with the sample. But, it is found that it is not Jawa sugar. This is a breach of an implied condition. B may reject the goods or 'treat the breach of condition as a breach of warranty and claim damages from A.
2. A buys by sample 100 bales of "Fair Bengal" cotton. After having inspected the bulk, the cotton *is* found to be not known in the market as "Fair Bengal". A may reject the goods.

Implied condition as to Quality or Fitness - Section 16

The general principle of contract is *"caveat emptor"*. One party to a contract need, not disclose to the other party all the material factors known to him, which Will enable the other party to enter into a contract. Each party shall make up his own mind. This principle, is extended, under the sale of goods, act: The buyer shall make up his mind about the quality of the goods or fitness for a particular purpose. Caveat emptor under this act literally means, **"buyer beware"**.

Hence, there is no implied warranty or condition as to the quality of fitness for any particular purpose of goods supplied: However there are exceptions to this rule.

Three conditions must be fulfilled

(1) The buyer makes known to the seller (expressly or by implication) the particular purpose for which he buys the goods.

(2) Thereby the buyer relies upon the skill and judgment of the seller.

(3) The goods are of a description, which it is in the course' of the seller's business to supply (whether he is a manufacturer or producer or not).

However, in the case of a sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose.

(a) Goods are bought by description,

(b) The seller should deal in goods of that description (whether he is the manufacturer or producer or not)

Now there is an implied condition that the goods shall be of merchantable quality (merchantable = saleable).

However, if the buyer has examined the' goods, there shall be no implied condition as regard defects, which such examination ought to have revealed (Patent as opposed to latent defects).

An implied warranty or condition as to quality on fitness for a particular purpose may be annexed by the usage of trade.

Note the scope of this section is very much narrowed on account of "the consumer protection act".

Case Laws

Priest Vs. Last

A goes to a chemist's shop and asks for a hot water bottle. He is shown a bottle, which, the· chemist says, will not stand boiling water, but is meant for hot water. A buys the bottle. While using it, it bursts. A is injured. This is a Sale for a particular purpose. There is a breach of condition. The seller is liable in damages for a breach of warranty.

Grant Vs. Australian Knitting Mills

A retail dealer in woollen goods sell underpants. He ought to know they are to be worn next to skin.

Frost Vs. Aylesbury Dair Co

Buys milk from a milk dealer. The milk dealer gives a printed statement to a. It states that the milk was free from the germs of disease. In fact, the milk contains typhoid germs. As wife is infected and dies, the milk was not fit for human consumption. This is a breach of an implied condition. The milk dealer is liable in damages for a breach of warranty.

Baldry Vs. Marshall

A asks for a car which is suitable for touring' purposes. The motor car dealer shows a car with a brand name. A places order for the car. The car is delivered to A. It was found that the car was not fit for touring purposes. A is entitled to reject the car and to recover the purchase money. A does not buy it under its trade name. A requires the car for a particular named purpose. .

Jackson Vs. Rolax Motor and Cycle Co.

A ordered motor horns from a manufacturer of horns. The horns were supplied. They were, scratched and damaged owing to bad packing.

Morelli Vs. Fitch and Gibbons

A sale of a bottle of "stone's ginger wine" by a public house is a sale of goods by description. If the bottle' breaks while opening with a corkscrew by reason of a buyer, there is a breach of condition as to merchantable quality. The buyer is entitled to damages.

Griffiths Vs. Peter Conway Ltd.

It was held that the seller was not liable in damages. The seller was a retail trader. He sold a Harris tweed coat to a buyer. The buyer's skin was abnormally sensitive. Hence the seller was not liable in damages.

Wallis Vs. Russel

It was held that if you buy crabs they are meant for human consumption. Otherwise it is breach of an implied condition.

Lesson-3

TRANSFER OF PROPERTY, RISK AND TRANSFER OF TITLE

Transfer of Title (sections 18 to 24)

When does the Property in the Goods pass to the Buyer?

The question simply means, "When does a sale take place?

There are seven rules regarding this

Section 18 - Rule 1

This is a contract for the sale of unascertained goods. Property in the goods is transferred to the buyer when the goods are ascertained.

Section 19 - Rule 2

This is a contract for the sale of specific or ascertained goods. The property in the goods is transferred to the buyer at such time the parties intend it to be transferred. For the purpose of ascertaining the intention of the parties the following factors shall be taken into account.

(1) The terms of the contract,

(2) The conduct, of the parties, and

(3) The circumstances of the case.

Section 20 - Rule 3

This is an unconditional contract for the sale of specific goods in a deliverable state. The property in the goods passes to the buyer when the contract is made.

It is immaterial whether the time of payment of the price or the time of delivery of the goods, or both is postponed.

Section 21 - Rule 4

This is a contract for the sale of specific goods. However the seller is bound to do something to the goods for the purpose of putting the goods into a deliverable state. The property in the goods passes to the buyer when such thing is done and the buyer has notice thereof.

Illustration

A, a ship builder, contracts to sell to B, for a stated price,' a vessel which is lying in A's yard. The vessel is to be rigged and fitted for voyage and the price to be paid on delivery. The property in the vessel passes to B when the vessel has been, rigged and fitted and notice thereof is given to B.

Section 22 - Rule 5

This is a contract for the sale of goods in a deliverable state, However, the seller is bound to weigh, 'measure, test or de some other act or thing in respect of the goods for the purpose of ascertaining the price. The property in the goods passes to the buyer when such act or thing is done and the buyer has notice thereof.

Illustration

1. You buy one kilo of vegetable. The vendor weighs one kilo of vegetable and puts it in your basket. The vegetable is yours. You have to pay for it.
2. You select a TV set. The shopkeeper tests the T.V and tells you it is ok, the property in the T.V set passes to you.

Section 23 - Rule 6

This 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 such description are unconditionally to the contract, either… (1) By the seller with the assent of the buyer, or

(2) By the buyer with the assent of the Seller.

Such assent may be express or implied .It may be given either before or after the appropriation is made.

Section 24 - Rule 7

Suppose the goods are delivered to the buyer on approval or "on sale or return" or ether similar terms, the property in the goods passes to the buyer-

(1) When the buyer signifies his approval or acceptance to the seller or
(2) When the 'buyer does any act adopting the transaction or
(3) When the buyer retains the goods even after the stipulated time (or reasonable time) without giving notice of rejection.

Delivery to a Carrier: Section 23 (2)

The seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer without right of disposal, the seller is deemed to have unconditionally appropriated the goods to the contract.

Illustration

A is the owner of a sugar mill. B orders of two tons of sugar. A keeps two tons of sugar separately, in his godown. B informs A that he will take delivery within a week. By this appropriation by A and assent by B, the property in the sugar (along with the risk) passes on to B. B orders two machines to be made by A. A makes the machines and .packs them. A informs B that they are ready and inquires him by what conveyance they should be sent. Before B could reply, A becomes insolvent. The official assignee claims the machine as still belonging to a B claims the machines as his property. In this case, A had made the appropriation. The assent of B was not, given. So, the property has not passed on to B. The property remained with A. So, the official assignee was entitled for the machines.

Adoption

If the buyer pledges the goods, he has adopted the transaction. The property passes to him. This is so even if the pledge is in fraud of the seller.

Reservation of Right of Disposal - Section 25

In the case of a contract for the sale of specific goods of where goods are subsequently appropriated to the contract, the seller may by the terms of the contractor appropriation reserve the right of disposal of the goods until certain conditions are fulfilled. In which case, even-though the goods have been delivered. to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer, the .property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

Where goods are .shipped and by the bill of loading the 'goods are deliverable to the order of the seller or his agent, the seller is prima facie deemed to reserve the right of disposal.

The seller may draw on the buyer for the price and transmit the bill of exchange and the bill of lading to the buyer for payment or acceptance. If the buyer doesn't accept the pill of exchange, he shall return the bill of lading.

Risk Prima-Facie follows Ownership Section 26

The general rule is the owner of the goods shall bear the loss if the goods are lost or destroyed. Until a sale takes place, the seller is the owner of the goods. Hence, the seller should bear the loss if the goods are lost or destroyed. This is so even if the goods are in the possession of the buyer.

After a sale takes place, the buyer becomes the owner of the goods. Hence, the buyer should bear the loss if the goods are lost or destroyed. This is so even if the goods are in the possession of the seller.

However, there are two exceptions to this rule.

1. The seller arid buyer may agree to separate risk from ownership. Thus the parties may contract that risk shall pass on delivery irrespective of the passing of the property.
2. The 'party (either 'seller or buyer) who "Causes delay in the delivery shall bear the loss" arising out of such fault.

F.O.B. Contracts- Free On Board

The property in the goods passes to the buyer only after the goods have been loaded onboard the ship.

C.I.F. Contracts - Cost Insurance Freight

This is to guard against the insolvency of the parties and the loss of the goods. The seller will insure the goods and deliver them to the shipping company. The bill of loading, insurance policy and the invoice will be sent to the bank. The buyer will have to receive the documents from the bank by paying the price (including cost of the goods, premium of insurance and freight).

In the above method, the seller continues to be me owner until the price is paid. The buyer becomes the owner when he obtains the documents of title to the goods. If, in the meantime, the goods are lost or destroyed, neither the seller nor .the buyer will be put to loss. The claim can be made against the insurer. A C.I.F. contract is a sale of goods and not a sale of document.

Nemo dat quod non habet - Exceptions

Sale by Non-Owner Sections 27, 30 and 54'

The maxim is *"nemo datquod non habet'*. This literally means, "No one gives what he has not". A person cannot confer a right upon another unless he himself has that right.

Under the Sale of Goods Act - Section 27

To confer a valid title upon the buyer, the seller should be the owner of the goods or should have authority to sell the goods.

Exceptions

Exceptions for this rule are circumstances when buyer is able to confer a valid title to the goods even though the seller is not the owner or does not have authority to sell the goods.

1. Estoppel by Conduct Section 27

Here, the true owner is precluded by his conduct from denying the authority of the seller to sell the goods. This may happen when the true owner leaves· the goods in the possession of the seller and by his conduct represents that the seller has authority to sell the goods.

2. Sale by Mercantile Agent - Section 27

A mercantile agent acting in the ordinary course of business 'can always confer valid title upon the buyer. This is the rule and not an exception. The exception arises only when the mercantile agent lacks or exceeds .authority. Three conditions have to be fulfilled.

(a) The mercantile agent should be in possession of the goods with the consent of the owner.

(b) He should sell the goods in the ordinary course of business.

(c) The buyer should buy the goods in good faith and without notice of lack of authority of the mercantile agent.

If all the conditions are fulfilled, the buyer will get valid title to the goods even if the mercantile agent exceeds or lacks authority.

3 Sale by a Joint Owner - Section 28

(1) One joint owner should be in possession of the goods by the permission of the co-owners.

(2) He should sell the goods to a buyer who should buy the goods in good faith and without notice that the seller has no authority to sell.

4. Sale under a Voidable Contract – Section 29

A voidable contract is essentially a valid contract until it has been rescinded. So, a third party, who takes the goods in good faith and before the contract has been rescinded, gets valid title to the goods.

The requirements are -

(1) The seller of goods should have obtained possession of goods under a voidable contract.

(2) The contract should not have been rescinded at the time of sale.

(3) The buyer should buy the goods in good faith and

(4) The buyer should not have notice of the Seller's defect of title.

5. Resale by a Seller-Section 29

(1) The seller should continue to be in possession of the goods after the original sale.

(2) He should sell the goods to a subsequent buyer.

(3) The Subsequent buyer should buy the goods in good faith and without notice of the previous sale.

Now, the subsequent buyer gets valid tide to the goods as against the original buyer.

6. Sale by buyer in Possession on Section-30 (2)

(1) The buyer obtains possession of the goods, with the consent of the seller, before the property has passed to him,

(2) The buyer seI1s the goods to another person,

(3) Such person receives the-goods in good faith and without notice of any right on lien which the original seller had in respect of the goods.

Now, such person gets valid title of the goods.

Note the common elements for all the above exceptions are

(1) Possession with the seller;

(2) Good faith on the part of the buyer, and

(3) Buyer has no notice of defect of title.

7. Unpaid Vendor's Right of Resale - Section 54 (3)

Where an unpaid vendor having exercised his right of lien, resells the goods the' subsequent buyer will get valid title as against the original buyer.

Note strictly speaking, this is not an exception. It is the rule. The unpaid vendor is able to confer a valid title upon the subsequent buyer by virtue of his statutory authority to resell the goods.

Lesson - 4

PERFORMANCE OF THE CONTRACT

Duties of Seller and Buyer - Section 31

It is the duty of the seller to deliver the goods and of the buyer to accept and pay for them in accordance with the terms of the contract of sale.

Payment and delivery - Section 32

Delivery of the goods and payment of price are concurrent Conditions. The seller should be ready and willing to give possession of goods to the buyer in exchange for the price. The buyer should be ready and willing to pay the price in exchange for possession. This is subject to an agreement to the contrary.

Delivery - Section 33

Delivery of goods sold may be made by doing anything which the parties agree shall be treated as delivery or which has the effect of putting the goods in the possession of the buyer or of any person authorised to hold them on his behalf.

Part Delivery - Section 34

A delivery of part of the goods operators as a delivery of the whole. But an intention to seven it from the whole does not operate as a delivery of the remainder.

Buyer to Apply - Section 35

The seller is not bound to deliver the goods until the buyer applies for delivery. This is subject to an express contract.

Rules as to delivery - Section 36

Whether the buyer should take possession of the goods' or whether the seller should send the goods to the buyer depends upon the contract between the parties. The contract may be express or implied.

Goods sold shall be delivered…

(1) At the place where they are at the time of sale or

(2) At the place of agreement if the goods are agreed to be sold or

(3) At the place where they were manufactured or produced in case of future goods.

If no time is fixed, the seller shall send the goods within a reasonable time.

If at the time, of sale, the goods are in the possession of a third person, delivery is effected when the third person acknowledges to the buyer that he is holding the goods on behalf of the buyer.

Demand for delivery or tender of delivery shall be made at a reasonable hour, Otherwise the demand or lender is ineffectual.

The seller shall bear the expenses to put the goods in a deliverable state. This is subject to contract between the seller and the buyer.

Delivery or Wrong Quantity - Section 37

Here three circumstances may arise -

(1) Short Delivery

If the seller delivers goods-less than contracted for, the buyer has two options

(a) He may reject the whole, or

(b) If the accepts the goods, he-shall pay for them at the contract rate,

(2) 'Long Delivery'

If the seller delivers goods more than contracted for, the buyer has three options

(a) He may reject the whole, or

(b) He may accept the goods contracted for and reject the rest, or

(c) He may accept the whole. Now, he shall pay for the goods at the contract rate,

(3) Mixed Delivery

If the seller delivers goods mixed with goods of different description, the buyer has two options -

(a) He may reject the whole

(b) He may' accept the goods contracted for and reject the rest.

Note: The above rules life subject to any usage of trade or special agreement ·or course of dealing between the parties.

Moore & Co Vs. Landaaar & Co.

A agreed to sell to B 3,000 tins of canned fruit, each case to contain 30 tins. A delivered half of the goods packed in cases containing 24 tins. B was entitled to reject the . , whole even though the value of the consignment was not affected,

Delivery in Installments - Section 38

The buyer is not bound to accept delivery of goods by installment. However, the parties may agree otherwise. In the case of delivery by installments and payment for each installment, if the seller or the buyer commits a breach, it may be treated as a severable breach or breach of the whole contract. It depends upon the circumstances of the case.

Delivery to a Carrier - Section 39

Delivery to a carrier (named by the buyer or not) is prima-facie deemed to be delivery to the buyer. This is so if the seller is authorised or required to send the goods to the buyer, in pursuance of contract of Sale. Unless otherwise authorized by the buyer, the seller shall make contract with the carrier on behalf of' the buyer as may be reasonable. Regard shall be bad to the nature of the goods and the other circumstances of the case.

Different place of Delivery - Section 40

The seller may agree to deliver the goods at his own risk at a place other than that where they are when sold Even then the buyer shall take any risk of deterioration in the goods necessarily incident in the course of transit.

Acceptance - Section 42

The buyer is deemed to have accepted the goods -

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

(2) When the goods are delivered to him and he does any act in relation to the goods which is inconsistent with the ownership of the seller or

(3) when, after the lapse of a reasonable time, he retains the goods without giving notice of rejection.

Unpaid vendor and his rights - Sections 45 & 54

Unpaid vendor is the seller of goods –

(1) When the whole of the price has not been paid or tendered

(2) When a cheque, bill of exchange or a like negotiable instrument has been received towards the price and. such instrument has been dishonoured.

(3) In the case of credit sale, if the stipulation as to credit has expired and the whole of the price has not been paid,

(4) If the buyer has-become insolvent.

Note-Under section 2(8) **"Insolvency"** does not mean that the buyer should be adjudged an insolvent under the insolvency acts. Under this act, a person is said to be an insolvent who has ceased to pay his debts in the ordinary course of business or "cannot pay his debts as and when they become due. .

Rights or-an Unpaid Vendor

(1) Personal Remedy

He may file a suit for the price. This is a judicial remedy:

(2) Remedy against the Goods

These are remedies available to, the seller, without the intervention of the court. These remedies are known as extra-judicial remedies. There are three such remedies. They may be exercised so long as the buyer or his agent has not taken possession of the goods. If the buyer or his agent has taken possession of the goods, none of these remedies is available to the seller. The remedies are-

(i) Unpaid vendor's lien

(ii) Stoppage in transit

(iii) Limited right of re-sale

Rights of lien

Unpaid Vendor's Lien -Sections 47 to 49

There is a right to retain the goods' until the price is paid. Obviously he can exercise this right only when he has possession of the goods as the seller or as the' agent or bailee for the buyer.

Return of rejected goods - Section 43

Suppose a buyer, having the right to do refuse to accept the goods delivered to him. He is not bound to return the goods to the buyer. It *is* sufficient if he gives notice of refusal to the seller.

Illustration

A is a watch dealer. A sells a watch to B. A delivers the watch to B. B brings the watch to A for repairs, Now, A may exercise his right of lien over the watch as an unpaid vendor. This is in addition to his right as a bailee for the charges. If the unpaid vendor had made part delivery, he may still exercise his right of lien on the remainder of the goods unless he has waived the lien. He loses the lien if he delivers the goods to a carrier for the purpose of transmission to the buyer without reserving right of disposal.

However, if the right of disposal is reserved and the buyer becomes insolvent while the goods are in the course of transit, he can exercise his right of stoppage in transit.

Stoppage in Transit - Sections 50 to 53

The goods should be in the Course of transit, The buyer 'should have become insolvent, Now, the seller,(unpaid vendor) has the right to stop the goods in transit and resume possession of the' goods and retain the goods until payment or tender of the price.

Duration of Transit- Section 51

Mere arrival of the goods at the destination does not put an end to transit.

The transit is at an end when -

(1) The buyer or his agent takes delivery of the goods from the carrier or other bailee.

(2) The .carrier or the bailee acknowledges to the buyer or his agent that he holds the goods on behalf of or at the risk of the buyer an,d continues in possession of the goods as bailee for the buyer. It is immaterial that the buyer has indicated a further destination.

(3) If the buyer or his agent takes delivery of the goods at an intermediate station.

If the buyer has rejected the goods, and the carrier or other bailee continues in possession of them, the transit is not deemed to be at an end, .even if the seller has refused to receive them back.

The transit is deemed to be at an end if the carrier or other bailee wrongfully refuses to deliver the goods to the buyer or his agent. If part of the goods has been delivered, the seller may exercise this right in respect of the remainder of the goods. That is unless part delivery has been made under circumstances to show an agreement to give up possession of the whole of the goods.

Transfer of Documents of Title - Section 53

Suppose the seller has transferred the document of title to goods (e.g.: lorry receipt, railway receipt) to the buyer even when the goods are in transit. Two things may happen. The buyer transfers the document of title to a transferee who takes them in good faith and for consideration.

The transfer may be

(1) By Way of Sale

If the transfer is by way of sale, the unpaid vendor's right of stoppage in transit is defeated.

(2) By Way of Pledge

If the transfer is by way of pledge, the unpaid vendor may exercise this right subject to the rights of the pledgee. In other words, before exercising his right he shall discharge only the debt under the pledge and not" any other debt, which the buyer may owe to the pledgee.

The unpaid vendor may require the pledgee to satisfy himself out of any other goods of the buyer, which the pledge may have against the buyer.

Limited Right or Resale - Section 54

A sale is not rescinded merely because the unpaid vendor has exercised his right of lien or stoppage in transit. The sale is kept alive for the purpose of enforcing any other remedy against the buyer.

Function of Notice

Except in case of perishable goods, the unpaid vendor should give notice to the buyer of his intention to re-sell the goods.

However, such notice is not mandatory.

(1) If such notice is given, the seller shall be entitled to profit, if any, arising out of the re-sale. Further he can claim "loss, if any, from the buyer.

(2) If such notice is not given, the seller shall surrender the profit to the buyer and cannot claim loss, if any.

Whether such notice is given or not, the subsequent buyer will get valid title to the goods as against the original buyer. A right of re-sale may be expressly reserved in a contract of sale. If the seller exercises the right and resells the goods, the original contract of sale is rescinded. However, the seller may claim damages from the original buyer.

Suits for Breach - Sections 55 and 60

The seller may sue the buyer for the price of the goods, when the property has passed to the buyer and the buyer wrongfully neglects or refuses to pay for the goods.

Suppose under a contract of sale; the price is payable on a certain- day irrespective of delivery and the buyer wrongfully neglects or refuses to pay such price, the seller may sue him for the price although the property in the goods has not passed and the goods have not been appropriated to the contract.

If the buyer wrongfully neglects or' refuses to accept and pay' for' the goods, the seller may sue him for damages for non- acceptance.

If the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may sue the seller for damages for non-delivery.

In the case of specific or ascertained 'goods, the court may pass a decree for specific performance. The decree may be unconditional or upon such terms and conditions as damages and payment of the price.

For a breach of warranty or where the buyer elects or is compelled to treat a breach of condition as a breach of warranty the buyer may-

(1) Claim a deduction from the price the loss-if loss is less than the price
(2) Refuse to pay the price – if loss equals the price and,
(3) Refuse to pay the price and claim excess - if loss exceeds the price.

Anticipatory breath - Section 60

If either party repudiates the contract before the date of delivery, the other party may either -

(l) Treat the contract as subsisting and wait till the date of delivery or
(2) Treat the contract as rescinded and sue for damages for breach

Auction Sale - Section 64

1) Where goods are put for sale in lots, each lot is prima-facie deemed to be the subject of a separate contract of sale.
2) The bidder is the offer or. The sale is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner. This is acceptance of the offer. Until such announcement is made any bidder may retreat his bid. This is revocation of offer before acceptance.
3) The seller may fix an upset price. The seller may expressly reserve his right to bid. Otherwise it shall not be lawful for the seller to bid himself or to employ a person to bid at such sale, any sale contravening this rule is fraudulent upon the buyer. He may set aside 'any sale made to him.
4) If the seller makes pretended bidding to raise the price, the sale is voidable at the option of the buyer.
5) The bidders may agree not to out-bid each other Stich an agreement is not unlawful. It may be a restrictive trade practice under the M.R.T.P. Act. The Seller can protect himself by a reserve bid.

UNIT III
Lesson - 1
ACCEPTANCE AND THE CONTRACT OF AGENCY

Meaning

It is signification of assent to the order of the drawer by delivery or notification thereof. It is ordinarily made by the drawee by signing of his name across the face of the bill and by delivery.

Who can *be* acceptors: Sec. 33 & 34

a) Drawee, ie. Person directed to pay.

b) All or some of the several drawees, when bill is addressed to more than one.

c) Drawee in case of need

When in any bill, on any .endorsement thereon; the name of any person is entered, in addition to the drawee, to be resorted to in the case of need i.e. In the event of bill being dishonoured by the drawer by non-acceptance or non-payment, such a person is called a drawee in case of need. The holder of the bill is at liberty to choose whether' he will proceed, to the drawee in case of need or-not.

d) An acceptor for honour

e) When no drawee has been, named in a bill but a person accepts it, then he may be stopped from denying his liability as an acceptor.

f) Agent of any of the person mentioned above.

The authority of an agent to make, draw, accept or endorse notes and bills depends on the general law of agency.

Agency

Every person capable of binding himself or of being bound may so bind himself or be bound by a duly authorized agent acting-in his name.

A general authority to transact business and to receive and discharge debts does not confer, upon an agent the power of accepting or endorsing bills of exchange so as to bind his principal.

An authority to draw bills of exchange does not by itself impact an authority to endorse.

To explain, the drawee of a bill of exchange who has signified hi~ assent to the order of the drawer is called the acceptor. The acceptor becomes liable to the holder after he has signified his assent but not before.

Under Section 33 of the Act, no person except the drawee of a bill of exchange or all or some-of several drawees or a person named therein as drawee in case of need, can bind imself by an acceptance. Under Section 34, where they are several drawees of a bill of exchange who are not partners, each of them can accept it for himself, but none of them can accept it for another without his authority.

It follows from the aforesaid provision that the following persons can be acceptors.

(a) Drawee, i.e., the person directed to pay.

(b) All or some of the several drawees when the bill is addressed to more drawees than one.

(c) A drawee in case of need.

(d) An acceptor for honour

(e) Agent of any of the persons mentioned above.

f) when no drawee has been .named in a bill but a person 'accepts it, then he may be stopped from denying his liability as an acceptor.

Acceptance is ordinarily made by the drawee by the signing of his names across' the face of the bill and by delivery or notification thereof

Under Section 27 of the Act, every person capable of legally entering into a contract, may make drawn accept; endorse, deliver and negotiate a 'promissory note, bill of exchange or cheque, himself or through a duly authorised agent. The agent may sign in two ways. viz., (a) he may sign the principal name, for it is immaterial what hand actually signs the name of the principal, when in fact there exists an authority for the agent to put it there. It is thus essential that the agent, while putting his signature to the instrument, must have either express or implied that authority to' enter for his principal who must be *sui juris* into the particular contract. The authority of an agent to' make, draw accept or endorse notes arid bill depends on the general law of agency and is 'a question .of fact. From a perusal of Section 27 and 28 it is however evident that a general authority to transact business and to discharge debts does not confer' upon an agent the power' to endorse bills of exchange so as to bind, his principal, nor can an agent escape personal liability unless he indicates that he signs as an agent and does not intend to incur personal liability (parmode Kumar Pate vs. Damodar Sahu I.L.R. (1953).

The essentials of a valid acceptance are as follows:

(a) Acceptance must he written

The drawee may use any appropriate word to convey his assent. It may be sufficient acceptance even if just a hare signature is put without additional words. But it should be remembered that an oral acceptance is not valid in law. However oral acceptance may be sufficient only in the case of hundies and that too only if a special custom is proved to exist.

(b) Acceptance must be signed

A mere signature would be sufficient for the purpose. Alternatively the words accepted may be written across the face of the bill with a signature underneath, if it is not so signed it would not be an acceptance.

(c) Acceptance must be on the bill

That the acceptance should be on the face of the bill is not necessary, an acceptance written on the back of a bill has been held to be sufficient in law. What is essential is that it must be written on the bill else it creates no liability as acceptor on the part of the person who signs it. Now what will, happen if acceptance is signed upon a copy of the bill and the, copy is not one of the part of it or if acceptance is made on a paper attached to the bill in either of the cases, acceptance would not be sufficient.

(d) Acceptance must be completed by delivery

It would not complete and the drawee would not be bound until the drawee has either actually delivered' the accepted bill to the holder' or tendered notice of such acceptance to the holder of the bill or some person on his behalf.

Where a bill is drawn in sets the acceptances should be put on one part only. Where the drawee signs his acceptance on two or more parts, he may become liable' on each of them separately.

(e) Acceptance may be either general or qualified

By a general acceptance, the acceptor assents without qualification to the order of the drawer. The acceptance of a bill is said to be qualified, when the drawee does not accept it according to the apparent tenor of the bill but attaches some conditions or qualification which have the effect of either reducing his, (acceptor's) liability or acceptance of the liability subject-to certain conditions. 'The holder of a bill is entitled to require an absolute and unconditional acceptance as well as to treat it as dishonoured, if it is not so accepted. However he may agree to qualified acceptance, but he does so at his own risk/peril, since he thereby discharges all' parties prior to himself unless he has obtained their consent.

An acceptance is qualified where - (Sec. 86)

(i) It is conditional, declaring the payment to be dependent on the happening of an event therein stated.

Example

(a) Accepted payable when in funds (Juisan vs. Shobrooke)

(b) Accepted payable on giving up bills of lading (or cover (Smith vs. Virtue)

(c) Accepted payable when a cargo consigned to me is sold (Smith vs. Abbot)

(ii) It undertakes the payment of part only of the sum ordered to be paid

Example: A bill drawn for Rs.5,000 but accepted for Rs.4,000 only.

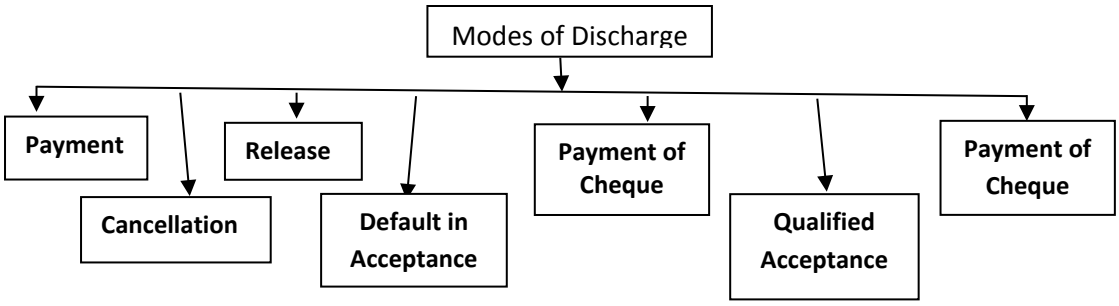
(iii) When no place of payment being specified on the order

It undertakes the payment at a specified place and not otherwise or elsewhere; or where, a place of payment being specified in the order, it undertakes the 'payment at some other place and not otherwise or elsewhere. .

(iv) Where it undertakes the .payment at a time other than that at which under the order it would be legally due.

Example: bill drawn payable three months after date is accepted as accepted, payable six months after date.

Lesson – 10
DISCHARGE



Mode of Discharge of Liability: Sec. 82

a) By payment

All parties to an instrument are discharged from liability when the amount due on the instrument is paid.

They party primarily liable to pay is the acceptor in the case of a bill, the maker in the case of note and drawer in the case of a cheque. But payment can be made by any party to the instrument and he can then recover the amount from the party primarily liable. Payment is an effective discharge only if it is "payment in due course"

b) By cancellation of acceptor's or endorser's name

When the holder of a negotiable instrument or his agent cancels the name of any party on the instrument with the intent to discharge him from liability, such party and all subsequent parties, who have a right of recourse against the party whose name is cancelled, are discharged from liability to the holder.

The subsequent parties are in. the position of sureties to the prior party whose name is cancelled and a discharge of the principal debtor automatically discharges the sureties.

If the makers or acceptor's name has been cancelled the liability of other parties to this instrument who must have obviously become parties there to subsequent to the maker or acceptor and as such must be in the position of sureties to him comes to an end.

If the name of an endorser has been cancelled, then all the endorsers subsequent to him will be discharged but those prior to him will remain liable. But if the holder, without consent of the endorser, destroys or impairs the endorser's remedy against a prior party, the endorser is discharged from liability.

c) By Release

The holder can discharge the maker, acceptor or endorser otherwise than by cancellation of names (by a separate agreement of waiver, release or remission) The bolder may agree to release any them from liability by a separate agreement or may do so by conduct, which has the effect of discharging a party from his liability.

The effect of release is the same as. that of 'cancelling a party's name, i.e., the party so released and .all the parties subsequent to him who .have a right of action' against the party so released are discharged' from liability in due course.

d) By default in acceptance

The holder of a bill has to present it to the drawee *for* his acceptance, the drawee should be allowed only forty-eight hours to consider whether he will accept or not.

If the holder allows the drawee more than forty-eight hours (exclusive of public holidays) all previous parties who do not consent to such allowance are discharged from

liability to the holder" When the bill is hot returned to the holder as duly accepted within the above-stated time, the duty of the bolder is to treat it as dishonoured by non- acceptance.' He must give' a notice to the drawer and to all prior parties and must not allow time unless they give their consent that more time should be allowed. The acceptor will, however, remain liable in terms of his acceptance.

e) By default in presenting cheque within reasonable time

It is the duty of the holder of a cheque to present it for payment within reasonable time of its issue. If he fails to do so and before be actually present the cheque something happens (for eg., the failure of the bank) .

Which prevents the banker from paying the cheque then the drawer of the cheque is discharged as against the holder provided that he had sufficient balance to meet the cheque when it ought to have been presented:

Eg: A draws a cheque for *Rs. 1,000/-* and, when the cheque ought to have been presented, he has funds at the Bank to meet it. The bank fails before the cheque is presented. The drawer is discharged, but the holder can prove against the bank for the amount of the cheque.

In determining what a reasonable time is, regard shall be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case. If the holder and the banker are at the same place, the cheque should be presented the next day after its receipt. But if they are at different places, due margin has to be given for the time taken in transit.

A draws a cheque at Lucknow on a bank in Calcutta. The bank fails before the cheque could be presented in the ordinary course. A is not discharged, for he has hot suffered, actual damages through any delay in presentirtg the cheque. Similarly a crossed cheque takes more time in reaching the drawee - banker and, therefore, time for clearance is excluded in determining reasonable time for presentment.

f) Payment of cheques

The section lays down two principles relating to payment of cheques.

(i) Where a cheque is payable· to order and it appears to be endorsed by or on behalf of the ·payee, the banker will be discharged from his liability if he pays such a cheque in good faith and without negligence. The reason why 'this' protection becomes necessary is that there are changes of endorsements being forged and the banker, having no means of checking the genuiness of an endorsement, would be hesitant to pay endorsed cheques. The facility afforded by cheques as negotiable would be instruments e considerably lost. The result of this protection is that bankers feel safe in making. Payment of endorsed cheques at least to this 'extent that a payment made in good faith and without negligence cannot be brought into question only on the ground of forgery in some endorsement.

(ii) Where a cheque is originally expressed to be payable to bearer, the banker will be discharged from his liability by paying such a cheque in good faith to the bearer and this will be so even if the cheque contains endorsements in full or in blank or endorsement of restrictive nature.

g) Dissenting parties discharged by qualified acceptance: See, 86

The holder of a bill is entitled to an absolute .and unqualified acceptance. If the holder assents to a qualified acceptance, then all the previous parties whose consent is not obtained to such acceptance are discharged from liability. Thus the previous parties are discharged in the following cases-

i) When acceptance is qualified.- Eg : Declaring the payment to be dependent on the happening of an event.

ii) When the acceptance is for a part of the sum.

iii) When the acceptance substitutes a different place or time .of payment.

iv) Where they are not being partners, the acceptance is not signed by all the drawees. But if they subsequently approve of such acceptance by the holder, they will not be discharged.

h) By material alteration without assent of all parties liable: Sec. 87

Material Alteration

A material alteration is one which varies the rights, liabilities or legal position of the parties as ascertained by' the deed in its original state, or otherwise varies the legal effect of the instrument as originally expressed, or which may otherwise prejudice the party bound by the deed as originally executed.

Any material alteration of a negotiable 'instrument renders the instrument void as against anyone who is a party thereto at the time of making such alteration and does not consent thereto unless it was made in order to carry out the common intention of the original parties.

Conditions

a. Alteration should be intentional without consent of all parties.

b. Alterations should be material that it alters the character of the instrument to a great extent.

Types of material alteration

(i) ***Alteration of date of the instrument or of payment***

(ii) Alteration of the amount of the instrument

(iii) Alteration in the place of payment

Eg: Where a bill is accepted payable at the Punjab. National Bank, and the' holder without the consent of the acceptor, scores out the name of the Punjab National Bank inserts that of the United Commercial Bank.

(iv) ***Alteration of the rate of interest:*** Insertion' of a rate of interest and of the words, "per month" has been held by the Madras High. Court as sufficient to avoid the instrument. Where all the columns except the' interest column of a pro note were filled and the promise filled the figure of 1.5% without consulting the maker, the pro note was discharged. The alteration was material because otherwise 18% interest would have been payable under section 80.

(v) ***Alteration by adding the name of a party:*** Where a note was altered by causing another person to sign as a joint and several maker, the court held that this was a material alteration, and if made after the note was issued would avoid it.

(vi) ***Alteration by increasing or fixing stamps:*** **-** Affixing stamps when the instrument originally carried no Stamps, or-increasing their value or attesting the instrument where it originally carried no attestation, - have been held to be material alterations. These things vary legal position of the parties.

Permitted Alteration

An alteration which is not material does not make the instrument void. The Act itself permits three kinds of alteration even though they are material.

a. Writing of the amount in an' inchoate instrument' by holder in due course.

b. Conversion of an instrument endorsed in blank to an endorsement in full.

c. Crossing subsequent to issue.

Exceptions

The principle does not apply to the following cases:

i) An acceptor or endorser cannot complain of any alteration, which was made before his acceptance or endorsement.

ii) Alterations which are made to carry out the common intention of the parties cannot be complained.

iii) A party cannot complain of an alteration to which be- has assented. Thus where the time for the payment of a bill was altered by the drawee before acceptance with the consent of the drawer there being no other party to the bill at the time it was not avoided

(iv) An alteration made before the document becomes a negotiable instrument does not vitiate. But where the date of a bill was altered before it was presented to the drawee for acceptance he was held not bound by his' acceptance as the bill had already been .avoided by the alteration.

By Payment, Alteration Not Being Apparent: Sec, 89

A payment on an altered note, bill or cheque, provide the alteration is not apparent and payment is made in due course by person or a banker who is liable to pay the amount' he is protected.

Example

A draws a cheque for, Rs. 8/- in favour of B who fraudulently converts eight into eighty, and the alteration is not apparent the banker, paying Rs. 80/- will not be liable to make good to the drawee the amount paid in excess.

By extinguishments of rights of action on bill in acceptors hand: Sec.90

Where a bill of exchange which has been negotiated is, at, or after maturity held by the acceptor .on his own right all rights to action thereon are extinguished.

Payment in due course

Payment in due course which results in discharge of a negotiable instrument must satisfy the following conditions

(i) The payment must be in accordance With the 'apparent tenor of the instrument.

(ii) The payment must be made by or on behalf of the drawee or acceptor.

(iii) The person to whom, payment is made should be in a possession of the instrument and should also be entitled to receive payment on it.

(iv) The payment should be made.

a) In good faith, b) Without negligence and c) Under bonafide circumstances

(v) There should not exist any ground for believing that the possessor is not entitled to receive the payment.

Discharge from Liability

Distinction between Discharge of Party and Discharge or instrument

An instrument is said to be discharged only. When the party who is ultimately liable thereon is discharged from liability. Therefore discharge of a party to an instrument does not discharge the instrument itself. Consequently the holder' in due course may proceed against the other parties liable on .the instrument.

Eg: The endorser of a bill may be discharged from his liability but even then the acceptor may be proceeded against. On the other hand, when a bill has been discharged by payment, all rights there under are extinguished even a holder in due course cannot claim any amount under the bill.

Lesson- 11

DISHONOUR

Types Of Dishonour

A bill maybe dishonoured by non-acceptance or by non-payment. A promissory note and a cheque are dishonoured only by non-payment.

Dishonour by non-acceptance; See. 91

A dishonour by non-acceptance of a bill of exchange may take place in anyone of the following circumstances.

(a) When the drawee, either does not accept the bill within forty-eight hours' of presentment or refuses to accept it;

(b) When one of several drawees not being partners makes default in acceptance.

(c) When the drawee gives a qualified acceptance;

(d) When 'presentment for acceptance is excused and the bill remains unaccepted and or to present it for payment at maturity.

Dishonour by non-payment: See. 92

An instrument is dishonoured by non-payment

a. When the party primarily liable - **Eg:** the acceptor of a bill the maker of a note or the drawee of a cheque makes.default in payment;

b. When presentment for payment is excused and the instrument remains unpaid after maturity.

Distinction

If dishonour is by non-acceptance, there is no right of action against drawee as he is not. a party to the bill holder of bill, can proceed only against drawer or indorser, if any If dishonour is by non - payment drawee can be sued.

Notice of Dishonour

By whom notice of dishonour is to be given: Sec. 93

a. Holder thereof or

b. Some party thereto who remains liable thereon .

To whom notice of dishonour is to be given: Sec. 93

a. To parties whom the holder proposes 'to charge with liability severally or jointly.eg: drawer and indorser,

b. May be given either to party himself **/** agent **/** legal representative on death **/** official assignee on his insolvency,

c. Notice not necessary to maker of a note or drawee /acceptor of bill cheque.

Effect of non-service of notice

a. Non-service of. notice to prior party within reasonable time discharges him from liability.

b. U/s 30 - for liability of drawer *U/s* 35 - liability of indorsee, notice of dishonour compulsory for continuation of liability.

Requirements of valid notice

(a) Notice to give exact description of instrument dishonoured.

(b) Notice to state party to whom notice is sent and that instrument

(i) Has been dishonoured (ii) He is liable

(c) Misdescription which misleads addressee vitiates the notice.

Mode of service of notice: Sec. 94

Notice may be oral or written, and may be sent by post. It may be in any form But it should inform the recipient, expressly or by reasonable intendment that the instrument has been dishonoured and in what way dishonoured and that he will be held liable on it.

The notice should be .given within reasonable-time after dishonour and should be directed to the party's place of business, or where he has no such place, to his residence. If the notice is duly directed and sent by post, and miscarried, such miscarriage does not render the notice invalid.

Duty to transmit notice: Sec. 95

The party receiving notice of dishonour, should transmit the same to prior parties. He cannot sure any prior party to whom he has not transmitted the notice unless the party has received notice from some other source.

Notice to Agent: Sec. 96

In the - case of an instrument which has been deposited with an agent for presentment. and is dishonoured the agent will be entitled to the same time for sending notice of dishonour to his principal as if he were himself the holder of the instrument. The principal would. be further entitled to a like period. in sending the notice to the party whom he wants to sue.

Notice to person dead: Sec, 97

When the party to whom notice of dishonor is dispatched is dead. but the party dispatching the notice is ignorant of his death, the notice is sufficient.

When come of dishonor is unnecessary (Section 98)

(a) In a suit against the drawer or endorser on an instrument being dishonoured, notice of dishonour is a material part of the cause of action. However, in the following cases the .notice of dishonor is not necessary.

(i) When the necessity of the notice has been dispensed with by an express waiver by the party entitled .to it. For example when the drawer of a bill worms the holder that the bill will be dishonoured on' presentment the notice of dishonour is said to have been.dispensedwith (Berli vs. Levell (S 1) 13 East 213).

(ii) When the drawer has countermanded payment be having put an impediment in the way of the holder obtaining payment is not entitled to the notice of dishonor.

(iii) When the party charged would not suffer damage for want of a notice. In such a case neither presentment nor notice of dishonour is necessary, provided it is shown that at the time of drawing the instrument there were no funds belonging to the drawer 'in the hands of the drawee (Subro vs. Sitaram 2 Born L.R 891).

(iv) When the party entitled no notice after due search, cannot be found.

(v) Where there has been accidental omission to give the notice provided the omission has been caused by as unavoidable accident circumstance e.g. death or dangerous· malady of the holder or' his agent or other inevitable accident, or overwhelming catastrophe not attributable to the default misconduct or negligence of the party tendering notice.

(vi) When one of the drawersis acceptor. From-this it is also- possible to deduce a further rule that notice of dishonour is not necessary for charging the drawer where the drawer and drawee of a bill are partners does not give rise to the presumption that they are partners in respect of the drawing of the bill, or that the bill was drawn by one of them on behalf of both. (Jambu Ramaswamy vs. Sundraraju Chetti 29 Mad. 239). Such a case does not fall under purview of the rule mentioned above. So as to dispense with notice,

(vii) In the case of promissory note which is not negotiable

(vii) When the party entitled to notice, knowing the facts, promises unconditionally to pay the amount due on the instrument.

Noting and Protesting

Noting: Sec. 99

It is a mode of authenticating the fact that a bill or note has been dishonoured . When a promissory note or bill of exchange has been dishonoured by non-acceptance or non-payment in order to create a proof of this fact the holder may approach a Notary public and have the fact of dishonour noted either on the instrument itself or on a separate piece of paper or partly upon each. Noting must be made within a reasonable time after dishonour. Upon such request being received the. Notary inquires from the party liable to pay and if he still dishonours, the notary makes a note of the fact of dishonour,

The note should contain .the following particulars:

(i) The fact that the instrument has been dishonoured,

(ii) The date on which it was dishonoured,

(iii) The reason, if any, assigned for the dishonor,

(iv) If the instrument has not been expressly dishonoured,' the reason why the holder treats it as dishonoured, and . .

(v) Notary's charges. The advantage of noting is that it creates evidence of the fact of dishonour and thing, connected with it. But -even so noting is not compulsory except for foreign bills. The holder may at his choice have the fact of dishonour noted or not,

Protest: Sec. 100

Protest is one step further to noting. Where the holder gets the fact of dishonour noted, he may also have the dishonour and noting certified by the Notary Public. 'Thus the holder, will get a certificate from the Notary Public certifying the fact of dishonour. Such a certificate is called a protest. The advantage of noting and protesting is that this constitutes prima facie good evidence in the Court, of the fact that the instrument has been dishonoured.

Protest for better security

Protest for better security is a measure of protection against the consequences of the acceptor's insolvency.

When the acceptor of a bill of exchange becomes insolvent or his credit has been publicly impeached, and this has happened before, the maturity of the bill, 'the holder may approach' a notary public and ask him to demand from the acceptor a better security than the mere bill. The protest should be done within a reasonable time.

If the acceptor refuses to oblige ‘with any security, the holder should have the fact’ of refusal noted and certified by the notary. Such a certificate is called a protest for better security. This should be done within a' reasonable' time after the acceptor's refusal to provide.

Notary Public

A Notary Public is appointed by the Central or State Government. His functions are to attest deeds, contracts and **Oth**er instruments that are to be used' abroad and to give a certificate of due execution of 'such documents. He enjoys the Confidence of the business world, and any certificate given by him is presumed to be true by a court of law. The profession of notaries is regulated by the Notaries Act, 1952.

Notice of protest: Sec, 102

In circumstances where a protest is a compulsory legal requirement, Section 102 requires that instead of a notice of dishonor, a notice or protest should be given. Notice of protest will have to be given in the same manner and subject to the same condition as notice of donhonour with only this difference that notice of protest can be given by the same notary who makes the protest.

Foreign bills - Compulsory protest: Sec. 104

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

Noting equivalent to protest: Sec. 104

A bill or document which has been noted can be protested at anytime thereafter for faking legal action against the parties. Thus, where a document has been noted within the time required by law legal proceedings cannot be vitiated on account of protest not having been made.

Acceptance for Honour: Sec. 108

When a bill of exchange has been noted or protested for non-acceptance or for better security, A stranger, as a general rule, cannot accept a bill. But if a bill is dishonoured by non-acceptance, the holder may nevertheless allow any other person to accept it for the honour of the drawer or any one of the Indorses. The person so accepting the bill is called "acceptor for honour". The requirements subject to which acceptance for honour can take place are:

a) The bill must have been noted or protested for non-acceptance or for better security;
b) An acceptance *for* honour can take place only with the consent of the holder;
c) An acceptance for honour must be by writing on the bill
d) An acceptance for honour is a person who is not already liable on the bill;
e) Acceptance for honour can be for the honour of any party already liable on the bill.

The mode of making acceptance of honour

A person desiring to 'accept for honour must by writing on the bill under his hand, declare that he accepts under protest the protested bill for the honour of the drawer or of a particular indorser or whom he names, generally in honour,"

Rights and liabilities of an acceptor for Honour Rights

On paying the bill, the acceptor for honour Can sue the party for whose honour the bill is accepted and all prior parties. Such parties *are* liable to compensate the acceptor for honour for all loss or damages sustained by *him* in consequence of such acceptance.

Obligations

An acceptor for honour binds himself to all parties subsequent to the party for whose honour he accepts to pay the amount of the bill, if the drawee does not. The acceptor for honour has to pay only if the following conditions are fulfilled –

(i) The bill should' once more-be presented to the drawee for payment at maturity.
(ii) If the drawee still refuses to pay, the bill should be noted or protested for payments';
(iii) The bill should be presented or forwarded to the acceptor for honour not later the day next after the day of its maturity. .

Payment For Honour : sec. 113

When a bill of exchange has been noted and protested for non-payment, any person can volunteer to pay it. Such payment will be called payment for honour. The conditions essential for such payment are -

(i) That the bill must have been noted or' protested for non-payment;
(ii) That the person paying or his agent declares before Notary public, the party .for whose honour he pays;
(iii) That such' declaration has been recorded by such Notary Public;
(iv) That the payment must be made for the honour of any party liable to pay the bill, and
(v) That the payment' may be made by any person whether he is already liable on the bill or not.

Right of Payer for honour: Sec: 114

The person who pays a bill for honour is subrogated to the position and rights of his holder. He is entitled to all the rights of the holder at the time of such payment. He can recover from the party for whose honour he made the payment;

a. All sums paid by him for satisfaction of the liability under 'the instrument.

b. The interest on such sums, and

c. All expenses properly incurred by him in making the payment of the bill.

The title of the payer for honour is also subject to the obligations of. the holder. The holder for eg. is bound to give notice of dishonour to the party whom he wants to sue. The payer for honour will have to show that such notice was given or was otherwise received by the party whom he sues.

Drawee In Case Of Need: Sec. 115

Where the drawer of a bill is afraid that the drawee may not accept the bill, he may mention the name of an additional drawee who may be resorted to in case the original drawee declines his acceptance. Such an additional drawee is called' the drawee in case of need".

On the bill being dishonoured by the original drawee, it should be carried'to the drawee in case of need and if he also dishonoured then only the bill can be taken to be dishonoured. The drawee incase of need is not liable Unless the bill has been presented to him and he has accepted it. A, drawee in case of need can accept and pay the bill of exchange without the need for any protest (Sec. 116).

The failure to present the bill to the drawee in case of need absolves the drawer from Liability.

Lesson – 12

HUNDIS

Hundis

Bills of exchange drawn up in the vernacular are generally known as Hundis. The Negotable Instruments Act ordinarily is not applicable to Hundis but, the parties to the Hundis may agree to be' governed by the Negotiable Instruments Act,

Different Types Of Hundis

The most common types of hundis are the following:

(i) Shah Jog Hundi

In this case, apart from a drawer and a drawee, there is -another party to the instrument known as Shah (a financier of repute). It is only payable to Shah. The function of the Shah is that he presents the hundi, when it eventually comes to him for payment to the drawee on behalf of the holder. In so far this Shah acts like a banker to whom a cheque has been endorsed specially.

(ii) Jokhmi Hund

It is documentary bill which is drawn by a consignor or the consignee in respect of goods shipped by the consignor. The name of the vessel by which the goods have been shipped is also mentioned in the· hundi. The consignee is not required to pay the hundi unless the. goods reach their destination. 'In consequence, the consignor or the person with whom he has negotiated the hundi, has to suffer the loss in case the ship is sunk.

(iii) Nam Jog Hundi

It is a hundi payable to the party named therein or to his .order. The party, however, has a right to endorse it in favour of any other person as can be done in case of any other bill of exchange.

(iv) Jawabee Hundi

It is an' instrument for remitting .money and takes the form 'of ordinary letter advising the party that .he 'may collect money from a banker. The remitter hands over the hundi .to his banker who in turn endorses it to a correspondent residing in the town in which the payee is resident. The correspondent, on receiving the letter, forwards it to the payee. The payee on presenting the letter collects the amount from the correspondent

(v) Dhani Jog Hundi

This is a Hundi payable to Dhani or owner i.e. a person who purchases it.

(vi) Finnan Jog Hundi

This is a Hundi payable to order.

(vii) Dharshani Hundi

Hundi payable at sight and Transferable by endorsement

(viii) Maidi Hundi

Known in Bengal as MUDDATI HUNDI: Hundi payment after a time

OTHER TERMS

1. Zikri Chit

a. Issuedby some party liable thereon to holder of hundi.
b. Letter of protection addressed to a merchant in town where hundi is payable requesting accepting the hundi in case of dishonour .
c. Interded to be used by holder if hundi is dishonoured by non-acceptance.

2. Peth

Duplicate copy of'hundi issued on loss of original hundi

3. Perpeth

Triplicate copy of hundi given on loss of duplicate hundi

4. Khoka

A hundi paid and cancelled

Classification of hundis according to time of payment

Hundis payable at sight are known as darshani hundis and those payable after a time are known as miadi hundis. A darshani hundi is transferable by endorsement. In drawing a miadi hundi, the interest for the period of hundi is charged. A miadi hundi is known in Bengali as the muddati hundi.

Compensation

The compensation is to be determined according to the following rules:

1. The principal amount and Incidental Expenses;
2. The first rule provides that the holder is entitled;

a) To the amount due upon the instrument; and

b) The expenses properly incurred in presenting" noting and protesting the instrument;

c) The interest, if any, due upon the instrument .is to be calculated according to provisions of sec. 79 and 80;

d) Holder is entitled to recover full amount of the instrument and not merely the amount for which the instrument was endorsed to him;

e) Where bill of exchange is dishonoured by non-acceptance, the holder becomes entitled to sue' at once without having to wait for the 'date of maturity, the cause of action arises immediately and the relevant date of calculation of interest is date of non-acceptance.

2. Compensation in Foreign Currency

Where the person from whom compensation is sought to be recovered resides at a place different from that at which the instrument was payable, the holder is entitled to' compensation at the current rate of exchange between the two places. Thus the rate of exchange prevailing on the day of dishonour would be applicable.

3. Endorser

On the dishonour of an instrument, every successive endorser becomes liable to the holder provided that he has received notice of dishonour. If any .such endorser pays the instrument, he becomes entitled to recover compensation from the party. who was primarily liable to pay the instrument at its maturity. His compensation will include:-

a. The amount paid by him.

b. Interest in that amount at the rate of 18% p.a from the date of payment to the holder or realisation of the amount.

c. All the expenses caused by the dishonour and payment.

4. Compensation to Endorser in Foreign Currency'

Where the endorser who has paid and the person whom he wants to sue, reside at a different place, the endorser will be entitled to receive the sums mentioned in the proceeding point at the current rate of exchange between the two places.

5. Drawing of a bill for the compensation amounts

The party, who is entitled to compensation in terms of the above principles, may draw a bill for the compensation amount upon the party liable to him. The bill may be made payable at sight or on demand. The amount of it may also include properly incurred expenses. The dishonoured instrument and the protest must accompany the bill for it. If the drawee dishonours such a bill also, he will be liable to make compensation for it in the same manner as in the case of the original bill.

Questions

1. What are the ·presumptions of negotiable instruments?
2. Explain the difference between a promissory note and a bill of exchange.'
3. Explain the difference between a cheque and a bill of exchange.
4. What are the differences between a cheque and a demand draft?
5. Who is a 'holder in due course'? What are his rights?
6. Explain the types of endorsements.
7. What are the liabilities of parties, in respect of instruments?
8. Explain the modes of discharge.
9. -Explain dishonour of cheque and the procedure in such cases.
10. Give a brief note on hundies.

Unit - IV

THE COMPANIES ACT 1956

Objectives - Complete Unit **4 and 5**

1. To understand all about kinds of companies and the Condition relating to their incorporation.
2. To know about the condition related to share and debentures.
3. To understand the duties of power of directors.
4. To understand the function of auditors.

Lesson – 1

COMPANY - DEFINITION, CHARACTERISTICS, CLASSES

Definition of a company

Companies Act

Section 2(10) - A Company means a Company as defined in Section 3.

Section 3 (1) (i) - Company means a Company formed and registered under this Act or an existing Company.

Section 3 (1) (ii) - Existing Company means a Company incorporated under any of the previous laws.

Chief Justice Marshall

A. Company is an artificial being, invisible, intangible and existing only in the contemplation of law.

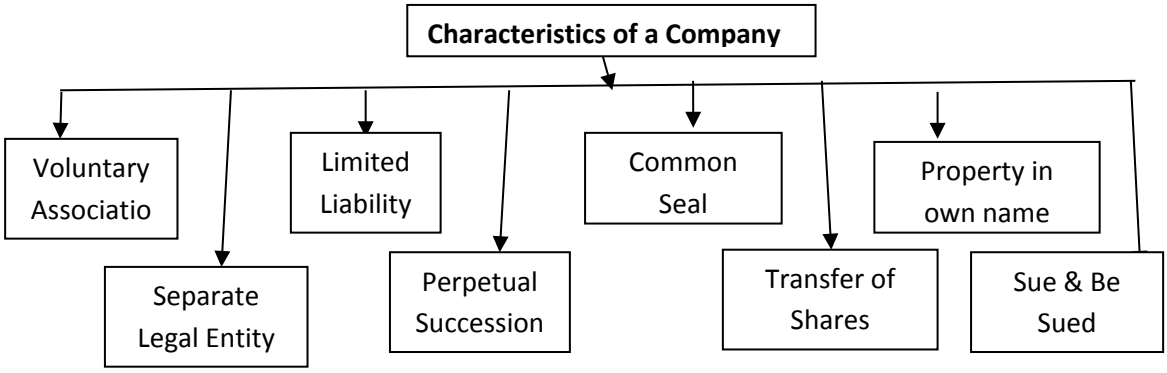
Heney

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

Lord Justice James

A Company is an association of person who contribute money or money's worth to a common stock and employ it some trade or business and who share the profit or loss arising there from. The common stock is denoted in money and .is the capital of the Company. The persons who contribute. it or -to whom it belongs are the members. The proportion. Of capital to which each member is entitled is his share.

CHARACTERISTICS A COMPANY



Characteristics of a company

1. It is a voluntary association of persons.
2. It has a separate Legal Entity - A Company is in law regarded as an entity separate from its members; i.e., it has an independent corporate existence.

a. Salomon Vs. Salomon & Co. Ltd.

Facts

There was a sale by 'S" of a shoe business to a newly formed Company. The consideration was 38, 782 pounds of which 'S' took 20,000.shares of 1 pound each. His wife, daughter and 4 sons took up one share each. Subsequently, the Company was wound up on which date the assets wereworth6,000 pounds and liabilities were l7,000 pound (including 10.000 pounds secured debentures held by 'S) Payment was first made to 'S' as he was a secured' creditor.

Contention

The unsecured creditors contended that S' could not be treated as a secured creditor as he was the Managing Director of a one man Company which was no different from'S' and the Cloak of the Company was a mere sham and fraud.

Decision

It was held that a Company is distinct from the members who from it and their liability are restricted to the extent of unpaid value of shares, if any.

b. Lee V Lee's Air Farming Ltd.

Facts

'L' held 2,999 shares out of 3,000 shares in a Company. fie was the Managing Director and chief pilot on a salary. He was killed in an air crash while working for the Company. His wife claimed compensation since her husband died during the course of employment. ***Contention***

The Insurers challenged that 'L' and the Company was the same person.

Decision

It was held that ‘L’ was a separate person distinct-from the Company he formed and hence compensation was due to the widow.

C. Kandoli Tea Company Ltd.

Facts

Certain persons transferred their estates, on which advalorem duty was payable, in the name of the Company. They claimed exemption from such advalorem duty on the ground that the transfer was' from them individually, to themselves in another name.

Decision

It was held that the Company was separate from the shareholders and transfer was as much as conveyance.

3. Limited Liability

A Company may be one limited by shares or one limited by guarantee. If it is a Company limited by shares, then the liability of the members is limited to the extent of money remaining unpaid on shares held by him. For example face value of a share is Rs.*10/-* and a member has already paid Rs. *6/-,* then he cannot be called upon to pay during the lifetime of the Company more than Rs, *4/-* per share.

If it is a company limited by guarantee, then the liability of the members is limited to such an amount as the members 'may undertake to contribute; in the event of its winding up.

4. Perpetual Succession

A company is a juristic person and its life does not depend on the life of its members. The membership of a Company may keep changing from time to time, but that does not affect the Company's continuity. The death or insolvency of individual member does not in any way affect the corporate existence of the Company. As Gover put it. "Members may come and member may go, 'but the Company goes on forever". As has been held in Meat Supplies Guildford Ltd, even a hydrogen bomb could not destroy a Company. An incorporated body never dies.

5. Common Seal

It is the official signature of the Company. As the Company has' no physical existence it has to act through its agents and all contracts entered into by its agents must be under the seal of the Company. Normally the seal of the Company is affixed to the documents in accordance with the prescription of the Company's Articles.

6. Transferability of Shares

This provides liquidity to the investor and stability to the Company, Shares or interest' of the member of a Company is freely transferable except to the extent of restrictions prescribed in the Articles of a Private Company.

7. Own &·Hold property in-its own name

A Company is a legal person. It is capable of owning, enjoying and disposing of the' propert in its own name. No member can claim himself to be the owner of the Company's property during its life time or even on its winding up. A shareholder does not have even an insurable interest in the property of the Company; it was held the insurance Company was not liable to him, The property of the Company is not the property of the shareholders.

Eg: Macaure held all except one share of a timber company. He 'was also a substantial creditor of the company. He insured the company's timber in his own name. The timber was destroyed by fire. His claim was rejected by the insurance company for want of insurable intent. Held the insurance company was not liable to him. *(Macaure vs. Northerm Assurance Co. Lid)*

8. Capacity to sue & be sued

A Company being a body corporate can sue 'and be sued in its own name.

9. Limitation of action

The creditors can make their claims (limitation) only against -company and cannot Registrar against shareholders. Their action steps with company. It is only the company, which can' call for any unpaid capital from shareholders.

