



VELS



INSTITUTE OF SCIENCE, TECHNOLOGY & ADVANCED STUDIES (VISTAS)
(Deemed to be University Estd. u/s 3 of the UGC Act, 1956)
PALLAVARAM - CHENNAI

DCMBA-15

Legal and Business Environment



MBA
ODL MODE
(Semester Pattern)

School of Management Studies and Commerce

Centre for Distance and Online Education

Vels Institute of Science, Technology and Advanced Studies (VISTAS)

Pallavaram, Chennai - 600117

**Vels Institute of Science, Technology
and Advanced Studies**

Centre for Distance and Online Education

**Master of Business Administration
(MBA) - ODL Mode
(Semester Pattern)**

**DCMBA-15: Legal and Business
Environment**

(4 Credits)

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FOREWORD



Dr. Ishari K Ganesh
Chancellor

Vels Institute of Science, Technology and Advanced Studies (VISTAS), deemed to be a university, was established in 2008 under section 3 of the Act of 1956 of the University Grants Commission, Government of India, New Delhi.

VISTAS has blossomed into a multi-disciplinary Institute offering more than 100 UG & PG Programmes, besides Doctoral Programmes, through 18 Schools and 46 Departments. All the Programmes have the approval of the relevant Statutory Regulating Authorities such as UGC, UGC-DEB, AICTE, PCI, BCI, NCTE and DGS.

The deemed to be University aims to provide innovative syllabi and industry-oriented courses, and hence, the revision of curricula is a continuous and ongoing process. The revision is initiated by the faculty depending on the requirement and approved by the Board of Studies of the concerned Department/School. The courses are under Choice Based Credit Systems that enable students to get adequate freedom in choosing subjects.

I am pleased to inform you that VISTAS has been rendering its services to society to democratize the opportunities of higher education for those who are in need through Open and Distance Learning (ODL) mode.

VISTAS ODL Programmes offered have been approved by the University Grants Commission (UGC) – Distance Education Bureau (DEB), New Delhi.

The curriculum and syllabi have been approved by the Board of Studies, Academic Council, and the Executive Committee of the VISTAS, and they are designed to help provide employment opportunities to the students.

The ODL Programme (B.Com., BBA and MBA) study material have been prepared in the Self Instructional Mode (SIM) format as per the UGC-DEB (ODL & OL) Regulations 2020. It is highly helpful to the students, faculties and other professionals. It gives me immense pleasure to bring out the ODL programme with a noble cause of enriching learners' knowledge. I extend my congratulations and appreciation to the Programme Coordinator and the entire team for bringing up the ODL Programme in an elegant manner.

At this juncture, I am glad to announce that the syllabus of this ODL Programme has been made available on our website, www.vistas.ac.in, for the benefit of the student fraternity and other knowledge seekers. I wish that this Self Learning Materials (SLM) would be a nice treatise to the academic community and everyone.

CHANCELLOR

FOREWORD



Dr.S.Sriman Narayanan
Vice-Chancellor

My Dear Students!

Open and Distance Learning (ODL) of VISTAS gives you the flexibility to acquire a University degree without the need to visit the campus often. VISTAS-CDOE involves the creation of an educational experience of qualitative value for the learner that is best suited to the needs outside the classroom. My wholehearted congratulations and delightful greetings to all those who have availed themselves of the wonderful leveraged opportunity of pursuing higher education through this Open and Distance Learning Programme.

Across the world, pursuing higher education through Open and Distance Learning Systems is on the rise. In India, distance education constitutes a considerable portion of the total enrollment in higher education, and innovative approaches and programmes are needed to improve it further, comparable to Western countries where close to 50% of students are enrolled in higher education through ODL systems.

Recent advancements in information and communications technologies, as well as digital teaching and e-learning, provide an opportunity for non-traditional learners who are at a disadvantage in the conventional system due to age, occupation, and social background to upgrade their skills.

VISTAS has a noble intent to take higher education closer to the oppressed, underprivileged women and the rural folk to whom higher education has remained a dream for a long time.

I assure you all that the Vels Institute of Science, Technology and Advanced Studies would extend all possible support to every registered student of this deemed to be university to pursue her/his education without any constraints. We will facilitate an excellent ambience for your pleasant learning and satisfy your learning needs through our professionally designed curriculum, providing Open Educational Resources, continuous mentoring and assessments by faculty members through interactive counselling sessions.

This university brings to reality the dreams of the great poet of modern times, Mahakavi Bharathi, who envisioned that all our citizens be offered education so that the globe grows and advances forever.

I hope that you achieve all your dreams, aspirations, and goals by associating yourself with our ODL System for never-ending continuous learning.

With warm regards,

VICE-CHANCELLOR

Course Introduction

The Course **DCMBA-15: Legal and Business Environment** has been divided in to five blocks consisting of 17 Units. Law is a system of rules created and enforced through social or governmental institutions to regulate behavior, with its precise definition a matter of longstanding debate. This course is mainly focused on developing the legal agendas of a country which, in turn, helps in taking managerial decisions in the future for the MBA student especially in connection with business transaction. There should be basic knowledge among students to create a contract so that the parties involved in business will enter in a contract with their clients. For an entrepreneur initially starting the business, the studying of the legal environment helps him or her to understand various factors like success or failure, growth or diminished of the business.

The Block-1: Introduction to Legal and Business Environment has been divided in to four Units. Unit-1 gives the Introduction to Legal Aspects of Business, Unit-2 explains Business Management and Jurisprudence, and Unit-3 explains about the Structure of the Indian legal systems, sources of law and Unit-4 deals with Manager and legal system.

The Block-2: Indian Contract Act 1872 has been divided in to four Units. Here, Unit-5 explains about the Indian Contract Act 1872 and particularly fundamentals of contract laws and formation of contracts will be discussed. Unit-6 deals with principles of contract laws legality of object consideration. Unit-7 discusses the performance of contract and Quasi contract and Unit-8 discusses the discharge of contract and breach of contract.

The Block-3: Contract Management has been divided in to three Units. Here, Unit-9 explains about the Special Contract Act 1872. Unit-10 deals with laws of agency and principal-agent problem. Unit-11 discusses the bailment, pledge, guarantee and indemnity.

The Block-4: Transfer of Ownership and Property has been divided in to four Units. Here Unit-12 explains about the Sales of Goods Act 1930. Unit-13 deals with Transfer of Ownership and Property, Performance of contract. Unit-14 discusses the Consumer Protection Laws-Law relating to Business Organization and Unit-15 deals with Partnership Company form of organization.

The Block-5: Copyrights and Trademarks has been divided in to 2 Units. Here Unit-16 explains about protecting the property of business and Unit-17 deals with Copyright, Trademark, secret, Geographical Indications.

DCMBA-15: Legal and Business Environment

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The Block-1: Introduction

Block-1: Introduction to Legal and Business Environment has been divided in to four Units (Unit-1 to Unit-4). **Unit-1: Legal Aspects of Business: Introduction to Business Law** deals with Introduction, Meaning of Legal Aspects of Business, Various Definitions of Law, Concept of Business Law, Features of Law, Sources of Law and Functions of Law

Unit-2: Business Management and Jurisprudence explains about Introduction, Characteristics of Business law, Nature of Business Law, Jurisprudence, Meaning of Jurisprudence, Various Definition of Jurisprudence, Nature of Jurisprudence, Scope of Jurisprudence, Value of Jurisprudence, Benefits of Jurisprudence and also the Importance of Jurisprudence, Different Theories of Law, Kinds of Punishment, Codification of Law and Case Study.

Unit-3: Structure of the Indian Legal Systems: Sources of Law describes about the Introduction, Kinds of Law, Indian Legal System, Sources of Law, Fundamental Duties, Indian Judicial System and Case Study.

Unit-4: Manager and Legal System presents about the Introduction, Legal Status of Manager, Authority of Managers, Role of Manager in Legal system, Importance of Legal system and Case Study.

In all the units of Block -1 **Introduction to Legal and Business Environment**, the Check your progress, Glossary, Answers to Check your progress and Suggested Reading has been provided and the Learners are expected to attempt all the Check your progress as part of study.

Unit-1

Legal Aspects of Business: Introduction to Business Law

STRUCTURE

Overview

Objectives

1.1. Introduction

1.2. Meaning of Legal Aspects of Business

1.3. Various Definitions of Law

1.4. Concept of Business Law

1.5. Features of Law

1.6. Sources of Law

1.7. Functions of Law

Let Us Sum Up

Check Your Progress

Glossary

Answers to Check Your Progress

Suggested Readings

Overview

In this Unit, the introduction to legal business environment, meaning of legal aspects of business, various definitions of law, features of law, sources of law, characteristics of law, functions of law, advantages and disadvantages of legal system and also the concepts of business and sources has been clearly explained.

Objectives

After reading this Unit, you will be able:

- To state the meaning of law
 - To define law
 - To state the features, scope and characteristics of law
 - To understand the concept of law
 - To know various functions of law
-

1.1. Introduction

Law is a system of rules created and enforced through social or governmental institutions to regulate behavior, with its precise definition

a matter of longstanding debate. It has been variously described as a science and the art of justice. State-enforced laws can be made by a group legislature or by a single legislator, resulting in statutes; by the executive through decrees and regulations; or established by judges through precedent, usually in common law jurisdictions.

Private individuals may create legally binding contracts, including arbitration agreements that adopt alternative ways of resolving disputes to standard court litigation. The creation of laws may be influenced by a constitution, written or tacit, and the rights encoded therein.

The law shapes politics, economics, history and society in various ways and serves as a mediator of relations between people.

Legal systems vary between countries, with their differences analyzed in comparative law. In civil law jurisdictions, a legislature or other central body codifies and consolidates the law. In common law systems, judges make binding case law through precedent, although on occasion this may be overturned by a higher court or the legislature.

Historically, religious law influenced secular matters, and is still used in some religious communities. Sharia law based on Islamic principles is used as the primary legal system in several countries, including Iran and Saudi Arabia.

Law's scope can be divided into two domains. Public law concerns with government and society, including constitutional law, administrative law, and criminal law. Private law deals with legal disputes between individuals or organizations in areas such as contracts, property, torts and delicts.

What Is Law?

Law is a word that means different things at different times. *Black's Law Dictionary* says that law is "a body of rules of action or conduct prescribed by controlling authority, and having binding legal force. That which must be obeyed and followed by citizens subject to sanctions or legal consequence is a law."

1.2. Meaning of Legal Aspects of Business

Legal Aspects of Business examines the role of the law on all aspects of business ownership and management. Law is the body of principles recognized and applied by the state in the administration of justice. Mercantile law deals with contractual situations and the right and obligations arising out of mercantile transactions between mercantile

persons, property. A contract is a legally enforceable agreement between parties to do something or to *not* do something.

Any legal contract must contain certain elements. First, it must contain an offer. The offer is what someone is going to do, such as lease you a tractor, sell you a guitar, paint your house, or simply pay you. Second, the offer must be accepted.

Acceptance means that you agree to what is offered, without any changes. If you make changes to the offer, it is typically considered a “counter- offer.” which must itself be accepted. Third, it must represent the intent of both parties to enter into a legally binding agreement. In other words, both parties have to be aware that the agreement could be enforced by law.

Finally, it must contain consideration. “Consideration” means something of value, which is usually money, bargained for in exchange for the product or service that is being offered.

The parties have to be competent to enter into this agreement and they have to have entered into it voluntarily. These agreements can be oral, but naturally the enforceability increases if they are written. If the agreement is oral, it is still enforceable, but first you have to prove that it existed, which can sometimes be hard to do.

1.3. Various Definitions of Law

Natural School

In the natural school of thought, a court of justice decides all the laws. There are two main parts of this definition. One, to actually understand a certain law, an individual must be aware of its purpose. Two, to comprehend the true nature of law, one must consult the courts and not the legislature.

Positivistic Definition of Law

John Austin’s law definition states “Law is the aggregate set of rules set by a man as politically superior, or sovereign to men, as political subjects.” Thus, this definition defines law as a set of rules to be followed by everyone, regardless of their stature.

Hans Kelsen created the ‘pure theory of law’. Kelsen states that law is a ‘normative science’. In Kelson’s law definition, the law does not seek to describe what must occur, but rather only defines certain rules to abide by.

Historical Law Definition

Friedrich Karl von Savigny gave the historical law definition. His law definition states the following theories.

- Law is a matter of unconscious and organic growth.
- The nature of law is not universal. Just like language, it varies with people and age.
- Custom not only precedes legislation but it is superior to it. Law should always conform to the popular consciousness because of customs.
- Law has its source in the common consciousness (Volkgeist) of the people.
- The legislation is the last stage of law making, and, therefore, the lawyer or the jurist is more important than the legislator.

Sociological Definition of Law

Leon Duguit : states that law as “essentially and exclusively as a social fact.”

Rudolph Von Ihering’s Law definition: “The form of the guarantee of conditions of life of society, assured by State’s power of constraint”. This definition has three important parts. One, the law is a means of social control. Two, the law is to serve the purposes of the society. Three, law due to its nature, is coercive.

Roscoe Pound: studied the term law and thus came up with his own law definition. He considered the law to be predominantly a tool of social engineering.

Realist Definition of Law

The realist law definition describes the law in terms of judicial processes.

Oliver Wendell Holmes stated – “Law is a statement of the circumstances in which public force will be brought to bear upon through courts.”

According to **Benjamin Nathan Cardozo** who stated “A principle or rule of conduct so established as to justify a prediction with reasonable certainty that it will be enforced by the courts if its authority is challenged, is a principle or rule of law.”

As the above law definitions state, human behavior in the society is controlled with the help of law. It aids in the cooperation between members of a society. Law also helps to avoid any potential conflict of interest and also helps to resolve them.

Check Your Progress-1

True/False

- a. Any legal contract must contain certain elements.
- b. Law's scope can be divided into four domains.
- c. Leon Duguit states that law as “essentially and exclusively as a social fact.”
- d. Law is the body of principles recognized and applied by the state in the administration of justice.
- e. The word ‘Law’ has been derived from the Teutonic word ‘Lag’ ,which means ‘definite’.

1.4. Concept of Business Law

Business Law is also known as Commercial law or corporate law, is the body of law that applies to the rights, relations, and conduct of persons and businesses engaged in commerce, merchandising, trade, and sales. It is often considered to be a branch of civil law and deals with issues of both private law and public law. The word ‘Law’ has been derived from the Teutonic word ‘Lag’ ,which means ‘definite’. On this basis law can be defined as “a definite rule of conduct and human relations”. It also means a uniform rule of conduct which is applicable equally to all the people of the State. Law prescribes and regulates general conditions of human activity in the state.

