III YEAR – V SEMESTER
COURSE CODE: 7BCS5C1
CORE COURSE – XII – COMMERCIAL LAW

Unit I

Contract – Definition – Nature of contract – Agreement Vs Contract – Classification of contracts – Valid , Void and voidable contracts – Express contract and Implied contract – Executed and executor – unilateral and bilateral – quasi contract.

Unit II

Essential elements of a valid contract – Consensus ad-idem – proposal and acceptance conclusion of contract – lawful consideration – capacity of partners – free consent – mistake misrepresentation – Fraud, coercion and undue influence – Lawful object.

Unit III

Discharge of contract – performance – tender, novation – impossibility – operation of law – breach of contract Assignment, devolution and appropriation.

Unit IV

Remedies for breach of contract – damages and specific performance – special contracts – indemnity and guarantee – rights of surety – discharge of surety – Law of agency.

Unit V

Bailment – duties of bailer and bailee – finder of lost goods – pledge – pawner and pawnee – pledge by non owners – carriage of goods – Common carrier – Duties.

Unit – I

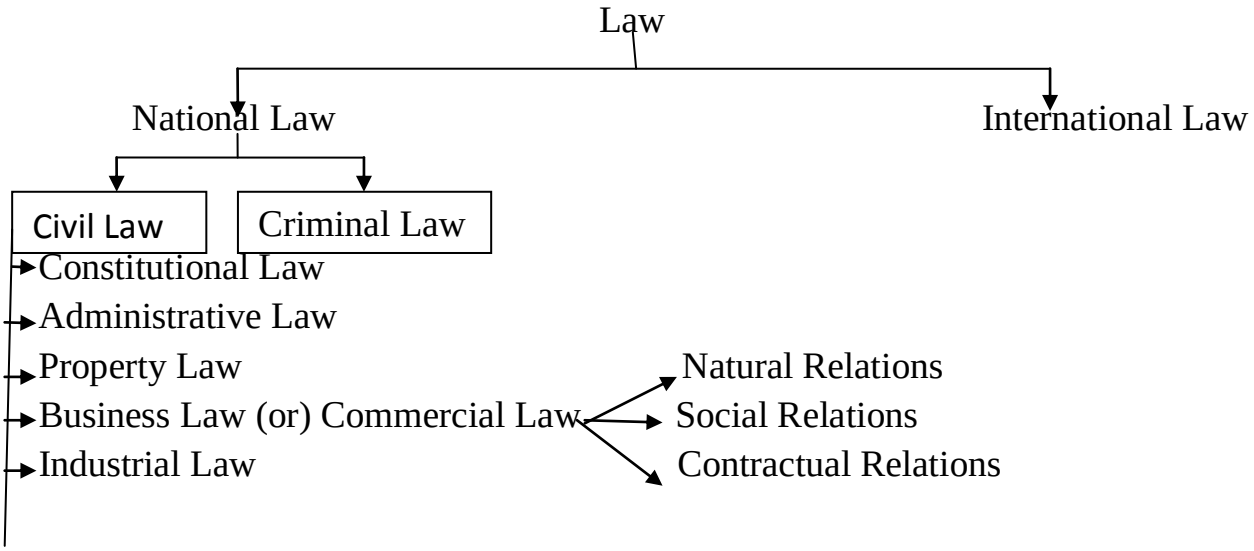
Contract – Definition – Nature of contract – Agreement Vs Contract – Classification of contracts – Valid , Void and voidable contracts – Express contract and Implied contract – Executed and executor – unilateral and bilateral – quasi contract.

Commercial Law

What is Law?

Law is General Rules and Regulations. Which have to be followed by every one. Law is for every one. There is no exemption for any kind of people.

Everybody has to be followed.



Commercial Law/ Mercantile Law

Mercantile Law also known as Commercial Law or Business Law

1. Law and Society are very closely related.
2. Law aims at bringing about and maintaining peace and order in society.
3. The purpose of Law is the Administration of Justice.

The primary purpose of Law is to keep peace in society. In the absence of Law, no person will recognize the rights of others. Life cannot be lived peacefully and business cannot be carried out smoothly. To control all kinds of activities of people. Through a uniform set of rules and principles.

Commercial Law

Commercial Law refers to these rules and regulations with govern the formation and execution of business transactions made by various person in the society.

We should know the minimum rules and regulation of Business principles.

Business Law

1. Indian Contract Act 1872
2. The Negotiable Instrument Act 1881
3. The Sales of Goods Act 1932
4. The Indian partnership Act 1932
5. The essential Commodities Act 1955
6. The Companies Act 1956
7. The Consumer Protection Act 1986

INDIAN CONTRACT ACT 1872

The Law of Contract forms the oldest branch of the Law relating Business transactions.

The Law relating to contract in India is Contained in the Indian Contract Act 1872.

The Act came into force on the first day of September 1872.

What is contract?

An Agreement which creates Legal Obligations is a contract.

The Indian Contract Act 1872.

Under Section 2(h) difines.

"An agreement enforceable by law is a contract"

In other words an agreement which can be enforced in a Court of Law to known as a contract.

Thus a Contract Consists of the Two elements

1. An Agreement
2. The Agreement must be enforceable by law

What is Agreement?

The term agreement is defined in Section 2 (e) of the Indian Contract Act 1872.

"Every promise and every set of promises, forming Consideration for each other is an Agreement."

What is Promise?

Section 2 (b) defines promise as "A proposal when accepted, becomes a promise."

Offer + Acceptance = Agreement.

There are some Agreements which are not enforceable in a law court. Such agreement do not give rise to contractual obligations and are not contracts.

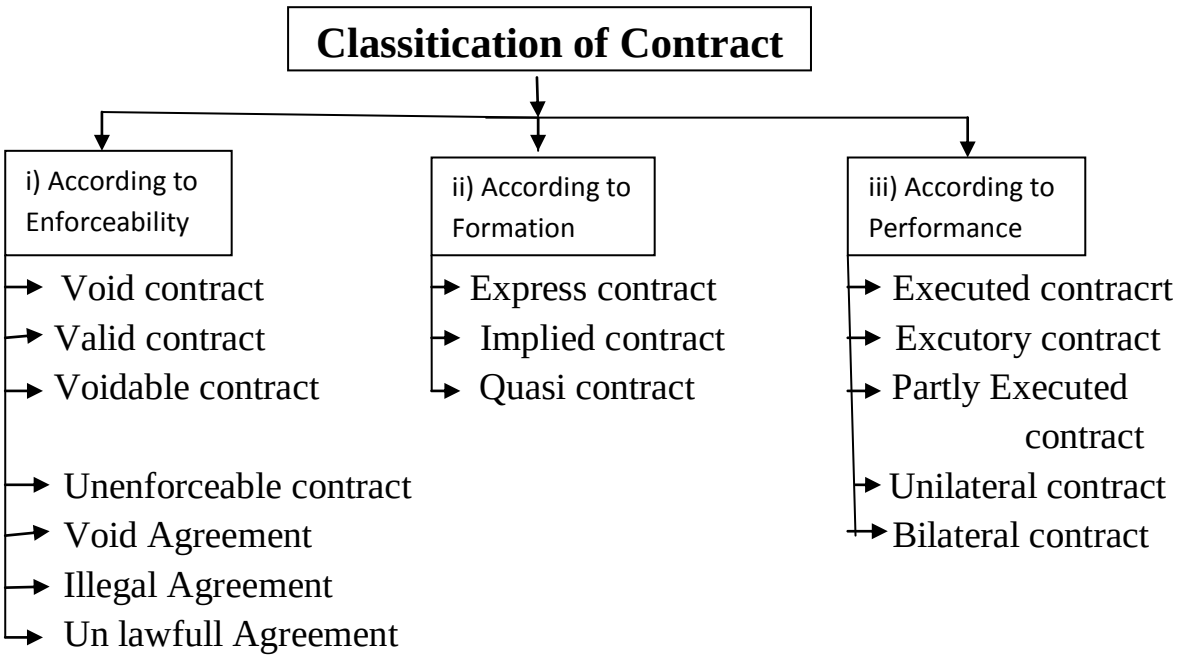
Essential elements of a Valid Contract

1. Minimum Two parties.
2. Offer and Acceptance.
3. Free consent.
4. Legal capacity.
5. Lawful Consideration.
6. Lawful Object.
7. Legal Obligation.
8. Certainty and possibility of performance.
9. The terms and Conditions.
10. Legal formalities.

Distinction between an Agreement and a Contract

An agreement may be distinguished from a Contract as shown below.

Agreement		Contract
1. Agreement + offer = proposal Offer + Acceptance = Agreement		Agreement+ its legal Enforceability = Contract
2. An agreement may create social or legal obligations.		An Contract creates only legal obligations between the parties.
3. All agreements do not become contracts.		All contracts are based on agreements.
4. An agreement usually informal.		Contract a formal arrangement between two or more parties.
5. No consideration required.		Consideration is essential.
6. An agreement does not give legal rights and obligations to the parties.		Contract give rights to the parties.
7. Any promise with a valid consideration is an Agreement.		But is not contract unless enforceable by law.



I. According to enforceability

1. Void contract

A void contract is that which is not enforceable by law section 2 (i) "A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable."

A contract which is enforceable by law at the time it was made. But later on if it becomes legally un enforceable due to some reasons, it is called void contract.

Example:- A promised to marry 'B' Later on B died. In this case the contract becomes void (on the death of 'B')

2. Valid Contract

A contract which satisfies all the legal requirements laid down in section 10 of the Act is known as a valid contract.

A valid contract is an agreement which is binding and enforceable at Law.

3. Voidable contract

Section 2(i) An agreement which is enforceable by Law at the option of one or more of the parties thereon, but not at the option of the other or others in a voidable contract.

Example:- A agreed to sell his car to 'B' for Rs. 50,000/- . The consent was obtained by use of force.

The contract is voidable at the option of A. A can put an end to this contract it he so decides. (cocerion, fraud, misrepresentation, undue influence.)

4. Unenforceable contract:

Sometimes a contract may become unenforceable owing to certain technical defect in it.

Example:- i) Where a party to a written contact has given his/her Signature.

ii) Deficit in Stamp duty.

iii) Not registered.

iv) Not attested etc.

5.Void Agreement:

An Agreement not enforceable by law is said to be void Sec 2(g) a void agreement has to legal effect. It confers no rights on any person and creates no obligations. Such an agreement is without any legal effect.

Ex:- i) An Agreement with a minor(a person whose age is below 18 years).

ii) An Agreement with a person of unsound mind.

iii) An Agreement without consideration.

6) Illegal Agreement:

An Agreement is illegal if the activation of the parties to it.

a) Involve the commission of a crime.
b) Violate basic public policy.
c) Are immoral in nature.