10. Representative Management

The Company is managed by cleared representatives of the shareholders viz., Directors collectively referred as 'Board'.

To Sum up

When a company is registered, it is clothed with a legal personality. It comes to have almost the same rights and powers as a human being. Its existence is distinct and separate from that of its members, Members may die or change, but the company goes on till it is wound up on the grounds specified the Act. In other words, it means that it has perpetual succession. A company can own property, have banking account, raise loans, incur liabilities and enter into contracts. Even members can contract with company, acquire right against it or incur liability to ***it.*** For the debts of the company, only its creditors can sue it and not its members.

As the company is an artificial person it cannot only through some human agency, viz., directors. They are at the helm of affairs of the company and act as its agency, but they are not the agents of the members of the company. A company has a common seal to authenticate its formal acts.

DIFFERENCER BETWEEN A COMPANY AND PARTNERSHIP FIRM

Basic of difference	Company	Partnership Firm
1. Mode of creation	Only when registered under company's Act	By mutual agreement between partners Registration is optional
2. Separate Legal	Yes	No
3. Separate Property	Yes	No
4. Agents	Members are not agents of the Company	Partners are agents of the Firm
5. Transfer of Shares	Shares can be transferred	Cannot be transferred
6. Enter into contracts with Company/Firm	Member can enter into a contract with the Company	The Partner cannot enter into a contract with the Firm
7. Liability	Limited	Unlimited
8. Perpetual Succession	Yes	No
9. Minimum No of Persons	Two for private companies and seven for public companies	Two
10. Maximum No. of persons	Fifty-private companies unlimited – public Companies	10 for Banking & 20 for any other Business
11. Audit	Compulsory	Optional
12. Minimum paid-up Capital	Applicable	Not applicable

LIFTING THE CORPORATE VEIL

Once a company is formed and registered under the Act it is separate legal entity distinct from its members there could be an abuse of this corporate device. That gave birth to the theory called lifting the veil of corporateness.

Sometimes the courts and the legislature in deference to economic reality have ignored the corporate personality and instead looked behind the legal facade. This simply means that there are circumstances when the members directors or certain persons can be made personally liable for the debts or acts of the company.

Under statutory provisions

1. Reduction of membership below the statutory minimum (S.45):-

Three conditions have to be fulfilled:

(a) The number of members shall fall below the statutory minimum that is to say, less than two in the case of a private company-and less than seven in the case of public company.

(b) The company should carry. on business' for more than six months after the number is so' reduced.

(c) The members (i.e. the remaining members) should be aware of the reduction and carry on the business.

If all the three conditions are fulfilled, such remaining members become jointly and severally liable for the debts of the company contracted after the period of six months and may be severally sued for the same.

The company still remains intact. The creditor of the company may file a suit against the company: He may also choose to ignore the company and file a suit against the members. Not only that, he may file a suit against any members for the whole obligation.

Reduction of membership below the statutory minimum is one of the grounds for winding up through Court under Section 433 (d)

2. Misdescription of Name (Section 147(4) (c)

If an officer of a company signs a cheque, bill of exchange, hundi, promissory note wherein the name of the company is not mentioned or misdescribed apart from penal liability the officer responsible for the default becomes personally liable on those instruments, unless the company duly pays those amounts. The object of the provision is that the third parties should be enabled to know that they are dealing with limited liability companies.

3. Group accounts (Section 212)

The balance sheet of a holding company shall contain particulars about its subsidiaries. The holding company and subsidiary companies are separate legal entities. However for the purpose of group accounts, this separateness is ignored.

4. Fraudulent trading (Section 542)

This happens .in the course of winding up' of a company. In the winding up proceeding, it appears that certain persons have carried on the business of the company ***(i)*** with the intent to defraud the creditors of the company or ***(ii)*** for any fraudulent purpose. Such persons can be made personally liable for ail 'or any of the debts of the company without any limitation as to liability as the Court may direct. An application may be made to the court by the official liquidator, or the liquidator or any creditor' or contributory of the company.

5. Failure to refund Application Money: (Sec. 69)

In case of first allotment of shares in a Public Company, if minimum subscription has not been received or the Company has not obtained the certificate of commencement of business, the Directors shall be personally liable to pay the money with interest if application money is not repaid within 70 days.

6. Misrepresentation in Prospectus: (Sec, 62-63)

In case of misrepresentation in a Prospectus, every Director, promoter, and every other person who authorises the issue of such a prospectus incurs liability words those who subscribe for shares on the faith of such untrue statement.

7. Non-payment of Tax

When any private Company is wound up and any tax assessed on the Company, whether before or in the Course of liquidation, in respect of any income of any previous year cannot be recovered every person who was Director of that Company at any time during the relevant previous year shall, be jointly and severally liable for payment of tax.

8. Ultra wires Acts (beyond powers)

Directors of a Company will be personally liable for all those acts, which they have done on behalf of the Company, if they are *Ultra vires* the Company.

11. Lifting Under Judicial Interpretations

Instances of lifting the corporate veil under judicial precedents:

1. Protection of revenue

Section 179 of the Income-tax Act provides as follows: For any tax assessed on a private company whether before, during or after its liquidation, the directors are personally liable for the payment of such tax.

A is an income tax assessee. His income consisted of dividends and interests. He formed four private companies. The investments were put in the name of the companies but held by him as an agent. Incomes were credited into the accounts of the company. A received them as pretended Loans.

The court held that the companies and the assessee were not two different persons. The companies did not do any business. They were created solely for the purpose of enabling the assessee to avoid super tax, (in *Sir Dinshaw Manekjee Pettit,* AI.R. (1927)).

Bacha F Guzadar v.CfT Bombay. At that time agricultural income was exernpt from tax. However in the case of Tea Estates, 60% was treated as agricultural income, 40% was liable for tax as

income. A lady was a member in a Tea Company. She claimed that 60% of her .income from divided shall be treated as agricultural income. The Court negatived her contention and held that income in her hands, which she received as divided, cannot be treated as agricultural income.

2. Company is formed to defraud existing creditors

Where a company is formed to defraud the existing creditors the Courts will lift the veil to do justice to the creditors. This was laid down in Salomon's case itself and has been explained earlier.

3. Company is formed to escape legal obligation

Where a company is formed' to escape a legal obligation the Courts will not recognise such a company as a separate entity. Facts of *Gilford Motor Co. v. Home,* (1993) Ch. 935; B was in the employment of A during, employment' B covenanted B in order to escape the legal obligation formed a nominal company. The company carried on the rival trade and solicit the customers of A. B in order to escape the legal obligation formed a nominal company. The company carried on the rival trade. Can B contend that he was the party to the agreement and not the company?

In such cases, the courts will look into the reality of the situation. For what purpose B formed the Company? Solely for the purpose of defeating a pre-existing legal obligation. So, the Court passes an order of injunction not only against B, but also against the nominal company restraining them both from practicing the rival trade. "The corporate device cannot be used as a mask to escape a legal obligation".

This case was followed in another case, *Jones v. Lipman* (1962) 1 W.L.R. 832; (1962) 1 All ER 413. Facts of the case:

A agreed to sell a land to B. Subsequently, A changed his mind. A, in order to escape the legal obligation formed a nominal company and transferred the land to the company. Looking into the reality of the situation the court ordered specific performance not only against A but also against the nominal company enforcing them both to sell the land to B.

4. Where the corporate facade is really only agency and instrumentality

F.G. Films Ltd.

An American Company produced a film in India, technically in the name of a British Company. Where in the President of the American Company, which financed the production of the film, held 90% of the share capital. The .Board of Trade refused to register the film as a British film on the ground that the British Company acted merely as a nominee of the American Corporation.

5. Where the doctrine conflicts with public policy

Connors Bros. Vs. Connors

The Corporate veil was pierced to identity the Managing Director who used his position contrary to public policy reason was that the persons in defacto control of its affairs were residents of Germany, which was at war with England. The alien Company was not allowed to proceed with the action as that would meant giving money to the enemy, which was considered monstrous and against public policy.

6. Avoidance if Welfare legislation

Workman employed in Associated Rubber Industries Ltd., Bhavnagar Vs. Associated Rubber Industries Ltd., Bhavnagar and another

A new Company was formed by the Principal Company with no assets of its own except those transferred to it by the principal company with any business or income of its own excepts receiving dividends from shares transferred to it by the principal Company. The Supreme Court held that the new Company was formed as a device to reduce the gross profits .of the principal company' and thereby reduce the amount to be paid by way of bonus to the workmen. The amount of dividends received by the new Company should therefore be taken into account while assessing the gross profit of the principal company.

7. Quasi Criminal cases

The courts have sometimes applied the doctrine. In quasi-judicial cases to ascertain the actual persons behind.

It was held by Lord Mac Naghten.

"The company is at law a different person altogether from the subscribers to the memorandum and bough it may be that after incorporation. the business is precisely the same as it was therefore and the same persons are mangers, and the same hands receive the profits the company is not in law the agent of the subscribers or trustees for them. Nor are the subscribers as members liable in any shape or form except to the extent and ill the manner provided by the Act.

Thus this case clearly established that company has its own .existence and as a result a shareholder cannot be held liable for the acts of the company even though he holds virtually the entire share capital. The whole law of corporation is in fact based on this theory of corporate entity. Now the question may arise whether this veil of Corporate Personality can even be lifted or rend (i.e. tom), Before going into this question one should first try to understand the meaning of the phrase "lifting the veil". It means looking behind the company as a legal person (i.e. disregarding the corporate entity and paying regard, instead to the realities behind the legal facade. Where the Courts ignore the company and concern themselves directly with ·the members or managers, the corporate veil may be said to have been lifted. Only in appropriate circumstances, are the. Courts willing to lift the corporate veil and that too when questions of control are involved rather than merely a question of ownership.

To sum up

"The· doctrine of the lifting of the veil has been applied, in the words. of palmer, in five categories of cases, where companies are in relationship of holding and subsidiary (or sub-subsidiary) companies where a share holder has lost the privilege of limited liability and has. become directly liable to certain creditors of the company on .the ground that with his knowledge the company continued to carry on business six months after the number of its members was reduced below the· legal minimum in certain matter pertaining to the law of taxes death duties and stamps, particularly where the question of the "controlling interest" is in issue, in the law relating to exchange control and in the law relating to trading with the enemy where the test control is adopted *(Palmer's Company Law 20th Edn. page J* 36) In some of these cases judicial decisions have no doubt lifted the veil and considered the substance of the matter. It must now be clear that the registration of a company does not exonerate a member from his personal liability at all times and in all circumstances: Honest enterprise by means of companies is allowed but the public is protected against kiting and hurnan buggery, The sanctity of a separate corporate identity is upheld only in so far as the entity is constant with underlying policies, which give it life.

OTHER COMPANIES

1. Body corporate *I* Corporation

"Body Corporate / Corporation" includes a company incorporated outside India but does not include

a) A Corporation

b) A registered Cooperative Society

c) Any other body corporate (not being a company as defined in the Act) which the Central Government may specify in this behalf

The word 'Includes' implies a broader coverage to comprise:

a) Public-Financial Institutions - Sec. 4A

b) Nationalized banks

c) Corporations formed under Act of Parliament

Itshould also be noted that every incorporated company is a body corporate but

the reverse is not true as there are many body corporates, which are not incorporated as companies.

The Supreme Court held that a society registered under the Societies Registration Act does not come within the body corporates though the society is recognised as a legal person capable of holding property and becoming members of a company.

2. One man Company

A company where all shares are literally held by one person. Such. company is usually a private company. In such companies for complying with requirement of statutory minimum number of members .(2 or 7) a few shares are held by some representative of the main shareholders

3. Citizenship of Company

A Company though a legal person, it is not a citizen either under the -

a) Constitution of India, or

b) Citizenship Act, 1955

However, a company has both "Nationality and Residence"

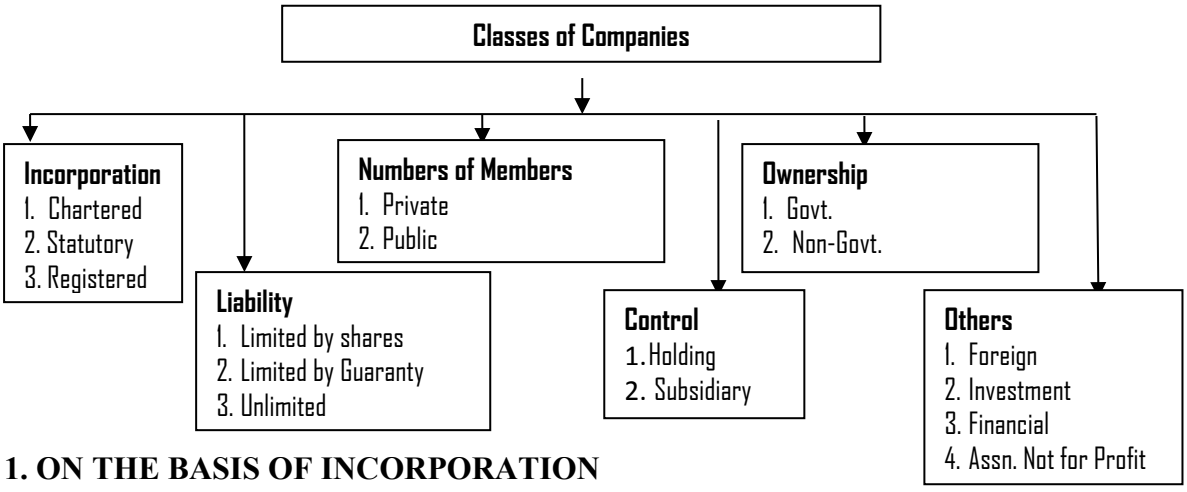
Under the constitution a company has, no fundamental rights, which are expressly available to citizens only. It can however claim some protection of these fundamental rights, Eg : rights to equality etc.,

Although, a company cannot be a citizen it has a nationality, domicile and residence. the company's residence is primarily important in connection with

a) The Income Tax Act
b) The Foreign Exchange Management Act

A Company resides where the central control' and management of its business is exercised. Thus 'a joint stock company resides where its plate of incorporation is, where the meetings of the whole company or those who represent it are held and where its governing body meets in bodily presence for the purposes of the company and exercises the powers conferred upon it by statue and by Articles-of Association.

CLASSES OF COMPANIES



1. ON THE BASIS OF INCORPORATION

a. Statutory companies.

They are Companies created by a special statute of the Legislature/Parliament, ego Reserve Bank of India, LIC, UTI etc., the provisions of the Companies Act, 1956 apply to them if they are not inconsistent with the provisions of the special Act under which they are formed.

b. Registered companies

They are Companies as defined U/S 3 of the Act .

II. ON THE BASIS OF LIABILITY

a. Companies Limited by Shares: Sec. 12 (2) (a)

It is a Company where the liability of its members is limited by its MoA to the amount unpaid on the shares, This liability could be enforced during the life time of the company or in the event of Winding up.

b. Companies Limited by Guarantee: Sec.12 (2) (b)

It is a Company where the liability of the members is limited by MoA to such an amount which the members under take to contribute to the assets of the Company, in the event of its being wound up. The features of such a Company are legal personality and limited liability.

a. The Articles of such a Company must state. the number of members with which Such a Company is registered.
b. Such Companies are usually not formed for the purpose of profit but for the promotion of art science culture and other charitable purposes.
c. Such Company may or may not have share capital.
d. Such guaranteed amount cannot be mortgaged/charged before liquidation Such sum can be called by the Company for payment of liquidation expenses and general liabilities at the time of liquidation.
e. Form of Memorandum &. Articles of Association for:

i	Guarantee Company without share c	Table C in Schedule I
ii	Guarantee Company with share capital	Table D in Schedule I

f Liability of shareholders:

1.	Guarantee Company without share	To the extent of guarantee
II.	Guarantee Company with share capital	To the extent of guarantee unpaid *liability* on share capital

Difference between Share Company And Guarantee Company

Company limited by shares.	Company limited by guarantee
Members may be called upon to discharge their liability at anytime either during the company' lifetime or during its winding up.	Members. may be called upon to discharge their liability only after commencement of winding up and only subject to certain conditions.

C. Unlimited Company: Sec. 12 (2) (C)

It is a Company Without limited liability.and in such a case every member is liable for the debts of the Company as an in an ordinary partnership, but only in proportion to their interest in the Company. Such a Company mayor may not have share capital.

A company having not any limit on the liability of its members is termed in the Act as unlimited company. 1n such a company the liability of a member ceases when he ceases to be a member.

The liability of each member extends to the whole amount of the company's debts and liabilities but he will be entitled to claim contribution from other members. In case the company has a share capital the articles of association must state the amount of share capital and the amount of each share (Schedule, Table E). So long as the company is a going concern the liability on the shares is the only liability, which can be enforced by the company though the liability of the members is unlimited so far as creditors are concerned.

An unlimited company can register it is a limited company if a resolution is passed to that effect (Section 98) If the unlimited company has share *capita* it any increase the nominal value of its shares provided that no part of such increase shall be capable of being called up except in the event and for the purpose of the company being wound up or to provide that a specified portion of its uncalled share capital shall not be capable of being called up except in the event and for the purposes of the company being wound-up (Section 98).

It must have its own Articles of Association. The Articles mast state the number of members with which the Company is to be registered. If the Company has share capital, the Articles must also state the amount of share capital with which the Company is to be registered,

The registration does not affect any debts liabilities, or contracts of the Company before or at-the time of registration.

III. a. Private Company (Section.3(I) [iii)

(i) Earlier privates. comparues had three restrictive conditions in their articles of Association viz.

(a) Restriction on the right to transfer it shares.

(b) Limitation on the number of members to fifty (50)

(c) Prohibition on inviting public to subscribe to any shares or debentures of the company.

The Amendment Act, 2000 further provided that a private company should included following restrictions in its Articles i.e.

(d) Prohibit an invitation or acceptance of deposits from persons other than its member, directors or their relatives.

(1) Restriction on transfer of shares

The articles contain a provision restricting the right to transfer it shares. The object of such a provision is to confine the ownership of an interest in the company to a choice circle of friends and relatives (Section 3(1) (iii)a) The right of transfer is generally restricted in the following manner,

(a) By authorising the directions to refuse transfer of shares to persons whom they do not approve or by compelling the shareholder to offer his shareholding to the existing shareholders first. It may be noted that it can' only restrict the right of sale to a member. On this consideration the articles usually provided that' before selling or transferring his share, the director must be communicated in writing of such intention of the shareholder).

(b) By specifying the method for calculating the price at which the shares may be sold by one member to another. Generally it is left to be determined either by the auditor of the company or by the company at a general meeting.

(2) Limitation of membership

The articles must contain a provision whereby the company 'limits the number of its members (exclusive of employees who are members and ex-employees continuing to be members) to 50; in counting the number of shareholders joint shareholders are treated as a single member (Sec:3(l) (iii)b The reason why employee members are excluded from the computation is perhaps to enable the company to associate workers with the management of the company and to give them the benefit of owning interest in the company. This will in its turn impel the orkers to work for the welfare of the company arid thereby to promote industrial peace'. That is why, it way be pertinent to note here that section 77 authorises a company to grant loans to its mployees, etc., (other than directors) to purchase its shares.

(3) Prohibition on making aiI invitation to public

The articles must prohibit any invitation to the public to subscribe for any of its shares or debentures (Section 3(1) (iii) c) such a prohibition is necessary for the substance of the private character of the company. One should note that under Section 67, an offer or invitation of the public selected as members of the company is an offer or invitation to the public or debenture - holders of the company. But such an invitation to the public shall be excluded from the category of invitation to the public if such offer or investigation can be properly regarded in all circumstances;

(i) As not being calculated to .result directly or indirectly in the shares or debentures is becoming available for subscription or purchased by person other than those receiving the offer or invitation.

(ii) Otherwise as ·being a' domestic concern of the persons making' and' receiving the offer or invitation.

Consequently, a company is permitted to offer shares, or debentures to its members or debentures holders An Offer of shares by the directors to their' friends by a document marked private and confidential not for publication is not an invitation to the public *(Sharewell vs. Combined Incandescent Metals Syndicate (1970»* Similarly a circular offering the .allotment of. shares in a new company in exchange for existing shares is not a prospectus *{Govemment Stock etc., co vs. Christopher (1956).*

(iii) It may be noted that after the above amendment no private limited can take any loan deposit or retain any loan deposit taken, 'from any outsider (other than its 'members, directors or their relatives).

(iv) Every private company should have paid up 'capital of Rs. one Lakh. Existing companies will have to issue new shares to ensure paid up capital of.Rs. 1 Lakh within 2 years of commencement of Amendment Act. Such capital may be Equity or Preference.

(v) If paid up capital is not increased to Rs. 2 Lakhs within 2 years the company will be deemed to be a defunct company under section 560 names of such a company will be struck off by the registrar of the companies.

b) Public company (Section 3(1)(iv)

(i) The amended definition provides that a company, which is not a private company, will be a public company. Further a private company, which is a subsidiary of a public company is also covered the definition of a public company.

(ii) It is now necessary that a public Company should have paid up capital of at least Rs.5 Lakhs to the case of an existing company the paid up capital should be increased to Rs.5 Lakhs within 2 years from commencement of Amendment Act. If this is not done, name of the company will be removed as a defunct company under section 560.

(iii) A private company, which is a subsidiary .of public company, will have to comply with the above requirement of minimum paid-up capital and other provisions applicable to public companies.

(iv) Section 25 company is not required to have the above minimum capital.

c) Deemed public company: (DELETION OF SECTION 43A)

(i) Provisions of Section 43A have now been deleted.w.e.f 14.12.2000 except subsection (2A) which states that where a public. company referred 'to his-sub-section (2) becomes a private company on or after the commencement of the companies (Amendment) Act 2000, such company

shall inform the Registrar that it has became-a private company and there upon the Register shall substitute that words "private company" for the words "public" company.in the name of the company upon the register' and shall also make the necessary alteration in the certificate of incorporation issued to the company and in its memorandum of association within four weeks from the date of application made by the company.

(ii) The Procedure to be followed *(43A(2A)*

a. When *43A* is deleted the private company has to ensure a minimum paid up capital of 1Lakhs.

b. Pass Special Resolution under section 21 to change name by adding the word "private"

c. Inform REGISTRAR and he shall be within 4 weeks from the date of application made by the company make necessary alternation *in'* the certificate of' incorporations.

d. Amend Articles to provide restrictive causes as stated in Para 1 above

(iii) Subsidiary of public company,

a. 43A company which is subsidiary of a public cannot *be* converted into a private company in view of new definition of public company under section 3 (1) (iv)

b. Such a company to have Minimum capital of Rupees 5 Lakhs - Minimum directors - 3 and Minimum Members - 7.

(iv) Holding and subsidiary companies

Holding and subsidiary companies are relative terms. A company is a holding company of another only, it the other is a subsidiary. Any of the three circumstances illustrated below must exist to constitute the relationship of holding and· subsidiary companies.

A will be subsidiary of B. if B controls the composition of the Board of Directors of A. i.e. if B can Without the consent or approval' of any other person appoint or remove a majority of directors of A B will be deemed to possess the power to appoint majority of persons as directors of A (i) when these persons cannot" be, appointed in that capacity without B, s consent or (ii} when their appointments follow necessarily from their appointments directors manager or the holder of any office in B company or (iii) when the holding company (i.e. B) itself for it another subsidiary holds the directorship in A company (Section 4(l) (a) &(2))

(i) A will be a subsidiary of B. if B is entitled to exercise control over more than half the total voting power of A, where A is an existing company in respect of which the holders of preference shares had the same voting rights in an respects as the holders of equity shares.

(ii) Again, A will be subsidiary of B, if B hold more than- holds in nominal value of its equity share capital where A is any company other than the one specified under (i) above in' other words B must hold more than 50% of the equity capital on the basis of the nominal 'capital whatever may be the amount paid up on the shares. (Section 4(l) (a) & (b)

For the purpose of condition described in Para (ii) above the shares that a company holds must be held in its own' right and not merely in fiduciary capacity. Thus the shares held in trust for an individual not be excluded. On the other hand shares held by another person as a nominee for the company or any of its subsidiaries should be regarded as being held by the company for the purpose, 283

In order to determine whether a company is subsidiary of another, shares held by any person under the provisions of any debentures any not to take into account. Where company's ordinary business includes money-lending shares of other company held as security in a normal business transaction are to be disregarded.

A company will be subsidiary of another company called holding company if it a subsidiary of a subsidiary of the holding company. For example. B is a subsidiary of A and C is a subsidiary of B. In such a case C ·will be subsidiary of A in the like manner if D is a subsidiary of C, D will be subsidiary of B as well as of A and so on (Section 4(1)

Indian private companies, which are subsidiaries of foreign public companies, are divided into two categories, one where the entire share capital of the private subsidiary company is 'held by the foreign holding company, either alone or in consortium and the second, where the entire share capital is not so held. For the purpose of this Ad, the first category of companies will not be subsidiaries of a public company and as such will not be subject to the controlling provision of the Act relating to such companies But for the purposes of this Act, the second Category of companies will be treated as subsidiaries of a public company (Section 4(7).

Normally, a subsidiary company cannot be a member of its holding company. Where however it was a member before it become subsidiary it shall not have voting right at a meeting through it may exercise other rights of members (Section 42)

V. ON THE BASIS OF OWNERSHIP

a. Government companies: Sec. 617

A Government Company is a company in which not less than 51 % of the paid up share capital is held

a. By the Central Government, or

b. by the.State Government, or

c. Party by the "Central Government and partly by one or more State Governments.

b. Non Government Companies

They are Companies other than Government companies.

VI. OTHER TYPES OF COMPANIES

a. Foreign Companies: See. 592. 602

It is a Company incorporated outside India, which' has an established place of business in India, Such a Company should file a return with particulars of its background within 30 days of setting up business in India.

b. Investment Company

It is a Company whose principal business is the acquisition of shares, stock, debentures or other securities. .

c. Public financial Institutions:

By virtue of section 4A the following institutions are to be regarded as public financial institutions

(a) The Industrial Credit and Investment Corporation of India Ltd- a company that was formed and registered under the Indian companies Act 1913,

(b) The .Industrial Finance Corporation of India - a company established under Section 3 of the Industrial Finance Corporation Act 1948

(c) The 'Life' Insurance Corporation of India - established under Section 3 of the Life Insurance Corporation Act 1956.

(d) The Industrial Development Bank of India - established under section e of the Industrial Development Bank of India Act 1964.

(e) The Infrastructure Development Finance Company-Ltd.

(f) The Unit Trust of India established under Section 3of the Unit Trust of India Act 1963.

(g) The Infrastructure Development Finance Company Ltd.

Other public financial institutions specified (to mention a few) by the Central Governments are:

(h) The General Insurance Corporation-of India

(i) The National Insurance Co.Ltd.

(j) The United India Fire and 'General Insurance Co.Ltd)

(k) The Orient Fire and General Insurance Co. Ltd.

(l) The New India Insurance Co. Ltd.

(m) The Industrial Reconstruction Corporation of India Ltd. (Now called the Industrial Reconstruction Bank of India Ltd)

(n) Tourism Finance Corporation of India Ltd. (TFCI)

(0) Shipping Credit & Investment Co. of India Ltd (SCICI)

(p) Risk Capital & Technology Finance Corporation Ltd.

(q) Technology Development and Information Company Ltd.

(r) Power Finance Corporation Ltd.

(d) Association not for profit: Sec. 25

Section 25 permits the registration under a License from the Central Government of an association not for profit with limited liability without .being required to use the word limited or the words 'Private Limited' to their name. The Central Government may grant such a Licence if –

(a) It is intended to form a Company for promoting commerce, art religion charity or any other useful object and

(b) The Company prohibits payment of any dividend to its members but intends to apply its profits or other income to the promotion of its objects.

A Licence may be granted subject to such regulations and conditions as it thinks fit and if necessary may direct the, same to be incorporated in the Memorandum and Articles of Association.

Features

a) The Company cannot alter its objects clause in the Memorandum of Association without the approval of the Central Government.

b) The Company enjoys all the privileges of a Limited Company and is subject to all its obligations except those, in respect of which exemption by a 'special or general order is granted by the Central Government.

c) The Company need not pay stamp duty for registering their Memorandum and Articles of Association.

d) The Company is exempted from the requirement of having a minimum paid-up capital

e) The Company need not end its name with the words 'Limited or Private Limited'

f) The Licence may be revoked at any time if conditions are not complied with the revocation is' done by the central government after giving notice of its intention and giving an opportunity of being heard.

g) On revocation the registrar shall put 'limited' or 'private Limited' against the company's name in the register.

h) C. Difference Between A Company And A Partnership Firm

S.No.	Basis	Public Company	Private Company
a.	Minimum no. of members	7	2
b.	Maximum No.	No restriction	50
c.	Minimum No. of Directors	3	·2
d.	Restriction on Directors appointment. • Consent • ion Shares	File Consent Regr. Take up qualification Shares, if any	Not applicable
e.	Restriction on Invitation to subscribe to shares.	No restriction	Prohibited
f.	Transferability to shares	Freely transferable	Restricted
g.	Quorum	Five members . personally present'	Two rnernbers personally present
h.	Managerial Remuneration Ceiling	Applicable ..	Not applicable
ı.	Commencement of Business	After obtaining certificate of commencement Elf Business	After obtaining of certificate Incorporation
i.	Statutory meeting	Compulsory	Not applicable
k.	Approval of Central Government for appointment of Directors	Where the no. of Directors exceed 12	Not Necessary
l.	Retirement of Directors by rotation	Two thirds	Not applicable
m.	Minimum paid-up Capital	Rs. 5 Lakhs	Rs: 1 Lakh

(vi) Procedure- Poor Cenversion or A Private Company Into A Public Company

a) A private limited company, if it desires to convent itself into a public limited company, will have to follow the under-mentioned procedure.

(1) It should take the necessary decision in its board meeting and fix up the time place and agenda for convening a general meeting to alter the articles of association and consequently the name by a special resolution as well as to alter by special resolution the "objects clause" of the memorandum subject to the confirmation of the Company Law Board under Section 17 and by ordinary resolution the share capital clause under Section 94 if the alteration of share capital is involved in process.

(2) The company has to see that any change in' the articles confirms to the provisions of the Companies Act (Section 31 (1) also to see that such change does not increase the liability of any members who had become the member before the alteration.

(3) It must issue notices for the general meeting in order to pass there at the special resolutions together with the explanatory statements for the alteration of the articles and the memorandum.

(4) It Will have to convent the general meeting in order to pass there at the special resolution - (i) for the purpose of the alteration 'of" the memorandum and article of association and (ii) also for the purpose of deleting those articles which are required to be included in the articles of private company only (Section 3(1) (iii) Such other articles which do not apply to public company should be deleted and those which apply should be inserted. Consequent the above changes,. it Will have to delete the word 'private' from its name (Section 21)

(5) It shall file either the prospectus in the Form prescribed under Schedule II or the statement in lieu or prospectus in the form prescribed under scheduled IV within 30 days of the passing of the resolution mentioned in (4) above in die manner stated in Section 44.

The aforesaid prospectus or ' the statement in lieu of the prospectus must be in conformity with parts I and II of Schedule II or with parts I and II of schedule IV respectively.

(6) In the matter of the prospectus or the statement in the prospectus of the company has to adopt abundant caution against any untrue statement being included therein. because inclusion of Untrue statement included in a prospectus or statement in law of prospectus shall be deemed to be untrue if it is misleading in the form and context in which if is included Likewise, where the omission from prospectus or a statement in lieu of prospectus of any matter is calculated to mislead, it Shall be deemed in respect of such omission to be a prospectus or a statement in lieu of prospectus in which an untrue statement is included.

(7) It shall file with the concerned stock exchange 6 copies of such amendments on both articles and" memorandum one of which must be a certified copy.

(8) It shall file with the Registrar the said special resolution together with the explanatory statement within 30 days of their passing (Section 192)

(9) It must take some of the steps regarding further issue of capital under Section 81, which are not in common with the steps discussed in relation to further issue of shares.

(10) The company has to apply. to the Register for the issue of a fresh certificate of incorporation for' the changed name, namely the existing name with.' the .word "private" deleted. On issue of such certificates shall' the name. of the converted company be final and complete. (Section 23)

b. Conversion by default: Sec.43

It is a Private Company fails to comply with any of the restrictive provisions of Sec.3 **(I)** (iii) such Company ceases to be Private Company and becomes a Public company. The company ceases to enjoy the privileges and exemptions conferred on Private Company.

All provisions of the Act shall become applicable as if any Company were a Public Company.

(vii). Conversion of a public Company in to a Private Company

A Public Company by amending its articles and inserting the restrictive clauses give under sec. 3 (1) (iii) of the Act can become a Private Company.

The amendment to the Articles shall' have effect only after the Central Government approval is the amendment bas the effect of converting a Public Company to a Private Company' (Sec.31) Therefore the Company not only requires shareholders approval by Special Resolution but also the approval of the Central Government.

On approval of central government a printed copy of the altered Articles of Association is to be filed by the company with the Registrar of companies within a month of the date of receipt of approval.

(Viii) Privileges and Exemptions

A private company can have a greater degree of secrecy as regards its affairs and enjoys grater freedom on its operation: It enjoys some privileges and exemptions which a public company is deprived of briefly these are as follows:

1. Two or more persons may form a private company. (Section 12(1)
2. The restrictions on the commencement of business contained in Section 149 (excepting those contained in Section 149(2A) which have been made applicable to all companies) do not govern private companies.
3. A private company may allot shares without issuing a prospectus or delivering. to Registrar a statement in lieu of prospectus (Section 70)
4. It need not hold a Statutory Meeting or file a statutory report (Section 165)
5. The provisions of Section 81 as regard further issue of capital do not apply to a private company (Section 81(3)(a) .
6. The consent of directors to act as such, and to take up qualification shares. need not be filed with the Register (Section 266)
7. There is no restriction on the amount of overall managerial remuneration that it may pay (Section 198)
8. The consent of the Central Government for any increase in 'the remuneration of directors including managing or wholetime director or upon their appointment at increased remuneration, is not required (Section 310)
9. The directorship of a private company is not included in the maximum number of directorship that person may hold. (Section 278)
10. The consent of the Central Government for advancing loans to directors is not required (Section 295)
11. There are no restrictions on the powers of the Board of Directors (Section 293)
12. The Central Government is not empowered to prevent a change in the Board of Directors of a company, which is likely10 affect management prejudicially (Section 409)
13. It can advance loans for the purchase of is own shares (Section 77(2)
14. Provisions of Section 416 relating to contracts by agents of a company in which the company is an undisclosed principal are not applicable.
15. A director can vote on a contract in which he is interested (Section 300(2) (a).

Lesson-2

FORMATION OF COMPANY

INCORPORATION OF COMPANY / MODE OF REGISTRATION

In the case of a public company with or without limited liability any 7 more persons can form a company by subscribing their names to memorandum and otherwise complying with the requirements of the Act. In exactly the same way 2 or more persons can form private companies (Section 12) Persons who form the company are known as promoters. It is they who conceive the idea of forming the company. They take all necessary steps for its registration,

Procedure

1. The promoters ace to decide on the type of the company viz, Public/private Company, Company limited by shares/guarantee with or without' share capital unlimited Company.
2. The State where the registered office of the Company is to be situated is to be decided by the promoters.

(a) Lawful purpose

The essence of validly in Corporate Company is that must consist (of a particular number of persons and association for lawful purpose. Unless purpose appears to be unlawful *exfacie* or is transparently illegal or prohibited by any statute, it cannot be regarded as a unlawful purpose,

Where the purpose is not lawful, i.e, where any of the objects is illegal the Registrar may refuse to register and. if tie register and if the register the certificate of registration is not Conclusive for this purpose and the registration itself may be .cancelled by the Central Government taking appropriate proceedings *(Bowman vs. 'Secular Society) Ltd 1917.*

The Register needs not require into the circumstances which the company was proposed to be formed, there is no such obligation on him. Inspite of this if he undertakes any such 'enquiry, he .would be exceeding his jurisdiction and such an excess is not permissible.

(a) Applying for the name

The promoters of the company should decide upon at least three suitable names in order of preference to afford flexibility to the Register to decide the availability of the name. In case of a public company the name must end with the word. Limited and in case of a private company, with the words Private Limited. The name should not be undesirable, or identical with the name of an existing company (Section 20 (*Also* the name should not be the one which is prohibited under the 'Emblems and names (Prevention of Improper Use) Act, 950. Further the guidelines issued by the Department of Company Mairs should be followed while deciding the name.

An application shall be made in the prescribed form along with fees to the Register of Companies of the State in which the registered office of the proposed company is to be situating, for ascertaining the availability of the proposed name. The Registrar shall ordinarily inform availability or otherwise of the name within fourteen days from the date of submission of the application. Such a name shall be available for adoption within six months from the date of intimation by the Registrar.

(c) Documents to be filed

After getting the name approved, the following documents along with the application and prescribed and prescribed fees, are to be filed with the Registrar.

(1) Memorandum of Association (Section 33(1) (a)

(2) Articles of Association, if any (Section (1) (b)

(3) The agreement if any which the company proposed to enter into with any individual for appointment as its managing or whole time director or manger (Section (1) (c)

(4) A declaration that the requirement of the Act and the rules framed there under have been. complied with .This declaration is required to be signed by an advocate of the Supreme Court High Court or an' attorney or a pleader having the right to appear before High court or a secretary, or a chartered accountant in whole time practice in India who is engaged in the formation of company or by a person named in .the articles as a director, manager or secretary .of the company. (Section 33(2)

(5) Incase of a public company having share capital, where the articles name a person as director / directors the list of the directors and their written consent in prescribed for to act as directors and take up qualification shares (Section 266).

Beside the aforementioned documents, the company must give a notice regarding the situation of its registered office under Section 146 within 30 days of registration.

(d) Subscribing their names

Subscribing name means signing the names. Section 15 stipulates that the Memorandum should be signed by each Subscriber who should add his address, description and occupation in the presence of one witness. An agent may sign on behalf of the subscriber if he is authorised by a power of Attorney in this behalf In the case of a company having share capital, the subscribers to the memorandum should take atleast one share each and state clearly the number and nature of' shares taken by them. In the same way the Articles of Association should be signed. Both the Memorandum and Articles should be duly stamped and dated.

Only person can be a signatory to the memorandum. It follows therefore that a firm cannot be signatory. to the memorandum for it is not a person having an individuality separate from that of its partners, only individuals or other legal entities can be members of a company *(Ganesh Dass vs. R.G.Cotton Mills Co.(1974))* But under Section 25(4) a firm may continue to be member of any association to the entitling it to be registered as a company with a limited liability. But it is an exception to the generality of the law; which precludes .the firm being accepted as a shareholder of a company.

(e) Commencement of business

A company having a. share capital which has issued a prospectus inviting the public' to subscribe for its shares cannot commence any business or exercise any borrowing power unless:

(a) The minimum number of shares, which have to be paid for in cash, has been subscribed and allotted.

(b) Every director bas Paid in respect of shares for which he is bound to pay an amount equal to what is payable on shares offered to the public on application and allotment.

(c) No money is or may become liable to be paid to application of any shares or debentures-offered for public subscription by reason of any failure to apply for of' to obtain permission.

(d) A statutory declaration by the secretary or one of the directors that the foresaid requirement have been complied with is filed with the Registrar, If however a company having a share capital has not issued a prospectus inviting the public to subscribe for its shares, it cannot commence any business or exercise borrowing powers unless it has issued a statement in lieu' of prospectus and the condition contained in paragraphs (b) and (d) aforementioned have been complied with.

(f) Statement in Lieu of Prospectus

If a public company does not issue a prospectus inviting the public to purchase its shares because the' directors think that they can sell the .shares even without the issue or the prospectus it can do so. However the company must file with the Registrar "Statement in lieu of prospectus before it allots the shares or debentures to the applicants. This statement contains almost all those particulars, which are given in the prospectus, but it must be in the same form as is given in Schedule III. In any case, such a statement must be filed atleast three days before the allotment is made. A private company is not required to issue either a prospectus or statement in lieu of prospectus.

But the foregoing provisions are not applicable to a private company (Sub-section (7) of Section 149)

Sub-section (2A) restrains companies from commencing any business to pursue "other objects of the company" which are not incidental or ancillary to the main objects whether or not and segregation between the two has been made as contemplated by the provisions contained in, Section 13(1)(b) of the Companies Act, unless the following conditions have been complied with:

(i) That the company has approved of the commencement of any such business by a special resolution passed in that behalf at a general meeting, and

(ii) That the company has filed With the Registrar a. declaration duly benefited by one of the directors or secretary, in' prescribed form that resolution has been passed or the Central Government in pursuance of an application made under Sub-section (2B)bas permitted the company to commence such a business.

If the company commences any such business in contravention of this provision every person who is responsible for the contravention, without prejudice to any other liability would be punishable with a fine.

(g) Certificate of incorporation

Upon the registration of the documents mentioned earlier under the heading "Documents to be filed for registration of the company" 'and the payment of the necessary fees, the Registrar of Companies issues a certificate that the company is incorporated an in the case of a limited company that is limited (Section 34)

Section 35 provides that a certificate of incorporation issued by the Registrar in respect of any association shall be conclusive evidence of the fact that all the requirements of the Act have been complied with in respect of registration and· matters precedent and incidental thereto and that the association is a company authorised to be registered and duly registered under the Act.

The certificate of incorporation is conclusive to all administrative acts relating to incorporation and as to the date of incorporation. In *Jubilee Cotton Mills vs. Lewis* on 6th January, necessary documents were filled .for registration with Registrar. Two days later i.e on 8th January Registrar issued a certificate of incorporation dated as 6th January. On 6th January some shares were allotted to Lewis i.e. before the certificate of incorporation was issued Held Certificate of incorporation is conclusive evidence of all that it contains and allotment of shares is valid.

Moosa Goola Arif Vs. Ebrahim Goola Arif

A Company was registered on the basis of M & A signed by 2 persons and a guardian on behalf of 5 minor members. The guardian signed separately· for each the 5 members. The plaintiff contended that the certificate of incorporation should be declared void. Held the certificate .of incorporation was valid.

(b) Effect of Registration [Section 34)

1. On the registration of the Memorandum of a company. the Registrar shall certify under his hand that the company-is incorporated and in the case of a limited company, that the company is limited.
2. From the date of incorporation mentioned in the certificate, the Company becomes a legal person separate from the corporator, and there comes into existence a binding contract between the company and its members as evidenced by the Memorandum and Articles of Association· *(Hari Nagar Sugar Mills LId vs.S.S. Jbunfhunwala AIR* 1961 SC *1*669). It has perpetual existence 'until it is dissolved by liquidation or struck out of the register and bas the common sea. A shareholder, who buys shares does not buy any interest in the property of the company but in certain cases a writ petition will be Maintainable by a company or its shareholders. .

A new legal personality emerges from the moment of registration of a company and from that moment the persons subscribing to the Memorandum of Association and other persons joining as members. are regarded as a body corporate or a corporation in aggregate and the new legal person beings to function as an entity: A company on registration acquires a separate existence and the law recognises it as a legal person separate and· district from its members *(Stale Trading Corporation of India vs. Commercial Tax Office AIR 1963 SC1811.*

Under the provisions of the . Act, a company may purchase shares of another company and thus become and thus become a controlling company. However merely because a company purchases all shares of another company' it will not serve as a means of putting an end to the corporate character of another company and each company is a separate juristic entity *(Spencer & Co Ltd Madras vs. CWT Madras (1969)*

The law recognizes such a company as a juristic person separate and distinct from its members The mere fact that the entire share capital has been contributed by a Central ·Government and all its shares held by the President of India and other officers of the Central Government does not make any difference in the position of registered company and it does not make a company an agent either of the President or the Central Government (Heavy Electrical Union vs. State of Bihar AIR 1970 SC 82)

Under Section 35, a certificate of incorporation given by the Registrar in respect of any association shall be conclusive evidence that all the requirements of the Act have been complied with in respect of the registration and matters precedent and incidental thereto and that the association is a company authorised to be registered under this Act.

Lesson - 3

MEMORANDUM

Memorandum of Association

The memorandum of association of a company is in fact its charter; it defines its constitution arid the scope of the powers with which it has been established wider the Act. It is the very foundation on which the whole-edifice of the company is built.

"Fundamentally, there are two objects in registering the memorandum. First, that the intending corporator who contemplates the investment of his capital may know within what fields it will be incurring risks. Secondly, that anyone dealing with the company may know without reasonable doubt whether the contractual relationship which he is proposing to enter into with the company is one relating to matters within· its corporate objects". A company cannot depart from the provisions contained in the memorandum however imperative may be the necessity for the departure. It cannot into a contract or engage in any trade or 'business which' is beyond the power confessed on it by the memorandum. It does so, it would be ultra *vires* the company and void. A memorandum is a: public document under Section 610. Consequently every person entering into a contract with the company is presumed to have the knowledge of the conditions contained therein.

(a) Contents of memorandum:

(Section 13) The particulars of clauses which the memorandum of a company must contain are as under:

(1) The name of the company with 'Limited' as the last word and 'Private Limited' in the case of a private company.

(2) The State in which the registered office will be situated. .

(3) The objects of the company in the case of a company in existence immediately before the commencement of the Companies (Amendment) Act, 1965.

In the case of a company formed after the commencement of the Amendment Act, 1965. The memorandum must contain (a) the main objects of the company, together with other objects incidental or ancillary to the attainment of the main objects (b) other objects of the company not included in (a) above. .

(4) In the case of a company (other than a trading corporation) with objects not confined to one state, the state to whose territories the objects extend,

(5) A declaration that the liability of members is limited,

(6) A statements as to the amount of share capital, and its division into shares of fixed amount.

The memorandum must conclude with a declaration of association signed by the subscribers, who shall add their description address and occupation, each stating against his name the number .of shares he agrees to take. The signatures of the subscribers must be attested, one witness is usually sufficient and he must add his address description and occupation. It must be printed and 'divided into .paragraphs, numbered consecutively and should be .in one of the forms in Tables B, C,D and E of Schedule to the Act as applicable to the type of the company or in a form as near thereto as circumstances admit (Sections 14 and 15)

To sum up

Name Clause

The name of the Company with 'Limited' as its last word in the case of public Company, and “Private Limited” as its last words in the case of a private Company.

Situation Clause

The State in which the registered-office of the Company is to be situated.

Object Clause

In the case of Companies other than trading corporations with objects not confined to one State, the States to whose territories the object extend -

(a) The main objects of the Co to be pursued by the Co. on its incorporation

(b) The objects incidental or ancillary to the attainment of the main objects,

(c) The other objects of the Company not included in clause.

Liability Clause

The declaration that the liability of the members is limited, in the case of a Company limited by shares or limited by guarantee. The memorandum of a Company limited by guarantee shall also state that each member undertakes to contribute to the assets of the Company, such amount, not exceeding a specified amount as may be required in the event of its being wound up while he is a member or within one year after he ceases to and liabilities" of the Company, as may have .been contracted before he ceases to be a member as the case may be and of the costs charges and expenses of winding up and for adjustment of the rights of the contributories among themselves.

Capital Clause

In, the case of company limited by shares the amount of the share capital with which the company is to be registered divided into shares of fixed amount. In the case of a company limited by guarantee, it states the liability of each member, to contribute specified amount to the assets of the Company in the event of winding up for payment of the liabilities of the Company.

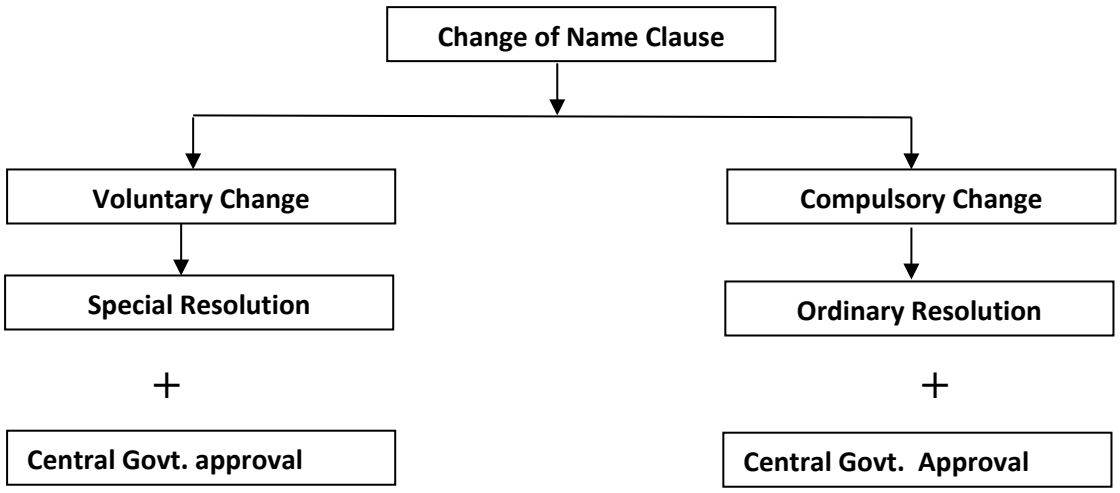
Association Clause

The association Clause by which the persons subscribing to the Memorandum declare there to form a company and agree to take shares indicated opposite' their respective names. No subscriber shall take than one share, it must be printed and divided into paragraphs and numbered consecutively.

It is to be stamped in accordance with the stamp laws prevalent in the State where the registered office of the Company is to be situated.

It is to be signed by each subscriber (7 in the case of public, company or e in the case of a private company as the case may be or his duly constituted power of attorney indicating such capacity) and add his address description and occupation if any. Incase of Companies having share capital each subscriber is to take up atleast one share and state clearly number and nature of shares taken up. The above signatures are to be attested by a witness. If the subscriber is illiterate, he should give his thumb impression which should be described as such by the person writing for him. The latter should place the name of the executants against below the thumb impression and authenticate by his own signature. Such person hould also read and explain the contents of the document to the executants and make endorsements to that effect.

ALTERATION OF MEMORANDUM



Alteration of the Memorandum

The memorandum be altered only to the extent and in the manner provided ·by the Act (Section 16)' which allows alterations by a· special resolution followed by confirmation thereof by the Company Law Board only for the under mentioned purposes. A resolution, which' is passed by 3/4th of the members present, is known as Special Resolution, Special resolution' and the Company Law Board's' confirmation are' not necessary in the circumstances mentioned in (c) (f) and (h) below necessary in the circumstances mentioned in (c) (f) and (h) below

a) Changing the place of its registered office from on State to another -Section 17
b) Changing the object – Section 17
c) Change of registered office within a State (New Section 17A)
d) Changing the name - Section 21, 22 and 23 (approval of Central Government necessary)
e) Changing any other provisions contained in the memorandum including those relating to the appointment of managing director or manager in the same manner as the articles of the company (that is' by special resolution) or in any other manner provided by the Act - Section 16(3).

(f) Creating reserve liability - Section 99

(g) Increasing consolidating sub-dividing or otherwise altering the share capital Section 94.

(h) Reducing the share capital - Section 100

(i) Rendering unlimited liability of its directors or of any director or manager - Section 323 Shareholder's fight can be altered or modified according to the provision contained in Section 106 and 107

An alteration that has the effect of increasing the liability of a member to contribute to the share capital of requires him to take more shares or otherwise to pay money to the company, shall not bind an existing member unless he agrees to it in writing (Section 38).

According to the proviso to Section 38 where the company is a club or any other association and. the alteration requires the members to pay recurring or periodical subscriptions at a higher fate although he does not agree in writing to be bound by the alteration, it will bind him. .

(a) Name Clause

No company shall be registered by a name, which in the opinion of the' Central Government is undesirable - Section 20(1) Under the Emblems and Names Act, the companies without the prior sanction of the Central Government cannot use 1950 names like U.N.O and W.H.O:" If the proposed name of the company is identical with or too nearly resembles of name-of another company which is already in existence the Central Government may refuse to register it (Section 10(2) Ewing vs. Buttercup Margarine Co. Ltd) The company must also be permitted to mention the fact it is the successors to proprietary concern or firm etc. In this way, good will is preserved.

The name of public limited company must and the work limited and that of a private limited company with the word "Private Limited". But as you have already noticed earlier, the Central Government' by Licence,' authorise company, which is non- profit making association to change its name so as to omit the words, "Limited or Private Limited" as the case may be by passing a special resolution.

The name and the address of the register or office must be printed or affixed outside every office or place of business in the characters of one of the languages in general use in the locality and mentioned in all business letters bill heads, letter papers, notices and other official publications. The name alone must be engraved on the seal and mentioned in all bills of exchange, promissory notes, endorsements, cheques and orders for money or goods invoices, receipts, etc., the characters must be legible. The address of the registered office is also required to shown (Section 147) .

The use of words "Limited" and "Private Limited" by any person or body of persons not incorporated With a limited liability or as a private limited company, as the case may be is an offence punishable with a fine-' (Section 63)

(b) Change of name

A company may, by special resolution and with the approval of the Central Government signified in writing change its name (Section 21) (*Power under Section 21 bas been delegated to the. registrar of company. The application for change of name is required to be made to me REGISTRAR in for a with a fee Rs, 500. Where the Register is satisfied with the company's proposal he may accord to rite Central Government would not be necessary where the only change in the. name of the company is addition thereto or the deletion there from of the words "private" consequent upon the conversion as per the provisions of this Act -of a public company into a' private company or vice versa (Proviso to Section 21). It may be noted that this proviso is designed to obviate the technical necessity of obtaining Government's approval for the mere addition or deletion of the word "private" to and from a company's name in the aforesaid circumstances.

If through inadvertence etc. the name is identical with or too Dearly resembles the name, by which a company in existence has been previously registered it may be changed by ordinary resolution with the sanction of the Central Government within twelve months of the approval of the Central Government within three months of the date of the direction of the Central Government being received or such longer period as the Central Government may deem fit to allow (Section 22(1)

Where the name of a company has been changed the Registrar shall issue fresh certificate with the change embodied therein, the change in name shall not affect any of the Company's rights or obligations of the company or render any legal proceedings by or against it. Any legal proceedings which might have been continued or commenced by or against the company' by its former name may be continued by its new name (Section 23)

To sum up

Special Resolution (Voluntary change of name)

(a) The Shareholders should approve name change by a special resolution.

(b) The availability of the desired name is to be obtained from Registrar by filing an application along with the prescribed fees.

(c) Form 23 should be filed with Registrar within 30 days together with a copy of the special resolution and approval of the Central Government (power delegated to Registrar) is to be obtained.

Approval of central government is not, necessary where the only change is addition or deletion of 'private' or the conversion of a private company into a public, company.

Ordinary resolution (Compulsory changes of name)

If through inadvertence or otherwise a Company is registered with a name which in the opinion of the Central Government, is identical with, of too nearly resembles the name of an existing Company, the Company

(a) May change is name by ordinary resolution and with the Previous approval of the Central Government.

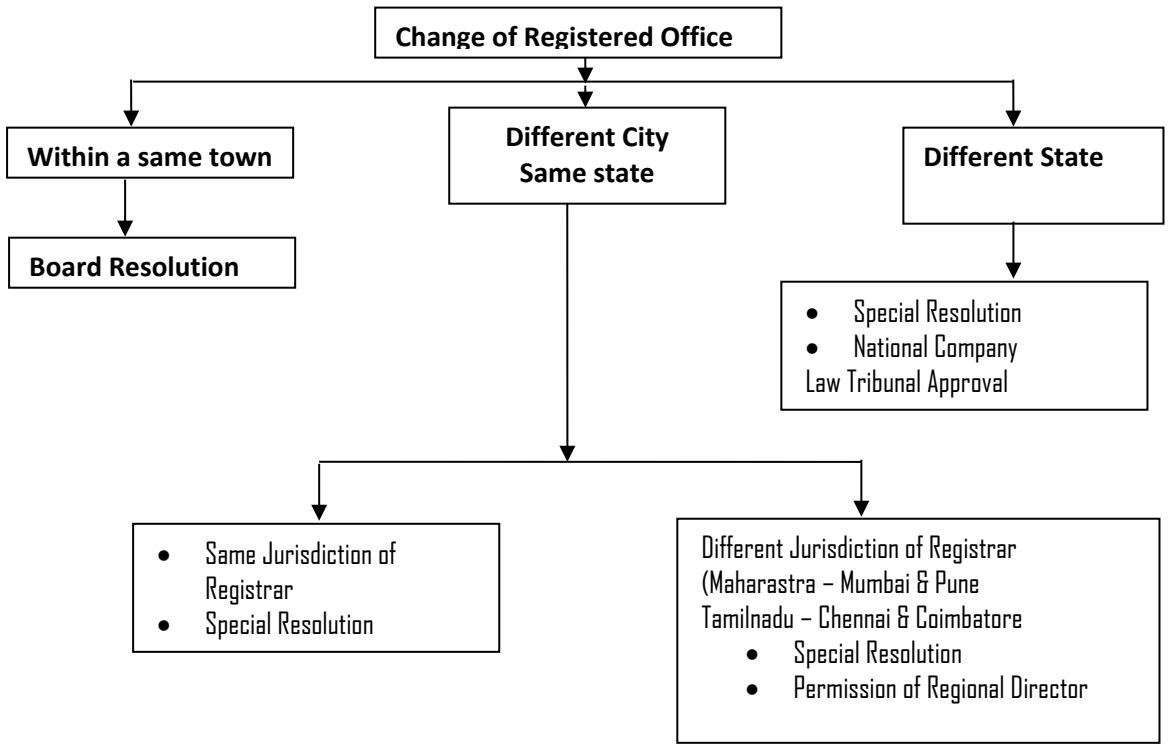
(b) Shall change its name if the Central. Government so 'directs within 12 months of its first registration by its new name, as the case may be. When so directed by the central Government the Company shall by ordinary resolution and with the previous approval of the Central Government in writing change its name or new name within a period of 3 months from the date of the direction.

Fresh Certificate of (incorporation: See. 23

A fresh certificate of incorporation will be issued by the Registrar after emerging the new name in his register after which the new name becomes effective.

The name change should be noted in each copy of M & .A.

The change of name shall not affect any rights or obligations of the company by render defective any legal proceedings by or against the Company.



(c) Registered Office

Every company must have registered office where. (a) Necessary documents be served upon or deposited (b) notice letters etc, may be issued (c) Inspection be had and (d) communication may be made. The domicile and the nationality of a company is determined by the place of its registered office. This is also important for determining the jurisdiction of the Court.

A company must have a registered office as from the day on which it commences business, or as from the 30th day after the date of its incorporation whichever is earlier. It may be noted that the address of the registered office ordinarily is not to be stated in the memorandum of association. For if this was done every change therein would, require amendment of the memorandum. It is advisable to provide in the articles that the registered office should be-situated at such place the Board should from time to time fix. otherwise the registered office cannot be removed outside the city etc., where it is situated without special resolution notice of the situation of the registered office and of every change therein must be sent to the Registrar (otherwise than through a statement as to the address of the registered office in the annual report) within 30 days of the date of incorporation of the date of changes. This provision is designed to locate the spot where the records of the company could be inspected and where the letters should be addressed and notices served upon the company:

The address may be changed within the local limits of any city, town or village where such office is situated by just giving a notice to the concerned Registrar within 30 days after the date of the change: But a special resolution will be required if the change of the registered office in from one Village, town etc., in the same state (Section·l46)

The Company is required to given an advertisement in. the newspapers indicating the Change proposed to be made and also a notice is to be given to the State Government when it is proposed to transfer the registered office from one state to another. *(Vide* Rule 36 of the Company Law Board) (Bends) Rules 1975 (App IV)

The law as contained in Section 17(3) requires notices for this to be served on all shareholders. In an Orissa High Court case, only two shareholders out of three had passed the special resolution and as such, the resolution was held to' be invalid. Again when application is made from for a change in registered office of a company from one State to another, the former State is the authority whose- interests are affected by this change and thus has the locus stand to such an application. *(Orient Paper Mills Limited vs. State AIR 1977 Orissa 582)*

The court (now the Company) must be satisfied as to the bonafide of the company application for the proposed change. Thus where a company proposing to change *the* location of registered office from Orissa, Andhra Pradesh had relied on section 17(1)(a) for the change or the ground more direct and economic administration but had failed to clarify how the expenses would be curtailed or how the administration from Andhra Pradesh could be more direct while the factory or unit or production was in Orissa it was held that bona fides of the company's application for the change were questionable (Orissa Chemicals and Distilleries Private Ltd. Inre. AIR 1961 Orissa 62)'

Steps to be taken by a company: (i) for transfer of its registered office from one state say West Bengal to another State say Tamil Nadu".

(i) The Company may by a special resolution alter the provisions of its memorandum so as to change the- place of Its registered office from West 'Bengal to Tamil Nadu, this change alone needs conformation of the Company Law Board. When an application is made for a change as a fore said, it is the 'state where the registered office is at present situated, whose interests ate like to be affected by the change and thus will have the locus stand to oppose such an application (Orissa paper Mills Ltd. vs. Stale. AIR 1957 482) Further more it shall be necessary to satisfy the Company Law Board 'as to the bonafides of the company's application for the proposed change (Orissa Chemicals Distilleries Pvt. Ltd in Re, AIR.1961 Orissa 621) At present the C.L.B. has the power either to confirm or' refuse to confirm alteration relating to change .of registered office)

(ii) New section 17

a) The amended provision shall apply only to companies that change their registered office from the, jurisdiction of the Register of Companies' to the jurisdiction of another register of Companies within the same. State: (At present the provision shall be applicable the States of Maharashtra & Tamil .Nadu which have more than one office of, REGISTRAR namely at Mumbai & Pune and Chennai & Coimbatore respectively)
b) The company cannot do such change of office unless the Regional Director confirms
c) To obtain confirmation the company has to apply in the prescribed form
d) The Confirmation must be communicated to the company within d weeks from the date of receipt of the application,
e) Certified Copy of the confirmation along with the attested copy of the memorandum of Association must e filed with the REGISTRAR for registration within 2 months from the date of confirmation.
f) Within one month of filing the REGISTRAR shall Certify registration, which shall be the conclusive evidence that all requirements with respect to alteration and confirmation have been complied with.