Business law consists of many different areas taught in law school and business school curricula, including: Contracts, the law of Corporations and other Business Organizations, Securities Law, Intellectual Property, Antitrust, Secured Transactions, Commercial Paper, Income Tax, Pensions& Benefits, Trusts& Estates, Immigration Law, Labor Law, Employment Law and Bankruptcy. It is a branch of law that examines topics that impact the operation of a business.

1.5. Features of Law

- Law must be applicable to all. Everyone in the eyes of law is equal and no one can escape from the eyes of the law.
- Law is uniform in nature. Power of making law lies in the hand of the state. State passes those laws which are considered to be for human welfare.
- The state has a government which also helps in making law and through which laws are enforced.

- Laws are said to be reliable and just for every individual present in the state. These are rules for every individual.
- Every state needs the law as it is believed to be the most important element which helps the state to function smoothly.
- Law can be the threat to those who are willing to do wrong in society and once they commit anything wrong are severely punished.
- The punishments which are given to the guilty are also decided by the law.
- Each country has the court which settles any issues taking place in a state according to the laws formulated.
- Law act as a shield to every individual in the state. It helps people co-exist harmoniously and protect themselves from any wrong or evil doings.
- These laws are made by the representatives of the citizen. Then this law also requires public opinion and should also function in accordance with public needs.
- Law is said to be blind as it does not believe in any discrimination. All are equal in front of the law.

1.6 Sources of Law

Custom: These are believed to be one of the most important sources of law. In earlier times people used to follow certain customs which were accepted by all and which served as fair, equal and just to all individuals. Different social institutions borrowed these customs. Whoever went against the will of custom would face punishment. Later, these customs took a new turn and formulated as an organized political institution having converted all the customs into law. People started to believe these customs are best for them, therefore, they are believed to be the best source of law.



Source: Business Word

Religion and Morality:

Each religion has its own set of rules and regulation which helps people be a good human. In the past, there was no organized institution of law and so religion played its role. Religion was strictly followed and whoever violated it suffered punishment according to their religion.

People had in mind that if they did anything wrong, God would punish them and put them in hellfire and if they did well they would enjoy in heaven. But with the improvement and human civilization, people started to put aside religion and began to go freely. Therefore some religious rules turned into properly organized law. Few states took few rules and regulations and put them as the rule which should be followed by all. Rules of morality and religion acted as source material to the state to formulate the law.

Legislation:

In older days, customs or rulers acted as the main source of lawmaking. But later the government was set up and in government, we have a body which is said to distribute legislation which now acts as a main source of law. Legislation converts all customs to guide people's behavior. Every state has its own legislative body which serves as a source and got the identity of the Legal sovereign from ruler to the legislation.

Delegated Legislation:

Due to less time, availability of fewer people with professional skills and quick need of laws to exercise, the state gave rise to the delegation of legislation. The state got an emergency to make laws as quickly as possible as it cannot rely on one specific legislation. So the power to make law was divided into different executives for easy, fast and smooth lawmaking process. Now it serves as a giant source of law.

Judicial Decisions:

The judicial decision means the decision made by the court in accordance to the cases and interprets which law should be applied where. There are certain situations when judicial decisions also become laws for future and that is why they have to be considered as a source of law. Decisions made by main courts which are recognized as apex court can only be used as proper law.

Equity:

This basically means acting fairly and serving justice to all. In some exceptional cases, not all laws are suitable. So the judge has to use his intelligence and act with keeping in mind what is fair for whom. Equity

serves as a painkiller to those who are suffering and might in future gain popularity and formulate laws on the basis of equity.

Scientific commentaries:

Many jurists use scientific commentaries to make some laws better or we can say to develop and evolve laws jurist need these scientific commentaries. Jurist points out problems and strengths of the law and helps this law to become stronger. The opinion given by this jurist is then used as a reference to make a decision on certain cases.

1.7 Functions of law

Maintenance of law and order in society

Laws are directives that govern and regulate human behavior and code of conduct to ensure order. They are made for people within a territory to abide with. Laws are also responsible for keeping peace of a country intact.

Many countries possess a very diverse population. If the same law is applied throughout the population, irrespective of their diversity, different needs and differences in opinions, it would cause conflicts. Hence, laws are drafted to cater the needs of different parts of the society and help in maintaining peace in the country. For example, in a secular country like India, the constitution leaves certain subjects, like marriage. These laws are called Personal laws.

Protection of Fundamental Rights

There would be no use of any law that does not work towards protecting and securing the rights of people. Law is in place to maintain order and benefit the society. They are written to cater to people's needs and interests. In cases of crimes, laws punish violators in order to ensure that the basic rights of the people are protected and further set examples to ensure security. Thus, one of the most fundamental functions of law is to promote and protect human rights

Control of Political System

Law and politics have an obvious relationship. One of the major governmental functions is to draft and amend laws in the interest of the people. However, the political system is also subject to law and has to perform its duties according to law and be responsible for its consequences. Thus, law also governs and controls the political system by predetermining their duties, the structure of the system and who qualify to be a part of it.

The Regulations of Economic Activity

Law also sets the rules and regulations that must be followed while performing economic activities such as sale, trade, labor and investment. Law is needed to have valid and legal business deals and agreements. Laws such as sales tax, income tax, and GST and customs law are also responsible for government revenue that is used as funds for investing in the development of the country. Hence, law is also responsible for governing the economic sector and its counterparts to ensure ordinance.

Regulations of Human Relations

Human relations, such as contracts, agreements, families and marriages also come under the purview of law. Law plays the function of keeping human behavior and relations in a check. Thus, it automatically influences human relations by restricting unacceptable behavior, for example adultery. It is also responsible for clarifying the correct procedure of entering legal relationships, its legality and validity. Cases in marriage, like divorces, are needed to be approved by the law and registered in order to be valid. Hence, law holds control over the regulation of human relations.

International Relations

Law is responsible for conducting and making international relations. It plays an important role in forming economic, diplomatic and strategic relations with other nations. Visa law is also responsible for allowing people from other countries to enjoy the services provided by that nation. Laws are also used against policies and demands of other nations, and protect and promote the nations interests.

Let Us Sum Up

In this unit, you have learned about the following:

- Legal Aspects of Business examines the role of the law on all aspects of business ownership and management
- Law is the body of principles recognized and applied by the state in the administration of justice.
- Law has its source in the common consciousness of the people.
- Law must be applicable to all. Everyone in the eyes of law is equal and no one can escape from the eyes of the law.
- Law can be the threat to those who are willing to do wrong in society and once they commit anything wrong are severely punished.

- Law act as a shield to every individual in the state. It helps people co-exist harmoniously and protect themselves from any wrong or evil doings.
- People started to believe these customs are best for them, therefore, they are believed to be the best source of law.
- The judicial decision means the decision made by the court in accordance to looking after the cases and interprets which law should be applied where.
- Equity serves as a painkiller to those who are suffering and might be in future gain popularity and formulate laws on the basis of equity.
- Law and politics have an obvious relationship. One of the major governmental functions is to draft and amend laws in the interest of the people.
- Laws are directives that govern and regulate human behavior and code of conduct to ensure order.
- Law is responsible for conducting and making international relations. It plays an important role in forming economic, diplomatic and strategic relations with other nations
- Law plays the function of keeping human behavior and relations in a check. Thus, it automatically influences human relations by restricting unacceptable behavior, for example adultery.

Check Your Progress-2

1. _____ rights are recognised and enforced at law.
 - A. Legal
 - B. Moral
 - C. Natural
 - D. Ethical

2. The judicature Act of 1873 did not abolish_____, but abolish rules of its conflict.
 - A. Law
 - B. Equity
 - C. Law or equity
 - D. Law and equity

3. Personal rights are _____.
 - A. Inheritable
 - B. Uninheritable

- C. Inheritable or uninheritable
 - D. Neither inheritable or uninheritable
4. The law is derived mainly from two sources. Judge-made law is known as:
- A. Statute law or legislation
 - B. Common law
 - C. Rule of law
 - D. Supreme law
5. Law made by Parliament is known as:
- A. Supreme law
 - B. Common law
 - C. Rule of law
 - D. Statute law or legislation

Glossary

Law:	Law is a system of rules
Legal system:	Procedure or process for interpreting and enforcing the law
Legal Aspects of Business:	Role of the law on all aspects of business ownership and management.
Legislation:	The last stage of law making
Custom:	Important sources of law
Judicial Decisions:	The decision made by the court
Equity:	Fairly serving justice to all

Answers to Check Your Progress-1

- a- True
- b- False
- c- True
- d- True
- e- True

Answers to Check Your Progress-2

1. A. Legal
2. D. Law and equity
3. B. Uninheritable
4. B. Common law
5. D. Statute law or legislation

Suggested Readings

1. **Balachandran V.**, Legal Aspects of Business, Tata McGraw Hill, 2020.
2. **Chakravarty, R., & Gogia, D.** Chakravarty's Intellectual Property Law: IPR. New Delhi: Ashoka Law House- 2010.

Unit-2

Business Management and Jurisprudence

STRUCTURE

Overview

Objectives

2.1. Introduction

2.2. Characteristics of Business law

2.3. Nature of Business Law

2. 4. Jurisprudence

2.5. Meaning of Jurisprudence

2.6. Various Definition of Jurisprudence

2.7. Nature of Jurisprudence

2.8. Scope of Jurisprudence

2.9. Value of Jurisprudence

2.10. Benefits of Jurisprudence

2.11. Importance of Jurisprudence

2.12. Different Theories of Law

2.13. Kinds of Punishment

2.14. Codification of Law

2.15. Case Study

Let Us Sum Up

Check Your Progress

Glossary

Answer to Check Your Progress

Suggested Readings

Overview

In this Unit the Concept of Business Law, Characteristics of Business Law, Nature of Business Law will, Jurisprudence, Meaning of Jurisprudence, Various Definition of Jurisprudence, Nature of Jurisprudence, Scope of Jurisprudence, Value of Jurisprudence, Benefits of Jurisprudence, and Importance of Jurisprudence with examples, Different Theories of Law, Kinds of Punishment, Codification of Law and the Case Study to understand the concept better has been clearly explained.

Objectives

After reading this Unit, you will be able:

- To state the meaning of Jurisprudence
- To define Business law
- To state the nature, scope, benefits and values of Jurisprudence
- To understand the different kind of punishment
- To know codification of law

2.1. Introduction

Business Management System, or BMS, is a tool set that is used for tactical implementation and strategic planning of practices, processes, policies, guidelines, and procedures to use in the deployment, execution, and development of business strategies and plans, as well as any associated management activities. They provide a foundation for both tactical and strategic business decisions when it comes to current processes, tasks, activities, and procedures with the goal of meeting all objectives an organization has and satisfying the customer expectations and needs.

The main idea of Business Management System is to give management the tools for monitoring, planning, and controlling their activities and measure the performance of a business. They also aim to put into effect continuous improvement processes in the company. This system finds the principles of the organization's existence and is linked closely to business's success criteria.

It is a multi-level hierarchy of different business solutions that show how an organization that is profit-oriented will perform different functions, such as marketing, sales, staffing, and purchasing to complete a task successfully.

What is meant by business law?

Business law, also called commercial law or mercantile law, is the body of rules, whether by convention, agreement, or national or international legislation, governing the dealings between persons in commercial matters.

2.2. Characteristics of Business law

The following are the Characteristics of Business law:

- Defining general rules of commerce;
- Protecting business ideas and business assets;

- Providing mechanisms that allow business people to determine how they will participate in business ventures and how much risk they will bear.
- Ensuring that losses are borne by those responsible for causing them and
- Facilitating planning by ensuring that commitments are honoured.

2.3. Nature of Business Law

The nature of Business Law are as follows:

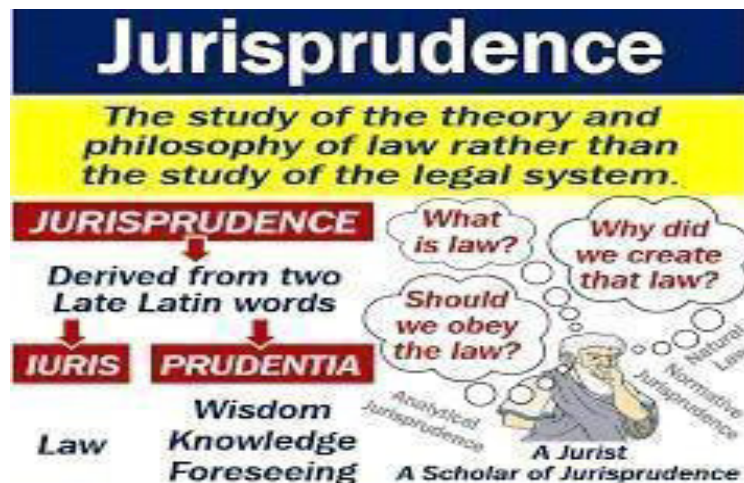
- It is a conduct, culture tradition and religion developed by humans.
- It creates rights and duties.
- It ensures all the people have specific power and responsibility.
- It maintains peace and security.
- It provides justice and administers punishment.
- It always aims to give justice to the victim and punishment to the law breakers.
- It regulates day to day activities.
- Regulates internal activities.
- Defined by the Supreme Court.

2.4. Introduction of Jurisprudence

The term 'Jurisprudence' is derived from Latin word 'Jurisprudentia' which means either "Knowledge of Law" or "Skill of law". The word "juris" means law and 'prudencia' means knowledge, science or skill. Thus 'Jurisprudence' signifies knowledge or science of law and its application.

Jurisprudence, or legal theory, is the theoretical study of law. Scholars of jurisprudence seek to explain the nature of law in its most general form and provide a deeper understanding of legal reasoning, legal systems, legal institutions, and the role of law in society.

Modern jurisprudence began in the 18th century and was focused on the first principles of natural law, civil law, and the law of nations. General jurisprudence can be divided into categories both by the type of question scholars seek to answer and by the theories of jurisprudence, or schools of thought, regarding how those questions are best answered.



Source : *Business Word*

Contemporary philosophy of law, which deals with general jurisprudence, addresses problems internal to law and legal systems and problems of law as a social institution that relates to the larger political and social context in which it exists.