7)Unlawful Agreement:

An Unlawful agreement is one the is not approved by law on some ground of public policy. Such an agreement is void from the very begining. Therefore is not enforceable in restraint in a court of law.

Ex. An agreement in restraint of marriage i.e, an agreement that restricts a person's right to choose his life partner. There is an agreement between

'x' and 'y' by which 'x's daughter will marry 'y's son. Such an agreement in unlawful and, therefore, not enforceable.

Distinction between a Void contract and a Voidable contract:

Void contract	Voidable contract
1. A void contract was valid when it was made. Due to subsequent happenings. It has become void.	1. A voidable contract is valid until it is avoided or rescinded by the affected party. Such a party however, has to avoid it within a reasonable time.
2. Something beyond the control of the party makes a valid contract void. Eg:change of law, destruction of the subject matter etc.	2. A contract in a voidable contract when the element of free consent in missing.
3. A void contract cannot be enforced by either party.	3. A voidable contract is valid until it is avoided by the affected party.
4. The question of a third party acquiring rights does not arise.	4. There is scope for a Third party to acquire rights over what has been obtained under a voidable contract.
5. There is no question of payment of damages(compensation) to anyone under a void contract.	5. The affected party can claim damages.
6. Void contract cannot be performed under the law.	6. While a voidable contract can still be performed.
7. A Void contract cannot confer any rights.	7. A voidable contract confers enforceable till is not essential.

Distinction between unlawful Agreement and an Illegal agreements:

Unlawful Agreements	Illegal Agreements
1. Unlawful agreement in such an agreement where in the agreement is made out without the prescription of Law.	1. Illegal agreement done against Law.
2. Unlawful acts are simply not approved by Law.	2. Illegal act result in the commission of a crime.
3. What is unlawful need not be illegal.	3. What is illegal is always unlawful.
4. As no crime is committed.	4. As an illegal act results in the commission of a crime.
5. The party to the agreement is not awarded punishment.	5. Punishment is awarded.

II. According to formation:

1. Express contract:

An express contract is one that is entered into by the parties by words, spoken or written. Section 9 provides that "In so for as the proposal or acceptance of any promise is made in words the promise is said to express."

An Express promise will result in an express contract when such contract is formed.

There is no difficulty in understanding the rights and obligations of this parties.

Ex. 'M' writes a letter to 'N' that he offers to sell his car for Rs.1,00,000/- and 'N' in reply informs 'M' that he accepts the offer. This is an Express contract. Usually it will be in a written form.

2. Implied Contract:

An implied contract doesnot arise but of express promise by the parties but inferred from their acts or from the circumstances of a particular case.

Section 9 further states "In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied"

Such contract comes into existence on account of the parties.

Ex. 'X' went to restaurant and took a cup of coffee. In this there is an implied contract that he will pay for the cup of coffee, even though he makes no express promise to do so.

3. Quasi contract

These are certain dealings which are not contracts strictly, though the parties act as it there is contract.

Contract is not actually entered into by the parties but in some thing imposed on a party by law.

It is based on the principle that a person shall not be allowed to enjoy certain benefits unreasonably at the cost of another.

A pays 'B's electricity bill when the latter is not in station to avoid disconnection.'B' is under a quasi contractual obligation to return the money to A.

III. Classification According to performance

1. Executed contract

When both the parties have completely performed their respective obligations, under the contract, the contract is said to be executed.

When both the parties to it fulfill their respective obligations a contract is said to be executed.

Ex. A carpenter, agrees to make a table for 'Y' for a sum of Rs. 5,000/-. The contract becomes executed the moment X makes the table and 'Y' pays the agreed sum.

2. Excutory contract

In this contract the obligations of the parties are to be performed at a later time.

When the both parties have not performed their respective obligation under the contract, the contract is said to be excutory.

Ex. Mr. 'M' agrees to sell this bus to 'N' for a certain amount. Delivery and payment are to be made in the month. The contract is said to be excutory.

3. Unilateral contract

In certain contract one party has to fulfill his obligations, whereas the other party has already performed his obligations. Such a contract is called Unilateral (or) one sided contract.

In case of unilateral contract the obligation is outstanding only against one of the parties at the time of formation of contract.

4. Bilateral contract

Bilateral contract is one in which the obligation on the part of both the parties to the contract are outstanding at the time of formation of the contract in such contracts promise on one side is exchanged for a promise on the other.

5. Partly executed contract

It is a contract in which one party has already fulfilled his obligations and the other is yet to fulfill his obligation.

Unit – II

Essential elements of a valid contract – Consensus ad-idem – proposal and acceptance conclusion of contract – lawful consideration – capacity of partners – free consent – mistake misrepresentation – Fraud, coercion and undue influence – Lawful object.

Offer and Acceptance

We have understood the following two equations from the discussions we have had in the previous chapter.

Contract = Agreement + Enforceable by law

Agreement = offer + Acceptance or Proposal + Acceptance.

This chapter focuses attention on offer and Acceptance.

Offer

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

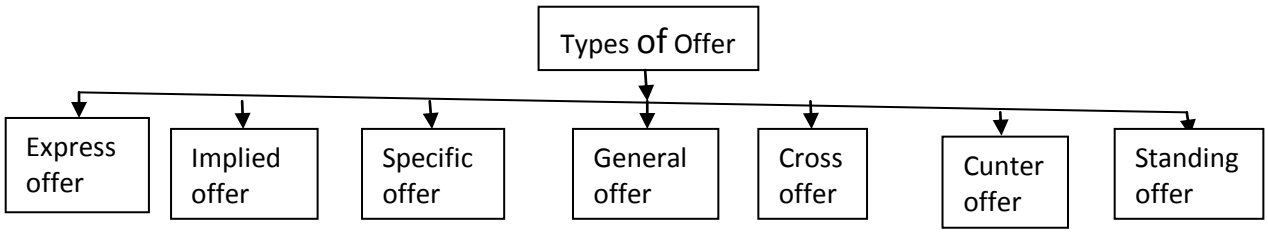
The person making the offer or proposal to called the "Offeror" (or) promissor (or) "Proposor"

The person to whom the offer is made is called the "offeree" or proposee or promisee.

Essentials of a valid offer:

The following and legal Rules for a valid offer

1. The offer must be communicated to the other party.
2. The offer must be Definite and clear.
3. The offer must be creating legal relationship.
4. The offer must be with a view to obtain acceptance.
5. An offer may be positive or negative.
6. The offer should amounts to acceptance.
7. Special terms and conditions of the offer be communicated.
8. An offer may be Express or Implied.
9. An offer may be General or Specific.
10. Two identical cross-offer do not result in a contract.



1) Express offer:

An offer made by express words- spoken or written is known as Express offer.

Ex:- i) 'M' tells 'N' will you buy my car for Rs.10,000/-

ii) 'X' writes to 'S' I want to sell my car for Rs.10 lakhs.

2) Implied offer:

An offer that is to be inferred or understood from the conduct of the parties or the circumstances of each particular case is known as implied offer.

Ex:-The offer by a bus transport company to carry passengers is also an implied offer.

3) Specific offer:

An offer made to a specific person or group is known as a specific offer.

Ex:-A School management offers a cash prize of Rs.10,000 to its 12^{th} standards students who secure more than 80 percent in any subject in the board exam(commercial law) prize.

4) General offer:

When an offer is made to the world at large. It is known as a general offer.

Any member of the public who is aware of such an offer may accept it.

Ex:-Many offers a reward of Rs.10,000 to anyone who traces out his missing car.

5) Cross offer:

Cross offers take place when two persons make identical offers to each other with respect to the same subject matter and without knowing the intention of the other.

Ex:- M by a letter, offers to sell his car to N at knowing M's intention to sell and before receiving letter, 'N' to writes to 'M' expressing his willingness to buy 'M's car. Thus, both 'M' and 'N' have only made an identical offer and neither of them has given acceptance. It is therefore, clear that there is no binding contract between them.

6) Counter offer:

Counter offer takes place when the person to whom the offer is made,instead of accepting the terms of the offeror desires modification of the same.

Ex:- 'M' offers his motorcycle to 'N' for Rs.1,00,000 and wants 'N' to pay the full amount within two days. 'N' wants the motorcycle for 70,000 and also to weeks time to pay. There is no acceptance of the offer 'N' and it only amounts to a counter offer.

7) Standing offer:

A standing offer is of a continuous nature. It is not restricted to a single transaction. It applies to a series of future transaction.

Ex:- 'X' an edible oil merchant, offers the supply edible oils to a hotel as and when required for the next two years. The offer by X is a standing offer.

What is mean tender?

A tender involves inviting quotations from different parties.

Ex:- Invite quotations from the suppliers of steel either for a particular project or for a certain number of project to be undertaken in the near future(as a standing offer). The quotation of the applicant that is found most favourable is finally accepted.

Acceptance

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

Who can Accept?

An offer can be accepted only by the person or persons for whom the offer is intended. An offer made to a particular person can only be accepted by him because he is the only person intended to accept. But, an offer made to the world at large can be accepted by any person whatsoever. To constitute a valid acceptance the assent must be communicated to the offeror.

Essentials and Legal Rules for a Valid Acceptance:

The acceptance of an offer to be legally effective must satisfy the following requirements:

1. Acceptance must be Absolute and Unqualified (Sec. 7 (1))
2. Acceptance must be Communicated to the Offeror
3. The Acceptance must be in the Prescribed Manner
4. The Acceptance must be in Response to Offer

5. The Acceptance must be by the Offeree
6. The Acceptance must be given before the Offer Lapses or is Revoked
7. Acceptance may be Express or Implied

Essentials of a Valid Acceptance

1. It must be absolute and unqualified.
2. It must be communicated to the offeror.
3. It must be in the prescribed manner.
4. It must be made within reasonable time.
5. It must be by the offeree.
6. It must be in response to offer.
7. It must be made before the offer lapses.
8. It cannot be implied from silence.

Lawful Consideration

Consideration is one of the most important essentials of a valid contract.

In simplest terms consideration is what a promisor demands on the price for his promise.

Consideration is "which for what"- Something that a person gives for something he receives.

That means "Something in Return"

Consideration = Something in Return

Definition of Consideration

In the famous English case Currie vs Misa

"A valuable consideration in the sense of the law may consist either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the order."

Thus according to this view, consideration need not always result in a benefit to both the parties.

It is possible that one party may receive some benefit and the other party may suffer a loss or a detriment.

Section 2(d) of the Indian contract Act defines.

Consideration means "when at the desire of the promiser, the promise or any other person has done or abstained from doing or does or abstains from doing or promises to do or to abstain from doing something. Such act or abstinence or promise is called a consideration for the promise"

The analysis of this legal definition shown that following are the essential parts of the consideration.

a) The consideration is an act.
b) Such act should be done by the promise or any other person
c) Such act may be done at the define of the promise
d) Such act is either already executed.
e) (or) is in the process of Execution.
f) (or) may still executory.

