SYNOPSIS
CONTRACT II
CONTRACT OF INDEMINITY
Course Teacher- Mrs Sridevi Krishna

Definition:

A contract of indemnity is "a contract by which one party promises to save the other from the loss caused to him by the conduct of the promisor himself, or by the conduct of a third party" (Sec.123).

Example : A contracts to indemnify B against consequences of any proceedings which C may take against B in respect of a certain sum of 200 rupees. This is a contract of indemnity. A will be termed as *"Idemnifier"* and B as the *"Idemnity-holder".*

Definition is not very exhaustive:

According to the definition given by Sec. 124 of the Contract Act, contract of indemnity includes (i) only express promise to idemnify and (ii) cases where loss is caused by the conduct of the promisor himself or by the conduct of any other person. It does not include (a) implied promise to indemnify and (b) cases where the loss is caused by accident or by the conduct of the promises.

According to English law, a contract of indemnity is "a promise to save another harmless from loss caused as a result of a transaction entered into at the instance of the promisor". It thus, includes the loss caused by events or accidents also. The definition of a contract of indemnity as per Indian Law is thus very restrictive. If it is strictly applied, even the contracts of insurance would fall outside the purview of contract of indemnity. But Indian Courts apply the English definition to contracts of indemnity. As was observed by Justice Chagla, "Sections 124 and 125 of the Contract Act are not exhaustive of the law of indemnity and the courts here would apply the same principles that the courts in England do". (Gajanan Moreshwar V. Moreshwar Madras, 1942 Bomb. 302).

Indian courts, in a large number of cases, have also observed that contracts of indemnity also include implied promise to indemnify.

Example: A is the owner of an article. It is lost and found by B. B sends it to an auctioner for selling it. The auctioner sells the article. A recovers damages from the auctioner for selling away his article. The auctioner can recover the loss from B. There is an implied promise by B to save the auctioner from any loss that may be cuased to him on account of any defect in B's authority to let the article sold.

Commencement of Indemnifier's Liability

High Courts have differed in their judgements regarding commencement of indemnifier's liability. According to High Courts of Calcutta, Madras, Allahabad and Patna indemnity holders when asked to meet a liability, can compel the indemnifiers to put him (indemnity-holder) in a position to meet the liability without waiting until he (indemnity-holder) has actually discharged it. High Courts of Bombay, Lahore and Nagpur have, however, held that idemnifier can be made liable only when indemnity-holder has incurred an actual loss, i.e., discharged the liability. The former view seems to be more correct and is also in consonance with the English view "to indemnity does not merely mean to reimburse in respect of moneys paid, but to save from loss in respect of liability against which the indemnity has been given...if it be held that payment is a condition precedent to recovery, the contract may be of little value to the person to be indemnified, who may be unable to meet the claim in the first instance." (Kennedy L.J.) in Liverpool Insurance Co. case 84

Thus, we can conclude that if the indemnity holder had incurred an absolute liability, he has the right to call upon the indemnifier to save him from that liability and pay it off.

Rights of the indemnity-holder when sued

The indemnify holder is entitled to the following rights:

1. Indemnity-holder is entitled to recover all damages which he might have compelled to pay in any suit in respect of a matter covered by the contract.

2. Indemnity holder is entitled to recover all costs incidental to the institution or defending of the suit. But the party indemnified can not recover costs when he has not acted as a prudent man in defending the action against him or has not been authorised by the indemnifier to defend the suit or where the costs incurred have been unreasonable in amount.

3. Indemnity holder is entitled to recover all sums paid under any compromise of any such suit, provided the compromise was not contrary to the directions of the promisor and it has been made on the best available terms. Promisee must have acted prudently in making such a promise. (Sec. 125).

It is to be noted that a contract of indemnity being a specie of the general contract and therefore, must satisfy all essentials of a valid contract such as competent parties, free consent, lawful object etc., otherwise it will not be valid.

Example: A agrees to indemnity B for all consequences which may arise as a result of his (B) giving a good beating to C. The object being unlawful the agreement is also void.

CONTRACTS OF GUARANTEE

Definition

A 'Contract of Guarantee" is a contract to perform the promise or discharge the liability, of a third person in case of his deault. The person who gives the guarantee is called the 'surety'; the person in respect of whose default the guarantee is given is called *'the principal debtor'* and the person to whom the guarantee is given is called the *'creditor'*. The contract of guarantee may be either written or oral (Sec. 126).

Purpose: Contracts of guarantee are usually entered into

(a) to secure the performance of something which may be immediately related to a mercantile agent, or

(b) to secure the honesty and fidelity of someone who is to be appointed to some offce, or

(c) to secure some one from injury arising out of some wrong committed by another.

Essentials of a valid contract must be present

A contract of guarantee like other ordinary contrary must satisfy all the essentials of a contract but it has two distinctive features.

(a) Something done or any promise made for the benefit of the principal debtor is presumed by law to be a sufficient consideration for the contract of guarantee. It is not necessary that the surety himself must be benefited.

Example: A sells and delivers goods to B. C afterwards requests A to forbear to sue B for the debt for a year and promises that if he does so, C will pay for them in default of payment by B. A agrees to forbear as requested. This is a sufficient consideration for C's promise.

(b) In a contract of guarantee, the creditor and surety must be competent to enter into a contract but principal debtor may be a minor or a person incapable of entering into a contract. In such a case the surety will be taken as the principal debtor and will be liable to pay.

(c) In a contract of guarantee, the liability of the surety is condition. It arises only when the principal debtor makes a default. A liability which arises independently of a 'default' is not within the definition of guarantee. (Punjab National Bank V. Sri Vikram Cotton Mills, (1970) ISCC 60).

Invalid Guarantee

Following are a few of those cases when the guarantee given by the surety will be invalid and cannot be enforced against him:

(i) *Guarantee obtained by misrepresentation* (Sec. 142): Any guarantee which has been obtained by means of misrepresentation made by the creditor, or with his knowledge and assent, concerning a material part of the transaction, is invalid.

(ii) *Guaranttee obtained by concealment* (Sec. 143): Any guarantee which the creditor has obtained by means of keeping silence as to material circumstances is invalid.

(iii) *In case co-surety does not join* (Sec. 144): Where a person gives a guarantee upon a contract that the creditor shall not act upon until another person has joined in it as co-surety, the guarantee will be invalid if that other person does not join.

Example (i) A agrees with B to stand as a surety for C for a loan of Rs. 1000 provided D also joins him as surety. D refuses to join. A is not liable as a surety.

(ii) A guarantees to C payment for iron to be supplied by him to B to the amount of 2,000 tons.

B and C have privately agreed that B should pay five rupees per ton beyond the market price, such excess to be applied in liquidation of an old debt. This agreement is concealed from A. A is not liable as a surety.

Kinds of Guarantee

Contracts of guarantee may be

(i) Specific, or (2) Continuing.

1. ***Specific guarantee****:* Specific guarantee means a guarantee given for one specific transaction. In this case the liability of the surely extends only to a single transaction.

Example: A guarantee payment to B of the price of 5 sacks of flour to be delivered by B to C and to be paid in a month. B delivers sacks to C. C pays for them. Afterwards B delivers four sacks to C, which C does not pay. The guarantee given by A was only a specific guarantee and accordingly he is not liable for the price of the four sacks.

2. ***Continuing guarantee*** (Sec. 129): A continuing guarantee is that which extends to a series of transactions (Sec. 129). It is not confined to a single transaction. Surety can fix up a limit on this liability as to time or amount of guarantee, when the guarantee is a continuing one. The fact that the guarantee is continuing can also be ascertained from the intentions of the parties and the surrounding circumstances.

Example: (i) A, in consideration that B will employ C in collecting the rents of B,s zamindari, promises B to be responsible, to the amount of 5,000 rupees, for the due collection any payment by C of those rents. This is continuing guarantee.

(ii) A gurantees payment to B, a tea/dealer to the amount of £ 100, for tea he may from time to time supply to C.B supplies C with tea to the extent of the agreed value i.e., £ 100 and C pays B for it. Afterwards B supplies C with tea to the value of £ 200. C fails to pay. The guarantee given by A was a continuing guarantee, and he is accordingly liable to B to he extent of £ 100.

Revocation of continuing guarantee

A continuing guarantee is revoked by any of the following ways.

1. *By notice* (Sec. 130). A continuing guarantee may at any time be revoked by the surety as to future transactions, by giving a distinct notice to the creditor.

Example: A in consideration of B's discounting at A's request, bills of exchange, for C guarantees to B, for twelve months, the due payment of all such bills to the extent of 5,000 rupees, B discounts bills for C to be extent of 2,000 rupees. Afterwards at the end of three months, A revokes the guarantee. This revoation discharges A from all liability to B for any subsequent discount. But A is liable to B for 3,000 rupees, on the default of C.

2. *By Death* (Sec. 131): Death of the surety will operate as a revocation of the continuing guarantee with regard to the future transactions unless the contract provides otherwise. No notice of death need be given to the creditor. Heirs of the surety will not be liable forany fresh transactions entered into by the creditor with the principal debtor after the death of the surety without knowledge of such death.

Nature of surety's liability

Where the parties do not specifically agree as to the extent of he liability or the surety does not put up any limit on his ability at the time of entering into the contract, the liability of the surety will be co-extensive with that of the principal debtor. In other words, whatever amount of money a creditor can legally realise from the principal debtor including interest, cost of litigation, damages etc., the same amount he can recover from the surety.

Example: A guarantees to B the payment of a bill of exchange by C, the acceptor. The bill is dishonoured by C. A will be liable not only for the amount of the bill also for any interest and charges which have become due on it.

The liability of the surety arises immeidiately on the default of the principal debtor but the creditor is not bound to give any notice of the default of the principal debtor to the surety or it exhaust all the remedies open to him as against the debtor before proceeding against the surety. Besides that, creditor is free to release the debt when it becomes due to either from the debtor or the surety. It is not necessary for him to proceed against the debtor first. He may sue the surety without suing the principal debtor. It is surety's duty to see that the principal debtor pays or performs his obligation.

Rights of the Security

Rights of the surety can be classified under three heads: (i) Against the principal debtor.

(ii) Against the creditor.

(iii) Against the co-sureties.

1. Rights of the surety against the principal debtor

(a) *Rights to be subrogated:* When the principal debtor had committed the default and the surety pays the debt to the creditor, surety will stand in the shoes of the creditor and will be invested with all the rights which the creditor had against the debtor (Sec. 140).

(b) *Right to claim indemnity:* In every contract of guarantee, there is an implied promise by the principal debtor to indemnify the surety and the surety is to recover from the principal debtor whatever sum he has rightfully paid under the guarantee but no sums which he has paid wrongfully, e.g., cost of fruitless litigation (Sec. 145).

Examples : (i) B is indebted to C, and A is surety for the debt. C demands payments from A, and on his refusal sues him for the amount. A defends the suit, having reasonable grounds for doing so, but

is compelled to pay the amount of the debt with costs. He can recover from B the amount paid by him for costs, as well as the principal debt.

(ii) A guarantees to C, to the extent of 2000 rupees, payment for rice to be supplied by C to B. C supplies rice to a less amount than 2000 rupees, but obtains from A payment of the sum of 2,000 rupees in respect of the rice supplied. A cannot recover from B more than the price of the rice actually supplied.

2. Rights of the surety against the creditor

A surety is entitled to the benefit of every security which the creditor has against the debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not and if the creditor loses or without the consent of the surety parts with such security, the surety is discharged to the extent of the value of the security (Sec. 141). But a surety, however, cannot claim the benefit of the securities only on the payment of a part of the debt.

3. **Right against co-sureties**

When two or more persons stand as sureties for the same debt or obligation they are termed as co-sureties. The position of co-sureties is as follows.

Co-sureties liable to contribute equally (Sec. 146): Where two or more persons are co-sureties for the same debt or duty, either jointly or severally, and whether under the same or different contract, and whether with or without the knowledge of each other, the co-sureties in the absence of any contract to the contrary, are liable, as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains unpaid by the principal debtor.

Example: A, B and C are sureties to D for the sum of 3,000 rupees lent to E.E makes default in payment. A, B and C are liable, as between themselves, to pay 1,000 rupees each.

Liability of co-sureties bound in different sums (Sec. 147)

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

Example: (i) A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 rupees, B in that of 20,000 rupees, C in that of 40,000 rupees, conditoned for D's duly accounting to E. D makes default to the extent of 30,000 rupees. A, B and care each liable to pay 10,000 rupees.

(ii) A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 rupees, B in that 20,000 rupees and C in that of 40,000 rupees, conditioned for D's duly accounting to E, D makes default to the extent of 40,000 rupees. A is liable to pay 10,000 rupees, and B and C 15,000 rupees each.

Discharge of surety

Surety will be discharged from his liability in the following cases:

1. *By notice or death* (Secs. 130 & 131): A contract of continuing gurantee may be terminated at any time by notice to the creditor. The death of the surety brings an end to continuing gurantee. No notice of death need to given to the creditor. The surety will not be responsible for acts done after his death.

2. *Variations in terms of the original contract between the principal debtor and the creditor* (Sec. 133): If the contract between the creditor and the principal debtor is materially altered without the consent of the surety, the surety is discharged as to transactions subsequent for the alteration.

Example (i) : A becomes surety to C for B's conduct as a manager in C's bank. Afterwards, B and C contract, without A's consent that B's salary shall be raised, and that he shall become liable for one-fourth of the losses on overdrafts B. allows a customer to overdraw, and the bank loses a sum of money. A is discharged from his suretyship by the variance made without the consent, and is not liable to make good this loss.

(ii) C contracts to lend B Rs. 5,000 on first March. A guarantees repayment. C pays the amount to B on first January. A is discharged from the liability, as the contract has been varied in as much as C might sue B for the money before the 1st March.

3. *By release or discharge of the principal debtor* (Sec. 134). The surety is discharged by any contract between in creditor and the principal debtor, by which the principal debtor is released or by any act or omission of the creditor, the legal consequence of which is the discharge of a surety on one agreement will not release the other surety bound for the same debtor by a separate agreement from his engagement, unless the effect of such release is to adversly affect the others right to contribution.

Example (i) : A gives a gurantee to C for goods to be supplied by C to B. C supplies goods to B, and afterwards B becomes embrassed and contracts with his credtiors (including C) to assign to them his property in consideration of their releasing him from their demands. Here B is released from his debt by the contract with C, and A is discharged from his suretyship.

(ii) A contracts with B fro to grow crop of indigo on his (A's) land and to deliver it to B at a fixed rate. C guarantees A's performance of his contract. B diverts a stream of water which is necessary for irrigation of A's land and thereby prevents him from raising the indigo. C is no longer liable on his guarantee.

Compounding by creditor with the principal debtor (Sec. 135). A contract between the creditor and the principal debtor by which the creditor makes a composition with, or promise to give time to, or not sue to the principal debtor discharges the surety unless the surety assents to such contract.

But where a contract to give time to the principal debtor is made by the creditor with a third person, and not with the principal debtor, the surety is not discharged (Sec. 136).

Example: C, the holder of an overdue bill of exchange drawn by as surety for & and accepted by B, contracts with A to give time to B, is not discharged.

Similarly, mere forbearance on the part of the creditor to sue the principal debtor within the limitation period or to enforce any other remedy against him does not in the absence of any provision in the guarantee to the contrary discharge the surety (Sec. 137).

Example: B, owes to C a debt guaranteed by A. The debt becomes payable. C does not sue

B for a year after the debt has become payable. A is not discharged from the suretyship.

Where there are co-sureties a release by the creditor of one of them does not discharge the other;

neither does it free the surety so released from his responsibility to other sureties (Sec. 138).

5. *Creditor's act or omission imparing surety's eventual remedy* (Sec. 139). If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, any the eventual remedy of the surety himself against the principal debtor is thereby impaired, the security is discharged.

Example: (i) B contracts to build a ship for C for a given sum to be paid by instalments as the work reaches certain stages. A becomes surety to C for B's performance of the contract. C without the knowledge of A, prepays to B the last two instalments. A is discharged by his pre-payments.

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

6. *Loss of security* (Sec. 141). If the creditor losses on, without the consent of the surety, parts with any security given to him at the time of the contract of guarantee, the surety is discharged from liability to the extent of the value of security.

Example: C advances to B, his tenant Rs. 2,000 on the gurantee of A. C has also further a security of Rs. 2,000 by a mortage of B's furniture. C cancells the mortage. B becomes insolvent, and C sues A on his guarantee. A is discharged from his liability to the amount of the value of the furniture.

7. *By invalidation of the contract of guarantee* (Secs. 142, 143 and 144). A contract of guarantee becomes invalid if guarantee was obtained by fraud or concealment etc. about meterial facts as discussed before. Surety in such a case will be discharged from his liability.

Difference between indemnity and guarantee

Contract of Indemnity (Section 124)	**Contract of Guarantee (Section 126)**
It is a bipartite agreement between the indemnifier and indemnity-holder.	It is a tripartite agreement between the Creditor, Principal Debtor, and Surety.
Liability of the indemnifier is contingent upon the loss.	Liability of the surety is not contingent upon any loss.
Liability of the indemnifier is primary to the contract.	Liability of the surety is co-extensive with that of the principal debtor although it remains in suspended animation until the principal debtor defaults. Thus, it is secondary to the contract and consequenty if the principal debtor is not liable, the surety will also not be liable.
The undertaking in indemnity is original.	The undertaking in a guarantee is collateral to the original contract between the creditor and the principal debtor.
There is only one contract in a contract of indemnity - between the indemnifier and the indemnity holder.	There are three contracts in a contract of guaratee - an original contract between Creditor and Principal Debtor, a contract of guarantee between creditor and surety, and an implied contract of indemnity between the surety and the principal debtor.
The reason for a contract of indemnity is to make good on a loss if there is any.	The reason for a contract of guarantee is to enable a third person get credit.
Once the indemnifier fulfills his liability, he does not get any right over any third party. He can only sue the indemnity-holder in his own name.	Once the guarantor fulfills his liabilty by paying any debt to the creditor, he steps into the shoes of the creditor and gets all the rights that the creditor had over the principal debtor.

Bailment

The term *bailment* is derived from the French *bailor,* "to deliver."

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 ".

Explanation.-If a person already in possession of the goods of another contracts to hold them as a bailee, he thereby becomes the bailee, and the owner becomes the bailor of such goods, although they may not have been delivered by way of bailment.

The person delivering the goods is called the 'bailor'. The person to whom they are delivered is called the 'bailee'.

Examples:-

(i) A lends his motor cycle to B for his use.

(ii) A gives a piece of cloth to a tailor to make it into a coat. (iii) A gives his radio set to a mechanic for repairs.

Essential characteristics

The essentail elements of the definition of bailment can be summed up as under:-

(a) Bailment is always based upon a contract. In exceptional cases it can also be implied by law, e.g., finder of goods.

(b) There can be a bailment of moyable properties only but money is not included in the category of movable goods.

(c) In Bailment the possession of goods must change. It thus requires temporary delivery of goods. Mere custody of goods without possession will not be sufficient to constitute bailment. A servant or a guest using his master's or host's goods will not be a bailee.

In bailment the delivery of goods may be actual or constructive.

Example:

(i) A delivers his radio set to B for repair. This s a case of actual delivery of goods by A to B. A is the bailor and B is the bailee.

(ii) A employed a goldsmith to melt old jwellery and prepare new jewels. Everyday she used to receive half-made jewels from the goldsmith and put them in a box and leave the box in the goldsmith's room. She kept the key of the room with her. On one night-the jewels were stolen. It was held that there was redelivery of jewels to the lady and the goldsmith could not be regarded as bailee. The lady herself must bear the loss (Kaliapurimal v. Visalakshmi).