Ancient natural law is the idea that there are rational objective limits to the power of legislative rulers. The foundations of law are accessible through reason, and it is from these laws of nature that human laws gain whatever force they have. Analytic jurisprudence (Clarificatory jurisprudence) rejects natural law's fusing of what law is and what it ought to be. It espouses the use of a neutral point of view and descriptive language when referring to aspects of legal systems.

It encompasses such theories of jurisprudence as "legal positivism", which holds that there is no necessary connection between law and morality and that the force of law comes from basic social facts; and "legal realism", which argues that the real-world practice of law determines what law is, the law having the force that it does because of what legislators, lawyers, and judges do with it. Normative jurisprudence is concerned with "evaluative" theories of law. It deals with what the goal or purpose of law is, or what moral or political theories provide a foundation for the law.

2.5. Meaning of Jurisprudence

Jurisprudence in its widest sense means "knowledge of the law" but in its limited sense evolution and explanation of general principles upon which actual rules of law are based. It is mainly concerned with the rules of external conduct which people are compelled to obey. Thus, for example, there are various branches of law existing in the modern legal system such as contract, crime, trust, properties, companies, labour etc.

In jurisprudence, we have to study the basic principles of each of these branches. Jurisprudence examines the general principles of law. Therefore, Jurisprudence may be considered to be the study and systematic arrangements of the general principles of law or that science which imparts to us knowledge about 'law'.

2.6. Various Definition of Jurisprudence

It is very difficult to define term 'jurisprudence'; However, several attempts have been made in this context to define the term. Some of the definitions of the term "jurisprudence" given by various eminent jurists as follows:

Ulpian:

Ulpian, a Roman Jurist defines jurisprudence as "the observation of things divine and human, the science of just and unjust."

Dr M. J. Sethna:

Jurisprudence is a study of fundamental legal principles including their philosophical, Historical and sociological bases and analysis of legal concepts.

Austin:

Austin was the first jurist to make jurisprudence as a science. He defines 'jurisprudence' as "the philosophy of positive law." He opines that the appropriate subject to jurisprudence is a positive law (jus positivum) i.e. law as it is (existing law, written). In other words, jurisprudence is not a moral philosophy but it is a scientific and systematic study of the existing, actual and positive law has distinguished from natural, ideal or moral law. Austin divides jurisprudence into two classes viz 'general Jurisprudence and particular jurisprudence. According to him 'General Jurisprudence' is the philosophy of positive law. On the other hand 'Particular Jurisprudence' is the science of any such system of positive law as now actually obtains or once actually obtained in a specifically determined nation or specifically determined nations.

Criticism:

Austin's definition criticized by Salmond and Holland and other Jurists on the ground that it is not proper and appropriate to classify as the general Jurisprudence and Particular Jurisprudence.

Holland:

An English Jurist Sir Thomas Erskine Holland defines, Jurisprudence as, " Jurisprudence is the formal science of positive law" According to him

jurisprudence should only concern itself with the basic principles of concepts underlying in any natural system of law.

Criticism:

Many eminent jurists have criticised the definition of Holland that jurisprudence is the formal science of positive law. It is not free from defects. The question arises what is a formal science? Holland himself explains that by the term 'formal' he means that jurisprudence concerns itself with human relations which are governed by the rules of law rather than the material rules themselves, for the latter are the subject of legal exposition, criticism or compilation rather than jurisprudence.

Gray :

According to John Chipman Gray "jurisprudence is the science of law, the statement and systematic arrangement of the rules followed by the Court and the principles involved in those rules", meaning that jurisprudence deals with only that kind of law which consists of rules enforced by courts while administering justice.

Criticism:

Stone has criticized Gray's definition and said that Gray has failed to determine any province of jurisprudence rather he has reduced jurisprudence to merely a matter of arrangement of rules.

Salmond:

Salmond defines Jurisprudence as, "the science of the first principles of the civil law." Civil law = rules enforced by courts while administering justice.

According to Salmond, "jurisprudence" can be defined in two senses (1) in the 'Generic Sense' jurisprudence can be defined as Science of Civil Law' and (2) in the 'Specific sense' Jurisprudence can be defined as the science of the first principle of civil law.

The Civil law consists of rules applied by Courts in the administration of Justice. Salmond agrees with both Austin and Holland only to the extent that jurisprudence is 'a science, a systematic study of basic principles of legal systems and with Gray upholding that Jurisprudence only deals with jurist's law.

Criticism :

Salmond's Definition has been criticised on the ground that he has narrowed down the field of jurisprudence by saying that it is a science of civil law and hence covers only particular legal system.

Keeton:

Keeton Defines jurisprudence as "the study and systematic arrangement of the general principles of law".

H.L.A Hart:

A legal system consists of primary and secondary rules. These rules explain the nature of law and provides key to the science of jurisprudence. By primary rules he meant rules which impose duty while secondary rules confer powers which provide for creation or variation of duties by removing defect of primary rules.

His view was a reaction against rigid positivism. He viewed Jurisprudence as a science of law in a broader perspective by co-relating law and morality.

Roscoe Pound:

Dean Roscoe Pound defines jurisprudence as "the science of law, using the term law in the juridical sense, as denoting the body of principles recognised or enforced by public and regular tribunals in the administration of justice".

He believed that behind every issue, there is something social; therefore, in the study of jurisprudence, the emphasis should be on the relationship between law and the society.

Dr K. C. Allen:

Jurisprudence is the scientific synthesis of all the essential principles of law.

G.W. Paton:

Jurisprudence is a particular method of study, not the law of one country, but of the general notion of law itself.

Julius Stone:

"Jurisprudence is the lawyer's extraversion." It is the lawyer's examination of the precepts, ideals and techniques of the law in the light derived from present knowledge in disciplines other than the law.

From the above definitions of Jurisprudence, it could be seen that there is no commonly agreed definition of Jurisprudence. Each Jurist guided by his own consciences but since the conception of the term law till the beginning of the 20th century, a new approach to the study of law in relation to society is given. Some jurist, therefore, treats law as "social

engineering" an instrument to bring social change or support social change. Thus the function of law is the supplement to social sciences.

Check Your Progress-1

True/False

- a. The word "juris" means law and 'prudentia' means knowledge, science or skill.
- b. Ancient natural law is not the idea that there are rational objective limits to the power of legislative rulers.
- c. Austin divides jurisprudence into two classes viz 'general Jurisprudence and particular jurisprudence.
- d. Keeton Defines jurisprudence as "the study and systematic arrangement of the general principles of law".
- e. "Jurisprudence is not the lawyer's extraversion."

2.7. Nature of Jurisprudence

Jurisprudence is the eye of law. It is the grammar of law. Jurisprudence is regarded as philosophy of law dealing with the nature and functions of law. It contains the general principles upon which actual rules of law are based. As per Austin's view, the matter of Jurisprudence is positive law set by Political superiors to political inferiors.

2.8. Scope of Jurisprudence

There is no unanimity of opinion regarding the scope of jurisprudence. Different authorities attribute different meanings and varying premises to law and that causes different opinions with regard to the exact limit of the field covered by jurisprudence. Austin distinguished law from morality and theology and restricted the term to the body of the rules set and enforced by the sovereign or supreme law making authority within the realm.

Thus the scope of jurisprudence was limited to the study of the concepts of positive law and ethics and theology fall outside the province of jurisprudence. P.B. Mukharji writes that new jurisprudence is "both intellectual and idealistic abstraction as well as behavioristic study of man in society. It includes political, social, economic and cultural ideas. It covers the study of man in relation to the state and society."

Thurman W. Arnold defines jurisprudence "as the shining but unfulfilled dream of a world governed by reason. For some, it lies buried in a system, the details of which they do not know. for some, familiar with the

details of the system, it lies in the depth of an unreal literature, for others, familiar with its literature, it lies in the hope of a future enlightenment, for all, it is just around the corner. "The view of lord Radcliffe is that jurisprudence is a part of history, a part of economics and sociology, a part of ethics and a philosophy of life. Karl Llewellyn observes - "Jurisprudence as big as law-and bigger".

2.9.Value of Jurisprudence

- The Philosophy of law is the basis for legal rules
- It has great advantage in the study of legal system
- The Knowledge of law is essential while making law
- Jurisprudence is concerned with what and how the law should be
- Jurisprudence has educational value
- It provides the rules of interpretation
- It helps in ascertaining the true meanings of laws
- The legal concepts sharpens lawyer's logical technique
- It makes the lawyer to bring theory and life into focus
- It analyses, clarifies, clears overlapping of legal rules
- It provides interdisciplinary approach in the social context.

2.10. Benefits of Jurisprudence

Julius Stone perfectly defines Jurisprudence. According to him "jurisprudence is lawyers extraversion". The knowledge of Jurisprudence sharpens the lawyers own technique of the logical analysis of legal Concepts. It helps lawyers to set the law in its proper contours by considering the needs of the society and by taking note of the advances made in related and relevant disciplines.

Holland observed that jurisprudence throw light on the basic ideas and the fundamental principles of law in a given society. Therefore some of the jurists call it "eye of law". Jurisprudence helps the judges and lawyers in ascertaining true meaning of laws passed by the legislature by providing the rules of interpretation. To become a successful lawyer or judge jurisprudential background is necessary.

2.11. Importance of Jurisprudence

Jurisprudence also has some practical value. Nowadays progress in science and mathematics has been largely due to increasing

generalization which has unified branches of study previously distinct unified branches of study previously distinct, simplified the task of both scientist and mathematician and provide them to solve by one technique a whole variety of different problems. Generality can also be understood as improvement in law. One of the tasks of jurisprudence is to construct and elucidate concepts serving to render the complexities of law manageable and more rational. In this way, theory can be useful to improve practice.

Jurisprudence has an educational value. The logical analysis of legal concepts sharpens the logical technique of a lawyer. Jurisprudence can be helpful to the people to find answers to new legal problems must be found by a consideration of the present social needs and not in the wisdom of the past.

Jurisprudence is the grammar of law. It throws light on the basic ideas and the fundamental principles of law. By studying jurisprudence a lawyer can find out the actual rules of law. Jurisprudence provides guidelines to the judges and the lawyers in ascertaining the true meaning of the laws passed by the legislatures by providing the rules of interpretation. The study of jurisprudence also helps in rationalizing the thinking of the students.

Check Your Progress-2

True/False

- a. There is no unanimity of opinion regarding the scope of jurisprudence.
- b. Julius Stone perfectly defines Jurisprudence. According to him "jurisprudence is not lawyers extraversion".
- c. Legal realism argues that the real world practice of law is what determines what the law is.
- d. Jurisprudence is the eye of law.
- e. Natural law is not the theory that certain rights or values are essential by virtue of human nature and universally identifiable through human reason.

2.12. Different Theories of Law

There exist four primary schools of thought in general Jurisprudence

- Natural Law
- Legal Positivism

- Legal Realism
- Critical Legal Studies

Natural Law

Natural law is the theory that certain rights or values are essential by virtue of human nature and universally identifiable through human reason. Historically, natural law refers to the use of reason to compare both social and personal human nature to understand the binding rules of human behaviour. The law of nature being determined by nature, is universal.

An example of natural law is the insistence of religious and natural scholars that law was created by nature. They believe that as humans are a creation of nature, nature itself dictates how they should live. Some scholars of natural law insist that through nature human beings can understand what is right and what is wrong.

According to this theory, what is good and what is evil is already known to humans upon birth; anything which harms a human's mind, body or being is wrong. Theories of natural law circle around what is considered moral or immoral. Therefore, there is a link a between the morals of humans and the law they follow.

Legal Positivism

Unlike natural law, legal positivism says that there is no link between morality and law. This insists that laws are created and dictated by how human beings behave socially. In the positivist's view law is established by some socially recognized legal authority. The merits of the law are not something that needs to be considered; it might be 'bad law' by some standards but as long as it is governed by an authority it is still law.

According to legal positivism, the fact that a policy is just, wise, efficient or sensible is never enough reason for thinking that it is actually the law; and the fact that it is unjust, unwise, inefficient or insensible is never enough reason to doubt whether a law or set of laws are valid or not. So according to this theory of law; the laws established by Hitler to persecute the Jews were valid laws; anyone following and working under those laws did not do anything wrong as these laws were made by a legitimate authority 'the government'.

Legal Realism

Legal realism argues that the real world practice of law is what determines what the law is. The law has the force that it does because

of what legislators, lawyers and judges do with it. Some realists believe that one can never be sure that the facts and law identified in the judge's reasons were the actual reasons for the judgment, whereas other realists accept that a judge's reasons can often be relied upon, but not all of the time. Realists are interested in methods of predicting judges with more accuracy.

According to realists, if a law is passed with certain and consistent pattern then that pattern is the law. Legal realists do not rely on the text or the documentations of law but rather just focus on the people who practice law. Therefore, according to them, the concept of law is evident in how lawyers and judges apply it.

Critical Legal Studies

Critical legal studies are a relatively new theory of jurisprudence that has developed since the 1970s. It is a negative thesis that says that the law is largely contradictory and can be best analyzed as an expression of the policy goals of the dominant social group. Scholars of this legal theory believe that the dominant beings in a class of people dictate what the law should and should not be.

The scholars of this theory argue that the current laws are the evidence of the will of dominant classes. For example, the creation of the UN is an example of law created through legal dominance. The UN was created by the victors of the Second World War; hence they were the dominant group who had the power to create and dictate law.

Theories of Punishment

The purpose of Criminal Justice and the object of punishment are to reduce crimes in the society. There are five theories of punishment in the administration of criminal justice. They are:

- Deterrent theory
- Retributive theory
- Reformatory theory
- Preventive theory
- Expiatory theory

2.13. Kinds of Punishment

The object of punishment is to prevent and reduce crimes and protect the society from criminals. There are six kinds of punishments under Section 53 of Indian Penal Code, 1860.

- Death Punishment
- Life Imprisonment
- Penal Servitude
- Imprisonment
- Deportation
- Solitary Confinement
- Forfeiture of Property
- Fine

Delegated Legislation:

Delegation means allotment or transfer. Delegated legislation means transfer of law making power. It is a kind of subordinate legislation or executive legislation. The main function of executive is to enforce the laws made by the legislature, but sometimes the legislature may transfer its lawmaking power to the various departments of Government to make law. This is known as delegated legislation. According to Prof. Griffith, delegated legislation during 19th and 20th centuries has grown in accordance with the growth of executive and administrative functions.