Change within the local limits of the same town

(a) board resolution to approve the charge

(b) Form No. 18 is to be filed with Registrar within 30 days giving notice of change and new location of the registered office. This does not constitute change of Memorandum.

Change from one city to another within the same state

(a) Shareholders are to approve change by passing a special resolution

(b) Copy of resolution together with from 18 advising new address is to be filed with Registrar.

OBJECTS CLAUSE

The object clauses enables shareholders, creditor and all those who deal with the company to know what its powers 'are and what is the range of it activities and enterprise, it is therefore true that the object clause of the memorandum of association of a company is of fundamental importance to its members well as to its non-members as well as to its non-members. In the first place, it gives protection to members who learn from it the purpose to which their money can be applied. In the seconds place, it protects persons dealing with the

company who can infer from it the extent of the company powers. The narrower the objects appended in the memorandum the lesser is the subscriber's stick the wider these objects the greater is the security of those who transact business with the company.

(g) Alteration of objects:

The members of a company may rightly expect that their money would be employed only for the objects for which the company has been established. Accordingly the Act permits alteration of the objects only so far as is considered necessary for specified purposes. Section 17(1) permits a company to alter its objects for the under mentioned purposes:

(a) To carry on business more economically

(b) To attain the main purpose of the company by new or improved means.

(c) To carry on some business which under the existing circumstances may conveniently or advantageously be Combined with the existing business.

(d) To change and enlarge the local area of operations

(e) To restrict or abandon any of the existing Objects

(f) To sell or disposes of the whole or any part of' the undertaking

(g) To amalgamate with any other objects or body or person

As per section 17(2) the alteration of the provisions of memorandum relating to change of place of its registered office from one state to another requires to be confirmed by the Company Law Board on petition. In other words, companies are now under liberty to alter the object change of the memorandum without confirmation of CLB. However, alteration can be made only an grounds stated above in sub-section (1) of section 17.

In addition according to the amended section 18(1) a company shall file with the Register a copy of the special resolution passed by the company in relation to clauses (a) .to (g) of sub section (1) of section 17 within one month from the date' of such resolution. The Registrar shall register the same and certify the registration under his hand within one month firm the date of filing such documents. Such certificate shall be conclusive evidence that all the requirements With respect to alteration have been complied with and memorandum so altered shall be the memorandum of the company.

If the documents required to be filed with the Register under section 18 are not filed within the prescribed time the alteration shall at the expiry of such period, become void and inoperative (Section 19).

To sum up

Objects can be altered only to:

a) Carry on business more economically or more efficiently
b) Attain its main purpose by new or improved means
c) Enlarge or change the local area of operations
d) Carry on some business, which under the existing circumstances can conveniently or advantageously be combined with the objects specified in the Memorandum .
e) Restrict or abandon any of the objects specified in the Memorandum
t) Sell or dispose the whole or any part of the undertaking of the Company or
g) Amalgamate with any other Company or body of persons.

To change the objects, Special Resolution of shareholders is necessary and Form 23 is to be filed with Registrar within one month from the date of resolution together with a printed copy of MoA as altered.

The Registrar would confirm the alteration by issuing a certificate confirming alteration within 1 month after which only the alteration is effective. The change is to be noted in all copies of the MoA.

For transfer from one Registrar to another Registrar jurisdiction in same state-

(i) An application is to be made in 'the prescribed from' to the Regional Director for confirmation.

(ii) The confirmation or otherwise shall be communicated to the Company within four weeks from the date of receipt of the application.

(iii) A certified copy of the confirmation should be filed within two months from the date of confirmation together with the printed copy of the Memorandum as altered with the Registrar.

(iv) The Registrar shall register the same and certify the registration within one month from the date of filling of such document.

(v) The certificate shall be conclusive evidence that all the provision of the Act have been complied with in relation to the alteration and confirmation.

Change of registered office from state to another: See. 17

a) A special resolution is to be passed by he shareholders approving the change.
b) Form No. 23 is to be filed together with the extract of such special resolution within 30 days of passing of the above resolution,
c) A petition is to be filed with the National Company Law Tribunal (NCLT) for confirmation of change.
d) Notice must be given to all persons whose interest will be affected in the change.
e) Consent of creditors of the Company must be obtained.
f) Notice must be given to the Registrar so that he can appear before the NCLT and state his objections and suggestions, if any
g) NCLT after considering above may make an order confirming the alteration either wholly or in part and on such terms and conditions as it think proper
h) A certified copy of the order of NCLT together with printed copy of altered Memorandum must be filed within 3 months of the order with the Registrar
i) Registrar on receipt of the above order will register it and issue within, one month a certificate which will be conclusive evidence of alterations - Sec. 18
j) In the event of shifting of registered office from one state to another a certified copy of the order is to be filed with Registrar of both (he status within 3 months of the order.
k) The Registrar of the present State must send all the documents to the Registrar of the other state in due course
l) Notice of 'new address in form No,18 is to be given to the Registrar of the state in which the office is situated.
m) On failure to register the NCLT .order within 3 months, the Registrar will render all proceeding with NCLT and the order aforesaid void.
n) NCLT may extend, the time for filling such order by period as it thinks proper at. Any time by order,

Change of Object Clause

The powers of the company are limited to (a)Power expressly given by the memorandum (teamed "express" powers) or conferred by statue,(b) powers reasonably incidental necessary to the company main purpose (termed "implied" powers).

Acts beyond the company powers are *ultra vires and* void and cannot be ratified even though every members of the Company may ,give his consent *(AShbury, Railway* Carriage Co. vs. Riche (1875) The test to be applied whether a power is implied or hot is not the benefit the transaction is expected to confer on the company, but whether it can reasonably be regarded as arising from the main objects of the company.

It is customary to exclude the general rule of construction for the interpretation of the intention contained in different clause of the memorandum shall be no way limited or restricted by reference to inference from the terms of any other paragraph or the name of' to the company.

The subscribers to the memorandum may choose any "object", or "object" for the purposes of their company. There are two restrictions however on the selection of "object" for a company (i) the objects should not include any thing which is illegal or contrary to law or public policy, e.g .floating a company for dealing in lotteries *(Ex.Parte More (1931)* or trading with alien enemies *(Daimler,& Co. vs. Continental Tyre Co.1921)* Objects which are in restraint of trade *(Mac:;Ellis vs. Ballymacalligot etc.Company* (1919) or are biaspbemeous (but not denying Christianity) have also been held to be bad *(Bowen' vs. secular society* (1971) (ii) the objects should not also contemplate doing anything, which is prohibited by the companies Act. A part from those two restrictions, the object of a company may be anything that the proposed company desires to achieve *(LAl Gopal Dult VS. Khortriah Mego ZliteZamindary Co.)*

Liability clause

Liability Clauses in the memorandum define the limitations of the liability of members. This liability may be limited in either of the two ways. a) it may be limited to the amount remaining unpaid on shares held by a member or shareholder or (b) incase of guarantee company it may be limited to the amount which each member undertakes to contribute to the assets of the company in the event of winding up. It may be noticed that the limited liability clauses is entirely omitted from the memorandum in case of unlimited company because the liability of members of such a company is unrestricted.

Alteration of Liability clause

No members of a company shall be bound by an alteration' made in the memorandum or articles after the date on which he became, a member, if such an alteration 'requires him to take or subscript for more spares should the number' held by him as the date of alteration or in any way increase his liability. (Section 38) But the section will not' apply where the members agrees in writing: either before or after a particular alteration in made, so as to bound by the alteration. 'Similarly if the company is a club or association alteration in the memorandum the articles requiring a member to pay subscriptions / charges at a higher rate a member may be bound by the alteration even though he does not agree in writing. 'In the case of registration of unlimited company as a; limited company the liability may either be limited or reduced such an .alteration by way change of registration of such companies shall not alter any debts liabilities or contracts incurred or entered into by or on behalf the company before the registration.

(G) Capital clause

The capital clause states the amount of share capital with which the company proposes to be registered and the division thereof, into shares of fixed amount. It is for those who are promoting the company to decide the amount of capital, which will be necessary for the company. Such capital is called that "Nominal" or "Authorised" capital. There is .no limit to the amount of authorised capital' with 'which a company can be incorporated. The amount of authorised capital should be sufficiently high so that further issue of shares may easily be done to finance the expanding business. It is optional for a company to state the division of that authorized capital into different shares, if any and the rights of various classes of shareholders in this clause. Generally such details are described capital into different classes of shares, lf any" and the rights of various Classes of shareholders in the clause. Generally such details are described in the articles of the company. Note that an unlimited company having a share capital is not required to have the capital clause-in its memorandum, in the case of such company. Section 27(i) provides that the amount of share capital with which the company is to be registered must be stated in the Articles of Association for a Company.

Alteration of Capital Clauses Sec.94

A company can make the following types of alteration by an ordinary resolution if authorised by its articles to do so-

a) Increase its share capital by issue of new shares.
b) Consolidate the existing shares into shaares of larger denomination e.g., 1 Crore share of Rs.10/- each into10 Lakh shares ofRs.l00/- each.
c) Subdivide its shares of small amount than is fixed by the Memorandum e.g. 1000 shares @ Rs. 1,00,000/- into 1 Crore shares of Rs. 10/- each;
d) Convert fully paid shares in to stock or vice versa;
e) Cancel un-issued shares and to that extent diminishes the amount of share capital.

A copy of the resolution should be filed with Registrar within 90 days passing of the resolution the Registrar shall record the notice and make an alteration may be necessary in the M & A.

Lesson- 4

ARTICLES OF ASSOCIATION

(1) Definition: See: 2(2)

Articles means the Articles of Association of a Company as originally framed or as altered from time to time in pursuance of any previous company law or of this Act. The Articles of Association are the rules, regulations and byelaws for the internal management of the affairs for the company. They are framed with the object .of carrying out the objects as set out in the .Memorandum of Association. The Articles should not contain anything, which is inconsistent with either the provisions of the Memorandum of Association or of the Companies Act.

The articles of association of a. company are its rules and regulation, which are framed to manage its internal affairs: Just as the memorandum contains the fundamental conditions upon which along the company is allowed to be incorporated, so also the articles are the internal regulations of the company (*Guiness vs. Land Corporation Ireland).* These: general functions of the articles have been applied summed up by Lord Cairns in Ashbury carriage CO. vs. Riches as follows". The articles playa part subsidiary to memorandum of association, they accept the memorandum as the. character of incorporation and so accepting in the articles Registered to define the duties, the incorporation and so accepting it thee articles Registered to define the duties the rights and powers of the governing body as between themselves and the company and the mode and from in which the business of the company is to be carried on and the model and form-in which changes in the internal regulation. for the company may from time to time be made"

The document containing the articles of association of a company *(the Magna Carta)* is a business document hence it has to be construed strictly. It regulates domestic management of a company and creates certain tights' and obligations between the members and the company. (s.s. *Rajkumar vs.Perfect Castings (P) Ltd* (1968)) The articles of association in fact the bye-laws of the company a according to which director and other officers are required to perform the functions as regards the management of the company, its accounts and audit. It is important therefore that the auditor should study them and while doing so he should note the provisions therein in respect of relevant matters.

Every company limited by guarantee or an unlimited or a private limited company is required to register it articles along with the memorandum of association, If a public company limited by .shares does not register articles, the regulations contained in Table A would be applicable as if these were the articles of the company.

2. Usual Contents of Articles

a. Exclusion wholly or- in part of Table A
b. Adoption of preliminary contracts
c. Number and value of shares
d. Allotment of shares
e. Calls on shares
f. Lien on shares
g, Transfer and transmission of shares
h. Forfeiture of shares
i) Alteration of Capital
j) Share certificate
k) Conversion of shares into stock
l) Voting rights and proxies
m) Meetings
n) Directors; their appointment etc
o) Borrowing powers
p) Dividends and reserves
q) Accounts and audit
r) Winding up

3. Form of Articles

Type of Company	Form of Articles
Company limited by shares (Sec. 8)	• Adopt Table A of Schedule I in full, or • Own Articles to the exclusion of Table A, or • Own Articles and adopt Table A in part
Company Limited by guarantee and not having share capital (Sec. 29)	Own Articles in a form as in Table C
Company limited by guarantee and having share capital (Sec. 19)	Own Articles is a form as in Table D
Company with unlimited liability (Sec.29)	Own Articles in a form as in Table E

4. Form and signature: See. 30

Articles shall be printed, divided into paragraph and signed by each subscriber to the Memorandum, stating his name address, description and occupation if any, in the presence of atleast one witness who shall attest the signature and likewise and his address.

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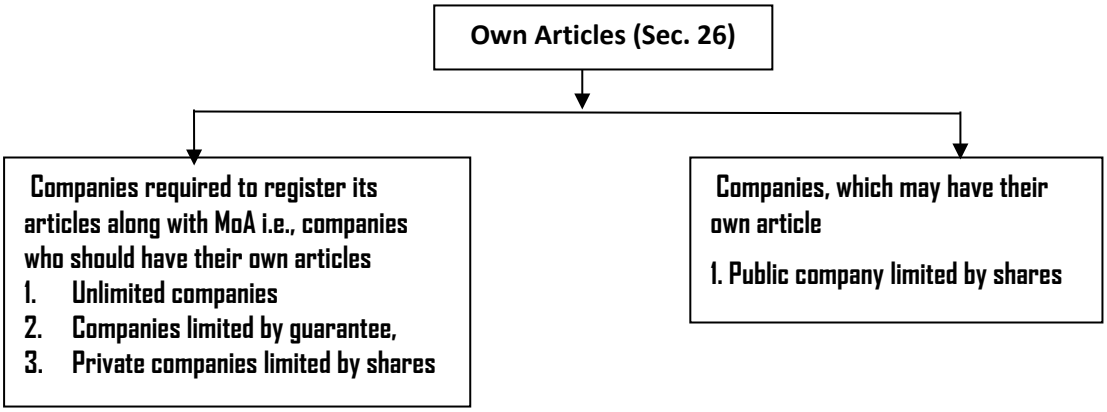


Regulations in case of C Companies mentioned above: Sec. 27

(a) Unlimited Companies

Articles should state:

(a) Number of member with the company is to be registered.

(b) If it has share capital, the amount of share capital with which the company is to be registered.

(b) Company limited by guarantee

Articles shall state, the number of members with which the Company is to be registered. If the public company does' not, register articles, the regulation contained in Table A would be applicable as if these were the articles of the company.

(c) Private Company having share capital

Articles shall confirm to requirements of sec. 3 (i) (iii)

Note: If the public company does not register articles, the regulation contained in Table A would be applicable as if these were the articles of the company.

Alteration of Articles

Section 31 vests companies with power to alter to its articles. A company cannot. divest itself of these powers (Andrews vs. Gas Meter Co. (1897) I Ch. 161) Matters as to which the memorandum is silent can be dealt with by the alteration of article (Section 19(1) The alteration must be effected by special resolution. The fundamental of a company to alter its articles is subject the following limitations.

a) The alteration must not exceed the powers given by memorandum or conflict with the provision thereof.
b) It must not in consistent with any provisions as of the Companies Act or any other statute.
c) It must not be illegal.
d) It should not be in fraud on minority. or inflict a hardship, on minority without any corresponding benefit to ·the company' as a whole. The court will not interfere unless the alteration could reasonably be considered as being not for the benefit of the company *(Brown British Abrasive Wheel Co(1919)) Side bottom vs .Kersnew Lesse & Co. Ltd (1920)).*
e) The alteration must not be inconsistent with and order of the Court Section 404 any subsequent alteration thereof which is inconsistent with such an order can be made by the company only with the leave of the court.
f) It may be regarded as having a retrospective effect so long as it does not affect the things already done by the company *(Allen vs. Gold Reef of West Africa (l909)*
g) If a public company is converted into a private company then the approval of the Central Government is necessary (Section 31 (1) proviso) Printed copy of altered articles shall be filed with the Register within one month of the date of central Government's approval (Section 31 (2A)

It may further be noted that an injunction cannot. be granted to prevent the adoption of new articles, which constituted a breach of contract. But if toe company acts on them it may be liable to damages *(Shirulaw vs. Southern Foundries Ltd 19-10*)

h) An alteration that has the effect of increasing the liability of a members to contribute to the company is not binding on a present members unless he has agreed there to in writing (section 38)
i) A reserve capital once created cannot be unreserved but may be cancelled on a reduction of capital *(Midland Railway Carriage Wagon Co. (l907) (Section* 99).
j) Any irregular alterations which have been acted on for many years are binding.

To simplify

Power to alter the Articles is vested with the company u/s 31 A Company cannot divest itself of the power to alter Articles Alteration is to be effected by special resolution passed by the shareholders.

Limitations

a) Must not be in consistent with the Act
b) Must not conflict with the Memorandum and must not exceed the power given by it
c) Must not be illegal or against public policy
d) Must not be inconsistent with an order of the Court
e) Must not increase liability of members

f) Must not result in expulsion of a member.
g) Must not be a bud on minority or inflict hardship on minority unless the-alteration is bonafide and is made for the benefit of the company as a whole.
h) Must be for the benefit of the company
i) Approval of Central Government is to be obtained if alteration has the effect of converting a public Company into a private company.
j) Alteration may be made with retrospective effect so long as it does not alter things already done by the company.
k) Alteration that has the effect of increasing the liability of a member to contribute to the company is not binding on a member unless he has agreed there to in writing.
l) A reserve liability created u/s 99.cannot be undone./ cancelled except on a reduction of capital.
m) Irregular alteration acted upon for many years are binding on the Company
n) A company is not prevented from altering its articles even if such an alteration would result in breach of some contract the affected party may however file a suit for damage for breach of contract but where the compensation would not be an adequate remedy, the court may restrain the Company from altering the articles.

Copies of Memorandum and Articles

A Company is bound on payment of one rupee by a member to supply within seven days of requisition a, copy of the memorandum and articles of association and even agreement and resolution' referred to in Section 192 not employed in- memorandum or articles. The, copies must be in a accordance with any alterations which have been made, before the date of issue, oft lie copies.

5. Difference between memorandum & articles of association

Memorandum of Association	Articles of Association
It is a-primary document	It is a secondary document
It is subordinate to the Act	It is subordinate to Memorandum. and the Act
It is charter of the Company and defines the fundamental conditions and objects.	It contains the Rules & Regulations
For alteration in certain cases, NCLT approval is required	For alteration the approval of the members is required
It defines the relation between the company and outsiders	It defines the relation between the Company and members (Internal Management)
Acts which are ultravires the memorandum cannot be ratified even by all the members.	Acts ultravires the articles can be ratified by the members.
Every company must have its own memorandum.	A public company limited by shares need not have articles of its own in such a case Table A applies.

Lesson-5

PROSPECTUS

Definition: Sec.2 (36)

It is any described or issued as prospectus and includes any notice, circular, advertisement or other document inviting deposits from the public or inviting offers from the public for the subscription or purchase of any shares in or debentures of a body corporate.

In this context, it should 'be noted that prospectus is not an offer in itself but an invitation to make an offer, signifying thereby that on acceptance of such an invitation by any member of the public, no binding contract between him and the company comes into being. Application for purchase of shares ·or debentures or for making a deposit constitutes an offer by the subscriber to the company and it is only on its acceptance by the company that binding contract comes into existence.

Features

1. It is a document in writing. An oral invitation is not a prospectus.
2. It must be for the subscription or purchase of any shares or debentures of a corporate body.
3. It is an invitation to the public. An offer is not to be treated to public if -
   - It is directed to a specific person or group of persons:
   - It is not calculated to result in the shares or debentures becoming available to others.

.4. Whether shares are issued to -the public is a matter of fact and depends on the circumstances of the cases; the test is not who receives the offer or invitation but who can accept it.

Pramanath Sanyal Vs. Kali Kumar Dutt

An advertisement in the newspaper stating some shares are still available for sale, according to the terms of the prospectus, which may be obtained on application, was held to be a prospectus. A single private communication does not satisfy the word 'issue'.

Nash Vs. Lynde

In this case several copies of the document marked "Strictly confidential" and containing particulars of proposed issue of shares were sent accompanied by application form by the Managing Director of the company to a Co-Director who passed it to a relation. Thus the document was passed or! Privately through a small Circle of friends the Director. It was held there had been no issue to the public,

A circular issued by a Company to the shareholders of other companies to acquire: shares in these companies and issue its own shares in exchange of those shares does not amount to prospectus as there is no public issue:

Public is general work and includes section of the public, See 67 (1) It is not necessary that prospectus should be issued by a company. It may be issued on behalf of the company by its agents like an issuing house,

S.E.B.I. guidelines 2000, provides that the term 'Advertisement' includes notices, brochures, pamphlets. ·'circulars,· show cards, catalogues, hoardings, placards,' posters, insertion in newspapers, pictures, films, coverages offer documents or any other print medium, radio, television programmes through an electronic medium.

The prospectus is the basic document on the basis of which the intending investors decided whether or not .they should subscribe to the shares or debentures. Therefore the law requires unstinted disclosure of various matters through prospectus and forbids variations of any terms and 'conditions of a contract contained therein. except with the approval and authority of the company in-general meeting (Section 61).

"Those who issue prospectus holding out to the public great advantage which will accrue to persons who take up shares on the representations contained. In therein, are bound to state everything with scrupulous accuracy and 'not, only to abstain from stating as fact' that 'Which is not so' but to omit no fact Within their knowledge, the existence of which might in any degree affect the nature or extent or 'quality of the privilege and advantages which the prospectus holds out as an inducement to take shares" (as per Kindersley V.C. in New Burnswick and Canada Railway co.' Vs .Mullridge).

It is therefore essential that the information is statutorily needing disclosure' is stated fully and precisely So that the investing' public which is ignorant' of the present and future prospects of the company may get all the information which is likely to affect the public mind. It is only to protect the members. of the public against their being misguided by half truths or falsehoods that the law casts a liability on various' persons connected with the issue of the prospectus to compensate 'every person (who subscribes on the faith of the prospectus) for any loss or damage he may have sustained because of the inclusion of any untrue statements in the prospectus (**Section 62).**

Under the new section 25 matters relating to the prospectus shall be administered by S.RB.I. in the case of a listed public company and in the case of a public company which intends to list its securities on recognized Stock Exchange.

Requirements as to issue of Prospectus

Dating: Sec.55

A prospectus may be dated. Unless the contrary is proved, the date of publication of the prospectus is the date of the prospectus. .

Signature

Existing Company: The prospectus must be signed by every person named as Director or his agent authorized in writing.

Intended Company: The prospectus must be signed by the proposed Directors of the company or his agent authorized in writing.

Registration of Prospectus: See. 60

A signed copy of the prospectus is to be filed with RoC before publication. It should be accompanied by following documents:

The consent of the expert mentioned in the prospectus, if his report is included in the prospectus.

A copy of every contract relating to the appointment or remuneration of a Managing Director or Manager.

A copy of every material contract not being a contract entered into in the ordinary course of business of the Company, entered into within two years of the issue of the prospectus;

A written statement relating to the adjustments if any, in respect of figures of any profit or losses, and assets and liabilities;

The consent in writing of the person, if any, named in the 'prospectus as the auditor, legal advisor, attorney, solicitor, Issue House, banker managers to the issue or broker of the 'company to act in that capacity;

The consent of the Director under Section 266in respect of new Directors, any, named therein.

A copy of the underwriting agreement, if any, should also be filed as required by Section 76,

The prospectus must contain a statement that a copy has been delivered for registration, and also indicating the requisite documents (giving names) delivered with it.

The prospectus must be issued within 90 days of registration with the registrar.

Approval of prospectus by various agencies

The draft prospectus has to be approved by various agencies before it is filed with the RoC of the concerned state. The various agencies who approve the prospectus are the following.

All the lead managers to the issue. Each of the stock Exchanges where the shares/ debentures are proposed to be listed.

The draft prospectus is vetted by. S.E.B.I to ensure adequacy of disclosures. However vetting of S.E.B.I. does not amount to approval of prospectus. S.E.B.I does not take any responsibility for the correctness of the statement made or opinions expressed in the prospectus.

It was also decided that ROC shall not register .a prospectus where prior to registration of the prospectus, the ROC before whom the prospectus is filled for registration is informed by SEBI that the Contents of prospectus filed are in contravention of any law or statuary rules and regulations. Each merchant baker has been given a code number.

The SEBI has issued circular undue guidelines for disclosure and investor protection that the draft prospectus filed with SEBI is not a Public document. The final, prospectus becomes available to the public only 2-3 weeks prior to the opening of the issue. To introduce greater transparency, the draft prospectus filed with SEBI would be made as a public document. The lead managers shall simultaneously file copies of the draft document with the stock exchanges Where issue is proposed to be listed, and can charge an appropriate sum to the person requesting such copy (ies).

When Registrar Must Refuse Registration: See, 60

a) If it is not dated;
b) If it does not comply with the requirements of sec .56 as to the matters and reports to be set out in it;
c) If it contains Statements or reports of experts engaged or interested in the formation or promotion or management of the company sec. 57,
d) If it includes statements purported to be made by an expert without a statement that he has given and has not withdrawn his consent to the manner of its inclusion therein;
e) If it does not contain consent in writing of directors;

f) If a copy of the documents mentioned in section 60-

i) Has not been filed, or does not comply with the provisions of section 60.

ii) Or a statement With regard to the fact that a copy of is bas been filed with the registrar is not included.

g) If it is not accompanied by the consent in writing for the auditor, legal adviser, attorney, solicitor, issue house, bankers managers to the issue or broker if named in prospectus to act in. that capacity - section 60 (3)

Contents of prospectus: see. 56

(a) It is to disclose matters as specified in schedule II of the companies act, 1956'

(b) Schedule II information is disclosed in three parts

(c) State matters as specified in part **I** of schedule **II** ·

- General information
- Capital structure of the company and issue details
- Terms of present issue
- Particulars of issue
- Company, management and project
- Particulars of any issue made by the company and other listed companies
- Under the same management.
- Particulars of outstanding litigaticn, Criminal proceedings and defaults
- Management's perception of risk factors:

(d) Set out reports specified in part II schedule II

- General information
- Financial information
- Statuary and other information

(e) Part I and part II are subject to the requirements of schedule II

- Report of accountant under part. II should be by a qualified accountant who should not be· an officer/servant/partner in. company or in the employment of an officer/servant/partner of company or in any subsidiary or holding company.
- Time and place of inspection of documents.

(f) Declaration by director that all relevant provisions of companies act 1956 and other guidelines issued by government have been complied with and that no statement made in prospectus is contrary to the provisions of companies act, 1956 or rules made there under.

The government has revised the format of prospectus, This has been done to provide for greater disclosure of information regarding the company, its .management, the project proposed to be undertaken by the company, the financial performance of the company for the last five years and management perception of risk factors so as to enable the investors to take an informed decision regarding investment in shares or debentures offered through public issue, The company 'will also be required to furnished particulars, in regard, to other listed companies under the same management within the meaning of section 370(IB) of the companies act, which have made an capital issue during the last three years. The company will

inform whether they have obtained credit rating for debenture/preference share issue. A declaration will also have to be furnished to the effect that all the relevant provisions of the companies act, 1956 and the guidelines issued by the government have been complied with and no statement made in prospectus is contrary to the provisions of companies act, 1956 and rules made thereafter.

Additional Disclosure: SEBI

a) Disclaimer clause stating-that vetting of offer document by SEBI should not be in any way deemed/construed as approval from SEBI for proposed issue.
b) Details of reservation made to various categories of applicants viz NRI/OCBs.
c) Manner of obtaining stock invest by applicant and manner of disposal of applicants accompanied by stock invest.
d) Buyback arrangement for purchase of non-convertible (Khokha) portion of PCDs.
e) Performance vis-a-vis promises relating to previous issue.
f) Deployment of proceeds of issue,
g) Stock market data,
h) Statement relating to allotment and refund.

When Prospectus Need Not Be Issued: See.56

In the following cases although the shares are offered and application forms issued, a prospectors containing all the details required under section 56, is not necessary,

a) Where a person is bonafide invited to enter 'into an underwriting agreement with regaled to shares or debentures
b) Where the shares or debentures are not offered to public
c) Where the issue relates to shares or debentures uniform in all respects, with the shares or debentures already issued and dealt in or quoted at- a recognized stock exchange
d) Where the shares or debentures are offered to the existing holders of shares or debentures respectively,
e) Where any prospector is published as a newspaper advertisement ordinarily called prospectus announcement, or the names etc, of the signatories to he memorandum, or the number of shares subscribed for by them.

Application to accompany prospectus: Abridged prospectus

No application form can be issued for shares or debentures unless accompanied by a memorandum containing the salient features of the prospectus as prescribed (called a bridged prospectors) except in cases where:

a) The offer is made in connection with the bonafide invitation to a person the enter into an underwriting agreement with respects to the shares or debentures.
b) The shares or debentures are. not offered to the public:
c) The offer is made only to the existing members or debentures holders of the company with or without a right to renounce:
d) The shares or debentures offered are in all respects uniform with shares or debentures already issued and quoted on a recognized stock exchange.

Central government has prescribed form 2 A for this purpose. The Department of company affairs has directed that the share application form should be part of abridged prospectus being attached to it along a perforated line.

Form 2 A should contain following details

1) General information
2) Capital structure of company
3) Terms of present issue
4) Particulars of issue

Statement By Experts

Before we go into this aspect, we must know who is an 'expert'. The term includes an engineer, valuer, accountant, and any other' person whose profession gives authority to a statement made by him [Section 59(2). The report of an expert cannot be included in a prospectus if he is any way connected with the formation or promotion or management of the company [Section 57]. In other words, the person must be independent to "function-as an "expert"'. Even if he is unconcerned or unconnected or impartial, his report in this capacity cannot be included: (a). unless he has given his written consent to the issue of the prospectus and has not withdrawn such consent before the delivery of the copy of the prospectus to the Registrar for registration, and (b) unless a statement as to his consent and non-withdrawal of it' appears in the prospectus [Section 58]. It is a sound rule designed to protect a prospective investor by making the 'expert' a party to the issue of the prospectus and making him liable for untrue statements.' If the report of the expert is published in contravention of the provisions of Section 7 or 58, every person who is knowingly a party to the issue of the prospectus shall be punishable with fine which may extend to Rs.50,000 [Section59].

Suppose, an expert has given his consent to the inclusion of his report in the prospectus (as required under Section 59) and has withdrawn his consent before the issue of the prospectus and inspite of this the prospects has been issued. In either of these circumstances, the directors of the "company and every other person who authorized the issue of the prospectus shall be liable to indemnify the expert 'against all damages, costs and expenses which he may have incurred on account of his being associated with the issue of the prospectus as an expert [Section 62(3)].

Shelf Prospectus (New Section 60A)

1) Any public financial institution, public sector bank or scheduled bank whose main object is financing shall file a shelf prospectus.
2) A Company filing a shelf prospectus with the Registrar shall not be required to file prospectus afresh every stage of offer of securities by it within a period of validity of such shelf prospectus.
3) A company filing a shelf prospectus shall. be required to file an information memorandum on all material facts relating to new charges created, changes in the financial position as have occurred between the first offer of securities, previous offer of securities and the succeeding offer of securities within such time as may be prescribed by the Central Government, prior to making of a second or subsequent offer of securities under the shelf prospectus.
4) An information memorandum shall be issued to the public along with shelf prospectus filed at the stage of the offer of' securities and such prospectus shall be valid for a

period of one year from the date of opening of the first issue of securities under that prospectus: Provided that where an update of information memorandum is filed every time an offer of securities is made; such memorandum together with the shelf prospectus shall constitute the prospectus.

Explanation - For purpose of this section.

a) "Financing" means making loans to or subscribing in the capital of a private industrial enterprise engaged' in infrastructural financing or, such, other company as the Central government may-notify in this behalf;

b) "Shelf prospectus" means a prospectus issued by any financial institution or bank for one-or more issues of the securities or class of securities specified in that prospectus.

Information Memorandum (New Section 60B)

1) A public company making an issue of securities may circulate information memorandum to the public prior to filing of a prospectus.

2) A Company inviting subscription by an information memorandum shall be bound to file a prospectus prior to the opening of the subscription lists and the offers as a red-hearing prospectus, at least three days before the opening of the offer

3) The information memorandum and red-herring prospectus shall carry same obligations as are applicable in the case of a prospectus.

4) Any variation between the information memorandum and the red-herring prospectus shall be highlighted as variation by the issuing company. Explanation - For the purposes of sub-sections (2), (3) and (4) "red-herring prospectus" means a prospectus which does 'into have complete particular on the price of the securities offered and the quantum of securities offered.

5) 'Every variation as made and highlighted in accordance with sub-section (4) above shall be individually intimated to the persons invited' to subscribe to the issue of securities.

6) In the event of the issuing company or the underwriters to the issue have invited or received advance subscription by way of cash or post-dated cheques or stock-invest, the company or such underwriters or bankers to the issue shall not encase such subscription moneys or such underwriters or bankers to the issue shall not encase such subscription moneys or post-dated cheques or stock invest before the date of opening of the issue, without having individually intimated the' prospective subscribers of the variation and without moneys or post-dated cheques or stock invest before the date of opening of the issue, without having individually intimated he prospective subscribers of the variation and without having offered an opportunity to Such prospective subscribers to withdraw their application and cancel their post-dated cheques or stock-invest or return of subscription paid.

7) The applicant or proposed .subscribers shall exercise his right to withdraw from the application on any intimation of variation within seven days from the date of such intimation and shall indicate such withdrawal in writing' to the company and the underwriters.

8) Any application for subscription which is acted upon by the company or underwriters or bankers to the issue without having given enough information of any variations, or the particulars of withdrawing ~f offer or opportunity for canceling the post-dated

cheques or stock invest or stop payments for such payments shall be void and the applicants shall be entitled' to receive a refund or return of its post-dated cheques or stock-invest or subscription moneys or cancellation of its application, as if the said application had never been made and the applicants are entitled .to receive back their original application and interest at the rate of fifteen per cent for the date of encashment till payment of realization.

9) Upon the closing of the offer of securities, a final prospectus stating therein the total capital raised. Whether by way of debt or share capital and the closing price of the securities and any other detail is as were not complete in the red-herring prospectus shall be tiled in a case of a listed public company with the Securities and Exchange Board and Registrar, and in any other case with the Registrar only.

Misstatement *I* Untrue Statement in Prospectus

A prospectus shall be deemed to be "a prospectus in which an untrue statement is included" if:

- It contains a statement which is misleading in the form and context in which it is included"
- There is a Omission from the prospectus of any matter calculated to mislead.

A person who has subscribed for a share or debenture on the faith of prospectus and has sustained any loss or damage can sue.

Purchaser of shares from the market has no· remedy for misstaternent in the prospectus.

Peek Vs. Gurney

A deceitful prospectus was" issued by the Directors of a Company. P received a copy but did not .subscribe to the shares: Several months later 'p' purchased 2000 -shares in the secondary market. The Company was would up. P had to pay nearly Pounds 1,00,000 as call money. P sought indemnity for his loss from the Directors at the time of issue' of prospectus, P's action against Directors for deceit was rejected, the reason being P did not, subscribe for share on the basis of prospectus.

The following can be used

a) The Company
b) Every Director
c) Every person whose name appeared in the prospectus as a proposed Director
d) Every promoter
e) Every person who has authorized the issue of prospectus
f) Experts

Proof

The onus of proof of misstatement is on the allottee. He should prove the following

a) The misrepresentation was of fact
b) The fact misrepresented was material
c) He acted on misrepresentation
d) He has suffered damages in consequence
e) Proceeding for recession should start as soon as allottee comes to know of misleading statement
f) Notice not enough

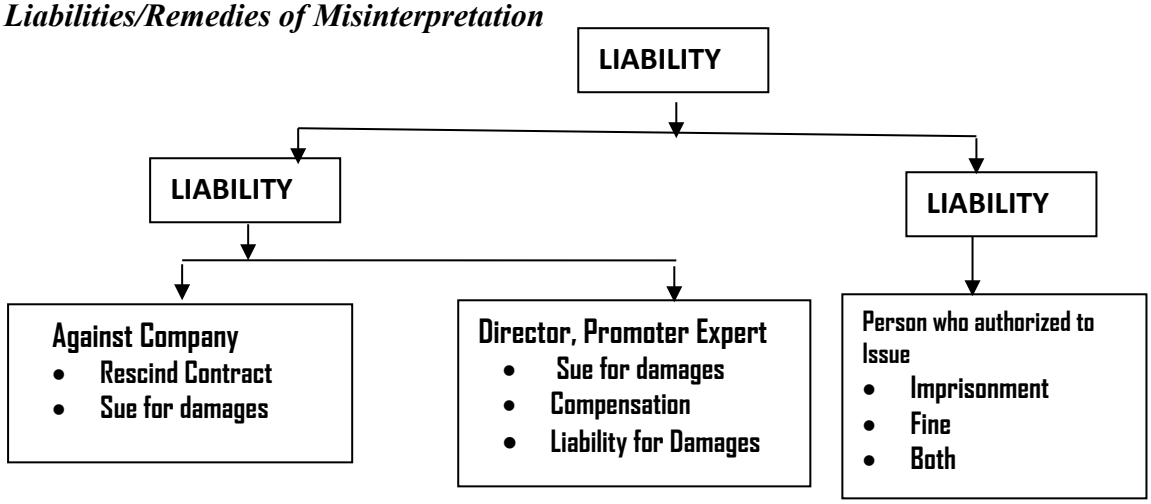
Golden rule / Golden Legacy Enunciated by Kinderseley V.C in New Burnswick, etc. Land & Co. Y.G. Muggeridge

The principle is that Directors arid other persons who fife responsible for the issue of the prospectus indirectly hold out to the public that great advantages are likely to accrue to' those members of the public who would take up shares in the Company. This 'holding out' casts onerous duty on them, i.e., they must state the facts honestly and faithfully. They must not only abstain from stating something as a fact when it is not actually so, but also must not omit a fact which they how or should have known and the existence of which might in any degree affect the nature or quality of the privileges and advantages which the prospectus holds outs an inducement to take shares.

Rex Vs. Lord Kyslant

All statements in the prospectus issued failed to -disclose that dividends stated as paid were not" out of the trading profits but out of retained capital profits. There was no disclosure off act that the Company made loss for 3 years. Prospectus was-held false in material particulars, Chairman and Managing Director Lord Kyslant who knew that it was false was held guilty or fraud.

Liabilities/Remedies of Misinterpretation



The principle is those directors and other persons who are responsible for the issue of the prospectus indirectly bold out to the public that great advantages are likely to accrue to those members of the public who would take up shares in the company. This "holding out" casts onerous duty on them. i.e., they must state the facts honestly and faithfully. They must not only abstain from stating something as a fact when it is not actually so, but also must-not omit a fact which they know or should have known and the existence of which might in any degree affect the nature or quality of the .privileges and advantages which- the .prospectus holds out as an: inducement to take shares. This principle was propounded in New Burswick, etc. Land Co. vs. G. Muggeridge.

If the persons responsible for the issue of the prospectus fail to discharge such an onerous obligation resulting in' an untrue statement being crept into' the prospectus, then certain rights accrue to 'the shareholders against the company and the directors and others.

They are as follows:

(1) Remedies against the company - A company is liable for a misstatement if it is shown that the prospectus was issued by the company or by someone with the authority of the company. The subscriber may have the following remedies against the company:

a) Rescission of the contract: A contract made with the company to purchase shares is an uberrimae fidei contract (i.e., a contract based on the utmost good faith). It implies that if a misrepresentation or non-disclosure of fact renders a statement untrue in a material particular or renders the whole prospectus untrue, the contract is voidable at the option of the aggrieved party. In other words, the subscribers to the shares can file a suit against the company to rescind' the contract under the general law of contracts. But before this right can be exercised the following conditions must prevail, namely:

(i) The statement was an omission of material fact or material Misrepresentation of act;
(ii) it induced the shareholder to take the shares;
(iii) The shareholders relied on the statement in the prospectus in applying for the shares. A purchaser of shares In the open market has no remedy against the company or any other person even if he purchased shares by being influenced by misrepresentation in. the prospectus (peek vs Gurney), 1983.
(iv) The omission of material fact or misrepresentation of a material fact was. misleading;
(v) Those acting on behalf of the company acted fraudulently;
(vi) Those purporting to act on behalf of the company were authorized to act on its behalf;
(vii) be suffered a loss or damage;
(viii) The proceeding for rescission was started as soon as the allottee came to know of the misleading statement.

(b) Damages for deceit - The second remedy against the company is damages for deceit under the general law of contract. The allottee may recover damages from the company for any loss he may have suffered if he was induced to take shares based on a fraudulent misrepresentation of material facts.

Another, remedy is to sue the company for damages for deceit. The allotted cannot, however, both retain the, shares and get damages against the company. He must show that he repudiated the shares and has not acted as a shareholder after discovering the misrepresentation.

(2) Remedies against Directors, Promoters and Experts

(i) Compensation (or mis-statement): According to Section 62, every director, promoter and every person who is responsible for the issue' of the prospectus containing false or untrue information are liable to compensate all those persons who subscribe to the shares on the faith of the prospectus. But the action for damages must 'be taken within 3 years from the date of the allotment of the shares.

It should be remembered that the wove-mentioned remedy by way of damage will not be available to a person .if he has not, purchased the shares on the basis of the prospectus. A person cannot be said to have bought shares on the basis of the prospectus, 'if he had' done so from an existing shareholder or' from the share market; therefore, in these circumstances he cannot bring an action for' deceit against the directors (peek vs.' Gurney).

'The subscribers may institute a suit for damages against those responsible for the issue of the prospectus, in spite of the fact that the contract to purchase shares has been repudiated. This is an action for deceit under the general Jaw [Derry vs. Peek. (1889)] and this action can be taken even if the remedy by way of rescission (as against the company) has been lost through or negligence-or even If the company goes into liquidation.

(ii) Criminal liability formis - statements [Section 63]: Apart from liability to compensate shareholders who have suffered' a loss due to untrue statement ill the prospectus, directors and other persons responsible for the issue of the prospectus may also render themselves punishable with imprisonment for a term which may extend to two years or with fine up to five thousand rupees or with both. That is so say, every person who had authorized the issue of the prospectus containing an untrue statement is prima facie guilty of criminal offence under Section 63 of the Act. However, such persons may plead that the statement was immaterial or that they had reasonable ground to believe and did, up to the time of the issue of the prospectus, believe that the statement it was true in order to exonerate themselves from this criminal liability;

(iii) Liability for omission: An omission to state in a prospectus a matter required as per Section 56, may give rise to an action for damages by a subscriber who has suffered loss there by even if the omission does not make the prospectus false or misleading but he has to prove that he has sustained damage by reason, of this omission. The Act does not specifically mention that the directors will be liable but this seems to be implied from Section 56(4).

You should note that a director or other person responsible for the issue of the prospectus does not incur any liability for the non-compliance with or contravention. of the requirements of Section 56, if he is able to prove, as regards any matter not disclosed, that he had no knowledge of the lapse; or that non-compliance or contravention was the result of an honest mistake of fact on his part or in respect of matters which were not material [Section 56(4)].

When a director is not liable (Section 62(2)]: A person who is held' liable for the issue of a prospectus containing an untrue statement as a director will be exonerated from such. a liability if he can show: .

(a) In a suit under Section 62

(i) that he (having, consented to became a director) had. withdrawn his consent ' to' become 'a director before the issue of the prospectus and that it was issued without his' authority or consent;

(ii) that the-prospectus was issued without his authority or consent; and that on becoming aware .of its issue, he forthwith gave reasonable public notice' of the issue having been made without his knowledge 'or, consent; or

(iii) that after the issue of the prospectus and, before allotment there under he, on becoming aware of any untrue statement therein, had withdrawn his consent and given a reasonable public notice of the withdrawal and of the reasons therefore; or

(iv) that he had reasonable ground to believe and, 'until allotment, did believe that the statement was true. This provision pertains to the untrue statement not purporting to have been made on the authority of. an expert or of a public official document or statement.

(v) that the untrue statement.' purporting to be a statement by an expert or contained in a report or valuation of an expert was a correct and fair representation of the 'expert's statement. and 'he had reasonable ground to believe and, until issue of prospectus, did believe that the expert was competent to make it and the expert had given and had not withdrawn his consent to the issue of the prospectus and had not withdrawn it before delivery of a copy of the prospectus for registration; and

(vi) that the true statement, arising from the statement made by an official person or from the public official documents was a correct and fair representation or correct copy or correct and fair extract of the document.

(b) In a suit under Section 56

A director or other person sued for non-compliance of Section 56 may defined himself by proving:

(i) that he had no knowledge of the matter not disclosed,

(ii) that the contravention was an honest mistake of fact;

(iii) that in the opinion of the Court, the matter net disclosed was immaterial or was otherwise such as ought to be excused.

(3) When an expert is not liable [Section 62(3)] An expert who would be liable by reason of having given his consent under Section 58 to the issue of the prospectus containing a statement made by him wouldn't be liable if he can prove:

(i) that having given his consent to the issue of the prospectus, he withdraw it in writing before the delivery of a copy of the prospectus for registration; or

(ii) that after the delivery of a copy of the prospectus for registration but before allotment, he on becoming aware of the untrue statement withdraw his consent in writing and gave reasonable public notice thereof and the reasons therefore; or

(iii) that he was competent to make the statement and he had reasonable ground to believe, and did up to the time of allotment of the shares or debentures believe, that the statement Was true **[Section 62(3)]**

Note: The defence under (i) is available only to a director; defence under (i), (ii), (iii) & (iv) to all persons mentioned in Section 62(1)(a) to (d) and the defence under Section 62(3) is available only to an expert .

(4) Right of directors and Expert to indemnity [Section 62(4)) Where the prospectus names any person as a director (or as having agreed to become a director) and he (i) has not consented to become a director; or.(ii) has withdrawn his consent before the issue of the prospectus and. has not authorized, or consented to its issue, then (i) the directors of the company, (excluding those without those knowledge or consent, the prospectus was issued) and (ii) any other person who authorized its issue are liable to indemnity the person so named (as a director) or-whose consent was required against all damages, cost and expenses which he may incur, consequent upon his name being included or 'consent there to being accorded.

The expert can also claim indemnity against the persons aforementioned in case where (i) he has not given the consent or (ii) he has a withdrawn his consent before the issue of the prospectus and in Spite of this fact consent to its issue is mentioned in the prospectus as required under Section 58.

(5) Penalty for fraudulently Inducing a person to invest money ([Section 68] Under Section 68, any person Who, by making (knowingly or recklessly) any false, deceptive or misleading statement, promise, etc. or by dishonest concealment of material facts, induces another person to enter into:

(i) an agreement for the acquisition, disposal, subscribing or underwriting of shares 'or debentures, or

(ii) an agreement for securing any profit to any of the parties from the yield of shares or debentures or from fluctuations in the value of shares or debentures, shall be punishable with imprisonment up to 5 years or fine up to Rs.l,00,000 or with both.

(6) Impersonation for acquisition of shares [Section 68A) Under Section' 68A, the following .acts are punishable with imprisonment for a term extending to five years, viz., (a) making an application to a company for acquiring or subscribing for its-shares there in under a fictitious name; or (b) inducing a company to' allot or register any transfer of shares therein to him or any other person in a fictitious name.

It is obligatory for every company to prominently state the foregoing provisions in every issue of a prospectus-as well as in the form or application for shares.

(7) New Section 68b - Issue of Securities Only in Demat Form

Initial Public offer of Securities of Rs.10 Crores or more should be only in Dematerialised form, by complying with the requisite provisions of the "Depositories Act, 1996 and Regulations made there under. However, the new section is not synchronizing with the provisions of section 8 the Depositories Act, 1996 which provides an option to the subscribers'to receive' 'security certificate or hold securities in demat form with a depository. It would therefore appear that the option is being withdrawn, and subscribers I.4D. bold securities only in Dematerialised form, Further SEBI Guidelines provide that a company can make an issue of Securities to the public or an right basis only in demat form, while this section implies 'that only with regard to initial. offer it should be in demat form, whereas for any Subsequent issue it could be in physical form . A listed Company has been defined section 2 (23A) to mean a public company, which has any of its securities; listed in any recognized Stock Exchange.

Statement In Lieu of prospectus Sec 70.

Who bas to file?

All public companies with share capital have to-issue a Prospectus or a Statement in lieu of Prospectus, The statement in lieu of Prospectus has to be filed in Case of:

1. A private, Company converting into a public Company
2. A public company having a share capital which:

a) Does not issue prospectus on or with reference to its formation.

Or

b) Issues a prospectus but has not.or proceeded to allot due to failure i.e., non-· receipt of minimum subscription 'shall not allot any of its shares/debentures unless atleast 3days before-first allotment there has been delivered to the Registrar of Companies a statement in lieu of prospectus. Private Company need not file either prospectus or statement in lieu of prospectus.

Form

In accordance with Schedule III of the Act.

Signature

Every person named therein as Director or proposed Director of Company or by his agent authorizing in writing.

Minimum Subscription

'No minimum subscription needs to' be stated in statement in beu proprebas prospectus since it does not relate to an offer to issue a stated number of share are stated price to subscribers.

Deemed Prospectus / Prospectus by Implication / Offer For Sale Sec. 64

What?

Where a Company allots or agrees to allot any existing shares or debentures with a view to their being offered for sale to the public, any' document by which the offer of sale to the public is. made shall for all purposes be deemed to be a prospectus .issued by the Company. An offer for sale is also issued when the Company proposes to allot its shares/debentures to its existing shareholders/debenture holders as rights issue:

Presumption

It will be presumed, unless the contrary is proved, that an allotment of shares, or debentures was made with a view' to their being offered for sale to the public if

a) The offer to the public (by. the Issue House) was made Within 6 months of allotment or agreement to allot (to the Issue House), or
b) The Company did not 'receive the .whole consideration at the time when the Issue House made the offer.

Contents

The offer for sale must set out all the details required to be inserted in a prospectus. It should *also'* state the net amount of consideration received by the' Company on the shares' or debentures to which the offer relates to, and state the place and time at which the relevant contracts may be inspected.

Lesson-6

SHARES

Allotment of Shares

Definition

Since the prospectus issued by the (Company is an "Invitation to offer" and an application for shares is only an I**I** offer" by a, prospective shareholder of a Company to take up shares, ·the "Allotment" is the acceptance by the Company of that offer which results in a binding contract between the Company and the applicant.

Allotment of shares" means the act of appropriation' by the Board of Directors of the Company, out of previously unappropriated capital, of a certain number of shares to persons who have made an application for those shares:

Reissue of forfeited shares is not an allotment. Allotment is the acceptance by the company of such offers to take shares. It is an appropriation of shares to an applicant for shares and appropriation out of the previously unappropriated capital of the company.

That is why, if the shares which have been forfeited are reissued, you cannot call it an "allotment", The word "allotment" gives us the notion, of a lot". Therefore, there must first be a lot of shares, then the division of them into value or classes and lastly allocation of them among various applicants *(Calcutta Stock Exchange Association)*

Requisites of Valid Allotment:

General

a) There should be n allotment by proper authority, i.e., Board of Directors or Committee of Directors a-authorized by the Board to allot the shares.

b). There must be an offer by the investors to subscribe:

c) There must be an acceptance of the offer by the Company.

d) The acceptance should be absolute and Unconditional Conditional acceptance otherwise than in the terms of issue is usually invalid. *(Ramabhai Vs. Ghai Ram)*

e) Acceptance must be within a reasonable time. *(Ramsgate Victoria Hotel Vs. Montefiore)*

f) Acceptance should be communicated. *(Household Fire Insurance Co. Ltd Vs. Grant)*

Statutory

a) filing of prospectus /Statement in lieu of prospectus :

Where a public Company invites public subscription, it must a prospectus with the Registrar, before making the allotment. In case, the public Company arranges Capital privately, it must give a Statement in lieu of prospectus with the registrar at least 3 days before the first allotment is made.

The aforesaid provisions of See 70 do not apply to a private Company.

b) Listing Permission

If the Company is intending to offer shares ,or debentures to the public by issue 0 ,a prospectus, such Company shall; before issue, make an application to recognized Stock Exchange(s) for permission for the share to be dealt with in the Stock Exchange(s) , Sec. 73.

c) *Minimum*

Application Money with Scheduled Bank: Minimum of 5% of nominal value is to be received and kept in a separate bank account in a scheduled bank till allotment is made. If certificate of commencement of business has not yet 'been obtained the money should remain in the Scheduled Bank until the Certificate is received.

d) Period of opening of Subscription List

Subscription list to be kept open for a period of:

Public issue	*Min*	*3 working days*
	Max	*Not specified in the Company Act.*
	As per SEBI	
	** Where issue is unwritten – 10 working days*	
	** Where issue is not unwritten – 21 working days*	
Right issue listed Company	*Min.*	*15 days – Request for split forms 30 days -*
	Max.	*For closure of rights issue 60 days*
Right issue unlisted	*Min.*	*15 days – Sec. 81*
Companies	*Max.*	*Not applicable*

e) Fifth day Allotment

Allotment is not to be made until the beginning of the fifty day from the date of the issue of the prospectus or such later date as may 'be specified in the prospectus. This date is known as date of opening of subscription list - See 72,

This above provision gives the applicants for shares sufficient time to withdraw their applications, if they are not satisfied with the prospectus.

f) Minimum Subscription should be received: Sec 69

g) Listing Requirement

i) Every Company intending to offer shares to the public for subscription by the issue of a prospectus shall before such issue, make an application to one or more recognised stock exchanges for permission for the listing of its shares. The name of the stock exchange or each of the stock exchanges is to be stated in the prospectus,

ii) If the permission has not been granted by the Stock exchanges or each of the stock exchanges before the expiry of 10 weeks from the date of closing of the subscription list or refused, the allotment made shall become void.

iii) The Company can however, appeal to the Central Government against refusal.

- Within 15 days from the date of' refusal
- Within 15 days from the expiry of prescribed period of 10 weeks

In case appeal is preferred, allotment is not void in the appeal is dismissed.

iv) Where the permission has not been applied for, or having applied, permission is refused or not granted, the Company must repay the application money forthwith and if not repaid within 8 days after Company becomes liable to pay then the

1) Company; 2) Every Director; 3) Officer in default is jointly and severally liable to repay it with interest not less than 15% p.a. depending 'upon the period of delay from the expiry of the 8th day - Sec.73.

v) If the permission has been granted by the recognised Stock exchanges and the money received from applicants for shares or debentures are in excess of the aggregate of the application money relating to the shares or debentures. In respect of which allotments have been made, the Company shall repay the excess amount.' If not repaid within 8 days after Company becomes liable to pay then the Company, every director of the Company Who is an officer is default shall be jointly and severally liable to repay it with interest not less than 15% p.a. depending upon the period of delay from expiry of the 8th day.

vi) All money received as application or allotment moneys shall be kept in a separate Bank Account maintained with the Scheduled Bank "until the permission has been granted or where an appeal has been preferred against the refusal to grant permission, until the disposal of the appeal, and .the money' standing in such separate account shall, where the permission has not been applied for as aforesaid or has not been granted, be repaid within the time specified. If default is made in complying with the above provision -'the Company, every officer of the Company who is in default shall be punishable with fine which may extend to Rs.50,000.

vii) Money standing to the credit of the separate Bank account shall not be utilized for purpose other than the following purposes namely-

- Adjustment against allotment of shares; where the shares have been permitted to be dealt in on the stock exchange or specified in the prospectus.
- Repayment of Money received from applicants in pursuance of the prospectus where shares have not been permitted to be dealt it on the stock exchange or each. stock exchanges' specified In the prospectus, as the ·case may be or where the Company is for any other reason unable to make the allotment of share.

h) Dematerialised shares

Every Listed Company making an Initial Public Offering (IPO) for Sum of Rs.10 Crore or more should issue securities only in Dematerialised form in accordance with Depositories Act, 1996,

The capital issued shall be made fully' paid up within 12 months of date of time. (SEBI Guidelines)

Minimum Subscription and Refund: In terms of section 69(1) of the Act, every prospectus for shares must contain an indication, as to the minimum amount which in the opinion of the Board of Directors must be raised. The amount so stated in the prospectus which shall be reckoned exclusively of any amount payable otherwise than in money is-referred to as the "minimum subscription. The amount payable on 'application of each share shall not be less titan 5% of the nominal amount of the share. If the applications are not received by the company for such quantum of shares for' making the minimum subscription, within 120 days of the issue of prospectus, all moneys received from the applicants for shares shall be repaid. Without interest: If any such money is not repaid within 130 days after the issue prospectus, moneys will be repaid with interest at the rate' of 6% p.a. from the expiry of 130 days.

Position as per SEBI Guidelines: As per SEBI Guidelines, the minimum subscription in respect of public and rights issue shall be 90% of the issue amount. The requirement of 90% minimum subscription shall not be mandatory in case of offer for sale of securities. In case of non-receipt by the company of 90% of the issued amount from public subscription plus accepted devolvement from under Writers or from other sources in case of under subscribed issues, within 60 days from the date of closure of the Issue, the company shall refund forth with the subscription amount in full without interest and with. interest@ 1.5% p.a. if not paid within 10 days after the expiry of the said 60 days.

Restriction on Use of Application Moneys

The issuer company cannot use the moneys received with the applications and kept deposited with the bankers to the issue until the date the, shares or debentures are allotted. Until that the said amount-shall not be utilised for any purpose other than the following:

(1) Adjustment of excess moneys against allotment of 'shares permitted to be dealt With in a Stock Exchange; or

(2) Repayment of money" if (allure to get permission from the Stock Exchange.

(a) Utilisation of said moneys for purposes stated in the prospectus

On and from the date the allotment is made, the moneys in respect of applications for shares or debentures, which have been allotted, can be utilised by the company for the purpose$ for which the issue was made.

(b) Approval of Stock Exchange for basis of allotment

It may be. noted that the necessary particulars of applications received shall be furnished to the Stock 'Exchange concerned and the basis of allotment approved by the Stock Exchange before the Board makes allotment, or' Committee of Directors appointed for the 'purpose by the Board.

The basis of allotment of the issue need not be intimated to the applicant and it will be sufficient if the companies publish the same in a widely circulated newspaper.

(c) Prospectus to be field (Section 70):

The company shall file with the Registrar a prospectus or statement 'in lieu of prospectus before allotment. Further it may be recalled that no public company having "a share capital which does not issue a prospectus or which does not proceed to allot shares in pursuance thereof shall be entitled to allot any of its shares unless a statement in lieu of prospectus is filed with Registrar at least three days before the first allotment in terms of Section 70 of Act. But this Section does not apply to a private company.

(d) Opening of subscription list:

The subscription list for public issues should be .kept open for at least 3 working days and a disclosure to this effect should be made in the prospectus, The maximum period for which the issue should be kept open has not been Stipulated for public issues. The Ministry of Finance, Stock Exchange Division has clarified that the subscription list for public issues can be kept open for a maximum period of 21 working days where the issue is not underwritten and for a maximum of 10 working days where the issue is underwritten. Where, after a prospectus is first issued generally, a public notice has been given by some person (responsible under Section 62) so as to exclude, limit, or diminish his

responsibility, then the shares cannot be allotted until the beginning of the 5th day after the date on which such public notice was given. The reason for the prescription of this period of 5 days is to enable the public to digest the contents of the prospectus as also to obtain independent advice to form a judgment before they could stake their money, An application of shares is riot revocable until the end of the 5th day from the opening of the subscription list (Section 72)

(e) Listing of shares on stock exchange (Section 73) :

(i) Where, the prospectus states that application has been made for permission for the shares or debentures offered for subscription to be" dealt in on one or more recognised

stock exchange, in such a case prospectus shall state the name of the stock exchange or as the case may be, each stock exchange. The eligibility criteria for listing of securities of a company the stock exchange are as follows:

a) In respect of new companies, the invest hold limit for listing will be issued capital of Rs.5 Crores.

b) in respect of existing, and now seekink listing as the Bombay Stock Exchange, all the following criteria will have to be fulfilled

(1) Minimum issued equity capital of RS.3 Crores,

(ii) Minimum Book value of RS.5Crores (Capital + Free reserves) and
(iii) Minimum Market capitalisation of Rs. l0 Crores,

SEBI has prescribed new norms for minimum quantity of capital of 25 percent being offered to the public beyond all reservations .to different Categories of persons and institutions.

iii) If the permission has not been granted by the stock exchange or each such stock exchange before the expiry of 10 weeks from, the' dare of the closing of the subscription lists the allotment made shall become void.

iv) An appeal may be preferred against the decision of any recognised stock exchange refusing the aforesaid permission for enlistment under Section 22 of the Securities

Contract (Regulation) Act, 1956, and then such allotment Shall not be void until the

dismissal of the appeal. .,

(iv) Where the permission has not been applied for or has been applied for, has not been granted, the application 'money received must be refunded to the applicants forth with without any interest. If the money is not refunded within 8 days after the Company becomes liable to repay it, the company and every. Director of the company who is an officer in default shall, On arid from the expiry of the eighth day be jointly and severalIly liable to repay that money with interest at such rate which shall not be less than 15 per cent, as may be prescribed, having regard to the length of the period of delay in making the repayment of such money (Sub-section (2))

v) If the permission has been granted by the recognised stock exchanges and the moneys received from applicants for shares or debentures are in excess of the aggregate of the application money relating to the shares or debentures in respect of which allotments

have been made, the company shall repay the moneys to the extent of such excess forthwith without interest. But if such moneys are not repaid within 8 days the company and every director of the company who is an officer in default shall, on and from the expiry of the eighth day, be jointly and severally liable to repay that money with interest at such rate, not less than 15 percent, depending upon the period of delay (Sub-section 2(A)) If default is made in complying with these provisions then the company and every officer of the company who is in default shall be punishable with fine extending up to Rs.50,000 and where repayment is not made within 6 months from the expiry of the 8th day also with imprisonment for a term which may extend to one year (Sub-section 2(B))

(vi) All moneys received as application or allotment moneys, shall be kept in a separate bank account maintained with a .Schedule bank "until the permission has been granted or where an appeals has been preferred against the refusal to grant permission, until the disposal of the appeal, and the moneys standing in such separate account shall, where the permission has not been applied for as aforesaid or has not been granted, be repaid within the time and in the manner specified in Sub-section (2)".If default is made in complying with this sub-section, then die Company and every officer of the company who is in default shall be punishable with fine extending up to Rs.50,000 (Sub-section (3)).