(d) In bailment, ownership is not transferred. The bailor continues to be the owner of the goods. (e) Goods are delivered upon a condition that they are to be returned in specie.

Deposit of money in a bank is not a case of bailment since the return of money will not be of the identical coins deposited. Moreover the money handed over to the bank is not for safe custody but to be credited to some kind of account. The relation between the bank and the depositor of money is that of a borrower and the lender and not that of a bailor and bailee.

Bailment may broadly be classified into two categories, namely-

1. Gratuitous bailment, and 2. Non-gratuitous bailment.

Gratuitous Bailment

A bailment with no considerations is called a gratuitous bailment. In this kind of bailment neither the bailor, nor the bailee is entitled to any remuneration or reward. Such a bailment may be for the exclusive benefit of either party, i.e., the bailor or the bailee, discussed as below.

Bailment for the exclusive benefit of the bailor.

In this case the bailor delivers the goods for the exclusive benefits and the bailee does not derive any benefit out of it.

For example, "A" leaves his pets with "B", his neighbour to be looked after during A's physical absence. In this case, A alone is being benefited by the bailment. Or, if you park your car in your neighbour's premises to be taken care in your absence, you as a bailor derive the exclusive benefit from the bailment. Bailment for the exclusive benefit of the bailee

This is the case where a bailor delivers the goods to the bailee for the exclusive benefits of the bailee and does not gain anything from the contract himself.

For example, you lend your book to a friend of yours for a week without any charge or favour. In this case the recipient of the book as a bailee, is the sole beneficiary of this transaction of bailment.

Non-Gratuitous Bailment

Contrary to gratuitous bailment, a non-gratuitous bailment or bailment for reward is one that involve some consideration passing between the bailor and the bailee. Obviously in this case the delivery of goods takes place for the mutual benefit of both the parties.

For example, "A" hires "B's" car. Here B is the bailor and receives the hire charges and A is the bailee and enjoys the use of the car. Similarly, when you give your PC or laptop for repair to some techie, both you and the computer techie are going to be benefited by this contract – while you get your computer repaired, he gets his fees or charges.

Rights of the bailee

1. *Rights to interplead* (Sec. 165). If a person, other than the bailor, claims the goods bailed, bailee may apply to the court to stop the delivery of the goods to the bailor and to decide the title to the goods.

2. *Rights against third person* (Sec. 180). If a third person wrongfully deprives the bailee of the use or possession of the goods bailed, or causes them any injury, the bailee is entitled to use such remedies as the owner might have used in a like case if no bailment has been made. Bailee can thus bring a suit against a third person for such deprivation or injury.

3. *Right of particular lien for payment for services* (Sec. 170). Where the bailee has (a) in accordance with the purpose of bailment, (b) rendered any service involving the exercise of labour of skill, (c) in respect of the goods, he shall have (d) in the absence of a contract to the contrary, right to retain such goods, until he receives due remuneration for the services he has rendered in respect of them. Bailee has, however, only a right to retain the article and not to sell it. The service must have entirely been formed within the time agreed or a reasonable time and the remuneration must have become due.

This right of particular lien shall be available only against the property in respect of which skill and labour has been used.

Examples

(i) A delivers a rough diamond to jeweller, to be cut and polished, which is accordingly done. B is entitled to retain the stone till he is paid for the services he has rendered.

(ii) A gives cloth to B, a tailor, to make into a coat. B promises A to deliver the coat as soon as it is finished, to give A three month's credit for the price. B is not entitled to retain the coat until he is paid.

4. *Right of general lien* (Sec. 171). Bankers, factors, wharfingers, attorneys of a High Court and policy brokers will be entitled to retain, as a security for a general balance of amount, any goods bailed to them in the absence of a contract to the contrary. By agreement other types of bailees excepting the above given five may also be given five may also be given this right of general lien.

5. *Right to indemnity* (Sec. 166). Bailee is entitled to be indemnified by the bailor for any loss arising to him by reasons that the bailor was not entitled to make the bailment or to receive back the goods or to give a directions respecting them. If the bailor has not title to the goods, and the bailee in good faith, delivers them back to, or according to the directions of the bailor, the bailee shall not be responsible to the owner in respect of such delivery. Bailee can also claim all the necessary expenses incurred by him for the purpose of gratuitous bailment.

6. *Right to claim compensation in case of faulty goods* (Sec. 150): A bailee is entitled to receive compensation from the bailor or any loss caused to him due to the failure of the bailor to disclose any faults in the goods known to him. If the bailment is for hire, the bailor will be liable to compensate even though he was not aware of the existence of such faults.

7. *Right to claim extraordinary expenses* (Sec. 158) : A bailee is expected to take reasonable care of the gods bailed. In case he is required to incur any extraordinary expenses, he can hold the bailor liable for such expenses.

8. *Right of delivery of goods to any one of the several joint bailor of goods.* Delivery of goods to any one of the several joint bailors of goods will amount to delivery of goods to all of them in the absence of any contract to the contrary.

Duties of the bailee

1. *To take reasonable care* (Sec. 151 & 152): Bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the good bailed. It will not make any difference whether the bailment is gratuitous for reward. If any loss is caused to the goods, in spite of such reasonable care by the bailee, he shall not be liable for the loss. Bailee shall be held liable for losses arising due to his negligence.

Example (i): A delivered to B certain gold ornaments for safe custody. B kept the ornaments in a locked safe and kept the key in the case box in the same room. The room was on the ground and was locked from outside, and therefore, was easily accessible to burglars. The ornaments were stolen. It was held that the bailee did not take reasonable care, and therefore, was liable for the loss (Rampal V. Gauri Shanker, 1952).

(ii) A deposited his goods in B's godown. On account of unprecedented floods, a part of the goods were damaged. Held, B is not liable for the loss (Shanti Lal V. Takechand).

A bailee is liable to compensate the bailor for any damages done to the thing bailed by the negligence of his servants acting in the course of the employment.

2. To return the goods. Bailee must return or deliver the goods bailed according to the direction of the bailor, on the expiry of the time of bailment or on the accomplishment of the purpose of bailment (Sec. 160).

Bailee shall be responsible to the bailor for any loss, destruction or deterioration of the goods from of the date of the expiry of the contract of bailment, if he fails to return deliver or tender the goods at the proper time (Sec. 161).

3. *To return any increase or profit from the goods* (Sec. 163). Bailee is bound to deliver to the bailor any increase or profit which might have came from the goods bailed, provided the contract does not provide otherwise.

Example: A leaves a cow in the custody of B. The cow gives birth a calf. B is bound to deliver the calf as well as the cow to A.

4. *To use goods according the conditions of bailment* (Sec. 154). Bailee must use the goods according to the conditions of the contract of bailment or the directions of the bailor. He shall be held liable for compensation to the bailor if any damage is caused to the goods because of his unauthorised use. Bailee must not do any act with regard to the goods bailed which is inconsistent with the terms of the bailment, otherwise the contract shall become voidable at the option of the bailor and bailee shall be held liable to compensate and damages caused to the goods.

Example: A lends his horse to B for his own riding only. B allows C, a member of his family, to ride the horse. C, rides with care but the horse accidently falls and is injured. What remedy has A against B ?

A can claim damages from B for the injury caused to the horse from an unauthorised use. B in this case has failed to use the horse according to the conditions of bailment, and therefore, he shall be liable to pay compensation to the bailor for the damages caused to the horse because of his unauthorised use.

5. *Must not mix up the goods with his own goods* (Sec. 155 & 156-157). Bailee is not entitled to mix up the goods bailed with his own goods except with the consent of the bailor. If he, with the consent of the bailor, mixes the goods bailed with his own goods, both the parties shall have an interest in proportion to their respective shares in the mixture thus produced (Sec. 155).

If the bailee, without the consent of the bailor, mixes the goods bailed with his own goods and the goods can be separated or divided, the property in the goods remains in the parties respectively bailee is bound to bear the expenses of separation and division and any damage arising from the mixture (Sec. 156).

If the bailee, without the consent of the bailor mixes the goods of the bailor with his own goods in such a manner that it is impossible to separate the goods bailed from the other goods and to deliver them back, the bailor is entitled to compensation by the bailee for loss of the goods (Sec. 157).

Examples : (i) A bails two bales of cotton marked with a particular mark to B. B, without A's consent, mixes the 100 bales of his own, bearing a different mark. A is entitled to have his 100 bales returned, and B is bound to bear all the expenses in the separation of the bales and any other incidental damages.

(ii) A bails a barrel of cape flour worth Rs. 45 to B. B withouth A's consent, mixed the flour with country flour with country flour of his own, worth only Rs. 25 a barrel. B must compensate A for his flour.

6. *Must not set up an adverse title.* Bailee must not set up a title adverse to that of the bailor. He must hold the goods on behalf of and for the bailor. He cannot deny the title of the bailor.

Rights of Bailor and Bailee against Third Parties

1. *Suit by bailor or bailee against a wrong-doer* (Sec. 180). If a third person wrongfully deprives the bailee of the use of possession of the goods bailed, or does them any injury, the bailee is entitled to use such remedies as the owner might have in a like case if no bailment had been made; and either the bailor or the bailee may bring a suit against a third person for such deprivation or injury.

2. *Appointment of compensation obtained by such suits* (Sec. 181). Whatever is obtained by way of relief or compensation in any such suit shall as between the bailor and bailee, be dealt with according to their respective interests.

Termination of Bailment

A contract of bailment shall terminate in the following circumstances:
1. *On expiry of stipulated period:* If the goods were given for a stipulated period, the contract of bailment shall terminate after the expiry of such period.

2. *On fulfillment of the purpose:* If the goods were delivered for a specific purpopse, a bailment shall terminate on the fulfillment of that purpose.

3. *By Notice:* (a) Where the bailee acts in a manner which is inconsistent with the terms of the bailment, the bailor can always terminate the contract of bailment by giving a notice to the bailee.

(b) A gratuitous bailment can be terminated by the bailor at any time by giving a notice to the bailee.

4. *By death:* A gratuitous bailment terminates upon the death of either the bailor or the bailee.

Rights and liabilities of the finder of goods

One who finds goods belonging to another and takes them in his possession is called the finder of the goods. He rights and liabilities have been discussed in Secs. 168 and 169 of the Contract Act as follows:

(i) A finder of the goods is free to take or not to take the goods found out under his custody. A person who finds goods belonging to another and takes them into his custody is subject to the same responsibility as a bailee.

(ii) Finder of goods is not entitled to bring a suit for the realisation of compensation for the trouble and expenses voluntarily incurred by him in preserving the goods and in finding out the real owner. However, he can exercise his right of particular lien on the goods found out and may refuse to deliver them to the real owner until he receives the compensation for his trouble and expenses.

(iii) In case where the real owner of the goods has offered a specific reward for their return of goods lost, the finder of the goods may sue for the realization of such rewards and may also retain his possession ever the goods until he received the reward with all other necessary costs.

(iv) Finder of the goods has no right to sell the goods found out except when all the following conditions are satisfied.

(a) When the thing found out is commonly the subject of sale.

(b) When the owner cannot be found out with reasonable diligence or when the owner refuses to pay the lawful charges of the finder.

(c) When the thing is in danger of perishing or losing the greater part of its value or when the lawful charges of the finder in respect of thing found out exceed two-thirds of the value of the goods.

Lien

Lein is a right of person to retain that which is in his possession and which belongs to another, until the demands of the person in possession are satisfied.

Kinds of Lien

There are two kinds of liens : (a) particular lien, (b) general lien.

Particular Lien

It is a right to retain possession over those particular goods in connection with which the debt arose. It is restricted to those goods which are subject matter of the contract and are liable for certain demands of the person in possession of those goods.

According to Section 170 where the bailee has, in accordance with the purpose of the contract of bailment, rendered any service involving the exercise of labour and skill in respect of the goods bailed, he has, in the absence of a contract to contrary, a right to retain such goods in his possession until he receives due remuneration for the services he had rendered in respect of them.

Besides the bailee, other persons who are entitled to exercise particular lien are unpaid seller of goods, finder of goods, pawnee, agents, etc.

General Lien

It entitles a person in possession of the goods to retain them until all claims of the person in possession against the owner of the goods are satisfied. It is not necessary that the demands should arise only out of the articles detained under possession. General lien is a kind of a special privilege which the law has granted only to few persons (i) bankers, (ii) factors (iii) wharfingers, (iv) attorney of the High Courts, (v) policy brokers, and (vi) others by agreement. These parties, can exercise general lien against any goods under their possession and for any sum legally due on a general balance of account. But where the goods are deposited for some special purposes, e.g., safe custody, they will not come under the spell of general lien. This is because acceptance of goods for, special purpose implied by excludes general lien.

Example (i) K deposited certain jewels with the Madras Bank to secure certain debt. after payment of this debt he demanded the return of these jewels from the bank. He was still indebted to the bank for certain other debts. On the bank's refusal to return, it was held that he was not entitled to recover unless he proved that the bank had agreed to give up its general lien (Kunhan V. Bank of Madras, 1895).

(ii) A solicitor has a general lien on all the papers of the client in his possession in his professional capacity as solicitor. He can claim a lien for all costs due to him from the client but not for money loans

CONTRACT OF PLEDGE

Pledge is the bailment of goods as security for payment of a debt or performance of promise. Bailor in this case is called the 'pawnor' and the bailee is called the 'pawnee' (Sec. 172).

Pledge by non-owners

Ordinarily only a person who is the real owner of the goods can make a valid pledge, but in the following cases pledge made by non-owners will also be valid.

1. *Pledge by a mercantile agent* (Sec. 178). Where a mercantile agent is, with the consent of the owner, a possession of goods or the documents of title to goods, any pledge made by him, when acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were

expressly authorised by the owner of the goods to make the same, provided that the pawnee act in good faith and has not at the time of the pledge notice that the pawnor has no authority to pledge.

2. *Pledge by person in possession under voidable contract* (Sec. 178 A). When the pawnor has obtained possession of the goods pledged by him under a contract voidable under Section 19 or Section 19A, but the contract has not been rescinded at the time of the pledge, the pawnee acquired a good title to the goods, provided he acts in good faith and without notice of the pawnor's defect of title.

3. *Pledge where pawnor has only a limited interest* (Sec. 179). Where a person pledges goods in which he had only a limited interest, the pledge is valid to the extent of that interest.

Example: A finds a watch on the road and spends Rs. 25 on its repairs. He pledges it with B for Rs. 50/-. The real owner can get the watch by paying Rs. 25 to the pledge.

4. *Pledge by a co-owner in possession.* If there are several joint owners of goods and goods are in the sole possession of one of the co-owners with the consent of other co-owners, such a co- owner can make a valid pledge of goods.

5. *Pledge by seller or buyer in possession after sale:* A seller who has got possession of goods even after sale, can make a valid-pledge, provided the pawnees act in good faith.

Example: X buys goods from Y, pays for them, but leaves them in the possession of Y, and Y

then pledges the goods with Z who does not know of sale to X, the pledge is valid.

Similarly, if the buyer obtains possession of goods with the consent of the seller before payment of price and pledges them, the pawnee will get a good title provided he does not have the notice of seller's right of lien or any other right.

Rights and duties of the pawner

Right to receive goods till sole (Sec. 177). If a time is tipulated for the payment of the debt or performance of the promise, for which the pledge is made, and the pawnor makes default in the payment of the debt or the performance of the promise at the stipulated time he may redeem the goods pledged at any subsequent time, before their actual sale of them, but he must in that case pay, in addition, any expenses which might have arisen from his default.

Rights and duties of the pawnee

1. *Right to receive payment of the debt or to obtain the performance of promise with interest and expense*(Sec. 173). Pawnee has a right to retain possession on the goods pledged till he obtains payment of his debt interest on that debt and all other necessary expenses which he might have incurred for the preservation of the goods pledged or in respect, of his possession.

2. *Right of Particular lien* (Sec. 174). Pawnee has no right to retain his possession over the goods pledged for any debt or promise other than the debt or promise for which they were pledged unless otherwise provided for, by a contract.

3. *Right to receive extraordinary expenses* (Sec. 175). Pawnee is also entitled to receive from the pawnor any extraordinary expenses which he might have incurred for the preservation of the goods pledged.

4. *Pawnee's right in case of default of the pawnor* (Sec. 176). In the case of default by the pawnor in the payment of debt or the performance of promise at the stipulated time or on demand or within reasonable time, the pawnee can exercise the following two rights:

(a) He has a right to bring a suit on the debt or promise and can retain the goods pledged as a collateral security.

(b) He has also a right to sell the goods pledged after giving reasonable notice of sale to the pawnor.

He has a right to claim any deficit arising from the sale of the goods pledged from the pawnor. He will have to return to the pawnor any excess obtained by the sale of goods pledged beyond the amount necessary to pay the debt and other expenses due.

5. *Pawnee must not use the goods pledged.* He must not use goods pledge unless they are such as will not deteriorate by wear.

Besides the above rights and duties, all other rights and duties of the bailor and bailee apply equally to pawnor and the pawnee.

CONTRACT OF AGENCY

Meaning

When a person employs another person to do any act for himself or to represent him in dealing with third persons, it is called a *'Contract of Agency'.* The person who is so represented is called the

'principal' and the representative so employed is called the 'agent (Sec. 182). The duty of the agent is to enter into legal relations on behalf of the principal with third parties. But, by doing so he himself does not become a party to the contract to the contract not does he incur any liability under that contract. Principal shall be responsible for all the acts of his agent provided they are not outside the scope of his authority.

Competence of the parties to enter into a contract of agency

The person employing the agent must himself have the legal capacity or be competent to do the act for which he employ the agent. A minor or a person with unsound mind cannot appoint an agent so as to be legally represented by him (Sec. 183). But an agent so appointed need not necessarily be competent to contact (Sec: 184) and hence minor or an insane can be appointed as an agent he can bring about legal relations between the principal and the third party but such an incompetent agent cannot personally be held liable to the principal.

Consideration not required: Contract of agency requires no consideration. It comes under the category of those contracts which law has declared to be valid without consideration (Sec. 185).

Creation of Agency: Agency may be created by any of the following ways:

1. **Expressly** (Sec. 187)

When an agent is appointed by words spoken or written, his authority is said to be express.

2. **Impliedly** (Sec. 187)

When agency arises from the conduct of the parties or inferred from the circumstances of the case, it is called implied agency.

Example: A of Calcutta has a shop in Delhi. B, the manager of the shop, has been ordering and purchasing goods from C for the purpose of the shop. The goods purchased were being regularly paid for but of the funds provided by A. B shall be considered to be an agent of A by his conduct.

Partners, servants and wives are usually regarded as agents by implications because of their relationship.

Wife as an implied agent to her husband

(a) Where the husband and wife are living together in a domestic establishment of their own, the wife shall have an implied authority to pledge the credit of her husband for necessaries. The implied authority can be challenged by the husband only in the following circumstances.

(1) The husband has expressly forbidden the wife from borrowing money or buying goods on credit (Debenham V. Mellon (1880) 6 A.C. 24).

(2) The articles purchased did not constitute necessities.

(3) Husband had given sufficient funds to the wife for purchasing the articles she needed to the knowledge of the seller (Miss Gray Ltd. V. Cathcort (1922) 38 T.L.R. 562).

(4) The creditor had been expressly told not to give credit to the wife (Etherington V. Parrot

(1703) Salia 118).

(b) Where the wife lives apart from husband without any of her fault, she shall have an implied authority to bind the husband for necessaries, if he does not provide for her maintenance.