Examples:-

'A' agree to sell a house to 'B' Rs. 5,00,000/- For 'A' is promise the consideration is Rs. 5,00,000/- For 'B' is promise the consideration is the house.

Essentials and legal rules for a valid consideration

1. The consideration must move the desire of the promisor.
2. The consideration may move from the promise or any other person.
3. The consideration may be past, present or future.
4. The consideration need not be adequate.
5. The consideration must be real and not illusory.
6. The consideration must be lawful.
7. The consideration must be something which the promisor is not already bound to do.
8. The consideration may be either positive or negative.
9. Consideration is not enforceable.
10. Consideration has incurred a liability.
11. Consideration must be something which the promisor.
12. Consideration must not be illegal or immoral.
13. Consideration must not be opposed to public policy (An agreement made without consideration is void).

Consideration Exception to the Rules:

1. Natural Love and affection.
2. Voluntary compensation(service).
3. Time Barred Debt.
4. Agency sec(185).
5. Completed gift.
6. Family Arrangements.
7. In case of a trust.
8. An assignee can enforce.

Capacity to Contract

Section 10 of the Indian Contract Act requires the parties to be competent to make a valid contract.

The term "Capacity to Contract" is defined in sec- 11 of the Indian Contract Act.

"Every person is competent to contract who is of the age of the 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."

In other words all persons are competent to make contract except the following:

1. Minors (A person who has not attained the age of majority)
2. Persons of unsound mind.
3. Persons disqualified by any law.
4. Mental deficiency.
5. Idiots.
6. Lunatics.
7. Drunker persons.

Minor

A minor is a person who has not attained the age of majority.

For the purpose of entering into contract "the age of majority" is 18 years.

The term minor is explained is section 3 of the Indian Majority Act 1875.

"A minor is a person who has not completed eighteen years of age."

In the following two cases, a person becomes major on completion of 21 years.

1. Where is guardian of a minor is person.
2. Where the superintendence of minor's property is assumed by a court.

Position of Minor's Agreement

1. An agreement with a minor is void.
2. The rule of Estoppel does not apply to a minor.
3. No restitution except in certain cases.
4. Minor is Liability for Necessaries supplied.
5. Minor is Liability in Tort.
6. No Specific performance.
7. No Ratification.
8. A minor can be a Beneficiary.
9. Partnership by minor.
10. A minor can be an agent.
11. Minor can be a Shareholder.
12. A minor cannot be Declared Insolvent.
13. Minor cannot be a surety.
14. Contracts of Apprenticeship and service.
15. Contracts of minor's parents.

Qualification of person

1. Major person.
2. Person with sound mind.
3. Person who is not disqualified from any law.

Disqualification of persons

1. Foreign sovereign (Ambassador)
2. Alien enemy
3. Corporations
4. Professionals
5. Convicts
6. Married women
7. Insolvents

Free Consent

According section 10 free consent of all parties to an agreement is one of the essential elements of a valid contract.

The consent of the parties means that there is perfect identity of mind of both the parties.

There is no misunderstanding between the parties regarding the subject matter of the contract.

For enforceability of an agreement it is not only necessary that the parties to the agreement should have given consent but their consent should also be free.

The form consent is defined in sec 13 of the Indian Contract Act as follows.

"Two or more persons are said to consent when they agree upon the same thing in the same sense."

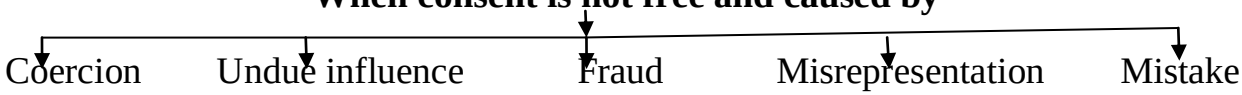
"Consent means that the parties should have the identity of mind."

That means "Same thing in the same sense"

"When there is no consent, there is no contract."

Ex. X had two cars, one is of Green colour and other in white. X offered to sell his green car to Y for Rs. 1,00,000/- Y accept the offer beleving it to be for the white one. In this case, no contract arises between X and Y as there is no real consent of the parties.

When consent is not free and caused by



1. Coercion as defined in section 15
2. Undue influence as defined in section 16
3. Fraud as defined in section 17
4. Misrepresentation as defined in section 18
5. Mistake as defined in section 20,21 and 22.

Coercion

Coercion means forcibly compelling a person to enter into contract.

Coercion is the threat or force used by one party against the other for making him to enter into an agreement.

Section – 15 of this act defined Coercion is the committing or threatening to commit any act forbidden by the Indian Penal Code 1860 or the unlawful detaining or threatening to detain, any party to the contract.

According to above definition of coercion it may so in any of the following acts.

1. To commit an act.
2. To threat to commit.
3. Unlawful detention of any property.
4. In the absence of force consent.
5. Forbidden by the Indian Penal Code.

Undue influence

According to Section 16(1)

"A contract is said to be induced by undue influence where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and we of the position to obtain an unfair advantage over the other."

The term undue influence means the unfair use of one's. Superior power in order to obtain the consent of a person who is in a weaker position.

In certain cases the parties to as agreement are so related do each other that one of them is in a position to dominate the will of the other.

Some times a party is compelled to enter into an agreement against his will because of an unfair position by the other party.

Example:-

1. Master and Servant.
2. Doctor and Patient.
3. Lawyer and Client
4. Parent and Child.
5. Guardian and Ward.
6. Religious Guru and disciple.

Comparison between coercion and undue influence

1. Definition	
Coercion as defined under section 15 of Indian Contract Act 1872.	Undue influence as defined under section 16 of Indian Contract Act 1872.
2. Importance	
Act based upon the use of physical force, Punishable Under Indian Penal Code.	Act based upon the use of moral force which is not punishable.
3.Parties	
Coercion can be employed by any person even by a stranger to the contract.	Undue influence is employed by any of the parties to the contract.
4. Relationship of the parties	
Need not my Relationship in between themselves.	Must have a fiduciary relationship (dominate the will of the other)
5. Dominance of one party	
In coercion none of the parties has dominating position.	In undue influence one of the parties has the position to dominate the will of the other.
6. Rights	
The arrived party has a right to avoid the contract.	The arrived party condition by the court an it may decide.
7. Punishment	
Coercion is an act punishable under Indian Penal Code.	Undue influence is not punishable under it.

FROUD

The term fraud may be defined as an intentional, deliberate or willful misstatement of facto. Which are material for the formation of a contract.

The important requirement of fraud is that the misstatement of facts must be made by one party with an intention to deceive the other.

Definition:-

According to section 17 of the Indian Contract Act. "Fraud" means and includes any of the following act committed by a party to a contract or with his connivance or by his agent.

Essentials of Fraud

1. Making a false suggestion as to a fact.
2. Active concealment of a fact.
3. A promise without intention to perform,
4. Any act filled to deceive.
5. Representation of fact to deceive.
6. The party subjected to fraud suffered loss.

Misrepresentation Section(18)

Misrepresentation is a false statement which the person making it honestly believes to be true or which does not know to be false.

In other words a representation which is false or misleading known as misrepresentation.

A false representation may be by a person either.

a) Innocently (or)
b) Intentionally (or)
c) Wilfully (or)
d) Deliberately

A false statement is made innocently therefore without any intention of deceiving the other party it is called misrepresentation.

But if the false statement is made intentionally therefore to deceive other party. It is called fraud.

Section (18) misrepresentation means and in cludes:

1. Unwarranted Assertion
2. Breach of Duty
3. Innocent Mistake

Mistake Section (20)

Mistake may be defined as an incorrect belief which leads one party to misunderstand the other.

The mistakes take place where the concerned parties are not fully aware of the terms of the agreement and they terms in a different sense.

An agreement is valid as a contract only when the parties agree upon the same thing in the same sense. There are many types of mistakes. But the following are important from the subject point of views:

The mistake may be

i) Bilateral mistake
ii) unilateral mistake

i) **Bilateral mistake** may be defined an a mistake in which both the parties to an agreement are confused about the facts which are essential to the agreement.

ii) Unilateral mistake may be defined an a mistake in which only one of the parties an agreement is confused about the facts which one essential to the agreement section (22).

Lawful Object

For an agreement to become a valid contract. It is important that its object is lawful. According to section 23.

In each of these cases, the object or consideration is unlawful is void

The consideration or object of an agreement is lawful unless.

1. it is forbidden by law or
2. Is of such a nature that if permitted it would defeat the provisions of any law or
3. Is fraudulent or
4. Involves or
5. Implies injury to the person or
6. Property of another or
7. The court regards it is immoral or
8. Opposed to public policy

See 23 of the Act, declares what kinds of consideration and objects are not lawful.

In word object and consideration are not used in the same sense.

For Example:- Where money is borrowed for the purpose of marriage the consideration for the contract is loan and object is marriage. That is the word object means 'purpose.'

The following illustrations appended to section 23 of the Act. Clearly indicate that the consideration and object are not the same.

(a) X,Y and Z enter into an agreement for the division among them of gains as aired by them by Fraud. The agreement is void as its object is unlawful.

(b) X promise to obtain for Y an employment in the public service and Y promise Rs. 5000 to X. The agreement in void as the consideration for it is unlawful.

An agreement will not be enforceable if its object or the consideration is unlawful.

According to section 23 of the act the consideration and the object of an agreement are unlawful in the following cases.

1. If it is forbidden by law.
2. If it is such a nature there, if permitted, it would defeat the provisions of any law.
3. If it is fraudulent.
4. If it involves or Implies Injury to the person or property of another.
5. If the court regards it as immoral.
6. If the court regards it as apposed to public policy.

When Consideration or Object is Unlawful

1. If it is forbidden by Law.
2. If it would defeat the provisions of any Law.
3. If it is fraudulent.
4. If it causes injury to the person or property of another.
5. If the court regards it as immoral.
6. If the court regards it as opposed to public policy.

Agreements Opposed to Public Policy

1. Agreements of trading with enemy.
2. Agreements inter faring with course of justice.
3. Agreements in restraints of legal proceedings.
4. Agreements for stifling prosecution.
5. Agreements of maintenance and champers.
6. Agreements to oust the jurisdiction of courts
7. Agreements varying periods of limitation.
8. Traffic in public officers and titles.
9. Agreements to influence elections to public office.
10. Agreements to create interest opposed to duty.
11. Agreements to create monopolies.
12. Agreements to restrain parental rights.
13. Agreements restraining personal freedom.
14. Agreements restraining marriage.
15. Agreements to defraud recitation.
16 Marriage brokerage agreements.
17. Agreements in restraint of freed
18. Agreements interfering with marital duties.
19. Agreements waiving illegality or immorality.
20. Agreements not to bid.