(vii) Moneys standing to the credit of the separate bank account referred to in Sub-section (3) above shall not be utilised for purpose other than either of the following purposes namely: .

(a) adjustment against allotment of shares, where the shares have been permitted to be dealt in on the stock exchange or specified in the prospectus, (b) repayment of money received from applicants in pursuance of the prospectus, where shares have not been permitted to be dealt in on the stock exchange or each stock exchange specified in the prospectus, as the case may be, or where the company is for any other reason unable to make the allotment of shares (Sub-section (3A).

It shall be deemed that permission has not been granted if the application for permission, where made, bas, not been disposed of within the time specified in Sub-section (1) above (Sub-section (5))

f. Irregular Allotment

It refers to an allotment in contravention of provisions of Sec. 69 and 70 ie-

1. Where the allotment is defective because it is made before the expiry of the fifth day after the publication of the prospectus is issued generally, the allotment is valid, but the Company and its officers in default are liable to a fine.

2.Where an allotment is made before receiving minimum subscription or before receiving the application money subject to a minimum of 5 percent of the nominal value of the share or without having filed a prospectus or a statement in lieu of prospectus with, the Registrar of Companies, the allotment is voidable at the option of the allottee.

3.Where the allotment is defective because no application was made to the Stock Exchange for permission or an application was made but refused listing, the allotment is void.

g) Effect of Irregular Allotment:

When the shares are not allotted in pursuance of Sections' 69 and 70 such an allotments is known as irregular allotment. In spite of the stringent provisions of Sections 69 and 70, one may find that allotment has been made in utter contravention thereof .The

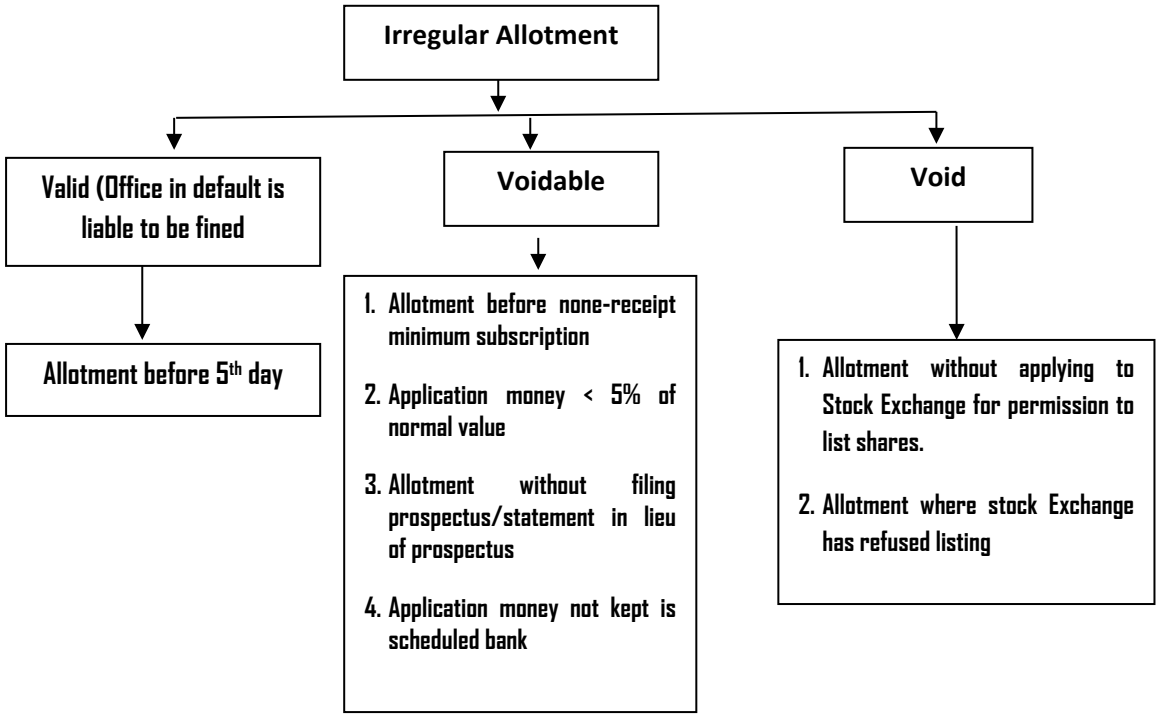
directors may choose to take a chance and proceed to allot shares although minimum subscription has not reached or a prospectus or statement in lieu of prospectus has not been filed. Such an allotment is treated by the Act not as void *ab initio* but as irregular.

The applicant for the shares may avoid the allotment. If the does so within the time specified by Section 71, namely,

(a) Where the allotment was made-before the statutory meeting, within 2 months after the holding of statutory meeting of the company and not later; or

(b) Where no statutory meeting is required to be held by the company, within 2 months after the date of allotment and not later; or .

(c) Where the allotment was made after· the statutory meeting within 2 months of allotment (and not later) the allotment shall be voidable despite the fact that the company is in the course of being wound up. Within the above mentioned period, the allottee must intimate to the company that he wants to avoid the allotment. If legal proceedings are required to be taken, these need not be within the period of two months provided the notice of avoidance was served on the company within the aforesaid time, but they should be reasonably prompt thereafter if they are required to be brought *(National Motor Mail Coach Co. (1908.* Furthermore, Sub-section (3) of Section 71 makes every director of company, who knowingly contravenes or authorises, the contravention of any of 'the provisions of Section 69 or Section 70 with respect to allotment, liable to compensate the company and the allotted for any loss, damages or costs which they may have sustained or incurred thereby. But the proceedings for such compensation can only be taken within two years from the date of allotment. As the allotment is only voidable at the option of the shareholder, the shareholder may keep the shares and yet sue the directors who have knowingly contravened either of the two Sections (69 and 70) to compel them to make good the loss to him as a result of the irregular allotment.



(g) **Return of allotment (Section 75):**

The Company is to submit a report in prescribed From No.2 called 'Return of Allotment'; to the Registrar within 30 days of allotment of shares. It must state:

(1) In case shares are allotted in cash:

(a) The number and nominal amount of the shares allotted;

(b) The names, addresses and occupations of the allottees and the amount, if there be any, paid or due and payable on each shares. But the company must not show shares as having been allotted for cash, if Cash has not been actually received by it.

(2) In case shares allotted are not bonus shares and allotted as fully or partly paid up otherwise than in cash: The company 'must produce for the inspection and examination of the Registrar certain documents. These documents are:

(a) A contract in writing constituting the title of the allottee; and

(b) Any contract of sale or contract of service or other consideration in respect of which the allotment was made.

These documents must be duly stamped. A1so along with these documents the company must file with the Registrar:

(i) Copies of the said contracts after verifying them in the prescribed manner; and

(ii) A return stating the number and nominal. amount of the shares so allotted, the extent to which they are to be treated as paid-up and the consideration for which they have been allotted.

Under Rule 5 of the Companies (Central Governments) General Rules and Forms, 1956 these copies of contracts must be verified by affidavit of a responsible officer of the company, Where such a contract is not in writing.jhe company must within 30 days after allotment, file with the Registrar a document embodying the said particulars of the contract. The document must bear the same amount of stamp duty as would have been payable if the contract bad been in writing.

(3) In the case of issue of bonus shares. The return is required to indicate the number and nominal amount of shares allotted, the names, addresses and· occupations of the allottee and resolution authorising the Issue of bonus shares:

(4) In the case of issue of shares at a discount; The return must be accompanied:

(i) By a copy of the company's resolution authorising such an issue,

(ii) By copy of the order of Court which sanctions the issue, and

(iii) Where the' maximum rate of discount exceeds 10 percent by a copy of the Central Governments order permitting the issue at a higher percentage.

The 30 days period for filing the return is extendable by the Registrar. But the company has to seek this extension by an application either before or after the expiry of this period.

While explaining the meaning of the word 'allotment', we have stated' why a re-issue of forfeited shares does not constitute an allotment. In consonance with that reasoning, Section 75(5) specifically states that the provisions of Section 75 do not apply to such Case; thus, the question of filing a return in respect of it does not arise.

OTHER Provisions

3. Revocation by applicant

The law of contract applies to the application of shares. Hence an application can be revoked before It IS accepted i.e. allotment of shares by Company.

b. Publication of Notice by persons responsible for issue of prospectus: *U/s 62*

Where a person referred to above issues a public notice so as to exclude, limit or diminish his responsibility, then the shares cannot be allotted until the fifth day after the date on which the public notice was given.

c. Subsequent allotment of Shares

The provisions of Section 69 relating to minimum subscription does not apply. However, the provision of minimum application money of 5% of nominal value shall apply.

d. Allotment of Debentures

The provisions relating to issue of' shares apply to debentures also except provisions relating to:

- Amount payable of application
- Deposit of application money in scheduled bank.

SHARE CERTIFLCATE

a) Meaning

A share certificate is a certificate issued to the members, by the Company, under its common seal, specifying the number of shares held by him and the amount paid on each share" It is a declaration by the Company to the world that the person in whose name the certificate is made out and to whom it is given, is a bonafide shareholder of the Company and it is given by the Company with the intention that it shall be so used by the person to whom it is given, and acted upon in sale and transfer of shares, A Share certificate is a prima facie evidence of shares held - Number and paid-up value,

b) Implications of share certificate

(i) Estoppel as to title,

The Company cannot deny the truth of the certificate as against a person who has relied upon it and who, in consequence, has changed his position.But if an officer of the Company, who has no authority to issue certificate, issues a forged certificate, then there is no estoppel.

(ii) Estoppel as to payment

Where· a Company states that shares are fully paid up, it cannot later contend that they were not, unless the Person relying upon the certificate knew that the shares were not in fact fully paid up. It is to be noted that a certificate is an evidence of title and does not constitute title or certify equitable in share, . .

c) Time

The share certificate is to be delivered within 3 months of allotment of shares or within 2 months after application for registration of the transfer of any shares.

The above time limit is also applicable to Debentures.

Extension of time: Only in the case of Debenture Certificates, Extension by the NCLT, if it satisfied on an application by a Company, can be given for further period of 9 months.

d) Default

If default is made in complying with the provisions -

- The Company, and
- Every officer of the company who is in default shall be punishable with fine, which may extend to Rs.5000 for every day during which the default continues.

e) Duplicate Share Certificate

Share certificate shall be issued, only either in exchange for those which are sub-divided or consolidated or in replacement of those which are defaced torn, mutilated or worn out or where the pages in the reverse transfers have been fully utilized unless:

i) The consent of the Board is given (in case of loss of destruction of certificate);

ii) The certificate in lieu of which it is being issued is surrendered to the company and is cancelled;

iii) Payment of fees for issue' of duplicate certificate is made by the shareholder (not exceeding Rs.2 per share certificate);

iv) Proper evidence and indemnity to the satisfaction of the Company is furnished;

v) Out-of-pocket expenses estimated to be incurred by the Company in investigating the evidence, as the Board may think fit, are deposited with the Company, in case of lost or stolen share certificates, the cost of public notice shall also to be borne by the member;

vi) The words 'Duplicate Issued in lieu of Share Certificate No/Sub-divided /Replaced/Lost/Consolidation of share (as the case may be) are rubber stamped on its face and also on the counterfoil. The word 'Duplicate' may either be rubber stamped or punched;

vii) Mutilated, defaced or tom certificates surrendered shall be defaced by a cancellation mark and destroyed after three years with the authority of the Board.

Share Warrant: See. 114 & 115

Meaning: Sec. 114

It is a document issued under the common seal of a Public Company Stating that its holder is entitled to shares specified therein. .

Features

• It is a bearer document and it is transferable by mere delivery.

• Registration of transfer is not necessary.

Conditions for issue

a) Shares should be fully paid up

b) Articles should authorize such issue

c) Prior approval of the Central Government is to be obtained

d) Share Warrants are to be issue under the common seal of the Company

e) Bearer of Share Warrant is not a member of the company

Entries in Register of Members: Sec. 115

It should contain the following –

a) Fact of issue of the warrant

b) Statement of shares include in the warrant; distinguishing each share by its number

c) Date of issue of the warrant

d) On issue of the warrant, the name of the member to whom the warrant is issued is struck off from the register of members.

e) On surrendering the warrant, bearer entitled to share certificate on payment of fees. if any

f) The Company shall be responsible for any loss incurred by any person by reason of the Company entering in 'its Register of Members the name of bearer of share warrant in respect of the shares specified therein without a warrant surrendered or cancelled.

Other aspects

- A Private Company can neither issue share warrants nor can have Articles to such effect. The Articles of Public Company may provide *that* the bearer of a share warrant shall be a member of the Company for the purposes defined in the Articles.
- Holding of a share warrant does not operate as a qualification for being a Director where such qualification shares are required to be held by the Directors according. to Articles.
- Dividend Coupons are attached to the Share warrants providing for the payment of future dividends on the shares specified in the warrant.

Distribution between Share Certificate and Share Warrant

Basis	Share Certificate	Share Warrant
Is holder a member	Yes	No
Provision in Articles	Not Necessary	Necessary
Approval of Central Govt.	Not Necessary	Necessary
Who can Issue?	Both private & Public Limited Companies	Only for fully paid up shares
Cases where it can be issued?	For fully as well as partly paid up shares	Only for fully paid up shares
Transfer	Made by execution of Transfer deed and delivery	By delivery
Negotiability	Not Negotiable	It is by usage similar to a Negotiable instrument
Eligibility as Qualification share for Director	Eligible	Not Eligible
Right to present petition for winding up	Possesses	Does not possess such right
Stamp duty on Transfer	Payable	Not payable
Stamp Duty at the time of issue	Nominal	Very High
Payment of Dividend	Paid to holder by issue of Dividend warrant favour of the holder	Dividend payment is advertised. Holder to present coupon attached with the warrant and collect the divided.
Terms of issue	There is statutory obligation on every company issuing shares to issue a share certificate	A share warrant can be issued by a public company only if is permitted to do so by its AOA and has obtained prior approval of the Central Government.

Calls

A Call is a demand by. the Company on its shareholders to pay the whole or part of the balance remaining unpaid on each share, at any time during the continuance of the Company or by the liquidator in the event of winding up of the Company.

On the call being made, it becomes a debt due to the Company - Sec. 36(2). The Company is entitled to charge interest on call during the period of default. Reserve capital u/s 99 cannot be called up except at the time of winding up of the Company.

Power to make call is to be exercised only by the Board of Directors. It cannot be delegated. The Resolution for call made is to specify:

- Amount of call per share
- Time allowed for payment

The call amount shall not, to exceed $1/4^{th}$ of the nominal value of a share. A call shall not be payable at less than one month from the date fixed for payment of preceding call. Calls to be made shall be as per the conditions specified in the Articles of the Company and only for the benefit 'of the Company.

Calls in advance: Sec. 92

The Company can accept, if authorized b the Articles, only to the extent of amount remaining unpaid on any share either in full or in part.

a) Calls made in advance does not entitle the shareholder to additional voting rights,
b) Liability for unpaid value to the extent of calls in advance is extinguished.
c) The shareholder is entitled to interest- on calls paid in, advance to the extent authorized by the Articles,
d) Calls made in advance are not refundable,
e) On winding up, shareholders who have paid calls in advance are entitled to excess amount paid with interest before payment to other shareholders.
f) The power to receive calls in advance is to be exercised in the interests of the Company.

Forfeiture of Shares

Forfeiture is one of the remedies available to the Company for non-payment of amount due on allotment and call money.

1. Forfeiture can be done only if the Articles provide for the same.
2. It can be done only for non-payment of calls and not for recovery of any debt due from the member unless the Articles so prescribe. .
3. Power of forfeiture is to be exercised bonafide, in the interests of the Company.

Effect of forfeiture

1. On forfeiture, the member ceases to be a member and his name is struck off from the register of members
2. If the shares are partly paid, on forfeiture the is discharged from the liability to pay unpaid value of shares, if any.
3. Forfeited shares become the property of the Company and to this extent involve a reduction in paid-up capital till they are reissued.
4. Liability of original shareholder whose shares are forfeited is as follows

- If articles so provide, he shall remain liable for payment of unpaid calls for a period of 3 years-from the date of forfeiture. .
- If he is discharged for any reason from all liability on his share and Company goes into liquidation within one year of cessation. of his membership, he will be put on the AB list of Contributories:

Action

1. Forfeited shares can, at the discretion of Board of Directors either be cancelled or re-issued.
2. Reissue can be at any price provided the total sum paid by the original owner of the shares together with the reissue price is not less than the called up amount at the time of re-issue.
3. If the original holder has surrendered the share certificate, it is duly transferred by execution of transfer deed on receipt of money from new allottee.
4. If the original holder has hot surrendered then a new certificate will be given to the new allottee and a public notice in a newspaper to the effect is issued.

Procedure

Due notice is to be served on the defaulting shareholder giving details of

a) Amount unpaid together with any interest accrued.
b) The last day on which payment is to be made which should be a day not being earlier than 14 days from the date of service of notice on or before which payment is to be made.
c) The fact that, if the payment is not made on or before the date so mentioned, the shares in respect of which the call was made would be forfeited.
d) Usually, along with the Notice, an extract of AOA is sent showing the director's power to forfeit the shares.

An improper notice invalidates the procedure of forfeiture

If the amount remains unpaid after aforesaid due notice, a duly verified declaration in writing by Director/Manager/Secretary that, the Share' has been duly forfeited on the date stated in the declaration shall be conclusive evidence of forfeiture and the procedure followed.

Lien of Shares	Forfeiture of Shares
It may be exercised in respect of amounts due on shares and other accounts also.	It is in respect of amount due on shares only.
It is a 'kind security for a debt and' to be retained until payment of debt in full.	It is a penalty clause to 'enforce payment of money 'due on shares in time,
It is enforced by sale of shares.	It is an act of depriving the shareholders of his rights in the forfeited shares.
The surplus, if any, OD sale is to be returned to the number	The member cannot claim refund of money already paid by him,
It does Dot result in reduction in share capital	It would result in reduction in share, Capital, if Dot re-issued.

Surrender of Shares

The Act and Table A are -silent on surrender of shares. The Articles should provide for surrender of shares.

Surrender leads to cessation of membership; Surrender unlike forfeiture, is a voluntary action by the shareholder.

The Surrender of shares by a member to the Company is valid in the following cases.

a) In case of partly paid shares .where forfeiture is called' for: where the Articles give powers to the directors to accept surrender of shares and it is accepted in the case, of partly paid shares to save the Company from going through the formalities of forfeiture, the surrender is valid.

Surrender of partly paid shares, not liable to forfeiture, is unlawful as it -

i) Releases the shareholder from further liability in respect of shares
ii) Amounts to a purchase by the Company of its own shares and
iii) Is a reduction of capital without the sanction of the court?

c) In case of fully paid shares where they are exchanged for fully paid and where surrender of shares is in accordance with the Articles and accepted in case of fully paid shares in exchange for new shares of the same nominal value and the surrendered shares remain capable of re-issue, the surrender is valid. Surrendered shares can be validly reissued in the someway as- forfeited shares, if the- Articles authorise their reissue.

Impersonation: See.116

Where a person deceitfully personates as an owner of a share in a Company and thereby

a) Obtains or attempts to obtain any such share /share warrant / coupon;
b) On receives or attempts to receive any money due to any such owner.

He is punishable with -

a) Imprisonment upto 3 years, and
b) Fine

Voting Rights: Sec. 87 &. 89

Equity Shareholders: Sec-87

- Right to vote on every resolution placed before the shareholders;
- Voting right on poll is in proportion to his Share of paid-up capital.
- Voting right on poll may be exercised by him personally or through a proxy.

Preference Shareholder: Sec.87

Ordinarily they are entitled to vote only on matters directly relating to rights attached to preference share capital e.g. resolution for winding up of Company. Preference shareholder is entitled to vote on every resolution placed before the Company at any meeting, if dividend on such capital in full or in part is remaining unpaid in the case of Cumulative preference shares for an aggregate period of not less than 2 years preceding the date of commencement of meeting.

- Non-cumulative preference shares for an aggregate period of not less than 2 years ending within expiry of the financial year immediately preceding the commencement of the meeting or an aggregate of not less than 3 years comprised in 6 years ending with expiry of aforesaid financial year.

Dividend on preference shares whether declared or not shall be deemed to fall due:

a) On the last date specified for payment in the Articles;
b) On the last date specified for payment in terms of issue;
c) If no date is specified the day immediately following such period. The above rules do not apply to an independent private Company. The articles cannot restrict voting rights except that a member who has not paid calls cannot exercise his voting right.

Variation of Shareholders Rights: Sec. 106 & 107.

Members rights is determined by the Companies Act, MoA & AoA of and terms of issue

Rights can be varied either by-

a) Consent in writing of not less than three fourth of issue of shares of that class or

b) With sanction of a special resolution passed at a separate meeting of the holder of issued shares of that class.

Such variation can be done only if-

a) Articles provide for variation, or

b) There is no express provision to the contrary in the Articles / terms of issue of the aforesaid class of shares.

Procedure in addition to the above includes -

i) Information to Stock Exchange if the shares are listed in accordance with the listing agreement;

ii) File with the Registrar of Companies within 30 days - Form NO.23 - resolutions for variation with fees prescribed in Schedule X;

iii) Note the variation in all printed copies of Memorandum and Articles of Association of the Company.

Rights of Dissentient Members: Sec.l07

a) Holders of riot less than 10% of class of shares, whose rights are varied, can dissent.

b) They can apply to the Court to have the variations cancelled by making a petition giving necessary details as required under Companies (Court) Rules, 1919.

c) Application is to be made within 21 days of consent *I* passing of the resolution.

d) The Court after hearing will either confirm variation or disallow the variation.

e) The decision of the Court is final

f) Where a petition is made by a dissenting member to the Court, variation is effective only after the order of the Court.

g) Within 30 days of service on the Company of the Court Order, it is to be filed with the Registrar of Companies' with filing fee. Subdivision of shares does not tantamount to variation.

Alteration of share capital: sec.94

1. What?

a) Issuing new shares

b) Consolidation of existing shares into shares.nf larger denomination

c) Subdivision of existing shares into shares of smaller denomination

d) Converting fully paid shares into stock and vice versa

e) Cancel the shares not taken up

2. Procedure

a) Alteration is to be approved by the Company by ordinary resolution' in General

b) Meeting

c) Notice must be given to the Registrar of Companies within 30aays (Sec. 95 and 96).

3. Others

a) Articles should permit alteration of share capital
b) Alteration should be bonafide in the interests of the Company and not of any group,
c) Alteration according to Sec.94.does not result in reduction of capital,

Automatic Increase in Share Capital: Sec.94a

1. **When?**

- When the Central Government, by its order made under Section 81 (4) of the Act, directs that any debentures issued to, Or the loans obtained from the Government by a Company or any part thereof shall be converted into shares in the Company, on such terms and conditions as are considered reasonable in the circumstances; and
- Where the Central Government, on an application made by the public financial institutions, directs that the debentures issued for, loans raised by the Company or any part thereof should be converted into shares of the Company in pursuance of the exercise of the option attached to Such debentures or loans issued to or granted by the financial institutions.

There is no necessity for any provision in the Articles for alteration. The Capital clause in Memorandum/ rticles automatically stands increased.

3. Procedure

Return is to be filed with the Registrar of Companies within 30 days 'of receipt of order from the Central Government - Sec.95 and 96 '

Reduction of Share Capital: Sec. 100 - 104

1. By Whom?

A Company limited by shares or A Company Limited by Guarantee and having a share capital.

2. What?

Reduction of issued subscribed and paid-up capital of the Company.

3. How?

Reduction may be in any of the following manner

i) Extinguish or reduce liability on any of its shares in respect of unpaid /uncalled share capital;
ii) Cancel any paid-up share capital, which is lost or .not represented by available assets either With or without extinguisher or reducing liability or any of its shares;
iii) By Paying off returning paid-up capital which is not required by the Company either with or without extinguishing or .reducing liability on any of its shares;
iv) A Combination of' the above

4. Procedure

a) Special Resolution - Company approval: See. 100
b) Application to NCLT with petition to confirm reduction: Sec.101
c) NCLT Formalities: If proposed reduction involves -
    i) Diminution of liability in respect of unpaid share capital, or
    ii) The payment to any shareholder of any paid-up share capital, or
    iii) In any other case, if the NCLT so directs, the following provisions shall have effect

- NCLT to settle a list of creditors entitle to object i.e. creators having a debt/claim admissible in Winding up;
- If creditor objects - either his consent to reduction is obtained or he should be paid off or his payment secured.

d) NCL T to confirm scheme of reduction taking into consideration the interest of minority shareholders and creditors: Sec.l02

e) *It* reduction of capital involves payment of excess, payment should first be provided for in the scheme to pay off preference shareholders.

f) NCLT may direct-

i) That the words and reduced' be added to the Company's name for specified period;

ii) That the Company must publish reasons for the reduction, as also the causes, which led to it giving proper information to the public

g) Registration of order and minutes: Sec. 103

h) Registrar to issue Certificate of Registration under its hand confirming above. It is conclusive evidence that –

(i) Requirements of the Act with respect to reduction of capital have been complied with, and

(ii) that the-share capital is as stated in the minutes;

(iii) The minutes shall be deemed to be substituted for the corresponding part of the memorandum thereby altering the memorandum. The copies of the Memorandum which will be issued subsequently must be in accordance with the alteration.

Registration of order of court with Registrar

The order of NCLT confirming the reduction shall be produced before the registrar and a certified copy thereof shall be filed with him for registration. The resolution for reducing share capital as confirmed by the order of the court shall take effect only on its registration with the Registrar.

Reduction of Share Capital without sanction of the Court

a) Forfeiture of Shares

b) Surrender of Shares.

c) Cancellation of Shares - As discussed in alteration of Share Capital

d) Purchase of shares by Company u/s 402(b), where the Company Law Board by virtue of its powers, u/s 397 or 398, order the, purchase of the shares or interest of the members of the company by the company.

e) Redemption of redeemable preference shares in accordance with the provisions of Sec.80.

f) Buyback of shares - Sec. 77 A,

Liability of members in respect of reduced Share Capital: See, 104

On a reduction of share capital, the extent of the liability of any past or present member n any call or contribution shall not exceed the difference between:

- The amount paid on share or the reduced amount, if any, which is deemed to have been paid thereon by the member; and
- The amount of the share as fixed by the minutes of reduction.

If however, the name of any creditor entitle to object to the reduction of share capital is not entered on the list of creditors, by reason of his ignorance of the preceding for reduction, and after the Company is unable to pay his debt or claim, then:

- Every member at the time of registration of the NCLT's order for reductions is liable to contribute for the payment of that that debt or claim an amount not exceeding the amount which he would have contributed on the day before registration of the order and minutes; and
- If the Company is wound up, the NCLT's on the application by the creditor, on proof of his ignorance, may settle a list of contributories to make and enforce calls and orders on the contributories, settled on the list, as if they were ordinary contributories in a winding up.

Liability of officer of company in reduction of capital

If any officer of the company-

a) Knowingly conceals the name of any creditor entitle to object to the reduction;
b) Knowingly misrepresents. the nature or amount of the debt or claim of any creditor; or
c) Abets or is privy to any such concealment or misrepresentation as aforesaid.

Then he is liable for:

a) Punishment with imprisonment of a term which may extend to one year, or
b) Fine, or
c) Both.

Diminution of share capital

Diminution denotes a cancellation of that portion of the issued capital which has not been subscribed for. Diminution of Share capital means reduction of authorized capital only. Hence provisions of reduction of capital will not apply. It is only a case of alteration of capital and it is sufficient if the formalities of alteration of capital are complied with.

TRANSEER AND TRANSMISSION OF SHARES

A. Meaning

Transfer refers to voluntary conveyance of rights and duties/liabilities of a member as represented in a share from a shareholder who wishes to cease to be a member or decreases his number of shares held (Transferor) to a person desirous of becoming a member or a member who desires the number of shares held (Transferee).

B. Procedure for Transfer: Sec.108

1. Application to company for registration of transfer IS to be made either by the transferor or by the transferee.
2. Compliance with the provisions in the Articles, if any.
3. Instrument of transfer should be in the prescribed form (Form 7B). Such form should be presented to the prescribed authority (Registrar) Wh9 shall stamp or otherwise endorse there on the date on which it is so presented.

After presentation only, the instrument is to be signed by the transferor and the transferee with details of:

- Number of shares transferred
- Details of shares- transferred, i.e., Share Certificate number and distinctive Numbers
- Name, address and occupation of transferee

4. Instrument of transfer is to be delivered to the Company along with the share certificates and if no such certificates are in existence, the letter f allotment of shares is to be annexed.

Time of Delivery

- In the case of shares dealt in or quoted on a recognized Stock Exchange, at any time before the' date of which the Register of Members is closed in accordance with law for the first time after its presentation or within 12 months from the date of presentation whichever is later. '
- In any other case within 2 months from the date of such presentment

Transfer of partly paid-up shares

If transfer is of partly paid up shares and the application for transfer is made by the transferor, then the transfer is not to be registered by the Company unless the Company gives notice of application to the transferee, and the transferee gives no objection to the transfer within two weeks from the receipt of notice. Notice is deemed it being duly given if dispatched by prepaid registered post to the transferee at the address given in the instrument of transfer.

The Board of Directors, on satisfaction of the above steps, is to register the transfer and make an endorsement on the back of the share certificate recognizing the .transferee as a new holder.

Steps for Transfer of Shares

1. On receipt of the transfer instrument, duly executed, in the prescribed form along with the share certificate or allotment letter, it is usual for companies to give an acknowledgement for the same.
2. The instrument is to be checked thoroughly to find out whether the same is in order.
3. Where the instrument of transfer is received from a person other than the transferor and the shares are partly paid-up, the Company has to send a notice to the transferee.
4. Before effecting any transfer, the Company should ensure that the instrument is lodged within the time limit as prescribed in Section 108 (l A) of the Companies Act.
5. Where the shares are intended to be transferred to a body corporate, it should be ascertained as to whether-
    a) The Memorandum & Articles of Association empower the transferee Company to make the investment;
    b) The Board of Directors of the intended transferee body corporate has passed the necessary resolution and has empowered the person concerned to deal with the matter in this behalf;
    c) "The person executing the deed on behalf of the body corporate has valid authority to do so;"
    d) If the provisions of Section 108 A to - 108 I are attracted, whether the necessary formalities there under have been complied with.
6. Where the intended transferee is a trust or a partnership firm or other association of persons, it should be verified whether -

a) Where the transferee is a trust.

The trust is registered under the Societies Registration Act or not. If it is registered as aforesaid, the trust becomes a body corporate and shares can be registered in the name of the trust. Otherwise shares have to be registered in one or more names of the trustees of the trust, authorised by resolution of the Board of Trustees by whatever name called.

b) Where the transferee is a partnership from or other association of Persons

If the shares are purchased by a partnership firm or an association of persons, the shares are to be registered in the individual name(s) of one or more partners, in the case of partnership firms; or in the name or names of any of the office bearers of the association, in the case of association of persons. Similarly, in case the shares are purchased by a Hindu Undivided Family, shares have to be registered in the mime of the karta, without mentioning the representative character.

c) Where the transferee is a minor

Where the transferee is a minor, transfer of shares is to be effected in accordance with the provisions of the Articles of Association of the company. Where shares to be transferred are fully paid-up, Company may register the same in favour of the minor thought the guardian.

d) Transfer by Legal Representative

A Legal representative of a deceased member may transfer his shares even though his name is not entered in the register of members. The transfer will be as valid as if he had been a member at the time of execution' of the instrument of transfer.

7. After making thorough scrutiny, the officer in charge is to put his initial on the form and the particulars of the transfer instrument will be entered in the Shares Transfer Register.
8. At periodic intervals the register along with necessary transfer documents and enclosures will be put up to the Board or the Shares Transfer Committee thereof if there is one or such other authority as may be determined by the Board, In this behalf, depending on the practice of the Company and concerned authority Will initial the Shares Transfer Register for having approved the transfer. The date of approval of the, transfer will be indicated in the register;
9. Where transfers are duly approved, endorsement will be made on the share certificates in favour of the transferees and will be certified by the Secretary or an officer authorised by the Board in this behalf After doing so, the share Certificates will be returned to the sender along with a covering letter. Where new certificates are to be issued, they have to be issued in conformity with the Companies (Issue of Share Certificates) Rules, 1960.
10. Necessary entries should be made in the Register of members in regard to the transferor and transferee.
11. In case of a refusal to register the transfer, the Company must send notice to the transferor and transferee as per the provisions of Section 111of the Companies Act

Refusal of Transfer

Power of the Board to refuse registration of transfer: *Sec.111*

Grounds on which registration of transfer may be refused are as under.

a) If partly paid-up shares are being transferred and transferee is known to be financially incapable of paying balance calls.
b) If partly paid-up shares are being transferred to a minor incapable of entering into a contract.
c) In cases where due call money has not been paid by the transferor

d) When the transferor is a debtor of a Company, which has a lien on such shares
e) If instrument is incomplete, irregular and defective and not properly stamped
f) On other, just and equitable grounds in the general interest of the Company.

Time for refusal

Refusal must be conveyed in writing to the transferor and transferee within 2 months from the date on which instrument of transfer deed is lodged with the Company for transfer and reasons for refusal should be indicated.

Remedy against refusal of transfer of shares

When?

Remedy arises if the Company -

- Refuses to register transfer of shares, or
- Fails to reply within 2 months of lodging the documents for registration;
- Is to rectify the register of members for wrong inclusion or omission of name.

Who?

Any aggrieved person - either transferor or transferee or any other person is entitled to remedy

Appeal to whom?

Application is to be made to NCL T.

Time Limit

The time limit for application is –

i) Within two months of receipt of notice of refusal or
ii) Where no reply has been received within 4 months of lodging documents for registration
iii) No time limit for rectification of register of members for wrong inclusion or omission of name

Preceding

The NCLT may, on hearing, either

i) Dismiss the appeal; or
ii) Reject the application; or
iii) By order direct that the transfer be registered by the Company
iv) Order may also direct the Company to pay damages, if any, sustained by any person aggrieved,
v) NCLT also has powers-to pass interim orders including order as to injunction or stay as it may deem fit and just, such order as to costs as it thinks fit and incidental or consequential orders regarding payment of dividend or the allotment of bonus or rights shares during the pendency of the appeal.

The Company is to comply with NCL T order within 10 days of receipt.

Demat Shares: Sec. 111A

The procedure and conditions are similar to Section 111 above except that complaint to NCLT may be made by Depository, Participant or SEBI also.

OTHERS

Effect of Transfer - *During period of registration*

Transfer is not complete until registration. The transferee does not get legal title to share until his name is entered in the Register of Members:

The transferor continues to be the owner of shares and on principle of equity he holds them in trust for the transferee.

The transferor has voting rights but must vote as the transferee directs. However, if the transferee has not paid the price, the transferor may vote as he pleases.

The transferor is to pay calls, if any and must recover the same from the transferee.

Dividend / Right, to be adjusted between Transferor i.e, Seller and Transferee i.e., Buyer based on their contractual rights viz Ex-rights /dividend or Cum-rights/Dividend Price.

Blank Transfer

When a shareholder signs the transfer form without fining in the name of the transferee and date of transfer and hands-it over with the share certificate to the transferee thereby enabling him to deal with the shares, he is said to have made a transfer 'In Blank' or ‘Blank Transfer'.

This facilitates purchase and sale of shares in the Stock Exchange. Ultimately when it reaches the purchaser who wants to retain the shares, he can complete the blank transfer by inserting his name and can get the shares registered in his name after paying the stamp duty.

'Until registration of his name in the register of members’ the transferee does not become a shareholder and thus he cannot exercise any rights as shareholder in respect of the shares. For such ultimate transfer and registration, the first seller will be treated as the transferor.

A blank transfer deed is not a negotiable instrument merely because it passes from one person to another freely. Hence, a bona fide transferee from a person who has acquired a blank transfer deed by fraud does not acquire good title to the shares included in the deed.

The restrictions on time limit for registration" of transfer is placed as discussed earlier to prevent misuse of blank transfer. Some of the misuses are-

a) Avoidance of transfer stamps;
b) Concealment of the identity of the real beneficial owner behind their nominees
c) Evasion of tax, suppression of secret profit invested in holding on blank transfers.

Forged Transfer

It is transfer deed on which the signature of the transferor is forged. The consequences of forged transfer are:

1. Transferor's Rights

- A forged transfer is a nullity and it does not confer any legal title upon the transferee.
- The true owner can have his name restored on the register of members.

2. Transferee's Claim.

If the Company has issued a share certificate to the transferee on a forged transfer and he has sold these shares to an. innocent buyer, the buyer gets no right to be registered as a shareholder: In such a case, he can claim damages from the Company on the ground that he acted on the share certificate of the Company.

3. Company's Claim

If the Company has been put to a loss by reason of the forged transfer, it may recover the loss from the person who procured registration, even though he might have acted in good faith.

Certificate of transfer: Sec.112

Where a shareholder wishes to transfer only part of his shareholding or wishes to sell them to two or more persons, he is required to lodge the share certificate with the Company.

Where he has already with the company the relevant share certificate, together with an instrument of transfer for part of the shares, he may request the Company to certify on the instrument of the transfer that the share certificate for the share covered by the instrument of ransfer has been lodged with the Company. This is known as certification.

Certification is, therefore, the act of noting by' the Secretary etc. Stating that the share certificate has been lodged with the Company, Where any person acts on the faith of a false certificate by a Company made negligently, the Company shall be under the same liability to him as if the certification had been made fraudulently.

If, however, by negligence, the Secretary, after certifying the transfer, returns the original certificate to the transferor who pledges the same the Company shall not be liable to the pledgee as -

- It owes no duty to the pledgee;
- The immediate cause of his loss was not the issue of the certificate.
- It is to be noted that the Company is under no obligation to certify any instrument of transfer of shares.

Revalidation and Transfer

A share transfer form is valid in the case of transfer of listed 'Company shares for a period of 12.months from the date of presentation or book closure whichever is earlier and two months from the date of presentation in the case of unlisted Company shares. If the transferee fails to lodge the transfer deed before' the time of expiry of the deed, the deed will be become invalid.

However, under the Act procedure exists to revalidate the said form. An application should be made to Registrar of Companies in Form NO.7 C along with the requisite filing fee. Along With the form the share transfer deed to be revalidated duly completed in all respects, together with a copy of the share certificate, which is to be transferred) must be sent. Registrar will affix a stamp on the deed to the effect that the document is revalidated and from the said date the document will have a validity period of one month,

Balance Ticket

When only a portion of the shares is transferred, the Company usually issues him a ticket for the balance 'of shares, which have not been transferred. Such a ticket is called it ‘balance ticket'.

Transmission of Shares

If refers to transfer by operation of law. Transmission of shares takes place when a registered shareholder dies, or IS adjudicated as insolvent or if the -shareholder being a Company, goes into liquidation.

Procedure

1. Legal representation to be recognized-
   Death: If joint holding, survivor; or else executor or administrator /heir;
   Insolvency: Official assignee/ receiver.
2. Notice to be given to the Company by legal representative;

3. Transmission is recorded by the Company on the basis of evidence showing the entitlement of the transferee to the shares;
4. No transfer form is required / no stamp duty is required;

All the rights of the original member are transferred to the legal representative during after transmission.

Additional points

1. Upon the death, the shares of the deceased vest in the executors or administrators and the estate becomes liable for the calls if the shares are not fully paid up.
2. The Legal representative/official Assignee may elect either-
   i) To be registered himself as a shareholder;
   ii) To make such transfer of shares whether they are party paid or fully paid.

Distinction between Transfer and Transmission Of Shares

Basis	Transfer	Transmission
Course of Action	Voluntary action	Operation of law
Consideration	Consideration is always there	No Consideration
Stamp Duty	Yes	No
When Effected?	Oil sale	On death, insolvency and lunacy
Instrument of transfer deed	Compulsory	Not necessary

Nomination of Shares: See, 109 A &109 B

a) Every shareholder or a debenture holder may nominate at any time, a person to whom his shares or debentures should devolve iii the event of his death. The nomination will be in the prescribed form.
b) In case of joint holdings, the joint holders may together nominate a person to whom such share or debentures should devolve in case of death of all the joint holders.
c) Where the nominee is a minor, then the' holder of shares or debentures may make the nomination to appoint a person to become entitled to share in or debentures of the Company, in the event of his death the minority.
d) Where a nomination has been made in accordance with the provisions of this section, and such nomination has not been cancelled or varied, such nominee shall automatically become entitle to such shares or debentures, in the event of death of shareholder or debenture holder, and in case of joint, in the event of death of all joint holders.
e) This is the overriding power conferred under this section, notwithstanding any other law for the time being in force or in any disposition, whether testamentary or otherwise, in respect of such shares or debentures.
f) Any person appointed as a nominee, shall either-
   - Get himself registered as a member, or
   - Transfer such shares or debentures, as the case may case may be but subject to such restrictions and conditions of this Act, relating to transfer of shares or debentures. Such provisions shall apply to him as if the death of the member or debenture holder had not occurred.
g) Where the nominee elects to be registered as a member, then he shall send to the Company a notice in writing conveying his decision, accompanied by the death certificate' of the deceased shareholder or debenture holder', as the case may be.

h) The company may buy its own shares from any member by a Court order under section 402. By implication, an On death of the member or debenture holder, the nominee becomes entitled to same dividends arid other benefits as if he were the registered member. But unless he opts to become a registered member, he shall not be eligible to exercise any right conferred by membership in relation to meeting of the Company.

i) However, the Board may require the nominee, by giving a notice, either to register himself as a member or to effect transfer of such shares or debentures. Where the nominee fails to comply With such notice, within 90 days, the Board may thereafter, withhold all dividends, bonuses, or other moneys payable in respect of such share or debentures, till the compliance of such notice.

The above provisions with respect to Nomination facility shall equally apply to DEPOSITS.

Purchase Of Own Shares and Financial Assistance for Purchase of Own Shares

Purchase of or loans for purchasing its own shares by company prohibited - A fundamental principle of Company Law was that a Company cannot buy its own shares. This is laid by section77,whith provides that no company limited by shares, and so guarantee company having a share capital shall buy its own shares, except as provided by (i) section 77 (see exception below (ii) by section 100-104 (by way of reduction of capital), (iii) by section402(by way of preventing oppression)and (iv) by section 800 or by a corresponding provision of the early Act (by way of redemption of redeemable preference shares). Further, no public company and no private company (being subsidiary of a public company), can give financial aid to any person (either directly or indirectly) and whether by way of loan, guarantee or surety or otherwise, for, or in connection with, purchase or subscription made or to be made of any shares of its own or of its holding company. On contravention of the above, the company and every officer in default is liable to a fine (upto Rs.10,0000).

There are, however, certain exceptions to this rule, namely:

a) A banking company may lend money for the purpose in the ordinary course of its business but on the security of its own shares; or
b) The company in pursuance of a scheme for the purchase of or subscription for fully paid shares of the company (or those of its holding company) to be held by trustees for. the benefit of the employees of the company, may advance loan for the purpose;
c) The company may advance a loan to a person bonafide in its employment (other than directors, or managers) to enable them to purchase or subscribe for fully paid shares for an amount not exceeding their salary or wages for a period of six months [Section 77].
d) Nothing in section 77 shall affect' the right of a company to redeem any of its redeemable preference shares issued under section 80 or under any corresponding provision in any previous Companies Act.
e) unlimited company may buy its own shares.

Whether A Company Can 'Buy-Back' Its Own Shares?

While the answer to this question before passing the Companies (Amendment) Act, 1999 was emphatically No, the position is now quite opposite Section 77A of The Companies (Amendment) Act, 1999 provides for a company to purchase *its* own shares or other specified securities subject to certain conditions and regulations.

j) *Sources of Funds for Buy-Back:* Notwithstanding anything contained in this Act, but subject to the provisions of sub-section (2) of this section and section 77B, a Company may purchase its own-shares or other specified securities out of
   i) Its free reserves; or
   ii) The securities premium account; or
   iii) The proceeds of any shares or other specified securities: Provided that no buy-back of any kind of .shares or other specified securities shall be made out of the proceeds 'of an earlier issue of-the Same kind of shares or same kind of, other specified securities: *Specified securities" includes employees" stock option or other securities as may be notified by/he Central Government from time 10 lime.*

***Conditions for buy -back*:** No company shall purchase its own shares or other specified securities under sub-section. (1) unless –

a) The buy-back is authorised by its articles;
b) a special resolution has been passed in general meeting of the company authorising the buy-back;

Provided that nothing contained in this clause shall apply in any case where-

i) The buy-back is or less than 10% of the total equity paid-up capital and free reserves of the company; and
ii) Such buy-back has been authorised by the Beard by means of a resolution passed at its meeting;

* Provided further that no offer of buy-back shall be made within a period of 365 days reckoned from the date of the preceding offer of buy-back. If any.

Explanation: For the purposed of this clause the expression "offer of buy-back" means the offer of such buy-back made in pursuance of the resolution of the board referred in the first proviso. *"Compantes (Amendment) ordinance 2001 dated 23.10.2001.*

c) The buy-back is or less than twenty-five per cent of the total paid-up capital and free reserves of the company; Provided that the buy-back of equity shares in any financial year shall not exceed twenty-five per cent of its total paid-up equity capital in that financial Year.

d) The ratio of the debt owed by the company is Dot more than twice the capital and its free reserves after such-buy-back; Provided that the Central Government may prescribe a higher ratio of the debt than that specified under this clause for a class or classes of companies.

The expression "debt" includes all amounts of unsecured and secured debts; The expression "free reserves" shall have the same meaning assigned to it in clause (b). Explanation to section 372A which means those reserves which, as per latest audited balance-sheet of the company, are free for distribution as dividend and shall include. balance to the credit of the securities premium account but shall not include share application money.

e) All the shares or other specified securities for buy-back are fully paid-up;

f) The buy-back of the shares or other specified securities listed on any recognised stock exchange is in accordance with the regulations made by the. Securities and Exchange Board of India in this behalf;

g) The buy-back in respect of shares or other specified securities other than those specified in clause (f) is in accordance with the guidelines as may be prescribed.

3) Procedure before buy-back:

The notice of the meeting at which special resolution is proposed to be passed shall be accompanied by an explanatory statement stating-.

a) A full and complete disclosure of the all-material facts;

b) The necessity for the buy-back;

c) The class of security intended to be purchase under the buy back;

d) The amount to be invested under the buy-back; and

e) The time limit for completion of buy-back.

4) Time limit for completion of buy-back

Every buy-back shall be completed within twelve months from the date of passing the special resolution or a resolution passed by the Board under clause *(b)* of sub-section (2).

5) Buy-back from Whom

The buy-back under sub-section (1) may be -

a) From the existing security holders on a proportionate basis; or

b) From the open market; or

c) From odd lots, that- is to say, where the lot of securities of a public Company, whose shares are listed on a recognised stock ·exchange, is smaller than such marketable lot, as may be specified by the stock exchange; or

d) By purchasing the securities issued to employees of the company pursuant to a scheme of stock option or sweat equity.

6) Declaration of solvency

Where a company has passed a special resolution under clause *(b)* of sub-Section (2) or the Board has passed a resolution under the first provision to clause (b) of sub-section (2) to buy-back its own shares or other securities under this section, It shall, before making such buy-back, file with. the Registrar and the Securities and Exchange Board of India a declaration of solvency in the form as may be prescribed and verified by an affidavit to the effect that the Board has made a full inquiry into the affairs of the company as a result 'of which they have formed an opinion that. it is capable of meeting its liabilities and will not be rendered insolvent within a period of one year of the date of declaration adopted by the Board, and signed by at least two directors of the company, one of whom shall be the managing director, if any;

Provided that no declaration of solvency shall be filed with the Securities and Exchange Board of India by a company whose shares are not listed on any recognised stock exchange (sub-section 6)

7) Extinguishments of Securities

Where a company buys-back its own securities, it shall extinguish and physically destroy the securities so bought-back within seven days of the last date of completion of buy-back.

8) Cooling Period

Where a company completes a buy-back of its shares or other specified securities under - this section, it shall not make further' issue of same kind of shares (including allotment of further shares under clause (a) of sub-section (1) of section 81 or other specified securities Within a period of six months. Except by way of bonus issue or in the discharge of subsisting obligations such as conversion of warrants, stock option schemes, sweat equity or conversion of preference shares or debentures into equity shares.

9) Register of buy back

where a Company buys-back its securities under this section, it shall maintain a register of the securities so bought, the consideration paid for the securities bought-back, the date f cancellation of securities, the date of existing and physically destroying of securities and such other particulars as maybe prescribed.

10) Filling of Buy-back Return

A company shall, after- completion of the buy-back under this section, file with the Registrar and the Securities 'and Exchange Board of India, a return containing such completion, as may be prescribed:

Provided that no return shall be filed with the Securities and Exchange Board of India by a company whose shares are not listed on any recognised stock exchange.

11) Penalty for Default:

If a company makes default in complying with the provision of this section or any roles made there under or any regulations made under clause (f) of subsection (2) the company or any officer of the company who is in default shall be punishable with imprisonment for a term which may extend to fifty thousand rupees, or with both.

Transfer of certain sums to Capital Redemption Reserve account – Section 77 AA-

Where a company purchases its own shares out of free reserves, than a sum equal to the nominal value of the share ‘so purchased shall be transferred to the capital redemption reserve account referred to in clause (d) of the proviso to sub- section (l) of section 80 and details of such transfer shall be disclosed in the balance sheet.

Prohibition of buy-back in certain circumstances - Section 77B

1) No company shall directly or indirectly purchase its own shares or other specified securities -

a) Through any Subsidiary company including its own subsidiary companies. or

b) Through any investment company or group of investment companies; or

c) If a default, by the company, in repayable of deposit or interest payable thereon, redemption of debentures or preference shares or payment of dividend to any shareholder or repayment of any term Joan or interest payable thereon to any financial institutions or bank, is subsisting.

2) No company shall directly or indirectly purchase its own shares or other specified securities in case such company has not complied with provisions of sections 159, 207 and 211.

Lesson - 7

DEBENTURES

Definition

A debenture may be defined as a document containing an acknowledgement of indebtedness which needs not to be, although it usually is under seal, which need not to give. Although it usually does give, it charges on the assets on the company by way of security and which may or may not be one of a series. .

Under section 2(2) debentures includes debentures stock, ban and other securities of the company whether constituting a charge on the assets of the company or not. Debentures are bonds, issue in acknowledgement of any indebtedness, generally, however, they are issued under the Company's seal and contain a provision for the repayment of principle sum at the appointed date and the payment of interest at fixed rate. Debentures are usually secured upon the company's property or undertaking.

Thus, a debentures is an Instrument which is drawn under the seal of the company: it binds the company to pay a, sum of money at a fixed time with interest but the debenture' Stock is a debt which carries interest at a fixed rate; it is constituted generally by a deed of covenant with trustees and the stockholder obtains a certificate of title. A stock is called perpetual if the' principle amount of debt is not payable at any fixed time but only in the case of winding up or in case of default in paying interest.

Let us once again recapitulate the distinction between a debenture and debenture stock. The former is the description of an instrument while the later is the description of debt or sum secured by a instrument, Lord Lindley has described debenture stock as the borrowed capital Consolidated into one mass for the sake of convenience.

a) Types of debentures

Debentures may be of the following types:

1. Naked or unsecured debenture.
2. Secured debentures
3. Redeemable debentures
4. Perpetual debentures
5. Bearer debentures

1. Registered debentures **Naked or unsecured debentures:** debentures that do not carry any charge of the assets of the company are known as naked or unsecured debentures. The holders of these debentures do not have any security as to repayment of principal or interest thereon.
2. **Secured debentures:** debentures that are secured by a mortgage of the whole or part of the assets of the company are known as mortgage debenture or secured debenture.
3. **Redeemable debentures**: debentures that are redeemable at the expiry of a certain period are known as redeemable debentures. Debentures once redeemable can be reissued in accordance with the provision of section 121 of the companies act.
4. **Perpetual debentures:** where the debentures are redeemable on the happening of specified events which may not happen for an indefinite period, for example, winding up, they are known as perpetual debentures.
5. **Bearer debentures:** these debentures are payable to a bearer and are transferred by delivery and no stamp duty is payable on the transfer. The debenture-holder is not registered in the, books of the, company but is entitled to claim interest and payment of principle. A bona fide transferee for value is n not affected by the, defect in the title of the transferor.

6. **Registered debentures:** these debentures are payable to registered holders a registered holder is one whose name appears on the debenture certificate/ letter of allotment and is registered on the company's register of debenture holders maintained under section 152 of the companies act 1956.

Classification of debentures, according to convertibility

According to convertibility, debentures are future classified into three categories:

a) Fully convertible debentures (FCDs)
b) Non-convertible debentures (NCDs)
c) Party convertible debentures(PCDs)

l. Fully convertible debentures: convertible debentures are those debentures that are converted into equity Shares of the company on the expiry of specified period or periods. Where, the conversion is to be made at are after 18 months from the date of allotment but before 36 months, the conversion is optional on the part of the debenture holders in term of S.E.B.I guidelines convertible debentures may or may not carry any interest.

2. Non-convertible debentures: non-convertible debentures are those debentures that do not confer any option on the holder to convert the debentures in to equity shares and are redeemed at the expiry of a specified period(s).

3. Partly convertible debentures: partly convertible debentures consist of two parts – convertible and non-convertible. The convertible portion (s) is/are Convertible into equity shares at the expiry of specified period(s). Whereas the non-convertible portion is redeemed at the expiry of a certain period(s). Where the conversion takes place at or after 18 months, the conversion is optional at the discretion of the debenture holder.

Distinction between fully convertible and partly convertible debentures

Features	Fully convertible debentures	Partly convertible debentures
(i) Classification for debt equity ratio computation	Classified as equity for debt Equity for computation	Convertible portion classified As 'equity' and Don-convertible Portion as 'debt'
(ii) Flexibility in financing	Highly favourable debt equity ratio	Favourable debt equity ratio.
(iii) Capital base	Higher equity capital on conversion of debentures	Relative lower equity
(iv) Suitability	Better suited for companies without established track record.	Better suited for companies with established track record.
(v) Servicing of equity	Higher burden of servicing of equity	Relatively lesser burden of equity servicing
(vi)Debentures redemption reserve	Not required	Arrangement may be made buyback of the non-convertible portion.
(viii) Popularity	Highly popular With Not so popular with investors.	Not so popular with investors.

Convertible debentures can be fully or partly convertible. The major points of distinction between fully and partly convertible debentures are highlighted below:

Characteristics of debentures

1. It is in the form of a certificate generally under the common seal of the company.
2. It is an acknowledgement of the indebtedness of the company to the holder.
3. It provides for payment of a specified sum at a specified rate of interest.
4. It is usually in series with a. pari-passu clause.
5. It normally has a charge on the assets of the company; debentures may be secured by a fixed charge or by a floating charge or a combination of both.
6. It does not carry voting rights,

Debenture stock

A debentures stock is a borrowed capital consolidated into one mass. It is generally secured by a trust deed. A person may subscribe for or transfer only an integral number of debentures, but in the case of debenture stock, he may subscribe for, or transfer, any amount, even a fractional amount. Debenture stock must be fully paid, while debenture mayor may not be fully paid.

Debenture certificate: sec. 113

It is to be issued within 3 months of allotment or within 2 months after application for registration of transfer. It is to be delivered in accordance with procedure prescribed u/s 52 of the act.

The company law board may extend time by a further period of 9 months if it is satisfied that it is not possible for company to deliver certificates within the specified period.

Default

If default is made in complying With the above provisions, ever officer of the company who is in' default shall be punishable with imprisonment for a term which may extend to two years and the company and every officer of the company who is in default shall be punishable with fine, which may extend to Rs.5000 per .day of default.

Shares	Debentures
Shares are part of the capital of a company	Debentures constitute a loan
Shareholders are members/owner of the company	Debenture holders are creditors of the company
Dividend on shares is based on profits	Amount of interest is fixed
Shares have no charge on the assets of the company	Debentures generally have a charge on the assets
There are restrictions in the act for issue of shares at a discount	There are no restrictions for Issue of debentures at a discount
Shares carry voting rights	Debentures do not carry voting rights
Dividends can be paid only out of profits	Interest is payable even if there is no profit
Company cannot buy its own shares except redeemable preference	Company can purchase or redeem its own debentures

Debentures with pari passu clause

1. Debentures are normally issued in a series with a pari passu clause. In such a case, they are to be discharged rate ably, though issued at different points of time.
2. In the event of a deficiency of assets to satisfy the whole debt secured by the issue of debentures, they will abate proportionately.
3. If there is no pari passu clause in the terms of issue, they are payable according to the date of issue.
4. If they are issued on the same date and are serially numbered they would rank in numerical order.
5. A company however cannot issue a new series of debentures so as to rank pari passu with prior series unless the power to do so is expressly reserved and contained in the debenture deed of the previous series.
6. Where a series of debentures creating a charge and containing a pari passu clause are issued by a company, the following particulars shall be filled with the register for registration-

- The total amount Secured by the whole series;
- The dates of the resolutions authorizing the issue of the series and the date of the covering deed by which the security is created;
- A general description of the property charged;
- The names of the trustee, if any, for the debenture holders.

Transfer of debentures: bearer debentures are negotiable instruments and hence are transferable by delivery free from may equities. A bonafide transferee for value gets a good title notwithstanding any defect in the title of the transferor. Transfer of registered debentures takes place exactly in the same way as the transfer of shares.

Fixed and floating charges: debentures may be secured by a fixed charge or by a, floating charge or by a combination of both a floating charge is an equitable charge which in not a specific charge on any property of the company. Thus, the company may, despite the charge deal with any of the assets in the ordinary Course of business. “it is of the essence of a floating charge that is remains dormant until the undertaking charged ceases to be a going concern or until the person in whose favour the charge is created, intervenes. His right it intervenes may, of course, be suspended by agreement. But, if there is no agreement of suspension, he may exercise his right whenever he pleases after default”.

On the other hand, a specific (fixed) charge is a charge which is expressed to cover specific property like land, building etc. although the company usually remains in possession of the property. It can only deal with it subject to the prior rights created by the charge.

It is thus evident that a floating charge is characteristically ambulatory and shifting; it flows "with the property which is intended to affect until some event occurs or some act is done which is causes it to settle and fasten on the subject of the charge within its reach and grasp". But specific charge is a change is a charge which fastens on to the property which is ascertained and definite or capable of being ascertained and made definite.

The main characteristics of a floating charge as described in *[Yorkshire woolcombers's association (1903)]* are as follows:

a) It is a charge on a class of the company's assets, present and future, that class being one,

which, in the ordinary course of the business is changing from time to time. .

b) Generally, it is contemplated that the company carryon its business in an ordinary way with such a Class of assets till some event occurs on which the charge is to settle down on the property as then existing and the, charge becomes; fixed. The moment the charge crystallizes, it becomes a fixed charge. It. takes place when some event contemplated in the agreement creating the charge occurs, e.g. debenture holders enforcing their securities on a default being made by company either in payment of interest or capital on the company being wound up.

There are two major statutory limitations to the rights arising out of floating charge, Firstly, a Boating charge Within, 12 months preceding the commencement of the winding up (whether compulsory or voluntary or subject to supervision), shall unless it is proved that the, amount of any Cash paid to the company at the time of or subsequent to the creation of and in consideration for the change together with the interest on that amount at 5 percent per annum or at any other prescribed rate.

Debenture Trust: Sec.117

Debenture trustees

No company shall issue a prospectus or a letter of offer to the public for Subscription of its debentures, unless it has, before such issue, appointed one or more debenture trustees and the company has, on the face of the prospectus stated that the debenture trustees have given their consent to be so appointed.

A person shall not be appointed as debenture trustees, if he-

- Beneficially holds shares in company
- Is beneficially entitled to moneys which are to be paid by the company to ht debenture trustee:
- Has entered into any guarantee in respect of principal debts secured by the debentures or interest thereon.

The functions of debenture trustee are generally to protect the interests of the debenture holders and to redress their grievances effectively. In particular, they make lake such other steps-

1. To ensure that the assets of the company and each of the guarantors are sufficient to discharge the principal amount at all times.
2. To satisfy himself that the prospectus does not contain any matter inconsistent with the terms of the trust deed.
3. To ensure that the company does not branch of the covenants of the trust deed.
4. To take reasonable steps to remedy any breach of the covenants of the trust deed or terms of issue.
5. To take steps to call a meeting of the debenture holders when necessary.

The trustees are to file a petition before NCLT if the interests of the debenture holders are in jeopardy.

Debenture trust deed

A trust deed for securing any issue of debentures shall be in such form and shall be executed within the prescribed period. A Copy of the trust deed shall open to inspection by any member/debenture holder who may also obtain copies on payment of the prescribed fee.

Liability of trustees for debenture holders: sec.19

A trustee is liable for any breach of trust where he fails to show the degree of cafe and

diligence required of him as trustee, having regard to the provisions of the trust deed conferring on him any powers authorities or discretion.