3. Agency by necessity

Under certain circumstances, a person may be compelled to act as an agent to the other, e.g. master of the ship can borrow money at a port where the owner of the ship has not agent, to carry out necessary repairs to the ship in order to complete the voyage. In such a case of necessity, person acting as an agent need not necessarily have the authority of the principal. However, the agent must act under pressing conditions and for the benefit of the principal.

Example: The master of the ship on finding that the cargo is rapdily perishing is entilted to dispose it of at the best price available so as to bind the consignor as an agent by necessity.

4. Agency by estoppel (Sec. 237)

When an agent has without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts and obligations if he has by his words or conduct induced such third person to believe that such acts and obligations were within the scope of the agent's authority.

Example: A says to B in the presence of and within the hearing of C that he is C's agent. C remains mum. B supplies goods of Rs. 10,000/- to A taking him as C's agent. C's responsible for the payment of price of these goods.

5. Agency by ratification (Sec. 196 to 200)

Ratification means subsequent acceptance and adoption of an act by the principal originally done by the agent without authority. According to section 196. "Where acts are done by one person on behalf of another but without his knowledge or authority, he may check to ratify or to disown such act. If he ratifies them, the same effects will follow as if they had been performed by his previous authority."

Example: The manager of a company perporting to act as an agent on the compnay's behalf but without its authority, accepted an offer by L, the defendant L subsequently withdrew the offer, but the company ratified the manager's acceptance. L was held to be bound by the acceptance. His revocation of the offer was held to be invalid. Ratification relates back to the due when the agent had first acted and, therefore, subsequent revocation shall have no effect.*

In order that ratification may be legal and valid, it must satisfy the following essentials. (1) The act must be done in the name of the principal.

(2) Principal must have been in existence and competent to contract at the time when agent acted on his behalf as well as on the date of ratification.

(3) The act must be legal which the principal must be competent to do.

(4) Ratification must be with full knowledge of all the material facts (Sec. 198).

(5) Ratification must relate to the whole act and not to a part of it. Ratification of a part of the act will not be valid (Sec. 199).

(6) There can be no valid ratification of an act which is to the prejudice of a third person (Sec. 200).

* Blton Partners V. Lambert (1889) 41 Ch. D. 295

Example: A holds a lease from B, terminable on three months notice, C, an unauthorised person gives notice to termination to A. The notice cannot be ratified by B, so as to be binding on A.

(7) Ratification of an act must be made, either within the time fixed for this purpose or within a reasonable time after the contract was entered into by the agent.

Extent of agent's authority (Sec. 186 to 189)

Principal is responsible for the acts of the agent done by him within the scope of his authority. The authority of an agent may be express or implied. An authority is said to be express when it is given by words spoken or written. An authority is said to be implied when it is to be inferred from the circumstances of the case (Sec. 186 to 187).

Example: A owns a shop in Serampur, living himself in Calcutta, and visiting the shop occasionally. The shop is managed by B, and he is in the habit of ordering goods from C in the name of A for the purpose of the shop end of paying for them out of A's funds with A's knowledge. B had an implied authority from A to order goods from C in the name of A for the purposes of the shop.

The authority of an agent extends to the performance of every lawful thing necessary to do an act for which he is appointed. When he is appointed to carry on business he can do every lawful thing necessary for the purpose or as is usually done in the course of conducting such business (Sec. 188).

An agent has authority in an emergency to do all such acts for the purpose of protecting the principal from loss as would be done by a person of ordinary prudence, in his own case, under similar circumstances, the emergency must be real not permitting the agent of communicate with the principal (Sec. 189).

Example: A consigns provisions to B at Calcutta, with directions to send them immediately to C at Cuttack. B may sell the provisions at Calcutta, if they will not bear journey to Cuttack without spoiling.

Delegation of agent's authority (Secs. 191 to 195)

The general principal is "A delegate cannot further delegate". *(Delegatus non-protest delegate).* An agent, himself being the delegate of his principal, cannot further delegate his powers. However, under certain circumstances the agent may delegate some or all of his powers to another person. Such person may be either a sub-agent or a substituted agent.

Sub-agent

A 'sub-agent" is a person employed by and acting under the control of the original agent in the business of agency (Sec. 191). In the following cases an agent can appoint a sub-agent unless he is expressly forbidden to do so:-

(i) When the ordinary custom of trade permits the appointment of a sub-agent.

(ii) When the nature of the agency business requires the appointment to a sub-agent.

(iii) When the act to be done is purely ministerial and involves no exercise of discretion or confidence, e.g. routine clerks and assistants.

(iv) When the principal agrees to the appointment of such a sub-agent expressly or implidly. (v) When some unforeseen emergency has arisen.

The relations of the sub-agent to the principal depend on the question whether the agent had an authority to appoint the sub-agent and whether sub-agent is properly appointed.

Where the sub-agent is properly employed the principal is, so far as regard third persons, represented by the sub-agent and is bound by and is responsible for his acts as if he was an agent originally appointed by the principal, therefore, will be responsible for the acts of a properly appointed sub-agent.

Where an agent, without having authority to do so, has appointed a person to act as a sub-agent, i.c., a sub-agent is improperly appointed, the principal is not represented by or responsible for the acts of the sub-agent as between himself and the third parties. The sub-agent is also not responsible to the principal for anything. The agent is responsible for the acts of the sub-agent both to the principal and to the third persons (Sec. 193).

Substituted agent

Where an agent holding an express or implied authority to name another person to act in the business of the agency, has accordignly, named another person such person is not a sub-agent but a substituted agent. The substituted agent shall be taken as the agent of principal for such part of the work as is entrusted to him (Sec. 194).

Example: A directs B, his solititor, to sell his estate by auction, and to employ an auctioneer for the purpose. B names C, an auctioneer to conduct the sale. C is not a sub-agent, but is A's agent for the conduct of the sale.

In selecting substituted agent for his principal an agent is bound to exercise the same amount of discretion as a man of ordinary prudence would exercise in his own case, and if he does this, he is not responsible to the principal for acts or negligence of the substituted agent.

Example: A instructs B, a merchant, to buy a ship for him. B employed a ship surveyor of good reputation to choose a ship for A. The surveyor makes the choice negligency and the ship turns to be unseaworthy and is lost. B is not, but the surveyor is responsible to A.

Effect of agency on contracts made with third persons

The consequences of agents' acts, done in the course of his employment, in relation to third parties can be studied under the following three heads:

1. When the agent expressly contracts as an agent for a named principal.
2. When the agent expressly contracts as an agent for an unnamed principal.
3. When the agent acts for an undisclosed principal.

1. When the agent contracts for a named principal

(i) *Acts within authority of agent.* The principal is bound by the acts done by the agent within his actual authority. He will also be liable to the third parties for the acts of the agent which may be beyond his actual authority but which come within his ostensible or apparent authority unless the third party knows of the limitations of the agent's apparent authority.

Example: A leaves a watch with B, an auctioner, with the instruction that it is not to be sold below Rs. 100. B sells the watch to C for Rs. 80, who does not know about the special instruction. A cannot set aside the contract.

(ii) Acts beyond agent's authority (Sec. 27) "When an agent does more than he is authorised to do and when the part of what he does, which is within his authority, can be separated from the part which is beyond his authority, so much only of what he does as is within his authority, is binding as between him and his principal."

Example: A being an owner of a ship and cargo, authorises B to procure an insurance for 4,000 rupees on the ship. B procures a policy of Rs. 4,000 on the ship and another for the like sum on the cargo. A is bound to pay the premium for the policy on the ship, but not the premium for the policy on the cargo.

Where an agent does more than he is authorised to do, and what he does beyond the scope of his authority cannot be separated from what is within it, the principal is not bound to recognise the transaction (Sec. 228).

Example: A authorises B to buy 500 sheep for him. B buys 500 sheep and 200 lambs for one sum of Rs. 6,000. A may repudiate the whole tranaction.

(iiii) *Liability of principal inducing belief that agent's unauthorised acts were authorised.* When agent has, without authority, done acts or incurred obligations to a third person on behalf of his principal, the principal is bound by such acts or obligations if he has by his words or conduct induced such third persons to believe that such acts and obligations were within the scope of the agent's authority (Sec. 37).

Example: A consigns goods to B for sale, and give him instruction, not to sell under a fixed price. C, being ignorant of B's instructions, enters into a contract with B to buy the goods at a price lower than the reserved price. A is bound by the contract.

(ii) *Notice to the agent.* "Any notice given to or information obtained by the agent, provided it be given or obtained in the course of business transacted by him for the principal shall be between the principal and the third parties, have the same legal consequences as if it had been given to or obtained by the principal." (Sec. 29).

Example: A is employed by B to buy from C certain goods of which C is the apparent owner and buys them accordingly. In the course of the treaty for the sale a learns that goods really belonged to D, but B is ignorant of that fact. B is not entitled to set off a debt owing to him from C against the price of the goods.

(v) *Misrepresentation or fraud by an agent:* The principal is liable for misrepresentation or fraud of the agent committed in the course of the employment or within the scope of employment or within the scope of agent's apparent authority (Sec. 38). It is immaterial for whose benefits such fraud or misrepresentation has been done.

Of course, the principal is not liable for misrepresentation made or fraud committed by his agent in matters which do not fall in agent's authority.

(vi) *Admission made by an agent:* The law considers the principal and agent as one person and, therefore, any admission made by the agent in the course of agency business will be taken to have been made by the principal and the principal will be bound by that admission. In a case where the station master reported to the police that one of the porters had run away with the parcel, it was held that admission made by the station master was admission made by the railway company itself and, therefore, it was responsible to compensate for the loss.

2. **When the agent contracts for an unnamed principal**

An agent is not personally liable to third parties when he has disclosed the fact that he is an agent but has not disclosed the name of his principal to them. The third parties can proceed only against the principal and not against the agent. However, if the agent declines to disclose the identity of his principal then asked by the third parties, they can sue him peresonally also.

3. **When the agent contracts for an undisclosed principal**

When an agent makes a contract with a person who neither knows, nor has reason to suspect that he is an agent, his principal is termed as an undisclosed principal. The position of the third party, the principal and the agent in such a case is as follows:

(i) If the, third party comes to know the existence of the principal before obtaining judgement agains the agent, he may sue either the principal or the agent or both. If he decides to sue to the principal, he must allow the principal the benefit of all payments received by him (third party) from the agent (Sec. 231).

Example: A enters into a contract with B to sell him 100 bales if cotton and receive Rs. 500 in advance from B afterwards he (A) discovers that B was acting as agent for C.A may sue but he must give credit to C for Rs. 500 paid by his agent, B to him.

(ii) The principal, if he likes, may interevene and sue the third party. In such a case he can obtain such performance subject to the rights and obligations subsisting between the agent and the other party to the contract. (Sec. 232).

Example: A who owes 500 rupees, to B, sells 1000 Rupee's worth of rice to B. A is acting as agent for C in the transaction. but B has no knowledge nor reasonable ground of suspicion that such is the case. C cannot compel B to take the rice without allowing him to set off A' debt.

(iii) Para 2 of Sec. 231 states that the principal discloses himself before the contract is completed, the other contracting party may refuse to fulfil the contract if he can show that, if he had known who was the principal in the contract, or if he had known that agent was not a principal, he would not have entered into the contract.

(iv) When a person who has made a contract with an agent induces the agent ot act upon the belief that the principal only will be held liable, or induces the principal to act upon the belief that the agent only will be held liable, she cannot afterwards, hold liable the agent or principal respectively (Sec. 234).

G authorised L & Co. to buy goods for him from A. later on G himself approached A for purchasing them. A knew that L & Co. were buying goods for G but preferred to treat L & Co. as principal and debited their account L & Co. failed to pay the money and A sued G for payments. It was held that A was not entitled to recover payment from G because he (a) had shown a clear intention from the beginning that he had given credit to the agent alone, and he also knew of the principal (Addison v. Gandaseqni (812).

(v) A person untrully representing himself to be the authorised agent of another, and thereby inducing a third person to deal with him as such agent, is liable, if his alleged employer does not ratify his acts, to make compensation to the other in respect of any loss or damage which he has incurred by so dealing (Sec. 235).

Example: A and B, directors of a company borrowed money from D on its behalf. The company had no powere to borrow money under its memorandum of association. D was unable to recover the amount of the loan from the company, and he therefore, sued the directors. They were held liable (Collen V. Wright, 1857).

Personal liability of the agent

Generally an agent is not personally responsible for the contracts made by him on behalf of his principal. But he incurs personal liability in the following cases:

1. *Foreign principal:* When the contract is made by the sale or purchase of goods for a merchant resident abroad, in case of breach of contract the third party can make the agent personally liable.

2. *Undisclosed principal:* When the agent does not disclose the name of the principal the third party can make the agent personally liabily if he has relied upon the responsibility of the agent.

3. *Principal cannot be sued:* Wherer the principal though disclosed cannot be sued, e.g. foreign sovereign, ambassador, etc., or the principal is disqualified from contracting though otherwise competent to contrast and this inability of the principal was not communicated to the third party at the time of contracting, he can hold the agent personally liable.

4. *Personal liability by agreement:* When the agent expressly by agreement or impliedly by conduct undertakes personal liability of the contract.

5. *Agent's liability for breach of warranty:* When the agent acts without or beyond his authority and in this was commits a breach of warranty of authority, he can be hold personally liable.

If the agent knows that he is exceeding his authority, the breach of warranty will amount to deceit (Polhill V. Walter (1832) 3 B & Ad. 114).

6. *Agent signs the contract in his own name:* An agent who signs a Negotiable Instrument e.g. Bills of Exchange, Promissory Notes etc., his own name without making it clear that he is signing as an agent, will be held, personally liable.

7. *Agency coupled with interest:* Where the contract of agency relates to a subject matter in which the agent has a special interest, agent shall be personally liable to the extent of his interest since he shall be a principal for that interest.

8. *Non-existent principal:* If an agent acts for a non-existent principal, he shall be held personally liable as if he had contracted on his own account, e.g., promoters entering into contracts on behalf of a company yet to come into existence.

Rights of an Agent

1. *Right to claim reimbursement for expenses:* Agent has the right to retain, out of the money received on behalf of the principal, money advacned or expenses properly incurred in conducting the agency business (Sec. 217). The agent may have paid the money at the request of the principal, or on account of the understanding implied by the terms of the agency or through mercantile usage.

2. *Right to receive remuneration:* He has also a right to claim remuneration as may be payable to him for acting as an agent. In the absence of any contract to the contrary, this right to claim remuneration will arise only when he has carried out the object of the agency in full without being guilty of misconduct (Sec. 219).

An agent who is guilty of misconduct in the business of the agency is not entitled to any remuneration in respect of the part of that business which had been misconducted (Sec. 220).

Example: A employs B to recover 1,00,000 rupees from C, and to lay it out on good security. B recovers, 1,00,000 rupees and lays out 90,000 rupees on good security, but lays out 10,000 rupees on security which he ought to have known to be had, whereby A losses 2,000 rupees. B is entitled to remuneration for recovering the 1,00,000 rupees and for investing the 90,000 rupees. He is not entitled to any remuneration for investing the 10,000 rupees and the he must make good the 2,000 rupees to A.

3. *Right to indemnification against consequences of all lawful acts :* An agent has a right to be indemnified by the principal against the consequences of all lawful acts done in exercise of his authority. (Sec. 222).

Example: B, a broker at Calcutta, by the orders of A, merchant there, contracts with C for the purchase of 10 casks of oil for A. Afterwards A refuses to receive the oil and C sues B. B informs A, who repudiates the contract altogether. B defends, but unsuccessfuly, and has to pay damages and incurs expenses. A is liable to B for such damages, costs and expenses.

4. *Rights of indemnification against consequences of acts done in good faith:* An agent has a right to be indemnified by the principal for any compensation which he may be required to pay to the third parties for injuries caused to them by his wrongful acts within the scope of his actual authority done in his good faith, i.e., without any wrong or dishonest intentions (Sec. 223).

Example: B at the request of A, sells goods in the possession of A, but which A had no right to dispose of B does not know his, and hands over the proceeds of the sale to A. Afterwards C, the true owner of the goods sues B and recover the value of the goods and cost. A is liable to indemnify B for what he has been compelled to pay to C and for B's own expenses.

But where one person employs another to do an act, which is criminal, the employer is not liable to the agent either upon an express or an implied promise, to indemnify him against the consequences of the act (Sec. 224).

Example: A employs to B to beat C, and agrees to indemnify him against all consequences of the act. B thereupon beats C, and has to pay damages to C for so doing. A is not liable to indemnify B for those damages.,

5. *Right of indemnification for injuries caused by Principal's neglect:* An agent has a right to claim compensation from the principal for injuries caused to him by the negligence or want to skill on the part of the principal (Sec. 225).

Example: A employs B as a bricklayer in building a house, and puts up the scaffolding himself. The scaffolding is unskillfully put up, and B is in consequence hurt. A must make compensation to B.

6. *Right of particular lien:* An agent is entitled to retain under the possession both movable and immovable of the property of the principal received by him until the amount due to him for commission, disbursements and services has been paid or accounted for him, provided the contract does not provide otherwis (Sec. 221).

Duties of an Agent

1. *To follow the instructions of his principal:* The agent must conduct the business of the principal according to the directions of the latter. In the absence of any such directions, he must follow the custom of the business prevailing in the locality where the agent is conducting such business. If the agent acts otherwise and the principal sustains a loss, the former must compensate the latter for it. He will have to account for the profits to the principal if there are any. He will also lose his remuneration (Sec. 211).

Example: A, an engaged in carrying on for B a business in which it is the custom to invest from time to time, at interest, the money which may be in hand omits to make such investment. A must take good to B the interest usually obtained by such investment.

2. *Duty to act, with skills and diligence* (Sec. 212): The agent must conduct the business of agency with as much skill as is generally possessed by persons engaged in similar business unless the principal has notice of his want of skill.

Example: A, an agent for the sale of goods, having authority to sell on credit, sells to B on credit without, making the proper and usual enquires as to the solvency of B. B. at the time of such sale is insolvent. A must make compensation to his principal in resepct of any loss thereby sustained.

3. *Duty to render accounts:* An agent is bound to render proper accounts to his principal on demand. He must explain those accounts to the principal and produce the vouchers in support of the entries (Sec. 213).

4. *Duty to communicate with the* principal: In cases of difficulty it is the duty of the agent to use all reasonable diligence in communicating with the principal and in seeking to obtain the instructions. It is only in an emergency where there is no time to communicate that he may act bonafide without consulting the principal (214).

5. *Duty not to deal on his own account:* The relationship of principal and agent is of a fiduciary character. An agent, therefore, should not deal on his own account and should not do anything which may indicate a clash between his interest and duties. An agent shall have to pay all the benefits to the principal, which may have resulted to him from his dealings on his own account in the business of the agency without the knowledge of the principal (Secs. 215 & 216).

Example: A directs B, his agent, to buy a certain house for him. B tells A that it cannot be bought, any buys the house for himself. A may, on discovering that B has bought the house, compel him to sell it to A at the price he gave for it.

6. *Duty not to delegate his authority:* An agent cannot delegate his authority to another person unless authorised or warranted by the usage of trade or nature of the agency. A work entrusted to the agent must be done by him.

7. *Duty to protect the interest of principal or his legal representative in the event of principal's unsoundness of mind or his death:* When an agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him (Sec. 209).

8. *Duty to pay sums received for principal:* The agent is bound to pay to his principal all sums received on his account after deducting for his own claim (Sec. 218).

Rights and Duties of the Principal

The agent's duties are principal's right and agent's rights are principal's duties.