Unit III

Discharge of contract – performance – tender, novation – impossibility – operation of law – breach of contract Assignment, devolution and appropriation.

Discharge of Contracts

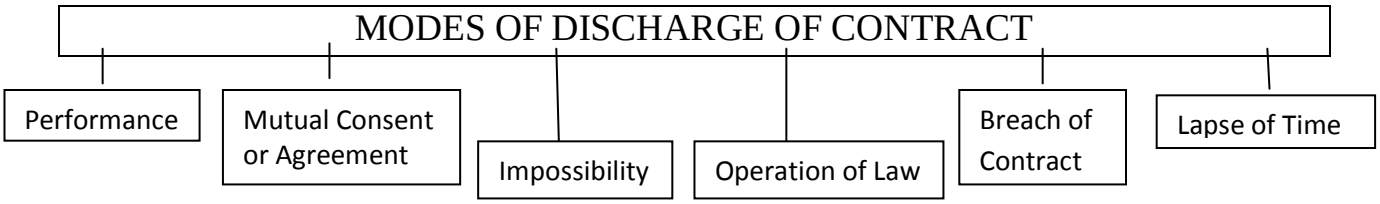
Introduction

When the rights and obligations arising out of a contract are extinguished, the contract is said to be discharged or terminated. Thus the discharge of a contract means that the parties are no more liable under the contract.

Discharge of contract takes place when the rights and obligations created by it come to an end. It results in the termination of the contractual relationship between the parties to a contract.

Modes or Methods of Discharge of Contract

Discharge of contract may take place by any of the modes indicated in the chart below:



Various Modes of Discharge

1. Discharge by Performance of Contract

Performance is the usual mode of discharge of a contract. The contract is said to be discharged when parties to a contract, perform their respective obligation which they have agreed to do.

2. Discharge by Agreement or Mutual Consent

A contract may discharged by mutual agreement of the concerned parties. The rights and obligations created by an agreement can be discharged without their performance by means of another agreement between the parties which provides for the extinguishment of the earlier rights and obligations. As a contract is created by an agreement, in the same way, it can be discharged by an agreement, i,e,. by further consent to another contract. The consent may either be (i) Express or (ii) Implied.

(i) Express Consent at the Time of Formation of Contract.

"If the parties to a contract agree to substitute a new contract for it, or rescind or alter it, the original contract need not be performed." (Section 62).

"Every promise may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit," (Section 63).

In other words, the original contract is discharged when the parties enter into a fresh contract in place of original contract. And the following are the important for the discharge of a contract by a fresh contract:

1. Novation
2. Rescission
3. Alteration
4. Remission
5. Waiver
6. Accord and Satisfaction
7. Merger

1. Novation

The term 'Novation' means substitution of a new contract for the existing one. The new contract may be between the same parties or between different parties. The novation may be of the following two types:

a) Novation Involving Change of Parties

In the type the parties to the contract are changed but the contract remains the same. The usual and most common form of novation is substituting a new debtor in place of an old one with the consent of the creditor.

Example: X is indebted to Y and Y to Z. By mutual agreement Y's debt to Z and X's debt to Y is cancelled and Z accepts X as his debtor. This is novation.

b) Novation without changes of Parties

Substitution of a contract may take place even without change of parties. That is, sometimes the concerned parties to a contract agree to substitute the existing contract for a new contract. In such situations the original contract is discharged and need not be performed.

Example: M owes N Rs. 20,000. M enters into an agreement with N and gives N a mortgage of his (M's) estate for Rs. 10,000 in place of the debit of Rs. 20,000. This is new contract and extinguishes the old.

2. Rescission

Rescission means cancellation of the contract. While novation results in a new contract in place of the old one, rescission is the cancellation of the original contract. A contract may be discharged, before the date of performance, by agreement between the parties to the effect that it shall no longer bind them. Such

an agreement amounts to "rescission" or cancellation of the contract, the consideration for mutual promises being the abandonment by the respective parties to their rights under the contract.

Example: A promises to supply certain goods to B on a certain day. Before the actual date of performance A and B mutually agree that the contract will not be performed. The contract is rescinded.

Rescission may take place in any of the following modes:

i) By Mutual Consent

ii) By the Aggrieved Party

iii) By the Party whose Consent is not Free

iv) Non – performance till a long Time

Rescission may either be total or partial. Former is the discharge of the whole contract, while the latter is the variation of the original contract either by:

a) Rescinding some of the terms of the contract; or

b) Substituting new terms for the ones which are rescinded; or

c) Adding new terms without rescinding any of the terms of the original contract.

3. Alteration

Alteration means a change in one or more of the material terms of the contract. The alteration is valid when it is made with the consent of all the parties. An alternation may either be material or immaterial. If a material alteration in a written contract is done by mutual consent, the original contract is discharged by alteration and the new contract in its altered form takes its place.

Although novation and alteration appear to be the same since, in both the cases, the terms of the contract are substantially varied, in the case of novation, there may be a change of the parities while in the case of alteration, the parties remain the same.

Example: M enters into a contract with N for the supply of a machine at his warshouse on 1st February. Later both M and N agree to postpone the date of delivery to 1st March. This change amounts to alteration of the contract.

4. Remission

Remission may be defined " as the acceptance of a lesser sum than what was contracted for or a lesser fulfillment of the promise made." According to Section 63 of the Act, "Every promise may dispense with or remit, wholly or in part, the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit

Examples: A owes B Rs. 5,000. A pays to B who accepts in satisfaction of the whole debit Rs. 2,000 paid at the time and place at which the Rs. 5,000 were payable. The whole debit is discharged.

5. Waiver

Waiver means the abandonment of a right which a person is entitled to. That is, waiver means abandoning the rights. Where a party waives his right under the contract, the other party is released of his obligations. A waiver is nothing unless it amounts to a release. To constitute a waiver neither an agreement nor consideration is necessary.

Example: A agrees to repair the car of B. B later on forbids A to repair the car. A is no longer bound to perform the promise. Thus, the contract is terminated by waiver.

6. Merger

Merger takes place when an inferior right accruing to a party, under a contract merges into a superior right accruing to the same party either under the same or the other contract. In such cases, the inferior rights merge into the superior rights. And on merger the inferior rights vanish and are not required to be enforced.

Example: A purchases a house, which he was having on lease. His right as a lessee will merge into his right as an owner, as right of a lessee is inferior to the right of an owner.

7. Accord and Satisfaction

These two terms are used in English Law. The term ‘accord’ may be defined as the promise toaccept less amount than what is due under the contract. Satisfaction means the payment or fulfillment of the lesser obligation. Under the English Law, the old contract is discharged when the accord is followed by satisfaction.

3. Discharge by Impossibility of Performance

A contract is discharged if its performance becomes impossible. In other words, there is no question of discharge of a contract which is entered into to perform something that is obviously impossible. For instance an agreement to discover treasure by magic. In such cases, there is no contract to terminate. The impossibility in these cases is inherent in the transactions. Such a contract is void ab-initio. The impossibility of performance may be of two types.

A) Initial Impossibility

B) Subsequent Impossibility

Case where the doctrine of Supervening Impossibility Applies:

Supervening impossibility may occur in many ways, some of which are explained below:

1. Destruction of Subject Matter
2. Death or Personal Incapacity

3. Change of Law
4. Declaration of War
5. Failure of Pre-condition

Cases not Covered by Supervening Impossibility

1. Difficulty of Performance
2. Commercial Impossibility
3. Failure of a Third Party
4. Self Induced Impossibility
5. Failure of one of the Several Objects
6. Strikes, Lockouts and Civil Disturbances

4. Discharge by Lapse of Time

A contract is discharged by lapse of time. The Limitation Act 1940 lays down that in case of breach of a contract legal action should be taken within a specified period. If it is not performed and if no action is taken by the promise in Court of Law within the specified period, he is debarred from enforcing the contract. Lapse of time terminates a contract. The period of limitation for simple contract is three years. It the three years expire and creditors fails to file a suit to recover his amount, the debtor is discharged from his liability.

5.Discharge by Operation of Law

Following are the circumstances under which the law regards the contract as discharged:

a) Unauthorised Material Alteration

A material alteration made in a written document or contract by one party without the consent of the other, will make the whole contract void. An alteration which is not material or which is authorised will not affect the validity of the contract. A material alteration is one which alteration is one which changes, in a significant manner, the legal identity or character of the contract or the right and liabilities of the parties to the contract. The effect of making such an alteration is exactly the same as that of cancelling the contract. Both parties will be discharged from their respective obligations.

b) Death

Death of the promisor results in termination of the contract in cases involving personal skill or ability. In other cases, the rights and liabilities of the deceased person pass on to the legal representatives.

c) Insolvency

A contract is discharged by the insolvency of one of the parties to it when an Insolvency Court passes an "order of discharge" exonerating the insolvent from liabilities on debts incurred prior to his adjudication.

d) Merger

Merger takes place when an inferior right accruing to a party, under a contract merges into a superior right accruing to the same party either under the same or the other contract. In such cases, the inferior rights merge into the superior rights. And on merger the inferior rights vanish and are not required to be enforced.

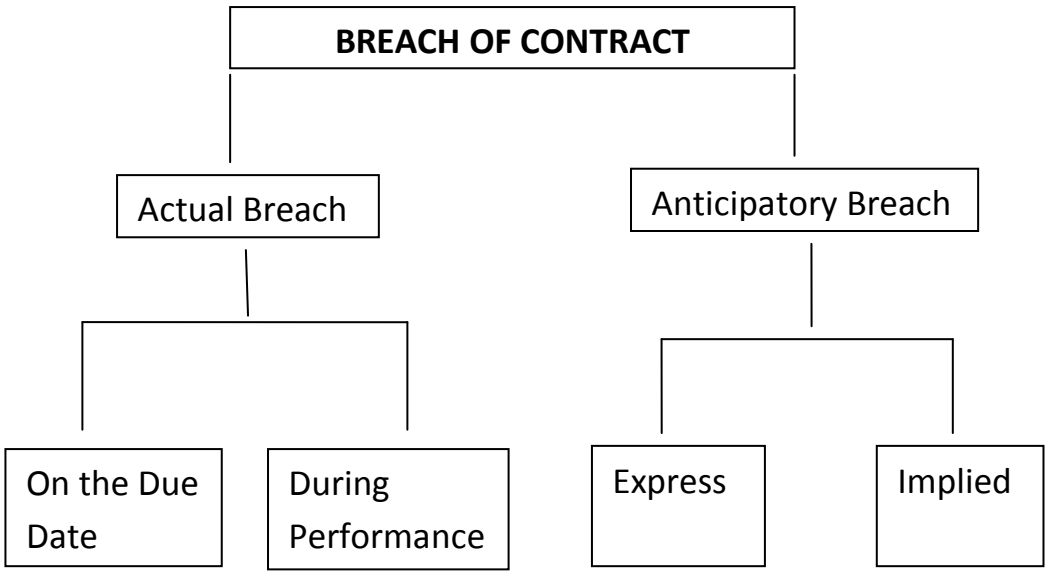
Example: A purchases a house, which he was having on lease. His right as a lessee will merge into his right as an owner, as right of a lessee is inferior to the right of an owner.