The reasons for the growth of delegated legislation are as follows:

- Pressure of work on the Government
- Lack of time to the Parliament
- Lack of technical knowledge to the members of legislature
- Flexibility and Expediency
- Experimentation
- Emergency Situation

The authority to which delegation is made has no independent power to make law. Hence, delegated legislation is controlled in the following ways:

- Parliamentary control
- Judicial Control
- Procedural Control

2.14. Codification of Law

Codification means the systematic arrangement of law. According to Oxford Dictionary Code is a systematic collection of Statutes, body of

laws, so arranged as to avoid inconsistency and overlapping. According to Salmond, codification is making the rules in the form of enacted law. Codification implies collection, compilation, methodical arrangement and systematization of whole body of laws. It provides systematic principles and rules. It brings simplicity, symmetry, intelligibility and logical coherence.

2.15. Case Study

Aerospace Leader Chooses Icertis to Digitally Optimize Source-to-Contract Process

Founded in 1967, Airbus is a manufacturer of commercial and military airplanes, helicopters, and space engines, with €63.7 billion in annual revenue and 130,000 employees.

The Challenge

With more than 12,000 direct suppliers, Airbus needed a transformative approach to contracting “that accelerates business velocity while improving compliance,” said Chief Procurement Officer Klaus Richter. Support for the company’s complex global operation required best-in-class supplier evaluation, selection, contracting, and collaboration. Easy integration with existing procurement systems was also a priority.

The Solution

The Icertis Contract Intelligence (ICI) platform and ICI Sourcing application impressed Airbus with their ease of use. With no training, platform users were able to execute source-to-contract actions. The company was also impressed with Icertis’ track record of rapid global implementations.

The Results

With a streamlined source-to-contract process for its direct suppliers, Airbus will now be able to accelerate commercial negotiations and increase compliance. The company has also been able to eliminate the leakage associated with its previous disjointed sourcing and contracting process.

Let Us Sum Up

In this unit, you have learned about the following:

- Business management is the coordination and organization of business activities.

- The main idea of Business Management System is to give management to the tools for monitoring, planning, and controlling their activities and measure the performance of a business.
- Jurisprudence, or legal theory, is the theoretical study of law.
- Jurisprudence is that science which gives us knowledge about "law" but the term law we always use in its abstract sense
- Jurisprudence is regarded as philosophy of law dealing with the nature and functions of law
- Natural law is the theory that certain rights or values are essential by virtue of human nature and universally identifiable through human reason.
- Legal positivism says that there is no link between morality and law
- Legal realism argues that the real world practice of law is what determines what the law is, the law has the force that it does because of what legislators, lawyers and judges do with it.
- Critical legal studies are a relatively new theory of jurisprudence that has developed since the 1970's.
- Delegation means allotment or transfer. Delegated legislation means transfer of law making power. It is a kind of subordinate legislation or executive legislation.
- Codification means the systematic arrangement of law.
- It provides systematic principles and rules. It brings simplicity, symmetry, intelligibility and logical coherence.

Check Your Progress-3

1. Antoyodaya jurisprudence also means
 - A. Anti-poor jurisprudence
 - B. Anti-government jurisprudence
 - C. Pro-poor jurisprudence
 - D. D. Pro- government Jurisprudence
2. Corporations are of two kinds
 - A. Corporate Aggregate and Corporate Binding
 - B. Corporate Dual and Corporate individual
 - C. Corporate aggregate and Corporate Sole
 - D. Corporate Solicitor and Corporate Sovereign

3. As per Analytical Jurisprudence, Sanction means
 - A. Acquiescence
 - B. Punishment
 - C. Agreement
 - D. permission
4. Who introduced the concept of Pure theory of Law?
 - A. Holland
 - B. Salmond
 - C. Austin
 - D. Hans Kelson
5. "Prudentia", means _____.
 - A. Skill
 - B. Knowledge
 - C. Skill or knowledge
 - D. Wise

Glossary

'Jurisprudentia' :	"Knowledge of Law" or "Skill of law"
Juris":	Law and Prudentia mean knowledge, science or skill
Business management :	Organization of business
Business Management System:	Tactical implementation
Codification:	Arrangement of law
Legal realism:	The real world practice of law

Answers to Check Your Progress-1

- a-True
- b-False
- c-True
- d-True
- e-False

Answers to Check Your Progress-2

- a-True
- b-False
- c-True

d-True

e-False

Answers to Check Your Progress-3

1. C. Corporate aggregate and Corporate Sole
2. C. Pro-poor jurisprudence
3. B. Punishment
4. D. Hans Kelson
5. C. Skill or knowledge

Suggested Readings

1. Daniel, Albuquerque. *Legal Aspect of Business*, Oxford, 2020.
2. Vinod, K. & Singhania, *Direct Taxes Planning and Management*, 2008.

Unit-3

Structure of the Indian Legal Systems: Sources of Law

STRUCTURE

Overview

Objectives

3.1. Introduction

3.2. Kinds of Law

3.3. Indian Legal System

3.4. Sources of Law

3.5. Fundamental Duties

3.6. Indian Judicial System

3.7. Case Study

Let Us Sum Up

Check Your Progress

Glossary

Answers to Check Your Progress

Suggested Readings

Overview

In this Unit, the Structure of the Indian legal systems, Introduction, Kinds of Law, Indian Legal System, Sources of Law, Fundamental Duties, Definition of Indian Judicial System and Case Study has been clearly explained.

Objectives

After completion of this unit, you will be able:

- To state the meaning of Indian legal system
- To know the fundamental duties
- To state the sources of law
- To understand various Indian Legal System
- To be aware of the Indian Judicial System

3.1. Introduction

The Constitution of India was adopted on 26th November 1949. It is based on the Government of India Act, 1935. The Constitution of India is the bulkiest in the world and a product of the aspirations of the people. It

is not a parliamentary creation but “of the people, by the people, and for the people,” qualifying it as the largest democracy in the world. The Preamble to the Constitution establishes India as a “Sovereign, Socialist, and Democratic Republic.”

The Indian Constitution is federal in nature, but unitary in spirit. The quality of governance in India is neither completely central nor entirely unitary; it is quasi-federal. India has the Parliamentary or Cabinet form of government, at the state as well as the union level. In a parliamentary democracy, there is interdependency between the executive and the legislature. The Judiciary enjoys an independent status. The Indian Constitution provides for a bicameral parliament whereby the Parliament comprises two houses; The Rajya Sabha (Council of States) and the Lok Sabha (House of the People). At the state level as well, the legislature has two houses; Vidhan Sabha (Legislative Assembly) and Vidhan Parishad (Legislative Council).

3.1.Kinds of Law

Salmond classified law into eight different kinds. They are as follows:

Imperative law:

Authoritative rule is called as imperative law. The first characteristic of imperative law is that it must be in the form of a general rule. The second characteristic of imperative law is that some authority should enforce it. According to Austin, law is a command of sovereign.

Physical or Scientific Law:

Natural law is called as Physical or Scientific law. Physical law is also known as natural law or law of nature. E.g : law of gravitation, law of planetary motion, law of tides, law of chemical combination etc.

Natural or Moral law:

Command of God is called as natural or moral law. Natural law is unwritten. The world is governed by the natural law. An ideal state follows the principles of natural law. Natural law can never be compared with the positive law of the State.

Conventional law:

A law based on agreement is called conventional law. It binds only the parties to the agreement. Generally parties enforce Conventional law and in some cases it is enforced by State. The State enforced Conventional law becomes a part of civil law. Eg: laws of cricket, rules of a club, international law etc.

Customary law:

A law based on reasonable customs and usages is called customary law. It is a kind of law supported by conservative people. The State recognized customary law becomes a part of civil law. Eg: Hindu law of marriage, Succession etc.

Practical or technical law:

A law which has certain ends is called practical or technical law. These rules guide us as to what we ought to do in order to attain certain ends. Eg: laws of music, law of architecture, laws of style, laws of any art or business etc.

International law:

The law of nations is called international law. According to Oppenheim International law is the name for the body of customary and treaty rules, which are considered legally binding by civilized states in their intercourse with each other.

Civil law:

The term Civil law is derived from '*jus civile*' or civil law of the Romans. According to Salmond, civil law is the law of the state or of the land, the law of lawyers and the law courts. It is a kind of positive law of the land. It is also known as municipal law or national law.

Common law and Equity law of England:

The general law of England is called common law. The common law of England was produced during the regimes of William I and Edward I. The general laws in England are classified into three kinds such as:

1. Statute law
2. Common law
3. Equity law

Almost every kind of law has reference to the common law and equity law of England.

Constitutional law:

According to Salmond, Constitutional law is the body of those legal principles, which determine the constitution of the state. According to A.V. Dicey, Constitutional law includes all rules, which directly or indirectly affect the distribution or exercise of the Sovereign power of the State. According to Austin, Constitutional law is not positive law or law in the strict sense, but is merely positive morality. It derives its force only from public opinion regarding its expediency and morality.

Administrative law:

According to Prof. Wade Administrative law is primarily concerned with administration. It is neither concerned with judicial control nor legislation. Dr. Jennings defines it as the law relating to the administration. It determines the organization, powers and duties of administrative authorities.

General and Special law:

The general or the ordinary law of the land is called general law. It consists of those legal rules, which are taken judicial notice of by the courts. The law, which are specially proved and brought to the notice of the courts is called Special law.

Private and Public law:

The law which governs the relation between person and person is called Private law. Eg: law of property, law of contracts, law of torts etc. Law which governs the relation between person and state is called Public law.

Substantive and Procedural law:

Generally law may be either substantive or procedural. The law, which deals with rights and remedies is called Substantive law. Substantive law refers to ends. Eg: IPC. The law which deals with means, mode or manner of obtaining the remedy prescribed for the violation of right is called Procedural law. It is also known as adjective law.

Foreign and local law:

The law of a foreign country is called foreign law. The law of a particular locality is called local law. Ignorance of local law is no excuse, but ignorance of foreign law is excusable just like the ignorance of fact.

Martial law:

The law administered in the courts maintained by military authorities is called martial law.

Check Your Progress-1

True/False

- a. The Constitution of India was adopted on 26th November 1959.
- b. According to Prof. Wade Administrative law is primarily concerned with administration.
- c. The Indian Constitution is federal in nature, but unitary in spirit.

- d. The law of a foreign country is called foreign law.
- e. Supreme Court is the Apex court of the country and was constituted on 28th January 1960.

3.3 Indian Legal System

The Indian judicial system follows the common law system based on recorded judicial precedents as inherited from the British colonial legacy. The court system of India comprises the Supreme Court of India, the High Courts and subordinate courts at district, municipal and village levels.

Hierarchy of courts

The Indian judiciary is divided into several levels in order to decentralize and address matters at the grassroots levels. The basic structure is as follows:

1. **Supreme Court:** It is the Apex court of the country and was constituted on 28th January 1950. It is the highest court of appeal and enjoys both original suits and appeals of High Court judgments. The Supreme Court is comprised of the Chief Justice of India and 25 other judges. Articles 124-147 of the Constitution of India lay down the authority of the Supreme Court.
2. **High Courts:** High Courts are the highest judicial body at the State level. Article 214 lays down the authority of High Courts. There are 25 High Courts in India. High Courts exercise civil or criminal jurisdiction only if the subordinate courts in the State are not competent to try the matters. High Courts may even take appeals from lower courts. High Court judges are appointed by the President of India upon consultation with the Chief Justice of India, the Chief Justice of the High Court and the Governor of the State.
3. **District Courts:** District Courts are established by the State Governments of India for every district or group of districts based on the caseload and population density. District Courts are under the direct administration of High Courts and are bound by High Court judgments. Every district generally has two kinds of courts.
 - **Civil Courts**
 - **Criminal Courts**

District Courts are presided over by District Judges. Additional District Judges and Assistant District Judges may be appointed based on the caseload. Appeals against District Court judgments lie in the High Court.

Lok Adalats / Village Courts: these are subordinate courts at the village level which provide a system for alternate dispute resolution in villages.

Tribunals: The Constitution provides the government with the power to set up special tribunals for the administration of specific matters such as tax cases, land cases, consumer cases etc.

Appellate jurisdiction refers to the authority of a court to rehear / review a case decided by a lower court. In India, appellate jurisdiction is vested in both the Supreme Court and High Courts. They may either overrule or uphold the judgments of lower courts.

Civil Courts

Civil courts provide remedies for civil wrongs committed by individuals against other individuals and entities. Civil matters range from property disputes to breaches of contract to divorce cases. Civil courts follow the principle of *ubi jus ibi remedium* (for every wrong the law provides remedy). Unless expressly or impliedly barred by any other law in force, civil courts have the jurisdiction to try all suits of civil nature.

The **Code of Civil Procedure (CPC) 1908** governs the procedures to be followed by civil courts in administering civil cases in India. As a matter of fact, every suit must be instituted before the court of lowest jurisdiction (the Munsif court). Upon institution, it is decided whether the respective court has competence to try the case.

The Civil Court hierarchy in districts is as follows:

1. **District Court:** The court of district judges is the highest civil court in a district. It exercises both judicial and administrative functions. The District Judge combines the powers of trying both civil and criminal cases. Hence, they are designated the District and Sessions Judge.
2. **Sub-judge Court:** If the value of the subject-matter of the suit is worth more than Rs.1 lakh, the Sub-judge and Additional Sub-judge courts may try the suit.
3. **Additional Sub-judge Court:** This is created based on the case-load.
4. **Munsif Court:** If the value of the subject-matter of the suit is worth Rs. 1 lakh or below, the Munsif court is competent to try the suit.

Criminal Courts

The power of the various criminal courts is mentioned under the **Code of Criminal Procedure (Cr PC)**.

According to Section 26 of the Cr PC, any offence mentioned under the Indian Penal Code may be tried by:

1. High Courts
2. Courts of Session
3. Any other Court as specified in the First Schedule of the Code of Criminal Procedure

Judicial Authority of the Supreme Court

Articles 141 and 144 of the Constitution uphold the authority and jurisdiction given to the Supreme Court to make decisions and uphold the law of the land. These articles give animal welfare judgments their binding force, ensuring that they are appropriately enforced and implemented by the respective authorities. They allow for the Supreme Court to issue directives and fill gaps in law until the legislature steps in.