Termination of Agency

Agency may be terminated by any of the following ways.

By Act of Parties

1. *By agreement between the principal and agent:* In some cases contract of agency itself may contain provisions as regard the termination of agency. They may be express or implied, which may be inferred from the circumstances of the case and terms of the contract.

2. *By revocation of agency by the principal:* Principal may either expressly or impliedly, after giving reasonable notice, revoke the authority of the agent before it has been exercised by the latter so as to bind the former (Sec. 207).

Example: A empowers B to let A's house. Afterwards A lets it himself. This is an implied revocation of B's authority.

Principal shall have to pay compensation to the agent for any earlier revocation of his authority without sufficient cause before the period for which it was given to him.

Irrevocable agency: However, the principal will not be entitled to revoke the authority of the agent in the following circumstances.

(i) *Where the agency is coupled with interest:* An agency where the agent himself has an interest in the property which form the subject matter of agency is said to be agency coupled with interest. Such an agency cannot be revoked.

Example: A gives authority to C to sell A's land and to pay himself out of the proceeds the debt due to him from A. A cannot revoke this authority, nor can it be terminated by his insanity or death.

(ii) *Where authority has been partly exercised by the gent:* If the authority has partly been exercised by the agent, the principal cannot revoke the authority of the agent so far as regards such acts and obligations as arise from acts already done in the agency (Sec. 204).

Example: A asks B, his agent, to pay out of A's funds a sum of Rs. 1,000 to C in two equal installments. By a subsequent letter A revokes B's authority. Before this revocation B had already paid a sum of Rs. 500 to C. A is bound by this payment.

(iii) *Where agent has incurred personal liability:* Where the agent has purchased bounds in his personal name for the principal has thereby made himself personally lilable, the principal cannot revoke agent's authority.

Example: A authorised B to buy 1,000 bales of cotton on account of A and to pay for it but of A's money remaining in B's hands B buys, 1,000 bales of cotton in his own name, so as to make himself personally liable for the price. A cannot revoke B's authority so far as regards payment for the cotton.

4. *By renunciation of business by the agent:* Agent, after giving reasonable notice to the principal, may renounce the business of agency. In case the contract of agency is enterest into for a fixed period, agent shall have to pay compensation to the principal for his earlier renunciation of the business of agency.

5. *By insolvency of the principal:* The contract of agency will come to an end when the principal becomes insolvent and the fact of his insolvency comes to the knowledge of the agent. As against third persons, the agency will terminate when it comes to their knowledge. Insolvency of an agent will not lead to the termination of the contract of agency.

6. *Destruction of the subject matter of the contract of agency:* The contract of agency will come to an end when the subject matter of the agency will come to an end or when it ceases to exist or when the principal is deprived of his powers on the subject matter of the contract of agency.

7. *Principal becoming an alien enemy:* Breaking out of war between two countries in one of which resides principal and in the other resides the agent, shall cause the termination of the authority of an agent.

When termination of agent's authority takes effect as to agent, and as to third person: The termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him, or so for as regards third persons, before it becomes known to them. (Sec. 208).

Agent's duty on termination of agency by principal's death or insanity when an agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him (Sec. 209).

Termination of sub-agent's authority: The termination of the authority of an agent causes the termination (subject to the rules herein contained regarding the termination of an agent's authority) of the authority of all sub-agents appointed by him (Sec. 210).

Indian Partnership Act, 1932

The Indian Partnership Act 1932 defines a partnership as a relation between two or more persons who agree to share the profits of a business run by them all or by one or more persons acting for them all. As we go through the Act we will come across five essential elements that every partnership must contain.

Elements of a Partnership

1] Contract for Partnership

A partnership is contractual in nature. As the definition states a partnership is an association of two or more persons. So a partnership results from a contract or an agreement between two or more persons. A partnership does not arise from the operation of law. Neither can it be inherited. It has to be a voluntary agreement between partners.

A partnership agreement can be written or oral. Sometimes such an agreement is even implied by the continued actions and mutual understanding of the partners.

2] Association of Two or More Persons

A partnership is an association between two or more persons. And persons by law only includes individuals, not other firms. The law also prohibits minors from being partners. But minors can be admitted to the benefits of a partnership.

The Act is actually silent on the maximum number of partners. But this has been covered under the Companies Act 2013. So a partnership can only have a maximum of 10 partners in a banking firm and 20 partners in all other kinds of firms.

3] Carrying on of Business

There are two aspects of this element. Firstly the firm must be carrying on some business. Here the business will include any trade, profession or occupation. Only that some business must exist and the partners must participate in the running of such business.

Also, the business must be run on a profit motive. The ultimate aim of the business should be to make gains, which are then distributed among the partners. So a firm carrying on charitable work will not be a partnership. If there is no intention to earn profits, there is no partnership.

4] Profit Sharing

The sharing of profits is one of the essential elements of a partnership. The profit sharing ratio or the manner of sharing profits is not important. But one partner cannot be entitled to the entire profits of the firm.

However, the sharing of losses is not of any essence. It is up to the partners whether the losses will be shared by all the partners. If nothing is said then the losses are also split in the profit sharing ratio.

Say for example two individuals are operating out of the same warehouse. So they agree to divide the rent amongst themselves. This is not a partnership since there is no profit sharing between the two.

5] Mutual Agency

The definition states that the business must be carried out by the partners, or any partner/s acting for all of them. This is a contract of mutual agency another one of the five elements of a partnership.

This means that every partner is both a principle as well as an agent for all the other partners of the firm. An act done by any of the partners is binding on all the other partners and the firm as well. And so every partner is bound by the acts of all the other partners. This is one of the most important aspects of a partnership. It is, in fact, the truest test of a partnership.

1] Active Partner/Managing Partner

An active partner is also known as Ostensible Partner. As the name suggests he takes active participation in the firm and the running of the business. He carries on the daily business on behalf of all the partners. This means he acts as an agent of all the other partners on a day to day basis and with regards to all ordinary business of the firm.

Hence when an active partner wishes to retire from the firm he must give a public notice about the same. This will absolve him of the acts done by other partners after his retirement. Unless he gives a public notice he will be liable for all acts even after his retirement.

2] Dormant/Sleeping Partner

This is a partner that does not participate in the daily functioning of the partnership firm, i.e. he does not take an active part in the daily activities of the firm. He is however bound by the action of all the other partners.

He will continue to share the profits and losses of the firm and even bring in his share of capital like any other partner. If such a dormant partner retires he need not give a public notice of the same.

3] Nominal Partner

This is a partner that does not have any real or significant interest in the partnership. So, in essence, he is only lending his name to the partnership. He will not make any capital contributions to the firm, and so he will not have a share in the profits either. But the nominal partner will be liable to outsiders and third parties for acts done by any other partners.

4] Partner by Estoppel

If a person holds out to another that he is a partner of the firm, either by his words, actions or conduct then such a partner cannot deny that he is not a partner. This basically means that even though such a person is not a partner he has represented himself as such, and so he becomes partner by estoppel or partner by holding out.

5] Partner in Profits Only

This partner will only share the profits of the firm, he will not be liable for any liabilities. Even when dealing with third parties he will be liable for all acts of profit only, he will share none of the liabilities.

6] Minor Partner

A minor cannot be a partner of a firm according to the Contract Act. However, a partner can be admitted to the benefits of a partnership if all partner gives their consent for the same. He will share profits of the firm but his liability for the losses will be limited to his share in the firm.

Such a minor partner on attaining majority (becoming 18 years of age) has six months to decide if he wishes to become a partner of the firm. He must then declare his decision via a public notice. So whether he continues as a partner or decides to retire, in both cases he will have to issue a public notice.

Kinds of Partnership

The distinction between partnerships can be done on the basis of two criteria. They are as follows

1. With Regard to the Duration of the partnership – either Partnership at Will or Partnership for Fixed Duration
2. With regards to the extent of the business carried by the partnership – either General Partnership or Particular Partnership

1] Partnership at Will

When forming a partnership if there is no clause about the expiration of such a partnership, we call it a partnership at will. According to Section 7 of the Indian Partnership Act 1932, there are two conditions to be fulfilled for a partnership to be a partnership at will. These are

- There is no agreement about a fixed period for the existence of a partnership.
- No provision with regards to the determination of a partnership

So if there is an agreement between the partners about the duration or the determination of the firm, this will not be a partnership at will. But if a partnership was entered into a fixed term and continues to operate beyond this term it will become a partnership at will from the expiration of this term.

2] Partnership for a Fixed Term

Now during the creation of a partnership, the partners may agree on the duration of this arrangement. This would mean the partnership was created for a fixed duration of time.

Hence such a partnership will not be a partnership at will, it will be a partnership for a fixed term. After the expiration of such a duration, the partnership shall also end.

However, there may be cases when the partners continue their business even after the expiration of the duration. They continue to share profits and there is an element of mutual agency. Then in such a case, the partnership will now be a partnership at will.

3] Particular Partnership

A partnership can be formed for carrying on continuous business, or it can be formed for one particular venture or undertaking. If the partnership is formed only to carry out one business venture or to complete one undertaking such a partnership is known as a particular partnership.

After the completion of the said venture or activity, the partnership will be dissolved. However, the partners can come to an agreement to continue the said partnership. But in the absence of this, the partnership ends when the task is complete.

4] General Partnership

When the purpose for the formation of the partnership is to carry out the business, in general, it is said to be a general partnership.

Unlike a particular partnership in a general partnership the scope of the business to be carried out is not defined. So all the partners will be liable for all the actions of the partnership.

***Rights of Partners* Inter Se**

Partners can exercise the following rights under the Act unless the partnership deed states otherwise:

1. **Right to participate in business:** Each partner has an equal right to take part in the conduct of their business. Partners can curtail this right to allow only some of them to contribute to the functioning of the business if the partnership deed states so.
2. **Right to express opinions:** Another one of the rights of partners is their right to freely express their opinion. Partners, by a majority, can determine differences with respect to ordinary matters connected with the business. Each partner can express his opinion to decide such matters.

3. **Right to access books and accounts:** Each partner can inspect and copy books of accounts of the business. This right is applicable equally to active and dormant partners.

4. **Right to share profits:** Partners generally describe in their deed the proportion in which they will share profits of the firm. However, they have to share all the profits of the firm equally if they have not agreed on a fixed profit sharing ratio.

5. **Right to be indemnified:** Partners can make some payments and incur liabilities through their decisions in the course of their business. They can claim indemnity from each other for these decisions. Such decisions must be taken in situations of emergency and should be of such nature that an ordinarily prudent person would resort to under similar conditions.

6. **Right to interest on capital and advances:** Partners generally do not get an interest on the capital they contribute. In case they decide to take an interest, such payment must be made only out of profits. They can, however, receive interest of 6% p.a. for other advances made subsequently towards the business.

***Duties of Partners* inter se**

Now that we have seen the rights of partners let us see the duties the Act has prescribed,

1. **General duties:** Every partner has the following general duties like carrying on the business to the greatest common good, duty to be just and faithful towards each other, rendering true accounts, and providing full information of all things affecting the firm. etc

2. **Duty to indemnify for fraud:** Every partner has to indemnify the firm for losses caused to it by his fraud in the conduct of business. The Act has adopted this principle because the firm is liable for wrongful acts of partners. Any partner who commits fraud must indemnify other partners for his actions.

3. **Duty to act diligently:** Every partner must attend to his duties towards the firm as diligently as possible because his not functioning diligently affects other partners as well. He is liable to indemnify others if his willful neglect causes losses to the firm.

4. **Duty to use the firm's property properly:** Partners can use the firm's property exclusively for its business, and not for any personal purpose, because they all own it collectively. Hence, they must be careful while using these properties.

5. **Duty to not earn personal profits or to compete:** Each partner must function according to commonly shared goals. They should not make any personal profit and must not engage in any competing business venture. They should hand over personal profits made to their firm.

Effect on Rights and Duties after a change in Firm

The nature of the existing relationship between partners will be affected whenever there is a change in the firm's constitution. Such changes occur in the following situations:

1. Change in constitution of the firm due to incoming or outgoing or partner(s);
2. Expiry of the pre-determined term of the firm; and
3. Carrying out of additional business undertakings than originally agreed upon.

Mutual rights and duties of the partners will continue to be the same as they existed prior to such changes, but partners can change this by making a fresh partnership deed.

Relation of Partners to Third Parties

A Partner is an Agent of the Firm (Section 18)

A partnership is a relationship between partners who agree to share the profits of the business. The business can be carried on by all of them or any of them acting for all. This definition suggests that a partner can be an agent of the others.

Section 18 specifies that a partner is an agent of the firm for the purpose of business of the firm. This is actually one of the essential elements of a partnership.

Hence, a partner embraces the character of both, the principal and the agent. Therefore, if he acts for himself and in his own interest in the common concern of the partnership, then he is acting as a principal. On the other hand, if he acts for and in the interest of his partners, then he is acting as an agent.

It is important to note that a partner is an agent only or the purpose of business of the firm. He is not an agent for all transactions and dealings between the partners themselves.

Implied Authority of a Partner (Section 19)

If a partner does an act in the usual course of business of the firm, then his act binds the firm. This authority of a partner to bind the firm is Implied Authority. Unless a contrary agreement exists, implied authority does not empower a partner to (Section 19 – subsection 2 of the Indian Partnership Act, 1932):

- Submit a dispute, relating to the business of the firm, to arbitration
- Open a bank account in his name, on behalf of the firm
- Compromise or relinquish, full or part of a claim by the firm
- Withdraw a suit or proceedings filed on behalf of the firm
- Admit any liability in a suit or proceedings against the firm
- Acquire an immovable property on behalf of the firm
- Transfer an immovable property belonging to the firm
- Enter into a partnership on behalf of the firm

Section 22 of the Indian Partnership Act, 1932, adds that the act which was done by the partner to bind the firm must be done in the name of the firm or in any other manner which implies an intention to bind the firm.

While the implied authority depends on the nature of the business of the firm, a partnership of a general commercial nature may allow the partner to:

- Pledge or sell the partnership property
- Purchase goods on behalf of the partnership
- Borrow money, contract and pay debts on account of the partnership
- Draw, make, sign, endorse, transfer, negotiate and procure negotiable papers in the name and on account of the partnership.

According to Section 20 of the Indian Partnership Act, 1932, the partners of a firm can make a contract to extend or restrict the implied authority of a partner.

These restrictions or extensions apply to a third party only when the third party is aware of the restrictions or does not know that he is dealing with a partner of the firm.

Partner's Authority in an Emergency (Section 21)

As per Section 21 of the Indian Partnership Act, 1932, if there is an emergency, then every partner has the authority to do all such acts that a person of ordinary prudence would do to protect the firm from a loss. Such acts bind the firm.

Partnership Property (Section 14)

The property of a firm is also known as partnership property, partnership assets, joint stock, common stock, or joint estate. A partnership property includes all property and rights, and interest in property that the partnership firm purchases.

These purchases can also be made for the purpose and in course of the business of the firm, including the goodwill of the firm. All partners collectively own such properties.

Hence, a partnership property comprises of the following items if there is no agreement between the partners showing any contrary intention:

- All property and rights and interest in property that the partners purchase in the common stock as their contribution to the common business.
- All property and rights and interest in property that the firm purchases either for the firm or for the purpose and in course of the business of the firm.
- Goodwill of the business.

Determining whether a particular property is partnership property depends on the true intention or agreement between the partners.

Hence, if a firm uses the property of a partner for its purposes, it does not make it a partnership property unless that was the real intention. At any time, the partners may agree to convert the property of a partner or partners into partnership property.

If such a conversion is made in good faith, then it would be effectual between the partners and against the creditors of the firm. The partners may also agree to convert the separate property of any partners into the property of the firm.

Goodwill

Section 14 specifies that the goodwill of a business is the property of the firm and is subject to a contract between the partners. However, it does not define the term goodwill.

Goodwill is the value of the reputation of a business in respect of the expected future profits OVER AND ABOVE the profits that a firm earns in the same class of business. It is a part of partnership property. The firm can sell the goodwill separately or along with other properties.

When a partnership firm dissolves, all partners have a right to have the goodwill sold for the benefit of all the partners unless there is an agreement contrary to the same. After the firm sells the goodwill, any partner may make an agreement with the buyer to not carry on any business similar to that of the firm within a certain time-period or local limits. Such an agreement is notwithstanding anything contained in Section 27 of the Indian Contract Act, 1872 and is valid if the restrictions are reasonable.

Application of Partnership Property (Section 15)

According to section 15, the partnership property should be held and used exclusively for the purpose of the firm. While all partners have a community of interest in the property, during the subsistence of the partnership no partner has a proprietary interest in the assets of the firm.

Each partner has a right to his share in the profits of the firm until the firm subsists. He also has a right to see that the application and use of the assets of the firm are for the purpose of the business of the partnership.

Minors Admitted to Benefits of Partnership

Section 30 of the Indian Partnership Act 1932 contains legal provisions about a minor in a partnership. Now we know the Indian Contract Act 1857 clearly states that no person less than the age of 18, i.e. a minor can be a party to a contract. And a partnership is a contract between the partners. Hence a minor cannot be a partner in a partnership firm.

However, according to the Partnership Act, a minor may be admitted to the benefits of a partnership. So while the minor will not be a partner he will enjoy all the benefits of a partnership. To admit all the minor to the benefits of the partnership all of the partners of the firm must be in agreement.

Rights of a Minor Partner

Once the minor is given the benefits in a partnership there are certain rights that he enjoys. Let us take a look at the rights of a minor partner.

i. A minor partner will obviously have the right to his share of the profits of the firm. But the minor partner is not liable for any losses beyond his interests in the firm. So a minor partner's personal assets cannot be liquidated to pay the firms liabilities.

ii. He can also like any other partner inspect the books of accounts of the firm. He can demand a copy of the books as well.

iii. If necessary he can sue any or all of the other partners for his share of the profits or benefits.

iv. A minor partner on attaining majority has the right to become a partner of the firm. He has six months from attaining majority to decide if he will execute this right. Whether he decides to become a partner or not he must give public notice about the same.

Liabilities of a Minor Partner

i. A minor cannot be held personally liable for the losses of the firm. And if the firm declares insolvency the minor's share is kept with the Official Receiver

ii. After turning 18 the minor partner can choose to become a partner of the firm. But he may choose to not become a partner. In this case, the minor partner has to give a public notice about this decision. And the notice has to be given within 6 months of gaining a majority. If such a notice is not given even after 6 months then the minor partner will become liable for all acts done by the other partners till the date of such notice.

iii. Should the minor partner choose to become a partner he will be liable to all the third parties for the acts done by any and all partners since he was admitted to the benefits of the partnership.

iv. If he becomes a full-time partner he will be treated as a normal partner and have all the liabilities of one. His share in the profits and property of the firm will remain the same as it was when he was a minor partner.

Right of an Outgoing Partner to Carry on a Competing Business

Section 36 (1) of the Indian Partnership Act, 1932 (Partnership law), imposes certain restrictions but allows an outgoing partner to carry on a business and advertise it, which competes with the partnership firm. However, it restricts him from:

- Using the name of the partnership firm
- Representing himself as a partner of the firm
- Soliciting the custom of persons who were dealing with the firm before he ceased to be a partner.

Section 36 (2) talks about an agreement in restraint of trade. According to this subsection, an outgoing partner may make an agreement with his partners that when he ceases to be a partner of the firm, he will not carry on any business similar to that of the firm within a specified period or local limits. This is notwithstanding anything contained in Section 27 of the Indian Contract Act, 1872.