Any clause in the debenture trust deed releasing or exempting the trustee from liability for breach of trust, or indemnifying him against livability for breach of trust, so void except in the following cases:

- Where the trustee can show that he took such care and diligence as is required of him as a trustee having regard to the powers, authorities and discretion conferred on him by the trust deed:
- Where a majority of not less the 3/4 in value of the debenture holders present and voting in person or, where proxies are permitted, by proxy, at a meeting summoned for the propose, agree, and the voting relates to specific acts or omissions or to a trustee who is dead or has ceased to act.

Debentures with Voting Rights Is Not To Be Issued: Sec.117

No company can issue debentures carrying voting rights at any meeting of the company, whether generally or in respect of any particular classes of business.

Right to Obtain Copies and Inspection if trust Deed: Sec.118

Every debenture holder and member is entitled to have a copy of the trust deed securing the issue of debentures on payment-

- In case of printed trust deed such sum as may be prescribed.
- In case of a trust deed, which in not printed. Of such sum as may be prescribed for every one hundred words or fractional part thereof required to be copied'.

The company has to comply with the request within 7 days,

If the company which have been fails to give copies the aggrieved debenture holder in apply to the NCLT. Which may by order direct that the copy requited be sent forthwith,

The trust deed shall be open to inspection by any member/debenture holder in the same manner as register of member as provided in sec.163. . .

Debenture Redemption Reserve (Drr)

Creation of security and debenture reception reserve (DRR)

Every a company is required to create DRR for the redemption of such debentures, to which adequate amount shall be credited, from out of profits every year until such debentures are redeemed.

The amount in DRR shall be utilized only for debenture redemption.

Where a company fails to redeem the debentures on maturity, the NCLT may on application by any debenture holder, direct the company to repay the principal and Interest thereon,

Reissue of Redeemed Debentures: Sec.121

Where debentures previously issued have been redeemed, a company may reissue such debentures of issue others in their place provided

- There is no provision to the contrary express or implied, in the articles or, conditions of issuer or in any other contract entered onto by the company.
- The company has not shown an intention to cancel them

On reissue of redeemed debentures the person entitled to them has the same right and priories as if the debentures have not been redeemed

Where with the object of keeping debentures alive for the purpose of reissue, they have been transferred to a nominee of the company; a transfer from such nominee .is defined to be a reissue of debentures.

Where the company has deposited any of its debentures to secure advances, the debentures to have been redeemed by reason only of the debt having been ceased while debentures remain deposited. .

Reissued debentures shall be treated as new debentures for the purpose of stamp duty. The power to reissue debentures in place of redeemed debentures does not authorize issue of debentures different in their foRm those redeemed.

The date of redemption of reissued debentures cannot be later than that of the original debentures.

OTHERS

Register and index of debenture holders (sec.152) .

A register of all debenture holders is to be maintained in accordance duly index.

Remedies of debentures holder

***1. Unsecured* holder.**

- Sue for principal and interest:
- Petition u/s 439 for winding up of the company on ground specified in sec.433 (1) (e) viz., inability to pay debts.

2. *Secured debenture holder*

- **Debenture holder's action:** sue on behalf of himself and all other debenture holders of same class to obtain payment and enforce security by sale.
- **Appoint a receiver, if conditions of issue permit:** On the appointment of a receiver, the assets specifically Charged in favour of the debenture holders, and the power of the company to deal with them on the ordinary course of business cease, although the company continues to exist until it is wound up
- The trustees may an application to the court for an order of foreclosure, the effect of which is that the borrowers interest in the assets charged is completely extinguished and the lender becomes the owner of them. For an action of foreclosure, it is necessary that all debenture holders of the class concerned join hands.
- He may have the property sold by the trustee if the debenture trusts deed permits the sale.
- If the company is insolvent and his security is insufficient, he may value his security and prove for the balance. In the alternative, he may surrender his security and prove for the whole amount of his debt. He is prohibited from proving for interest, which became due after winding up.
- Petition for winding up U/S 439 on grounds specified in sec.433 (1) (e) i.e. inability to pay debts.

The issue of debentures to public by listed companies is governed by the guidelines issued by securities Exchange board of India (SEBI) viz-

1. Guidelines for issue of FCDs/PCDs and NCDs
2. Guidelines for protection of interests of debenture holder

Special provisions as to debentures (new sections 117A, 117B and 117C) companies (Amendment) Act, 2000

New section 117A-deals with execution of trust deed in the prescribed form. Any member/ debenture holder shall be entitled to obtain copy of the trust deed on payment of prescribed fees. The trust .deed will be available for inspection by a member/debenture holder. If default is made in giving such inspection penalty of Rs.500 for every day during which the default continues can be levied by the court.

New section 117B - deals with appointment and duties of debenture trustees. It is now provided that before issue of prospectors or letter of offer for the debentures, the company should appoint one or more debentures trustees and disclose their names and also state that they have given their consent. It is now specifically provided that

(a) A shareholder who has beneficial interesting shares

(b) Creditor or

(c) A person who has given guarantee for repayment of principal and interest in respect of the debentures cannot be appointed as a debentures trustee. The section gives the list of duties of a debentures trustee who has to protect the interest of debentures holders.

New section 117C- provides that the company should create debentures redemption through credit of adequate amounts out of its profits every year until the debentures are redeemed. The word ‘adequate' is not deposed. It is also provided that such reserve shall not be used for any purpose, except of issue and redeems the debentures on maturity It default is made CLB can pass such orders as it deems fit. There is also a provision for prosecution for prosecution of officers and imprisonment up to 3 years and fine of Rs. 500 per day during which defaults continues.

Lesson - 8

DIRECTOR

A company being an artificial person cannot act by itself. It has neither a mind nor a body of its own. It must act through some human agency. The persons by whom the business of the company is carried on are termed as directors. The institutions of the company is composed of two organs, the general body of shareholders and the board of directors. The board is the managerial body. It is the supreme executive authority to exercise control over the affairs of the company. It is constituted by the general body constituting the board means appointing directors:

Who is a director?

According to section 2(13) of the Companies Act, 1956, "director" includes any person occupying the position of director by whatever name called. Sir George Jessel observed in *Re Forest of-Dean Coal Mining Co.*

"It does not matter much what you call them so long as you understand what the true position is, which is that they are commercial men managing a trading concern for the benefit of themselves and all other shareholders."

A director may be defined as an individual, who directs controls, manages or super intends the affairs of a company. As a body, they frame the general policy of the company, direct its affairs, appoint the company's officers, ensure that they carry out their duties and recommend to the shareholders regarding distribution of dividend. The directors of a company collectively are referred to as the "Board of directors" or Board".

Where a person functions as a director' but without being lawfully appointed, he cannot be termed as a director. .

Persons deemed to be directors (Shadow director)

According to explanation (1) of Section 303, any person in accordance with whose directions or instructions, the Board of directors of a company is accustomed to act shall be deemed to be a director of the company, except when the Board of directors so acts on advice given by him in professional capacity (**Section 7).**

Only individuals to be directors

Nobody corporate, association or firm shall be appointed director of a company and only an individual shall be so appointed (Section 253), It is because that the office of a director is to some extent an office of trust. There should be somebody readily available who can be held responsible for the failure to carry out the obligations of such an office. It will be difficult to fix that responsibility if the director is a body corporate, association of persons or firm.

Number of Directors

Section 252 provides that every public company (other than a public company which has become such by virtue of Section 43-A) must have atleast 3 directors and every private company must have atleast 2 directors. The Companies (Amendment) Act 2000 has inserted in Sec. 252 (1) the following:

'Provided that a public company having,

(a) A paid-up capital of five Crore rupees or more;
(b) One thousand or more small shareholders, May have a director elected by such small shareholders in the manner as may be prescribed.

Explanation: For the purposes of this sub-section "small shareholders" means' a shareholder holding shares of nominal value of twenty thousand rupees or less in a public company to which this section applies:

This is the statutory limit and subject to it the articles of a company may prescribe the

maximum and the minimum number of directors for its board of directors. A company in a general meeting may by ordinary resolution increase or reduce the number of its directors within the limits fixed in that behalf by its articles (Section 258). Beyond such limits, a variation can be made by passing a special resolution. A company is not bound to appoint the maximum number of directors for its board of directors. While a company must have the minimum number of directors required under section 252, it may appoint any number within the maximum.

Any increase beyond the limit fixed by the articles must be approved by the Central Government except where the increase in the number of directors does not make the total number of directors more than twelve. Such an increase will become void if approved by the Central Government (Section 259). This provision is not applicable to a Government company and to a private company, which is not a subsidiary of a public Company, and a company as per Section 25.

Appointment of Directors

The appointment of directors is accordingly regulated by the Act . Directors may be appointed in the following ways:

1. By the articles as regard first directors (Section 254).
2. By the company in general meeting (Sections 255 to 257, 263, 264).
3. By the directors (Section 260, 262, 313).
4. By third parties (Section 255)
5. By the principle of proportional representation (Section 265).
6. By the central government (Section 408).

1. **First directors:** The first directors are usually named in the articles. The articles may also provide that both the number and the mimes of the first director shall be determined in writing by the subscribers' to the memorandum or a majority of them. Where the company has no articles or the articles are silent regarding the appointment of directors, the subscribers to the memorandum who are individuals shall be deemed to be first directors of the company. They shall hold office until the directors are appointed at the first annual general meeting (Section 254).

   If all the subscribers to the memorandum happen to be bodies corporate, none of the subscribers can be deemed to be directors and the company will have no directors until the first directors are appointed under section 255.

   Where the person named in the list of first directors do not assume the office, for any reason for example, death, then it is duty of the subscribers of the Memorandum to hold a meeting for appointment of directors.

2. **Appointment by company.** Appointment of subsequent directors is made at every annual general meeting of the company Section 255 provides that not less than two third of the total number of directors of a public company or of a private company which is subsidiary of a public company must be appointed by the company in general meeting. These directors must be subject to retirement by rotation. The remaining directors of such a company and the directors generally of a purely private company must also be appointed by the company in general meeting. In other words, not more than one third of the total number of directors can act as non-retiring directors i.e. not subject to retirement by rotation.

   Example: *A company has six directors. It can appoint only2 directors (1/3rd of six) as permanent directors if it wants to do so. The remaining four directors shall be liable to retire by rotation.*

The object of Section 255 is to prevent the mischief of self-perpetuating management.

The directors to retire by rotation at every annual general meeting must be those who have been longest in office since their last appointment. As between persons who become directors on the same day those who are to retire will, subject to any agreement among themselves, be determined by lot. [Sec. 256 (1) and (2)]

Rotational director means a director retiring by rotation and does not include additional, alternate, debenture holders or Central Government's nominee directors. Similarly directors appointed by financial institutions in pursuance of the agreement entered into by these institutions with the company are not liable to retire by rotation. Such nominee directors are also not to be taken, into account for computing one-third numbers of directors liable to retire.

Where annual general meeting is not held

The directors cannot prolong their tenure by not holding an annual general meeting in time. They would automatically retire from office on expiry of the maximum permissible period within which such meeting ought to have been held. To call annual general meeting is the duty of directors and by omitting to convene such meeting, they cannot take advantage of their own default.

Re-appointment

At the annual meeting at which a director retires, the company may fill up the vacancy by appointing the retiring director or some other person thereto. [Sec. 256 (3)]. Demand re-appointment of a retiring director (Section 256)

The retiring director is deemed to be reappointed at the annual general meeting of adjourned meeting except in the following cases:

(1) At any previous meeting, a resolution for his re-appointment was put to vote, but was lost or
(2) The retiring director has, in writing, expressed his unwillingness to continue or
(3) He is not qualified or is disqualified for appointment or
(4) A special or ordinary resolution is necessary for his appointment or reappointment by virtue of any provisions of the companies Act, or
(5) It is resolved to fill two or more vacancies by a single resolution,

1. Appointment of a director other than a retiring director

A person other than a retiring director is also eligible for appointment to the office of director subject to his necessary qualification. A notice in writing signifying his candidature must be left at the office of the company at least fourteen days before the date of the meeting along with a deposit of Rs.500, which shall be refunded to such person or as the case may be to such member, if the person succeeds in getting elected as a director. The notice may be given either by the candidate himself or by his proposer [Sec. 257 (1)]. It shall not apply to a private company unless it is subsidiary of a public, company.

The company shall .inform the members at least seven days before the meeting about the candidature. A person who is being proposed as a candidate for the office of a director must sign and file with the company his consent in writing to act as a director if appointed.

Such a person shall not act as a director unless he has within 30 days of his election, signed and filed with the register his Consent in writing to act as a director. This requirement does not apply to a director retiring by rotation. (Sec. 264).

2. Appointment of directors to be voted individually

Appointment of directors of a public company must be voted individually by separate ordinary resolution, unless the company has in general meeting unanimously so resolved. In other words each director shall be appointed by a separate resolution unless it is unanimously decided at the general meeting that more than one director may be appointed by a single resolution. Any resolution moved in contravention of this provision shall be void even if no objection was raised at the time of its being so moved. [Sec. 263]

3. Appointment by directors. The directors are empowered to appoint-

(i) Additional directors (ii) Alternate directors

(iii) Directors filling casual vacancy.

Additional directors. The board of directors may appoint additional directors from time to time if so, authorized by its articles. The number of directors and additional directors must not exceed the maximum strength fixed for the board by the articles. The additional directors shall hold office only up to the, date of the next annual general meeting [Sec. 260].

The purpose of section 260 is to enable the board to appoint competent persons who may otherwise find it difficult to come in by election.

If the annual general meeting of the company is not held, or cannot be held, the person appointed as additional director vacates his office on the last day on which the annual general meeting should have been held in terms of section 166 of the Act.

Additional directors must possess qualification shares (if articles so provide) within two months.

Alternate directors. The board of directors may appoint an alternate director if authorized (i) by the articles or (ii) by a resolution of the company at general meeting. An alternate director acts in the place of a director who is absent for more than three months from the State in which board meetings are held. He cannot hold office for a period longer than that permissible to the original director in whose place he has been appointed. He must vacate office on the return of the original director. [Sec.313]. Like other directors an alternate director has to perform same duties and he is subject to same liabilities.

Where the articles prescribe a share qualification for the office of director, the alternate director must possess or acquire the qualification as provided in section 270.

Casual vacancy. Where the office of any director appointed by the company in general meeting is vacated before the expiry of his term the directors may fill up the vacancy at a meeting of the board, any vacancy other than one, caused by retirement of a director by rotation or by efflux of time is a casual vacancy. Such a vacancy may occur by reason of death, resignation, bankruptcy, disqualification or failure of an elected director to accept the office. The director so appointed will hold office till the end of the term of the director in whose place, he is appointed [Sec. 262.]The term casual vacancy does not include vacancy caused by retirement by rotation.

Procedure for filling casual vacancy

(1) Get the written consent of the person proposed to be appointed.
(2) Call the meeting of the Board of directors to be casual vacancy.
(3) Intimate the appointee of his appointment as director.
(4) See that the person appointed to fill casual vacancy files with the Register his consent to act as director within 30 days.
(5) File with Registrar return as required by section 303.
(6) Make sure that necessary entries are made in the Register of directors and Register of directors shareholdings.

4. Appointment by third parties (Nominee Director).

Section 255 permits one third of the total number of directors of a public company and of a private company which is a subsidiary of a public company to be appointed by parties other than shareholders on a non-rotational basis.

The articles may give right to debenture holders, financial corporations or banking companies who have advanced loans to the company to nominate directors on the board of company. The number of directors so nominated should not exceed one, third of the total strength of the board. They are not liable to retire by rotation. These directors shall perform all the duties but they have got immunity from action from liability.

5. Appointment by proportional representation.

Directors of a company are generally appointed by a simple majority of shareholders and a substantial minority cannot succeed in placing even a single director on the board. Section 265 intends to protect the interests of minority shareholders by giving them an opportunity to place their nominees on the board.

The articles of a company may provide that the appointment of not less than 2/3 of the total number of directors of a public company (or of a private Company which is a subsidiary of a public company) shall be according to the principle of proportional representation, either by the single transferable vote or by a system of cumulative voting or otherwise. Such appointments shall be made once in three years and interim casual vacancies may be filled up according to section 262.

6. Appointment by the Central Government.

The central government has the power under section 408 to appoint directors "on an order passed by the Tribunal (earlier Company Law Board) to effectively safeguard the, interest of the company or its shareholders or the public interest to prevent mismanagement or oppression. Such directors shall hold office for a period not exceeding three years on anyone occasion.

The power can be exercised by the Tribunal either on a reference made by the Central Government or on an application

(i) Of not less than one hundred members of the company or

(ii) Of members of the company not holding less than one tenth of the total voting power therein.

The directors appointed by the central government under section 408 (1) shall not be required to hold any qualification shares nor shall his period of office be liable to termination by retirement of directors by rotation. Such a director mayor may not be the member of the company. Any such director may be removed by the central government from his office and another person may be appointed in his place. [Sec. 408 (4)] Restrictions on appointment of directors

A person shall not be capable of being appointed a director by the articles or named as a director or proposed director or the company or intended company in a prospectus or statement in lieu of prospectus unless he or his agent authorized in writing has

(i) Signed and filed With the Registrar his consent in, writing to act as such director; and

(ii) Either-

(a) Signed the memorandum for his qualification shares; on

(b) Taken his qualification shares from the company and paid or agreed to pay for them; or

(c) Signed and filed with the registrar an undertaking In writing to take from the company his qualification shares and pay for them; or

(d) Filed with the registrar an affidavit that his qualification shares, if any, are registered in his name [Sec. 266 (1)].

The provisions of this section do not apply to-

1. A Company not having a share capital;
2. A private company
3. a company which was a private company before becoming a public company; Or
4. A prospectus issued by or on behalf' of 'a company after the expiry of one year from the date on which the company was entitled to commence business.[Sec.266 (1)].

Validity of the acts of a director where his appointment is invalid (Section 290)

Under Section 290, the acts, done by a director shall be valid even if his appointment is discovered to be invalid because by any defect or disqualification or where his appointment had terminated by virtue of any provision to contained in the Companies Act or in the articles.

Exceptions, However, in the following cases, the acts will not be valid,

(a) Where appointment is illegal or no appointment at all

(b) Where the director continues in his office knowingly that his term has expired,

(c) Where the director know from the' beginning that his, appointment was defective,

(d) In case of acts done .after-his appointment has been shown to him to be invalid.

(e) Acts of managing director; manager, (subject to the provisions of section 269) or, secretary, (f) *Acts ultra vires* the company. .

(g) Where requirement as to minimum number of directors not satisfied,

(h) Where the third party was aware of the irregularity.

Share Qualification

So far as the Act is concerned a director need not hold any shares and need not be a member of at company. The articles of association generally require that the qualification of director shall be the holding of a specified number of shares known as qualification shares. The articles of a company generally provide for .such qualification shares so that directors may have personal interest in the company. Unless he is already qualified, he must obtain the qualification shares within two months after his appointment as a director. Any provision in the articles of a company in So far is it requires a person to hold the qualification shares before his appointment as a director or to obtain them within shorter time than two months will be void. The nominal value of these shares must not exceed Rs.5,000 or .the nominal value of one share where it exceeds Rs.5.000. Any provision requiring a director to hold as qualification shares more than this amount will be invalid. The bolding of share warrant shall not be deemed to be the holding of qualification shares. (Sec. 270).

It is not essential for the director to buy his shares directly from the director to buy his shares directly from the company. The director must hold the shares in his own right. Until the required number of shares is registered in the name of the director; he is not qualified. Lodging of shares transfer from is not the holding of shares.

Shares held by director jointly with any other person may be a sufficient qualification unless the articles require sole holding. Again if a director holds the shares as a trustees is duly qualified provided that it does not appear on the register of members that he is a trustee .But if a director takes his qualification shares from it promoter, it amounts to a breach of trust.

Penalty

If a person acts as a director of a Company without holding the qualification shares, he will be punishable with fine, which may extend to Rs 500 for every day between such expiry and the last day on which he acted as a director. (Sec.272 as amended in 2000).

Moreover by virtue of section 283, if a person fails to obtain the qualification shares as prescribed' by the articles within the period specified, he automatically vacates office and cannot act as a director after the expiry of that period. If the company is wound up during this period of two months, such director cannot be placed on the list of contributories in as much as there is no express or implied contract under which he would be hound to take the qualification shares[1]. If the officers of the company put the name of such director in the register after the period for qualifying has expired and he continues to act as a director, he is stopped by his conduct for repudiating the shares and will be liable to pay for them.

The above provisions do not apply to a private company, unless it is a subsidiary of a public company (Sec.273); nor do they to directors appointed by tile central government under section 408.

Disqualifications of director

The circumstances in which a person cannot be appointed as a director of a company are enumerated in section 274. According to this section; a person cannot be appointed as a director of a company, if

(a) He has been found to be of unsound mind by a competent court and the finding is in force;

(b) He has an undercharged-insolvent;

(c) He has applied to be' adjudicated as an insolvent and his application is pending;

(d) He has been convicted of an offence involving moral turpitude and sentenced to imprisonment for not less than e months and a period of 5 years has not elapsed since the expiry of his sentence;

(e) He has not paid any call in' respect of shares of the company held by him for a period of six months from the last day fixed for the payment. .

(f) He has been disqualified by an order of the court or Tribunal under section 203 of an offence in relation to promotion, formation or management of the company of fraud or misfeasance in relation to the company.

The companies (amendment) Act 2000 has inserted clause (g) to section 214 (1), namely;

(g) such person is already a director of a public Company which:-

1) Has not filed the annual returns for any continuous three financial years commencing on and after the first day of April, 1999; or

2) Has failed to repay its deposit or interest thereon due date or redeem its debentures on due date or day dividend and such failure continues for one year or more

Provided that such person shall not be eligible to be appointed as a director of any other public company for a period of five years from the date on .which such public company, in which he is a director failed to file annual accounts and annual returns under sub-clause (A) or has failed to repay Its deposit or interest or redeem its debentures on due date or pay dividend referred to in clause (B).

The central government may by notification in the official gazette remove the disqualifications enumerated in clauses (d) and (e) above. (Sec. 274(2).

A private Company, which is not a subsidiary of a public company, may by its articles provide for additional grounds for disqualification.

Section 275 as amended by the companies (Amendment) Act 2000 states that no person can be a director in more than fifteen companies. This number excludes directorship in private companies. Before the amendment, the limit was twenty companies.

Choice on becoming director of more than 15 companies.

Where a person already holding the office of a director in fifteen companies is appointed as a director of other companies, making the total number of his directorships more than fifteen, he shall choose the directorship which he wishes to continue to hold or, to accepts, so that number of the directorship, old and new, held by him shall not exceed fifteen. His new appointment will become void if he does not make a choice within fifteen days as aforesaid (*Sec.* 277 (2).

Exclusive of certain directorships for the purpose of 15 directorships.

The following companies shall be excluded in calculating the number of companies of which a person may be a director.

(a) A private company; which is neither a subsidiary nor a holding company of a public company;

(b) An Unlimited company;

(c) An association not carrying on business from profit or which prohibits the payment of dividend;

(d) A company in which such persons is only an alternate director (sec. 278 (1).

The prohibition that a director shall not hold the office of a director in more than 15 companies does not extend to the holding of directorship in foreign companies, as they do riot come within the definition of "company" in the act.

Penalty for acting as director in more than 15 companies.

Any person who holds office or acts as a director of more than 15 companies in contravention of the above provisions shall be punishable with fine which may extend to Rs.50,000 in respect of each of those companies after the first 15 (Sec. 279 as amended in 2000).

Vacation of office by directors (sec. 283)

The office of a director shall become vacant if

(a) He fails to obtain or ceases to hold the share qualification required of him by the articles of the company;
(b) He is found to be unsound mind by a competent court:
(c) He applies to be adjudicated an insolvent;
(d) He is adjudged an insolvent;
(e) He is convicted by a court of an offence involving moral turpitude and sentenced to imprisonment for not less than 6 months;
(f) He fails to pay any calls on the shares held by him within six months from the date fixed for payment, unless the central government has by notification in' the, official gazette removed this disqualification;

(g) He absents himself from three consecutive meetings of the board of directors or from all the meetings of board for a continuous period of 3 months whichever is longer without obtaining leave of absence from the board.

(h) He (whether by himself or by any person forms benefit or on his account) or any firm in which has is a partner or any private company of which he is a director accepts a loan, or any guarantee or security for a loan from the company in contravention of section 295;

(i) He does not disclose to the board of directors of his interest in any contract or proposed contract with the company.

(j) He is retained by court or Tribunal from being a director from committing fraud or misfeasance in relation to the company under section 203;

(k) he is removed, by the company in general meeting in pursuance of section 284;

(l) having been appointed a director by virtue of his holding any office or the other employment in the company, he ceases to hold such office or other employment in the company.

The grounds laid down above for vacating the office of director apply to all companies public and private. On the happing of any of the events, the director vacates the officeautomatica1ly. The provisions of this section apply to all directors by whom so ever appointed and for whatsoever period appointed. The board has no power to waive the event or condone the act.

The words 'absents himself' mean voluntarily or deliberate absence and do not cover cases of involuntary absence such as that caused by illness etc.

Example: A director who lived in Belfast was seriously ill and unable to travel, and failed to attend several meetings. It was held that he did not vacate his office as absence was not deliberate. (Re. London & Northern Bank, Mack's claim (900) W.N.114).

The office of a director is also vacated if he or his relative holds any office or place of profit in the company or its subsidiary in contravention of section 314.

A private company, which is not a subsidiary of a public company may by its articles provide for additional grounds for vacating the office of a director.

Penalty

A person who acts as a director knowing fully well of his disqualification is subject to a penalty which may extend to five thousand rupees for each day on which he so acts as a director.

Removal or directors

A director may be removed from his office;

(1) By the shareholders (Sec.284);

(2) By the central government (Sec. 388 B to 388 E)

(3) By the Tribunal[1] (Sec. 402).

1. Removal by shareholders: Section 284 empowers the company to remove a director· by ordinary resolution before the expiry of his period of office excent in the following cases;

(a) A director appointed by the central government under section 408.

(b) A director in case of a private company, holding officer for life on 1st day of April, 1952 (A director for life subsequent to that date may be removed).

(c) Directors appointed in accordance with the principle of proportional representation under .section 265. This is' to ensure that the directors appointed by the minority are not removed by a bare majority.

(d) Directors appointed by Central Government under Industries (Development & Regulation) Act, 1951.
(e) Special directors' appointed under .sick Industrial Companies (special Provisions) Act, 1985.
(f) Directors appointed by financial institutes under statutory powers:
(g) Nominee directors.
(h) Directors appointed by Tribunal under section 402.

Special notice: special notice is required of any resolution to remove a director or to appointed somebody in his place at the meeting at which he is removed. (Sec. 284 (2)).

On receipt of such notice, the company will immediately send a copy thereof to the director concerned and the director (whether or not he is a member .of the company) shall be entitled to be heard on the resolution at the meeting. (See 284 (3).

Director's right to make representation.

The director concerned may also make any representation in writing and the company may send the copy of such representation to every member. Where in the copy of the representation is not sent to the members, in that case the director concerned may require the representation to be read at the meeting. Copies of such representations may not be sent to members nor the same be read out at the meeting if the Central Government is satisfied on an application being made by the company of the aggrieved person that the rights as to representation is being abused to secure publicity for defamatory matter. In such a case the director concerned may have to pay *costs,* though not a party to the proceedings (Sec. 284 (4)).

Filling of vacancy

A vacancy created by the removal of a director as aforesaid can be filled up at the meeting at which he is removed provided special notice of the proposed appointment was also given. The director so appointed shall hold office till the date the director removed would otherwise have held office. If the vacancy is not filled, it shall be filled up, as casual vacancy except that the director removed shall not be re-appointed. (Sec. 284 (5) and (6).

Compensation

A director so removed shall not be deprived of any compensation or damages payable to him in respect of the termination of his appointment as director or of any appointment terminating with that as director.

Section 284 is general and applies to all directors including permanent and life directors (subject to the exception above) the right under this section is a statutory right given to a company arid the company can exercise this power wherever it finds a director unsatisfactory or otherwise undesirable the articles need not specify the circumstances in which the power can be exercised.

2. Removal by the central government

Section 388-B -to 388-E empower the central government to remove managerial personal including a director of a company from office on the recommendation of the Tribunal.

The procedure prescribed for the removal of such person is that the central government will state a case against such a person and refer the same to the Tribunal with a request that the Tribunal may require into it and record a decision as to whether such a person is fit and proper person to hold the office of director or any other office connected with the conduct and management of a company. Before making such an application to the Tribunal the central government must be of the option that there are circumstances suggesting:

(a) That the person is guilty of fraud, misfeasance, persistent negligence of default in carrying out his obligations and functions under the law or breach of trust; or
(b) That the business of the company has not been conducted and managed by him in accordance with the sound business principles or prudent commercial practices ; or
(c) That the management and conduct by the person has been such which is injurious or damaging to the interest of the trade, industry or business in which the company is engaged; or
(d) That such person has conducted or managed the business of the company fraudulently or in a manner prejudicial to public interest.

Every such reference will be made in the form of an application, which must contain a concise statement of material facts, which the central government may consider necessary for the purpose of the enquiry. The person against whom such reference is made must be jointed as respondent to the application. The Tribunal may allow the central government to alter or amend such application. (Sec. 388-B)

At the conclusion of the hearing of the case, the Tribunal shall record its decision stating specifically whether or not the respondent is a fit and proper person to hold the office of director. After receipt of the Tribunal findings to the effect that a person is not fit and proper, the central government shall, by order, remove such a person from office (Sec.388-D).

Effect of removal order. After such an order is made, the .respondent becomes disqualified to hold the· office of director or any other office connected with the management of the affairs of the company for a period of five years from the date of the order of removal. However, the central government may, with the previous sanction of the Tribunal permit him to hold any such office before the expiry of five years. A person who has been so removed shall not be entitled to any compensation for loss or termination of office, because such removal is not treated as breach of contract. On the removal of a person from the office of a director the company may with the previous approval of central government appoint another person to that office (Sec. 388-E)

3. Removal by the Tribunal

On an application to the Tribunal for prevention of oppression and mismanagement, the Tribunal may terminate, or set aside or modify any agreement between the company and the managing director or any other director or manager. (Sec.402). On such termination, the director cannot serve the company in a managerial capacity for a period of five years from the date of the order of termination, without the permission of the Tribunal. The director on removal cannot sue the company for damages or compensation for loss of office,

Assignment of office: A director cannot assign his office to anybody. It such assignment is made it shall be void. (Sec.312).

Resignation of director

There is no provision in Companies Act relating to the resignation of his office by a director.

A director can resign his office in the manner laid down by the company's articles. In such case, the resignation will take effect without any need for its acceptance by the board or the company in general meeting. If a director is appointed for a fixed term, his resignation, before the expiration of the period, may make him liable for damages to the company. If the articles contain no provision be can resign on reasonable notice.

Where a resignation states that it is to take effect on acceptance, or the articles so require, acceptance is necessary to end the tenure of office. Where, however, the resignation Says that it is to take effect immediately, acceptance is not necessary unless the articles or any provision of law makes it necessary. Any form of resignation, whether oral or written, is sufficient provided the intention to resign is clear. Even though the articles require resignation to be in Writing, a resignation made orally before a general meeting of die company is effective.

A resignation once made cannot be 'withdrawn without the consent of the company or the board. A director intending to resign the office should send his resignation at the registered office obligations already incurred.

A managing or whole time director cannot resign merely by giving a notice. His resignation is governed' by the terms and conditions of his appointment. In his case a formal acceptance of resignation, is essential so as to make it effective .He has to be relieved of his duty and obligations.

Contracts in Which Directors Are Interested

It is the rule of equity that a director who is fiduciary relationship with the company cannot enter into any transaction, which be in conflict with his interest. The companies Act, 1956, provides sufficient safeguards in such situations, which are discussed below these safeguards are based on the principle of law, that an agent Cannot himself in a position where his duty and interest conflict.

Board's sanction for certain contracts in which particular director is interested. Companies Act, 1956 does not absolutely forbid the directors from entering into contracts with the company. But to prevent the directors from misusing their powers, it is laid down in section 297 that the directors shall not enter into contracts with the company except with the consent of the Board of directors.

Section 291 provides that except with the consent of the board of directors accorded by a resolution .a 'director or his 'relative or any firm in which he or his relative has any interest or any private company of which he is a member or a director shall not enter into any contract with the Company for the sale purchase or supply of goods materials or services or for underwriting the subscription of any shares or debentures.

Approval of central government

In the case of a Company having a paid-up share capital of rupees one Crore or more, no such contract can be entered into except with the previous approval of the Central Government.

Exceptions: Consent of the board of directors is not necessary in the following cases:

1. Sale or purchase of goods for cash at prevailing market prices:
2. Contracts entered into the regular course of business involving rupees five thousand in the aggregate in any year.
3. Any transaction in the ordinary course of business of a banking or insurance company Section 297 will not be violated, if, without obtaining the sanction of the Board, a director owning premises enters into a contract of the tenancy with the company or gives on hire to the company any plant or machinery owned by him.

Contracts in urgent necessity

In the case of urgent necessity, contracts may be entered into, even if the value exceeds Rs. 5,000 in one year, without obtaining the consent of the Board, but in such a case, the consent of the Board shall be obtaining at a meeting within 3 months from the date of the contract. [Sec.297(3)].

Consequences if consent is not granted.

If consent is not granted by the board to any contract before it is entered into within 3 months thereof, the contract will be voidable at the option of the Board of directors. Even if consent is given after 3 months, the contract will be valid till it is actually avoided by the board. But if the board without avoiding the contract acts upon it the consent will be implied, and the company will be bound to pay for the benefit it receives.

Interested Director

A director who is interested in a transition of the company must disclose his interested to the Board. Section 297 provided that a director of the company or his relative a firm in which such a director or relative is a partner any other partner in such a firm, or a private company of which the director is a member or director, shall not any contract with the company-

(a) For the sale, purchase or supply of any goods, materials or services or
(b) For underwriting the subscription of any shares in, or debentures of the company.

But if a resolution has been passed at a board meeting and the other directors have consented to above contracts, then the interested directors can enter into above contracts. But previous approval of the Central Government is necessary. if the paid-up share capital of the company is rupees one Crore or more.

In case the consent is riot accorded to any contract under this section, anything done in pursuance of the contract shall be voidable at the option of the Board.

Procedure Where Director is Interested in a Contract

Disclosure of interest by directors

Section 299 provides that every director directly or indirectly interested in any contract or arrangement proposed to be or made with the company shall disclose the nature of his interest at a meeting of the Board.

Consequence of Non-Disclosure

(i) Every director who fails to company with the above provision shall-be punishable with Fine, which may extend to Rs.50.000.
(ii) Every such director shall vacate the office of director and shall also be subject to a fine of Rs.5000 for each day on which the director functions rafter incurring the disqualification.
(iii) Non-compliance does not avoid or invalidate' the contract but will make it voidable at the option of the company as n the case of contravention of section 297. It also makes the director accountable for any secret profit, which he has made.

Interested Director Not To Participate Or Vote in Board's Proceedings.

Section 300 prohibits an interested director-from participating in the discussion and/or voting on any 'contract or arrangement in which he is directly or indirectly concerned or interested. It also provides that his presence shall not be counted of the purpose of forming a quorum at the time of voting and that if he votes his vote shall not be counted.

An interested director is prohibited not only from voting but also from participate in the discussion. But where an interested director votes the proceedings are not thereby invalidated but only his vote will not be counted.

Though an interested director cannot vote as a director. But he can vote, as a shareholder, when the matter is put before the general meeting of the company.

Exceptions: The restriction on an interested director not to participate in the Board's meeting shall not apply in the following cases:

1. A private company, which is neither a subsidiary nor a holding company of public company.
2. A private company, which is a subsidiary of a public company with regard to counter acts or arrangements entered or to be, entered into by' such private company with the holding company:
3. To a contract of indemnity against any loss. Which a director may suffer by being a surety for the company.
4. To a contract with another company in which the director is a nominee director of the first company and holding not more than the qualification shares or is a member of the other company holding not more than two per cent of the paid-up share capital.
5. To a public company or a private company which is a subsidiary of the public company, which has been exempted by the central government by a notification.

Any director who knowingly contravenes the above provisions is punishable with fine, which may-extend to fifty thousand rupees. [Section 300(4) as amended in 2000] Section 301 requires every company to keep a register of contracts or arrangement in which a director is interested and which are covered by sections 297 to 299.

Holding of Office of Profit

Office of profit

Any office or place shall be deemed to be an office or place of profit -

i) In case it is held by a director, if the director holding it obtains from the company anything by way of remuneration over and above the remuneration to which he is entitled as a director;

ii) In case it is held by an individual other than a director or any firm, private company or other body corporate, if he or it obtains from the company anything by way of remuneration whether as salary, fee, commission, perquisites, the right to occupy any free of rent premises as a place of residence or otherwise. [See 314 (3)]

In terms of the above provisions, the office or place held by a director or any other person is deemed to be an office or place of profit, only if such director or person obtains from the company anything by way of remuneration over and above the remuneration to which he is entitled.

Director etc. not to hold office or place of profit

Section 314 imposes restrictions upon directors and certain persons connected with a director in regard to their holding an office or place of profit in the company or a subsidiary thereof It provides that except with the previous sanction of a special resolution of the company -

a) No director shall hold any office or place of profit

b) No partner, or relative of such director,

i) No firm in which such director or a relative of such director is a partner.
ii) No private company of which such director is a director or member, and
iii) No director, or manager of such private company shall hold any office or place of profit carrying a total monthly remuneration of such sum as may be prescribed.

Meetings of the Board of Directors

The directors of a company exercise most of their powers in meetings called the meetings of the Board.

The provisions regarding board meetings are as follows:-

1. At least One meeting in every three months.

In the case of every company, a meeting of the Board of directors must be held:

i) At least once in every three-months, and'

ii) at least four such meetings shall be held in every year. (Section 285)

In other words no three months should pass without director's meeting being held, and no year should expire without at least four directors meetings have been held in it. The Act contemplates that a period of three months should be taken to be a unit and meetings should be so, held that there should not be a gap exceeding three months between any two consecutive meetings.

2. Notice of meeting

Notice of every meeting of the Board of directors must be given in writing to every director for the time being in India, and at his usual address in India to every other director. Every officer of the company who is under a duty to give the notice as aforesaid and who fails to do so, shall be punishable with fine which may extend to Rs.1,000 [Section 286]

3. Quorum

It means the minimum number of directors, which must be present to make the proceedings of the Board valid. Section 287 of the Companies Act lays down that the quorum for meeting of the Board shall be:

i) One third of its total strength (any fraction contained in that one-third being rounded off as one), or

ii) Two directors whichever is higher [Section 287 (2)]

In calculating the total strength any vacancy in the Board is excluded and only the number of directors in office at the moment is taken into account [Section 287((2)] Section 287 only indicates the minimum number .of directors necessary to constitute a proper quorum. It is open to the company by its articles, to indicate a higher, but not a lower, number constituting a valid quorum *[Amrit .Kaur v.Kapurthala Flour Oil & General Mills Co. (Pvt.) Ltd* (1984))

A quorum is presumed to be present unless the resumption is questioned at the meeting or the records disclose that a quorum was, in fact, not present.

Disinterested quorum

A quorum must be a disinterested quorum *i.e.* it must consist of directors who are entitled to vote on the particular resolution before the Board. Where at any time the number of interested directors exceeds or is equal to two-thirds of the total strength of directors, then the remaining disinterested directors present at the meeting, not being Jess than two, shall be the quorum for that meeting:

Where all or all but one of the directors are interested, and there is no quorum, the proper way out of the difficulty will be to have the matter decided by the company in general meeting.

Quorum to be present throughout the meeting

In the case of a meeting of the Board of directors, the meeting cannot' transact any business, unless a quorum is present at every stage of the meeting. It is not enough to say that a quorum was present at the commencement of the business.

Adjournment for want of quorum

If the meeting of the Board Could not be held for want of a quorum, then unless the articles otherwise provided, the meeting shall be automatically adjourned to the same day next week at the same time the meeting win be held on the next working day. If at the adjourned meeting there is no quorum, the meeting cannot transact any business. [Section 288(1)]

Where a meeting-is called but could not be held for want of quorum, it will not be treated as a contravention of the provisions of' Section 285 which requires at least one meeting in every 3 months and at least 4 such meetings in a year to be held by a company.

Passing of resolution of circulation

The directors, exercise their powers by resolutions at board meetings or by circulation. A resolution in writing signed by all the members of the Board or Committee thereof for the time being entitled to' receive notice, will be, as valid and effectual as if it has been passed :at a meeting of the Board or its committee duly convented and held (Art. 81, Table *A).* For a resolution to be passed by circulation, it must be circulated in draft, together with the necessary papers to all the directors entitled to receive notice of a meeting and must be approved by a majority of them. (Section 289)

Powers of Board

A company being an artificial person acts through its directors, The director's represent the directing mind or will, of the company and control, what it does, All the powers of management of the affairs of the company are vested in the board of directors. The board thus becomes the working organ of the company. Sections 291to *293-A* deal with the powers of the board and the restrictions thereon.

The powers which vest in the board can be classified under three different heads:

1) Powers, which can be exercised in accordance with the article.
2) Powers, which can be exercised, only at board meetings.
3) Powers, which can be exercised with the consent of shareholders at general meetings.

General Powers

Section 291 of the Companies Act, 1956. It empowers the board to exercise all such powers and do all such acts and, things, as the company is authorised to exercise and do. In other words, the directors can do what the company is authorised to do unless there is any express restriction on their powers. There are, however, two limitations upon their powers.

1. The Board shall not 'excise those powers which under the Companies Act, 1956, or the memorandum of association or otherwise, are required to be exercised by the company in general meeting (proviso to Sec.291).
2. In exercising all such powers or doing of any such act, Board will be subject to the provision of this or any other Act, the memorandum or the articles.

Powers cannot be usurped

The directors shall exercise their powers bonafide and in the interests of the company. But once specific powers of control and management have granted by the company to its directors, the company cannot without justification impose its will at a general meeting. The shareholders cannot dictate to the directors the manner in which the executive authority is to

be employed, Thus where the power to sell the assets of a company is vested in the board and the board thinks that it is not in the interested of the company to sell its assets, it is not bound to do so, not withstanding a resolution to the contrary in general meeting. Similarly where the shareholders by resolution pressed the directors to forego a debt, it was held that the directors were entitled to enforce the payment of the debt.

Exception

The powers of the directors are subject to the control by the shareholders at the general meeting: In the following exceptional cases the general meeting is competent to intervene a matter delegated to board.

1. Directors acting malafide

The general body of shareholders can interfere where it is proved that the directors have acted from some improper motive or arbitrarily or capriciously. When the directors are themselves the wrongdoers against the company and have acted mollified or beyond their powers, and their personal interest is in conflict with their duty .in such a way that they Cannot or will not take steps to seek redress for the wrong done to the Company, the majority of the shareholders must in such a case be entitled to take steps to redress the wrong.

2. Directors themselves wrong, doers

Where the directors are themselves the wrong doers and have acted malafide, the shareholders can take steps to redress the wrong.

3. Board incompetent

The general body of shareholders may exercise the powers vested in the board when there is no legally constituted Board, which could .function, or if there is a board but that is unable or unwilling to act. The shareholders have *to* step in where all the directors are interested in a transaction.

Example

> *The articles of the company authorised the board 1to fill casual vacancies. Some casual vacancies Occurred and they were filled by the shareholders ill general meeting because at that time there was no director validly ill office. The appointment was challenged II was held that the appointment was valid.[Vishwanathan v. Tiffins B.A, and P. Ltd AIR. 1953).*

4. Deadlock in the Board

Where the· directors are unable to act on account of a deadlock and the administration was at a standstill, the shareholders have the inherent power to take necessary steps to ensure the working of the company.

5. Residuary powers

The residuary powers of a company reside in the general meeting of shareholders and the shareholders can always exercise such residuary powers.

Powers Exercisable At Board Meeting Only

Under section 292, the following powers can be exercised by the Board, only by resolutions passed at the board meeting;

a) The power to make Calls;
b) The power to issue debentures;
c) The power to borrow money otherwise than on debentures;'
d) The-power to invest the funds of the company;
e) The power to make loans;

There are certain other provisions of the Act, by which directors are required to exercise the following powers at a meeting of the board.

i) The powers to fill up casual vacancies in the board. (Sec. 262);
ii) The power to appoint alternate directors. (Sec. 313);
iii) The power to appoint additional directors. (Sec. 260);
iv) The power to appoint first auditors (Sec.*224);*
v) The power to grant consent to contracts in Which any director, or his relative, or his partner etc. are interested. (Sec. 297)
vi) The power to appoint ·a· person as 'managing director r manager, who is already holding such office in another company. (Sections 316 and 386);
vii) The power to invest in companies in the 'same group beyond a certain limit. (Sec. 372); and
viii) The power to receive notice of disclosure of shareholding by director (Sec. 308).

Audit Committee Section 292A

The Companies (Amendment) Act 2000 has inserted in a new section 292A, which provides for constitution of an Audit Committee by the Board of Directors of a Company.

According to Section 292A

1) Every public company having paid-up capital of not less than five Crores of rupees shall constitute a committee of the Board known as 'Audit Committee' which shall consist of not less than three directors and such of the total number of other directors as the Board may determine of which two-thirds of the total number of members shall be directors, other than managing or whole-time directors.
2) Every Audit Committee constituted under sub-section (1) shall act In accordance with terms of reference to be specified in writing by the Board.
3) The members of the Audit Committee shall elect a chairman from amongst themselves.
4) The annual report of the company shall disclose the composition of the Audit Committee.
5) The auditors; the internal auditor, if any, and the director-in-charge of finance shall attend and participate at meetings of the Audit Committee but shall not have the right to vote.
6) The Audit Committee should have discussions with the auditors periodically about internal control systems the scope of audit including the observations of the auditors and review the half-yearly and annual financial statements before submission to the Board and also ensure compliance of internal control systems.
7) The Audit Committee shall have authority to investigate into an matter in relation to the items specified in this section or referred to it by the Board and for this purpose shall have full access to information contained in the records of the company and external professional advice, if necessary:
8) The recommendation of the Audit Committee on any matter relating to financial management including the audit report; shall be binding on the Board.
9) If the Board does not accept the recommendations of the Audit Committee, it shall record the reasons therefore and communicate such reason to the shareholders.
10) The chairman of the Audit Committee shall attend the annual general meeting of the company to provide any clarification on matters relating to audit.
11) If a default is made in complying with the provision of this section, the company, and every officer who is in default, shall be punishable with imprisonment for a term which may extend to end year, or with fine which may extend to fifty thousand rupees, or with both.

Delegation of board's powers

Directors cannot delegate' their powers unless the power to delegate is, granted to them. The maximum *"delegatus non-potest delegate" applies to directors.* The Board may by a resolution, delegate to a committee of directors, the managing director or debentures, to invest the funds of the company and to make loans.-It may be noted that power to make calls and to issue debentures cannot be delegated at all by the directors and must be exercised by the directors, only at a board meeting: However, such resolution must specify the total amount that may be borrowed by the delegate, and the total amount upto which the funds may be invested and the nature of Investments. Similarly the resolution should specify the total amount up to which loans may be made, the purposes, of the loans, and the maximum that can be made for a particular purpose.

The powers of the Board of directors may be delegated only by means of resolutions passed at board meeting. They cannot be delegated by circular resolution or in any other manner.

Restrictions on powers (Section 293)

The Board of directors of a public company or of a private company, which is a subsidiary of public company, shall not exercise the following powers except with the consent of the company in general meeting:

(a) Power to sell, lease or otherwise dispose of the whole or substantially the whole of the undertaking of the company, In case of an improper sale or lease by the director the title of the purchase or lessee will not be affected provided he buys or takes. it in good faith and with due care and caution;

(b) Power to remit or give time for repayment of any debt due to the company by a director, However, no such consent is required for renewal or continuance of an advance made by a banking company to its director in the ordinary course of its business;

(c) Power to invest otherwise than in trust securities, the amount of compensation received by the Company in 'respect of the compulsory acquisition of any undertaking or property of the company;

(d) Power to borrow money, where the money to be borrowed together with the moneys already borrowed by the company will exceed the aggregate of the paid-up capital of the company and its free reserves. This however, will not include temporary loans obtained from the Company's bankers in the ordinary course of business;

(e) Power to contribute to charitable and other funds not directly relating to the business of the company or the welfare of its employees, any amount exceeding Rs. 50,000 in any financial year or five percent of the average net profits of the three preceding finical years, whichever to the business of the company is unrestricted.

In may be noted that though the Board should not exercise the powers specified in clauses (a) to (e) of section 293 (1) without the consent of the company in general meeting, the board is not, however, bound to exercise the powers, even though the company passes resolutions in respect of the exercise of such power. *[Pothen v. Hindustan Trading Corporation (P) Ltd (1*967)

Validity of Acts by Directors.

Section 290 provides that acts done by a personal as directors will be valid; not withstanding that it may afterwards be discovered that his appointment was invalid by reason of any defect or disqualification or had terminated by virtue of any provision in this Act or in

the articles. The object of this section is to protect persons (members and outsiders) dealing with the company, by providing that the acts of a person's acting as director will be treated as valid although it may afterwards be discovered that this appointment was invalid or that it had terminated.

The effect of these provisions is to validate the acts of a director who has not been validly appointed because there was some slip or irregularity in his appointment. Thus a stranger to the company or a member is entitled to assume that a person who appears to be duly appointed and qualified director is so in fact. As between a' company and third persons the de facto directors are de jure directors. Thus resolutions passed at a general meeting called by a board irregularly constituted are valid, Similarly a call made by the directors One of whom had ceased to hold his qualification shares but had shortly afterwards reacquired them and yet had not been formally reappointed by the other directors who had power to reappoint him, was held to be valid.

Example

A mortgage was executed bonofide by the managing director of a company. But there was no valid deleg4lion of such powers by the board, to, the managing director. It was held that the mortgage was binding on the company, the act of the managing director being validated by sectiono290 of the Act.

Duties of Directors

As directors possess immense powers they hold a key position in the company management. Law imposes certain duties upon them, in the interest of' the public good and for the protection of those who invest money in the company. The duties of a director vary from company to company and, within anyone company the directors may and frequently do have different responsibilities. Breach of these duties or negligence, in performing them on the part of a director entitles the company to sue him for any damage, which has been suffered by the company as a result of the breach or negligence.

The duties of directors may be discussed under the following beads:

1) Fiduciary duties,
2) Duty of care and skill,
3) Duty to attend board meetings,
4) Duty not to delegate,
5) Duty to disclose interest, and
6) Statutory duties.
7)

1. Fiduciary duties

The directors occupy a fiduciary position and must therefore; exercise their powers in good faith and for the benefit of the company as a whole. Directors should not enter into engagements in which there is a, possibility that the director's personal interest-could conflict with those of the company, which they are bound to protect.

Example

The directors of a company obtained a construction contract in their own name to the exclusion of the company. The directors also procured a resolution of the company ratifying their conduct On an action brought by a shareholder the Privy Council held that it was a breach of trust on the part of the directors and that the benefit of the contract belonged to the company. [cook v. Deeks (I916)]

Another consequence of the fiduciary position of a director is that he cannot make a secret profit by reason of opportunities acquired as a result of his position. Where a director makes profits by the use of confidential information, he is not entitled to retain it unless these profits are disclosed to and approved by the company.

Example

R Co. ltd owned' a cinema; and its directors wished to acquire two other cinemas in the town with a view to sell the three together. For this purpose a subsidiary company H was formed in which 3,000, shares were taken by the directors and R Company's solicitors. The cinemas were acquired: Ultimately it was decided not to sell the property of company; but to sell the share in R and H. The shares of the Ii Company which the directors had purchased at par were sold at a profit. It was held that the directors must account for the profit they had made: [Regal (Hastings) Ltd.v. Gulliver (1942)]

The fiduciary duty so owed is owed to the company as a whole and not to any individual member of it.

Where a director is instructed, to purchase some property for the company, and he purchases the same (or himself and then sells it to the, company at a profit, he is clearly liable to account for the profit so made:

Example

Directors bought shares from a shareholder while, they were negotiating for the sale of the company at a very high price. The directors did not disclose the fact to the shareholder. It was held that the directors do not owe fiduary duties to any individual shareholder. Accordingly they were not under a, duty to, inform the shareholder of the negotiations. [Percival v. Wright (1902)]

2. Duty of care and skill

A director must perform his duties with reasonable care and skill i.e. with that amount of care, which an ordinary man will be expected to take; if the business of the company was his own. A director will be liable for negligence in the carrying out of his duties, where a dividend was paid by directors after the company traded only for eight months without any investigation of company's trading position, such payment was improper and the directors must refund. However; a director cannot be held liable for mere error of judgment, if he acts honestly and with reasonable care.

The duty of care and skill will depend upon the nature and size of the company's business and the manner in which the work of the company is distributed between the directors and other officials of the company. The nature of the duties of a director to the company were discussed by Romer J. in the famous case of *Re. City Equitable Fire Insurance Co. Ltd.* wherein he observed:

"As a general' proposition a director will not be held liable for negligence unless guilty of gross or' culpable negligence in a business' sense. “The learned judge laid down the following propositions relating to the duty of care and skill.

1. "A director need not exhibit in the performance of his duties a greater degree skill than that may reasonable by expected from a person of his knowledge and experience. A director or a life insurance company, for instance does not guarantee that he has the skill' of an actuary or a physician.

2. A director is not bound to give continuous attention t the affairs of the company. His duties are of 'an intermittent nature to be performed at periodic board meetings and the meetings of any committee to which he is appointed, He is not bound to attend all such meetings through he ought to attend whenever he is reasonably able to do so.
3. In respect of all duties, that· having regard to the exigencies of business and the articles of association may properly be left to some other official, a director is, in the absence of grounds for suspicion, justified in trusting that official to perform such duties honestly."

To conclude in the words of Lindley M.R. "If directors act within their powers, if they act with such care as is to be reasonably expected of them, having regard to their knowledge and experience, and if they act honestly for the benefit of the company they represent, they discharge both their equitable as well as legal duty to the company,

3. Duty to attend board meetings

A director should attend the board meetings whenever he is able to do so, but he is not bound to attend all board meetings. Continuous non-attendance may tender a director liable for the acts of his co-directors. Section 283 (1) (g) provides that the office of director becomes vacant if he absents, himself from three consecutive meetings of the board or from all meetings of the board, for a continuous period of three months, whichever is longer, without obtaining leave of absence from the board.

4. Duty not to delegate

As a rule directors must perform their duties personally and should not delegate their office. The directors are bound by the maxim, *"delegates' nonpotest delegare."* The rule is, however, subject to certain exceptions. The directors may delegate their duties if the Act or the articles specifically authorise them to do so.

5. Duty to disclose interest

As a director is an agent of the company, he must see that his interest and duty do not conflict. If follows that the company can avoid a contract in which the director has an interest unless the prior sanction of the board has been taken.

According to section 299 of the Companies Act, a director who is interested in any transaction of the company, he is bound to disclose his interest to the board. The disclosure shall, be made at the first meeting, of the board held after he has become so 'interested. Section 300 provides that an interested director cannot take part in the discussion or vote on any contract in which he is directly or indirectly interested.

6. Statutory duties

Statutory duties are enumerated below:

1. Duty not to allot shares until minimum subscription is raised. (Sections 69, 70)
2. Duty to sign annual returns and the certificate attached thereto. (Sec. 161)
3. Duty to forward the statutory report to every member of the company. (Sec 165)
4. Duty to call an annual general meeting every year within the proper time (Sec. 166)
5. Duty to call an extraordinary general meeting on a valid requisition, (Sec. 169)
6. Duty to prepare profit and loss account and balance sheet and lay before the company with the director's report as to, the State of the company's affairs, (Sections 209, 210 and 217)
7. Duty to take share qualification. (Sec 270),
8. Duty to disclose shareholding. (Sec 308)
9. Duty to submit a statement of affairs on winding up.(Sec. 454)

The list of duties given above is .illustrative and 'not exhaustive.

Liability of Directors

The liabilities of directors can be classified into:

1. Civil liability. 2. Criminal liability.

1. **Civil liability**

   The directors may render themselves liable to (a) the company; and (b) to the third parties.

2. **Liability towards the company**

   Directors are agents and trustees of the Company as such they owe certain duties to the Company. Breach of these duties or negligence in performing them may make them liable to the company and its shareholders. They may become liable for:

(i) Negligence, (ii) misfeasance, (iii) breach of trust, and (iv) ultra vires acts.

i) Negligence

A director must exercise due care and diligence in the performance of his duties. When the directors acting within their powers fail to use such reasonable skill and diligence as may be expected from persons with their knowledge and experience in the management of the company's affairs, they can be held liable for negligence, However, they will not be liable for mere errors of judgment resulting in a loss to the company provided they acted bonafide for the benefit of the company.

Example

P owed some money to a company: The directors in exercise of their discretion decide not to sue to recover file debt and consequently, the money was ultimately lost on account of the delay in action. It would held though technically it would amount to a breach of duty, it would neither be an actionable breach nor amount to negligence if they exercise their discretion bontifide and in the best interest of the company. [Re. Forest of Dean Coal Mining Co. (1978)]

Where a director had reason for suspecting an officer of the company for fraud, failure to investigate would amount to negligence in the performance of his duties. However, a director would not be liable for negligence if the company has not suffered any damage.

Section 201 of the Companies Act provides that any provisions in the articles of a company or in any agreement with the company. exempting any officer of the company from any liability arising from any negligence, default or misfeasance shall be void.

(ii) Misfeasance

Misfeasance is defined as any breach of duty in the conduct of the company's affairs which causes loss to the company. It is something more than negligence. Any fraud or underhand dealing by the director will render him liable to the company for any loss suffered by the company as a result. In order to take action against a director on the ground of misfeasance two conditions must be fulfilled:

a) There must be misconduct or negligence on the part of a director, and

b) Such act must be wilful.

Misfeasance proceeding may be taken up against a director by the Tribunal (Court prior to 2002 amendment) if the company is in the course of winding up. Application to the Tribunal (Court prior to 2002 amendment) may be made by the liquidator, or any creditor or contributory. The Tribunal (Court prior to 2002 amendment) may require the directors who are guilty of misfeasance to make good the loss to the company. (Sec. 543). In case of misfeasance proceedings also, the directors may apply for relief under Sec. 633.

(iii) Breach of trust

The directors are further liable for a breach of trust. It means any misapplication of the funds of the company. As directors are trustees of the company, they must exercise their powers bonafide and in the interest of the company as a whole. The assets of the company are entrusted to tile directors to be applied to certain defined objects and they are for a breach of trust if they apply them to other objects. Thus, paying dividend out of capital or using the funds of the company for ultra vires purposes amounts to a breach of trust. Similarly, where a director had caused shares to be allotted to his infant children, he was made personally liable for the unpaid liability of the shares.

(iv) Ultra vires act

Where directors do any acts, which are in excess of' their powers, or which are ultra vires and company suffers a loss, the directors shall be personally liable to the company to make good the loss. It is not necessary to prove fraud in such cases. Thus where directors pay dividend the directors have used their powers to part with moneys of the company for a purpose, which the law forbids, they shall be personally liable to the company.

Liability to third parties

(1) As to contracts

Directors being agents of the company are not liable to third parties on contracts, which they make on behalf of the company. They will be liable only when ordinary agents will be liable under those circumstances. This was pointed out by Lord Cairns in *Ferguson vs. Wilson.*

"Wherever an agent is liable, those directors would be liable, where liability would attach to the principal and the principal only, the liability is the liability of the company".

Where the directors have no authority to make the contracts, the year still not personally liable on the contract because every person contracting with the company is bound to read its memorandum and know the powers of the company. But where such ultra vires transaction amounts to a breach of an implied warranty of authority held out by the directors they may be liable for damages. .

Example

A railway company had fully exercised its borrowing powers. Mr. Weeks lent $500 to the company and received a debenture which was subsequently declared void because the company had exhausted all its borrowing powers: It was held that the directors were liable in damages because they have warranted they have authority to act on behalf of the company and the company had power to issue such debentures. [Weeks v.Propert (1873)]

Where directors contract in their own names, without disclosing that they are acting for the company, they are personally liable on the contract. Further, if they contract, disclosing the fact that they are directors, but without using words, sufficient to bind the company, they may render themselves personally liable on the contract

(2) As to frauds and torts

A director who is a party to a fraud, or to the commission of any other tort is personally liable to the injured party. For example, if by the order of the directors a patent is infringed or another wrongful act is committed, the directors who are parties to it are personally liable. But a director is not liable for the fraud of his co directors unless it is authorised by him or he has participated therein.

(3) Liability under the provisions of the Act

The directors are personally liable to third parties under the provisions of the Act in the following cases:

a) Mis-statement in a prospectus (Sec. 62)
b) Failure to repay the application money for shares, where the minimum subscription as stated in the prospectus has not been subscribed.
c) Directors are liable to compensate the company and the allottee for any loss or damage due to irregular allotment. Proceedings against the directors must be commenced within two years of allotment.
d) Failure to repay application money for shares it application for these to be dealt in on the stock exchange is not made or refused (Sec.73) (Section.84(3) Fraudulently renewing a share certificate or issuing duplicate certificate-imprisonment upto 6 months or fine upto RS. one Lakh)
e) In case of fraudulent trading by the company, the directors may be held personally liable by an order of the Trimunal (Court prior to 2002 amendment) under section 542 of the Companies Act.