Article 141

Article 141 lays down that “the law declared by the Supreme Court shall be binding on all courts within the territory of India.” Since the Supreme Court is the Apex court of the country and all courts and tribunals are bound by its decisions, Supreme Court judgments become a source of law in them.

The binding part is the operative part of the judgment or the *ratio decidendi* (“reason of decision”) determined after reading the judgment in its entirety. It is the general principle derived from a judgment that is deduced by courts when deciding the case based on facts. Mere observations, or the *obiter dicta* (“said by the way”), on the other hand, refer to those parts of judicial decisions which are general observations of the judge in the case. Obiter dicta have only persuasive value, not binding authority.

Article 144

Article 144 lays down that “all authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court.” The Supreme Court has the power to hold any authority in contempt if they disregard or disobey the order of the court.

Binding value of Judicial Precedents

Since India is a common law country, previously decided judgments of higher courts such as the Supreme Court and High Courts are binding on subordinate and lower courts, i.e., subordinate courts are bound to follow the decisions and hold them to be the law. Precedents are an important source of law in India. The binding value of different courts in the court hierarchy is as follows:

- Decisions of the **Supreme Court** are binding on all courts in India. The Supreme Court is not bound by decisions of High Courts, lower courts or other judicial authorities.
- Decisions of a **High Court** are binding on all inferior courts (as long as they don't conflict with Supreme Court decisions) within its jurisdiction but holds only persuasive value for courts outside its jurisdiction. In case the decisions of the High Court conflict with the decisions of a similar bench, the matter is referred to a higher bench.
- **Lower courts** are bound by decisions of higher courts in their own states. Decisions by High Courts of other states hold only persuasive value.

Public Interest Litigation (PIL)

Public Interest Litigation (PIL) is an effective tool to advance social justice in India. Borrowed from the American tradition of Social Action Litigation, PILs have been widely used in India to advance the causes of disadvantaged and marginalized communities. The general rule to bring a cause of action in court is the rule of *locus standi* i.e. the party must possess sufficient connection or suffer particular harm in order to be a party to the case. In PILs, this rule is relaxed considerably as any citizen of India may bring an action in court to reduce a wrong if there has been a breach of Fundamental Rights. PILs are an effective tool in the furtherance of animal protection by allowing animal rights groups and activists to file PILs at the Supreme Court and give a voice to the voiceless.

Some landmark PILs related to animal welfare filed in the Supreme Court of India include the cases of ***People for Ethical Treatment of Animals v. Union of India*** (a case regarding the protection of animals against exploitation and ill-treatment during film-making) and ***Animal Welfare Board of India v. A. Nagaraja & Ors.*** (a case regarding the prohibition of a traditional bull-fighting practice called Jallikattu).

3.4. Sources of Law

Statutory Law:

Legislation or statutory is the most important source of law. Legislation is the making of law. But when we use the term legislation as a source of law, we mean law making by statutory authority. Both parliament and state assemblies have enacted a number of legislation that covers various aspect of business.

In England, a distinction is made between statute law or written law and the common law. Only the former is called legislation. In India, there is no common law. Here legislation or enacted law is different from customary or personal law.

English Mercantile Law:

The English mercantile law constitutes the foundation on which the super structure of the Indian mercantile law has been built. Our sales of goods Act, for instance has been taken from the English sales of goods of Act. Even now, despite the enactment of various statutes relating to matter falling with the purview of the mercantile law, our courts generally takes recourse to the English law where some principles are not expressly dealt within the Act, or where there is ambiguity.

Case Law:

Case law, popularly called Precedent by lawyers, is a judgment of a superior court including a point of principle and which necessitates its adoption and adherence in a subsequent case involving the same point. Case law is useful in as much as it helps courts to render uniformity with regard to the interpretation of statutes.

The past judicial decisions of courts are important source of law. Sometimes there is no statutory provisions which can answer a legal question raised in a law suit. In such cases, the court will look into previous court decision on similar matters to find the relevant law. Even when a statute is capable of answering a legal question, the court may refer the precedents to see how the statutory provision where applied in similar circumstances.

The precedents set by the high courts have a binding force on lower courts. And the precedents set by the courts of same status like high courts of different states have persuasive value for each other. In India, the Supreme Court is the highest court and its decisions have binding force on all the courts subordinates to it, i.e., on high court, district court and other subordinate courts.

Precedents (past judicial decisions):

In common law legal systems, a Precedent or authority is a legal case that establishes a principle or rule. This principle or rule is then used by the court or other judicial bodies use when deciding later cases with similar issues or facts.

Indian statute law:

Statutory law or statute law is written law set down by a body of legislature or by a singular legislator (in the case of absolute monarchy). This is as opposed to oral or customary law; or regulatory law promulgated by the executive or common law of the judiciary. Statutes may originate with national, state legislatures or local municipalities.

Mercantile law

Mercantile law is also known as “Lex Mercatoria”, it is the Latin expression for a body of trading principles used by merchants throughout Europe in the medieval. Literally, it means “merchant law”. It evolved as a system of custom and practice, which was enforced through a system of merchant courts along the main trade routes.

3.5. Fundamental Duties

The Fundamental Duties were added in 1976, upon recommendation of the Swaran Singh Committee, which was constituted by Indira Gandhi just after the declaration of national emergency, to study and amend the constitution.

This committee was under the Chairmanship of Sardar Swaran Singh, India's longest-serving union cabinet minister. Based on his recommendations, the government incorporated several changes to the Constitution including the Preamble, through the 42nd Amendment, which included the fundamental duties under the Indian Constitution.

However, by the 86th Amendment in 2002, the original 10 duties were then increased to 11, under Article 51A, Part IV-A of the Constitution of India. The 10 fundamental duties are as follows:

1. To oblige with the Indian Constitution and respect the National Anthem and Flag
2. To cherish and follow the noble ideas that inspired the national struggle for freedom
3. To protect the integrity, sovereignty, and unity of India

4. To defend the country and perform national services if and when the country requires
5. To promote the spirit of harmony and brotherhood amongst all the people of India and renounce any practices that are derogatory to women
6. To cherish and preserve the rich national heritage of our composite culture
7. To protect and improve the natural environment including lakes, wildlife, rivers, forests, etc.
8. To develop scientific temper, humanism, and spirit of inquiry
9. To safeguard all public property
10. To strive towards excellence in all genres of individual and collective activities The 11th fundamental duty which was added to this list is:
11. To provide opportunities for education to children between 6-14 years of age, and duty as parents to ensure that such opportunities are being awarded to their child.

The 11 fundamental duties look at the crisis in Indian society and become a tool for straightening it out. They serve as a source of protection for the liberty of the people.

3.6 Indian Judicial System

The Indian Judiciary is a system of courts that interpret and apply the law in the Republic of India. It uses a common law system, inherited from the legal system established by former colonial powers and princely states, as well as certain practices from ancient and medieval times.

The Indian judicial system is managed and administrated by officers of judicial service, those intended to fill the post of district judge and other civil judicial posts inferior to district judge. Previously, the judicial system included civil service officers. Judges of Subordinate Judiciaries are appointed by the governor on recommendation by the High Court. Judges of the High Courts and Supreme Court are appointed by the President of India on the recommendation of a collegium.

The judicial system of India is classified into three levels with subsidiary parts. The Supreme Court, also known as the Apex Court, is the top court and the last appellate court in India. The Chief Justice of India is its top authority. High Courts are the top judicial bodies in the states, controlled and managed by Chief Justices of States. Below the High

Courts are District Courts, also known as subordinate courts that are controlled and managed by the District and Sessions Judges. The subordinate court system is divided into two parts: the civil court of which a Sub- Judge is the head followed by the District Munsif court at the lower level; and the criminal court headed by Chief Judicial/Metropolitan Magistrate at top and followed by ACJM /ACMM& JM/MM at the lower level.

The other courts are the executive and revenue courts, which are managed and controlled by the state government through the district magistrate and commissioner, respectively. Although the executive courts are not part of the judiciary, various provisions and judgements empower the High Courts and the Session Judges to inspect or direct the working of executive courts.

The Ministry of Law & Justice at the Union level is responsible for raising issues before Parliament for the proper functioning of the judiciary. It has complete jurisdiction to deal with the issues of any courts of India, from the Supreme Court to Subordinate and Executive Courts. It also deals with the appointment of Judges of the High Courts and the Supreme Court. At the state level, the law departments of the states deal with issues regarding the High Court and the Subordinate Courts. The constitution provides for a single unified judiciary in India.

3.7. Case Study

HERE Technologies Drives Quick Time to Value With Icertis' Powerful AI Capabilities Location technology leader digitizes 70,000 legacy contracts to unlock valuable data for its entire workforce HERE Technologies is a Netherlands-based location data and platform company.

Business Challenge

HERE Technologies wanted to get more value from its legacy contracts that were not stored or accessible through Icertis Contract Intelligence (ICI). The leading location technology company had 70,000 documents in non-digitized, unstructured forms, representing a huge wealth of data that could not be easily accessed and shared across the company to make better business decisions. HERE had previously adopted the ICI platform to create a single source of truth for its contracts, and thereby increase efficiency, protect against risk, and empower its employees to manage contracts without heavy involvement from legal. Without access to legacy contracts, however, HERE's goal for a single source of truth was missing a critical component, and the effort to manually digitize

70,000 contracts and extract the data within them was cost- and time-prohibitive

The Solution

HERE turned to the ICI Discover AI application, which utilizes Icertis' cutting-edge patented AI technology trained on one of the largest annotated contract repositories in the world. The Discover AI app can identify and extract contract metadata, attributes, and clauses at scale, and has helped companies unlock value from millions of historical contracts to date. Utilizing the unmatched scale and power of Microsoft Azure, contracts can be converted from unstructured blocks of text to pursuable. digital assets in about 75% less time than manual processes allow. HERE ran 70,000 legacy contracts through the Icertis AI pipeline of proprietary algorithms. Using Optical Character Recognition (OCR) technology, contract data contained within text, images, tabular data, and low-resolution PDFs could be processed by the system.

Let Us Sum Up

In this unit, you have learned about the following:

- The Constitution of India was adopted on 26th November 1949. It is based on the Government of India Act, 1935.
- At the state level as well, the legislature has two houses; Vidhan Sabha (Legislative Assembly) and Vidhan Parishad (Legislative Council).
- The law of nations is called international law.
- A law, which has certain ends, is called Practical or technical law.
- A law based on reasonable customs and usages is called Customary law. It
- A law based on agreement is called conventional law
- The term Civil law is derived from jus Civile or civil law of the Romans.
- The law administered in the courts maintained by military authorities is called martial law
- Supreme Court: It is the Apex court of the country and was constituted on 28th January 1950.
- High Courts: High Courts are the highest judicial body at the State level.
- District Courts: District Courts are established by the State Governments of India for every district or group of districts based on the caseload and population density

- Lok Adalats/Village Courts: these are subordinate courts at the village level which provide a system for alternate dispute resolution in villages.
- The English mercantile law constitutes the foundation on which the super structure of the Indian mercantile law has been built.

Check Your Progress-2

1. A agrees to pay B Rs 10000, if two straight lines should enclose a space. The agreement is _____.
 A. Void
 B. Voidable
 C. Valid
 D. Illegal
2. Contingent contracts to do nor not to do anything, if a specified uncertain event happened within a fixed time, become _____, if, at the expiration of the time fixed, such event has not happened, or if, before the time fixed, such event becomes impossible:
 A. Bad
 B. Valid
 C. Void
 D. Voidable
3. Where two or more persons have made a joint promise, the promisee may in the absence of the express agreement to the contrary, compel to perform the whole contract:
 A. Severally
 B. Jointly
 C. Jointly and severally
 D. Jointly or severally as per the desire of the promise
4. Where persons reciprocally promise, firstly, to do certain things which are legal, and, secondly, under specified circumstances, to do certain other things which are /illegal, the first set of promise is a _____, but the second is a _____
 A. Void agreements/ contract
 B. void contract/agreement
 C. Contract/void agreement
 D. Contract/voidable contract

5. When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is:
- A. To make compensation for it, to the person from whom he received it.
 - B. Bound to restore it.
 - C. Need not to do anything in this regard.
 - D. Options A and B are correct.

Glossary

Authoritative rule:	Imperative law
Natural law:	Physical or Scientific law
Public Interest	
Litigation (PIL):	An effective tool to advance social justice in India.
Case law:	Precedent by lawyers
Mercantile law:	"Lex Mercatoria",
Merchant law":	A system of custom and practice

Answer to Check Your Progress-1

- a-False
 - b-True
 - c-True
 - d-True
 - e-False
-

Answer to Check Your Progress-2

1. A. Void
 2. C. Void
 3. D. Jointly or severally as per the desire of the promise
 4. C. Contract/void agreement
 5. D. Options A and B are correct.
-

Suggested Reading

1. D D Basu , "Introduction to the Constitution of India" – 25th edition – 1st January 2021
2. Daniel, Albuquerque. *Legal Aspect of Business*, Oxford, 2020

Unit-4

Manager and Legal System

STRUCTURE

Overview

Objectives

4.1. Introduction

4.2. Legal Status of Manager

4.3. Authority of Managers

4.4. Role of Manager in Legal system

4.5. Importance of Legal system

4.6. Case Study

Let Us Sum Up

Check Your Progress

Glossary

Answers to Check Your Progress

Suggested Readings

Overview

In this Unit the concept of Legal Status of Manager, Authority of Managers, Various Role of Manager in Legal system, and importance of Legal system will be discussed with examples and Case Study has been clearly explained.

Objectives

After completion of this unit, you will be able:

- To identify the sources of law and which laws have priority over other laws
- To understand some basic differences between the US legal system and other legal systems.
- To identify the various aims that a functioning legal system can serve.
- To describe the different sources of law in the US legal system and the principal institutions that create those laws
- To describe the origins of the common-law system and what common law means

4.1.Introduction

Indian Judicial System is going through serious problem of backlog of cases. Several recommendations, suggestions have been made by different committees, groups to deal with the chronic situation. It requires efficient and effective Court Management System in place. 13th Finance Commission allocated Rs. 300 Crore. for appointment of Court Managers across Indian Courts in the year 2010 but till date it has not streamlined yet because of various administrative issues across states. There is urgent need to equip Indian Courts with professionally qualified Court Managers for better administration of justice. There is many disparity regarding Court Manager's work profile and nature across the country. Looking at this concern, this platform has been created to highlight Court Management profession in India.