Right of an Outgoing Partner to Share Subsequent Profits

According to Section 37, of the Partnership Law, if a member of the firm dies or otherwise ceases to be a partner of the firm, and the remaining partners carry on the business without any final settlement of accounts between them and the outgoing partner, then the outgoing partner or his estate is entitled to share of the profits made by the firm since he ceased to be a partner.

The share may be attributable to the use of his share of the property of the firm or the interest at six percent per annum on the amount of his share in the property.

The surviving partners also have an option of purchasing the interest of the deceased or outgoing partner. If the surviving partners choose to purchase the interest, then the outgoing partner is not entitled to any further share in profits of the firm.

Admission or Introduction of a Partner (Section 31)

According to this section, the consent of all the existing partners is necessary before introducing a new partner into a partnership firm. This is subject to the provisions of Section 30 regarding minors in the firm. Further, the new partner has no liability for any actions of the firm done before his admission.

Rights and Liabilities of a New Partner

All liabilities of a new partner commence from the date of his admission as a partner in the firm. This is unless he accepts liability for the obligations incurred by the firm before his admission.

So, after the admission of a new partner, the new firm may agree to assume liability for the debts of the old firm and the creditors may accept the new firm as their debtor, discharging the old firm. It is important to note that the creditor's consent is important to make the transaction operative.

In a contract, the technical term for substituted liability is Novation. Hence, a mere agreement amongst the partners cannot operate as Novation unless the creditors provide their consent.

The retirement of a Partner (Section 32)

A partner retires when he ceases to be a member of the firm without ending the subsisting relations between the other members of the firm or between the firm and other parties. If a partner withdraws from a firm by dissolving it, then it is a dissolution and not retirement of a partner. The retirement of a partner from a firm does not dissolve it.

In a partnership, a partner may retire:

- With the consent of all the partners,
- In accordance with an express agreement by the partners, or
- The partnership is at will, by giving notice in writing to all the other partners of his intention to retire

Liabilities of an Outgoing Partner

A retired partner continues to be liable to the third party for acts of the firm till such time that he or other members of the firm give a public notice of his retirement. However, if the third party deals with the firm without knowing that he was a partner in the firm, then he will not be liable to the third party.

The retired partner, however, continues to be liable for acts of the firm done before such retirement of a partner. This liability holds good unless there is an agreement between him, the concerned third party, and partners of the reconstituted firm. Such an agreement can also be implied by the course of dealings between the third party and the reconstituted firm post announcement of the retirement of a partner.

If the partnership is at will, then it can relieve a partner without giving a public notice. To do so, the partnership needs to give a written notice to all the partners of his intention to retire.

Expulsion of a Partner (Section 33)

A partnership firm can expel a partner provided:

- The power of expulsion exists in the contract between the partners
- Majority of the partners exercise the power
- The power is used in good faith

If these conditions are not met, then the expulsion is not bona fide in the interest of the business. The test of good faith includes three aspects:

1. The expulsion should be in the interest of the partnership.
2. Before expelling a partner the firm serves a notice to him.
3. The partner being expelled is given an opportunity to state his version of events leading up to the expulsion.

If these aspects are not met, then the expulsion is not considered to be made in good faith and is null and void. It is important to note that the expulsion of partners does not necessarily result in the dissolution of the firm.

Insolvency of a Partner (Section 34)

When a partner of a firm is adjudicated as insolvent –

- He ceases to be a partner of the firm from the date of the adjudication
- Whether or not the firm subsequently dissolves
- His estate, which vests in the official assignee, ceases to be liable for any act of the firm from the said date
- The firm ceases to be liable for any act of such a partner.

Liability of Estate of a Deceased Partner (Section 35)

Usually, the death of a partner results in the dissolution of the partnership. However, if the partner's contract to not dissolve the partnership post the death of any partner, then the surviving partner continue the business of the firm after absolving the deceased partner's estate from any liability of the future obligations of the firm.

Further, it is not necessary for the firm to give a public notice or inform the persons dealing with the firm about the death of the partner.

An exception is a partnership consisting of only two partners. In such cases, the death of a partner results in the dissolution of the partnership.

Consequences of Non Registration of Firm

Section 69 of the Indian Partnership Act, 1932 offers a detailed explanation of the consequences of not opting for firm registration. These are:

1] No suit in a civil court by the firm or other co-partners against any third party

If the firm registration is not done, then the firm or any other person on its behalf cannot file a suit against a third party for breach of contract which the firm has entered into. Further, the person filing the suit on behalf of the firm should be in the register of the firm as a partner.

2] No relief to partners for set-off of claim

Without firm registration, any action brought against the firm by a third party having a value of more than Rs. 100 cannot be set-off by the firm or any of its partners. Pursuance of other proceedings to enforce rights arising from the contract cannot be done either.

3] An aggrieved partner cannot bring legal action against other partner or the firm

A partner of the firm or any person on his behalf cannot bring legal action against the firm or against any partner (or alleged to be a partner) if firm registration is not done. However, if the firm is dissolved, then such a person can sue the firm for dissolution it accounts and realization of his share in the firm's property.

4] A third party can sue the firm

Even if the firm registration is not done a third party can bring legal action against the firm.

It is also, important to note that despite these disabilities, the non-registration of a firm does not affect the following rights:

1. The right of a third party to sue the firm or any partner
2. Partners' right to sue the firm for dissolution or settlement of accounts (in case of dissolution)
3. The power of the Official Assignees, Receiver of Court to release the property of the insolvent partner and bring an action
4. The right of the firm and partners to sue or claim set-off of the value of the suit does not exceed Rs. 100.

Dissolution of a Firm

When the partnership between all the partners of a firm is dissolved, then it is called dissolution of a firm.

Modes of Dissolution

1] By Agreement (Section 40)

According to Section 40 of the Indian Partnership Act, 1932, partners can dissolve the partnership by agreement and with the consent of all partners. Partners can also dissolve the partnership based on a contract that has already been made.

2] Compulsory Dissolution (Section 41)

An event can make it unlawful for the firm to carry on its business. In such cases, it is compulsory for the firm to dissolve. However, if a firm carries on more than one undertakings and one of them becomes illegal, then it is not compulsory for the firm to dissolve. It can continue carrying out the legal undertakings. Section 41 of the Indian Partnership Act, 1932, specifies this type of voluntary dissolution.

3] On the happening of certain contingencies (Section 42)

According to Section 42 of the Indian Partnership Act, 1932, the happening of any of the following contingencies can lead to the dissolution of the firm:

- Some firms are constituted for a fixed term. Such firms will dissolve on the expiry of that term.
- Some firms are constituted to carry out one or more undertaking. Such firms are dissolved when the undertaking is completed.
- Death of a partner.
- Insolvent partner.

4] By notice of partnership at will (Section 43)

According to Section 43 of the Indian Partnership Act, 1932, if the partnership is at will, then any partner can give notice in writing to all other partners informing them about his intention to dissolve the firm.

In such cases, the firm is dissolved on the date mentioned in the notice. If no date is mentioned, then the date of dissolution of the firm is the date of communication of the notice.

Dissolution of a Firm by the Court

According to Section 44 of the Indian Partnership Act, 1932, the Court may dissolve a firm on the suit of a partner on any of the following grounds:

1] Insanity/Unsound mind

If an active partner becomes insane or of an unsound mind, and other partners or the next friend files a suit in the court, then the court may dissolve the firm. Two things to remember here:

- The partner is not a sleeping partner
- The sickness is not temporary

2] Permanent Incapacity

If a partner becomes permanently incapable of performing his duties as a partner, and other partners file a suit in the court, then the court may dissolve the firm. Also, the incapacity may arise from a physical disability, illness, etc.

3] Misconduct

When a partner is guilty of conduct which is likely to affect prejudicially the carrying on of the business, and the other partners file a suit in the court, then the court may dissolve the firm.

Further, it is not important that the misconduct is related to the conduct of the business. The court looks at the effect of the misconduct on the business along with the nature of the business.

4] Persistent Breach of the Agreement

A partner may willfully or persistently commit a breach of the agreement relating to

- the management of the affairs of the firm, or
- a reasonable conduct of its business, or

- conduct himself in matters relating to business that is not reasonably practicable for other partners to carry on the business in partnership with him.

In such cases, the other partners may file a suit against him in the court and the court may order to dissolve the firm. The following acts fall in the category of breach of agreement:

1. Embezzlement
2. Keeping erroneous accounts
3. Holding more cash than allowed
4. Refusal to show accounts despite repeated requests, etc.

5] Transfer of Interest

A partner may transfer all his interest in the firm to a third party or allow the court to charge or sell his share in the recovery of arrears of land revenue. Now, if the other partners file a suit against him in the court, then the court may dissolve the firm.

6] Continuous/Perpetual losses

If a firm is running under losses and the court believes that the business of the firm cannot be carried on without a loss in the future too, then it may dissolve the firm.

7] Just and equitable grounds

The court may find other just and equitable grounds for the dissolution of the firm. Some such grounds are:

- Deadlock in management
- Partners not being in talking terms with each other
- Loss of substratum (the foundation of the business)
- Gambling by a partner on the stock exchange.

Difference between Dissolution of a firm and Dissolution of a Partnership

Parameters	Dissolution of a Firm	Dissolution of a Partnership
Continuation of business	The business discontinues.	The business continues. However, the partnership is reconstituted.
Winding up	The firm is wound up. Assets are realized and liabilities are settled.	Assets and liabilities of the firm are only revalued.
Court order	A Court Order can dissolve a firm.	A Court Order cannot dissolve a partnership.
Scope	It involves the dissolution of partnership between all partners.	It does not involve the dissolution of the firm.

THE SALE OF GOODS ACT 1930

1. Goods: Goods have been defined by Section 2, sub-section 7 of the Sale of Goods Act 1930 as "every kind of movable property, other than actionable claims and money; and includes stock and shares, growing crops, grass and things attached to or forming part of land which are agreed to be served before sale or under a contract of sale.

Therefore Goods as defined by this act has the following characteristics:

1. Every movable property is goods.

2. Money and actionable claims are not considered as goods. Money is defined as the current coin of realm. But those coins which are no longer in circulation can become the subject matter of a contract of sale as an article of curiosity.

3. Goods include stocks and share although in English raw stocks and shares are not covered by the definition.

4. Goods also include growing crops and grass.

5. Anything which is attached to or forming part of the land (immovable property) can become goods if it is separated from the immovable property. Therefore, unless something is separate from immovable property, it cannot be called goods. But if separate valuation is put on immovable property on the one hand, and the fixtures and fittings on the other, it is taken as a proof that the intention of the parties was to separate the two. Similarly where two parties enter into an agreement under which one of them was to cut certain trees in the garden of the other party when their growth exceeded a certain specified limit, it was held that the portion of the trees cut are goods but not the trees themselves. In same way mineral beneath the surface of the earth are not goods but as soon as they are brought to the surface they become goods.

KINDS OF GOODS :

Broadly speaking goods are of the following three kinds.

(i) Existing goods : They are those goods which have actual existence at the time when the contract of sale is made. Existing goods are again of the following kinds:-

(a) Unascertained goods : They are those goods which are not actually identified by the seller but are described by description alone.

(b) Ascertained goods : Unascertained goods become ascertained when the seller decides which particular goods he is going to sell. This word is used as synonymous with specific goods but the difference between the two is that the ascertained goods may become identified only after a contract of sale has been made.

(c) Specific goods : They have been defined by Section 2, Sub-section 14 as those goods which are actually identified and agreed upon at the time a contract of sale is made.

Illustration : A person is the owner of a number of cars and enters into an agreement with the other to sell any of them. This is a contract for unascertained goods which would become ascertained when the seller decides as to which particular car he wants to sell and it will become a contract for specific goods when the car to be sold by the seller is actually pointed out to the buyer and he agrees to the same.

(ii) Future Goods : A person may enter into an agreement to seal something to the other which may have no actual existence but which he is to acquire, produce or manufacture in future. For example a cultivator may agree to sell the crop that he has sown.

(iii) Contingent goods : Are those the acquisition of which by the seller depends on a contingency which may or may not happen.

For example an importer in Bombay agrees to sell the consignment of goods which is on its way from America. This consignment is an instance of contingent goods because the acquisition of goods by the importer in Bombay depends upon a contingency whether it arrives safe at its destination or not. Therefore contingent goods are also a special class of future goods.

EFFECT OF PERISHING OF GOODS

According to sections 7 and 8 then word 'perishing' means not only physical destruction of the goods but it also covers :

(a) damage to goods so that the goods have ceased to exist in the commercial sense, i.e., their merchantable character as a such has been lost (although they are not physically destroyed) e.g., where cement is spoiled by water and becomes stone.

(b) Loss of goods by theft.

(c) where the goods have been lawfully requisitioned by the government.

It may also be mentioned that it is only the perishing of specific and ascertained goods that affects a contract of sale where, therefore, unascertained goods from the subject-matter of a contract of sale, their perishing does not affect the contract and the seller is bound to supply the goods from wherever he likes, otherwise be liable for breach of contract.

The effect of perishing of goods may be discussed under the following heads :

1. Perishing of goods at or before making of the contract this may again be divided into the following sub-heads:

(i) In case of perishing of the 'whole' of the goods where specific goods from the subject- matter of a contract of sale (both actual sale and agreement to sell) and they, without the knowledge of the seller, perish, at or before the time of contract, the contract is void. This provision is based either on the ground of mutual mistake as to a matter of fact essential to the agreement, or on the ground of impossibility of performance, both of which render an agreement void ab-initio.

(ii) In case of perishing of only 'a part' of the goods. Where in a contract for the sale of specific goods, only part of the goods are destroyed or damaged, the effect of perishing will depend on whether the contract is entire or divisible. If it is entire or indivisible and only part of the goods has perished, it is void. If the contract is divisible, it will not be void and the part available in good condition must be accepted by the buyer.

2. Perishing of goods before sale but after agreement to sell. Where there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided i.e., the contract of sale becomes void and both parties are excused from performance of the contract. This provision is based on the ground of supervening impossibility of performance which makes a contract void (section 8).

If only part of the goods agreed to be sold perish, the contract becomes void if it is indivisible, but if it is divisible then the parties are absolved from their obligations only to the extent of the perishing of the goods.

Further, if fault of either party causes the destruction of the goods, then the party in default is liable for non-delivery or to pay for the goods, though undelivered.

Effect of perishing of future goods. A present sale of future goods always operates as an agreement to sell. As such there arises a question as to whether Section applies to a contract of sale of future goods as well. The case of Howell Vs. Coupland provides the answer. In this case it has been held that future goods, if sufficiently identified, are treated to be as specifie goods, the destruction of which makes the contract void.

The facts of the case are as follows :

C agreed to sell to H 200 tons of potatoes to be grown on C's land. C sowed sufficient land to grow the required quantity of potatoes, but without any facult on his part, disease attacked the crop and he could deliver only about 10 tons. The contract was held to have become void.

Document of Title to goods: A document of title to goods is one that is produced as a proof of the possession or control of goods when such goods are subjected to any transaction in a business. In a business deal such a document authorizes, either by endorsement, or delivery, its possessor to transfer or receive goods. It gives a right to the purchaser to receive the goods or to deal further with the goods.

Conditions of a document of title to the goods :

1. The document of title to the goods must be used in the ordinary course of business.
2. The unconditional undertaking to deliver the goods to the possessor of the document.
3. The unconditional entitlement to receive the goods to the possessor of the document.

CONTRACT OF SALE

Under Section 4 of the Sale of Goods Act, a contract of sale has been defined as "whereby the seller transfers or agrees to transfer the property in goods to the buyer for a period.

A contract of sale is of two kinds: A sale and an agreement to sell. According to Section 4 sub-section 3 a sale has been defined as where the seller transfers the property in the goods to the buyer at the time when a contract of sale is made and an agreement to sell has been defined as where the seller agrees to transfer the property in the goods to the buyer after the expiration of a certain period of time or the fulfillment of certain conditions.

For example a cash transaction in which goods are immediately purchased and sold is an instance of a sale while forward contracts on a stock exchange in which goods are agreed to be purchased on a future date ate instances of agreement to sell.

Therefore, according to section 4 sub-section 4, an agreement to sell becomes a sale after the expiration of a stipulated time or the fulfillment of the conditions laid down in a contract of sale.

A sale and an agreement to sell differ from each other on the following points.

(1) A sale is an executed contract while an agreement to sell is an executory contract.

(2) In the case of a sale there is an immediate transfer of property or ownership in the goods but in an agreement to sell such a transfer of property or ownership is to take place at a future date either on the expiration of the fixed time or the fulfilment of certain conditions.

These two points of distinction create different legal implications in the case of a sale and an agreement to sell.

(a) In the case of agreement to sell as the property in the goods has not passed to the buyer.

The purchaser has the right of recovering damages only from the seller of goods that are sold to a third party but in the case of a sale the seller can be held guilty of either conversion or

misappropriation if the goods are sold by him to a third party because the property in the goods has passed to the buyer.

(b) In the case of an agreement to self if the buyer fails to pay the price of the goods the seller has only the right to recover damages from the buyer because buyer has yet not become the owner of the goods but in the case of a sale seller shall have the right to file a suit against the buyer for the price of the goods if the purchaser commits a breach of the contract, by refusing to purchase the goods because he has become the owner thereof.

(c) Where in the case of a sale the buyer becomes insolvent without the payment of price, the seller shall have to hand over the goods, if they are in his possession (except in the case of disputed ownership) to the official assignee of the buyer but in an agreement to sell he can refuse to deliver the goods till the payment of price because seller is still the owner of the goods.

(d) In an agreement to sell, if the seller becomes insolvent and the goods are still in his possession the buyer can not recover the goods but can file a petition against the seller in insolvency preceding for damages due to the breach of the contract but in the case of a sale the buyer can take the goods from the seller who has become insolvent (except in the case of reputed ownership).

Therefore it can be said that a sale creates a *"right in rem" while an agreement to sell creates a "right in personam".*

SALE DISTINGUISHED FROM OTHER TRANSACTIONS

Sale distinguished from Hire Purchase

Contracts of sale resemble contracts of hire purchase very closely, and indeed the real object of

a contract of hire purchase is the sale of the goods ultimately. Nonetheless a sale has to be distinguished from a hire purchase as their legal incidents are quite different. Under hire purchase agreement the owner of the goods agrees to transfer the property in the goods to the hire-purchaser when a certain fixed number of instalments of price are said by the hirer. Till that time, the hirer remains the bails and the installments paid by him are regarded as the hire charges for the use of the goods. If there is default by the hire purchaser in paying an installment, the owner has a right to resume the possession of the goods immediately without refunding the amount till the, because the ownership still rests with him. Thus, the essence of hire-purchase agreement is that there is no agreement to buy, but there is only a bailment of the goods coupled with an option to purchase them which may or may not be exercised.

But mere payment of price by installments under an agreement does not necessarily make it a hire-purchase, but it may be a sale.

The main points of distinction between the 'sale' and 'hire-purchase' are as follows:

1. In a sale, property in the goods is transfered to the buyer immediately at the time of contract, where as in hire-purchase the property in the goods passes to the hirer upon payment of the last installment.

2. In a sale the position of the buyer is that of the owner of the goods but in hire purchase the position of the hirer is that of a bailee till he pays the last installment.

3. In the case of a sale, the buyer cannot terminate the contract and is bound to pay the price of the goods. On the other hand, in the case of hire-purchase the hirer may, if he so terminate the contract by returning the goods to its owner without any liability to pay the remaining installment.

4. In the case of a sale, the seller takes the risk of any loss resulting from the insolvency of the buyer. In the case of hire purchase, the owner takes no such risk, for if the hirer fails to pay on installment the owner has the right to take back the goods.