2. Criminal liability - Companies Act, 1956

Imposes certain duties upon the directors and the may be liable to penalties by way of fine or imprisonment if they fail to perform them. These penal provisions are incorporated to create a sense of awareness in the directors in discharging the Obligations. Under the, Companies Act criminal proceedings against directors may be instituted in pursuance of the following sections, among others resulting in imprisonment:

a) Section 44(4)- Filling of prospectus containing untrue statements - two years imprisonment and/or find upto Rs.50,000.
b) Section 58A (6) (b) - Inviting deposits in contravention of the rules, or manner or conditions- five years imprisonment and fine (58AA and 58AAA)
c) Section 58B-Issuing false advertisement inviting deposits - two years imprisonment Rs.50,000 fine.
d) Section 68-Fraudutenlly inducing persons to invest money-imprisonment upto five years or fine Rs, 100000 or both.
e) Section 73 - Failure to repay excess application money-imprisonment upto one year and fine upto Rs.50,000
f) Section 105-Concealirig name of creditor-imprisonment upto1 year or fine or both.

g) Section 202 (1)-Undischarged insolvent acting as director-imprisonment upto two years or fine upto Rs.50,000 or both.

h) Section 207 as amended by the Companies (Amendment) Act 2000-Default In distributing dividends within 30 days simple imprisonment upto 3 years and fine of R5.1,000 for every day of default.

i) Section 209A-Failure to assist officer of Government as authorised by the Central Government/officer authorised by SEBI for inspection of books of account, etc.-imprisonment upto one year and fine not less than Rs.50,000

j) Section 210 (5) Failure to lay balance sheet etc. at annual general meeting imprisonment upto six months or fine upto·Rs.10,000 or both.

k) Section 217 (5)-Failure to attach to balance sheet a report of the board-imprisonment upto six months for each offence or fine upto Rs.20.000 or both.

l) Section. 221 (4)-Failure to supply information to auditor-imprisonment upto six months, or fine upto Rs.50,000 or both.

m) Section 250(9) Improper issue of shares-imprisonment upto six months or fine up to Rs.50,000 or both.

n) Section 295 (4)-Grant of loan to directors-simple imprisonment upto two years or fine upto Rs.50,000 or both.

o) Failure to disclose interest - fine of Rs.50,000.

p) Section 308(3) Failure to disclose share holdings-imprisonment upto two years or fine upto Rs.50,000 or both.

q) Giving loans to other bodies corporate in-excess of limits u/s370.

r) Section 407(2)-Acting as director after removal by Court-imprisonment up to six months or fine up to Rs.50,000 or both.

s) Section 488(3)-False declaration of company's solvency-imprisonment upto six months or fine upto Rs.50,000 or both.

t) Section 538 to 542 and, 550-Offences regarding companies-imprisonment ranges between 2 years and 5 years and fine from Rs.10.000 to Rs. 1,00,000.

It may be noted that any provision in the articles, agreement or any other instrument indemnifying a director against any liability is void except as provided In provision to section 201.

Power of the court to grant relief

Under section 633; the court has power to relieve an officer of a company from liability for negligence, default, breach of duty, misfeasance or breach of trust if it appears to the court that he had acted honestly and reasonably in the circumstances of the case. The object of this section is to provide against undue hardship in deserving cases and to give relief from liability to persons who though technically guilty of negligence etc., are able to convince the court that they have acted honestly and reasonably. Thus, where a director applied funds of the company for a purpose, which he honestly believed to be within the powers of the company, but which was later on held to be *ultra vires* relief may be given under this section.

For getting relief under the section it must be proved by the person concerned that-

(i) he acted honestly, (ii) he acted reasonably, and (iii) having regard to all the circumstances of the case, he ought fairly to be excused.

Directors with unlimited liability

Section 322 provides that a limited company may make the liability of any or all of its directors unlimited, if it is so provided by the memorandum.

Where the liability of the director is unlimited the member who proposes a person for appointment as director shall add to his proposal, a statement that the liability of the directors shall be unlimited. Before that person accepts the office, a notice in writing that his liability shall be unlimited shall be given to him. Default in giving such notice is punishable with fine which may extend upto Rs.1,000. The person in default will also be liable for any damage, which the director may suffer as a result of such default. But such default will not affect the unlimited liability of directors.

Prevention of management by undesirable persons

The object of sections 202 and 203 of the Companies Act is to prevent the undesirable persons from managing the affairs of companies.

An undischarged insolvent shall not discharge the functions of a director or manager, and shall also not directly or indirectly take part; or concern himself in the promotion, formation or management of any company.

If any person being an undischarged insolvent discharges any of the above functions, he shall be liable to imprisonment upto two years or with fine upto Rs.50,000 or both.

Sections 203 empower the Court or Tribunal to restrain fraudulent persons from managing the affairs of companies. It provides that the court or Tribunal may order that a person shall not be a director and shall not be concerned or take part in the promotion, formation or management of a company for a period not exceeding five years. Such an order may be made by the or Tribunal if:

a) A person is convicted of an offence in connection with the promotion, formation or management of a company; or
b) A person, who in the course of winding up of the company;
    i) Has been guilty of an offence punishable under section 542 of the Act, or
    ii) Has been guilty, while an officer, of fraud or breach of duty in relation to the company.

An application under section 203 may be made, by any member, creditor or by the official liquidator. An officer, against whom the application has been made, may appear at the hearing and give evidence or call witnesses. Where the application has been made by the official liquidator or liquidator concerning an officer of the company, the applicant may appear and call attention of the court to any matters which seem to be relevant, and may give evidence and call witnesses.

If any person who has been disqualified by an order of the court of Tribunal under section.203, acts as a director or takes part directly or indirectly in the management of a company, he will be liable to imprisonment upto two years or fine upto Rs.50,000 or with both.

Lesson - 9

DOCTRINES OF ULTRA VIRES, INDOOR MANAGEMENT AND CONSTRUCTIVE NOTICE

MEANING OF ULTRA VIRES AND THE DIFFERENT ULTRA VIRES ACTS

"Ultra vires" literally means "beyond powers" The opposite term is "intra vires" which means "within powers". When a company or its directors violate the provisions of this Act or any other law, such an act, is unlawful and' attracts penal liability. The act cannot be ratified even with the consent- of all the members. When directors exceed their authority, the company may ratify what the directors have done. In this topic we are concerned when the company has exceeded its powers, that is to say, when the act done is ultra vires the memorandum more particularly the object clause of the memorandum such an act is void and does not bind the company.

Purpose of the doctrine

The purpose of the doctrine is twofold namely (i) to protect the investors so that they may know for what purpose their money will be employed (ii) to protect the creditors so that the fund to which they must look for repayment is not dissipated in unauthorized activities.

Rationale behind doctrine

The rationale behind the doctrine is competency to enter into a contract for an individual competency is determined by age and soundness of mind. But company being an artificial person does not have a body or mind, "It does not have a body to be injured nor a should to be dammed."Hence its own charter namely the memorandum determines competency for a corporation. The .memorandum states what the company can do it states negatively what the company cannot do. The corporate life cannot be spent for any purpose other than those specified in the memorandum" *(Ashbury Railway Carriage Co. V. Riche (1875)).*

Case Laws

a. Ashabury Railway Carriage Co.Ltd V. Riche **(1875)**

The object of the company was *inter alia* to build railway coaches. The articles empowered the direction to carry on any object provided a proper resolution was passed. The company entered into a contract to construct a railway line in Belgium. This act of the directors was ratified by a resolution. When a dispute arose the question before the Court was whether the memorandum or articles was the superior document. Held memorandum is the superior document and articles are subordinate to it. Where there is a conflict between the memorandum and articles, the memorandum shall private. Memorandum defines the scope and ambit of the company. It deals with the relationship of the company with its outsiders, within the area the company can make its own internal regulations, which are called articles of association, Further the rationale behind the doctrine of ultra vires was laid down in this case

b. ***Re.German Dale Co.,*** **(1882)**

The object of the company was to manufacture coffee out of dates through a German patent. The company could not get the German patent Nevertheless; the company was able to obtain a Swedish patent. The company established a factory in Germany where coffee was manufactured out of dates without any patent. Upon the petition of two shareholders the Court ordered the company to be wound up on the ground that since the substratum of the company failed, the company had no rationale to go on.

c) Cyclist Touring Club Co., (1907

The object of the company was to protect touring cyclists. The company wanted to amend its object clause to protest touring motorists also. This amendment was not granted as it would defeat the purpose for which the company was formed.

d) Dr. Lakshmanaswamy. Mudaliar and others v. *L.I.C. of India,* (1963): (1963) 33 *Com.Cases 420 (S.C)*

This is a supreme Court judgment which laid down the meaning of incidental or ancillary object. The appellants were directors of United India Life Insurance Company. They were also trustees of a trust to be formed; The Company passed is solution whereby a sum ofRs.2 Lakhs was given as donation to the trust. When L.I.C. took over the life insurance business it was found - that the transaction was ultra vires the company. The trustees were asked to refund the amount.

The appellants contended as follows:-

(1) The donation was given out of the shareholders dividend account. The shareholders dividend account was the property of the shareholders and they were free to do anything with their amount. The Supreme Court negatived the contention and held that shareholders dividend account is the property of the company and continued to be so until the dividend account is the property of the company and continued to be so until the dividend has been declared and its destination has been determined.

The appellants again argued that giving donation to the trust was an incidental object. According to them the object of the trust was to promote education in art, science and commerce including the study of insurance.

e) The Court negatived the contention following the case of Tomkison v.S.E.Railway Co.

In that case a railway company gave a donation of 11,000 the Imperial institute to be formed and claimed it to be an incidental object. According to the Railway co, if the institute came into existence it would increase their passenger traffic. The court held that an incidental object should have a proximate connection with the main object. Any casual or remote connection cannot be construed as incidental.

***f) Jon Beauforte (London) Ltd.,* (1953):**

According to Gower, "the doctrine has ceased to be a protection to anyone and has become merely a trap for the unwary third party and a nuisance to the company itself". This was illustrated in the above case. The object of the company was to make ladies dresses. The company wanted to change to the manufacture of veneered panels. The necessary steps to alter its objects were never taken. However the company entered into three contracts namely. (1) For the construction.of the factory. (2) for the supply of veneers-and (3) for the supply of coke. The company failed to make a success of its new enterprise and went· into liquidation. Held none of the three contractors could prove in the liquidation. The argument that the coke might have been utilised for an intra vires purpose failed because the company ordered coke on a note paper describing the company as "veneered panel manufacturers".

***g) Bell House Ltd. V. City Wall Properties Ltd.,* (1962)**

This is an interesting case where interpretation of an object or pursuit of an object was made subjective.

The objects of both the plaintiff company and the defendant company were to act as engineering contractors and house estate agents. The plaintiff company introduced a financier to the Defendant Company and claimed procreation fee from the defendant company. The defendant company released to pay on the ground the procuring a financier was not an object of the plaintiff company and hence it was an ultra vires transaction. The plaintiff company argued that the doctrine of ultra vires was for the benefit of the shareholders and hence whatever was beneficial to the shareholders must be intra vires the Company. The court negatived the Contention and held that the rationale behind the doctrine in competency to enter into a contract. This decision was reversed in the Court of Appeal on the construction of the particular object clauses in question. The object clause included power to carry on any business which in the opinion of the board of directors may be advantageously carried on ….

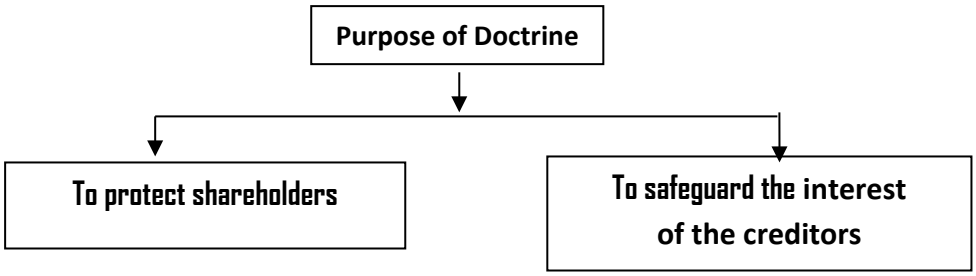
Gower comments as follows, "if object clauses expressed in this subjective form became standard practice companies will be able to carry on any businesses that the directors choose"

Effect of ultra vires transaction and borrowing

An ultra vires transaction being void does not vest the transferee With any right nor does it divest the transferor, In other words the transferor does not lose any right and the transferee does not get any right. Money taken by a company under an *ultra 'vires* borrowing cannot be recovered once the company spends it. However the lender is not completely without any remedy, if the money is utilised by the company to purchase any particular asset the lender will have a charge on that asset. This is a charge created by operation of law. If the money is kept in a separate account the lender can trace it in the hands of the company. If the money is utilised to discharge an intra vires debt the lender will be subrogated to the rights of the creditor whose debt has been discharged.

The impact of the doctrine of ultra vires is that a company can neither be sued on an ultra vires transaction nor can it sue on it. Since the memorandum is a "public document". It is open to public inspection, Therefore when one deals with a company one is deemed to know about the powers of the company. If in spite of this you enter into transaction, which is ultra vires, the company you cannot enforce it against the company. For example if you have supplied goods or performed service on such a contract or lent money, you cannot obtain payment or recover the money lent. But if the money advanced to the company has not been expended the lender may stop the company from parting with it by means for an injunction this is because the company does not become the owner of the money, which is ultra vires loan has been utilised in meeting lawful debt of the company then the lender steps into the shoes of the debtor paid off and consequently he would be entitled to recover his loan to that extent from the company.

An act which is ultra vires the company being void cannot be ratified by the shareholders of the, company. Sometimes act which is ultra vires can be regularized by ratifying it subsequently. For instance if the act is ultra vires the power of the directors the shareholders can ratify it, if is ultra vires the articles of the company, the company can alter the articles; if the act is within the power of the company but is done irregularly. Shareholder can validate it.



Class of Ultra vires Transaction	Effect & remedy (if any)
1. Ultra vires Statute	Cannot be Ratified
2. Ultra vires MoA	Cannot be Ratified
3. Ultra vires Articles	Can be ratified by altering articles by special resolution by shareholders.
4. Ultra vires Directors	If within the powers of Company (interactive) it can be ratified by shareholders in General Meeting

Exceptions

a) If an act is ultravires the Directors of the, Company but intravires the Company the shareholders may ratify it.

b) If an act is ultravires the Articles of the Company the Articles may be altered to include the act within the powers of the Company.

c) If an act is intravires the Company but regularly done, the shareholders may ratify it

d) The company can sue a person who borrows money from the Company under a Contract, which is ultra vires for the recovery of the money.

e) If an act is ultravires the Company the rights arising independently, thereon are not affected. Further, the rights over the property, acquired by ultravires expenditure are protected.

f) If a company has purchased some property from a third party under ultravires contract or has taken an ultravires loan the third party has the right to follow its property on money if it exists in specie. He may also obtain an injunction from the Court restraining the Company from parting with that property or money. But he must act before the, identity of the property is lost or the money is spent.

g) If a company taken an ultravires loan and uses it to payoff intra vires debts, the lender who has lent money under ultra vires contract substituted in the place of the creditor who has been paid off and he can recover the money.

h) If the Company has taken an ultravires loan through misrepresentation of' fact by the Directors the lender has the right to make the Directors personally liable on the ground of breach of implied warranty of authority.

i) If a Director of a Company makes an ultravires payment, the company can compel him or refund the amount. The Director .however has the right to be indemnified by the person receiving the money provided he knew the transaction to be ultravires the Company.

Doctrine of Constructive Notice

The Memorandum of Association and Article of Association (M & A) of every Company are registered with the Registrar. The Office of the Registrar is a public office and consequently they are public documents open" and accessible to all. Any person dealing with the Company is presumed to have read the M&A irrespective of whether he actually reads it or not. This kind of presumed notice is called as Doctrine of "constructive notice". The legal effect of this doctrine is that if a Person deals with the Company and the transaction is inconsistent with the provisions of M & A he cannot plead ignorance of the provisions of these documents.

Kotta Venkata SwamyVs. Raff Murthy

The Article required that all deeds should be signed by the Managing Director the Secretary and a working Director on behalf of the Company. The plaintiff accepted the deed of mortgage signed by the secretary and working Director. Held that the plaintiff could not claim under this deed.

This doctrine is not a positive one but a negative doctrine. It operates in the company's favour and against the person who failed to enquire the doctrine operates only against the person who has been dealing with the Company but not against the company itself. Consequently he is prevented from alleging that he did not know that the constitution of the company rendered particular act or a particular delegation of authority ultra vires thus the doctrine is a “cloud” for the stringers.

Doctrine of Indoor Management

This doctrine is an exception to the doctrine constructive notice.

According to this doctrine, with dealing the Company are presumed to have read the registered documents and to see that the proposed dealing is not inconsistent therewith but they are not bound to do more, they need not enquire into the regularity of internal proceeding as required by M&A They can presume that all this is being done regularly.

The doctrine has its origin in the case of Royal, British Bank Vs .Turquand

The Directors were authorised by the Articles to borrow on bonds such sums of money, by obtaining approval of the shareholders, by way of resolution in a general meeting. The Directors gave a bond to *‘T’* without authority of such a resolution. Held that *'T’* could sue the company on the strength of the bond, as he was entitled to assume that necessary resolution bad been passed. Hence this doctrine is also referred to as the rule in Turquand's case.

Exceptions to the Doctrine of Indoor Management

1. **Knowledge of irrecu1arity**

Where a person dealing with the Company has notion of the irregularity as regards maternal management he cannot claim benefit under the rule of indoor management. Thus directors of a company cannot normally claim the benefit of the rule, because he is also acting for the company in the transaction.

Howard Vs.Patent Ivory Co

The Directors of the Company under the Articles, had no power to borrow more than 1,000 pounds without the resolution of the Company in the generally without such a resolution, the Directors borrowed 2,500 pounds from them seems and took debentures. It. was field that the Directors had the notice of internal regularly and hence the Company was liable to them only to the extent of 1,000 pounds,

Devi Ditta Mal Vs. Standard Bank of India

Two Directors one of these Directors was not validly appointed approved a transfer of shares in a Company. The other was disqualified by reason of being the transferee himself. The transferor did not know these facts. Held the transfer was ineffective

2. Negligence

Where a person dealing with the company could discover the irregularity transaction, which is unusual, or not in ordinary course of business, if he had made proper enquires then he cannot claim protection under this rule. Likewise a person when deals with the company may be put upon enquiry by reason of unusual magnitude of the transactions having regard to the position of the agent who is acting for the company.

Underwood vs. Bank of Liverpool

The Articles of a Company provided that the business the company to be managed by the Directors, The Director and the principal shareholders the company paid cheques in favour of the company into his own account. The bank collected the cheques and credited him with the proceeds. An action was brought against the bank by the Company on behalf of the debenture holders it was held that the bank of entitled to do so.

3. Forgery

The rule cannot be applied to forgery, which must be regarded as nullity. In the case of forgeries the acts done in the name of the Company are void abinitio. A company can never be held bound by forgeries committed by its officers.

Ruben Vs. Great Fingall Consolidated Co,

The plaintiff was the Company secretary who had affixed the seal the company and forged the signature of two Directors issued the transferee of a share certificate issued under the seal of the defendant company the certificate. The certificate was held to be void.

4. Void acts

Where the acts done in the name of the Company are void *abinitio,* the doctrine of indoor management does not apply

5. Lack of authority

If an officer of a Company makes a contract with a third party and if the act of the office falls outside his ordinary authority, the company is not bound.

Credit Bank Cassel:Vs. Schenkers Ltd

A branch manager of the Company drew a bin exchange and also endorsed bills on behalf of the Company although he had no authority for these acts from the Company Held, the Company was not bound.

Anand Biharilal Vs. Dinshaw & Co

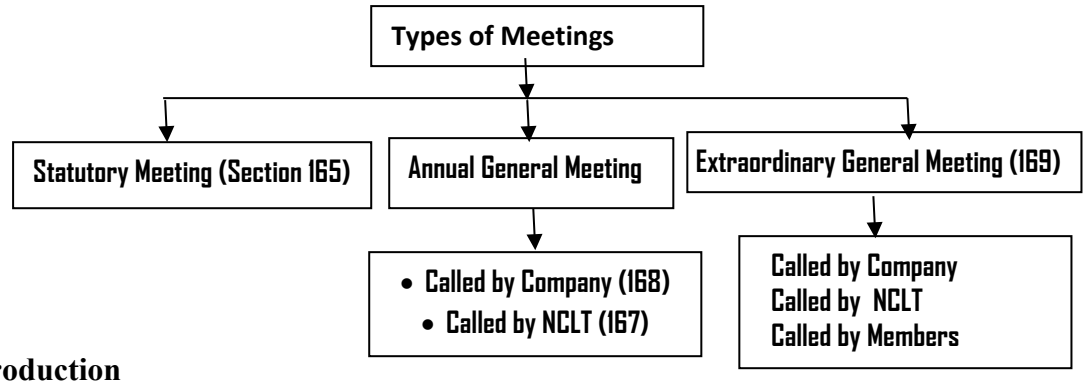
The plaintiff accepted a transfer of the company's property from its accountant since such transaction is apparently beyond the scope of an Accountant's authority, it was held void.

6. No knowledge or Articles

The protection under the rule of Indoor Management would be available only if the person had knowledge of the Articles so, if a person did not consult the Articles, he cannot claim protection under the rule of indoor management.

Unit - 5

MEETINGS & PROCEEDINGS



Introduction

A company is a corporate body or corporation, which is an artificial person, recognized as such by Law and capable of doing many of things a natural person can do. For example a company can own property enter into contracts, and even by guilty of certain offences. It does all these things on its own account, quite apart from the persons who compose it.

Unlike a natural person, a company cannot however think and express its will or make a decision except through resolutions passed at properly convened and constituted meetings of its members. They must act collectively, not a individually and act or decision of individual members while not duly assembled as body is not a valid act of the company. A company, i.e. its members collectively may delegate most (but not all)of their functions to directors who must ordinary meet together to perform them. Two main organs members or shareholders in general meeting and directors acting as a Board conduct the affairs of a company.

CLASSIFICATION OF MEETINGS

Meetings held the companies Act may be classified as follows:

1. Meetings of shareholders or members:
    (a) Statutory meeting
    (b) Annual general meeting
    (c) Extraordinary general meeting
    (d) Class meetings.
2. Meeting of debenture holders
3. Meetings of creditors and contributories in winding up
4. Meeting of creditors otherwise than in Winding up
5. Meeting of directors
    (a) Board meeting
    (b) Committee meeting

Why a meeting?

A company being an artificial person cannot act by itself. It can act only through its two principal organs, (l) board of directors, and (2) the shareholders. The boards of directors are collectively at board meetings. The consent of the shareholders is obtained in general meetings. The division of powers between the Board and the general meetings is given in section 291 to 293.

Section 291 (2) states that any regulation made by the company in general meetings shall not invalidate any prior act of the board, which would have been valid that regulation had not been made.

Certain powers to be exercised by Board only at meeting (Section 292)

The following powers shall be exercised by the board of directors only by means of resolutions passed at meetings of the board.

(a) The power to make calls on shareholders in respect of money unpaid on their shares.
(b) The power to issue debentures
(c) The power to borrow moneys otherwise than on debentures (Subject to the limit stated in s.293 (i) (d), beyond which approval of shareholders in G.M)
(d) The power to invest the funds of the company. (Under section 372 inter-corporate in investments exceeding a limit a resolution in the general meeting is required)
(e) The power to make loans (Under section 370 inter-corporate loans and guarantee require special resolution in the general meeting)

Delegation of powers

The board of directors may by a resolution passed at a board meeting delegate the powers under (c) (d) and (e) i.e. borrow invest and lend to the following persons namely:

(1) A committee of directors
(2) The managing director
(3) The manger
(4) The principal officer of the company
(5) The principal officer of a branch office

The board resolution delegating the power shall specify;

(1) In the case of clause (c) i.e. borrowing the total amount (outstanding at any one time) up to which moneys may be borrowed by the delegate.

(2) In the case of clause (d) i.e, investing;

(a) The total amount up to which the funds may be invested.
(b) The nature of investment

(3) In case of clause (e) i.e. loans;

(a) The total amount up to which the delegate may make them
(b) The purpose for which loans may be made
(c) Maximum amount for each purpose in individual cases.

Restrictions on powers of board (Section 293)

This applies to the board of directors of a public company of a private company, which is a subsidiary of a public company. The consent of such public company or subsidiary in general meeting is required to exercise the following powers.

For the purpose or recollecting the provisions the first words are rearranged as follows: Sell invest, remit, Contribute or Borrow (S.I.R.C.B)

(1) Sell, lease or otherwise dispose of the whole or substantially the whole of the undertaking
(2) Invest, the amount of compensation received by the company in respect of the compulsory acquisition of the undertaking (whole or substantially the whole) or of any premises or properties used for any such undertaking. Further on account of such acquisition the company cannot be carried on or can be carried only with difficulty or only after a considerable time.

Note: If the amount of compensations is invested in trust securities it can be exercised in the board meeting.

(3) Remit, or give time for the repayment of any debt due by a director to the company. If a person (other than a Director) owes money to a company, the Board of Directors may remit or give time for repayment. But where Directors himself owes money to a company the remission cannot be made by the Board of Directors. The consent in the General Meeting is required.

This does not apply to a renewal or continuance of an advance made by a banking company to its director in the ordinary course of business.

(4) Contribute to charitable and other funds (not directly relating to the business of the company or the welfare of its employees) any amounts the aggregate of which will in any financial year exceed fifty thousand rupees or five prevent of the average not profits made during the three financial years immediately preceding whichever is greater.

The resolution shall specify the total amount, which may be contributed.

(5) Borrow moneys, where the money to be borrowed, together with the moneys already borrowed by the company Will exceed the aggregate of the paid-up-capital of the company and its free reserves.

The resolution shall specify the total amount up to which moneys may be borrowed.

The above limit is calculated apart from temporary loans obtained from The Company's bankers in the ordinary course of business, Temporary loans mean loans repayable on demand or within six months from the date of loan such as short term. Each credit arrangements, discounting of bills. However temporary loans do not include loans raised for the purpose of financial expenditure of a capital nature.

A. STATUTORY MEETING: SEC. 165

Who?

Every Company limited by shares and every Company limited' by guarantee and having share capital is required to hold a meeting of the members of the company termed as statutory meeting. Statutory meeting is to be held once in the lifetime of the public limited company with share capital within the prescribed limit. Private companies, government companies, and a company limited by guarantee and not having share capital are not required to hold a statutory meeting.

When?

Within a period of not less than 1month and not later than 6 months from the date of commencement of business.

A meeting held prior to statutory of period one month is not a statutory meeting. The notice for such a meeting must say that it is intended to be statutory meeting (Gradner vs. Iredel (1912) I Ch. 700)

Notice

All the members of the Company shall be sent a report called 'Statutory Report' at least 21 days before the date of the meeting. The notice must say it is intended to be a statutory meeting.

Contents of the Statutory Report

The total number of shares allotted distinguishing

- Shares allotted as fully or partly paid-up otherwise than in cash, and
- In case of partly paid-up shares, the extent to which they are so paid-up
- In either case, the Consideration for which they have been allotted

a) Cash received: The total amount of cash received on account of shares allotted.

b) Summary of receipts and payments: An abstract of the receipts & payments of the company made up to a date within 7 days of the date of the report.

c) Directors and Auditors: The names, addresses and occupations of the Directors of the company and the changes, if any, which have occurred since the date of incorporation of the Company.

d) Contracts: The particulars of any contract which or the modification of the proposed the modification of which is to be submitted to the meeting for approval.

e) Underwriting contract: The extent if any to which each underwriting contract has no been carried out and the reasons thereof.

f) Arrears of calls: Call 'money due from each Director and from the manager.

g) Commission and brokerage: Particulars of commission or brokerage paid/payable in connection with the issue of shares./ debentures to any director /manager.

Signature:

The statutory report shall be certified as correct by riot less than 2 directors one of whom shall be a Managing Director, where there is one.

Audit Certificate

The auditors of the Company shall certify as correct the following Contents: -

- Total shares allotted by the company
- Cash received by the company in respect of all shares allotted.
- Summary of receipts and payments

Filing

The statutory report shall be delivered to the Registrar for registration.

Procedure at the meeting

(a) A list showing the names, addresses and occupations of the members of the Company, and the number of shares held by them is to be produced at the commencement of statutory meeting and is to remain: and accessible to any member during the continuance of the meeting.

(b) In any general meeting a-member who intends to discuss on any matter shall give previous notice to the company of his intention to discuss, Statutory meeting is an exception to this rule. The members present at the meeting may discuss any matter relating to the formation of the Company or wing out of the Statutory report, whether previous notice has been given or not. But no resolution can be passed of which notice has not been. giea as required by the act.

Adjourned meeting Sec.165 (8),

In any general meeting, if a member intends to move resolutions he shall give notice of his intention, to move the resolution before, the original meeting. If he fails to give the notice and if the meeting happens' to be adjourned he cannot give the notice during the interval and move the resolution at the adjourned meeting.

But a statutory meeting is an exception to this rule. The notice of intention to move a resolution may be given before or after the former meeting.

The power to adjourn rests with the decision of the meeting that is to say, the chairman may not adjourn Without the consent of the meeting and must adjourn if so directed by the meeting, not withstanding any discretionary-power given to the chairman by the articles. Normally, where the chairman is given a discretion he is not bound to adjourn the meeting even if' the majority desires it (Salisbury Gold Mining Co. Vs.Hathorn (1897) A.C.268, Parashuram Vs. Tata Industrial Bank Ltd., (1924) ILR47 Bom.915).

The statutory meeting also provides an exception to the normal rule that only business left unfinished at the original meeting can be transacted at the' adjourned meeting (Reg 53(2) Table A) Members have a right to introduce new business at the adjourned meeting, for the Act provides that any resolution of which notice has been given in accordance with the provisions of the Act, either before or after the former meeting, may be passed, and (he adjourned meeting has the same power as an original meeting. If the meeting wishes to pass a resolution on any matter, which it is entitled to discuss it, may adjourn so that in accordance with the provisions of the Act may be given in the interval.

Default: If any default is made in filing the statutory report or in holding the statutory meeting those in default are liable to a fine, which may extend to five thousand rupees (Section 165(9)) Another consequence of not holding the statutory meeting in time is that the court can under Section 433(b) order the compulsory winging up of the defaulting company.

Statutory Report: The Directors are required to send to report to the members of the company at least 21 days before the meeting. Even if the report is forwarded later than required, it shall be deemed to have been duly forwarded if all the members entitled to attend and vote agree to -it (sub-section 2) The eight particulars to be set out in the statutory report are contained in sub-section (3) of section 165. These are;

a) The number of shares allotted, distinguishing fully or partly paid up, otherwise than for case and stating the extent to which the partly paid up shares have been paid and the consideration for which they have been allotted.
b) The total amount of cash received on account of shares allotted
c) An abstract of receipts and payments up to the date within 7 days of the date of report, exhibiting under distinctive heading the receipts of the company from shares and debentures and other sources, the payment made there out and particulars concerning the balance remaining in hand and a account or estimate of the preliminary expenses of the company showing separately any commission or discount paid or to be paid on the issue or sale of share or debentures.
d) The names addresses and occupations of the directors and auditors manager and secretary if any and any change therein if occurred since of the company's incorporation.
e) The particulars of any contract or modifications thereof to be submitted to the meeting for its approval.
f) The extent of non-carrying of each underwriting contract together with the reason therefore.
g) The arrears due on calls from every director and manager and
h) Particulars of commission or brokerage paid or to be- paid to any director for manager in connection with the issue or sale of shares or debentured.

The report aforesaid must be certified as correct by at least two directors one of whom should be the managing director, if there be any. The auditors should also certify it to be correct insofar as the report relates to shares allotted by the company cash received in respect thereof and receipts and payments on revenues as well as on capital account of the company.

A copy of the above report should be sent to the Registrar also it has been sent to the members (Section 165(5)

ANNUAL GENERAL MEETING SEC. 166

Who?

Every company shall, in each calendar year, hold in addition to any other meetings, a general meeting termed as an Annual-General Meeting (AGM).

Notice

Notice is a calling for the meeting which shall be specified by AGM

Time

a) The AGM must be held each year, and
b) The gap between two AGMs shall not exceed 15 months, and
c) As per Sec: 210 the time gap between the end of the financial year and the date of AGM shall not exceed 6 months.

Eg: The financial year of a company ends on 31 March each year. The AGM to adopt the accounts, etc of the year ending 31/3/200 1 was held on 29/9/2001. The last date for holding the meeting would be 30/9/2001.

A company may hold its first AGM within 18 months from the date of its incorporation.

It shall not be necessary for a Company to hold any AGM in the year of its incorporation or in the following year if it holds AGM within 18 months from the date of its incorporation. The Registrar may for any special reason grant extension of time of hold an AGM by a period not exceeding three months. This does not apply to the first AGM.

Date, time and place: An annual general meeting must be called for at any time during business hours, on a. day that is not a public holiday, and must be held either at the registered office of the company or at some other place within the city, town or village in which the registered office of the company is situated, unless the company belongs to a class of companies exempted by Central Government from these requirements (Section- 166(2))

A public company or private company which is a subsidiary of public company may by its articles fix the time for its annual general meeting and may also by resolution passed in one general meeting' fix the time for its subsequent annual general meetings (Second proviso (a) to Section 166(2))

A private company which, is not a subsidiary of' public company, may in like manner and also by a resolution agreed to by all the members thereof fix time as well as the place (or its annual general meeting (Second proviso (6) of Section 166(2)). Such a place need not be within the city town or village in which the registered office of the company his situated.

An annual general meeting cannot be held on a public holiday. A public holiday has been defined in Section 2(38) as a public holiday within the meaning of the Negotiable Instruments Act 1881. Explanation to Section 25 of Negotiable Instruments Act states that the expression "public holiday" includes Sundays and any other day declared by the Central Government, by notification in the official Gazette, to be a public holiday. A day may be declared to be a public holiday after the notices calling the meeting for the day have already

been issued. To avoid the difficulties that may be caused from such a situation, Section 2(38) provides that no day declared by the Central Government to be a public holiday shall be deemed to be such to, be a such a holiday in relation to any meeting unless the declaration was notified before the issue of the notice convening such meeting.

Thus in fixing the date of the annual general meeting, Section 166 as well as Section 210 must be considered. A company and its directors may thus commit three different offences that of not holding the annual general meeting in a calender year, that of not holding the meeting within, 15 months after the last meeting, and that of not holding the meeting within six months of the date to Which the accounts are made up. (B. N. Viswanathan Vs. Assistant Registrar of Joint Stock Companies, Madras (1953) Sevaram Pansari Vs. Registrar of companies (1964) 34 Comp.cas. 31)

Business to be transacted

In the case of an AGM the following is deemed as ordinary business…

a) Consideration and adoption of annual accounts and the reports of the Board of Directors and auditors;
b) declaration of a dividend;
c) appointment of a directors in place of those retiring; and
d) appointment of auditors and fixing of their remuneration,

Special business

In, the case .of an AGM any business other than the ordinary business and in the case of any other meeting all business is deemed special

it is to noted that it is not the business but it is the meeting, which may make a business special, Some illustrations are given below -

a) Appointment of a, director other than a retiring director in an AGM is a special business;
b) An auditor is appointed in an extra-ordinary general meeting (i.e, due to casual vacancy caused by resignation) then it becomes a special business.
c) Dividend may be declared in an EGM in which case it is a special business.

In case of a special business, the notice convening the meeting shall contain an explanatory statement giving the prescribed particulars.

Length of notice

a) An AGM may be called by giving riot less than 21 days notice in writing. The period is calculated from the date of receipt of the notice by the members. It excludes-
    - The day of service of the notice
    - The day on which meeting is to be held

Notice is deemed to have been received by the members at the expiration of 48 hours after the letter containing it is posted.

b) A meeting may be called by a shorter notice if it is agreed by all the members entitled to vote thereon. The consent for a shorter notice may be obtained either before or after the meeting.

Default in holding annual general meeting:

If an offence is committed by a company by not holding an annual general meeting in accordance with section 166, it will render the company and every officer of the company who is in default punishable with the which may extend to Rs. 50,000m and in the case of a continuing default with further fine which may extend Rs; 2.500 for every day after the first day which such default continued. (Section 168)

The company Law: Board may not withstanding anything in this Act, or in the Articles of the company on the application of any member of the company, call or direct the calling of a general meeting of the company and gives such ancillary or consequential directions as the Company Law Board thinks expedient in relation the calling holding and conducting of the meeting. The directions, which the Company Law Board may give, include a direction that one member of the company present in person or by proxy shall be deemed to constitute a meeting. A general meeting so held is deemed subject to any directions of Company Law Board to be an annual general meeting of the company.(Section 167)

Relevant judicial rulings

1. The annual general meeting must be called whether or not the annual accounts are ready for consideration at the meeting (Re EI Sombrero Ltd (1958)
2. An annual general meeting held beyond time cannot be said to be void or illegal if the Registrar's permission is obtained because the meeting must be held it is not true to say that once the time for holding the meeting has expired the meeting can never be held as Section 166, 167 and 168 make the failure to hold an annual general meeting held within time punishable with penalty and do not say that the annual general meeting held after the prescribed time is void. Therefore the meeting can: be held and it will be valid even after the time fixed for holding it has expired.
3. If because of circumstances beyond their control (for example pandemonium in the hall) the directors decided not to hold the meeting, it cannot be said to have been held by mere fact that before the directors an announcement printed copies of balances sheet and agenda had been distributed to shareholders.
4. It may be noted that directors could not be allowed to escaper performance of duties regarding the meeting by a more plea that they had no real control over the affairs of the company and they did not willfully permit default if directors were mere passive spectators and did not have the statutory requirements carried out they may be considered as having willfully permitted default.
5. An annual general meeting cannot held at a place other than the town, city etc. in which registered office is situated.
6. If the registered office is not available moving to a nearby place and holding meeting there is not a violation of law, it is only an irregularity.
7. Where all members of the company were also members of the board of directors a meeting of the board could well be treated as a general meeting of the company.

Others

a) The central Government may exempt any class of Companies from the provisions of the Section.
b) If nay is declared by the Central government to be a public holiday after the issue of notice convening such a meeting *it* shall one be deemed to be a public holiday in relation to the meeting.
c) A public company or a private Company which is a subsidiary of public company may
    - By its Articles fix the time for its AGM
    - By resolution passed in one AGM fix the time for its subsequent AGMs.

A private company may by its articles and also by a resolution agreed to by all the members fix the time and place for its AGM such a place need not be within the city, town or village in which the registered office of the company is situated.

d) The provisions of the sections shall be read along with the provisions of section 210 of the companies Act, 1956, which provides that a Company cannot adopt in its. AGM the accounts, which precede the date of meeting by more than 6 months.

e) The purpose of AGMs is not only adoption of accounts. Even if the account are not ready the Annual General Meeting shall be held within the prescribed period and transfer other business other than accounts consideration and its related subjects and then adjourn the meeting to a suitable date when the accounts are likely to be ready. However it should be noted that such an adjourned meeting should also take place within the statutory limit laid down under 166 read with 210 of the Act.

f) Notice calling the meeting shall specify it as AGM.

g) The Registrar of Companies does not have not power to give the extension in the case of First AGM. The Department has opined that the RoC could consider the grant of extension only in cases where the application for extension is made before the expiry of the period laid down in 166(1)

h) Where an extension is granted by virtue of the power conferred on RoC and consequent to which the date of the meeting falls beyond the calendar year, it would be with in compliance.

i) An AGM of Company was convened on 30/12/01 adjourned to 3113/02 and the next AGM took place on 28/1/03 is violative of act.

j) Voting rights of members is based on the holding of the date of meeting and not on the date on which meeting ought to have taken place.

k) An AGM can be held without a special business but cannot be held without ordinary business.

l) Where all members of a Company were also members of BoD, a meeting of Board could well be treated as a general meeting of Company.

m) If an adjourned annual general meeting accidentally falls on a public holiday there is no contravention.

n) Non-functioning of the Company is taken over by the Government are not defences for not holding the general meeting. It was held in DELHI AND DISTRICT CRICKET ASSOCIATION that an AGM held within the statutory period will not be invalidated merely because the accounts are not laid before the AGM.

o) Two AGMs can be held on the same day. There should be separate notices for each such meeting and shall be held at different time.

p) If' there is a grant of extension of time by RoC, then the months gap between the end of the financial year and the date of the AGM Should be read as 6 plus the extension granted.

The Central Government's power to grant exemption is with reference to class of companies and not in case of an individual Company.

The requirement to File the Annual Accounts with the RoC is It mandatory requirement notwithstanding the AGM being adjourned without adopting the annual accounts.

Extraordinary general meetings

Any meeting (general) other than A.G.M is an E.G.M.E.G.M may to convened.

(1) By the company itself

(2) By the order of the company Law Board S. 186

(3) On the requisition of members.

As stated earlier every business in an E.G.M is a special business.

E.G.M by company: There is no specific provision in the Act regarding the time and place to hold an E.G.M. The Act does not specify the number of E.G.Ms to be held in a year. The provisions relating to notice quorum, voting etc. shall apply.

Where on account of the company's failure or refusal to call the meeting as requisitioned by the requisite number of share holders the requisitionists have had to call the meeting, the notice calling the meeting has not to satisfy the requirements as to explanatory statements to the same extent a is applicable when the company itself calls the meeting. S. Varadrajan v.V. Solvent Extractions P. Ltd (1994) 80 Comp. Cas 693 (Mad)

E.G.M by order of Company Law Board (Section 186): Prior to the Companies (Amendment) Act. 1974 this power was exercised by the Court. Hence in the case laws one will find the word 'court' instead of Company Law Board.

It has already seen that the C.L.B may call Or direct to be called the Annual General Meeting of a Company: if a company commits default in holding an A. G.M Since A.G.M is a must the word 'default' is used in section 167 Since E.G.M is not mandatory, the word "impracticable" is used in section 186

Section 186 applies to meetings other than an Annual General Meeting. It is impracticable for a company to call a meeting of the company (other than A.G.M) the C.L.B may order a meeting of the company to be called held and conducted in manner as the C.L.B. may give directions for the calling, holding and conducting of the meeting. One of the directions may be that one member present in person or by proxy shall be deemed to constitute a meeting.

Impracticable - meaning of - The word should be interpreted in a reasonable manner and from the common sense point of view of ordinary businessmen taking into the circumstances of each case. The Courts will examine the circumstances of each case and answer the question whether, as a practical matter the desired meeting can be called *for Re El.Sombrero Ltd.* (1958) Ch D 900.

The Court may exercise its jurisdiction even where the application is opposed by other shareholders, for a minority may not utilise the quorum provisions as a to frustrate the wishes of the majority *Re. H.R.Paul & Son Ltd.,* (1973) 118. J.166

The main principles were laid down in *Re Ruttonjee & Co. Ltd (1968)* 2-Comp L J 155; (1970) Com Cases 491 (Cal).

a. The Court would not ordinarily interfere with the internal management

b. The discretion shall be used sparingly and with caution.

c. Prudence demands that the Courts should ordinarily keep aloof from group rivalry and shall not participate in the internecine squabbles of a company.

d. When a member or a director moves an application under section 186, the Court should be satisfied that it has been made in the larger interests of the company to remove deadlock which is otherwise irremovable.

Distinguish power of CLB to convene AGM and an ECM

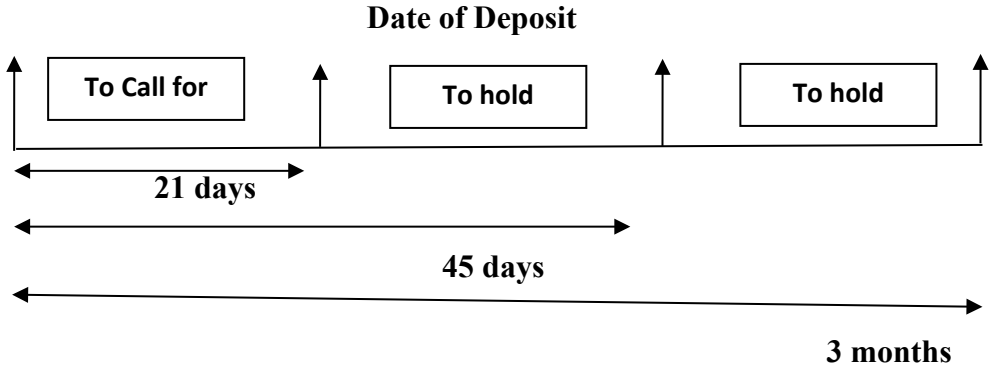
(or)

Distinguish between section 167 and Section 186

A.G.M (Section 167)	E.G.M (Section 186)
1. Every company must necessarily hold an annual general meeting. Hence the word 'default' is used in section 167.	Since extraordinary general meeting is not mandatory the word 'impracticable' is used in section 186
2. The Company Law Board acts on the application of a member.	Here the C.L.B. acts on the application of a member one of the directors or on its own motion.
3. The C.L.B. may call or direct to be called the A.G.M. of a company.	The C.L.B. may order the company to call for the meeting.

Extraordinary general meeting on requisition (Section 169)

Members holding not less than 1/10th of such of the paid-up capital of the company as that date carries the right of voting in regard to that matter shall sign the requisition setting out the matters to be considered at the meeting and deposit the requisition setting out the matters to be considered at the meeting and deposit the requisition at the registered office the company.



A diagram is given above to remember the days. The starting point is the date of deposit.

(1) The Board of Directors shall call for the meeting within 21 days from the date of deposit.

(2) The meeting shall be held on a day not later than 45 days from the date of deposit. If the board of directors fails to call for or hold the meeting as aforesaid the requisitionists themselves can have the meeting called for help and conducted but not later than 3 months from the date of deposit of requisition.

Any reasonable expenses incurred by the requisitionists shall be paid to the requisitionists by the company and recovered from the directors in default by retaining any sum due to them by the company.

If the meeting has been held before the expiry of 3 months, as stated above any adjournment can go beyond the period of3 months.

Rathnavely Chettiar v. Manickavelu Chettiar (1951) 21 Com Cases 93; (1951) 1 MLJ 5: AIR 1951 Madras 542.

A valid requisition was deposited to move a resolution to remove the managing director. The board of directors having railed to call for the meeting the requisitions themselves called for the meeting to be held at the registered office of the company. On the appointed day they found the registered office locked. With the result the meeting was held elsewhere and the resolution was passed. The Court held that the meeting was valid.

In *Pravin Kantilal Vakil v.Rohini Ramesh Sace* (1985) 57 comp cases (Born) (DB) held that if a meeting has been properly requisitioned it shall be held even when an application for a sanction of scheme of arrangement is pending before the Court. The Court observed that the meeting may be held for the limited purpose of considering a negotiation with the transferee company the purpose of considering a negotiation With the transferee company the proposed share exchange ratio in the scheme of amalgamation.

In L.I.C. of India v. Escorts Ltd., (1968) 60 Com. p 548 the Supreme Court held that every shareholder of a company has the right subject to compliance with the provisions of the Act, to requisition an extraordinary general meeting. He cannot be restrained by injunction from calling the meeting and he is not bound to disclose his reasons.

One member meeting

NCLT may give direction that may include a direction that even 1 member of the Company present person or by proxy shall be deemed to constitute a meeting

Additional Points:

a) It was held in LIC Vs. Escort Ltd., that it is not necessary for the requistionists to disclose reasons for resolutions they purpose to move at the meeting see 173 casts a duty on the management to disclose in an explanatory statement all material facts relating to the resolutions proposed.
b) Where the registered office is not made available to the requisionist or holding the meeting they may hold the meeting elsewhere.
c) Where an amalgamation scheme has been approved in a statutory meeting U/S 391, shareholders cannot requisition a meeting to compel the company for withdrawing its petition pending before court for its sanction.
d) It may be further noted that the court cannot prevent shareholders from requisitioning a meeting discussing and passing a resolution, proposing a modification to an amalgamation scheme, even when the scheme is pending for sanction before the court.
e) Once a final dividend is declared at the AGM no further dividend can be declared at the EGM. Interim dividend proposed at AGM exhaust the dividend for the year there is no power to declare further dividend at an EGM.

Validity

A meeting called held and conducted in accordance with the provisions of this section shall be deemed to be a meeting of a Company duly called held and conducted.

D. NOTICE

21 clear days notice shall be given for calling a general meeting. 21 clear days amounts to 25 days after considering time for servicing.

However for Section 25 Companies a notice of not less than 14 days will suffice. The AoA may provide for a larger period. The Act envisages only minimum notice period.

A private Company is at liberty to have its own provision regarding length of notice viz. it may be more or less than 21 days.

Short Notice

A notice shorter than 21 days can be given in case of AGM, With the concurrence of all the members entitled to vote at the meeting.

In case of any meeting other than an AGM, concurrence of atleast 95% of members having share capital with voting rights or 95% of voting power is required to give a notice less than 21 days: .

The consent is to be obtained in form 22A before commencement of meeting. The members to be taken into account for the purpose of above percentage shall be all those entitled to you on the resolution moved at the meeting.

The consent for short notice would not imply dispensing with requirements of agenda or documents like copy of accounts and auditing report (Sec. 219). The agenda and all documents have to be necessarily sent.

Contents

Notice, shall specify the Place, day and the hour of the meeting and shall contain a statement of business to be transacted at the meeting.

It may be noted that

a) A notice for a special business shall contain an Explanatory Statement.
b) If any item to be transacted at the General Meeting requires a Special Resolution then the intention to propose the resolution as a Special Resolution shall be stated in the notice.
c) Companies having a share capital shall state with reasonable prominence in the notice that a member entitled to appoint a proxy to attend and vote instead of himself and the Proxy need not be a member.

Notice for adjourned meeting:

A Notice is necessary in the case of adjourned meeting if

a) The original meeting adjourned sine die. (Without fixing a. future date)
b) Where a fresh business ought to be considered at the adjourned meeting in addition to the business left over.

Companies generally have provisions in the own Articles relating to notice for adjourned meeting. (Similar provisions exist in Regulation 52 of Table A).

The general rules for adjourned meeting may be summarized as:

a) A notice shall· be given for the adjourned meeting also as in the case of original meeting if the meeting is adjourned for 30 days or more.
b) Where a meeting is adjourned under: a Court injunction and could be held again only with the permission of the same agenda as specified. in the notice of the original meeting.
c) No business other than the business left unfinished at the original meeting shall be transacted at the adjourned meeting.

To whom?

a) Every member (inc1uding preference shareholders) of the Company or to the legal heirs of a deceased member.
b) Auditors of the Company.
c) Public Trustee

In the case of joint holders notice may be served on the first person whose name is in the Register of Members.

Service of notices

How?

Post: The notice shall be served in the manner presented in Sec. 53 viz. either personally or by ordinary post at the registered address in India. If no registered address is available for the members in India, then the notice will be served to his address if any within India furnished to the Company by the member for the purpose of service of notice to him.

A notice sent by post is deemed to have been effected only after 48 hours after the letter containing the notice is posted.

Registered Post: If any member has insisted that notice should be served to him by Registered Post or' Certificate of Posting and deposited with· the Company sufficient amount to defray the expenses, then the notice must be served to him in that manner only. However where the notice is sent by Registered Post and the member refuses to receive it then such tender of the Registered Cover and his refusal to accept is a valid service.

Advertisement: The Notice advertised in the newspaper circulating in the neighborhood of the Registered Office of the Company will be effective service of notice, on the date on which the advertisement appears in respect of members 'who have no registered address in India and also has not supplied to the Company any address in India for service of notice, It is deemed to be served on the date of notice.

The publication of notice in the newspaper does not obviate the necessity of sending individual notices to the shareholders who had left with the Company their registered address in India.

Validity: A meeting is invalid unless a proper notice of the meeting is given to all persons entitled to receive such notice.

An accidental omission to give notice or the non-receipt of notice by any member or other person to whom it should be given shall not invalidate the proceedings at the meeting. The notice should be issued under proper Authority normally the BoD.

A Managing Director of the Company who is not a shareholder cannot challenge the validity of the meeting on the ground that the Company has not served the notice on him.

Quorum for general meeting (Section 174)

"Quorum" means the minimum number of persons required to transact business at a meeting. Unless the articles provide for a larger number.

1) Five members personally present shall be the quorum for a public company.
2) Two members personally present shall be the quorum for a private company (and also for a deemed public company under section 43A).
3) The word "personally" denotes that a proxy will not be counted in the quorum.

When the quorum shall be present and consequences of want of quorum:-

The following provisions apply subject to provision in the articles. In other words, the articles may provide otherwise. The quorum shall be present within half an hour from the time appointed for the meeting.

If it is not so present the following consequences will ensue:

1) If the meeting has been called upon the requisition of members (Section 169) the meeting shall stand dissolved. When the members themselves want to have meeting and if they cannot come and if they cannot come in enough strength it is not worthwhile to have the meeting. Hence the dissolution.
2) In the case of other meeting, the meeting shall stand adjourned to the same day in the next week at the same time and place. The Board of directors also may determine the day, time and place of the meeting.

If at the adjourned meeting also the quorum is not present within half an hour from the time appointed, the members present shall be the quorum,

Whether single member constituted quorum at adjourned meeting: According to the Department of Company Affairs, there shall be at least two since the word "members" is used in plural. However, it is submitted that under the General Clauses Act singular includes plural and plural includes singular.

Whether proxy counted in quorum at adjourned meeting: The expression used is members present'" and .not "members personally present" Hence a proxy will be counted in the quorum at the adjourned meeting (provided the original meeting was adjourned for want of quorum). *Daimler Co. Ltd, v Continental 'Tyre and Rubber Co.* (1916) 2 A. C. 307, 325

When one man meeting possible? One man cannot constitute a valid meeting. However there are five circumstances where one man meeting is possible:

1. Section 174: lf the quorum is not present in a general meeting within half-an hour from the time appointed for the meeting, the meeting shall stand adjourned to the same day next week same time. If in the adjourned meeting also the quorum is not present the members present shall be the quorum.

According to the Department of Company affairs since the word members is used in a plural there shall be atleast two: But under the General Clauses Act singular includes plural and plural includes singular. Hence a single member may constitute a valid quorum at the adjourned meeting.

2. Section 16: If a Company commits default in holding an A.G.M the C.L.B may on the, application or a member call or direct to be called the AG.M of the Company to be held and conducted in the manner directed by the C.L.B One of the directions may be that one member present in person or through proxy may constitute a valid meeting.

3. Section 186: Where is it impracticable for a company to hold an E.G.M the C.L.B may on the application of any member, one of the directors or on its own motion order the company to call for an E.G.M to be held and conducted in the manner directed by the C.L.B One of the directions may be that one member present to person or through proxy may constitute a valid meeting.

4. Class meeting: For example if a particular class of shares in held by only one person.

5. Creditor's meeting.

Proxy

The term "proxy" denotes two things;

1) A person authorised to be present and vote at a meeting on behalf of a member.
2) The instrument through which such authority is created.

A proxy need not be a member. A member is entitled to attend and vote at a meeting through a proxy. This is a statutory right of a member hence he cannot be deprived of this right by the articles. Proxy forms remain valid and the authority given by them is exercisable at the adjourned meeting *Kothrai Industrial Corpn.Ltd v. Maxwell Dyes and Chemicals P.Ltd.,* (1996) 85 Company 79 (Mad)

(The student should note that a director cannot appoint a proxy to be present and vote on. his behalf at, a board meeting. The reason is on the principal "*delegatus non potest delegare":* A delegate cannot further delegate).

About a proxy

(1) A proxy will not be counted in the quorum
(2) A proxy shall not have any right to speak at the meeting.
(3) Unless the articles otherwise provide a proxy cannot vote on show of hands,
(4) A proxy can demand poll. A proxy can vote on poll.

Revocation of a proxy: A member may expressly revoke the proxy conforming to principles of contract.

The right of a member to attend and vote in person is paramount to his right to vote through a proxy. If the member chooses to be present at the meeting it acts as implied revocation of proxy.

Suppose a member dies having appointed a proxy. Can the company permit the proxy to vote? Obviously a person cannot represent a dead person. However, so far as third parties are concerned knowledge is relevant. The student is advised to refer section 201 and 208 of the Indian Contract Act 1872. So the company can permit the proxy to vote before it has notice of the death of the member.

Ordinary and two way proxies:- Votes may be cast either for the resolution or against the resolution. If a member does not give express direction in what manner to vote the proxy may exercise his direction. However the member may give express directions to the proxy to vote for the resolution or against the resolution. The form of proxy used for this purpose is known as two-way proxy.

Lodgement of proxy (Section 176(3):- The Articles of a company may specify the period within which a proxy duly completed shall be lodged with the company. The period shall, in no case exceed forty-eight hours. If the period is longer than forty eight hours it shall be read as though only a period of forty eight hour was meant. A company may permit a proxy to be lodged at the commencement of the meeting, during the meeting or even at an adjourned meeting;

Circulation of member's resolution (Section 188)

A company shall on the requisition in writing of such number of members specified below and the expense of the requistionists :

(a) give to the members of the company entitled to receive notice of the next Annual General Meeting, notice of any resolution which may properly be moved and intended to be moved and is intended to be moved at that meeting;

(b) Circulate to the members entitled to have notice of any General Meeting sent to them, any statement of not more than 1000 words concerning the subject matter of the proposed resolution or the business to be default with at that meeting.

The number of members required for a requisition is :

(1) Such number of members representing at least 1/20 of the total voting power of all members with the a right to vote on the resolution or business to which the requisition relates.

(2) At least 100 members having right to vote and holding shares on which an aggregate sum of one Lakh of rupees has been paid.

Notice of any such resolution shall be given and any such statement shall be circulated in the same manner and' as far as' is practicable, at the same time as the notice of the meeting.

A company shall not bound to give notice of any resolution or circulate any statement unless:-

(1) A copy of the requisition is deposited at the registered office of the company

  (a) In the case of requisition requiring notice of a resolution, not less than six weeks before the meeting.

  (b) In the case of any other requisition not less than two weeks before the meeting and

(2) A sum reasonably sufficient to meet the company's expenses is deposited with the company.

Further a company shall not be bound to circulate any statement if on an application made by the company any or any aggrieved person, the Company Law Board is satisfied that this right is abused to secure needless publicity for a defamatory matter.

Whether a singles member can give a special notice? or whether section 190 is governed by section 188.-A detailed discussion is beyond the scope of this book. In *Pedley v.Inland Waterways Association Ltd.,* (1977)1 All E R 209 slate J. stated that requirements in section -142 (equivalent to section 190 of this Act) could admit of two interpretations, but for reasons of practicality he regarded the section (special notice) as protective rather than an: enabling one.

Representation of corporation at meeting (Section 187)

Suppose a company has shares in another company. How will the former company be represented at the general meeting of the latter company?

A body corporate which is a member, of a Company, will be represented at the general meetings of the company through an authorised representative. A person will be, authorised to act as its representative through are solution of its Board of directors or other governing body. The authorised representative will be deemed to be a member. He shall be entitled to appoint a proxy on his behalf.

The same principal applies if the body corporate is a creditor of a company and when the body corporate is represented in the meeting of the creditors of the company.

Representation of President and Governors (Section l87 A)

The President of India or the Governor of a state, if he is a member of a company may appoint a person to act as his representative at any meeting of the company. The authorised representative will be deemed to be a member. He shall be entitled to appoint a proxy on his behalf.

Patterns of voting

At any general meeting voting in the first instance shall be decided on a show of hands (Section·177). The student will appreciate that in the case of show of hands, on account of the restriction of human anatomy each member can have only one vote, irrespective of his shareholding. Further unless the articles otherwise provide, a proxy cannot vote on show of hands.

Poll Section 87(1) (b) Sections 179 to 185)

A member's voting on a poll shall be in proportion to his share of the paid -up capital of the company. As stated earlier a proxy may demand poll and vote on poll. Poll may be ordered by the chairman before or on the declaration of the result by show of hands (Section 179(1).For under section 185(2) the result of the poll-shall be deemed to be the decision of the meeting on the resolution on which' poll was taken. Since result of the poll will override the result by show of hands counting hands is a futile Exercise when poll is ordered.

The chairman may order poll on his motion.

The chairman shall order poll so demanded by the number of members or proxies specified below:

(1) In the case of a public company having share capital: - Any member or members present in person or through proxy.
   (a) Having not less than 1/10th total voting power in respect of the resolution; or
   (b) Holding not less on which an aggregate sum of not less than fifty thousand rupees has been paid-up.

(2) Private company having a share capital

(a) If seven members are personally present, one member present in person or by proxy.

(b) if more than seven members are personally present, two members present in person or by proxy.

(3) In the case of any other company by any member or members present in person or by proxy and haying not less than $1/10^{th}$ of the total voting power in respect of the resolution.

Time of taking poll (Section 180, Also to section 175): - For the purpose of taking the *poll,* the chairman may adjourn a meeting but not late than 48 hours. But there are two circumstances (resolutions) when poll shall be taken forthwith:

(1) A poll demanded on an adjournment motion.

(2) A poll demanded on the election of chairman

Scrutineers at poll (Section 184):- The Chairman shall appoint two scrutineers to scrutinise the poll and to report on that Out of the two scrutineers, the Chairman shall choose a member from those present at the meeting. if such a member is available and is willing to be appointed.

Kinds of resolutions (Section 189)

First the student should understand the meaning of approval by the majority. It does not mean the majority of total number of members. Nor does it mean the majority of those present at the meeting. It means majority of those present and voting at the meeting. Many members may not choose to be present at a meeting. Even among members who attend a meeting some may choose to remain neutral and 'some may just be idle spectators, These are disregarded,

There are two kinds of resolution.

(1) Ordinary Resolution: The votes cast in favour of the resolution shall exceed the votes, if any, cast against the resolution.

(2) Special Resolution: The votes cast in favour of the resolution shall be not less than three times the number of votes, if any cast against the resolution and the notice of the meeting shall specify the intention to propose the resolution as a Special Resolution.

Can there be casting vote for special resolution?