The Legal Manager for any business is someone who is responsible for overseeing all of the organization's legal functions. This individual is a legal professional who is capable of providing accurate and relevant advice to the business, the business' clients, and the business' senior attorneys.

4.2.Legal Status of Manager

Manager means an individual who is subject to the superintendence, control and direction of the board of directors, has the management of the whole, or substantially the whole of the affairs of a company and it includes a director or any other person occupying the position of a manager, by whatever name called, whether under a contract of service or not. The definition of 'Manager' has not changed under the Act, as compared to the Companies Act, 1956 except for the removal of the words "not being the managing agent". The definition in the Companies Act, 1956 excluded managing agent from the definition of manager because Companies Act, 1956 had specific definition for 'managing agent' which was later omitted by the Companies (Amendment) Act, 2000. A manager also is identified as Key Managerial Personnel under clause (51) of section 2 of the Act.

4.3 Authority of Manager

Managers have authority and power in any business, but their influence is limited by legal restrictions. Decisions about how to treat employees, what to tell the public and how to spend money cannot be made entirely within the confines of company policy. Regulations require managers to adhere to a standard of behavior that is professional and honest.

Understanding the limits of managerial actions can help you avoid legal pitfalls that could harm your business.

Interviewing, Hiring and Firing

The retention and termination practices can result in lawsuits and investigations if legal boundaries are exceeded. The United States Equal Employment Opportunity Commission prohibits hiring and firing decisions based on race, ethnicity, gender, sexual preference and religion. Interviews and performance evaluations should be tailored to filter out any references to these topics as a basis for your decision-making. Using this approach, the violation of guidelines for how to treat employees will be less.

Decision-Making

The Company Fair Measures Inc. suggests that business reason for any of the decisions must be clearly explained. In fact, it is acceptable to make "unfair" decisions if the company's bottom line is improved. For example, you may choose to outsource your shipping services to another company and eliminate your internal shipping department. The decision based on payroll and benefits savings must be documented, and we can make a strong case that your choice was purely business-related and had nothing to do with attitudes towards any shipping personnel.

Health and Safety

A manager's zeal to meet deadlines cannot go beyond the boundaries of health and safety. Though it may cost time and money to keep work areas clean and orderly, the manager cannot afford the risk of overlooking these tasks. The resulting fines and lawsuits in the event of injury could cripple your company. In addition, a manager must provide safety gear such as helmets and masks for high-risk tasks. Make sure your managers understand the Occupational Health and Safety Administration standards for our industry.

The Public Interest

Managers must be careful to disclose any company actions that could harm the public. For example, if a company disposes of toxic chemicals, even in a safe manner, it should let the community know its disposal procedures. Companies that create dust or noise should require managers to develop relations with the community that offer the opportunity to discuss objections. If a company does harm to people,

such as by putting out a defective product, managers have an obligation to be honest about the error rather than trying to cover it up.

Legal Advice

Managers don't have to have knowledge of the law that is on par with lawyers. When in doubt, we can seek legal advice. A search on the internet can't replace expert legal advice. Managers can attend seminars to keep up with the latest legal requirements that affect them, but they should avoid making legal decisions without counsel.

Check Your Progress-1

True/False

- a. Indian Judicial System is going through serious problem of backlog of cases.
- b. A manager's zeal to meet deadlines cannot go beyond the boundaries of health and safety.
- c. Managers have authority and power in any business, but their influence is limited by legal restrictions.
- d. Managers do have to have knowledge of the law that is on par with lawyers.
- e. The role of Legal Manager or Manager – Law has turned out to be extremely important in any organization.

4.4. Role of Manager in Legal system

The role of Legal Manager or Manager – Law has turned out to be extremely important in any organization. The primary responsibility of this job profile is to safeguard the interest of the organization through legal means. With the expansion of market & new product lines across the organizations, role of legal managers has evolved as equivalent as that of Marketing or Operations. Small companies usually outsource this profile to law firms but large companies / MNCs house a dedicated legal department to undertake below tasks. Provide legal assistance to functional / department head and leadership in developing the agreement, communications and policies.

1. Provide legal assistance to Human resources team for employment matters and contract drafting for employment and other relating matters.
2. To act as an owner of company's IP assets such as trademarks, copyrights, patents, brand names (registrations & renewals)

3. Prepare & send legal notices to clients / IP infringers, filing of legal or civil case against debtors defaulting payments,
4. Coordination with Legal consultant / liaisoning agencies in other countries for legal cases, disputes resolutions and preparation of contracts with travel agents as per local laws.
5. Provide Counsel and Assistance to IT Department on software licensing, anti- infringement and anti-piracy compliances
6. Coordinate with Management for consultation and strategic direction with Compliance and IT for Governance, Risk, Audit and Compliance relating to
7. Contractual, legal and regulatory obligations
8. Information and Privacy Compliance across India and UAE and other international areas where business exists
9. Legal Document Repository – Manage and oversee the Company’s commercial contracting purposes, including contract forms and legal contracts repository
10. Collaborate with stakeholders and account owners / departments to educate internal stakeholders on compliance, legal and data protection requirements and to continuously promote a culture of compliance, integrity and data protection internally.
11. Provide Counsel, Assistance and Support in creation of structures and environment for ethical and legal compliances and support enforcement of global compliance policies that are applicable across multiple business units

4.5. Importance of Legal System

Law plays an agent of modernization and social change. It is also an indicator of the nature of societal complexity and its attendant problems of integration.

Further, the reinforcement of our belief in the age-old panchayat system, the abolition of the abhorable practices of untouchability, child marriage, sati, dowry are typical illustrations of social change being brought about in the country through laws. Law is an effective medium or agency, instrumental in bringing about social change in the country or in any region in particular. Therefore, we rejuvenate our belief that law has been pivotal in introducing changes in the societal structure and relationships and continue to be so.

Law certainly has acted as a catalyst in the process of social transformation of people wherein the dilution of caste inequalities, protective measures for the weak and vulnerable sections, providing for the dignified existence of those living under unwholesome conditions etc. are the illustrious examples in this regard.

Social change involves an alteration of society; its economic structure, values and beliefs, and its economic, political and social dimensions also undergo modification. However, social change does not affect all aspects of society in the same manner. While much of social change is brought about by material changes such as technology, new patterns of production, etc., other conditions are also necessary. After independence, the Constitution of India provided far-reaching guidelines for change. Its directive principle suggested a blueprint for a new nation. The de- recognition of the caste system, equality before the law and equal opportunities for all in economic, political and social spheres were some of the high points of the Indian Constitution.

4.6. Case Study

The conditions mentioned in CIT, Kerala v. Alagappa Textiles (Cochin) Ltd [83 (1980 SCR(1)723]. by the Supreme Court were as follows: "Section 2(24) of the Companies Act requires three conditions to be satisfied: (a) the Manager must be an individual, which means that a firm or body corporate or an association is excluded and cannot be a Manager (a fact which is expressly made clear in section 384). (b) he should have the management of the whole or substantially the whole affairs of the company and (c) he should be subject to the superintendence, control and directions of the Board of Directors in the matter of managing the affairs of the company. Subject to the changes made in the aspect covered by (a) and (b), in both the definitions [s.2(9) of 1913 Act and s. 2(24) of the 1956 Act], the aspect that a Manager has to work or exercise his powers under the control and directions of the Board of Directors is common and essential." An individual who is not entrusted by the whole or substantially whole of the affairs of the business or company cannot be termed as the manager of the company. It was held in Basant Lal v. Emperor [84 (1917Cr LJ 215] that a person who is not in charge of the whole of the affairs of the business cannot be termed as the manager.

The underlying principle laid down by the case was in light of facts that the person who is in charge of a branch but not whole or substantially the whole business, cannot be termed as manager It was held in various court judgments that merely designating a person as the manager such

as factory manager or shop manager or branch manager without entrusting to him the whole or substantial powers of the business or company cannot become a manager under the Companies Act, 1956.

A person in order to get qualified as the manager should be entrusted with whole or substantial powers of the business or company, he should be in a position to take decisions, he should be in a sort of governing role relating to the affairs of the company. In the department clarification dated 26.04.1956, it was clarified that a factory manager who was in charge of production and was not concerned with buying raw materials, selling finished goods, finances of the Company, would not be termed as manager under Companies Act.

Let Us Sum Up

In this unit, you have learned about the following:

1. Managers have authority and power in any business, but their influence is limited by legal restrictions.
2. Understanding the limits of managerial actions can help you avoid legal pitfalls that could harm your business.
3. The Legal Manager for any business is someone who is responsible for overseeing all of the organisation's legal functions.
4. The role of Legal Manager or Manager – Law has turned out to be extremely important in any organization.
5. Law plays an agent of modernization and social change. It is also an indicator of the nature of societal complexity and its attendant problems of integration.

Check Your Progress-2

1. Where the price is not determined by the parties to the contract of sale of goods, what price shall be paid by the buyer?
 - A. The buyer shall pay the seller a reasonable price.
 - B. The buyer shall determine the price at his discretion.
 - C. The seller shall determine the price at his discretion.
 - D. The seller shall charge the price according the market forces.
2. When can a seller stop the goods in transit?
 - A. When the buyer of the goods informs that he will make payment after some time.
 - B. The seller has no right to stop the goods in transit.

- C. When the buyer of goods becomes insolvent and goods are in transit.
 - D. When the buyer informs that he is now not in need of the goods.
3. Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer:
- A. At such time as the parties to the contract intend it to be transferred
 - B. At such time as the buyer only intend it to get it transferred.
 - C. It depends upon the circumstances of the case.
 - D. At such time as the seller only intends it to transfer to the buyer.
4. A seller of goods shall be deemed to be an “unpaid seller”:
- A. When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.
 - B. A seller who has obtained money decree for the price of the goods is still an unpaid seller, if the decree has not been satisfied.
 - C. When the whole of the price has not been paid or tendered.
 - D. All of the above.
5. When a buyer can sue the seller:
- A. He may ask for the specific performance, if this being the part of the contract.
 - B. He may initiate for the breach of the warranty.
 - C. He may initiate suit for delivery of the goods, if not delivered.
 - D. All of the above.

Glossary

Legal Manager: Responsible for overseeing all of the organisation's legal functions.

Manager: Individual

Answer to Check Your Progress-1

- a-True
- b-True
- c-True
- d-False
- e-True

Answer to Check Your Progress-2

1. A. The buyer shall pay the seller a reasonable price.
2. C. When the buyer of goods becomes insolvent and goods are in transit.
3. A. At such time as the parties to the contract intend it to be transferred
4. D. All of the above.
5. D. All of the above.

Suggested Reading

1. Kumar, Ravinder. Legal Aspect of Business. – Cengage Learning, 2nd Edition-2011.
2. Stim, Richard. Intellectual Property- Copy Rights, Trade Marks, and Patents, Cengage Learning, 2008

The Block-2: Introduction

The Block-2: Indian Contract Act 1872 has been divided into 4 Units (Unit-5 to Unit-8). **Unit-5 : Fundamentals of Contract Laws: Formation of Contracts** deals with Introduction, Various formation of contract, Indian Contract Act 1872, Essential Elements of Contract, Classification of contract and Case Study.

Unit-6 : Principles of Contract Laws - Legality of Object Consideration describes about Introduction, Principles of Consideration, Legal rules related to the consideration, Types of Consideration and Case Study.

Unit -7 : Performance of Contract- Quasi Contracts explains about Introduction, Meaning of Performance of a contract, Legal rules related to the performance of contract, Contracts which need not be Performed, By whom must Contracts be Performed, Quasi Contract – Meaning, Types of Quasi Contract and Case Study.

Unit-8 : Discharge of Contract- Breach of Contract presents about Introduction, Meaning of Discharge of Contract, Different mode of discharge of contract, Discharge by performance, Discharge by mutual consent or agreement, Discharge by impossibility of performance, Discharge of contract by operation of law, Discharge of contract by lapse of time, Meaning of Breach of contract, Types of breach of contract and Case Study.

In all the units of Block -2 **Indian Contract Act 1872**, the Check your progress, Glossary, Answers to Check your progress and Suggested Reading has been provided and the Learners are expected to attempt all the Check your progress as part of study.

Unit-5

Fundamentals of Contract Laws: Formation of Contracts

STRUCTURE

Overview

Objectives

5.1. Introduction

5.2. Various formation of contract

5.3. Indian Contract Act 1872

5.4. Essential Elements of Contract

5.5. Classification of contract

5.6. Case Study

Let Us Sum Up

Check Your Progress

Glossary

Answers to Check Your Progress

Suggested Readings

Overview

In this Unit, the concept of various formations of contracts and Indian Contract Act 1872, Various Essential Elements of Contract, Classification of contract with examples and Case Study to understand the concept better has been clearly explained.

Objectives

After completion of this unit, you will be able:

- To state the meaning of contract
- To create a simple contract
- To state the essential elements of contract
- To understand various classification of contract
- To be aware of the rules related formation of contract

5.1. Introduction

What is Contract law?

Contracts are the commitments among people to do in exchange for something they get. We can also interpret a contract as a guarantee between two businessmen that they require a legal and verbal coalition.

In the case of Contract law, this comes into existence wherein despite exchanging money of any kind they come into a contract where they make an exchange of something at the toll of others. We should always keep in mind that "All agreements are not contracts but all contracts are agreements." Agreements should satisfy all provisions of the Indian Contract Act, 1872 then only they are known as contracts. All agreements are not contract but all contracts are agreement

Offer + Acceptance = Promise

Promise + Consideration = Agreement

Agreement + Enforceable = Contract

An agreement can turn into an agreement just on the off chance that it is legitimately enforceable by law or satisfies the conditions set down under segment 10 of Indian Contract Act,1872. In this way, all agreements are certainly arrangements.

All agreements are not contracts in light of the fact that solitary arrangements which satisfy the conditions set down under area 10 of Indian Contract Act, 1872 become contracts. It isn't required that every one of the arrangements will fulfill the conditions set down under area 10 of Indian Contract Act,1872.

5.2. Various Formation of Contract

An enforceable agreement is a contract only if the contract is valid. A contract that is invalid, vitiated or irregular will either be void, voidable or unenforceable. Therefore, a contract must be formed keeping in mind certain conditions and terms that have to be met with before and during the formation of the contract. The Indian Contract Act, 1872, prescribes the law relating to contracts in India.