6. Discharge by Breach Contract

The 'breach of contract' means the failure of a party to perform his obligations. The party who fails to perform his obligations, is said to have committed a breach of contract. Breach is also a method of discharge of a contract. A breach of a contract discharges the aggrieved party from performing his obligations.

DISCHARGE BY BREACH

A breach of contract takes place when a party to a contract fails to fulfil his obligations arising under it. The way in which breach of contract may occur may be shown as follows:



Actual breach of contract

It may take place in two ways:

(a) On the Due Date: When one party to a contract fails to perform his obligation on the due date, actual breach of contract occurs.

Example:

X contracts with Y to sell and deliver 10 bags of rice @ Rs. 1,000 per bag on 1st June 2005. X fails to deliver as promised. A breach of contract occurs and Y can initiate legal action.

(a) During Performance : Actual breach of contract also occurs when a party, after having performed a part of the contract, refuses to perform further.

Anticipatory Breach of Contract

It takes place when a party to a contract declares his intention of not performing his obligation before the performance is due. This may be done either in an express or in an implied manner.

(a) Express Anticipatory Breach of Contract: When the promisor expressly makes known to the promisee of his intention to commit a breach.

(a) Implied Anticipatory Breach of Contract: When the promisor does some act that makes the performance of his promise impossible.

Devolution and Appropriation

Devolution

The transfer or delegation of power to a lower level especially by central government and local or regional administration.

The legal transfer of property from one owner to another.

Appropriation

Rules in appropriation of payment

1) Appropriation by the Debtor.
2) Implied Appropriation.
3) Appropriation by the Creditor.
4) Where neither party Appriopriates.

Any assumption by a person of the rights of an owner amounts to an appropriation and this includes where he has come by the property without stealing it any later by the property without stealing it any later assumption of a right to it by keeping or dealing with it as owner.

In law and good appropriation is the act of setting apart something for its application to a particular usage to the exclusion of all other uses.

Appropriation is a process by which previously unowned natural resources, particularly land, become the property of a person or group of persons.

Unit IV

Remedies for breach of contract – damages and specific performance – special contracts – indemnity and guarantee – rights of surety – discharge of surety – Law of agency.

Remedies for Breach of Contract

Parties to a lawful contract are expected to perform their respective promises. When one of the parties refuses to perform his promise, he is said to have committed a breach of the contract. Whenever there is breach of contract, the injured or the aggrieved party is entitled to bring an action for damages. A right of action is conferred upon the party injured. In some circumstances, the breach not only gives rise to a cause of action but will also discharge the injured party from performance of his part of the Agreement. In case of sreach, the aggrieved or injured party or more of the following remedies:

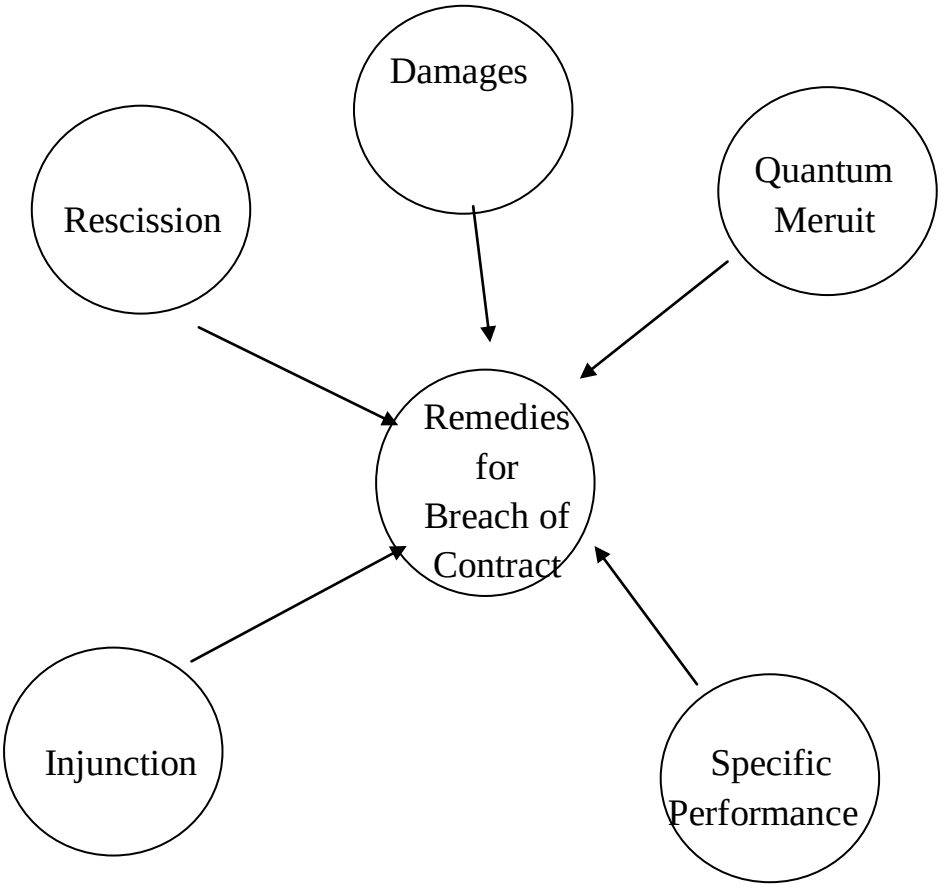
I. Suit for Rescission
II. Suit for Damages
III. Suit upon Quantum Meruit
IV. Suit for Specific Performance
V. Suit for Injunction

A contract imposes upon the parties certain obligations. When the parties fulfil their respective obligations, the contract is said to be performed or executed. But sometimes, a party to a contract may not fulfil his promise or obligation arising under it. In such a case, he is said to be committing a breach of contract.

Breach of contract, thus, takes place when a party to a contract fails to fulfil his obligations arising under it.

According to Section 64, a party rescinding a voidable contract has to restore any benefit that he has received under the contract, to the party who has provided it.

Section 75 makes it clear that if a person rightfully rescinds a contract, he is entitled to compensation for any damage that he has sustained through the non-fulfilment of the obligation by the other party.



I. Suit for Rescission

Rescission means setting aside or cancelling. In other words, the term 'rescission' may be defined as the cancellation of the contract. When a contract is broken by one party, the other party may treat the breach as discharge and refuse to perform his part of the contract, i.e., putting an end to the contract. On the rescission of the contract, the aggrieved or injured party is discharged from all the obligations under the contract.

Example: A promises B to sell his car for Rs. 60,000 on certain date. B agreed to pay the price on receipt of the car. A refused to sell his car to B need not pay the price.

According to Section 75 of the Indian Contract Act. "A person who rightly rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract."

II. Suit for Damages

The damages are a monetary compensation allowed to the injured party for the loss or injury suffered by him as a result of the breach of contract. In the event

of a breach of contract, the other party earns certain rights including the right to claim damages or loss arising therefrom. The object of awarding is to put the aggrieved party in the same position, has the contract been performed. The term 'damages' is used to means compensation in money as a substitute for the promised performance. The fundamental principle underlying damages is not punishment but compensation. The law of contract does not seek to punish the guilty. The guilty party is liable to pay damages to the aggrieved party. The court will compel the party in breach to make good the loss by paying to the other party.

Kinds of Damages

Damages are of the following kinds:

1) Ordinary or General or Compensatory Damages
2) Special Damages
3) Exemplary or Punitive or Vindictive Damages
4) Nominal Damages

1. Ordinary or General or Compensatory Damages

Ordinary damages are those which naturally arose in the usual course of things from such breach. Damages, awarded to compensate the injured party for the actual amount of loss suffered by him consequent upon the breach, are known as general damages. General damages are usually assessed on the basis of actual loss.

2. Special Damages

Special damages are those resulting from a breach of contract under some special or usual circumstances. These damages constitute the indirect loss suffered by the injured party due to the breach of contract.

3. Exemplary or Punitive or Vindictive Damages

These are such damages which are awarded by way of compensation for the lose suffered and not by way of punishment. Exemplary damages are granted for injured feeling, sufferings etc. Where courts take into account the feelings of the aggrieved party, exemplary damages may be ordered.

4. Nominal Damages

These are the damages which are very small in amount. In some cases there may be a breach of contract but no material loss would have been caused thereby. Thus nominal damages are awarded only for the name sake. Nominal damages are awarded simply to recognize the right of the party to claim damages of the breach of the contract even though the party suffered no loss.

Rules Regarding Damages

According to Section 73 of the Indian Contract Act. "When a contract has been broken, the party who suffers by such branch is entitled to receive from the party who has broken the contract, compensation for any loss or damage caused to

him thereby, which naturally arose in the usual course of thing from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it."

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

The Rules may now be summarized as follows:

1. General Damages
2. Special Damages
3. Remote Damages
4. Restitution and Compensation
5. Mitigation of Loss
6. Nominal Damages
7. Actual Loss (Actual Damages)
8. Vindictive or Exemplary Damages
9. Liquidated Damage
10. Damages in Quasi Contracts
11. Difficulty of Assessment

SPECIFIC PERFORMANCE

Payment of damages to the aggrieved or affected party, in case of breach of contract, may not always be an adequate remedy. In certain cases, the court may direct the party committing the breach to fulfil his obligation according to the terms of the contract.

'Specific performance', thus, is a direction by the Court, on a suit filed by the plaintiff, requiring the other party to fulfil his promise.

The Court may order specific performance of the contract under the following circumstances:

a) Where payment of damages will not be an adequate remedy.

b) Where there exists no basis for determining the actual damage suffered by the plaintiff.

c) Where the defendant is not a position to pay monetary compensation. However, no suit for specific performance is maintainable under the following circumstances:

a) Where damages provide adequate relief.

b) Where the contract, by its very nature, is revocable.

c) Where the contract is of a personal nature, e.g., contract to marry.

d) Where the contract is made by a company in excess of its powers as laid down in its Memorandum of Association.

e) Where the court cannot supervise the performance of the contract,e.g.,

f) Where the contract is made by trustees in breach of their trust.

Contract of Indemnity and Guarantee

The contract of indemnity and guarantee are the special kinds of contract. They are specious of general contract. As such, the principles of the general law of contract are applicable to them. Therefore, they must have all the essentials of a valid contract, for example, consideration, competency of the parties, lawful object etc. However, the special legal provisions relating to these contracts are contained in Sections 124 to 147 of the Indian Contract Act, beside the general principles.