Casting vote is the power of the Chairman of the meeting, which he may exercise when there is a tie, that is to say when the assembly is equally divided. In other words the votes cast in favour of the resolution are equal to votes cast against the resolution. This power of the Chairman is in addition to his voting right as a member. A Chairman has only a casting vote if there is ail equality of votes. In case of equality of votes he may decline to exercise his casting vote. In which case the motion is lost. He may give a contingent or hypothetical casting vote, to come into operation if, in the course of subsequent proceedings, it should, appear that there has been an equality of valid votes Bland v. Buchanan (1901) 2 KB 75.

In the case of special resolution the words 'used are "not less than three times" So, if the votes cast for the resolution are exactly three times the number of votes cast against the resolution, the resolution is passed. So, there cannot be a tie in the case of a special resolution. Hence the question of casting vote does 'not arise in the case of a special resolution.

Can a special resolution be passed through a simple majority? If so explain the circumstances in the light of the provisions of the Companies Act-There are two matters under the Act which requires special resolution but can be passed through a simple majority.

l. Section 81(1A): If a company wants to dispose of further issue of shares otherwise then as a rights issue the company shall pass a special resolution to that effect in a general meeting. If in that general meeting no such special resolution is passed nevertheless a simple majority is obtained by making an application to the Central Government. The company may dispose of the further issue in any manner beneficial to the company may dispose of the further issue in any manner beneficial to the company if the Central Government is satisfied in this behalf 2. The object clause in the memorandum is the most important clause, An investor should know for what purpose his money will be applied L.C.B Gower observes as follows, An investor in a gold mining company should not find himself holding shares in a fried fish shop". However the object clause may be drafted as wide as possible including both gold mining and fried fish shop businesses. To curb this evil section 13 was amended in the you 1965 Under the Amendment the object clause shall be in the two parts. .

The first part gives the main objects and the incidental objects and the second part gives the other objects.

The pursue an object under the head other objects the company shall pass a special resolution in the general meeting. If in that general meeting no such special resolution is passed but a Simple majority is obtained the company may make an application to the Central Government.The company may pursue the object if the application is allowed by the Central Government.

Prior to 1965 Amendment the object clause of a company was not divided into two parts. Hence for such companies in existence at the time of commencement of 1965 amendment any new business not germane to the business already carried on will be treated as other objects. Hence for such companies to carry on the new business a special resolution in general meeting is required.

Special notice: (Section 190, 225 and 284)

Special notice is not by the company. It is notice given by a member to the company only in respect of four matters under the Act. The Articles also may provide for special notice for any resolution (not conflicting with the provisions of the Act)

How special notice shall be given (Section 190): Notice of the intention to move the resolution shall be given to the company fourteen clear days before the meeting. The company shall give notice is received. If that is not practicable the company shall give notice of the resolution by an advertisement in a newspaper or in any other mode allowed by the Articles, not less than seven days before the meeting,

Four matters requiring special notice are:

(1) To appoint art auditor other than a retiring auditor at an annual general meeting.

(2) To expressly provide at an annual general meeting that a retiring auditor shall not be re-appointed. Section 225

(3) To remove a director

(4) To appoint somebody instead of a director so removed, at the same meeting,

The students should not confuse special notice with special resolution. They are two different things. In fact all the above four matters require only ordinary resolution. But there is one matter under the Act which requires both Special Notice and Special Resolution i.e. section 225 read with section 224A; appointment of an Auditor other than retiring Auditor at an A G.M. for a company in which not less than 25% subscribed capital is held by the Central Government etc (stated earlier).

Resolution

The purpose of a meeting & is to arrive at decisions and. the sense of a meeting is ascertained by voting upon proposals put to the meeting. A formal proposal put to the meeting is resolution; a company expresses its will by the mean of resolutions. There are only two kinds of resolutions under the Act, ordinary and special and they are defined in Section 189, some writers classify resolutions into three types namely ordinary, special and resolutions requiring special notice.

Ordinary Resolution

This is resolution passed by simple majority of these present in person or by proxy where proxies are allowed and voting upon the resolution. Members not participating in voting are not taken into account. *As* distinguished from a simple majority an absolute majority is a majority of all these entitled to vote whether they attend or not.

Section 189 (1) defines an ordinary resolution as follows

"A resolution shall be an ordinary resolution when a general meeting of which the notice required under this Act has been duly given, the votes cast (whether on a show of hands, or on a poll as the case may be) in favour of the resolution (including the casting vote, if any of the chairman) by members who being entitled so to do, vote in person or where proxies are allowed by proxy exceed the votes, if any cast against the resolution by members so entitled and voting".

(a) To authorise an issue of shares at a discount.(Section 79)
(b) To increase the share. capital if authorised by the articles, or otherwise alter the share capital apart from its reduction (Section 94, 100)
(c) To appoint auditors (section 224(1) but in the case of a company in which riot less than 25 percent of the subscribed share capital is a held, whether Singly or in any combination by a public financial institution or a Government company or ‘Central or anyState Government or a nationalised bank or' an insurance company carrying a general insurance business, the appointment of auditors requires a special resolution (Section 224A)
(d) To appoint directors
(e) To adopt annual accounts
(f) To declare dividends
(g) To wind up voluntarily when the period if any, fixed for the duration of the Company by the articles has expired or the event if any occurred on the occurrence of which the articles provided that the company is to be dissolved (Section 484 (1)
(h) To appointment liquidators in a members voluntary winding-up and to fix their remuneration (Section 490)
(i) To register an unlimited company as a limited company (section 32) and generally to do all things for which a special resolution is not specifically required either by the Act or the Company's articles.

Special Resolution

A part from ordinary resolutions various sections of the Act provide that certain things can be done by a Company with the authority of a special required passed at a dully-constituted general meeting:- A special resolution is an artificial conception of the Act, requiring a larger majority than an ordinary resolution. It has been defined by Section 189(2) as follows:

A resolution shall be special resolution when:

(a) The intention to propose the resolution as a special resolution has been duly specified in the notice calling the general meeting or other intimation given to the members of the resolution.

(b) The notice required under the Act has been duly given of the general meeting and

(c) The votes cast in favour of the resolution (whether on a show of hands, or on a poll as the case may be) by members who beings entitled so to do vote in a person or where proxies are allowed by proxy are not less than three times the number of the votes if any cast against the resolution by members so entitled and voting".

It is doubtful whether a resolution can take effect as a special resolution when the formalities required by Section 189 (2) have not been complied with even if it agreed to by all the members of the company. There are no cases directly in point and section 189 (2) should therefore be complied with;

The notice convening the meeting at which a special resolution is to be considered must set out the actual wording of the resolution and also annex an explanatory statement as required under section l73 in which the shareholders are informed of the material facts concerning the resolution and the nature of interest therein of the directors.

A printed or typewritten copy of the special resolution (together with a copy of the explanatory statement annexed under section 173) duly certified under the signature of an officer of the company must be filed with Register of Companies Within thirty days of its being passed (Section 192).

Acts for which special resolutions are required: Some matters may be so important and outside the ordinary course of the company business such as any important constitutional changes, that safeguards should be imposed to ensure that a larger majority than a simple majority of a members approve of them before they are given effect to. The Act requires that the following matters, *inter alia* have to be resolved by the company by a special resolution,

1) To alter any provisions contained in the memorandum, which could lawfully have been contained in the articles instead of the memorandum (Section 16)
2) To alter the objects or the place of registered office of a company (Section 17).
3) To change the name of the company (Section 21)
4) To alter the articles of association (Section 31)
5) To create a reserve liability that is to deten that a portion of the uncalled capital shall not be capable of being called up except in the event of a Winding up (Section 99)
6) To reduce the share capital (section 100)
7) To move the company's registered office within the same State outside the local limits of the city, town or village where such office is situated (Section 146(2)
8) To commence any new business, which IS not germane to the business, the company is carrying on currently though covered by the objects clause of the memorandum (Section 149 (2A)

9) To pay interest on shares out of capital (Section 208)
10) To appoint auditors if not less than 25 per cent of the company's financial institutions, nationalised banks, etc. (Section 24A).
11) To support an application to the Central Government to appoint inspectors in investigate the affairs of the company (section 237)
12) To authorise the payment of remuneration to non-executive directors by many of commission on the basis of a percentage of the next profits in the case of public many or a private company, which is subsidiary *ot a* public company (Section 304)
13) To authorise directors etc. to hold office or place of profit under the company (Section 314)
14) To alter the memorandum where the articles permit to make unlimited the liability of director (Section 323).
15) Investment exceeding the limits prescribed in Section 372A
16) To have the company wound up by the court (Section 433(a)
17) To wind up voluntarily for any reason not otherwise provided for by the section (Section 484)
18) To authorise the liquidator to transfer or sell the assets of the company which is proposed to be or is in the course of being wound up voluntarily to another, company in exchange for shares (Section 494 and 507)
19) To authorise the liquidator in members voluntary winding up to exercise the powers given by clauses (a) to (d) section 457, (1) to a liquidator in a winding up by the court (Section 512 (1) (a))
20) To sanction the exercise by the liquidator in volunteer winding up of powers mention in Section 546;
21) To direct the disposal of books and papers of the company in a members, voluntary winding up (Section 550(3) (a)];
22) To adopt Table A in ·Schedule I in a case of registration of a company under Part IX of the Act [Section 578(3) (an)];
23) To altec the form of constitution of a .company registered under Part IX of the Act [Section. 579(1)];

In addition to the requirements of the Act, a company' s own articles may prescribe for special resolution where under the Act only an ordinary resolution is. necessary, However, where the Act specifies for a special resolution, the articles cannot provide for the different kind of resolution.

Resolution requiring special notice: For certain purposes, the Act requires a special notice, i.e. 14 days notice, to be received by the company from a shareholder of his intention to move the resolution, either as an ordinary or as a special resolution. After the-receipt of the notice, the company must immediately issue a notice to the shareholders in this regard, not less than 7 days before the meeting either by serving it on them or through an advertisement in the newspaper haying an appropriate circulation or in any other mode allowed by the articles (Section 190).

The matters in respect of which special notice is required are: (1) for appointment a person as auditor at the annual general meeting other than the retiring auditor for providing expressly that the retiring auditor shall not be re-appointed [Section·225 (1)]; (2) for removing a director before the expire of the period of his office and appointing someone in the place of the director so removed [Section 284(2)]; and for appointing certain person who cannot be appointed in the ordinary course as director provided for in Section 261 [Section 261(2)].

Now suppose, at the annual general meeting of a company a resolution is proposed to be moved to the effect that the retiring auditors shall not be re-appointed. What would be the duly of the company and the right of the auditor in the circumstances? From the law discussed above the duty of the company may be summed up follows:

(i) On the receipt of the 14 days special notice the company must forthwith send a copy thereof to the retiring auditor [Section 225(2)].

(ii) Where the retiring auditor makes a written representation, not exceeding a reasonable length, to the company and requests the company to notify such representation to the members, the Company is bound to state in any notice of their solution given to the members, the fact of the representation having been made and send a copy of the representation to every member to whom notice of the meeting is sent-whether before or after a receipt of the representation by the company: Moreover the company is bound by his duty if the representation has not been received too late. If the representation has been received too late, the company will be relieved of this duty. But in such a case, the auditor may (without prejudice to his right to be heard orally) require that the representation shall be read out at the meeting.

The auditor's right to get the copies of the presentation sent out to members or readout at the meeting is-hedged in by the provision that if the Court is satisfied, on the application of the company or any other aggrieved person, that the right is being abused to secure needless publicity for a defamatory matter, the Court may order that the representation may not be circularized or read out. The Court may further order that the company's costs en such an application should be paid by the auditor, in whole or any part even though he is not a party to the application [Section 225(3)].

The rights of the auditor in this context are as follows:

(1) It follows from paragraph (ii) above that the auditor has the right to make representation to the company and to request it to the members.

(2) The auditor has also right to be heard orally at the meeting of the shareholders.

(3) Where a copy of the representation has not been dispatched as aforesaid because it was received too late or because *of* the Company's default, the auditor may without prejudice to his fight to be heard orally, require that the representation be read out at the meeting.

Circulation of members, resolution and statements: Students should carefully note the circumstances in which the members can make use of the administrative machinery of a company for introducing resolutions for consideration at any annual general meeting or for circulation of statements in regard to any resolution to be proposed at any general meeting or business to be dealt with at that meeting. Such circumstances are stated below:

The company or the receipt of the written requisition by: (1) such number of members as, represents net less than l/20th of the total, voting power of all members having at date of the requisition, the right *to* vote on the resolution or business to which the requisition relates; or (ii) not less than 100 members holding shares on which there has been paid up as aggregate sum of not less than Rs.l Lakh in all and having a right to vote, must (a) give to members entitled to have notice of meeting sent them, the notice of any resolution which may properly be moved and which is intended 10 be moved at the meeting; and (b) circulate to members who are entitled to have notice of any general meeting, any Statement in not more than 100 words in regard to the proposed resolution the business to be dealt with at the meeting.

The company is not bound to give notice of any resolution or to circulate any statement unless (a) a copy of the requisition by the requistionis is, deposited at the registered office of the company (i) in case of a requisition requiring a notice of a resolution, not less than 6 weeks

before the meeting and (ii) in the case of any other requisition, not less than 2 weeks before the meeting; and (b) a sum reasonably sufficient to meet the company's expenses has been deposited along with the requisition:

It is also not binding upon the company to circulate any resolution or statement when, on its application or that of an aggrieved party, the Company Law Board (Substituted for Court by the Amendment Act, 1988) decides that it contains defamatory matter.

In the case of a banking company, if the Board of Directors opines that the circulation of a statement will be detrimental to the interests of the company, it need not circulate the same.

Not withstanding any provision to the country in the company's articles a resolution in respect of which notice has been given by a member as aforementioned, may be dealt with at an annual general meeting; also any incidental omission to serve notice upon one or other members will not invalidate the proceedings (Section 188).

Registration of resolution and agreement (Section 192):

(a) Printed or typewritten copies of all special resolutions as well as certain ordinary resolutions and agreements, some of which are described below, together with explanatory statement under Section 173 are required to be filed with the Registrar of Companies within 30 days after the passing or making thereof.

(b) Resolution agreed to by all members of the company, which, if not so agreed to would have been Ineffective unless they had been passed as special resolutions.

(c) Any resolution of the Board of Directors or agreement executed by a company related to appointment, re-appointment, renewal of appointment or variation of the terms of appointment of the managing director.

(d) Resolutions or agreements agreed to by all the members of any class of shareholders but which, if not agreed to, would have been ineffective for their purpose unless those had been passed by some particular majority or otherwise in some particular manner and all resolution or agreements which effectively bind all the members of any class of shareholders though not agreed to by all of them.

(e) Resolutions requiring a company to be wound up voluntarily, passed under Section 484(1).

(f) Resolutions passed under section 293 (1) (a), (d), (e).

(g) Resolutions approving appointment of sole selling agents under Section 294 or 294AA on appointment of sole selling agent.

(h) Copies of the term arid conditions of appointment of a sole selling agent appointed under Section .294 or of a sole selling agent or other person appointed under Section 294AA.

(i) Where articles have been registered, a copy of every resolution which alters the articles and of every agreement shall be embodied in the articles. Where articles have not been registered, a printed copy of every such resolution or agreement shall be forwarded on request of any member on payment of one rupee [Section 92(2) and (3)].

It may be noted that Form No.23 of the Companies (Central Government's) General Rules and Forms, 1956 depicts the manner in which copies of any of the aforesaid resolutions and agreements are to be certified and filed with the Registrar,

Passing Of Resolution by Postal Ballot: [New Section 192a)

This, section provides for the procedure to be followed by the company for ascertaining the views of the members by postal ballot. 'Postal ballot' includes voting, by shareholders by postal or electronic mode instead of voting personally by presenting for transacting business in a general meeting of the company,

A company shall send notice and draft resolution by registered post 'to all shareholders explaining the reasons and requesting them to communicate within 30 days from the date of posting of letter,

If a resolution is amended to by a requisite majority of shareholders by means of a postal ballot, it shall be deemed to have been duly passed at a general meeting convened in that behalf.

Effect

If a resolution is assented to by a require majority of shareholders by means of postal ballot, it, shall be deemed to have been duly passed at a general meeting convened in that behalf:

"requisite majority" with regard to special ,resolution means votes cast in favour of the business is three, times more than the votes cast against, with regard to ordinary resolution, votes cast in favour is more than the votes cast against,

Notified resolutions on postal ballot

a) Alteration of objects clause;
b) Alteration of AoA:
c) Buy Back of Shares;
d) Issue of Equity Shares with differential voting rights;
e) Change of Registered Office;
f) Sale of undertaking;
g) Election of Director;
h) Variation in the rights attached to a class of shares or debentures,

Note: For the purposes of this section, 'postal ballot' includes voting by electronic mode,

1. The Companies (passing of the resolution by postal ballot) Rules, 2001 read with section 192A shall apply to notices calling meetings of the shareholders approved by the Board of Directors after 15th June 2001.
2. The voting right on postal ballot shall be in proportion to the shareholders share of the paid up equity share capital of the Company.

Procedure to be followed for conducting business through postal ballot

a) The company may make a note below the notice of general meeting for understanding of members that the transaction(s) at serial number requires consent of shareholders through postal ballot.
b) The BoD shall appoint one scrutinizer who is not in employment of the company, may be a retired judge or any person of repute who, in the opinion, of the board can conduct the postal ballot voting process in a, fair and transparent manner.
c) The scrutinizer will be ill position of 35 days (excluding holidays) from the date of issue to notice for AGM. He is to submit his final report on or before the said period.
d) The scrutinizer will be willing to be appointed and he is available at the registered office of the company for the purpose of ascertaining the requisite majority.
e) The-scrutinizer shall maintain a register the record the consent or otherwise received, including electronic, media, mentioning the particulars of name, address, folio number, number of 'shares" - nominal value of shares, whether the shares have voting; differential voting or non-voting rights and the scrutinizer shall also maintain record for postal ballot which are received in defaced or mutilated form.
f) The postal ballot and other papers relating to postal ballot will be under safe custody of the scrutinizer till the chairman considers, approves and signs the minutes of the meeting. Therefore, the scrutinizer shall return the ballot paper and. other related papers/registers to the company so as to preserve such ballot papers and other related papers/registers safely till the resolution is given effect to.

g) Consent, or otherwise relating to issue maintained in notice for AGM received after 35 days from the date .of issue will be strictly treated as if the reply from the member has not be received,

h) If defaults is made in following this procedure, fine of Rs.50,000 will be levied for each default.

Minutes: See. 193

- Minutes represents a record of business transacted at a meeting.
- Every Company is required to record the proceedings of every general meeting and of every meeting-of the Board of Directors or of every committee of the Board.
- It should be recorded within 30 days from the conclusion of every such meeting in a book kept for that purpose with pages consecutively numbered.
- Every page of the minutes book shall be initiated, or signed and the last page of the record, of the proceedings shall be dated and signed, in the case of
- A Board Meeting, by the Chairman of the said meeting or the Chairman of the next/succeeding meeting,
- A General Meeting by the Chairman of the same meeting or in the event of his death or insanity, by a Director duly authorized by the Board for the purpose.

Contents

1. Pasting or otherwise shall make no attachment to the minutes book.
2. The minutes book shall contain fair and Correct summary of the proceedings.
3. Appointment of officers made at a meeting should be included.
4. Minutes of meeting of the Board/committee shall also contain the names of the Directors present and also those dissenting from or not concurring in the resolution.
5. The Chairman need not include any matter in the minutes if he is of the opinion that it is defamatory of any person or is irrelevant or immaterial or is determined to the interests of the Company.
    - The minutes book must be bound and must be hand written. However, DCA has stated that loose leaf minutes books are agreeable provided the Company takes appropriate safeguards and they are bound into books at reasonable intervals of say 6 months.
    - If there is something recorded at an earlier meeting which is not acceptable at a later meeting, the proper procedure is to pass a subsequent minute rescinding the old one.
    - The minutes books shall be kept at the registered office of the Company.
    - Minutes of meetings kept in accordance with the provisions of Section 193, shall be conclusive evidence of the proceedings recorded therein. It does not require further proof of the facts started therein.

Additional points

- A director, who is present at a meeting at which the minutes of a prior board meeting is confirmed, is not thereby made responsible for what was done at the prior meeting.
- A member has the right to inspect the books containing the minutes of General Meeting during the business hours at the registered office at the company at free cost.
- On payment of the prescribed fee, he is entitled to be furnished with a copy of any such minutes within 7 days after his request.
- If any default is made by the company in the above matter, the NCLT has the power to order so.

Lesson-2

AUDIT

Legal position of auditor

In Re, *Kingston Cotton Mill Co.,* (1896) 2 Ch 279, Lopes LJ. observed that "an auditor is a watchdog but not a, blood hound". (Incidentally, this is perhaps the only phrase, which a student is able to write about an auditor). The learned Judge again said that "an auditor is not bound to be a detective." What the learned Judge meant was that an auditor should not approach his task with suspicion. But, when his suspicions are aroused he shall not fail to investigate.

In the above case, the managing director supplied false figures of the value of closing stock of raw cotton; it was held that the auditor was not at fault in accepting these figures without checking them in any way. In any event, it would have been very difficult to physically verify the quantity or the value of the stock of raw cotton on account of substantial but variable waste of material and on account of fluctuation in the market price.

Fomento (Sterling Area) Ltd. v. Selsdon Fountain Pen Co. Ltd, (1958) 1 All ER 1l. Lord Denning observed that an auditor is not a mere adder and subtracter, In that case the auditor had to interpret a patent royalty agreement. It was held that the auditor was entitled, to check the accuracy of the statement in its legal as Well is arithmetical aspect and for that purpose to require his client to take legal advice.

Re, Thomas Gerrad & Son Ltd, (1967) 2 All ER 525. The managing director had falsified the books of accounts. The supplier's original dates were altered in the invoices and the alteration was apparent. The auditor in his routine examination noted these alterations and asked for an explanation but did not make any further investigation. As a result their estimate of company's profits was wrong. The company declared dividends which it would not otherwise have done and paid tax which would not otherwise have been payable. The company went into liquidation. The liquidator took misfeasance proceedings against the auditors.

It was held that the damages recoverable included the dividends, the costs of recovering the tax and any tax not recoverable. The Court observed that "as a matter of Common sense the auditors should have communicated with the supplies".

Unlike the directors who are only liable to the company as a whole and not to individual members, the auditors are liable to the company as a whole, to individual members and to the non-members also. In view of' the decision in *Hedley Byrne & Co. Ltd. V.Heller and Partners Ltd* (1964) AC 465, the auditors may become liable to non- members also in certain circumstances.

In that case, an advertising agency wanted to find out about the credit worthiness of their potential client. They referred to their bankers who gave report about the credit worthiness of their potential client. Relying upon that the advertising agency spent huge amounts on their client. Later on, it was found that the client was not creditworthy. The advertising agency sued their bankers for damages. It was held that the bankers could have been made liable but for their exclusion clause from liability. The Court said that a person can be made liable for a negligent statement where he knows or ought to know or can reasonably foresee that another person is likely to act upon his statement. To him he owes a duty of care. If he commits a breach of duty of care, he is liable for negligence.

The scope of the auditor's duty of care was laid down in *JEB Fasteners Ltd. v. Marks, Bloom & Co.'s,* (1981) 3 All ER 289. The plaintiff had taken over a company. They filed a suit for damages against the auditors. The allegation was that the auditors had been negligent in preparing the company's (taken over company) accounts by over valuing the stock. It was held that an auditor owes duty of care to any person whom he ought to have foreseen as relying of the accounts for the purpose of deciding whether or not to take over the company.

However, in the above case, the defendants were not liable. For, it was found that the plaintiff would not have acted differently even if they had known the true position.

Appointment of authors (Section 224)

Auditors are appointed at annual general meeting of a company. The auditors so appointed shall hold office till the Conclusion of the next annual general meeting. The company shall give intimation about the appointment to every auditors (so appointed) within seven days of the appointment;

Before any appointment is made the company shall obtain from the auditor/s proposed to be appointment that appointment, if made, will be 'within the specified number.

Specified number:

(1) Twenty Companies-if each of which has a paid-up share capital of less than 251akhs rupees.

(2) Twenty companies-out of' which not more than ten shall be companies having paid-up share capital of rupees 25 lakhs or more.

In the case of a firm of auditors, specified number of companies shall be construed as the number of companies specified for. Every partner of a firm who is not in full time employment elsewhere.

Since a foreign company is not a company (only a body Corporate) under this Act, audit of foreign company is excluded. In the case of branch audit, accountability is only to the head office. Hence that is also excluded.

Appointment of an auditor in an annual general meeting is an ordinary business of the meeting. It requires only ordinary resolution.

Special resolution-when? [Section 224A]

Special resolution is required for the appointment of auditors for companies in which not less than 25% subscribed capital is held (singly or in combination) by: (1) Central Government, (2) State Government, (3) Government company, (4) Public Financial Institution, (5) Insurance company carrying on general insurance, business, (6); Nationalised bank,(7) any financial or other institution established by State Act and in which not less than 51 % subscribed capital is hold by a State Government.

Special notice-when? (Section 225)

Special notice is required in the following two cases:-

(1) To appoint an auditor other than a retiring auditor in an AGM.

(2) To expressly provide in an AGM that a retiring auditor shall not be re-appointed.

Special notice and special resolution (Section 225read with section 224A)

The retiring auditor shall be re-appointed unless: -

1) He is not qualified for re-appointment,
2) He has given notice in writing to the company of his unwillingness to be re appointed.
3) A resolution has been passed at that meeting appointing somebody instead of him or providing expressly that he shall not be re-appointed.
4) When a resolution cannot be proceeded with on account of the death, incapacity or disqualification of the person intended to be appointed.

First auditor/s

First auditor/s shall be appointed by the Board of directors within one month from the date of registration of the company. An auditor so appointed shall hold office till the conclusion of the next Annual General Meeting. Such auditor may be removed by the company in general meeting and another person may be appointed in his place. The removal does, not require the approval of the Central Government. If the Board fails to appoint the first auditor, the company is general meeting may make the appointment. Every auditor appointed at an Annual General Meeting shall within 30 days or the receipt from the company of the intimation of his appointment, inform the Registrar in writing that he has accepted or refused to accept the appointment.

Casual vacancy

The Board may tin any casual vacancy in the office of an auditor. But, if the vacancy is caused by the resignation of an auditor, only the company in general meeting shall fill the vacancy. An auditor appointed in a casual vacancy shall hold office until the conclusion of the next Annual General Meeting.

Removal of auditor [Sections 224(7) and 225]

Only the company in general meeting, after obtaining the previous approval of the Central Government may remove an auditor from office before the expiry of his term. Removal requires only an ordinary resolution.

The auditor shall be given an opportunity of being heard orally before the meeting. In *addition* to that right he may also make representation .in writing. The company shall state the fact of the representation having been made in any notice of resolution given to members of the company. A copy of the representation shall be sent to every member. Copy of representation need not be sent to the members if it has been received too late. In which case the auditor may require that the representation to be read out at the meeting. This is without prejudice to his right of being heard orally.

The representation need not be sent out and need not be read out at the meeting if this right is abused by the auditor to secure *needless publicity* to a defamatory matter. An order of the Company Law Board shall be obtained for this purpose by the company or any person claiming to be aggrieved.

The student should note that emphasis is laid on the words *"needless publicity"*. Meeting is a qualified privileged occasion, No action' for defamation can succeed unless the plaintiff establishes that it was made maliciously.

Privileged occasion is an occasion when the person makes the communication has an interest or a duty (legal, social or moral) to make it to the person to whom it is made and the person to whom it is made has a corresponding interest or duty to receive the communication. Thus, the Auditor may have a duty to make it and the shareholders may have a corresponding interest in bearing it.

Appointment of auditors by Central Government

The auditors of the Government companies are appointed by the Central Government on the advice of the Comptroller and Auditor-General of India.

Even for a non-government companies under section 224(3). Where at an Annual General Meeting no auditors are appointed or re-appointed, the Central Government may appoint a person to fill the vacancy. The company shall, within seven days of the Central Government's power becoming exercisable, give notice of that fact to the Central Government.

Powers and duties of auditors (Section 227)

Access to books and accounts and vouchers - Auditors have the right of access at an times to the books and accounts and vouchers of the company; wherever they might be kept whether at the registered office or elsewhere.

Right to information: Auditors are entitled to require from the officers of the company such information and explanations as they may think necessary for the performance of their duties as auditors.

Duty of Inquiry: It is the auditor's duty to inquire into the following matters:

a) Whether loans and advances have been properly secured and that the terms are not prejudicial to the company or its members;
b) Whether book-entry transactions are not prejudicial to the company;
c) Whether shares, debentures or other securities in which the company's money was invested have been disposed of at a price less than the cost of acquisition. It is not necessary to exercise this power in the ease of an investment banking company.
d) Whether loans and advances have been shown as deposits.
e) Whether personal expenses have been charged to revenue account,
f) Where shares are shown to have been allotted for cash, whether cash was actually received and, if not whether the position stated in the accounts incorrect, regular and not misleading.

Report to members: Auditors have to make their report to members stating whether in their opinion and to the best of the information, the accounts of the company give the information required by the Act and also in the manner required and that they give a true and fair view of the state of the company's affairs at the end of the company's financial year according to its balance-sheet and that the profit and loss account gives a true and fair view of profits for the financial year.

The report by the auditor has also to state whether the requisite information was provided to him, adequate returns were received from the branches, whether branch audit report has been forwarded to him as required. The Central Government may prescribe any other matter for auditor's report. This power should be exercised in consultation with the Institute of Chartered Accountants.

The accounts are not to be regarded as not giving a true and fair view merely because they do not disclose matters which are not required to be disclosed by any statutory previsions and the company takes care to mention such provisions in the annual accounts.

Branch Audit (Section 228)

The accounts of a branch office of a company shall be audited by the company's auditor or by a person qualified for appointment as auditor of the company. When the branch office is situated outside India the audit of the branch accounts may be done (in addition to persons mentioned above) by an accountant duly qualified to act as auditor in accordance with the laws of that country. The branch auditor shall be appointed by the company in the general meeting. The branch auditor shall prepare a report on the accounts of the branch office and forward the same to the company's auditor.

Special audit (Section 233A)

The Central Government may at any time by order: direct that a special audit of the company's accounts shall be conducted in the following cases:

Where the Central Government is of the opinion

a) That the affairs of any company are not being managed according to sound business principles or prudent Commercial practices; or

b) That any company is being managed in a manner likely to cause serious injury or damage to the interests of the trade; industry or business to which the company pertains; or

c) That the financial position of any company is such as to endanger its solvency.

The Central Government may appoint a chartered accountant or the company's auditor himself to conduct such special audit.

The special auditor shall have the same powers and duties as an auditor of a company. The report of the special auditor shall include, as far as may be, all matters to be included in an auditor's report and shall also include a statement on any other matters which may be referred to him by the Central Government. The special auditor shall make the report to the Central Government and not to the members of the company.

On receipt of the report of the special auditor the Central Government may take such action on the report as it considers necessary. If the Central Government does not take any action on the report within 4 months from the date of its receipt, the Government shall send to the company either a copy of the report or a relevant extract from the report with its comments on the report. The company shall be required to circulate the Copy or extract to its members or have them read before the company as its next general meeting.

The expenses of the special audit and the remuneration of the special auditor shall be determined by the Central Government and paid by the company.

Cost audit [Section 233 B read with Section 209 (1) (d)]

Under section 209(1) (d); in the case of a company pertaining to any class of companies engaged in production, processing, manufacturing or *mining* activities, the books of accounts shall include such particulars relating to utilisation of material or labour or other items of cost as may be prescribed; if such class of companies is required by the Central Government to include such particulars in the books of accounts. Where in the opinion of the Central Government it is necessary so to do in relation to a company mentioned above, the Central-Government may by order direct that an audit of cost accounts of the company shall be conducted by a cost accountant.

The auditor to conduct the audit of the cost accounts shall be appointed by the Board of directors with the previous approval of the Central Government. Before the appointment is made by the Board, a written certificate shall be obtained from the auditor proposed to he appointed to the effect that the appointment, if made, will be within the specified number (as for auditors).

An auditor conducted under this provision shall be in addition to the audit conducted by the auditors of the company. The auditors of the company shall not be appointed to conduct the audit of cost accounts.

The auditor (cost audit) shall have the same powers and duties as those of an auditor of a company. The auditor (cost audit) shall make his report to the Central Government in such form and within such time as may be prescribed and shall also forward a copy of the report to the company. The company- shall within 30 days from the date of receipt of a copy of the report furnish the Central Government with full information and explanations on every reservation or qualification contained in the report. The Central Government may call for further information, if necessary.

On the receipt of the report, information and explanation, the Central Government may take such action on the report, as it may consider necessary.

The Central Government may direct the company circulate to its members along with the notice of the annual general meeting (to be held for the first time after the submission of the report) the whole or portion of the report as may be specified in this behalf.

Lesson: 3

OPPRESSION AND MISMANAGEMENT

Rule in *Foss v. Harbottle:* Supremacy of majority

For an alleged act of irregularity ratified or capable of being, ratified by the majority of shareholders, no suit will lie at the instance of an individual shareholder. In other words, there is no use of having litigation over it. The facts of the case were:

A company suffered loss owing to the fraudulent acts and mismanagement of the directors. Two shareholders acting in their individual capacity filed a suit against the directors praying that the directors should make good the loss to the company. The Court dismissed the action on the following grounds.

Ground No.1*: *Proper plaintiff: In such cases the question arises as to who is the aggrieved party? Is it the company as a Whole or the individual shareholders? The company alone can be the aggrieved party. It may be said that individual shareholders are also affected by the acts of directors. But, then the directors owe a duty to the company as a whole and not to individual shareholders. Hence, the company alone can be the proper plaintiff.

***Ground No.2: Multiplicity of suits**:* If one shareholder can file a suit, the other shareholders also can file the suit on the same cause of action. Some may pursue the action. Some may leave the action in the middle with the result; the company will be involved in endless and immunerable litigations. This rule is based upon convenience and expediency

***Ground No.*3:** Infructuous litigation- Infructuous means fruitless. Even if the Court decides in favour of the plaintiffs, ultimately the company has to recover the amount. The company may convene a meeting and decide by a majority not to recover that amount. Thus, the order of the Court will be rendered useless. The Courts not entertain any cause of action which will lead to infructuous litigation.

***Ground No.4: Corporate v. Individual rights**:* When a person becomes a member in a company he has two distinct rights, namely-corporate and individual right. Corporate right is a right, which a person acquires by virtue of his being a member in a group. The proper forum to exercise the corporate right is the general meeting where the wishes of the majority alone shall prevail. The Courts will not interfere in the internal management of a company, which is left only for the majority to decide.

An example of the general policy of non-interference in the matters of business is. the case in which the court did not interfere is the appointment by the Board of director, in accordance with the company's articles of an executive director, chairman and additional directors. The court refused to grant any information on to restrain them from acting if their respective capacities ***Vivek Goenka v. Manoj Sonthalia, (1995)*** **83 Comp Cas 897 (Mad).**

Exceptions

The student should not come to the conclusion that a suit can never be filed against the company or the directors. Circumstances when a suit can be filed against the directors or the company constitute exceptions to this rule.

***Exception No.1: Void and illegal acts**:* This rule is concerned with irregular acts, which can be cured But, void and illegal acts cannot be ratified even with the consent of all the members. Hence, this rule does not apply to void and illegal acts. In other words, an individual shareholder can file a suit against the company or the directors for a void or an illegal act. If the company has already committed an illegal or void act, a suit for declaration shall lie. 'If the company contemplates to do an illegal or void act, a suit for injunction shall lie.

Exception No.2: Individual membership rights: This rule speaks of corporate right. But, when his individual rights are invaded, an individual shareholder can file a suit against the company or the directors.

Exception No.3: Fraud on minority of shareholders:- Where fraud is exercised on the minority and the minority is prevented from exercising their rights, this rule does not apply.

Comment

Strictly speaking exception No. 2 is the real exception. Exception No.1 is government by a suit in a representative character. Exception, No.3 is governed by qualified minority rights and this is dealt with under oppression and mismanagement.

Prevention of oppression and mismanagement

Requisite number of members to make an application before the Company Law Board is-

1) In the case of a company having share capital: 100 members or l/10th of the total number of its members, whichever is less or member/s holding not less than $1/10^{th}$ issued capital. The applicants should have paid all calls and other sum due-on their shares.
2) In the case of a company not having a share capital, not less than 1/5th of the total number of members.

Joint shareholders are counted as one member,

Anyone or more of the members may obtain the consent in Writing of the rest of the members and make the application en behalf of and for the benefit of all of them (Section 399) Under section 399(4), the Central Government may authorise any member to make an application.

Under section 401 the Central Government itself may make an application before the Company Law Board under sections 397 and 398. Also refer to section 243. (Investigation of affairs and application for winding up or for an order under sections 397-398)

Meaning or oppression

Oppression is given the meaning in which it is normally understood. A conduct, which cannot be tolerated is called oppression. The act of oppression is something which is harshful or burdensome. Only thing for the purpose of this section, It should be a course of conduct. The student should note that it may not be the majority who is oppressive towards the minority; The minority also can be oppressive towards the majority and paralyse the affairs of the company.

The expression “any member" denotes that only a member can invoke this section if he is oppressed in his capacity of a member. This section is .not available to a director if be is oppressed in his capacity as a director.

The expression “any member” also denotes that this section is available not only to the minority but also to the majority when the minority by their' concerted action make it impossible for the company to carry on with its affairs. In other words, this section can be invoked not only when the dog wags its tail but also when the tail wags the dog.

The words "are *being* conducted” mean that the acts complained of shall be continued and continue for persisting acts of oppression. The applicants cannot rush to the company Law Board for a Single or an isolated act of oppression. Further, the oppression should continue till the date of the application.

Mere oppression will not be sufficient. The applicants will have to satisfy the company Law Board that the degree of oppression is such that the company has to be wound up on the ground that this just and equitable to do so. But, if the company is wound up, the petitioners alone will suffer. The remedy will be worse than the disease itself. The majority may create a situation and drive the minority to the Court. If the company is wound up, the majority may be in a position to purchase the Surplus assets, start another company, and thereby get rid of the minority. Thus, the minority will be playing their opponent's game. "Killing the company to end oppression is a singularly clumsy method in its operation and suicidal to the petitioners." [L.C.B. Gower]. "Cutting the head is not a cure for headache" [Author].

The Company Law Board may, with a view to bring to an end the maters complained of, make such order as it thinks fit.

The Company taw' Board shall give notice of 'every application Board to it under section 397 or 398 to the Central Government and take into consideration the representations, if any, made to it by the Central Government before passing a final order.

CLB may on the application of any party to the proceeding, make any interim order for regulating the company's affairs pending the making of a final order,

Apart from the general powers under sections 397 and 398, the Company Law Board has specific powers to pass any order providing for the following matters:

1) The regulation of the conduct of the company's affairs in future.
2) The purchase of shares or interests of any members of the company by the other members or by the company itself.
3) In the case of' a purchase of its shares by the company, the consequent reduction of share capital. (Case law given below. Also refer to section 77)
4) The termination, setting aside or modification of any agreement between .the company and the following persons:-
    a) Managing director, manager or any director.
    b) Any other person not mentioned above. In the case of any other persons notice, shall be given to the party concerned. Further, no agreement with any other person shall be modified except after obtaining the consent of the party.
5) The setting aside of any transfer, delivery of goods, payment, execution or other act relating to property made or done by the company or against the company within three months before the date of application. The C.L.B. shall set aside the above acts provided they will be deemed to be a fraudulent preference if done by an individual before he is adjudged an insolvent. .
6) Any other matter for which provision should be made.

Mismanagement (Section 398)

All the provisions are common with section 397 *except* for two differences-

1) The burden of satisfying the Company Law Board that the company should be wound up is not required under section 398.
2) The word "likely" is used in section 398(1)(b). So, this section can be invoked not only when there is mismanagement but also when it is likely that the affairs of the company will be conducted in a manner prejudicial to public interest or the interests of the company on accouter of the material change in the management or control of the company.

So, section 397 is only curative in nature. But section 398 is not only curative but also preventive in nature.

Cass: The student should not that the analogous section 397 under the English Law in section 210 of that Act. Now the relevant provisions are in sections, 459-461 of the English Companies Act, 1985 and the key word of the remedy has been changed from "oppression" to "unfair prejudice". Again, the student is reminded that prior to the 1988 amendment the power was with the Court.

Cosmo Steel Ltd. v. Jairamdas Gupta & others, (1978) 48 Com Cases 312 (SC) - This judgment gives a good exposition on reduction on capital. Under section 402, the Court ordered the company to purchase the shares of its members and the consequent reduction of share capital It was contended on behalf of the company that reduction of capital required the consent 'of the Company by a special resolution. The Supreme Court negatived the contention and observed as follows: Capital can be reduced, under two circumstances;

1) Where the company itself does special resolution and confirmation by the Court are required.
2) But where the Court so orders under section 402, the question of special resolution does not arise. Otherwise the Court Will be at the mercy of the shareholders.

Shanti Prasad Jain v: Kalinga Tubes Ltd., (1965) 35 Comp Cass 351-A private company had three groups of shareholders. The agreed to maintain their equal holdings of shares with equal representation on the Board

The private was converted into a public company. The company proposed to make a further issue to the public. Two groups who were respondents in this case passed a special resolution to that effect (as required tinder section 81). The other group (petitioner in this case) contended that this was an act of oppression by the majority group. The Supreme Court held that a case for oppression had not been made. If the majority group is compelled to offer new shares only to the existing equity shareholders, they will be deprived of their right under section 81. The Supreme Court further observed that events have to be considered not in isolation but a part of continuous story. There must be continuous acts on the part of the majority shareholders continuing up to the date of the petition, showing that the affairs of the company were being conducted n a manner oppressive to some parts of the members.

Needle Industries (India) Ltd v. Needle Industries Newly (India) Holding Ltd., **(1981) 51 camp C ASES 743 (SC) -** A private company was a wholly owned subsidiary of an English company. Conforming to the policy of the Government of India, the foreign holding was diluted to 60%.The Chief Executive of the private company who controlled the test of the 40% wanted to have the foreign to issue the new shares to existing members. Proper notice of the meeting was not given to the English company was deprived of an opportunity to participate in the further issue. Even if proper notice was given they could not have participated in the further issue. The Supreme Court observed as follows: A resolution passed by the directors may be perfectly legal and yet oppressive. Conversely, a resolution, which is in contravention of law, may be in the interest of the shareholders and the company. An isolated act, which is contrary to law may not necessarily and by itself support the inference that the law was violated with a *mala fide* intention or that such violation was burdensome, harsh and wrongful.

Re H.R. Harmer Ltd.,(1959) 1 WLR 62 (CA) - Father, his wife and sons were directors of a company. As a result of gift of shares by the father, the sons had become majority shareholders. However, father and his wife, who did what he told her, had voting control. The father disregarded the resolutions of the Board and continued to run the businesses as if it was his own. The business could riot be run successfully on account of his autocratic behavior. The Court held that a case of oppression was made out. As a face saving device, the father was appointed life president but was ordered not to interfere in the affairs of the company.

Re B ellador Silk Ltd., (1965) 1 All ER 667-The petitioner failed on three grounds:

(1) The petitioner was brought for the collateral purpose of forcing the repayment of loans to other companies in which the petitioner was interested and was therefore an abuse of process;
(2) The act complained of concerned the petitioner as a director and not as a member; and
(3) The circumstances were not such as to justify a winding up.

Re Lundie Bros. Ltd., (1965) 1 WLR 745. It was just and equitable to windup the company and this was done on the ground that there was a complete deadlock. But an order under section 210 was denied because there was no proof of oppression to the petitioner in his capacity as a member.

Re Five Minute Car Wash Service Ltd., (1966) 1 W L R 745: The managing director had been unwise, inefficient and careless; the controlling shareholders had failed to exercise their control to curtail his damaging activities. It was held that oppression had not been established. The managing director had not" acted unscrupulously, unfairly, or with any lock of probity". Mere acts of omission of the controlling shareholders were not designed to achieve some unfair advantage.

Conclusion

The student would have appreciated the hurdles a shareholder will have to cross the file an application under section 397, let alone a successful application. In the words of L.C.B. Gower, an authority on this subject, we can sum up and say that. "Section 397 is a weapon in the armory of the shareholders which when brandished IN TERROREM is more potent than when actually used to strike with"

Powers of Central Government to prevent oppression and mismanagement (Section. 408)

This topic has already been dealt with under the chapter on directors. This comes under appointment of directors and additional directors by the Central Government. The student is advised to refer to that chapter.

Power of Company Law Board to prevent change in Board of Directors likely to affect company prejudicially (Section: 409)

This section is not available to the members. This section is available to the manager, managing director or one of the directors in the form of a complaint. The groundwork of the complaint is as follows:

1) A change in the ownership of shares held in the company has taken place or is Likely take place, and
2) As a result of which, a change in the Board of Directors is likely to take place, and
3) If the change is allowed, it would affect prejudicially the affairs of the company,

After making inquiry, the CLB may, by order, direct that-

a) Any resolution passed or that may be passed or (b) any action taken or that may be taken to effect a change i the Board of directors, after the date of complaint, shall not have effect unless confirmed by the Company Law Board.

The CLB has power to make an interim order pending inquiry.

This section does not apply to a private company, unless it is a subsidiary of a public company.

Investigation

In this topic, the student is advised to note the words “may” and "shall". This is important not only from practical point of view but also from academic point of view. The distinction lies between duty and Power. "The Central Government shall appoint an Inspector" denotes the duty of the Government, "The Central Government may appoint an Inspector" denotes the power of the Central Government.

Investigation of a affairs of company

Section 235 consists of two parts, The' first is On the report of the Registrar and the second part is on the application of members. On the report of the Registrar made under section 234(6) and (7), the Central Government may appoint an Inspector to investigate into the affairs of' a company and make a report thereon to the Central Government.

"Affairs" has been held to mean its business affairs-its good-will, profits or losses, contracts and assets, including its control over its subsidiaries and it makes no difference who is conducting those affairs.

In R.v.Board of Trade, Ex. p. St. Martin Preserving Company Ltd. (1965) 1 Q B 103, the Board of Trade had refused to appoint an inspector on the ground that the proposed investigation related to the conduct of the receiver appointed by debenture - holders. The court unanimously held that the activities of a receiver are the "affair" of the company is respect of' which he is appointed and accordingly allowed an order of mandamus to issue against the Department.

Application before company Law Board by members

The requisite number of members to make an application before the C.L.B. is as follows:-

1) In the case of a company having a share capital not less than 200 members or members holding not less than 1/10th total voting power.
2) For a company not having a share capital 1/5th of the persons on the company's register of members.

The parties concerned shall be given an opportunity of being heard before the C.LB. After hearing the parties, the Board may, by order, declare that the, affairs of the company ought to be investigated by an inspectors. Thereupon, the Central Government shall appoint one or more competent persons as Inspectors to investigate the affairs of the company and to report thereon in such manner as the Central Government may direct.

The Central Government may require the applicants to give security, for such amount not exceeding Rs1,000/- for the payment of the cost of investigation. [s.236]

'Shall' and' May' appoint (Section 237) The Central Government *shall* appoint an inspector in the following two circumstances:

1) If the company by a special resolution, or
2) If the Court by an order declares that the affairs of the company ought to be investigated by an Inspector appointed by the Central Govemment.

Note: By 1988 amendment the word "shall" has been used in part 2 of section 235 (explained above). Hence, the student should include this also and state three circumstances in the examination.

The Central Government *may* appoint an inspector in the following three circumstances, If in the opinion of the Company Law Board there are circumstances suggesting:-

1) That the business of the company is being conducted –
    a) With the intent to defraud its creditors, members or other persons;
    b) For a fraudlent or unlawful purpose;
    c) In a manner oppressive o f any of its members;
    d) The company was formed for any fraudulent or unlawful purpose.

2) That persons concerned in the formation of the company or management of its affairs have in connection there with been guilty of fraud, .misfeasance or other misconduct towards the company or any of its members.
3) That the members of' the company have not been given all the information with respect to its affairs, which they might reasonably EXPECT.

The student should note that the word used is "EXPECT" and not "ENTITLED". Entitlements are different from Expectations. Members are entitled to inspect certain statutory registers.

They do not have access to the account books, vouchers, correspondence and other books arid papers. But to fight a case against the company they may require some information. In the words of Gower, this is the only provision under the Act, which. enables an average Investor to collect sufficient ammunition to fight a battle against the company.

Investigation of ownership of company (Section 247)

The purpose of appointing an Inspector under this provision is to investigate and report on the membership of a company for the purpose of determining the true persons –

a) Who are or have been financially interested in the success or failure, whether real or apparent, of the company, or
b) Who are or have been able to control or materially to influence the policy of the company.

The Central Government may appoint if there is good reason so to do and *shall* appoint if the Company Law Board, in the course of any proceedings before it, declares by an order that the affairs of the company ought to be investigated as regards the membership of the company for the above said purpose. The Central Government may define the scope of his investigation 1) as respect the matters, 2) the period to which it is to extend, 3) limit the investigation to matters connected with particular shares or Debentures.

Powers of Inspector (Sections 239, 240, 240A)

1) The Inspector may investigate into the affairs of a related- company after obtaining the prior approval of the Central Government.
2) To call for the production of books and papers of company under investigation and those of related companies.
3) With the previous approval of the Central Government to call for the production of books and papers of any other body corporate.
4) The Inspector may examine on oath and take evidence in writing of the following persons:
   a) Officers, employees, agents of the company under investigation and those of related companies. Agents include bankers, legal advisers and auditors.
   b) Any other person with the previous approval of the Central Government.
5) The Inspector may make an application before a Metropolitan or I class Magistrate for entry, search and seizure. The Magistrate may be order authorise the inspector.
   a) To enter, with such assistance as may be required, the place where books and papers (likely to be destroyed, mutilated, altered, falsified or secreted) are kept.
   b) To search the place in the manner specified in the order.
   c) To seize books and papers be considers necessary for the purpose of his investigation.

Temporary protection or employees (Section 635 B)

This provision applies when an investigation is pending or when a reference application by the Central Government under section 388 B is pending before the Company Law Board. This provision is meant to enable an employee to give evidence in the above proceedings without fear of being victimized. During the pendency of an investigation or the application as aforesaid, a company; which proposes to punish an, employee by way of dismissal, discharge, removal or reduction in rank, shall send by post to the Company Law Board previous intimation in writing of the proposed, action. The Company Law Board may send by post notice of objection, if any to the company.

If the company does not receive any rejection within thirty days of sending the intimation, the company may proceed with the proposed action.

If the company is not satisfied with the objection raised by the C.L.R, the Company may prefer an appeal before the Court within thirty days of receipt of notice of objection,

[Note: - There seems to be an anomaly in the matter of limitation, under section 10F, an appeal lies to the High court from any decision or order of *C.L.B.,within sixty days]*.

Imposition of restriction upon shares [S.250]

A summary of section 250 is give below. The C.L.B. may be order impose restriction on shares (issued or to be issued) on a .reference made by the Central Government or on a complaint made by any person in this behalf. The restrictions may be imposed for a period not exceeding three years. The restriction may be any of the following:-.

1) Any transfer of those shares shall be void.
2) Where those shares are to be issued, they shall not be issued,
3) No voting right shall be exercisable on those shares.
4) No further shares shall be issued in right of those shares (i.e. no rights issue for them)
5) Except in liquidation, no payment shall be made of any sums due from the company on those shares (dividend capital)

Where a transfer of shares has taken place likely to result in the composition of the Board the C.L.B may by order, direct that (1) Voting right in respect of those shares shall not be exercisable for a period not exceeding three years, (2) No resolution or action taken to effect change in the composition of the Board before the date of the order shall have effect unless confirmed by the Company Law Board.

Lesson- 4

WINDING UP

Every one should know the distinction between insolvency and winding up. An individual may be adjudged an insolvent but a company can only be wound up. Only a debtor can be adjudged an insolvent. But a solvent company may be wound up the natural corollary is insolvency always results in deficiency, But winding up may result in surplus assets. When a person is adjudged an insolvent, his assets will vest with official assignee/receiver, In the case of winding up, assets will continue to vest with the company. But the administration will be taken over by the liquidator

Distinction between insolvency and winding up

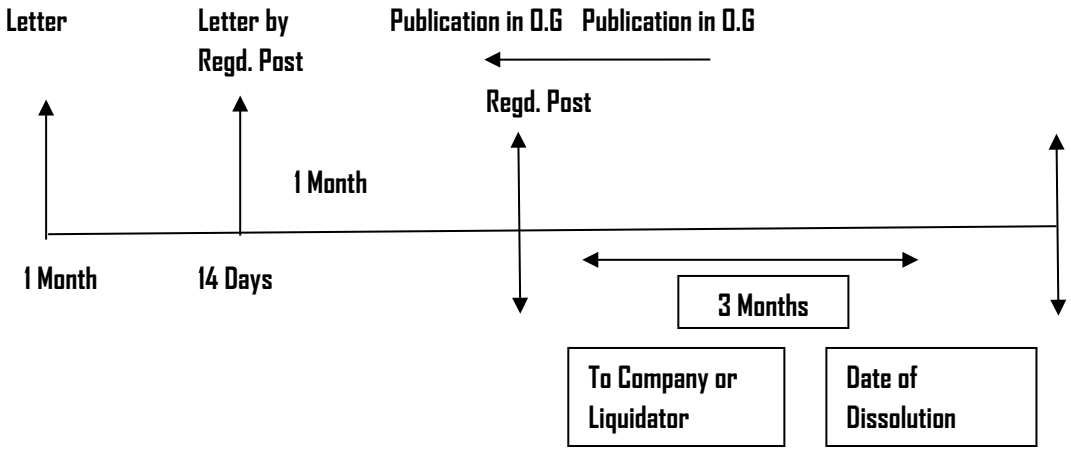
Insolvency	Willing Up
l. Only an individual can be adjudged an, insolvent	Only a company can be up wound up.
2. Only a debtor can be adjudged as an insolvent.	A solvent company may be wound up
3. Insolvency is always the result in deficiency	Winding tip is not linked with deficiency.
4. When a person is adjudged as insolvent he ceases to be legally competent	Company continues to be a legal person until it is dissolved.
5. Assets vests with the Official Assignee	Assets continue to be with the company but the administration is taken over by the liquidator.
6. When the insolvency proceedings are completed the insolvent will be discharged. That is say freed from all his debts. He again becomes a legal person	There is no such discharge. When winding up has been completed the company will be killed i.e. dissolved.
7. Any goods in the possession of an insolvent will be deemed to be his until proved to be otherwise. This principle is known as reputed ownership.	The principle of reputed ownership does not apply.

Winding up and dissolution

Winding up is the process by which the assets of the Company are salvaged and the affairs of the company are wound up. During winding up the company continues to be a legal person. When the affairs of the company are completely wound up, the company is killed with surprisingly little ceremony. The legal status comes to an end. This is called dissolution. Since a company is created by the process of law, it can only be destroy by the process of law. When the affairs of a company are completely wound up, there is no purpose in keeping it alive It shall be dissolved. However, a company may be dissolved without being wound up. In other words, there can be dissolution with winding up as we have seen earlier; this can happen in the case of amalgamation Transferor Company is dissolved without being wound up. Again under section 560, the name of a defunct company may be struck off the register by the Registrar. This will be our next topic.

Power of Registrar to strike off defunct company (Section 560)

This is the simplest method of dissolution without winding tip. When students read the Companies, Act, they should not think that the Act applies only to top companies in India. The Act applies to mushroom companies as well. These companies are form with enthusiasm but not with earnestness, some of them are still born and may be numerically more than top companies. The Registrar strikes the names of such companies off the register after complying with certain formalities, which consist of a letters at notifications. A chart is given below to remember the dates.



O.G: Official Gazette

(1) Where the Registrar has reasonable cause t o believe that a company is not carrying on business or in operation, he shall send to the company by post a letter inquiring whether the company is carrying on business or in operation.

(2) Within 14 days after the expiry of one month, the Registrar shall send another letter by registered post referring to the first letter and stating that if no reply is received within one month, a notice will be published in the Official Gazette with a view to strike the name of the company off the register.

(3) After the expiry of one month, he shall publish a notice in the Official Gazette that unless cause is shown to the contrary the name of the company will be struck off the register after the expiry of three months. This notice shall be sent by registered post to the company.

(4) After the expiry of three months, the name of the company will be struck off the register arid notice thereof will be published in the Official Gazette. On the publication in the Official Gazette, the company shall stand dissolved. .

Procedure for a company which is being wound up

Only steps numbers (3) and (4) given above Steps numbers (l) and (2) are dispensed with

Where a company is being wound up and the Register has reasonable caste to believe either that no liquidator is acting or that the affairs of the company have been completely wound up, any returns to be made by the

1) The Registrar may publish a notice in the official Gazette that unless cause in shown to the contrary the name of the company will be struck off the register after the expiry of three months. This notice shall be sent by registered post to the company or the liquidator.

2) After the expiry of three months the name of the company will be struck off the register and notice thereof will be published in the official Gazette. On the publication, the company shall stand dissolved.

Consequences of restoration of name

(1) Even though the name of the company has been struck off, the liability and the members shall continue and may be enforced as if the company had not been dissolved.

(2) The company whose name has been struck off may be wound up through Court.

(3) Within twenty years from the publication in the Official Gazette (date of dissolution), an application maybe made to the court for the restoration of name. The application may be made by the company, or any member or creditor of the Company. If the Court is satisfied that the company was carrying on business or In operation or that it is just that the company be restored to the register the Court may pass an order that the name of the company be restored to the register. The Court may give directions and make such provision as may be necessary to place the company and all other persons in the same position as if the name of the company had not been struck off.

(4) A certified copy of the court shall be delivered to the Registrar for registration there upon, the company shall be deemed to have continued in existence as if the name had not been struck off. .

Position of creditor

A creditor of a company who finds to his surprise that the name of the company has been struck off has remedies open to him.

(1) He may file a petition before the Court for winding up the company. In which case, he will do it for the benefit of ail the creditors,

(2) He may file an application before the Court for restoration of name. Having restored the name, he may file a civil suit for the recovery of the debt.

Since, the company shall be deemed to have continued in existence as if the name had not been struck off, .the clock is turned back. So, it appears that any limitation saved by the creditor during the lifetime of the company will remain intact.

Contributory (Sections 428 to 432)

Contributory means every person liable to contribute to the assets of the company in the event of its being wound up the term includes a fully paid shareholder. Winding up need not necessarily result in deficiency. In may end in surplus assets. For the purpose of participating in the surplus assets, the term includes a fully paid shareholder. Further, a contributory may present a petition for winding up a Company through court,

The term also includes an alleged contributory. This is for purpose of settling a dispute as to whether or not a person is a contributory.

Under section 36, when the Memorandum and Articles are registered, it will be deemed as though they have been signed by the company and each member. With the result, there is a contractual relationship between the members and the company. So, during the lifetime of a company, the liability of a member towards the company in contractual. But when winding up commences the liability of a contributory towards the company is imposed by law.

The liability of a contributory arises ex lege and ex contractu. With the result a fresh period of limitation operates in favour of the liquidator to enforce payment of calls.

When a contributory dies legal representative will become the Contributories. When a contributory becomes a insolvent his assignee shall represent him for all the purpose of winding up and shall be contributory accordingly If a body corporate is contributory and if the body corporate goes into liquidation the liquidator of the body corporate shall be a contributory.

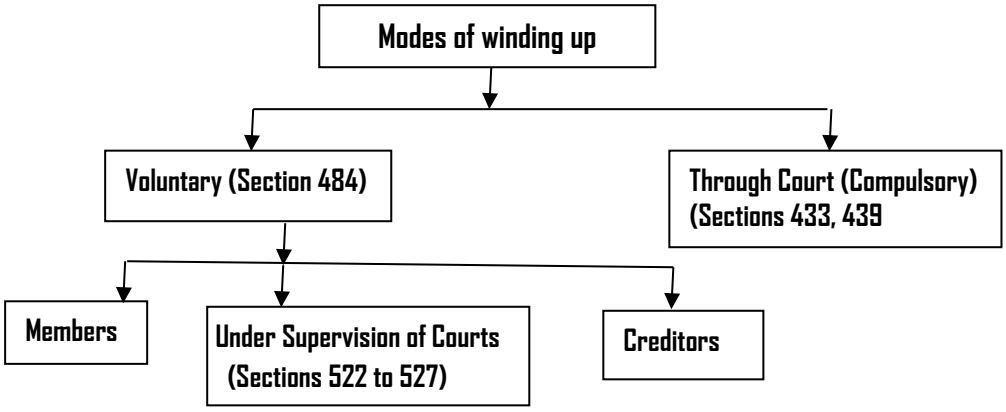
For the purpose of presenting a petition for winding up through Court a contributory should be one of the following:

Section 439(4): This applies to all grounds of winding except for ground under section 433(d), namely, reduction of membership below the statutory minimum.

(1) He should have been an original allottee of shares, or

(2) The shares should have been held by him for at least six months within a period of eighteen months immediately preceding the commencement of winding up; or

(3) The shares should have devolved upon him through the death of a former holder.



Winding up can be either through Court or voluntary. Voluntary winding can be members voluntary winding up or creditors voluntary winding up. If a declaration of cannot be made, it becomes creditors voluntary winding up. The further distinction lies in the appointment of liquidator.

In the case of members voluntary winding up the members will have their say in the appointment of liquidator; In the case of creditors voluntary winding up the creditors will have their say in the appointment of liquidator.

Winding up through Court

This topic shall be learnt as follows:

(1) Ground for winding up. Section 433.

(2) Who can file the petition. Section 439.

(3) Remarks on each ground.

Ground No. 1. When the company passes a *Special Resolution* to that effect.

Ground No. 2. If default is made in delivering the statutory report to the Registrar or holding the statutory meeting:

The petition may be filed by a contributory or by the Registrar with the previous Sanction of' the Central Government.