The requirements of a contract are as follows:

- There must be offer and acceptance – Section 2(d)
- There must be a consideration – Section 25
- Parties must be competent to contract – Section 11 and 12
- There must be free consent of the parties – Section 13 and 22
- The object of the contract must be lawful – Section 23 and 30
- When these requirements are not met, the contract will be invalid and could be rendered void.

Offer and acceptance

There needs to be a proposal (offer) and the acceptance of this proposal to form a contract. The communication of the proposal and the acceptance need to be complete. A proposal needs to be communicated to the promisee or the offeree who is willing to accept it. This proposal or acceptance can be express or implied:

- a) A proposal or offer is implied when the party expresses his or her desire to do something or to get something done by their actions.
- b) An express proposal or acceptance is when the offer or acceptance is expressed in some form, written, oral, or by words. Implied acceptances and offers are valid.

The communication of a proposal is said to be completed when it is brought to the knowledge of the person to whom the proposal is made. An acceptance can be made only if the offeree knows that an offer has been made to him/her, that is, when the communication of the offer is complete.

Upton-on-Severn RDC v. Powell (1942)

In this case, a person who received services from a fire brigade under the impression that the area was entitled to free service, had to pay the fire brigade when he found out that the area did not service charge free. He had made an implied promise to pay for the service while availing of benefits.

Lalman Shukla v. Gauri Datt (1913)

In this case, the servant (petitioner) could not claim the reward for finding the defendant's nephew. The communication of an offer that a reward would be granted for finding the nephew came to the knowledge of the servant after he had found the nephew. The communication of acceptance under the Contract Act has different rules for different modes used to communicate the acceptance.

For the postal mode of acceptance, the acceptance of the offer is complete when the letter of acceptance has been put into transmission by the offeree. This acceptance is complete against the offer or and the offeree and the contract will be created.

This has been reiterated in the case of Adams V. Lindsell (1817). The court's reasoning in this judgment was that if one party is given an option of knowledge/ information the other party must also be given the option to receive an acknowledgment. If this is given it will go on ad infinitum.

To stop this chain at the first instance, the contract is concluded when the letter of acceptance has been put into the transmission.

For an instantaneous mode of communicating acceptance, the Indian courts have accepted the principle followed in the case of Entores Ltd v. Miles Far East Corporation (1955), where it was held that the communication of acceptance is completed when the acceptance reaches the offeror. Therefore, for an instantaneous mode of communication, the acceptance is complete when it reaches the party to whom the acceptance is conveyed.

The acceptance of a contract must be absolute and unqualified as given in Section 7 of the Act. An acceptance that has a variation or is a partial acceptance is not treated as an acceptance. It is rather a counter-proposal/offer. This when accepted by the original offeror gives rise to a new contract and the previous offer becomes non-existent. Thus, an acceptance needs to be absolute and unqualified to give rise to a valid contract.

Consideration

Consideration is another major essential element for a contract to be valid. Section 25 of the Contract Act states that a contract without consideration is void. Consideration is defined under Section 2(d) of the Act. Fundamentally, consideration is the price for which the promise of the other party is bought, and this promise which has been given for value is enforceable. An act done at the request of another, express or implied is sufficient consideration to support a promise.

A promise to pay a subscription becomes enforceable as soon as any definite steps have been taken in furtherance of the object and on the faith of the promised subscription.

Doraswami Iyer v. Arunachala Ayyar (1935)

In this case, the defendant promised to pay some amount for renovation. He promised while the renovation was going on, but later refused to pay. Since the renovation was going on when he made the promise, it cannot be said that it was done at the desire of the promisor. Therefore, there was no consideration and he was not liable to pay the amount.

Hudson Re. (2011)

In this case, it was held that if there is no consideration to pay a particular sum towards a charity, a person cannot be held for non-payment. Past consideration is an act done without any promise. In Indian Law, a promise to compensate for a past act that is voluntarily

done is enforceable. An act done by one party at the request of another is also enforceable.

Lampleigh v. Brathwait (1615)

In this case, an imprisoned person asked an acquaintance to get him out of the prison. When this request was made, he had not promised to give the acquaintance anything in return. His friend got him out, after which he promised to pay him a certain amount, but he didn't pay. Therefore, the friend filed a case. The court held that the person is liable to pay since the act was done at his request.

Therefore, the consideration in a contract must be valid without which the contract will be void and unenforceable.

Competency to contract

The Section 10 of the Contract Act states that the parties must be competent to contract. Competency is defined in Section 11. Minors, persons of unsound mind, and persons disqualified by law to which they are subject are incompetent to contract. A contract entered into by a minor is void. A minor's guardian can enter into a valid contract on behalf of the minor. Such contracts can also be enforced by the minor. There cannot be reliance-based estoppel. The minor cannot be stopped from the original agreement. The defense of infancy acts in the minor's favour.

The doctrine of restitution- a minor obtains property of goods by misrepresenting the age. The property can be restored from the minor if it is in their possession.

Srikakulam Subramanyam v. Kurra Subba Rao (1948)

In this case, there was a minor and the minor's mother, who sold a piece of land to discharge a debt of the minor's father. This property was mortgaged. Subsequently, the minor had second thoughts and claimed that the contract was void. The Privy Council found that the contract was within the competence of the guardian. The contract was thus enforceable since the mother contracted on behalf of the minor. The contract had also been made for the benefit of the minor. Thus, it was not a void contract.

Leslie (R) Ltd. v. Sheill (1914)

In this case, a minor deceived a moneylender with respect to age and secured some amount. The moneylender sued the minor for the restitution of money. The money could not be traced therefore; this doctrine does not apply to money. The minor was not liable.

The agreement of a person who is of unsound mind is void similar to a minor's agreement in India. A person is said to be of sound mind for the purpose of making a contract, if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests. A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind.

Inder Singh v. Parmeshwardhari Singh (1957)

In this case, an individual sold a property worth a lot more for a smaller amount. The mother of this person showed that the person was of unsound mind. The court found that the person was of unsound mind when the contract was made and thus it was void.

Free consent of the parties

Section 10 specifies that free consent is an essential requirement of a contract. Section 14 of the Contract Act defines free consent. Both the parties entering a contract must enter the contract by their own will and must give free consent to the contract. There must be a meeting of the minds of the parties on the same subject, to form a valid contract.

Check Your Progress-1

True/False

- a. An enforceable agreement is not a contract only if the contract is valid.
- b. Contracts are the commitments among people to do in exchange for something they get.
- c. The agreement of a person who is of unsound mind is void similar to a minor's agreement in India.
- d. If consent is caused by mistake the agreement is void and cannot be enforced by either of the parties.
- e. Religious influence is not a very dangerous and powerful.

5.3. Indian Contract Act 1872

When consent to an agreement is given by coercion, undue influence, fraud, or misrepresentation, the contract is voidable at the option of the party whose consent was so caused. According to Section 2(i), a voidable contract has been classified as a contract that is enforceable by law at the option of one or more of the parties thereto but not at the

option of the other or others. If consent is caused by mistake the agreement is void and cannot be enforced by either of the parties.

Allcard v. Skinner (1887)

Religious influence is very dangerous and powerful. The court, in this case, stated that she cannot recover the amount due to the law of limitation. She had claimed to recover the amount after 6 years which is a delay and limits her from claiming the share. The court did recognize that it is a case of undue influence.

Lawful Object

Section 23 of the Contract Act states what considerations in a contract are lawful and unlawful. An object that is forbidden by law defeats the purpose of any law, is fraudulent, or opposed to public policy is unlawful. Contracts in which the consideration is unlawful are void.

Mohinder Singh v. State of Punjab (1963)

In this case a person, who was elected as a sarpanch for a period of five years, made an agreement with another member that the latter would be given two -year term and the elected one, the remaining three years. The agreement was held to be void as it would have defeated the purpose and provisions of the Punjab Panchayat Act, 1994.

The Indian Contract Act brings within its ambit the contractual rights that have been granted to the citizens of India. It endows rights, duties and obligations on the contracting parties to help them to successfully conclude business- from everyday life transactions to evidencing the businesses of multi-national companies.

The Indian Contract Act, 1872 was enacted on 25th April, 1872 and subsequently came into force on the first day of September 1872. The essence of the India Contract Act has been modeled on that of the English Common Law.

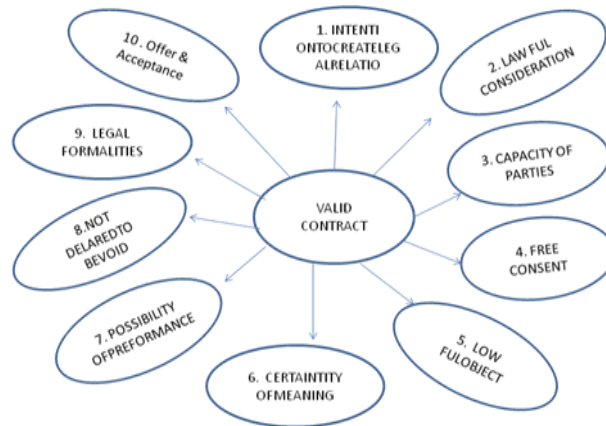
It is one of the most important legislation ever drafted by the Britishers and the principles enacted therein are nothing but the codification of the general principle governing transactional relationship because of which it has seen seldom amendments.

Before the act was enforced, the contractual relationship was governed by the personal laws of different religious communities like different laws for Hindu and Muslims.

Now, to understand the contract act in its present form we have to analyze the historical evolution of contract law taking into account the practices that were prevalent before the enactment came.

5.4. Essential Elements of Contract

The essentials elements of contract is depicted in the following chart.



Source : *Google.com*

Section 10 of the Indian contract Act has laid down the conditions for a contract to be valid.

Followings are the conditions:

Offer and Acceptance

The word offer (proposal) is defined under Section -2(a) of the Indian Contract Act, 1872 whereas section 2(b) defines that when an offer is accepted it becomes a promise. The three constituents should be fulfilled for a valid agreement. An offer is made, consensus-ad-idem and acceptance.

An offer and proposals in many instances are used correspondingly. Offer is the foundation of any contract. When one person signifies to another his willingness to do or to abstinence, from doing anything, to obtain the assent of that other such act or abstinence, he is said to propose. We should also keep this in mind a person making the offer is called the offer or and the person to whom the offer is made is called the offeree.

Consensus-ad-idem signifies that the offeree should elucidate in which manner the offer is made. He/she should be cleared with an exact sense of what it is going to be.

An acceptance is made after offering an offer then the offeree has two options just to accept or reject it. The offeree should only accept the order when they are cleared with all statements written in the contract.

It prevails that all rules and regulations composed on time of offer made and at time of acceptance should be the same.

Let us illustrate this with an example. Here's the crockery mart from where Mrs. Sharma orders a 12 cup of the set, 12 glasses, etc, and asks them to deliver. Then the mart manager offer a contract to Mrs. Sharma that he will deliver all the products safely to her house but in case there's any crack or a broken piece comes out then neither they will change nor she can sue them because they bring the goods on order so, they don't have any extra piece to exchange and that's why there is no guarantee in case of customer delivering. Mrs. Sharma learned all the conditions which the shopkeeper wrote on offer and then she accepted also and after a few days when she got her parcel and opened it, 3 mugs and 2 glasses were broken. Now, she cannot sue the shopkeeper for sending those mugs and glasses.

Landmark Case about this acceptance:

Felthouse v. Bindley For this situation, the applicant, Mr. Paul Felthouse needed to buy a horse from his nephew, yet the value he offered to pay for the horse was not exactly that his nephew was able to sell it for. The horse, in this manner, was as yet in his ownership. The Uncle conveyed his proposal through a letter, saying.

On the off chance that I hear not any more about him, I consider the horse mine at 30.15s" The nephew couldn't react to the letter since he was occupied with a sale on his ranch. Even though he asked the salesperson, Mr. Bindley, not to sell the horses, he incidentally did. Mr. Felthouse at that point sued the litigant for a change of his property. The litigant contended that the horse was not Mr. Felthouse's property, as there existed no agreement among him and his nephew at the hour of the bartering because Mr. Felthouse's offer was not acknowledged by his nephew and the nephew's quiet can't be viewed as an Balfourment of the offer.

It was held that Mr. Felthouse did not have the ownership of the horse at the time of the auction, which is why he could not sue for conversion, as the offer he made was not accepted.

Intent to make legal relationship:

Let's illustrate this with an example. Here's a two-person named A (wholesaler) and B (Retailer). They came into an agreement where A promised to give goods to B at the wholesale price but in case A didn't do the same B can sue him.

On the other hand, if B invites A to his daughter's wedding and A promises that he will show his presence there but then also if he doesn't go then B cannot sue A.

In the first illustration, A is liable but in second illustration A is not liable because we can observe in case A they share a legal relationship that has legal obligations and he is aware of its fallout. But in illustration 2 there is no lawful connotation which shows that there is no legal relationship and that's why A is not liable.

Landmark case on intention to make the legal relationship- Balfour

v. Balfour: The construct of intention to form legal relationships was understood within the case of Balfour v. Balfour. During this case, the suspect United Nations agency was utilized on a government job in Ceylon, visited England along with his married person. For health reasons the married person was unable to accompany the husband to Ceylon. The husband secured to pay 300/ month as maintenance to the married person for the time she lived apart. The husband did not pay the amount and was eventually sued by his married person. In the case, it was commanded that the husband wasn't prone to pay as there was no intention to form a legal relationship between the parties.

Admissible object and Authorized or Consideration

In the case of a valid contract legal consideration is very much essential. The word 'consideration' means to get something in return for something. Consideration is also something that a person gets an extra privilege, it can be in any kind of money, or according to contract. If there would be no consideration then the contract will be quashed and void. Section 2 (d) of the Contract Act 1872 defines a contract as: When at the desire of the promissory, the promise or any other person has done or abstained from doing or does or abstains from doing or promise to do or abstain from doing. Something such an act or abstinence or promise is called a consideration for the promise.

Let's discuss this with an illustration:

There's a man named Shiva who comes into consideration where he borrowed Rs. 500000 from Ashish and said he will pay back this money in the coming time to the owner of the Maruti Suzuki showroom when Ashish will buy a Car. This is a valid consideration between Shiva and Ashish. In the above illustration, we can observe that all the essentials of consideration are justified and fulfilled. This consideration is legal.

All the statements are clear.

- a) This can be in the past, present, or future.
- b) Money borrowed by Ashish but payback to the owner. Thus, this can move from one party to another.