Contract of Indemnity

To indemnify means to compensate or make good the loss. The contract of indemnity is entered into with the object of protecting the promise against anticipated loss. The contingency upon which the whole contract of indemnity depends is the happening of loss. Section 124 of the Indian Contract Act defines a contract of indemnity thus:

"A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself or by the conduct of any other person, is called a contract of indemnity." (Sec. 124).

Example: (Appended to this section), A contracts to indemnify B against the consequence of any proceedings which C may take against B in respect of a certain sum of Rs, 200. This is a contract indemnity.

In simple words, a contract of indemnity is a contract in which one person promises to protect or compensate the other for the loss suffered by him due to the conduct of the promisor or any other person. In the above example, A is the 'indemnifier' and B is the 'indemnified.' In other words, a person who promises to make good the loss, that is, the promisor is called the indemnifier and the person whose loss is to be made good, that is, the promise is called the indemnity-holder or the person who is indemnified.

Essentials of a valid Contract of Indemnity

The analyses of the definition of contract of indemnity, the following are the essentials for a valid contract of indemnity:

1) The contract of indemnity must contain all the essentials of valid contract – competency of the parties, free consent, consideration, legality of the object etc.

2) It is a contract between two parties. One person promises to save the other from any loss, which he may suffer.

3) The loss may be caused by the conduct of the promisor himself or any other person.

4) The contract of indemnity may be express or implied.

An express promise is one where a person promises in express terms to compensate the other from the loss/ That is, an express contract is by words or by writing.

Contract of Guarantee

According to Section 126, "a contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default." A guarantee may be either oral or written.

Example: A gives a loan of Rs. 2,000 to B and C promises to A that if B does repay the loan, he will pay. This is a contract of guarantee. In this example:

A is the creditor

B is the principal debtors

C is the surety (guarantor)

The person to whom the guarantee is given is called the creditor.

The person who gives the guarantee is called the surety.

The person for whom the guarantee is given is called the principal debtor.

Example: X and Y go into a shop. X says to the shopkeeper, "Let him (Y) have the goods. I will see you paid". This is a contract of indemnity. If he says, "If Y does not pay you. I will pay". It is a guarantee.

Contract of Indemnity	Contract of Guarantee
1. There are two parties – Indemnifier and the Indemnity holder.	There are three parties - the Creditor the principal Debtor and the surety.
2. The liability of the indemnifier is primary.	The liability of the Principal Debtor is primary. The liability of the surety is secondary, that is, the surety is liable only if the principal debtor fails.
3. There is only one contract i.e., between indemnifier and indemnified.	There are three contracts i.e., first between the creditor and the principal debtor, second between the creditor and the surety and third between the surety and the principal debtor.
4. Indemnifier need not act on the request of the indemnified.	Surety gives guarantee on the request of the principal debtor.

5. The liability of indemnifier arises on the happening of a contingent event.	There is an existing debt or duty, the performance of which is guaranteed by the surety.
6. An indemnifier cannot sue a third party for loss in his own name because there is no privity of contract. He can do so only if there is an assignment in his favour.	A surety on discharging the debt due by the principal debtor, can take action against the principal debtor for his own recovery.
7. It is for reimbursement of loss.	It is the security of the creditor for ensuring his payment.
8. The promisor has some interest in the transaction, apart from indemnity.	The surety gets nothing substantial for his promise. He is not connected with the contract except by means of the promise to pay the debt.

Rights of Surety

The rights of a surety can be discussed under the following three heads:

1. Against the creditor.
2. Against the principal debtor.
3. Against the co-sureties.

A. Rights of a Surety against the Creditor

1. Right to benefit of creditor's securities
2. Right of Subrogation

B. Right against the Principal Debtor

1. Right of Subrogation

When the surety has paid the guaranteed debt on the default of the principal debtor, the surety steps into the shoes of the creditor and will be able to exercise as against the principal debtor all these rights and remedies which could be exercised by the creditor. In other words, the surety is subrogated to all rights which the creditor had against the principal debtor.

2. Right to be Indemnity

According to Section 145, "In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully." The right occurs only on payment of all that the surety is liable under the guarantee.

C. Rights against co-sureties

When a debt is guaranteed by two or more sureties, they are called co-sureties. In such a case all the co-sureties are liable to contribute towards the payment of the guaranteed debt as per the agreement among them.

Discharge of Surety from Liability

A surety is to be discharged when his liability comes to an end. Circumstances in which a surety is discharged are discussed as follows:

1. Notice of Revocation (Sec. 130)

A guarantee may be specific guarantee or continuing guarantee. A specific guarantee once given is irrevocable. Section 130 of the Indian Contract Act provides that "a Continuing guarantee may at any time he revoked by the surety, as the future transactions, by notice to the creditor." However, surety remain liable for transactions entered into prior to the notice.

2. Death of Surety (Sec. 131)

Section 131 of the Act provides, "The death of the surety operates, in the absence of any contract to the contrary, as revocation of continuing guarantee, so far as regard to future transactions."

3. Novation (Sec. 62)

Novation means the substitution of a new contract either between the same parties or different parties for the old one. Thus novation of a contract of guarantee discharges it.

4. Variance in Terms of Contract (Sec. 133)

According to Section 133 of the Act, "Any variance, made without surety's consent, in the terms of contract between the principal debtor and the creditor, discharges the surety as to the transactions subsequent to the variance."

Discharge of Surety
1. By notice of revocation (130)
2. By death of surety (131)
3. By novation (62)
4. By variation in terms of contract (133)
5. By release of principal debtor (134)

6. By compounding by creditor with principal debtor (135)
7. By impairing surety's remedy (139)
8. By loss of security (141)
9. By misrepresentation (142)
10. By concealment (143)
11. By failure of co-surety to join (144)
12. By failure of consideration (127)

Law of Agency

Modern business is becoming complex day by day. Due to vast expansion of the modern business, it is not possible for a person to carry on all the business transactions himself. Thus circumstances require a businessman to depend upon another persons to transact his business. A businessman must necessarily depend on others for the efficient running of the business. He must delegate some of his powers to another. The another person who acts on behalf of a businessman is known as an agent. The person to whom such act is done, or who is so represented is called the principal. The contract which creates the relationship of principal and agent is called an agency. Thus, X appoint Y to sell his cars on his (X's) behalf. X is the principal. Y is his agent. The relationship between X and Y is called agency.

Section 182 of the Act defines that "an agent is a person employed to do any act for another, or to represent another in dealings with third person. The person for whom such act is done, or who is so represented, is called the principal.

Who can appoint an Agent? (Who may be a principal)

According to Section 183, "Any person who is of the age of majority according to the law to which he is subject, and who is of sound mind, may employ an agent." Thus, it is essential that a principal must have contractual capacity. A minor or a person of unsound mind cannot be a principal.

Who may be an Agent

Section 184 lays down that "As between the principal and third persons any person may become an agent, but no person who is not of the age of majority and of sound mind can become an agent, so as to be responsible to his principal according to the provisions in that behalf." An agent is a connecting link or a "conduit pipe" between the principal and third party. It is immaterial whether or not the agent is legally competent to contract.

Essentials of agency

1. The Principal must be Competent to Enter into a Valid Contract
2. Any Person may Become an Agent (Sec.184)
3. There should be an Agreement between the Principal and the Agent
4. The agent must in Representative Capacity

Essentials for a valid Ratification

1. Agent must act on behalf of the principal.
2. The principal must be alive at the time of the contract.
3. The principal must be competent to contract.
4. Ratification must be done with full knowledge of the principal.
5. Ratification must not be for the parts but for the whole transaction.
6. Ratification must be done within reasonable time,
7. The act to be ratified should be lawful.
8. Ratification must be communicated to concerned party.
9. Ratification should not injure a third person.
10. Ratification may be express or implied.

Kind of Agents

According to the extent of their authority, agents may be classified into three categories and they are:

(A) General Agent: General agent is one who represents the principal in all matters concerning a particular business. He is appointed mostly by general power of attorney. The authority of a general agent is continuous until it is terminated.

(B) Special Agent: Special agent is one who is appointed for a particular purpose. He has limited authority. He represents the principal in some particular transaction. His authority ends no sooner the particular act is performed.

(C) Universal Agent: A universal agent is one who is authorized to transact all the business of his principal of every kind and to do all the acts which the principal can lawfully do and can delegate.

Duties of an Agent

1. To conduct the business of agency according to instructions.
2. To follow customs in the absence of instructions.
3. To carry our the business with skill and diligence.
4. To render proper accounts to the principal.
5. To communicate with the principal, in case of difficulty.

6. To pay sums to the principal received for him.
7. To protect and preserve the interest of the principal.
8. Not to deal on his own account.
9. Not to make unauthorized profit from agency.
10. Not to use information obtained in the course of business against the principal.
11. Not to delegate authority.
12. Not to set up adverse title.

Rights of an Agent

1. Right to Retain Money (Sec. 127)
2. Right to Receive Remuneration (Sec. 219)
3. Effect of Misconduct (sec. 220)
4. Right of Lien (Sec.221)
5. Right to be Indemnified against Consequence of Lawful Acts (Sec. 222)
6. Right to be Indemnified against Consequence of Acts done in Good Faith (Sec. 223)
7. Right to Compensation (Sec. 225)
8. To do Lawful Acts (Sec. 188)
9. In Emergency (Sec. 189)
10. Right of Stoppage of Goods

Rights of Agent

1. To receive remuneration agreed upon.
2. To retain principal's money due to himself.
3. To be indemnified against lawful acts.
4. To be indemnified against consequences of acts done in good faith.
5. Right of lien on the possession of goods.
6. To stop goods in transit.
7. To claim compensation for injury by the principal's negligence.
8. To protect principal's property from loss.
9. To be liable for his misconduct.
10. To claim compensation for premature termination of agency.

Unit V

Bailment – duties of bailer and bailee – finder of lost goods – pledge – pawner and pawnee – pledge by non owners – carriage of goods – Common carrier – Duties.

Contract of Bailment and Pledge

Introduction

According to Section 148 of the Indian Contract Act, "A bailment is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished be returned or otherwise disposed of according to the directions of the person delivering them."

The person delivering the goods is called the BAILOR. The person to whom they are delivered is called the BAILEE. The transaction is called BAILMENT.

Bailment means 'to deliver' or 'to hand over.' Bailment signifies a contract resulting from delivery. It involves change of possession and not transfer of ownership. It implies a sort of relationship in which the personal property of one person, temporarily, goes into the possession of another person. Custody of goods without possession does not constitute bailment. For example, a servent.