The petition on this ground shall not be presented before the expiration a fourteen days after the last date on which the meeting ought to have been held. Instead of passing an order for winding up, the Court may direct the company to hold the meeting or file the report, as the case may be.

Ground No. 3.- If the company does not commence its business within a year from its incorporation or suspends its business for a whole year.

The petition may be filed by the contributory or by the Registrar With the previous sanction of the Central Government.

The Court may not pass an order of winding tip if the company has suspended business due to trade depression or some other valid reasons. The Court will have to consider the chance of revival of the business at a date, which is not too remote.

Ground No. 4. If the number of members is reduced below the statutory minimum.

The petition may be filed by the contributory .or by Register with the previous sanction of the Central Government.

Under section 45, reduction of number of members below the statutory minimum attracts personal liability for .the remaining members. We have seen this earlier under the "lifting the corporate veil". Personal liability and winding up on this ground can be avoided by appointing or including a nominal member or members, as the case may be.

Ground No. 5 If the company is *unable to pay its debts.*

The petition may be filed by a creditor or by the Registrar with the previous sanction of the Central Government.

The Registrar shall not present a petition on this ground, unless it appears to him from the financial condition of the company as disclosed in the balance sheet or from the report of the special auditor (section 233A) or an Inspector (section 235 or 237), that the company is unable to pay its debts.

When a. company is deemed unable to pay its debts. (Section 434) - This section gives three circumstances.

1) The first one refers to a creditor who has just made a demand for the repayment of the debt. The company should owe to a creditor a sum exceeding five hundred rupees. The creditor should have served upon the company a notice of demand calling upon the company to pay the amount. The company should have neglected to pay the sum or to secure or compound for the sum even after the expiry of three weeks from the service of notice of demand.

It may appear that a sum of Rs.500 is a ridiculously low, sum to bring a company for winding up. However, it should be noted that a company, which cannot pay even. Rs.500 is more insolvent than a company, which cannot pay Rs.50,000.

The company cannot plead that it has excess of assets over liabilities. The question before the Court will be whether it is able to meet its current demands as and when they become due. In other words the company should be commercially solvent.

If the debt is disputed the Court shall not pass on order of winding up. However, the dispute *shall be bonafide.*

2) This refers to a circumstance when the creditor of the company has filed a suit against· the company for the recovery of the debt and has obtained a decree against the company but is unable to execute the decree. Under this circumstance, the creditor petitioner will have to show before the court that an execution order or process of the Court is returned unsatisfied, wholly or in part.
3) This refers to a circumstance not covered by (1) and (2) mentioned above. Under this circumstance, the petitioner shall prove to the satisfaction of the Court that the company is unable to pay its debts for any reason other than the two circumstances mentioned above. In determining whether a company is unable to pay its debts, the Court shall take in to account the contingent and prospective liabilities of the company.

Ground No.6. - If the Court is of the opinion that it is *just' and equitable* that the company should be wound up.

This clause shall not read *ejusdem generis* with the other grounds mentioned above. This is an independent ground where the C6urts have discretion in ordering a company to be wound up, when the Court is of the opinion that it is not worthwhile to keep the company alive.

This was again considered and reiterated in the case of *Ebrahmi v. West Bourne Galleries Ltd.,* (1973) AC360:(l972) 2 ALL ER 429 (HL). Ebrahmi (E) and Nazar (N) were Directors, of a private limited company of which they took 500 shares each. Subsequently, Gerorge Nazar (GN) son of Nazar became a shareholder and Director. E and N transferred 100 shares each to GN. N and GN (Father and son) by virtue of their controlling interest removed E as a director. E filed an application on' the ground of oppression and alternatively a petition for winding up under the just and equitable clause. The Court dismissed the application on the ground of oppression because there, were faults. On both sides (parties in *pari delicto).* But the Court ordered that the company should be wound up. The House of Lords reviewed the just and, equitable ground and held that: (a) it was not to be construed restrictively under the *ejusdem generis* rule, and (b) it could be extended to new instances.

Other instances of just and equitable ground. If the substratum of the company fails. Re, German Date Co., (1882) (Facts given earlier under the lecture on "doctrine of *ultra vires".*

The object of the company was to manufacture coffee out of dates through a German patent. The company was unable to acquire the German patent. Nevertheless, the company was to acquire a Swedish .patent. The company established a factory in Germany where coffee was manufactured out of dates without any patent.

Upon thy petition of two shareholders, the Court ordered the company to be wound up on the ground that since the substratum of' the company failed, the company itself should fail.

Deadlock in management.- Yenidje Tobacco Company Ltd.,(1916). Two sole traders combined their businesses in a company of which they became shareholders and directors. Personnel relations between them became embittered. They communicated by passing notes through the company secretary. One director sued the other for fraudulent misrepresentation. The other director presents a petition for an order to wind up the company on the ground of deadlock. An order for compulsory liquidation was made.

The other instances are:

(a) Where a company was formed with an illegal object or or a fraudulent purpose.

(b) Where a company is a mere "bubble", that is to say, it never in fact had any business or property.

(c) In the case of oppression and mismanagement the Court will not pass an order of winding up only if it would unfairly prejudice the petitioners. However, the possibility of winding up on this ground is not ruled out.

[Note: Presently an application under sections 397 and 398 may be made before the Company Law Board the CLB does not have jurisdiction of winding up. So, a petition can only be made before the Court under section 433(f)].

Powers of Court on hearing petition (Section. 443)

On hearing a Winding up petition, the Court may –

a) Dismiss the petition with or without cost, or
b) Adjourn the hearing conditionally or unconditionally, or
c) Make any interim order that it thinks fit, or
d) Make an order for winding up the company with or without costs, or any other order that it thinks fit.

Grounds on which Registrar can present petition for winding up.

The Registrar can present a petition for winding up on the following grounds with the previous sanction of the Central Government.

1. When default is made in delivering the statutory report to the Registrar or in holding the statutory meeting. A petition of this ground cannot be filed until after the expiry of 14 days from the last date on which the meeting ought to have been held.
2. If the company does not commence business Within a year from its incorporation or suspense its, business for more than a year.
3. If the number of members is reduced below the statutory minimum.
4. If the company is unable to pay its debts, the Registrar shall not present a petition at this ground unless it appears to him either from the financial condition or the company as disclosed in the balance sheet or from the report or a special auditor or the report of an inspector appointed to investigate into the affairs of the company, that the company unable to pay its debts.
5. On the ground that it is just and equitable that the company should be wound up.

Official liquidator and liquidator

Official liquidator is an officer of High Court and is appointed by the Central Government. On a winding up order made by the Court be official liquidator shall be virtue of his office become the liquidator of the company.

In a voluntary winding up the liquidator of the company shall appoint the liquidator in the General Meeting. In a creditor voluntary winding up the creditors and the company may nominate a person to be the liquidator, at their respective meetings. If they nominate different persons, the persons nominated by the creditors shall be the Liquidator.

Power of Liquidator in winding up by Court (Section 457)

The following powers may be exercised only with the sanction of Court:.-

1) To institute or defend any Suit, other civil or criminal proceeding in the name and on behalf of the company.
2) To carry on the business of the company so far as may be necessary for the beneficial winding up of the company.
3) To sell immovable and movable property of the company wholly or in parcels-privately or through publication.
4) To raise money on the security of the assets of the company.
5) To do all such other things as may be necessary for the winding up the affairs of the company and distributing its assets.

Other powers *of* liquidator which require no sanction of Court

1) To do all acts and to execute all deeds, receipts and other documents in the name and on behalf of the company and for that purpose to use the company's seal.
2) To prove, rank and claim in the insolvency of a contributory.
3) To draw, accept, make and endorse any bill of exchange, hundi, promissory note in the name and on behalf of the company.
4) To take out in his official name, letters of administration to any deceased contributory.
5) To appoint an agent to do any business which the liquidator is unable to do himself

Powers of liquidator in voluntary winding up (Section 512)

1) Please refer to powers of liquidator (winding up through) which can be exercised with the sanction of Court. The same powers may be exercised in voluntary winding up as follows:

Members voluntary winding up- with the sanction of a Special Resolution of the company.

Creditor's voluntary winding up - with the sanction of the Court or the committee of inspection or a meeting of creditors.

2) The other powers listed above (1) to (5)
3) Exercise the power of court of making calls.
4) Call General Meeting of the company for the purpose of obtaining the sanction of the company by ordinary or special resolution,

Committee of inspection (in winding up by court) (Ss 464-465)

The court may, at the time of making an order of winding up or at any time thereafter, direct the appointment of a committee of inspection to act with the liquidator,

The liquidator shall, within two months from the date of such direction, convene a meeting of the creditors of the company to determine the members of the committee.

Within fourteen days of the above meeting, the liquidator shall convene a meeting of the contributories to consider the decision of the creditors meeting with respect to the membership of the committee. The meeting of the contributories may accept the decision of the creditors meeting (a) in its entirety, or (b) with modifications; or (c 1 reject it.

If it is not accepted in its entirety the liquidator shall apply to the court for directions as to (1) what the composition of the committee shall be, and (2) who shall be the members,

A committee of inspection shall not consist of more than twelve members being creditors and contributories of the company.

The committee shall meet at such times as it may from time to time appoint. The liquidator or any member of the committee may also call a meeting of the committee. The quorum shall be one-third of the total number of members or two, whichever is higher. The committee may act by a majority of its members present at a meeting.

A member of the committee may resign by notice in writing signed by him a delivered to the liquidator.

The office of a member will become vacant, if (1) he is adjudged an insolvent, (2) he compounds or arranges with his creditors, (3) he is absent. From five consecutive meetings of the committee without leave.

A member representing the creditors may be removed at a meeting of the creditors. A member representing the contributories may be removed at a meeting of contributories.

The removal requires ordinary resolution: Seven days' notice is required for the meeting. The notice shall state the object of the meeting.

The liquidator shall forthwith summon a meeting to fill the vacancy. If he is of the opinion that it is not necessary to fill the vacancy, he may apply to the court. The Court may make an order that the vacancy shall not be filled or shall be filled except in such circumstances as may be specified in the order. The continuing members, not being less than two, may act in spite of any vacancy.

Dissolution (Section 481)

When the affairs of the company have boon completely wound up or when the Court is of the opinion that the liquidator cannot proceed with the winding up for want of funds or any other reason, the

Court shall make an order that the company be dissolved from the date of the order. The company shall be dissolved from accordingly. A copy of the order shall be delivered to the Register by the liquidator within thirty days from the date of the order. The Registrar shall make in his books a minute of the dissolution of the company.

Power of Court to declare dissolution to be void (Section 559)

Dissolution under this provision means suspended animation. The company can be brought back - into active life by making an application to the court within two years of the date of dissolution. The application may be made by the liquidator of the Company or by any person who appears to the Court to be interested. The Court may make an order declaring the dissolution to be void upon such terms as the Court may think fit. It shall be the duty of the applicant to file a certified copy of the order of the Court with the Registrar within thirty days of the order of the Court, Failure to do so attract penal liability for the applicant.

Voluntary winding up

An ordinary resolution in the general meeting is required in the following two circumstances:

(a) When the period fixed for the duration of the company by the Articles has expired.

(b) The even on the occurrence of which the Articles provide that the company is to be dissolved has occurred.

In other cases a special resolution may be passed by the company to wind up the company voluntarily.

Within fourteen days of the passing of the resolution, the company shall give notice of the resolution in the Official Gazette and also in some news paper circulating in the district where the registered office of the company is situated.

Winding up commences from the date of passing of the resolution in the general meeting. The company shall cease to carry on its business, except so far as may be required for the beneficial winding up of such business. The legal status of the company shall continue until it is dissolved.

Declaration of solvency

This is a declaration made by the majority of the Directors to the effect that the company has no debts or will be able to pay its debts in full within such period specified in the declaration which shall not exceed three years from the commencement of' winding up. This is made by the directors after making a full inquiry into the affairs of the company. The declaration shall be verified by an affidavit. The declaration shall not be valid unless it is made within five weeks immediately preceding the date of passing of the resolution in the general meeting for winding up the company.

It shall be delivered to the Registrar for registration before that date. It shall be accompanied by (1) A copy of the report of tile auditors of the company on the. profit and loss account made for a period from the date of the last balance-sheet till the latest practicable date and on the balance sheet made on the date mentioned above, (2) A statement of the company's assets an liabilities as at that date.

If the declaration solvency is made it is "members" "voluntary Winding up" If the declaration has not been so made and delivered it becomes "creditors' voluntary winding up".

Appointment of liquidator (Members' voluntary winding up) (S.490)

The company shall in general meeting –

(1) Appoint one or more liquidators for the purpose of winding up the affairs and distributing the assets;

(2) Fix the remuneration to be paid to the liquidators.

The liquidator shall not 'take charge of his office 3 before the remuneration is fixed. The remuneration so fixed shall not be increased in any circumstances whatever, whether with or without the sanction of the Court.

Final meeting and dissolution (Section 497)

As soon as the affairs of the company are fully wound up, the liquidator shall-

(a) Make up an account of winding up, showing how the winding up has been conducted and the property has been disposed of and (b) call a general meeting of the company for the purpose of laying the account before the meeting and giving any explanation on that.

The meeting shall be called by advertisement in the Official Gazette and also in a newspaper circulating in the district where the registered office of the company is Situated. It shall be published not less that one month before the meeting. The advertisement shall specify the time place and object of the meeting.

Within one week after the meeting, the liquidator' shall send to the Registrar and the official liquidator a copy, of the .account and a return of the meeting. The official liquidator shall scrutinize the books and papers of the company. If on such scrutiny, the official liquidator makes. a report to the Court that the affairs of the company have not, been conducted in manner prejudicial to, its members or public interest, then from the date of submission of the report to the Court, the company shall be deemed to be dissolved.

Disclaimer (Section 535)

Disclaimer is a method by which the liquidator can get rid of certain burdens which on an analysis is more a liability than an asset. An analogy will help the student to understand this. When a Ship is sinking, the cargos are thrown out to delay the sinking. Similarly, a Company in Liquidation throws out or disowns certain burdens, The only difference is here it is done to accelerate the' liquidation. So, disclaimer helps the liquidator to complete the proceedings without considerable delay.

The power to disclaim may be exercised by the liquidator only with the leave of the Court in respect of the following:

(1) Land burdened with onerous covenants,

(2) Shares in companies,

(3) Unprofitable contracts,

(4) Property not saleable or readily saleable.

The power to disclaim shall be exercised within twelve months from the commencement of winding up. If the liquidator was not aware of any such property within one month from the commencement of winding up, he may exercise this power within twelve months from the date on which he becomes aware of any such property.

The student will appreciate that when a disclaimer is made; the sufferer is the other party. His right is reduced to a right to claim for damages for which he may have to prove before the liquidator. The other party may not know when the disclaimer will fall upon him. In order that he is not kept on tenterhooks, there is a provision in section 535 (4). The other party may apply in writing to the liquidator requiring him to decide whether he will or will not disclaim. Within twenty-eight days-of the receipt of the application, the liquidator may give notice to the applicant that he intends to apply to the court for leave to disclaim. But, if the liquidator fails to do so, he loses his power to disclaim. In case the property is a contract, the liquidator shall be deemed to have adopted it.

Fraudulent preferences and floating charge (Section 531 and 534)

The effect of this provision is to avoid any payment or disposition made within six months of the winding up with the intention of giving a creditor or his surety a preference over the other creditors. This rule affects transaction made within six months before the commencement of winging up.

A transfer of property or payment of money will be a fraudulent preference and therefore void if:

(a) It is made with the intention of' giving a particular creditor a preference over others; and (b) It is an entirely voluntary act and not made under pressure.

In the words of Gower, "The· effect of successfully invoking it may be to injure not the person preferred but an entirely an innocent third party".

In M *Kushler Ltd.,* (1943; Mr. and Mrs. K were the only directors and members of the company. The company had an overdraft at the bank guaranteed by Mr. K. Just before winding up commenced, a payment was made to the bank extinguishing the overdraft and thereby to relieve the director from the guarantee. The company had not paid any of its creditors at that time.

It was held that the payment was a fraudulent preference and therefore void. The bank had to refund the amount paid.

Avoidance of floating charge (Section 534)

On the same principle of fraudulent preference, floating charges created by insolvent companies within twelve months before the commencement of winding up are void.

An analysis of section 534 is giving below.

(1) A floating charge created on year or more before the commencement of winding up cannot be invalidated.

(2) A floating charge created within one year of commencement of winding up is also not void, if the company was solvent immediately afterwards.

(3) So, to avoid a floating charge, two conditions have to be fulfilled;

(a) The charge was created within a year before the commencement of winding up.

(b) The company was not solvent immediately afterwards.

Event in the above circumstance, the charge is void *except* in so far as the amount of cash paid to the company.

(a) At the time of or subsequent to the creation of the charge and

(b) In consideration of the charge.

Consequences of winding up

When the court makes an, order for, the winding up of a company the court shall forthwith cause intimation of the Winding up to be sent to the Official Liquidator and the Registrar,

It shall be the duty of the petitioner and of the company to file with the Registrar a certified *copy* of the order of the court within 30 days from the date of making of the order.

The Registrar shall make a minute of the order in his books relating to the company and notify in the Official Gazette that such an order has been made. Such order shall be deemed to be a notice of discharge of the officers and employees of the company. The Board of Directors and the Secretary will be discharged. They will continue in office only for the purpose of giving information to the liquidator. No suit or other legal proceeding shall be commenced or continued against the company except with the leave of the court.

An order for winding up shall operate in favour of all the creditors and all the contributories of the company as if the order has been made on a joint petition of the creditors and the contributories.

Wrongful withholding of property (Section 630)

The section imposes penalty for wrongfully with holding of property. This penalty can be inflicted upon any officer or employee of' the company who:

(1) Wrongfully obtains possession of any item of the company's property;

(2) Having in his possession any property of the company wrongfully refuses to deliver it to the company, or knowingly misapplies the property of the company to any unauthorised purpose.

A complaint in this respect can be made by any creditor or contributory of the company or by the company itself. Punishment can go upto Rs.1000/- The Court can order delivery of the property and can inflict imprisonment up to two years for default in Carrying out the orders of the court.

The expression employee would include any pastor present employees. A retired employee can be ordered to deliver to the residential accommodation V.M.Shah v.State of Maharastra,(1996).

Extent or liability of contributory

The list of contributories will be in TWO parts - A list and B list.

A list consists of members of the company at the commencement of winding up, i.e., present members.

B list consists of persons Who WERE members of the Company Within a year before the commencement of winding up.

1) A past .member shall not be liable to contribute unless it appears to the court that the present members are Unable to satisfy the contributions.
2) A past members shall NOT be liable if he has ceased to be a member for one year or more before the commencement of winding up.
3) A past members shall NOT be liable to contribute in respect of any debt or liability of the company contracted by the company after he CEASED to be a member.

Winding up subject to supervision of court (Sections 522 to 527)

The student should not that winding up subject to supervision of court is only voluntary winding up continued under the supervision of the court. Hence, the commencement of winding up is same as that of voluntary winding up, namely, the passing of the resolution in the General Meeting under section 484. Refer to section 486.

This mode of winding up has certain advantages. The Liquidator will have the liberty as in voluntary winding up' backed by the power of the court to enforce payment of calls.

At any time after a, company has passed a resolution for voluntary winding up, the court may make an order that the voluntary winding up shall continue, but subject to such supervision of the court.

Where an order is made for a winding up subject to supervision, the court may, by that or any subsequent order, appoint an additional liquidator/s. The court may remove any liquidators so appointed or any liquidator continued under the supervision order. The court may fill any vacancy occasioned by the removal, or by death, or by resignation. The court may appoint the Official liquidator as a liquidator. The court may also appoint or remove a liquidator on an application made by the Registrar,

A liquidator appointed by the court –

1) Shall have the same powers
2) Shall be subject to the same obligations
3) In all respects stand in the same position

As if he had been duly appointed as a liquidator in voluntary winding up. The liquidator may exercise all his powers, without the sanction or intervention of the court, in the same manner as if the company were being wound up altogether voluntarily. This is subject to any restrictions that may be imposed by the court.

An order made by the court for a winding up subject to the supervision of the court shall for all purposes, be deemed to be an order for winding up by the court. The purposes include the staying of suits and other proceedings. The court shall have authority to make calls or enforce calls made by the liquidator. Where an order has been made for winding up a company subject to supervision, an order may be made afterwards for winding up by the court.

Workmen's dues (Sections 529 and 529A)

Workmen dues in relation to a company mean the aggregate of the fail in the sums due from the company to its workmen.

1) All wages or salary including wages payable for time or piece work and salary earned by way of commission
2) All accrued holiday remuneration being payable to any workmen.
3) Compensation payable under the *Workmen Compensation Act* due to the death or disablement of any workmen or the company.
4) All sums due to any workmen from a Provident Fund, Pension Fund, Gratuity Fund or any other fund for the welfare of workmen maintained by the company.

Workmen's dues will be treated as debts due to secured creditors:

Workmen's portion in relation: to the security of any secured creditor is equal to the amount of workmen's dues divided by the aggregate of the amount of debts due to the secured creditors the quotient multiplied by the value of the security.

Lesson: 5
CONSUMER

Preamble

A person who buys a good or service for his own personal use and not for further manufacture is called a **consumer**. Consumers play an important role in the market. The market for a good or service constitutes all the consumers and producers of that good or service. If there is no consumer, producers will have no one to provide the goods. However, there are regularly reported cases of ***exploitation of the consumer***. Often less than the actual weight of foodstuff is sold to consumers, or many retailers sell products that are not certified. Many cases happen where more than the market price is charged to the consumer. In the light of this, ***consumer protection*** holds an important role.

Consumer Protection Act, 1986

Till the 1960s, India was plagued with cases of black marketeering, hoarding, inadequate weighing and food adulteration. These were problems that affected the well-being of the consumer and amount to consumer exploitation. The consumer movement began in the 1960s and gained momentum in the 1970s. Consumer dissatisfaction started to be demonstrated through the written word and in articles and newspapers. The level of dissatisfaction with sellers and manufacturers and their practices resulted in consumers raising their voice. Resultantly, the government decided to give recognition to consumer protection by enacting the Consumer Protection Act on 24thDecember 1986. The Act was aimed at ***protecting the rights of the consumers*** and ensuring free trade in the market, competition and accurate information to be available. This day is now observed as National Consumers' Day.

Consumer Rights

There are six broad consumer rights defined as per the Consumer Protection Act, 1986. These are:

Right to Safety

The Consumer Protection Act defines this right as a protection against goods and services that are 'hazardous to life and property'. This particularly applies to medicines, pharmaceuticals, foodstuffs, and automobiles. The right requires all such products of critical nature to life and property to be carefully tested and validated before being marketed to the consumer.

Right to Information

This right mentions the need for consumers to be informed about the quality and quantity of goods being sold. They must be informed about the price of the product and have access to other information specific to the product that they wish to consume.

Right to Choose

The consumer must have the right to choose between different products at ***competitive prices***. Thus, the concept of a competitive market where many sellers sell similar products must be established to ensure that the consumer can actually choose what to consume and in what quantity. This is to avoid monopoly in the market.

Right to Seek Redressal

When a consumer feels exploited, he/she has the right to approach a ***consumer court*** to file a complaint. A consumer court is a forum that hears the complaint and provides justice to the party that has been hurt. Thus, if the consumer feels he/she has been exploited, they can approach the court using this right.

Right to be heard

The purpose of this right is to ensure that the consumer gets due recognition in consumer courts or redressal forums. Basically, when a consumer feels exploited, he has the right to approach a consumer court to voice his complaint. This right gives him/her due respect that his/her complaint will be duly heard. The right empowers consumers to fearlessly voice their concerns and seek justice in case they are exploited.

Right to Consumer Education

Consumers must be ***aware*** of their rights and must have access to enough information while making consumption decisions. Such information can help them to choose what to purchase, how much to purchase and at what price. Many consumers in India are not even aware that they are protected by the Act. Unless they know, they cannot seek justice when they are actually hurt or exploited.

Consumer Forums

Consumer forums or **consumer protection councils** are organizations that help represent consumer interests. They guide consumers in the process of filing complaints in the court when they are exploited and also help in spreading consumer protection awareness.

A consumer court is where the cases are actually presented and heard. It follows a three-tier quasi-judicial system. District courts deal with cases up to 20 lakhs. A state-level court deals with cases between 20 lakhs and 1 crore, while a national consumer court deals with claims that exceed the value of 1 crore.

Consumer Protection Councils

The Central Consumer Protection Council

(1) The Central Government ***shall***, by notification, establish with effect from such date as it may specify in such notification, a Council to be known as the Central Consumer Protection Council (hereinafter referred to as the Central Council).

(2) The Central Council shall consist of the following members, namely:

(a) the Minister in charge of the consumer affairs in the Central Government, who shall be its Chairman, and

(b) such number of other official or non-official members representing such interests as may be prescribed.

Procedure for meetings of the Central Council

(1) The Central Council shall meet as and when necessary, but at least one meeting of the Council shall be held every year.

(2) The Central Council shall meet at such time and place as the Chairman may think fit and shall observe such procedure in regard to the transaction of its business as may be prescribed.

Objects of the Central Council

The objects of the Central Council shall be to promote and protect the rights of the consumers such as,

(a) The right to be protected against the marketing of goods and services which are hazardous to life and property;

(b) The right to be informed about the quality, quantity, potency, purity, standard and price of goods or services, as the case may be so as to protect the consumer against unfair trade practices;

(c) The right to be assured, wherever possible, access to a variety of goods and services at competitive prices;

(d) The right to be heard and to be assured that consumer's interests will receive due consideration at appropriate forums;

(e) The right to seek redressal against unfair trade practices or restrictive trade practices or unscrupulous exploitation of consumers; and

(f) The right to consumer education.

The State Consumer Protection Councils:

(1) The State Government shall, by notification, establish with effect from such date as it may specify in such notification, a Council to be known as the Consumer Protection Council for.....(hereinafter referred to as the State Council).

(2) The State Council shall consist of the following members, namely:

(a) The Minister incharge of consumer affairs in the State Government who shall be its Chairman;

(b) Such number of other official or non-official members representing such interests as may be prescribed by the State Government.

(c) Such number of other official or non-official members, not exceeding ten, as may be nominated by the Central Government.

(3) The State Council shall meet as and when necessary but not less than two meetings shall be held every year.

(4) The State Council shall meet at such time and place as the Chairman may think fit and shall observe such procedure in regard to the transaction of its business as may be prescribed by the State Government.

Objects of the State Council

The objects of every State Council shall be to promote and protect within the State the rights of the consumers laid down in clauses (a) to (f) of section 6.

(1) The State Government shall establish for every district, by notification, a council to be known as the District Consumer Protection Council with effect from such date as it may specify in such notification.

(2) The District Consumer Protection Council (hereinafter referred to as the District Council) shall consist of the following members, namely:

(a) The Collector of the district (by whatever name called), who shall be its Chairman; and

(b) Such number of other official and non-official members representing such interests as may be prescribed by the State Government.

(3) The District Council shall meet as and when necessary but not less than two meetings shall be held every year.

(4) The District Council shall meet at such time and place within the district as the Chairman may think fit and shall observe such procedure in regard to the transaction of its business as may be prescribed by the State Government.

The objects of every District Council shall be to promote and protect within the district the rights of the consumers laid down in clauses (a) to (f) of section 6.

Redressal Machinery

Consumers play a key role in maintaining the economy of India. Each and every person constitutes a consumer because each one of us is engaged in some form of exchange of goods or services through money as a medium. Gradually, there arise many kinds of disputes among the consumers as well as consumers and the sellers. In this context, it has to be stated that there lies a need for a statute which regulates the friction between the consumers and the sellers. For this purpose, Consumer Protection Act was enacted in the year 1986 to look after the various rights and duties of the consumers during the time of purchasing a product and even after that. The Act plays an important role in the fields where there arises an incidence of exchange of goods or services between two persons where money acts as a medium. The Act also provides certain guidelines as to what measures must be complied with during the time of such exchange, what are the various rights available to both the buyer and seller etc. It also provides certain provisions regarding the need and formulation of various 'Consumer Redressal Centres' both at the central as well as states level.

The Act lays down certain provisions regarding the definition of consumer, various consumer protection councils, and provisions in connection with various consumer redressal agencies in India as well as other miscellaneous provisions. Among this, provisions relating to consumer redressal agencies demand a lot of attention in the present Indian scenario. Many people are still not aware that there are such agencies working in favor of consumers in every district. Due to this reason, many of them are not getting proper solutions for their problems as consumers. Chapter III of the Act provides for the implementation of redressal agencies. The Consumer Protection Act, 1986 Section 9 provides for 'establishment of consumer dispute redressal agencies' and set up a three-tier system of consumer courts at the district, state and national levels. This lead to the formation of such as

- A District forum established by the State Government in each district of the State by its notification.
- A State Commission established by the State Government in each state by its notification and
- A National Commission established by Central Government by notification

Consumer grievances and complaints against traders are checked at these three levels. Also they provide relief and compensation to the affected consumers. Currently, there are more than 500 district courts functioning in the three tier system of India.

District Forum

Each District Forum shall consist of a person who is or has been qualified as a District judge, as the President. There must be two other persons who are not less than thirty-five years of age and also possesses a degree from a recognized university. The persons must have adequate knowledge in the field of economics, commerce, industry, public affairs, and administration. The district forum must have the jurisdiction to entertain such complaints where the value of goods or services and the compensation, does not exceed Rs. twenty lakhs. The need for district forums for consumer redressal is that majority of the people who face any consumer rights violation are unable to file a complaint in a state or national forum because such f have to look at matters concerning various other district forums which result in a large number of pending cases. District forums are also enabled with a faster way of dispensing consumer redressal as the amount of claim is pretty less than that of State/National redressal forums which enables normal people to seek a solution for their problems.

State Commission

Each State Commission shall consist of a person who is or has been a judge of High Court as its president. The Commission also consists of not less than two members, who are above thirty-five years of age and also possesses a degree from a recognized university. The persons must have adequate knowledge in the field of economics, commerce, industry, public affairs, and administration. The Act also states that not less than fifty percent of the members shall be from amongst the persons having a judicial background. The State Commission has a jurisdiction to entertain cases where the value of goods or services or the compensation claimed, if any, exceeds the number of Rs. twenty lakhs but does not exceed Rs. one crore. It also entertains appeals against any District Forum within the state and also looks after any pending disputes or cases decided by any of the District forums in which the forums have exercised a jurisdiction not vested in them by the law, or has been exercised illegally or with any material irregularity.

National Commission

The National Commission shall consist of a person, who is or has been a judge of the Supreme Court, to be appointed by the Central Government, shall be the President, provided that no appointment shall be made except after the consultation with the Chief Justice of India. The commission shall consist of not less than four members of its executive committee who shall not be less than thirty-five years of age and must be graduates from a recognized university. They must also be specialized in the areas of commerce, economics, and administration. The jurisdiction of the commission shall extend to any case where the compensation amount might exceed Rs. one crore and the Commission shall also entertain appeals against State Commissions. The Commission also has the power to check any pending disputes or cases decided by any of the State Commissions where the State Commission has exercised a jurisdiction not vested in it by law or it has been exercised illegally or with any material irregularity.

Power of Redressal Forums

There are various powers for all of the redressal forums with regards to its jurisdiction. Some of them include:

1. Examining, enforcing as well as summoning the witness on oath;
2. Discovering and producing any material evidence;
3. Receiving evidence on affidavit;
4. Requesting for report or test analysis from the concerned authorities and laboratories;
5. Issuing commission for examining the witness;
6. Enforcing any other powers prescribed by the Central or State Government.

Limitation period

The District, State or National Forum for consumer grievance redressal will not entertain a case which is filed two years after the occurrence of the case unless the party/parties can condone themselves regarding the reasons behind the delay of filing within the specified period. Such a provision was formulated to increase the accuracy of the function of such forums and also for delivering fast redressal solutions to the parties.[1]

How to file a Consumer Complaint in India?

We are all **consumers of goods and services** in one way or the other. The moment we take birth on this earth we become consumers and are entitled to seek relief under the Consumer Protection Act. These days we see that consumers are cheated and harassed in many ways. At times they are provided with inferior quality of goods, at times with less quantity than actually demanded whereas at other times the consumer is charged with excess prices than otherwise fixed for the commodity. The traders considers consumers as persons who are morons having paying capacity and can try to deceive them in every possible way.

Therefore there was a strong need felt to protect the consumers.

Although we have some laws which protect the consumers to some extent which are listed as follows:

- *The Indian Contract Act, 1872*
- *Sale of Goods Act, 1936*
- *The Food Safety and Standards Act, 2006*
- *Standards of Weights and Measures Act, 1976*
- *The Dangerous Drugs Act, 1952*
- *The Agricultural Produce (Grading and Making) Act, 1937*
- *The Indian Standards Institution (Certification Mark) Act , 1952 etc.*

But these laws involve the filing of a civil suit which is very expensive and time consuming and takes years in final disposal of the case.

So a need was felt that a Special Act should be enacted for Consumers which will provide speedy and simple access to justice for the Consumers. The legislature did not want the technicalities of law to be involved in an act which provides relief to the Consumers. Therefore Consumer Protection Act, 1986 was passed keeping in view the need to protect Consumers.

Now the question arises as to **Who Can File A Consumer Complaint?**

The answer to this question is **"only a CONSUMER" can file a complaint under the Act. Now we first need to identify as to Who Is A Consumer?**

A person has to satisfy the following conditions in order to be a CONSUMER:

- The person must have purchased goods for some value i.e. he must have paid money
- A person who has not himself purchased the goods but who uses the goods with the approval of the buyer is also a consumer
- A person must not have bought goods for resale or commercial purpose. But a person buying goods for self employment is a consumer.

Who file a Consumer Complaint in India ?

The Consumer Protection Act itself provides a list of persons who can file a complaint under the Act which is described hereunder

1. Firstly a Consumer
2. Secondly, Any voluntary Association Registered under the Companies Act, 1956, or under any other law for the time being in force
3. Thirdly the Central government or the State Government
4. Fourthly one or more consumers, where there are numerous Consumers having the same interest.

Conclusion

From various landmark judgments by the Supreme Court in connection with cases affecting consumer rights, it will be clear that there is an increase in the number of cases involving consumer protection when compared to the past. It indicates that people are now aware of their various rights as consumers. The Act not only covers the rights of the consumers but also provides certain duties for them too. It has been stated that it is the duty of a consumer to ask clearly about various characteristics and features of the product which he/she wishes to buy. The Act does not entertain certain malicious acts such as black marketing and selling a good above the prescribed rate of MRP. The doctrine of 'caveat venditor' (let the seller beware) has been changed into 'caveat emptor' (let the purchaser beware) so that the purchaser will also be aware of various features, merits and demerits of the good as well as protection of their rights themselves. There is still an emerging need of various other redressal machineries in this field due to the increased number of pending cases as well as for implementing alternative means in the field of consumer protection. The Act may be amended in such a way that it includes certain dispute redressal mechanisms like 'Alternative Disputes Resolution' as a core function of the said redressal agencies dealing with consumer rights.

Information Technology Act, 2000

The Government of India enacted the Information Technology (I.T.) Act with some major objectives to deliver and facilitate lawful electronic, digital, and online transactions, and mitigate cyber-crimes.

Salient Features of I.T Act

The salient features of the I.T Act are as follows

- Digital signature has been replaced with electronic signature to make it a more technology neutral act.
- It elaborates on offenses, penalties, and breaches.
- It outlines the Justice Dispensation Systems for cyber-crimes.
- It defines in a new section that *cyber café is any facility from where the access to the internet is offered by any person in the ordinary course of business to the members of the public*.
- It provides for the constitution of the Cyber Regulations Advisory Committee.
- It is based on The Indian Penal Code, 1860, The Indian Evidence Act, 1872, The Bankers' Books Evidence Act, 1891, The Reserve Bank of India Act, 1934, etc.
- It adds a provision to Section 81, which states that the provisions of the Act shall have overriding effect. The provision states that *nothing contained in the Act shall restrict any person from exercising any right conferred under the Copyright Act, 1957*.

Scheme of I.T Act

The following points define the scheme of the I.T. Act

- The I.T. Act contains **13 chapters** and **90 sections**.
- The last four sections namely sections 91 to 94 in the I.T. Act 2000 deals with the amendments to the Indian Penal Code 1860, The Indian Evidence Act 1872, The Bankers' Books Evidence Act 1891 and the Reserve Bank of India Act 1934 were deleted.
- It commences with Preliminary aspect in Chapter 1, which deals with the short, title, extent, commencement and application of the Act in Section 1. Section 2 provides Definition.

- Chapter 2 deals with the authentication of electronic records, digital signatures, electronic signatures, etc.
- Chapter 11 deals with offences and penalties. A series of offences have been provided along with punishment in this part of The Act.
- Thereafter the provisions about due diligence, role of intermediaries and some miscellaneous provisions are been stated.
- The Act is embedded with two schedules. The First Schedule deals with Documents or Transactions to which the Act shall not apply. The Second Schedule deals with electronic signature or electronic authentication technique and procedure. The Third and Fourth Schedule are omitted.

Application of the I.T Act

As per the sub clause (4) of Section 1, *nothing in this Act shall apply to documents or transactions specified in First Schedule*. Following are the documents or transactions to which the Act shall not apply −

- ✓ **Negotiable Instrument** (Other than a cheque) as defined in section 13 of the Negotiable Instruments Act, 1881;
- ✓ A **power-of-attorney** as defined in section 1A of the Powers-of-Attorney Act, 1882;
- ✓ A **trust** as defined in section 3 of the Indian Trusts Act, 1882;
- ✓ A **will** as defined in clause (h) of section 2 of the Indian Succession Act, 1925 including any other testamentary disposition;
- ✓ Any **contract** for the sale or conveyance of immovable property or any interest in such property;
- ✓ Any such class of documents or transactions as may be notified by the Central Government.

Amendments Brought in the I.T Act

The I.T. Act has brought amendment in four statutes vide section 91-94. These changes have been provided in schedule 1-4.

- ❖ The first schedule contains the amendments in the Penal Code. *It has widened the scope of the term "document" to bring within its ambit electronic documents*.
- ❖ The second schedule deals with amendments to the India Evidence Act. *It pertains to the inclusion of electronic document in the definition of evidence*.
- ❖ The third schedule amends the Banker's Books Evidence Act. *This amendment brings about change in the definition of "Banker's-book". It includes printouts of data stored in a floppy, disc, tape or any other form of electromagnetic data storage device. Similar change has been brought about in the expression "Certified-copy" to include such printouts within its purview*.
- ❖ The fourth schedule amends the Reserve Bank of India Act. *It pertains to the regulation of fund transfer through electronic means between the banks or between the banks and other financial institution*.

Intermediary Liability

Intermediary, dealing with any specific electronic records, is a person who on behalf of another person accepts stores or transmits that record or provides any service with respect to that record.

According to the above mentioned definition, it includes the following −

- Telecom service providers
- Network service providers
- Internet service providers
- Web-hosting service providers

- Search engines
- Online payment sites
- Online auction sites
- Online market places and cyber cafes

Highlights of the Amended Act

The newly amended act came with following highlights −

- It stresses on privacy issues and highlights information security.
- It elaborates Digital Signature.
- It clarifies rational security practices for corporate.
- It focuses on the role of Intermediaries.
- New faces of Cyber Crime were added.

Digital Signature

A digital signature is a technique to validate the legitimacy of a digital message or a document. A valid digital signature provides the surety to the recipient that the message was generated by a known sender, such that the sender cannot deny having sent the message. Digital signatures are mostly used for software distribution, financial transactions, and in other cases where there is a risk of forgery.

Electronic Signature

An electronic signature or e-signature indicates either that a person who demands to have created a message is the one who created it.

A signature can be defined as a schematic script related with a person. A signature on a document is a sign that the person accepts the purposes recorded in the document. In many engineering companies digital seals are also required for another layer of authentication and security. Digital seals and signatures are same as handwritten signatures and stamped seals.

Digital Signature to Electronic Signature

Digital Signature was the term defined in the old I.T. Act, 2000. **Electronic Signature** is the term defined by the amended act (I.T. Act, 2008). The concept of Electronic Signature is broader than Digital Signature. Section 3 of the Act delivers for the verification of Electronic Records by affixing Digital Signature.

As per the amendment, verification of electronic record by electronic signature or electronic authentication technique shall be considered reliable.

According to the **United Nations Commission on International Trade Law (UNCITRAL),** electronic authentication and signature methods may be classified into the following categories −

- Those based on the knowledge of the user or the recipient, i.e., passwords, personal identification numbers (PINs), etc.
- Those bases on the physical features of the user, i.e., biometrics.
- Those based on the possession of an object by the user, i.e., codes or other information stored on a magnetic card.
- Types of authentication and signature methods that, without falling under any of the above categories might also be used to indicate the originator of an electronic communication (Such as a facsimile of a handwritten signature, or a name typed at the bottom of an electronic message).

According to the UNCITRAL MODEL LAW on Electronic Signatures, the following technologies are presently in use –

- ✓ Digital Signature within a public key infrastructure (PKI)
- ✓ Biometric Device
- ✓ PINs
- ✓ Passwords
- ✓ Scanned handwritten signature
- ✓ Signature by Digital Pen
- ✓ Clickable "OK" or "I Accept" or "I Agree" click boxes

Offences & Penalties

The faster world-wide connectivity has developed numerous online crimes and these increased offences led to the need of laws for protection. In order to keep in stride with the changing generation, the Indian Parliament passed the Information Technology Act 2000 that has been conceptualized on the United Nations Commissions on International Trade Law (UNCITRAL) Model Law.

The law defines the offenses in a detailed manner along with the penalties for each category of offence.

Offences

Cyber offences are the illegitimate actions, which are carried out in a classy manner where either the computer is the tool or target or both.

Cyber-crime usually includes the following −

- ➢ Unauthorized access of the computers
- ➢ Data diddling
- ➢ Virus/worms attack
- ➢ Theft of computer system
- ➢ Hacking
- ➢ Denial of attacks
- ➢ Logic bombs
- ➢ Trojan attacks
- ➢ Internet time theft
- ➢ Web jacking
- ➢ Email bombing
- ➢ Salami attacks
- ➢ Physically damaging computer system.

The offences included in the I.T. Act 2000 are as follows –

- ✓ Tampering with the computer source documents.
- ✓ Hacking with computer system.
- ✓ Publishing of information which is obscene in electronic form.
- ✓ Power of Controller to give directions.
- ✓ Directions of Controller to a subscriber to extend facilities to decrypt information.
- ✓ Protected system.
- ✓ Penalty for misrepresentation.
- ✓ Penalty for breach of confidentiality and privacy.
- ✓ Penalty for publishing Digital Signature Certificate false in certain particulars.
- ✓ Publication for fraudulent purpose.
- ✓ Act to apply for offence or contravention committed outside India Confiscation.
- ✓ Penalties or confiscation not to interfere with other punishments.
- ✓ Power to investigate offences.

Example

Offences under the Information Technology Act 2000 Section 65, Tempering with computer source documents

Whoever knowingly or intentionally conceals, destroys or alters or intentionally or knowingly cau7ses another to conceal, destroy or alter any computer source code used for computer, computer program, computer system or computer network, when the computer source code is required to be kept or maintained by law for the being time in force, shall be punishable with imprisonment up to three year, or wit6h fine which may extend up to two lakh rupees, or with both.

Explanation – For the purpose of this section "computer source code" means the listing of programs, computer commands, design and layout and program analysis of computer resource in any form.

Object – the object of the section is to protect the "intellectual property" invested in the computer. It is an attempt to protect the compute source documents (codes) beyond what is available under the copyright Law.

Essential ingredients of the section

Knowingly or intentionally concealing

Knowingly or intentionally destroying

Knowingly or intentionally altering

Knowingly or intentionally causing others to conceal

Knowingly or intentionally causing another destroy

Knowingly or intentionally causing another to alter

This section extends towards the Copyright Act and helps the companies to protect their source code or their programs.

Penalties – section 65 is tried by any magistrate.

This is cognizable and non - bailable offence.

Penalties – Imprisonment up to 3 years and/or

Fine – Two lakh rupees.

The following table shows the offence and penalties against all the mentioned section of the I.T. Act-

Section	Offence	Punishment	Bailability and Cognizanability
65	Tampering with Computer Source Code	Imprisonment up to 3 years or fine up to Rs 2 lakhs	Offence is Bailable, Cognizable and triable by Court of JMFC.
66	Computer Related Offences	Imprisonment up to 3 years or fine up to Rs 5 lakhs	Offence is Bailable, Cognizable and
66-A	Sending offensive messages through Communication service, etc...	Imprisonment up to 3 years and fine	Offence is Bailable, Cognizable and triable by Court of JMFC
66-B	Dishonestly receiving stolen computer resource or communication device	Imprisonment up to 3 years and/or fine up to Rs. 1 lakh	Offence is Bailable, Cognizable and triable by Court of JMFC
66-C	Identity Theft	Imprisonment of either description up to 3 years	Offence is Bailable, Cognizable and triable by

		and/or fine up to Rs. 1 lakh	Court of JMFC
66-D	Cheating by Personation by using computer resource	Imprisonment of either description up to 3 years and /or fine up to Rs. 1 lakh	Offence is Bailable, Cognizable and triable by Court of JMFC
66-E	Violation of Privacy	Imprisonment up to 3 years and /or fine up to Rs. 2 lakh	Offence is Bailable, Cognizable and triable by Court of JMFC
66-F	Cyber Terrorism	Imprisonment extend to imprisonment for Life	Offence is Non-Bailable, Cognizable and triable by Court of Sessions
67	Publishing or transmitting obscene material in electronic form	On first Conviction, imprisonment up to 3 years and/or fine up to Rs. 5 lakh On Subsequent Conviction imprisonment up to 5 years and/or fine up to Rs. 10 lakh	Offence is Bailable, Cognizable and triable by Court of JMFC
67-A	Publishing or transmitting of material containing sexually explicit act, etc... in electronic form	On first Conviction imprisonment up to 5 years and/or fine up to Rs. 10 lakh On Subsequent Conviction imprisonment up to 7 years and/or fine up to Rs. 10 lakh	Offence is Non-Bailable, Cognizable and triable by Court of JMFC
67-B	Publishing or transmitting of material depicting children in sexually explicit act etc., in electronic form	On first Conviction imprisonment of either description up to 5 years and/or fine up to Rs. 10 lakh On Subsequent Conviction imprisonment of either description up to 7 years and/or fine up to Rs. 10 lakh	Offence is Non Bailable, Cognizable and triable by Court of JMFC
67-C	Intermediary intentionally or knowingly contravening the directions about Preservation and retention of information	Imprisonment up to 3 years and fine	Offence is Bailable, Cognizable.
68	Failure to comply with the directions given by Controller	Imprisonment up to 2 years and/or fine up to Rs. 1 lakh	Offence is Bailable, Non-Cognizable.
69	Failure to assist the agency referred to in sub section (3) in regard interception or monitoring or decryption of any information through any	Imprisonment up to 7 years and fine	Offence is Non-Bailable, Cognizable.

	computer resource		
69-A	Failure of the intermediary to comply with the direction issued for blocking for public access of any information through any computer resource	Imprisonment up to 7 years and fine	Offence is Non-Bailable, Cognizable.
69-B	Intermediary who intentionally or knowingly contravenes the provisions of sub-section (2) in regard monitor and collect traffic data or information through any computer resource for cyber security	Imprisonment up to 3 years and fine	Offence is Bailable, Cognizable.
70	Any person who secures access or attempts to secure access to the protected system in contravention of provision of Sec. 70	Imprisonment of either description up to 10 years and fine	Offence is Non-Bailable, Cognizable.
70-B	Indian Computer Emergency Response Team to serve as national agency for incident response. Any service provider, intermediaries, data centers, etc., who fails to prove the information called for or comply with the direction issued by the ICERT.	Imprisonment up to 1 year and/or fine up to Rs. 1 lakh	Offence is Bailable, Non-Cognizable
71	Misrepresentation to the Controller to the Certifying Authority	Imprisonment up to 2 years and/ or fine up to Rs. 1 lakh.	Offence is Bailable, Non-Cognizable.
72	Breach of Confidentiality and privacy	Imprisonment up to 2 years and/or fine up to Rs. 1 lakh.	Offence is Bailable, Non-Cognizable.
72-A	Disclosure of information in breach of lawful contract	Imprisonment up to 3 years and/or fine up to Rs. 5 lakh.	Offence is Cognizable, Bailable
73	Publishing electronic Signature Certificate false in certain particulars	Imprisonment up to 2 years and/or fine up to Rs. 1 lakh	Offence is Bailable, Non-Cognizable.
74	Publication for fraudulent purpose	Imprisonment up to 2 years and/or fine up to Rs. 1 lakh	Offence is Bailable, Non-Cognizable.

Cyber Law in India

In Simple way we can say that cyber crime is unlawful acts wherein the computer is either a tool or a target or both.

Cyber crimes can involve criminal activities that that are traditional in nature, such as theft, fraud, forgery, defamation and mischief, all of which are subject to the Indian Penal Code. The abuse of computers has also given birth to a gamut of new age crimes that are addressed by the Information Technology Act, 2000

Cybercrime refers to all the activities done with criminal intent in cyberspace. Because of the anonymous nature of the internet, miscreants engage in a variety of criminal activities. The field of cybercrime is just emerging and new forms of criminal activities in cyberspace are coming to the forefront with each passing day.

Cybercrimes can be basically divided into three major categories −

- Cybercrimes against persons,
- Cybercrimes against property, and
- Cybercrimes against Government.

Cybercrimes committed against persons include various crimes like transmission of child pornography, harassment using e-mails and cyber-stalking. Posting and distributing obscene material is one of the most important Cybercrimes known today.

Cybercrimes against all forms of property include unauthorized computer trespassing through cyberspace, computer vandalism, transmission of harmful programs, and unauthorized possession of computerized information.

Cyber Terrorism is one distinct example of cybercrime against government. The growth of Internet has shown that the medium of cyberspace is being used by individuals and groups to threaten the governments as also to terrorize the citizens of a country. This crime manifests itself into terrorism when an individual hacks into a government or military maintained website.

We can categorize Cyber crimes in two ways:

The Computer as a Target: using a computer to attack other computers.

e.g. Hacking, Virus/Worm attacks, DOS attack etc.

The computer as a weapon: using a computer to commit real world crimes.

e.g. Cyber Terrorism, IPR violations, Credit card frauds, EFT frauds, Pornography etc.

Cyber Crime regulated by Cyber Laws or Internet Laws:

Technical Aspects

Technological advancements have created new possibilities for criminal activity, in particular the criminal misuse of information technologies such as

a. Unauthorized access & Hacking:

Access means gaining entry into, instructing or communicating with the logical, arithmetical, or memory function resources of a computer, computer system or computer network.

Unauthorized access would therefore mean any kind of access without the permission of either the rightful owner or the person in charge of a computer, computer system or computer network.

Every act committed towards breaking into a computer and/or network is hacking. Hackers write or use ready-made computer programs to attack the target computer. They possess the desire to destruct and they get the kick out of such destruction. Some hackers hack for personal monetary gains, such as to stealing the credit card information, transferring money from various bank accounts to their own account followed by withdrawal of money. By hacking web server taking control on another persons' website called as web hijacking

b. Trojan Attack:

The program that act like something useful but do the things that are quiet damping. The programs of this kind are called as Trojans. The name Trojan Horse is popular.

Trojans come in two parts, a Client part and a Server part. When the victim (unknowingly) runs the server on its machine, the attacker will then use the Client to connect to the Server and start using the Trojan.

TCP/IP protocol is the usual protocol type used for communications, but some functions of the Trojans use the UDP protocol as well.

c. Virus and Worm attack:

A program that has capability to infect other programs and make copies of itself and spread into other programs is called virus.

Programs that multiply like viruses but spread from computer to computer are called as worms.

d. E-mail & IRC related crimes:

1. ***Email spoofing:***
   Email spoofing refers to email that appears to have been originated from one source when it was actually sent from another source. Please Read
2. ***Email Spamming:***
   Email "spamming" refers to sending email to thousands and thousands of users - similar to a chain letter.
3. ***Sending malicious codes through email:***
   E-mails are used to send viruses, Trojans etc through emails as an attachment or by sending a link of website which on visiting downloads malicious code.
4. ***Email bombing:***
   E-mail "bombing" is characterized by abusers repeatedly sending an identical email message to a particular address.
5. ***Sending threatening emails***
6. ***Defamatory emails***
7. ***Email frauds***
8. ***IRC related***
   Three main ways to attack IRC are: attacks, clone attacks, and flood attacks.

e. Denial of Service attacks:

Flooding a computer resource with more requests than it can handle. This causes the resource to crash thereby denying access of service to authorized users.

Examples include

attempts to "flood" a network, thereby preventing legitimate network traffic

attempts to disrupt connections between two machines, thereby preventing access to a service

attempts to prevent a particular individual from accessing a service

attempts to disrupt service to a specific system or person.

What is Vishing?

A. Vishing is the criminal practice of using social influence over the telephone system, most often using features facilitated by Voice over IP (VoIP), to gain access to sensitive information such as credit card details from the public. The term is a combination of "Voice" and phishing.

What is Mail Fraud?

Mail fraud is an offense under United States federal law, which includes any scheme that attempts to unlawfully obtain money or valuables in which the postal system is used at any point in the commission of a criminal offense.

What is ID Spoofing?

It is the practice of using the telephone network to display a number on the recipient's Caller ID display which is not that of the actual originating station.

What is Cyber espionage?

It is the act or practice of obtaining secrets from individuals, competitors, rivals, groups, governments, and enemies for military, political, or economic advantage using illegal exploitation methods on the internet.

What is the meaning of Sabotage?

Sabotage literally means willful damage to any machinery or materials or disruption of work. In the context of cyberspace, it is a threat to the existence of computers and satellites used by military activities

Name the democratic country in which The Cyber Defamation law was first introduced.

A. South Korea is the first democratic country in which this law was introduced first.

What are Bots?

A. Bots are one of the most sophisticated types of crime-ware facing the internet today. Bots earn their unique name by performing a wide variety of automated tasks on behalf of the cyber criminals. They play a part in "denial of service" attack in internet.

What are Trojans and Spyware?

Trojans and spyware are the tools a cyber-criminal might use to obtain unauthorized access and steal information from a victim as part of an attack.

What are Phishing and Pharming?

Phishing and Pharming are the most common ways to perform identity theft which is a form of cyber-crime in which criminals use the internet to steal personal information from others.

Preventing Cyber crimes

Cybercrime is considered one the most dangerous threats for the development of any state; it has a serious impact on every aspect of the growth of a country. Government entities, non-profit organizations, private companies and citizens are all potential targets of the cyber criminal syndicate.

The “cybercrime industry” operates exactly as legitimate businesses working on a global scale, with security researchers estimating the overall amount of losses to be quantified in the order of billions of dollars each year. In respect to other sectors, it has the capability to quickly react to new business opportunities, benefiting from the global crisis that – in many contexts – caused a significant reduction in spending on information security.

The prevention of cyber criminal activities is the most critical aspect in the fight against cybercrime. It’s mainly based on the concepts of awareness and information sharing. A proper security posture is the best defense against cybercrime. Every single user of technology must be aware of the risks of exposure to cyber threats, and should be educated about the best practices to adopt in order to reduce their “attack surface” and mitigate the risks.

Education and training are essential to create a culture of security that assumes a fundamental role in the workplace. Every member of an organization must be involved in the definition and deployment of a security policy and must be informed on the tactics, techniques and procedures (TTPs) belonging to the cyber criminal ecosystem.

Prevention means to secure every single resource involved in the business processes, including personnel and IT infrastructure. Every digital asset and network component must be examined through a continuous and an evolving assessment. Government entities and private companies must cooperate to identify the cyber threats and their actions—a challenging task that could be achieved through the information sharing between law enforcement, intelligence agencies and private industry.

Fortunately, like any other phenomenon, criminal activities can be characterized by specific patterns following trends, more or less strictly. Based on this consideration, it is possible to adopt an efficient prevention strategy, implementing processes of threat intelligence analysis.

Security must be addressed with a layered approach, ranging from the "security by design" in the design of any digital asset, to the use of a sophisticated predictive system for the elaboration of forecasts on criminal events.

Additionally, sharing threat information is another fundamental pillar for prevention, allowing organizations and private users to access data related to the cyber menaces and to the threat actors behind them.

At the last INTERPOL-Europol conference, security experts and law enforcement officers highlighted the four fundamentals in combating cybercrime as:

1. Prevention
2. Information Exchange
3. Investigation
4. Capacity Building

Prevention activities must be integrated by an effective incident response activity and by a recovery strategy to mitigate the effects of cyber incidents.

Once an event is occurring, it is crucial to restore the operation of the affected organization and IT systems. Recovery from cybercrime is composed of the overall activities associated with repairing and remediation of the impacted systems and processes. Typically, recovery includes the restoration of damaged/compromised data and any other IT assets.

An effective incident response procedure includes the following steps:

- **Identification** of the threat agent which hit the infrastructure.
- **Containment** of the threat, preventing it from moving laterally within the targeted infrastructure.
- **Forensic investigation** to identify the affected systems and the way the threat agent has penetrated the computer system.
- **Remediate/Recover** by restoring IT infrastructure back online and in production once forensics investigations are complete.
- **Report and share threat data** to higher management and share the data on the incident through dedicated platforms that allow rapid sharing of threat data with law enforcement and other companies.

Cybercrime Prevention Tips

1. Stay Updated

One of the easiest things you can do is keep your operating system and browser updated. Installing security patches helps protect you from these flaws. Luckily, Windows and most browsers have settings to update automatically, so you don't have to do anything other than stay protected.

2. Use Strong, Unique Passwords

Cybercrime prevention starts with using strong passwords. According to a report by Verizon, 63% of data breaches were the result of weak or stolen passwords. Just by using stronger passwords, many breaches could be prevented. It's also important to use unique passwords on every site and avoid social login to prevent hackers from getting your login information once and using it everywhere.

Consider using password managers to help you keep track of your passwords. You can also use special techniques, such as a password made from the first or second letter of every word in a sentence.

3. Always Use an Updated Antivirus

Your antivirus is only as good as its last virus definition update. Antivirus has to update often to protect you from current threats. With cybercrime on the rise, new threats emerge daily. Allow your antivirus to automatically update both the core program and virus definitions.

4. Lock Down Windows

Windows has built-in security features, such as requiring a password to access a locked computer. You should always lock your computer when it's not in use, especially in public. Remember to use a strong password for your computer to prevent unauthorized access.

5. Look for HTTPS

Always look for HTTPS in the address bar of your browser when visiting any sites where you'll provide personal or financial details, such as shopping and banking sites. This identifies that the website is using a security certificate the encrypts the data sent between you and the site.

Most browsers provide details on a site's security certificate to help you determine if a site's legitimate or not. Taking those few extra seconds is just one way to take charge of cybercrime prevention.

6. Avoid Public Wi-Fi

Public Wi-Fi is a playground for hackers. Most data isn't encrypted, so it's easy to pick up credentials as you log in to email, social media, and banking sites. For best results, avoid using public Wi-Fi or use a VPN to protect your data.

7. Skip Emails and Texts You Don't Recognize

Phishing emails, texts, and social media posts are easy to avoid. If something seems odd or you don't recognize the sender, delete or avoid it. Sadly, 30% of phishing emails get opened, leading to identity theft, malware, and ransom ware. Cybercrime prevention means avoiding any messages you don't trust.

If you receive a message from a site you use that tells you that something's wrong with your account, don't click the link in the email. Instead, exit the email and visit the website directly via your browser. If you can't find any issues, contact customer service to explain the email. It's safer and prevents many phishing scams from succeeding.

8. Limit Online Sharing

Cybercriminals can learn intimate details about your life simply by how much you share on social media. They can figure out your passwords, especially those that use important dates or family and pet names in them. They know what sites and apps you use. For best results, limit your sharing. Set your social media profiles to private so only your friends see what you post.

9. Check the Site you're Shopping On

While you might feel safer on major websites, such as Amazon, it's a good idea to protect yourself by looking for warning signs on any site you shop on. Scammers may lure you in only to steal your information. Some signs to watch for include:

- Numerous grammatical mistakes
- Currency listed strangely, such as 100$ versus $100
- Extremely low prices – if it's too good to be true, it probably is
- URLs with hyphens and symbols, such as shop-here-low-prices.com
- No privacy policy
- No HTTPS

If anything feels suspicious, leave the site immediately.

10. Always Monitor Your Accounts

Cybercrime prevention techniques aren't always perfect, but you can limit the damage by monitoring your accounts. Even when you protect yourself, the sites you use may still experience a breach. Keep an eye on your credit card and bank statements and check your credit .If you do spot strange activity, contact your bank or Credit Card Company immediately. They can put a hold on your account to prevent any further charges and may even refund unauthorized charges.

11. Never Provide More Details than Necessary

Some websites ask for your entire life history. Most of this is just for marketing purposes. However, you don't know what the site might do with that information. The only details you should ever need to provide while shopping online is your payment details and your shipping address.

Be wary of any sites that ask you for additional personal details, such as your social security number. Basically, if you don't think a site needs certain information, skip it. If it's required and you don't feel comfortable providing it, move on to another website.

12. Be Careful About Downloading

A common scam is to scare you into downloading an app via a pop-up that says something is wrong with your computer or you need antivirus right now. One of the best cybercrime prevention tips to remember is to never download anything you don't trust. This includes attachments in emails and texts. If you're not expecting an attachment, contact the sender to see if they really did send it or not.

You should also pay close attention to any programs or apps you install. Sometimes these include extra apps that could compromise your computer. You usually have the option to opt-out of the installation for the extras. Or, you choose a different app altogether that doesn't try to sneak any extra software on your computer.