5. In the case of a sale, the buyer can pass a good title to a bonafide purchaser from him but in a hire-purchase, the hirer cannot pass any title even to a bonafide purchaser.

6. In a sale, sales tax is levied at the time of the contract whereas in a hire-purchase sales tax is not livable until it eventually ripens into a sale.

Sale Distinguished from Contract for Work and Labour

A distinction has to be made between a contract of sale and a contract for work and labour mainly because of taxation purpose, sales tax is levied only in the case of a contract of sale when the property in the goods intended to be transferred and goods are ultimately to be delivered to the buyer, it is a contract of sale even though some labour on the part of seller of the goods may be necessary. Where, however, the essence of the contract is rendering of service and exercise of skill and no goods are delivered as such, it is a contract of work and not of sale.

Sale and Barter or Exchange

Where transfer in the property of the goods takes place for a price, it is called sale. But where goods are exchanged for goods, the deal is called a barter and not a sale similarly, when money is exchanged for money it is not a sale. It is called exchange. But when consideration of a transaction is partly in money and partly in goods, it is a sale.

Conditions and Warranties

Sometimes in a contract of sale certain representations are made by the seller to the buyer and such representations are also made a part of the contract of sale itself. They either rank as conditions or warranties. According to Section 12, "a condition is a stipulation essential to the main purpose of the contract, the breach of which gives rise to a right to treat the contract as repudiated." [Section 12 (2)].

A Warranty has been defined as "a stipulation collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated". [Section 12 (3)].

Whether a particular stipulation in a contract of sale is a condition or warranty depends upon the particular fact of the case or the intention of the parties at the time of making the contract. A stipulation may be a condition though called a warranty in the contract. [Section 12 (4)].

Example: (i) A goes to B a horse dealer, and says, "I want a horse which can run at a speed of

40 m.p.h. The horse dealer points out a particular horse and says, "this will suit you". A buys the horse. Later on, A finds that the horse can run only at the speed of 30 m.p.h. This is a breath of condition because the stipulation made by the seller forms the very basis of the contract.

(ii) A goes to B, a horse dealer, and says, "I want a good horse". The horse dealer shows him a horse and says, it can run at a speed of 40 m.p.h'. A buys the horse. Later on, A finds that the horse can run only at a speed of 30 m.p.h.

There is a breach of warranty because the stipulation made by the seller was a collateral one.

Stipulation as to time

Unless a different intention appears from the terms of the subject, stipulations as to time of payment are not deemed to be essence in a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract (Section 11). But in

mercantile contracts, time for delivery of goods is always taken as of essence unless otherwise agreed.

Example: There was a contract of sale of goods, c.i.f. Antwerp to be shipped in October. The buyer was not to reject delivery even if there was any difference in the type or value or grade specified. The goods could not be shipped till November on account of strike at the port. It was held that the buyer could refuse to take delivery of the goods. (Aron & Co. V/s Comptoir Wegmont (1921).

When Conditions to be Treated as Warranty

(1) Voluntary Waiver: According to Section 13(1) where a contract of sale has a stipulation to be fulfilled by the seller which is in the nature of a condition the buyer has a right to treat the breach of such condition as a breach of warranty and to file a suit for damages only. This is called the right of waiver. But a buyer who has once treated the breach of a conditions as a breach of a warranty and therefore has not repudiated the contract can later on import the same condition into the contract and can repudiate the same.

Illustration: A person made an agreement with the owner of a garage to build the body of a car on the chasis to be furnished by him and the car was to be delivered upto the 20th of May. The car was not delivered on that date and the purchaser of the card did not repudiate the contract but kept on pressing for delivery and on 29th of June he gave a notice to the garage owner that the car must positively be delivered on 25th July. The car was not delivered on that date but was delivered later on. The buyer refused to pay the price. The court decided that the buyer has a right to repudiate the contract.

(2) Compulsory waiver of a condition: Where a contract of sale is not severable and the buyer has accepted the goods either completely or in parts the buyer can treat the breach of condition as a breach of warranty and cannot repudiate the contract, unless there is an express or implied terms to that effect [Section 13 (2)].

IMPLIED CONDITIONS AND WARRANTIES

Implied Warranties (Section 14)

(1) The buyer must get quiet possession: In a contract of sale of goods there is an implied warranty that the buyer shall have and enjoy quiet possession of the goods [Sec. 14 (b)].

Example: A had given his bicycle on hire for a period of ten days to B. Soon after A sold it to C without disclosing to him that B was entitled to use the bicycle on account of hire agreement. B claims the bicycle from C. C's possession is disturbed. He is entitled to get damages from A.

(2) The goods must be free from encumbrance: That the goods shall be free from any charge or encumbrance (Legal burden) in favour of any third party which are not declared or known to the buyer before or at the time when the contract is made. [Section 16 (3)].

Example: A pledge his bicycle with C for a loan of Rs. 100 and promises him to give its possession the next day. Soon after he sells the bicycle to B, an innocent buyer, who does not know about the fact of bicycle being pledged. B may either ask A to clear the loan or may himself pay the money and then file a suit against A to recover the money with interest.

(3) *By usage of trade:* An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade. [Section 16(3)].

Implied Conditions (Sections 14 to 17)

(1) *Conditions as to title:* In a contract of sale of goods there is an implied conditional that the sellers shall have the right to sell the goods in the case of a sale and in an agreement to sell he shall

have such a right at the time when the property is to pass. [Section 14 (a)]. For example where a buyer of a car was deprived of the same due to the defective title of the seller, the court decided that the buyer can recover the full price of the car even though he has used the same for a few months. The above implied warranties, in fact, depend upon this condition because a buyer can only enjoy those goods which the seller has right to sell. [Section 14 14].

(2) Condition as to description: Where there is a sale of goods by description the goods shall correspond with the description and if the sale is by description as well as by sample it is not sufficient if the bulk of the goods corresponds with the sample alone and not with the description. [Section 15].

Illustration (1) : A Building Co., sold to a buyer a copper fastened ship and the ship was sold under the condition that is to be taken by the buyer subject to all the defects. Later on the ship was found not to be copper fastened in the language of the ship trade. The court, decided that there has been a breach of condition because the ship did not correspond to the description and the buyer was allowed to repudiate the contract.

Illustration (2) : There was a contract between a buyer and a seller for the sale of 'Foreign Refined Rape Seed Oil' warranted equal to the sample shown to the buyer. On when supplied was equal to the sample shown but was not refined rape seed oil. The court decided that the buyer had the right to repudiate the contract because the goods supplied did not correspond to the description as well as the sample, although they were similar to the sample exhibited to the buyer.

(3) Condition as to quality of fitness for a particular purpose: As a general rule the rule of caveat Empter applies when a purchaser purchases the goods for satisfying needs but there are cases when the buyer makes known to the seller the particular purpose for which the goods are required and relief upon seller's skill and judgement for supplying the goods of his requirement and the goods are of such a nature that they are sold by the seller in the course of his business, (whether he is the manufacturer or producer or not), there would be a breach of condition as regards quality fitness if the goods supplied are not fit for the purpose for which they have been purchased.

Illustration: The G.I.P. Railway Company purchased some timber from a seller especially for the purpose of being used as Railway sleepers and when supplied the timber was found unsuitable for the purpose. It was decided that the Railway Company, has a right to reject the goods because the timber was purchased for a particular purpose which was made known to the seller.

If the goods supplied by the seller to buyer are of such a nature that they can be put to several use but they are unfit to be used for any particular purpose for which they may have been purchased, there can be no breach of this condition if the buyer's purpose is not served. For example a buyer agreed to purchase from the seller jute bags for the purpose of packing food articles but when supplied jute bags had a peculiar smell which rendered them unfit for packing food stuff. The court decided that there is not breach of the condition relating to fitness for any particular purpose because the particular purpose for which bags were to be used was not make known to the seller and so although bags might have been purchased must be unfit for packing food articles, they were fit for other purposes.

Therefore in such a case the particular purpose for which the goods are to be specified must be specified by the buyer to the seller. But if goods are purchased under a patent or trade name there is no implied condition regarding their fitness for a particular purpose for which they might have been purchased. For example a cultivator purchases Ruston Oil Engine to be fitted in his well for irrigation his field but when put to use it was found unable to cope with the requirements of irrigation, the court decided that there is no breach of such a condition, because the buyer has exposed more confidence in the trade name rather than in the skill of the seller.

(4) Implied condition of merchantability: According to section 16 sub-section 2 where goods are purchased by description from a person who usually sells them (although he may be a manufacturer or producer or not) there is an implied condition that the goods supplied shall be of merchantable quality. For example : (Pir Mohammed V/s Dallo Ram) where black woollen yarn was supplied by the seller to the buyer and the same was found moth-eaten, it was decided that there was a breach of this condition.

The work merchantable has not been defined anywhere in the Act but it has been taken by the courts to mean the quality of the goods of which, if properly tendered to the buyer will compel him to accept their delivery but this does not imply that the seller is guaranteeing the goods to be easily saleable.

Illustration: A manufacturer of tonic water in England agreed to sell the same to a buyer in Argentina. The tonic water contained a particular acid and according to the law of Argentina the sale of any liquid article containing that particular acid was banned. The goods arrived in Argentina and were condemned by the Port authorities. The court decided that there is no breach of condition regarding merchantability as the tonic water was prepared according to the prescribed chemical formula and merchantability does not imply that the seller would provide an article for which there would be ready and willing buyer.

But if the buyer has examined the goods there is no implied condition regarding their merchantability in respect of those defects which any examination ought to have revealed. For example where a buyer purchased vegetable Ghee packed in the casks and the buyer inspected the containers from outside alone and agreed to purchase the goods but later on when the ghee was found to be adulterated, the court decided that there was no breach of condition as buyer has examined the goods and if he has not properly examined them, seller cannot be held liable.

5. Implied condition in a contract of sale by sample: (i) In the case of sale by sample the bulk of the goods must correspond with the sample in quality because in such cases it is the sample alone which has been held to be representative of the quality of goods to be supplied by the seller and therefore it is but natural that the goods must conform to the sample.

(ii) The buyer should get reasonable opportunity of comparing the bulk with the sample. There is some conflict of legal opinion as to whether the whole of the goods conform to the sample. The courts have laid down a rule that goods supplied shall be considered according to the sample if so much of the quantity out of the entire lot is equal to the sample as any standard of fair play and equity prescribes. In other words it is the discretion of the court to decide whether the goods conform to the sample or not.

(iii) In the case of sale by sample there is an implied condition that the goods shall be merchantable and free from defects which could not be disclosed by an ordinary examination. For example a manufacturer agree to sell 2500 pieces of grey shirting's each weighing 7 pounds the price of which was to be 18s. 6 d. per piece. The sample of the cloth was shown and approved by the buyer. When rendered it unfit to be made into dresses, because some china clay has used in the preparation of the cloth to increase its weight. The court decided that although the sample was shown and approved by the buyer yet it was of such a nature that the defect could not be detected so that goods are un-merchantable even though they conform to the sample.

Doctrine of Caveat Emptor

The maxim of caveat Emptor means "let the buyer beware". According to the doctrine of caveot emptor it is the duty of the buyer to be careful while purchasing goods of his requirement and, in the absence of any from the buyer, the seller is not bound to disclose every defect in goods of which he may be cognisant. The buyer must examine the goods thoroughly and must see that the goods he

buyers are suitable for the purpose for which he wants them. If the goods turn out to be defective or do not suit his purpose, the buyer can not hold the seller liable for the same, as there is no implied undertaking by the seller that he shall supply such goods as suits the buyer's purpose. If, therefore, while making purchases of goods the buyer depends on his own skill and makes a bad choice, he must curse himself for his own folly, in the absence of any misrepresentation or fraud or guarantee by seller.

Exceptions: The doctrine of caveat emptor is subject to the following exceptions:

1. Where the seller makes a misrepresentation and the buyer relies on it, the doctrine of caveat emptor does not apply. Such a contract being voidable at the option of the innocent party, the buyer has a right to rescind the contract.

2. Where the seller makes a false representation amounting to fraud and the buyer relies on it, or when the seller actively conceals a defect in the goods so that the same could not be discovered on a reasonable examination, the doctrine of caveat emptor does not apply. Such a contract is also voidable at the option of the buyer and the buyer is entitled to avoid the contract and also claim damages for fraud.

3. Where the goods are purchased by description and they do not correspond with the description.

4. Where the goods purchased by description from a seller who deals in such class of goods and they are not of 'merchantable quality', the doctrine of caveat does not apply. But the doctrine applies, if the buyer has examined the goods, as regards defects which such examination ought to have revealed.

5. Where the goods are bought by sample, the doctrine of caveat emptor does not apply if the bulk does not correspond with the sample, or if the buyer is not provided an opportunity to compare the bulk with the sample, or if there is any hidden or latent defect in the goods.

6. Where the goods are bought by sample as well as by description and the bulk of the goods does not correspond both the sample and the description, the buyer is entitled to reject the goods.

7. Where the buyer makes brown to the seller the purpose for which he requires the goods and relies upon the seller's skill and judgement but the goods supplied are unfit for the specified purpose, the principle of caveat emptor does not protect the seller and he is liable in damages.

8. Where the trade usage attaches an implied condition or warranty as to quality or fitness and the seller deviates from that the doctrine of caveat does not apply and the seller is liable in damages

ESSENTIAL OF A CONTRACT OF SALE OF GOODS: (OR ESSENTIAL ELEMENTS OF A CONTRACT OFSALE OF GOODS)

These are various essential elements which must be present in a contract of sale of goods these are:

(1) At least two parties: To make a contract of sale there must be at least two parties. These parties must be distinct, that is, a buyer and a seller. These parties should be also competent to make a contact. In this context the word 'buyer' means any person who buys or agrees to buy the goods and the word 'seller"' means any person who sells or agrees to sell the goods.

(2) Goods : the subject-matter of the contract of sale of goods, must be some goods the purpose of this contract is to transfer the property in these goods from the seller to the buyer. And the googs forming the subject-matter of contract should be monable. The regulation of transfer of immovable property does not come within the purview of sale of Goods act.

(3) Price-the consideration : In a contract of sale the consideration is price. The price must be money when the goods are sold in exchange for goods, this is not sale but only a barter. But price or consideration may by partly in money and partly in goods.

(4) General property : In a contract of sale the object is to transfer general property, from the seller to the buyer, in the goods. General property in the goods in different from special property in the goods. If a person has the ownership of the goods, it means, he has the general property in the goods. If the owners of the goods pledges these goods with a money-lender, the moneylender has special property in the goods.

(5) In a contract of sale all the essential elements of a valid contract must be present, namely, agreement, intention to create legal relationship, capacity to make contract, free consert, lawful consideration, lawful object, etc.

TRANSFER OF PROPERTY IN CONTRACTS OF SALE OF GOODS

The most important consequence of a contract of sale of goods is the transfer of property in the goods from the seller to the buyer because risk always follows such a transfer of ownership and the time of payment as well as the time of delivery of the goods is not an essential consequence of such a contract.

The most important point regarding the transfer of ownership is that it can take place only in case of ascertained and specific goods. According to Sec. 18 "No transfer of property in the goods can take place from the seller to the buyer unless and until they are ascertained".

Illustration: A sells 200 maunds of wheat out of a total of 618 maunds stored in a warehouse and gives a delivery order to B, the purchaser, directing the warehouse men to deliver 200 maunds of wheat to B. B lodges the delivery order with the warehouse men to no transfer of property takes place from A to B so far as the quantity to be sold to him is concerned because the goods were unascertained.

For the consideration of the problem of transfer of property it can be divided in two broad categories:

(a) Transfer of Property in Specific and Ascertained Goods

According to Sec. 19 where there is a contract of sale of specific or ascertained goods, the property in them shall pass from the seller to the buyer when the parties have intended it to pass.

In order to find out the intention of parties in this regard, consideration is to be given to the terms of the contract, conduct of the parties and circumstances of the case.

But if the parties fail to lay down their intentions regarding the transfer of property in the goods, certain rules have been laid down for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer, which are contained from Sec. 20 to 24 and which are the following:

1. When goods are in a deliverable state: According to Section 20 where there is an unconditional contract for the sale of specific goods in a deliverable state the property in the good passes to the buyer when the contract of sale is made and it is immaterial whether the time of payment of the price or the time of delivery of the goods or both is postponed.

Illustration : Where there is a contract between A & B for the purchase of a specific quantity of hemp stored on the premises of the seller A; price to be paid on 4th February and the delivery to be given on 1st of May while the contract is being made on 20th January the property in the specific lot of hemp shall be transferred from A to B on 20th January itself.

As goods under this rule are in such a state they can be immediately delivered to the buyer, there remains nothing which can prevent a transfer of ownership. But if the parties in such cases themselves decide that no transfer of property shall take place till the entire price is paid, or till the delivery of goods has been given to the buyer, there would be no transfer of property in the goods inspite of the fact that the goods are specific and in a deliverable state. As for example goods sold under hire purchase agreement.

2. When goods are not in a deliverable state: According to Section 21 where there is a contract for the sale of specific goods but the seller is bound to do something to the goods in order to put them in a deliverable state, property in them shall not be transferred until such thing is done by the seller and buyer has notice thereof.

Illustration: There was a contract for the wood of Oak trees in a certain forest. The buyer purchased the wood from the seller selecting certain portion of trees and rejecting others. According to the custom of trade the seller was to separate the selected portions from the rejected portions. But the buyer threw upon himself the duty of separating the two portions. The court decided that no transfer of ownership has taken places so far as wood is concerned.

3. When goods are to be measured etc.: According to Section 22, where there is a contract for the sale of specific goods in a deliverable state but the seller is bound to measure, weight or count the goods in order to determine the price, there would be no change of ownership from the seller to the buyer till such act is done and the buyer has notice thereof.

Illustration: There was a contract for the sale of 289 bales of goat skin. Every bale was to contain

5 dozens smaller bales and according to the contract the price was to be determined according to the price of smaller bales so that the seller was to count the number of smaller bales in every bigger bale. It was decided that no transfer of property has taken place when the bales were destroyed by the fire during the process of counting by the seller.

Transfer of property in unascertained goods: According to section 18 no transfer of property can take place from the seller to the buyer in unascertained goods. Therefore some acts have got to be done in order to convert unascertained goods into ascertained or specific goods. Such acts are collectively and technically called 'appropriation'. According to Section 23 "Where there is a contract for the sale of unascertained or future goods by description and goods of that description as well as in deliverable state are unconditionally appropriated to the contract, either by the seller with the consent of the buyer or by the buyer with the consent of the seller, the property in the goods shall be transferred from the seller to the buyer, as soon as such appropriation is made, the consent of the buyer or the seller as the case may be obtained either before or after appropriation.

Thus appropriation of goods is the most important act which permits the transfer of property from the seller to the buyer. Appropriation may be defined as the application of the goods for the purposes of a contract of sale such an act must have the following essentials.

1. Goods which are appropriated must be of the same description under which they are sold: For example where an order was placed for tea sets, jars and glasses made of china clay and where the seller while supplying the goods also placed some other things in the parcel it was held that there was no appropriation because the goods did not exactly answer the description given in the contract.

2. The goods appropriated to the contract must be in a deliverable state because unless they are in such a state no transfer of property can take place.

3. The goods must be unconditionally appropriated to the contract: According to section 23 sub-section 2. "Goods are said to be unconditionally appropriated to the contract when the seller gives

them to the buyer or a carrier or some other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer. The most common form of appropriation is the delivery of goods to person for the purpose of transporting them to the buyer and as soon as this is done, generally speaking, the property shall be transferred to the buyer if the seller has not reserved the right of disposal as defined by section 25.