According to Halsbury a bailment is "a delivery of personal chattels in trust on a contract, express or implied, that the trust shall be duly executed, and the chattels re-delivered, in either their original or altered form, as soon as the time of use for, or condition on which they were bailed, shall have elapsed or been performed."

BAILMENT

Sections 148 to 171 of the Indian Contract, 1872 contain provisions in respect of Bailment.

Meaning

The word 'Bailment' is derived from the French word 'baillier' which means 'to deliver'.

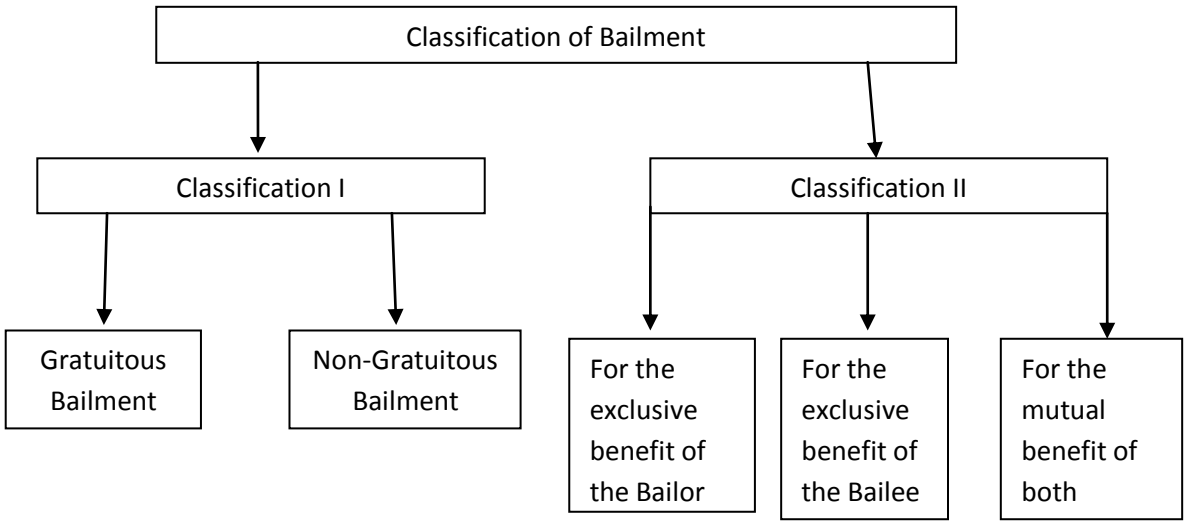
Definition

According to **Section 148,**

A 'bailment' is the delivery of goods by one person to another for some purpose, upon a contract, that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the 'bailor'. The person to whom they are delivered is called the 'bailee'.

Examples:

(a) X lends his bike to Y to be returned after a week. There is a contract of bailment between X and Y.
(b) A gives a piece of cloth to B, a tailor, to be stitched into a shirt. There is a contract of bailment between A and B.
(c) M entrusts N with certain valuables and requests N to take care of the same for a month when M is not in station. This results in a contract of bailment between M and N.



Essentials of Bailment

Section 148 of the Act explains the characteristics of bailment. They are as under:

1. Contract

2. Delivery of Goods

3. Specific Purpose

4. Return of Goods

Kinds of Bailment

Bailment may be classified on the basis of (i) Benefit and (ii) Reward.

Kinds on the Basis of Benefit

On the basis of benefits, bailment may be classified into three types:

(A) **Bailment for the Exclusive Benefit of Bailor:** It may be in the case of safe custody, where goods are delivered to a neighbour or someone else for safe custody without any charge, while the bailor (owner) goes away.

(B) Bailment for the Exclusive Benefit of Bailee: It may be in the case of a delivery of a thing to someone else for his use without any charge, for example, delivery of scooter to a friend to go some where.

(C) Bailment for a mutual Benefit: In this type of bailment delivery of goods is done with some consideration, for example, delivery a scooter to a mechanic for repairs.

Duties of Bailor

1. To Disclose the Faults in the Goods Bailed

2. Repay Necessary Expenses (Sec. 158)

3. To Indemnify the Bailee (Sec. 159)

4. Responsibility for any Loss due to Defect in Title (Sec. 164)

Duties of Bailor
1. To disclose known defects 2. To bear expenses (Gratuitous) 3. To bear extra –ordinary expenses.(Non- Gratuitous) 4. To receive back the goods 5. To indemnify the bailee

Duties of Bailee

1. To Take Reasonable Care of the Goods Bailed (Sec. 151)

2. Not to Make Unauthorised Use of Goods Bailed (Sec. 154)

3. Not to Mix the Goods Bailed with his Own Goods (Secs. 155,156 and 157)

4. To Return the Goods Bailed (Sec. 160)

5. To Return Increase or Profit Accrued

6. Not to Set up an Adverse Title

Duties of Bailee
1. To take care of goods bailed
2. Not to make unauthorized use
3. To return the goods bailed
4. Not to mix the goods with his own.
5. To deliver accretion to goods
6. Not to set up adverse title

Rights of Bailor

Rights of a bailor are almost the same on the duties of a bailee. There rights are summarized as follows:

1. Right to sue

The bailor has a right to sue the bailee for the enforcement of the bailee's duties and liabilities.

2. Right to Terminate the Bailment (Sec. 153)

Section 153 states that "A contract of bailment is voidable at the option of the bailor, if the bailee does any act with regard to the goods bailed, inconsistent with the conditions of the bailment."

Example: M lets to N for hire a horse for his own riding. N drives the horse in his carriage. M can terminate the bailment.

3. Unauthorised use by the Bailee (Sec. 154)

Section 154 states, "If the bailee makes any use of the goods bailed, which is not according to the conditions of the bailment, he is liable to make compensation to the bailor for any damage arising to the goods from or during such use of them."

Example: M lends a horse to N for his own riding only. N allows S, a member of his family to ride the horse. S rides with care, but the horse accidentally falls and is injured. N is liable to make compensation to M for the injury does to the horse.

4. Right against Mixture of Goods Bailed (Sections 155, 156 and 157)

If the bailee, without the bailor's consent, mixes up the goods bailed with his own goods, the bailor is entitled to have his goods separated where separation is possible. The bailor can also require the bailee to bear the cost of separation.

5. Right to Demand Return of Goods (Sec. 159)

In case of gratuitous bailment the bailor can, at any time, exercise his option to terminate the contract and take back the goods bailed.

6. He is Entitled to Claim Damages

Bailor can claim damages for loss, destruction or deterioration of the goods bailed, owing to bailee's negligence.

7. Right to Claim Increase in Value or Profits (Sec. 163)

The bailor is entitled to get any increase or profit from the goods bailed.

8. Suit against Wrongdoer (Sec. 180)

The bailor can sue a third person who wrongfully deprives he bailee of the use of the goods, or does them any injury.

9. Share in the Compensation Received (Sec. 181)

Compensation in any suit, under sec. 180, received shall be apportioned between bailor and bailee, in accordance with their respective interest.

Rights of Bailor
1. Claim damage against bailee's negligence
2. Right of termination
3. Claim for damages against unauthorised use
4. Compensation for unauthorised mix
5. Entitled to get back the goods
6. To enforce duties of bailee
7. Right to claim accretion to goods
8. Right to sue against wrongdoers

Rights of Bailee

The duties of the bailor are the rights of the bailee. However, to recapitulate, the bailee has the following rights against bailor:

1. A bailee is entitled to claim damages for any loss caused to him from the undisclosed faults in the goods bailed. (Sec.150)

2. In case of gratuitous bailment, bailee is entitled to recover from bailor all necessary expenses incurred by him for bailment (Sec. 158): and of the extraordinary expenses in case of non-gratuitous bailment.

3. Right to indemnify, in case of gratuitous bailment, against premature termination of the contract by the bailor for any loss sustained. (Sec. 159)

4. A bailee is entitled to claim any loss sustained by him because of non-entitlement or defective entitlement of the bailor on goods bailor on goods bailed.

5. If a third person claims the ownership or the goods bailed, the bailee can ask the court to decide the ownership and can withhold the delivery to the bailor.

6. If a third person wrongfully deprives the bailee of the use or possession of the goods bailed to him, he has the right to bring an action against such third party (Sec. 180)

7. According to Section 165, in case of several joint bailers, the bailee can deliver the goods back to one of them without the consent of all.

8. Bailee enjoys the right of lien (Sec. 170 and 171)

Finder of Lost Goods

A person who finds goods belonging to another and takes them into custody is called a finder of lost goods. A person,who finds goods belonging to the other, is not bound to take them into his custody or take charge of it. But if he picks them up or take charge of the goods, he becomes the bailee of those goods. Section 71 of the Act, clearly states that a person who finds goods belonging to another and takes them into his custody, is subject to the same responsibilities as a bailee.

Duties of a Finder of Lost Goods

His duties are the same as those of a bailee. In brief, the following are the duties of a finder of lost goods.

(a) He must take reasonable care of the goods found (Se. 151).

(b) He must try to find out the true owner of the goods. If he fails, he will be liable as a trespasser or a thief.

(c) He must not mix up the goods with his own goods.

(d) He should not use the goods found for his own purpose.

Rights of the Finder of Goods

1. The finder has the right of lien over the goods for his expenses.

As such he can retain the goods against the owner, until he receives compensation for trouble and expenses for preserving the goods and finding out the owner. But he has no right to sue the owner for any compensation.

2. In case the owner has offered any specific reward for the return of goods, the finder may sue for such reward and he may retain the goods until such reward is paid.

3. A finder has the right to retain possession of the goods against the whole world, except the true owner.

4. According to Section 169 of the Act, the finder of goods may sell if:

(a) the owner cannot, with reasonable diligence be found, or

(b) he refuses, upon demand, to pay the lawful charges of the finder, or

(c) the thing is in danger of perishing or of losing the greater part of its value, or

(d) the lawful charges of the finder, in respect of the thing found, amount to two-thirds of its value.

Pledge or Pawn

Pledge or pawn is a special kind of bailment where a thing is delivered as security for the repayment of a debt. According to section 172 of the Contrast Act, “The bailment of goods as security for payment of a debt or for

performance of a promise, is called pledge. The bailor in this case is called the pawnor. The bailee is called the pawnee". The following are the two parties to a pledge :

(a) Pawnor or pledger means the person who delivers the goods.

(b) Pawnee or pledge means the person whom the goods are delivered as security.

Example : X borrows Rs. 10,000 from Y and keeps his scooter as security for repayment of the debt. This kind of bailment of property is called a pledge or pawn. Here X is the pawnor and Y is the pawnee.

Essentials of Pledge

Essentials of a valid pledge are as follows :

1. The goods must be delivered by borrower to the lender as a security for repayment of debt or for performance of a promise.

2. The possession of the goods passes from one person to the other person and not the ownership.

3. Pledge can be of only movable goods – documents of title, shares, valuables etc. Immovable properties cannot be pledged.

4. The goods, pledged with the pawnee, to be returned on receipt of his full dues.

Duties of Pawnor

1. It is the duty of the pawnor to repay the loan taken from the pawnee within the time and in the manner specified in the contract.

2. He has to compensate the pawnee for any extraordinary expenses incurred by him.

3. Default or risk, if any, in the goods pledged, should be known to pawnor.

Rights of Pawnor

1. The pawnor has the right to take back the goods pledged provided that he has paid the whole of the amount of debt alongwith any interest or charges thereon, to the pawnee.

2. The duties of the pawnee are the rights of the pawnor. Therefore, the pawnor can enforce by suit all the duties of the pawnee (enumerated below).

3. Usually a time may be stipulated for the payment of the debt, or performance of the promise, for which the pledge is made. If the pawnor makes default in payment of the debit or performance of the promise at the stipulated time he may redeem the goods pledged at any subsequent time before the actual sale is made.

Duties of Pawnee

The duties of pawnee are similar to bailee.

1. He has to take reasonable care of the goods pledged.

2. He is not permitted any unauthorized use of the goods pledged.

3. He has to return the pledged goods on the payment of debt.

4. He should not do any act in violation of the terms of the contract.

5. He should not mix the goods pledged with his own goods.

6. Any accruals to the goods pledged belong to the pledgor and should be delivered accordingly.

Right of Pawner

1. Right of Retainer (Sec. 173)

2. Right of Retainer for Subsequent Advances (Sec. 174)

3. Right to Extraordinary Expenses (Sec.175)

4. Right in case of Default by Pawnor (Sec.176)

5. Right against the True Owner, when the Pawnor's Title is Defective

Pledge by Non-owners

It is a general rule that it is only the owner who can make a valid pledge. No one can convey a better title than what he had, is applicable to bailment and pledge. But, Sections 178, 178 A and 179 of the Indian Contract Act provide certain circumstances in which the pledge made by a non-owner or a co-owner is also valid. In the following cases, a non-owner can make a valid pledge.

1. Pledge by Mercantile Agent

According to Section 178, pledge by a mercantile agent, who is not authorized by the owner of goods, will be valid, if the following conditions are fulfilled:

a) The mercantile agent is in possession of goods or document of title to he goods;

b) Such possession is with the consent of the owner;

c) He acts in the ordinary course of business while making the pledge.

d) The pawnee acts in good faith, and

e) The pawnee has no notice of the pawnor's defective title.

2. Pledge by Seller or Buyer in Possession after Sale

According to Section 30 of Sales of Goods Act, a seller left in possession of goods after sale and a buyer, who obtains possession of goods with the consent of the seller before sale, can create a valid pledge provided that the pawnee acts in good faith and has no notice of the previous sale of goods to the buyer or of the lien of the seller over the goods.

3. Pledge by a Possession under a Voidable Contract

Where a person obtains possession or goods under a voidable contract, the pledge created by him will be valid, subject to the following conditions:

a) The contract has not been rescinded before the contract of pledge.

b) The pawnee acts in good faith, and

c) The pawnee has no notice of the pawnor's defect of title (Sec.178 A).

4. Pledge by Person having Limited Interest (Sec. 179)

Where a person pledges the goods, in which he has only a limited interest, the pledge is valid to the extent of that interest.

Example: X finds a cycle on the road and gets it repaired for Rs. 1000 and pledges it with Y for Rs. 2000. The real owner can get the cycle on payment of Rs. 1000.

5. Pledge by Co-owners in Possession

One of the several joint owners of the goods in possession thereof, with the consent or the other co-owners, may create a valid pledge of the goods.

Carriage of Goods

Transport plays a vital role in economic development of a country, If facilitates the movement of goods and labour. The role of transport is very important in the development of commerce. Thus, carriage of goods from one place to another within the country or from one country to another plays an important role in commercial life of modern world. Therefore, the study of law relating to 'Contract of Carriage of Goods' is very important.

Goods may be carried by land, sea or air. Therefore, the law relating to carriage of goods may be studied under three heads: (1) Carriage by land, (2) Carriage by Sea and (3) Carriage by Air. The Indian Statutes relating to the law of carriage are given below:

1. Carriage by Land:

   i. The Common Carriers Act 1865.

   ii. The Railway Act 1890.

2. Carriage by Sea:

   i. The Indian Bills of Lading Act 1856.

   ii. The Carriage of Goods by Sea Act 1925

   iii. The Merchant Shipping Act 1958.

   iv. The Marine Insurance Act 1963.

3. Carriage by Air:

   Carriage by Air Act 1972.

A contract of carriage may be defined as "a contract under which one person agrees to carry goods or passengers from one place to another for a fixed remuneration. The persons who agree to carry the goods or passengers are called 'carriers'.

Carriage by Land

The law relating to carriage of goods by land, including inland navigation, is contained in (a) The Carriers Act 1865 and (b) The Indian Railways Act 1890.

Classification of Carriers

The carriers are generally classified into (1) Common Carriers (also known as Public Carriers) and (2) Private Carriers. However, there is a third type of carriers known as 'Gratuitous Carriers'. Thus there classes of carriers,

1. Common or Public Carriers,

2. Private Carriers, and

3. Gratuitous Carriers.

1. Common or Public Carriers

A common carrier is one who undertakes for hire to transport from one place to another the goods of anyone willing to employ him either by land, sea or air. The Common Carriers Act 1865 defines a common carrier, as "any individual, firm or company (other than the Government) who transports goods, as a business for money, over land or inland waterways, without discrimination between different consignors".

Characteristics of Common Carrier

According to the definition given above, the characteristics of a common carrier in India are as follows:

1. The common carrier may, be an individual, a firm or company. But the Government is not included in the category. Thus, the post office is not a common carrier, though it may carry goods.

2. Only the carriers of goods are common carriers, So, carriers of passengers are not included therein.

3. One who carries goods as his regular business is a common carrier. A person carrying goods occasionally is not a common carrier.

4. A common carrier is one who is ready to carry the goods of any person without any discrimination. If a carrier reserves to himself the right to reject an offer, he is not a common carrier.

5. If a carrier offers to carry goods only from one specified place to another or to carry only a particular kind of goods, he is a common carrier.

6. The term common carrier is restricted to carriage by land and inland waterways only.

7. Charges for carrying goods are necessarily to be charged. One who carries goods free is not a common carrier.

Duties of a Common Carrier

The Common Carriers Act 1865 lays down the following duties. The English Common Law also apply to matters, not covered by this Act.

a) **Carry for all:** He is bound to receive and carry all goods which he professes to carry for all persons, who agree to pay him proper charges and who choose to employ him for the carriage of their goods.

b) **Carry goods safely:** He is the insurer of goods so takes all reasonable precautions for the safe carriage of the goods and deliver the goods safely.

c) **Delivery within reasonable time:** Upon the completion of the transit, he must deliver the goods as instructed by the consignor at the agreed time or within reasonable time. He should not deviate from customary route and not cause unwanted delay.

d) **Delivery the goods at the place:** He must deliver the goods at the place fixed by the consignor.

e) **Keep the goods in his custody:** Where it is a practice to take delivery of goods at wharf, the goods must be kept be the Carrier at his own risk in his custody for a reasonable time.

Right of Common Carrier

1. A common carrier is entitled to the agreed remuneration or to a reasonable remuneration for his services. He can demand payment in advance.

2. He has a right to retain the goods and refuse delivery thereof until his charges for the carriages are paid. He can exercise particular lien over the goods.

3. A common carrier is not bound to carry goods under certain circumstances (exceptions stated above).

4. If the consignee refuses to accept delivery of the goods the carrier is at liberty to take such steps as are reasonable and prudent under the circumstances. He can recover all reasonable expenses incurred by him in this connection.

5. By entering into a special contract with the consignor, he can limit his liability.

6. If perishable goods get spoiled on the way, he can sell them, in the absence of any special instructions by the consignor.

7. He can recover damages from the consignor for loss suffered by him because of dangerous nature of goods not being explained to him by the consignor.

Liability of Common Carrier

According to the English Common Law, a common carrier of goods is an insurer of goods carried. He is bound to indemnify the owner in full for any loss or damage to the goods, whether caused by his negligence or not, in course of carriage.

Private Carrier

Private carrier is one who casually or occasionally carries goods for others on special terms mutually agreed upon. He enjoys the discretion of accepting or rejecting any proposal for carriage of goods. He occasionally carries goods for others and that too under special agreement. Thus, he may or may not carry goods for others. He does not make a general offer. The contractor is a private carrier. He negotiates special terms for each service.

A private carrier is not governed by the Carriers Act 1865. His position is that of a bailee. Hence, he is governed by the Indian Contract Act.

Common Carrier Vs. Private Carrier

(1) A common carrier renders regular services, while private carrier renders casual and non-regular services.

(2) A common carrier generally cannot refuse to carry goods offered to him, while a private carrier keeps this right reserved.

(3) A common carrier, the terms of carriage are fixed, while private carriers special terms are negotiated.

(4) The liabilities of a common carrier are governed by the Common Carrier Act 1865 while the liabilities of a private carrier are those of a bailee.

Railways as Carriers

"A railway administration shall not make or give any undue or unreasonable preference or advantage to, or in favour of, any particular person of railway administration, or any particular description of traffic, in any respect whatsoever, or subject to any particular person or railway administration or any

particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Duties of Railways

(1) The railway administration is bound (like a common carrier) to carry goods of every person who is ready and willing to pay the freight and observes the regulations regarding packing etc. Similarly, railways are bound to carry every passenger who pays the necessary fare, Hence, the railways, as regards duties, are common carriers.

(2) Duty not to give any undue or unreasonable preference or advantage to, or in favour of, any particular person, or any particular description of traffic, in any respect whatsoever, or subject any particular person or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

LIABILITIES OF RAILWAYS

General Responsibility as Carrier of Good

(1) With the enactment of the Indian Railways (Amendment) Act 1961, the scope of liability of a railway administration has been much widened and enlarged from that of a bailee. Under amended Sec. 73, railway administration has been held liable for the loss, destruction or deterioration in transit of goods or animals received by it for carriage by rail from all causes except the losses arising from :

(a) Act of God,
(b) Act of public enemies,
(c) Act of war,
(d) Arrest, restraint or seizure under legal process.
(e) Order by or on behalf of the Central or State Government,
(f) Acts of commission or negligence of the consignor or the consignee or their agent,
(g) Natural deterioration due to some inherent vice in the goods.
(h) Latent defects, or
(i) Fire or explosion.

Thus, the liability of a railway administration is the same as that of a common carrier. Further, Sec. 42A of the Railway Act states that a railway administration must not give any unreasonable preference or advantage to any particular class of traffic.