4. Basis of appropriation: Appropriation of goods is done on the basis of consent of either the buyer or the seller. Such a consent may be obtained either before or after appropriation.

By the buyer with the consent of the seller: Where the buyer is holding the goods on behalf of the seller as an agent, the buyer can appropriate the goods for the purpose of the contract, inform the seller regarding the same, obtain his consent only them the property shall be transferred to the buyer.

By the seller with the consent of the buyer

Illustration No.1 A agrees to purchase 10 tons of petrol from B and already sends the steel tins to B for packing the petrol. As soon as B will fill the petrol in the steel tins sent to him by the buyer, the property shall be transferred from B to A because the consent of the buyer to the appropriation made by the seller shall be taken to have been given by the buyer himself supplying the steel tins (consent of buyer before appropriation).

Illustration No. 2 A of Madras orders certain goods from B a manufacturer of Calcutta. After the goods are ready, B appropriates the goods to the contract informing A that the goods are ready for delivery upon which A requests B to send them by Rail to Madras after affecting the Insurance thereon. The property in the goods shall pass from B to A as soon as the goods after being insured, are handed over to the Railway Authorities (consent of the buyer after appropriation).

Illustration No. 3 A sells 500 maunds of rice out of bigger quantity to B and the rice is packed in seller's gunny bags and the words "wait orders of the buyer" are pasted on the gunny bags with the address of the buyer, it was decided that the property has not changed hands although the goods are in a deliverable state because the buyer's consent to the appropriation has not yet been obtained.

5. Method of Appropriation: Appropriation of goods for the purpose of the contract may be made:

(a) By packing the goods in suitable containers.

(b) By separating the goods from a larger quantity.

(c) By the delivery of the goods to a common carrier or bailee for the purpose of transmission to the buyer without reserving the right of disposal which has been defined by Section 25 of the Sale of Goods Act as follows:

1. Where there is a contract for the sale of specific goods or unascertained goods which are unconditionally appropriated to the contract, the seller may under the terms of the contract or appropriation lay down certain conditions to be fulfilled by the buyer. In such a case although goods may be delivered to the common carrier or other bailee for the purpose of transmission to the buyer the property shall not be transferred to the buyer.

Illustration: A sells 500 bales of cotton to B on the condition that certain bills of exchange which have been drawn by B on A and which are still in circulation should be withdrawn by the buyer. The delivery of the bales was to be given in installments. The buyer fails to withdraw the bills of exchange and the seller stopped the delivery of installments claiming the price of the bales already delivered, it was decided that no transfer property has taken place even in the bales which have been delivered because the buyer has not fulfilled a condition laid down in the contract.

2. Where the seller sends the goods and takes a bill of lading or railway receipt, deliverable to himself or his order it is presumed that the seller has reserved the right of disposal over the goods.

3. Where the seller sends the goods and draws upon the buyer for the price, sending to him the bill of lading of the railway receipt along with a bill of exchange to be either accepted or paid by the buyer, the buyer shall not acquire the ownership of the goods till he has accepted or paid the bill of exchange and if by mistake he acquires the bill of lading without accepting or paying the bill of exchange, the property does not pass to him.

Illustration: A sells goods to B. He weights the goods at his own place of business, sends them to B's placed, taking the railway receipt and sending the same to his bander at B's place of business instructing him to surrender the R/R to the buyer B only when he pays the Bill of exchange. The banker surrenders the receipt to the buyer B upon his acceptance of the bill. Later on B refuses to honour the goods. A files a suit for the recovery of the price. Held that A has no right to recover the price because the property in the goods has not passed to B, it being contingent upon the payment and not the acceptance of the bill.

Consequence of the transfer of property: The most important consequence of the transfer of property under a contract of sale goods is the risk passes with the property. According to section 26, where the property in the goods remains with the seller, the seller bears the risk and when the property passes to the buyer, the risk devolves on the buyer whether the delivery has been made or not. But if there is any deal in the transfer of property due to the fault of any one of the parties to the contract, the risk shall remain with the party but for whose fault the property would have been transferred.

In other words there can be conditions under which there may be divorce between risk and ownership.

Illustration 1 : There was a contract between A & B for the sale of 814 tons of kerosene oil B, the purchaser, paid Rs. 1000 as part payment of the price. The seller A was himself to receive the consignment from A third party. On the receipt of the Railway receipt, A endorsed the same to the buyer B. The consignment was destroyed in transit, held that B is liable for the loss and cannot get back the refund of part payment made by him because as the R/R was endorsed in his name, he became the owner of the good and therefore shall have to bear the risk of loss.

But where the goods have been dispatched by the seller "on the risk and on account of the buyer" but the railway receipt was taken in the name of the seller or it was taken in the name of the buyer but was sent to the seller's agent with the instructions to part with the same upon the fulfillment of certain conditions by the buyer, the risk shall remain with the seller because he has reserved the right of disposal.

Transfer of property in transaction of sale or return: According to section 24 where the goods are sent to the buyer "on approval or on sale or return" or similar other terms the property in them shall pass to the buyer:

(a) When the buyer expresses his approval or acceptance to the buyer or does any other act adopting the transaction:

Illustration : A gives a diamond to B on sale or return. B gives the same to C on similar terms and C delivers the same to D on sale or return. The diamond was lost from the custody of D. As B cannot return the diamond to A, his act in giving the diamond to C shall tantamount to adopting the transaction. Similarly if the buyer on sale or return pledges the goods to a third party the act of pledge shall be taken to be an act adopting the transaction.

(b) Where the goods were sent to the buyer on sale or return with a fixed period of time within which he is to express his approval, the property shall pass to the buyer as soon as that period of time expires although the buyer does not give his approval or acceptance and if no such time is fixed upon the expiry of reasonable time.

Transfer of title: In the performance of a contract of sale of goods by a seller there are three stages, namely, the transfer of property in the goods, the transfer of possession of the goods, i.e. delivery of the goods and the passing of the risk. The main object of a contract of sale of goods is the transfer of property in goods from the seller to the buyer. The term 'property in goods' is different from the term 'possession of goods': 'property in goods' means the ownership of the goods whereas 'possession of goods' means custody or control of goods.

According to Sec. 27 only that person has a right to sell goods who is a real owner of them so that a sale by non-owner may create certain legal complications to avoid which Sec. 27 had laid down the following exceptions:

RIGHTS OF AN UNPAID SELLER (SEC. 45 TO 44)

Where a buyer to who property in the goods have passed, fails to pay the price there of the seller has a right to file a suit against the buyer for the price and similarly where the purchaser is responsible for non-fulfillment of some conditions in a contract of sale, he shall be liable to the seller for damages but these rights of a seller are based upon the personal liability of the buyer.

But there is another class of rights which are given to an unpaid seller by section 45 to 54 of Sale of Goods Act, 1930 and these rights are available only against the goods and not against the purchaser personally.

Who is an unpaid seller

According to Sec. 45, a seller is said to be unpaid where:

(a) the whole of the price has not been paid or tendered. But later on it was decided that if even a part of the price remains unpaid or if the seller has been partially paid, he can exercise these rights.

(b) Where a bill of Exchange or other negotiable instrument has been received as conditional payment and the condition on which it has been received has not been fulfilled by reason of the dishonour of the instrument or otherwise (Sec. 45). By this clause the benefits of the definition have been extended to that class of persons who cannot strictly speaking, be called sellers. For example where the bill of lading have been endorsed in the name of the agent or where an agent has paid or is responsible for the price.

According to Sec. 46 subject to the provisions of this Act and of any law for the time being in force in India and notwithstanding the fact that the property in the goods has been transfered to the buyer, an unpaid seller has the following rights:

1. Rights of the unpaid seller Against the Goods

(a) When the property in the goods has been transferred

(i) Right of Lien

(ii) Right of stoppage in transit

(iv) Right of resale.

(b) Where the property in the goods has not been transferred

Right of withholding delivery.

2. Right of an unpaid seller against the buyer personally

(a) Right to sue for price

(b) Right to sue for damages

(c) Right to sue for interest

(d) Right to repudiate the contract.

1. (a) When the property in the goods has been transferred:

(1) Right of Lien: According to Sec. 47 subject to provisions of this Act, the unpaid seller of goods who is in possession of them can retain the goods in his possession till the payment of price thereof in the following cases:

(i) Where the goods have been sold without any stipulation as to credit (cash sales). (ii) Where the goods have been sold on credit but the period of credit has expired.

(iii) Where the buyer becomes insolvent [Sec. 47(1)]. In this case insolvency is not to be taken in the sense in which it has been defined by insolvency law but it would be sufficient if the seller reasonably entertains some doubt about the capacity of the purchaser to pay and thereupon exercises his right of lien by retaining the goods in his possession.

Essentials of the right of lien:

(1) It can be exercised only when the property in the goods have been transferred to the buyer because if the seller is the owner of the goods, there can be no point in his exercising the right of lien because the goods are his own.

(2) Lien is always possessory because its essence lies in retaining possession and a person can retain only that which is in his possession.

(3) It is an indivisible right which means that if the seller has parted with the possession of the goods partially, according to Sec. 48 he can exercise his right of lien on the remainder of the goods. Further, if the buyer has paid the price in part he cannot compel the seller for the part delivery of the goods because under law seller is entitled to return the whole of the goods in his possession. If the part delivery of goods have already been given by the seller to the buyer, the seller shall not be able to exercise his right of lien if such part delivery indicates an intention, to give up the right of lien.

(4) This right is a personal right of an unpaid seller which can be exercised by him alone and not by any other person.

Illustration: A has sold the goods to B and the price of the goods has not been paid to him. A himself has purchased the goods from X who is also unpaid but X has surrendered the possession of the goods to A. As an unpaid seller A has a right of lien against B and he wants to transfer his sight of lien to X so that the price of the goods may be recovered by him and he may get himself reimbursed on behalf of A. Held that X is not entitled to exercise the right of lien because it has been held to be a personal right of the unpaid seller.

(5) There must be no agreement to the contrary by which an unpaid seller might have been restricted in exercising the right of lien.

(6) Right is available only for the price of the goods not for any other charges. For example Dock dues, Warehouse charges etc. Hence where a seller has to recover certain dock dues from the buyer and wanted to exercise his right of lien for such recovery it was held that the right cannot be exercised by him. Further, the price must have fallen due for payment by the buyer which means that if some period of credit is allowed by a seller, a right cannot be exercised because ‘credit

suspends lien but does not destroy it' so that as soon as the period of credit has expired right of lien is revived.

Termination of Lien (Sec. 49)

According to Sec. 49 unpaid seller's right of lien gets terminated under the following conditions. (a) Where the goods are handed over to a carrier or other bailee for transmission to the buyer

without reserving the right of disposal.

(b) Where the buyer or his agent acquires possession of the goods.

(c) By waiver: As the right of lien is optional and not compulsory, it can be willingly relinquished by the unpaid seller.

(2) Right of Stoppage in Transit (Section 50 to 52)

According to Section 50 subject to the provisions of this Act where the buyer becomes insolvent and the seller has parted with the possession of the goods and they have yet not gone into the possession of the buyer, the unpaid seller can regain possession if they are in transit and can retain them till the payment of price.

Essential Elements

(1) Property must have passed to the buyer. (2) The seller must have lost possession.

(3) The buyer must not have acquired possession. (4) The purchaser must have become insolvent.

(5) The seller must be unpaid.

(6) The goods must be in transit.

Therefore, the right of stoppage in transit is available only when the goods are with the carrier for the purpose of the transmission to the buyer because the exercise of the right can contemplate two points of time the time when the seller loses possession and the time when the buyer acquires possession. It is only during this interval when the goods are with a carrier that the right of stoppage is available. But the possession of the carrier may be in any one of the following three capacities.

(1) *As seller's agent:* Where the carrier is the agent of the seller, there is no need to exercise the right of stoppage in transit because the seller has not lost the possession of the goods.

(2) *As buyer's agent:* Where the carrier holds the goods as the agent of the buyer, there is no possibility of exercising the right of stoppage in transit but sometimes the carrier becomes the agent of the buyer sometime after the goods have been actually handed over to him for transmission to the buyer which means that in the beginning he is the agent of the seller but afterwards become the agent of the buyer. In this case right of stoppage is not available after the agent acknowledges himself as the agent of the buyer.

(3) *In his own name:* From the strict legal point of view this right is available when the carrier has the possession of the goods in his independent capacity as a carrier. Although in actual practice this seldom happens because usually carriers do not carry goods at their own risks. Therefore, it is the question of fact determined by the court in which capacity the carrier is holding the goods. This depends upon a number of factors by whom the carrier was engaged, the manner of his appointment, the party who indicates the destination to him and the manner in which the document of title to the goods, like R/R, bill of lading have been taken out.

Therefore, it is a question of fact as to whether a carrier holds the goods in any of the three capacities indicated above and this shall be decided by the court upon answer to the above queries.

If the goods are rejected by the buyer and the carrier continues in possession of them, the transit is deemed to end, even if the seller has refused to receive them back. On the other hand, whether the carrier wrongfully refuses to deliver the goods to the buyer, the transit is deemed to be at an end.

If part delivery has been made to the buyer, the right of stoppage may be exercised on the remainder of the goods unless part delivery signifies an intention to give up possession of the whole of the goods.

Method of exercising the right: According to Section 52 the right of stoppage in transit can be exercised by unpaid seller either by taking physical possession of the goods or by giving to the carrier a notice of his intention to exercise the right.

The most effective, easy and speedy method of exercising the right by the unpaid seller is to take the physical possession of the goods but in most of the cases this is not possible. Therefore, an unpaid seller intimates the carrier who is carrying the goods that he wants to exercise his right of stoppage in transit which indirectly means that the goods should not be delivered to the buyer.

If the information given by the unpaid seller has been properly communicated to him, the carrier is bound to obey. What is properly tendered information to a carrier is a question of fact and if the carrier is the agent, his principal must be informed under such conditions that he can with the diligence communicate it to his servant or agent in time.

The legal effect of the exercise of this right is that the seller shall be presumed not to have lost the possession of the goods and after the information is tendered to the carrier he holds the goods as an agent of the unpaid seller and must deliver them back to him. If the carrier after receiving information wrongfully delivers the goods to the buyer and he does so at his own peril.

Any expenses involved in such redelivery shall be borne by the unpaid seller.

Lien and stoppage in transit distinguished

(1) The right to stop goods arises only when the buyer is insolvent but the right of lien can be exercised even when the buyer is able to pay but does not pay.

(2) Lien is available only when the goods are in actual or constructive possession of the seller but the goods can be stopped in transit when the seller has parted with possession and the buyer has not obtained possession.

(3) When possession is surrendered by the seller his lien is gone, but his right to stop commences and remains as long as goods are in transit.

(4) The right of lien is to retain possession; the right of stoppage is to regain possession.

3. Rights of Re-sale

According to Section 54(1), where a seller has exercised his right of lien or stoppage in transit the contract of sale is not thereby set aside by the exercise of these rights.

But sub-section (2) of Section 54 lays down that where a seller has exercised the right of lien or stoppage in transit or where the goods are of a perishable nature, the seller can re-sell them by giving the buyer a notice of his intention to resell the goods and if the buyer does not, within a reasonable time, tender the price thereof. If the resale results in a loss the buyer shall have to make good the loss to the seller. But if it yields a profit the seller need not return the same to the buyer.

But to get these rights the resale must be properly conducted which means that:

(1) *Resale must be conducted within a reasonable time.* For example where the perishable goods were sold after an interval of 8 months it was held that the resale is not proper and the seller is not entitled to recover the loss.

(2) The buyer must be given a notice by the unpaid seller of this intention to exercise the right of resale in the absence of which the resale gets vitiated and if it results in a loss buyer has not to bear the same while if it yields in profit the buyer can claim the same from the seller.

Where the seller expressly are serves a right of resale in case the buyer should make default the seller may sell the goods in the event of such a default. The original contract of sale shall thereby be rescinded but the seller shall be entitled to get damages from the buyer for the loss suffered by him.

(3) The exercise of the right of resale is optional by the unpaid seller and the buyer cannot compel him to exercise the right.

1. (b) Where the property in the goods has not been transferred.

Right of withholding delivery: Where the property in the goods has not been passed to the buyer, the unpaid seller, cannot exercise right of lien, but get a right of withholding the delivery of goods, similar to and co-extensive with lien.

2. *Right against the Buyer Personally*

Consequences of Breach of Contract of Sale: The seller in addition to his rights against the goods set out above has two rights of action against the buyer personally:

1. Suit for price (Sec. 55)

Where the property in the goods has passed to the buyer, the seller is entitled to sue for price, whether the possession is with buyer or seller. [Sec. 55(1)].

2. Where the property has not passed

Where the price is payable on a certain day irrespective of delivery, the seller may sue for the price, if it is not paid on that day, although the property in the goods has not passed, [Sec. 55(2)].

2. Suit for damages for non-acceptance (Sec. 56)

Where the buyer wrongfully neglects or refuses to except and pay for them, the seller may sue him for damages for non-acceptance. The measure of damages is difference between contract price and market price.

Example: A, contracted to buy a car from B who is a car dealer. A refused to accept delivery. Held B was entitled to damages for the loss of their bargain i.e., the profit they would have made, as they had sold one car less than otherwise they would have sold.

Where the seller is ready and willing to deliver goods and requests the buyer to take delivery which the buyer does not do within a reasonable time, the seller may recover from the buyer:

1. Any loss occasioned by the buyer's refusal or neglects to take delivery.
2. A reasonable charge for the care and custody of goods. (Sec. 44).

3. Right to sue for Interest

The seller be entitled to recover interest or special damages in any case, where under law, interest or special damages may be recoverable, or to recover the money paid where consideration for the payment of it has failed.

5. Repudiation of the contract (Sec. 60)

Where the buyer repudiates the contract before the date of delivery, the seller may either treat the contract as subsisting and wait till the date of delivery, or he may treat the contract as rescinded and sue for damages for the breach. (This rule B known as rule of anticipatory breach of contract).

2. Rights of the Buyer

Suit for non-delivery: Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may sue him for damages for non-delivery. The measure of damages in such cases will be the difference between contract price and market price.

If the buyer purchased the goods for resale and the seller knew of this, the measure of damages will be the difference between the contract price and the resale price if the goods cannot be obtained in the market. If they can be obtained in the buyer ought to obtain them there and so fulfill his contract of resale with the result that damages will be the difference between market price and contract price.

Suit for recovery of Price: If the buyer has paid and the goods have not been delivered, he can sue the seller of the recovery of the amount paid.

Specific Performance: A buyer can only get his contract specifically performed i.e., obtain an order of the court compelling the seller to deliver the goods he has sold, when the goods are specific or ascertained this remedy is discretionary and will only be granted when damages would not be an adequate remedy. Specific performance will be granted if the goods are of special value or are unique e.g., a rare book, a picture or a piece of jewelly.

Suit for breach of warranty: On breach of warranty, buyer can either:

(a) set up against the seller the breach of warranty in diminition or extinction of the price of the goods:

(b) sue the seller for damages for breach of warranty.

The measure of damages for breach of warranty is the difference between value of goods as delivered and the value they would have had if the goods had answered to the warranty.

Interest: In the absence of a contract to the contrary, the court may award interest at such rate as it thinks fit on the amount of price:

(a) to the seller in a suit by him for the amount of the price from the date of the tender of goods or from the date on which the price was payable;

(b) to the buyer in a suit by him for the amount of price in a case of a breach of the contract on the part of the seller-from the date on which the payment was made.

DUTIES OF SELLER AND BUYER

It is the duty of the seller to deliver the goods and the buyer to accept and pay for them, in accordance with terms of contract of sale (Sec. 31).

Unless otherwise agreed delivery of the goods and payment of price are concurrent conditions; that is to say that seller shall be ready and willing to give possession of the goods to the buyer in exchange of the price and the buyer shall be ready and willing to pay the price in exchange of possession of the goods-(Sec. 32).

The seller of goods has a duty of giving delivery according to the terms of the contract and according to rules contained in the Sale of Goods Act.

Buyer of goods has following duties:-

1. He must pay the price according to the terms of contract.
2. If he wrongfully refuses to accept delivery he must pay compensation to the seller.

Delivery: Delivery has been defined by the Act as a "voluntary transfer of possession from one person to another". Delivery may be made by doing anything which the parties agree shall be treated delivery. Delivery to a carrier is generally regarded as a delivery to the buyer.

MODES OF DELIVERY

Delivery may be actual symbolic or constructive.

1. *Actual delivery:* Where the goods are physically handed over by the seller or his authorized agent to the buyer.

2. *Symbolic delivery:* Where the goods are bulky and incapable of actual delivery, the "mean of obtaining possession" of goods are delivered by the seller to the buyer. Delivery of the key of the warehouse where the goods are stored or the bill of lading etc., are all examples of symbolic delivery.

3. *Constructive deliver:* Where a third person in possession of goods acknowledges to hold goods on behalf of and at the disposal of the buyer, the delivery is constructive.

Example: A is the warehouseman of B. B gives a delivery order to C, a buyer, asking A to deliver a certain quantity of goods C. C goes to A with this delivery order. A agrees to deliver goods the next day. It is a symbolic delivery of goods because now A is holding goods on behalf of and at the disposal of C. B cannot now stop A from delivering the goods to C.

RULES REGARDING DELIVERY

1. *Delivery should have the effect of putting the buyer in possession (Sec. 33):* Thus where wood of fallen trees is sold the mere fact of buyer cutting them up will not amount to taking possession of them until he carries them away. The buyer is able to exercise some degree of control.

2. The seller must deliver goods according to the contract and where there is a condition precedent to the performance of the contract, the seller is not bound to deliver unless the condition precedent is satisfied unless the sale is on credit, the seller need not be ready and willing to delivery the goods before the price is paid.

3. *Buyer to apply for delivery:* Though the seller is bound to delivery the goods yet he need not deliver them unless the buyer applies for delivery (Sec. 35). Thus when the seller gives notice of the arrival of goods, it is the buyer's duty to apply for delivery.

4. *Where the goods are with a third person:* Where the goods at the time of sale are in the possession of a third person, there is not delivery by the seller to the buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf [Sec. 36(3)].

5. *Time of delivery:* Where a specified time has been mentioned within which delivery is to be made, it must be made within that time limit. Where however, no time is fixed for delivery of goods, the seller is bound to deliver them within a reasonable time.

6. *Tender of delivery:* It is not however the duty of the seller to send or carry the goods to the buyer unless the contract of provides. His only duty is to place the goods at the buyer's disposal so that the buyer may remove them. But it is essential that the goods must be in a deliverable state at the time of delivery or tender thereof.

7. *Place of delivery:* The place of delivery may be stated in the contract and where it is so stated the goods must be delivered during business hours on a working day. Where no place is mentioned the goods are to be delivered at a place at which they happen to be at the time of the contract of sale or if the contract is with respect to future goods, at the place at which the goods are manufactured or produced.

If the seller agrees, to deliver the goods to the buyer at a place other than that where they are when sold, the buyer must, in the absence of agreement to the country take the risk of deterioration necessarily incident to course of transit.

8. *Cost of delivery:* The seller has to bear the cost of delivery unless the contract otherwise provides. While the cost of containing delivery is said to be buyer's, the cost of putting the goods into deliverable state must be borne by the seller.

9. *Duty to Insure goods where goods are delivered to a carrier:* Where goods are delivered to a carrier the seller is bound to enter into a reasonable contract on behalf of the buyer with the carrier for the safe transmission of goods and if he fails to do so and the goods are destroyed, the buyer may decline to treat delivery to carrier as a delivery to him or claim damages. If the transit be by sea, the seller must inform the buyer in time so that he may have the goods insured. If the seller fails to do this, the goods would be at the seller's risk during transit.

10. When the seller is ready and willing to delivery the goods and requests the buyer to take delivery and the buyer does not comply with this request within a reasonable time. The buyer is liable to the seller for.

(i) any loss occasioned by the neglect or refusal to take delivery and

(ii) a reasonable charge for the care and custody of the goods.

Delivery to carrier or wharfinger (Sec.39) where the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether aimed by the buyer or not, for the purpose of transmission to the buyer, or delivery of the goods to a wharfinger for safe custody, is prima facie deemed to be a delivery of the goods to the buyer.

Seller's Duty: Unless the buyer requires to dispatch the goods at owner's risk, it is the duty of the seller, when he delivers the goods to the carrier or wharfinger, to enter into a reasonable contract on behalf of the buyer may decline to treat the delivery to the carrier or wharfinger as a delivery to himself, or may hold the seller responsible in damages.

Sea Transit: Unless otherwise agreed, where the goods are sent by the seller to the buyer by a route involving sea transit, where it is usual to insure, the seller must inform the buyer in time to get their goods insure during their sea transit, and if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit.

Acceptance of goods by Buyer: The buyer has a right to have delivery as per contract and accept them when they are according to the contract.

Acceptance of goods by the buyer takes place when the buyer: (1) Intimates seller that he has accepted the goods; or

(2) Does any act to the goods which is inconsistent with the ownership of the seller e.g. Pledge or resale.

(3) Retains the goods after the lapse of a reasonable time without intimating the seller that he has rejected them (Sec. 4).

Where goods are delivered to the buyer when he was not previously examined he is not deemed to have accepted them until he had reasonable opportunity of examining them. He is entitled to demand of the seller a reasonable opportunity of examining them in order to ascertain whether they are in conformity with the contract. The buyer may, however, accept them at once although a reasonable time for making an examination has not elapsed.

If the seller sends the buyer a larger or smaller quantity of goods than or ordered, the buyer may:

1. Reject the whole
2. Accept the whole
3. Accept the quantity he ordered and reject the rest (Sec.37).

If the seller delivers with the goods ordered goods of a wrong description, the buyer may accept the goods ordered and reject the rest or reject the whole.

Instalment deliveries: When there is a contract for the sale of goods to be delivered by stated instalments which are separately paid for and either buyer or seller commits a breach of contract, it is question depending on the terms of the contract and the circumstances of the case whether the breach is a repudiation of the whole contract or a severable breach merely giving to claim for damages (Sec. 38).

If the breach is of such a kind as to lead to the inference the similar breaches will take place with regard to future delivers, the contract can be at once repudiated by the injured party. For example, if the buyer fails to pay for one instalment under such circumstances as to suggest that he will not pay for future installments or the seller fails to deliver goods of the contract description under similar circumstances, the contract can be repudiated.

A sold to B 1500 tons of meat to be shipped 124 tons monthly in equal weekly installments. After about half the meat was delivered and paid for, he found the meat not of contract quality and he refused to take further deliveries. Held, B was entitled to do so.

Conditions attached to a Contract of Sale of Goods involving Sea Transit

F.O.B. In the case of contract of sale of goods which are to be shipped to a foreign port, a number of conditions are attached by parties or by custom and practice of merchants. Property in goods passes to buyer only after goods have been loaded on Board the ship and accordingly the risk attaches to the buyer only on shipment of goods which may at that time be specific or unascertained.

C.I.F. Contracts: In foreign transactions, two things are guarded against (i) the insolvency of parties (ii) the perishing goods through no fault of either party. Where the buyer orders goods from a merchant abroad the seller will insure the goods, deliver them to the shipping company and send the bill of landing and insurance policy together with the invoice to a bank and the buyer has to pay the price (which includes cost of goods, premium of insurance and freight) and receive the above documents from the bank. This method protects the seller for the goods continue to be in his ownership until the buyer pays for them and gets the documents and the buyer is equally protected as he is only called upon to pay against the documents and the moment he pays he obtains the documents which would enable him to get delivery of goods as soon as they arrive. If in the mean time the goods are lost at sea, neither will be put to loss for either the seller or the buyer whoever is the owner at the time of loss can make a claim against the insurer for such loss. The buyer is bound to accept the documents which represent the goods and honour the draft. If after taking delivery he finds that the goods are not according to the contract he may reject the goods and sue for damages.

Duties of the Seller

Selling under a C.I.F. contract is required to fulfill the following obligation:-

1. To make out an invoice of the goods sold in the usual form showing the price of the goods.

2. To ship at the port of shipment goods of the description contained in the contract within the time fixed or within reasonable time if no time is fixed.

3. To arrange for an insurance upon the terms current in the trade which will be available for the benefit of the buyer.

4. To procure a proper contract of affreightment (Bill of lading) under which the goods will be delivered at the destination contemplated by the contract.

Duties of the Buyer

1. Buyer is bound to accept all the complete and regular shipping documents when they are tendered to him.

2. He must pay the price irrespective of the arrival of the goods. He is bound to pay the price even before the arrival of the goods or even if the goods are destroyed because he can claim compensation for the loss in the value of goods from the insurance company.

C.I.F Cost, Insurance, Freight, Commission, Interest. Where the order for the supply of goods is placed with a commission agent he is entitled to charge his commission for the work done and interest for the time during which the price of goods remain unpaid.

Ex-ship contracts: The ownership in the goods will not pass until actual delivery. It will therefore be for the seller to insure the goods will not pass until actual delivery. It will therefore be for the seller to insure the goods to protect his interest. Even if the buyer has paid the price against the documents, the buyer does not acquire any interest in the goods.

RESERVATION OF RIGHT OF DISPOSAL BY SELLER:

As a rule, the property in the goods can be transferred from the seller to the buyer, if the goods are either specific or ascertained. In addition to this, for passing the property to the buyer form seller, the seller should not have reserved his right of disposal of the goods. A seller reserves the right of disposal of the goods till the fulfillment of certain conditions. For example, if according to a term of a contract the buyer is to make payment of price of the goods before delivery, it means the seller has reserved the right of disposal of the goods. In this case the property in the shall not pass to the buyer until the condition of payment of price of goods is fulfilled. The position will remain the same even if he goods have been delivered to the buyer or to a baille or carrier of goods for the purpose of carrying to the buyer.

A through there can be express reservation of the right of disposal of goods by the seller, he is deemed to reserve the right of disposal of goods in the following cases.

(1) In case the goods are handed over for shipment or carriage by railway and if the goods are deliverable to the order of the seller or his agent as per the bill of lading or railway receipt.

(2) In case the seller sends a bill of exchange for the amount of the price of the goods to the buyer, along with the bill of lading or railway receipt, for his acceptance. In this case, the property in the goods does not pass from the seller to the buyer till the acceptance of the bill of exchange by the buyer. In case the buyer does not accept the bill or dishonours the bill, the buyer must return the bill of lading or railway receipt; if he retains them wrongfully; the property in the goods does not pass to the buyer.

Sale by non-owners

1. Provisions of Indian Sale of Goods Act: There are certain conditions laid down by the Sale of Goods Act itself in which a non-owner can sell the goods not belonging to him. For example according to Sec. 54 of this Act an unpaid seller of goods has a right to sell them even though the property in them might have passed to the buyer and the purchaser of the goods shall acquire a good title to them.

2. Provisions of any other law for the time being in force in India. There might be certain other enactments which may prescribe conditions under which a sale effected by an apparent owner shall confer a good title on the purchaser. As for example a finder of lost goods under Sec. 76 of the Indian Contract Act can sell the goods under a certain conditions and similarly under section 168 a pledgee can also sell the goods and in both these cases a bonafide purchaser shall get a good title to the goods.

3. The real owner may by an act or omission prevents himself from later on denying the authority of the seller to sell the goods which means that the doctrine of estoppel applies to him. For example where an agent when authority has been conferred exceeds the same and affects a sale of the goods, the buyer would get a good title or where the real owner of goods accepts the payment of the goods from the agent knowing that the sale has been affected by the agent without his authority.

4. *Sale by a Mercantile Agent:* According to paragraph 2 of Sec. 27, where a mercantile agent is in possession of the goods or of a document of title to them with the consent of the real owner and effects a sale of them in the ordinary course of his business the buyer gets a good title to goods provided he acts in good faith and without any knowledge of the defect in the title of the mercantile agent.

(a) The person must be a mercantile agent. For example where a person was entrusted with jewellry to be sold in the country side it was held that he was a mercantile agent capable of conferring a good title on the purchaser.

(b) He must be in the possession of the goods for document of title to the goods. For example a railway receipt a bill of lading, a warehouse certificate etc. This means that the agent must be either in actual or constructive possession of the goods.

(c) The mercantile agent must enjoy such possession with the consent of real owner. If the consent of the real owner is not free, the possession by the mercantile agent under this rule is vitiated, and he cannot confer a good title on purchased. But these are cases where although the act of the mercantile agent does not amount to either fraud or misrepresentation which may vitiate his possession yet he has acquired the same by playing a trick in which case he has the authority to confer a good title on the purchaser. For example a person was duly entrusted with the possession of a car with instructions not to sell it below a specified price but, from the beginning, the agent had no intention of selling the car at that price and later on effects a sale it was decided that the buyer gets a good title because agent was duly entrusted with the possession of the car and it is not the duty of the purchaser to investigate any flaw in such possession although the agent has not fulfilled the instructions of the principal.

(d) The sale must be effected in the usual course of business. For example where the agent acquired the possession of a car from the real owner on the representation that he has prospective buyer in sight and later on obtained on employment with a motor company selling the car in that capacity, it was held that the buyer would not get a good title to the car because the sale has been effected in the course of business.

(e) The purchaser must act in good faith.

(f) He must have no knowledge about any defect in the title of the owner or the mercantile agent. Such a knowledge may be acquired by him directly or it may be obtained by him through any source whatsoever which would not entitle him to claim the benefit of this rule.

5. *Sale by a co-owner:* According to Sec. 28 where one of the several joint owners has the sole possession of the goods with the consent of the other co-owners a sale effected by such a co- owner in possession shall confer a good title to the buyer if he acts in good faith and without any

knowledge of the defect in the title of the seller. If one of the several co-owners is holding a jewel in safe custody, the buyer in good faith will get a good title (Sec.28).

6. Where the possession of the goods has been obtained by a person under a contract voidable under Sec. 19 or 19A, of Indian Contract Act. A sale of the goods by such a person before the contract is rescinded confers a good title on the buyer if he acts in good faith and without any knowledge of the defect in the title of the seller (example of a voidable contract (Sec. 20).

7. *Sale by a seller in possession after sale:* According to Sec. 30(1) if the goods or document of title to the goods are in possession of a seller, and the goods have already been sold by him to a third party but the seller again effects a disposition of the goods or the documents either by means of pledge or sale, the buyer would get a good title if he acts in good faith and without any knowledge of the defect in the title of the seller.

8. *Buyer in possession after sale:* According to Sec. 30(2) where a purchaser is in possession of the goods which he has either purchased or agreed to purchase with the consent of the seller and effect a disposition of the same either by pledge or sale, the buyer will get good title if he acts in good faith and without any knowledge of the defect in the title of the seller. B agreed to buy a car and pay for it if his solicitor approved and having obtained possession of car sold it to C but the solicitor subsequently did not approve of the transaction. C will get a good title to the car.

AUCTION SALE

A sale by auction is a public sale where goods are offered to be taken by the highest bidder. In the case of sales by auction:

(i) Where goods are put for sale in lots, each lot is prime facie deemed to be the subject of a separate contract of sale.

(ii) The sale is complete auctioneer announces its completion by the fall of hammer and until such announcement is made, any bidder may retract his bid.

(iii) A right to bid may be reserved expressly by or on behalf of the seller and where such right is expressly so reserved the seller or any one person on his behalf may bid at an auction.

(iv) Where the sale is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to himself to employ any person to bid at such sale.

(v) The sale may be notified to be subject to a reserved price.

(vi) If the seller makes use of pretended bidding to raise the price, the sale is voidable at the option of the buyer.

According to Baijamin, sales by auction are of 3 kinds.

(1) Sale without reserve where the employment of a puffer renders the sale voidable.

(2) Sale with a condition that the highest bidder shall be the purchaser.

(3) Sale with a right expressly reserved to bid by or on behalf of the seller.

An auction "with reserves" is one where an upset price is fixed below which the auctioner refuses to sell or reserves to himself the option of buying. An auction is said to be sold to be sold to the highest bidder whether the same bid be equivalent to the real value or not.

Section 64 prohibits secret bidding or use of pretended bids or the employment of "puffers" on behalf of the seller to raise the price at auction. Even when the sale is with reserve or subject to an upset price only the seller or in his absence only one person acting on his behalf may bid. If more persons than one bid to the knowledge of the seller with a view to enhance the price, the buyer can

avoid the contract treating the sale as fraudulent. On the other hand an agreement among intending bidders not to compete against each other with a view to knocking off the article at a low price has not been held to be illegal.

The seller can protect himself against too low a bid by fixing a reserve price below which he will not sell.

Puffers are persons who without having any intention to buy are employed by the seller to raise the price by fictitious bids, thereby increasing competition among the bidders while they themselves are secured from risk by secret understanding with the seller that they shall not be bound by their bids.

A "Knock out" is a combination of persons to prevent competition between themselves at an auction by an agreement that only one of their member shall bid and that anything obtained by him shall be afterwards disposed of privately among themselves. Such a combination is not illegal.

Damping is the illegal act of dissuading the would be purchaser from bidding or from raising the price by pointing out defects or doing some other acts which prevent persons from forming a proper estimate of the price of goods. Damping is illegal.

Questions for practice

1. Define Contract of Indemnity. Can Indemnity- holder claim indemnity before he suffers actual loss? Discuss
2. Define Contract of Guarantee. What are the rights and liabilities of sureties? Discuss
3. Define Continuing guarantee. When it can be revoked. Explain
4. Define Bailment. Explain the rights and duties of bailee.
5. Define Lien. Explain various kinds of Lien.
6. Who is a finder of goods? Explain the rights and duties of finder of goods.
7. Define Pledge. Who can make a valid pledge? Discuss.
8. Who is an Agent? What are the rights and duties of an Agent?
9. Explain the liabilities of sub agent and substitute agent.
10. Explain the duties of an agent towards third parties.
11. When agent will be held liable to a third party? Explain
12. Explain the modes of creation of agency.
13. Explain the modes of creation of agency through ratification.
14. Explain the modes of termination of agency.
15. Define partnership. Explain various kinds of partnership
16. Who is a partner? Explain various kinds of partners.
17. Explain the essential elements of partnership.
18. Explain the position of a minor in a partnership firm.
19. Explain the rights and liabilities of incoming and outgoing partner.
20. Explain the rights and duties of partners towards one another.
21. Explain the relation of partners towards third parties.
22. Explain the effects of non-registration of partnership firm.
23. Explain various modes of termination of partnership.
24. Define sale. Distinguish between sale and agreement to sell.
25. Define goods. Explain various kinds of goods
26. Explain implied conditions and implied warranties in a contract of sale.
27. Who is an unpaid seller? Explain the rights of an unpaid seller.
28. Explain the rules of sale of specific goods in a deliverable state.
29. Explain the remedies available both to seller and buyer in case of breach of contract of sale.
30. Elucidate the maxim *nemo dat quad non habet* and identify exceptions if any.