Landmark Case on Consideration- Durga Prasad v. Baldeo: In the case, it was held that it is essential that the consideration must have been given at the desire of the promisor, rather than merely voluntarily or at the instance of some third party.

Potential to Make a Contract

All the provisions given in Section 14- of the Indian Contract Act, 1872 should be fulfilled before coming into a contract. There are some conditions where a person cannot make a contract which is as follows:

- A person should attain adulthood.
- Minor cannot make the contract.
- He/she should be of sound mind.
- A drunken person is not allowed to make a contract.
- The person shouldn't be insolvent.

Hence, if a person is drunk, unsound, insolvent, or minor, they will not be capable of making any contract. Their contract will be considered invalid.

Let's discuss more with an illustration.

Let's say a girl named Riya (12years old) for whom the contract is made that her father said to make a contract with a person named Ayush that he will sell his property to him and in return whatever money he would have to get spent on Riya's education.

This is a valid contract. One can say that the minor cannot come into a contract but in this situation, the contract was not made by Riya, it is for Riya that's why it's not void.

Mohori Bibee v. Dharmodas Ghose:

In this case, it was held that an agreement by a minor is void.

Potentials for the existence of a contract

A contract is valid in cases where possible statements take place. Not the situation where there are chances but not sure.

Let's discuss more with illustrations. Illustration 1:

The two people named Aman and Sanjeev both came into a contract that Aman will sell his motorcycle to him but not decided at which amount. So in this condition, the contract is Invalid.

Illustration 2

The person named Kamal comes into a contract that if Rajesh brings stars from the sky to the earth then this contract is not justified. Because

bringing stars to the earth is an impossible task. Hence, the contracts are valid in a situation only when they can be fulfilled.

Landmark case regarding the frustration of contract- Krell

v. Henry:

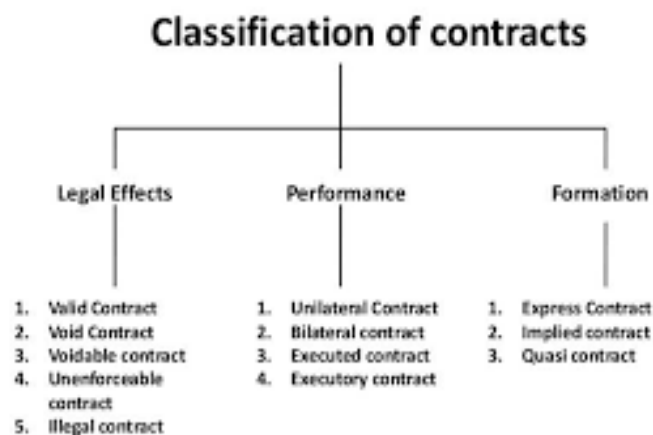
For this situation, the respondent consented to lease a level of the offended party to watch the crowning ordinance of King Edward VII from its overhang. The offended party had guaranteed that the view from the level's gallery will be fulfilling since the parade will be totally apparent from the room. The gatherings related through letters and concurred on a cost of 75 for two days. No place in their composed correspondence did the gatherings notice the crowning ritual function.

The crowning ritual didn't happen when the level was reserved for, as the thoughtful became sick. The litigant wouldn't pay the entire amount of cash that the gatherings had settled upon, consequently. It was held that it may very well be caused by the conditions encompassing the agreement and what the inferred reason behind the agreement was. Because of the crossing out of the parade, the motivation behind booking the level was disappointing.

Proper Considerations

According to the Indian Contract Act, 1872 the contract can be in both oral and written form. But as advisable the contract should be in written form to avoid any future crisis. If the contract is in written form then the person is bound to do a certain task but there is a risk in the case of an oral contract. Written contracts encompass the signature of both the parties which can be used in court for making the right decision. Otherwise, oral contracts are also valid.

5.5. Classification of Contract



Contracts may be classified on the basis of their

- A. Validity
- B. Formation
- C. Performance.

1. Validity or Enforceability:

- Valid contracts
- Void contracts
- Void agreements
- Voidable contracts
- Unenforceable contracts
- Illegal
- Agreements

2. Formation:

- Express contracts
- Implied contracts
- Quasi contracts
- E.corn. contracts

3. Performance:

- Executed contracts
- Executor contracts or
 - ✓ Unilateral contracts
 - ✓ Bilateral contracts

4. Valid Contract:

- An agreement enforceable at law is a valid contract.
- An agreement becomes a contract when all the essentials of a valid contract as laid down in Section 10 are fulfilled.

5. Void Contract:

- An agreement which was legally enforceable when entered into but which has become void due to supervening impossibility of performance for example a contract between a citizen of Pakistan and India is a valid contract during peace but if war breaks out between the two countries, the agreement will become void contract.
- A void contract is not necessarily unlawful, but is destitute of legal effects.

- The law will not enforce such a contract, nor can it be made valid by the parties.

6. Void Agreement:

- Accord to section 2(g), “An agreement which is not enforceable by law by either of the parties is void.”
- No legal rights or obligations can arise out of a void agreement.
- an agreement without consideration or with minor.

7. Voidable Contract:

- According to section 2(i), “An agreement which is enforceable by law at the option of one or more of the parties but not at the option of the other or others is voidable contract.”
- Note that the word used here is ‘contract’ and not just ‘Agreement’.
- This is the result of absence of free consent in the contract.
- This is so because the rights and duties are created and the contract is valid until the option to avoid it is exercised by the person whose consent to the agreement was not free but was obtained by coercion, undue influence, fraud or misrepresentation.
- Thus avoidable contract is valid and enforceable until it is repudiated by the party entitled to avoid it.

Example:

A, a person of weak intelligence made a gift of his entire property to B, who was in a position to dominate him. The gift having been obtained by undue influence is voidable at the option of A.

8. Unenforceable Contracts:

- It is contract which is otherwise valid, but cannot be enforced because of some technical defect like absence of a written form or absence of a proper stamp.
- Such contracts must be sued upon by one or both of the parties.
- Such contracts cannot be proved in the court.
- Such contracts will not be enforced by the courts until and unless the defect is rectified.

Example:

A borrows Rs.10,000 from B and makes a promissory note and a one rupee stamp is pasted on the promote. The agreement though complete is unenforceable because of the technical defect i.e., promissory note being under stamped.

9. Illegal Agreement:

- A contract which is either prohibited by law or otherwise against the policy of law is an illegal agreement.
- It is void ab initio.
- Thus, a contract to commit dacoit is an illegal contract and cannot be enforced at law.
- An illegal contract should be distinguished from a void contract.
- All illegal agreements are void but all void agreements or contracts are not necessarily illegal.
- Agreement with a minor is void but not illegal.
- Every void agreement is not illegal unless its object or consideration is Immoral Opposed to public policy etc.
- A void contract does not affect a collateral contract.
- An illegal agreement is like an infectious disease and is fatal not only to the main contract as well.

Example:

X borrows 50,000 from Y for the purpose of smuggling goods. Y knows of the purpose of the loan. The agreement between X and Y is collateral to the main agreement which is illegal. The collateral agreement is also illegal.

Contracts classified according to formation:

1. Express contract:

- An express contract is one entered into by words which may be either spoken or written.
- Where the proposal and acceptance is made in words, it is an express contract.

2. Implied contract:

- Where the proposal or acceptance is made otherwise than in words, it is an implied contract.
- Implied contracts can be smelted out of the surrounding circumstances and the conduct of the parties who made them.
- So where a person employs another to do some work the law implies that the former agrees to pay for the work.

3. Constructive or quasi- contract:

- It is a contract in which there is no intention on either side to make a contract, but the law imposes a contract.
- In such a contract rights and obligations arise not by any agreement between the parties but by operations of law.

- Thus, a finder of lost goods is under an obligation to find out the true owner and return the goods.
- Similarly, where certain books are delivered to a wrong addressee, the addressee is under an obligation either to pay for them or return them.

4. E-Com Contracts / Contracts over Internet:

- These contracts are entered into between the parties using internet.
- In electronic commerce, different parties/persons create networks which are linked to other networks through EDI (Electronic Data Inter-change).
- This helps in doing business transactions using electronic mode.

Classification on the basis of Performance:

Contracts may be classified on the basis of extent of their performance. Such contracts may be:

1. Executed Contract:

- An executed contract is one where both the parties have performed their obligations or carried out the terms of the contracts.
- In other words, it is a completed contract.

Example:

A sells a TV set to B for Rs. 20,000. B pays the price and A hands over TV set to B.

2. Executory Contract:

- Where the contract is yet to be performed either wholly or partially or one or both the parties have yet to perform their obligations, the contract is executor contract.

Example:

A agrees to make furniture for B for Rs. 5,000 Mr. A has yet to make furniture and Mr. B has not made the payment. So, both A & B are yet to perform their obligations. Suppose A has make the furniture but B has yet to make payment, it is executed on A's part by executory on B's part.

Thus, executory contract may be

- Unilateral
- Bilateral

3. Unilateral Contract:

- A unilateral contract is one in which a promise on one side is exchanged for an act on the other side.
- A contract is said to be unilateral where one party has discharged his obligation either before or at time of entering into contract.

Example:

Mr. A, a worker does manual labor at the request of Mr. B on a particular day. On completion of work it is B's obligation to pay him wages because A has already performed his obligation.

4. Bilateral Contract:

- These are the contracts where a promise on one side is exchanged for a promise on the part of other party.

5.6. Case Study

Case Study-1

- A forced to B to enter into a contract at the point of pistol. What remedy is available to B. If he does not want to be bound by the contract?
- C orally offered to pay A, an auto mechanic, Rs. 50 for testing a used car which C was about to purchase from D. Agreed and tested the car. C paid A Rs.50 in cash for his services. Is the agreement between C and A (a) express or implied,(b)executed or executory,(c) valid, void, voidable or unenforceable?

Case Study-2

A policeman, thinking that the driver of a bus was drunk, ordered him to leave the bus. The conductor asked a man in the street to drive the bus to its destination, a kilometer away. He drove the bus negligently and a passenger received injuries. Is the proprietor liable? A to sell a horse to B who tells A that he (B) needs the horse for riding to Mumbai immediately. The horse is ill at the time of agreement .What are the rights of A and B?

Case Study-3

A engaged B, an auctioneer, to sell some property on the terms that he should receive his due commission of Rs. 500. B, however, received secretly Rs.200 as commission from the purchaser. Discuss the rights of A and B. b. A, who owes B Rs 20,000, appoints B as his agent to sell his landed property at meerut and after paying himself(B)What is due to him, to hand over the balance to A.B invites offers. (a) Can A revoke this authority delegated to B? (b) Is B's authority terminated if A dies or become insane?

Let Us Sum Up

In this unit, you have learned about the following:

- Contracts are the commitments among people to do in exchange for something they get.
- A contract must be formed keeping in mind certain conditions and terms that have to be met with before and during the formation of the contract.
- A proposal needs to be communicated to the promisee or the offeree who is willing to accept it.
- The acceptance of a contract must be absolute and unqualified as given in section 7 of the Act.
- Consideration is another major essential for a contract to be valid. Section 25 of the Contract Act states that a contract without consideration is void.
- Both the parties entering a contract must enter the contract by their own will and must give free consent to the contract.
- When consent to an agreement is given by coercion, undue influence, fraud, or misrepresentation, the contract is voidable at the option of the party whose consent was so caused.
- The Indian Contract Act brings within its ambit the contractual rights that have been granted to the citizens of India.
- An express contract is one where the conditions are clearly stated in words, spoken or written.
- A contract may be created through the conduct or acts of parties (and not through their words spoken or written).

Check Your Progress

1. Which of the following is the Effect of ratification?
 - A. Ratification is started from the time of making a contract between the ratifier of the act and the person who did of the act.
 - B. A contractual relationship is started between the ratifier and the third party.
 - C. Both A&B
 - D. None of these
2. Which is correct for substituted agent or Co-agent?
 - A. A co-agent works under the rules, regulations, and instructions of the principal.
 - B. There is an agreement or contract between the co-agent and the principal.

- C. Co-agent is not affected by the termination of the original agency.
 - D. All of these
3. Which are the methods in which an agency relationship, familiar in law, can be established?
- A. by agreement
 - B. by ratification
 - C. by estoppel
 - D. All of these
4. An agent is a special employee who is employed to do any act for another or to represent another in dealing with any of the third person.
- A. True
 - B. False
 - C. Partially True
5. Auctioneer agent gets _____ lien.
- A. General
 - B. none of these
 - C. particular
 - D. special

GLOSSARY

Agreement:	Bonding between two or more parties
Contract:	Enforceable by law
Consideration:	Something in return
Executed:	Completed
Executory:	Yet to perform

Answers to Check Your Progress-1

- a-False
- b-True
- c-True
- d-True
- e-False

Answers to Check Your Progress-2

1. C. Both A&B
2. D. All of these
3. D. All of these
4. A. True
5. D. All of these

Suggested Reading

1. **Khan, A. U., & Debroy, B.** Intellectual Property Rights Beyond: An Indian Perspective on the Debate on IPR Protection and the WTO. Kottayam: DC School Press. -2005.
2. **Lexis Nexis**, "The Code of Civil Procedure", 1908 (Palmtop Edition) Hardcover – 22 , April 2016.

Unit-6

Principles of Contract Laws- Legality of Object Consideration

STRUCTURE

Overview

Objectives

6.1. Introduction

6.2. Principles of Consideration

6.3. Legal rules related to the consideration

6.4. Types of Consideration

6.5. Case Study

Let Us Sum Up

Check Your Progress

Glossary

Answers to Check Your Progress

Suggested Readings

Overview

In this Unit the concept of Principles of Consideration, Legal rules related to the consideration, Types of Consideration with examples and Case Study to understand the concept better has been clearly explained.

Objectives

After completion of this unit, you will be able:

- To state the meaning of contract
- To create a simple contract
- To state the essential elements of contract
- To understand various classification of contract
- To be aware of the rules related formation of contract

6.1.Introduction

An agreement in order to be enforceable has sure essential elements. Just as to Section 10 - all agreements are contracts if they are made through the free consent of the parties competent to contract, for a lawful consideration and with a lawful substance, and are not hereby declared to be void. Consideration is the very essence of a contract. If there is no

consideration in an agreement, it is not enforceable by law except in certain cases. As the maxim says, "No Consideration, No Contract". As a matter of fact, consideration is the very life and blood of every contract.

6.2. Principles of Consideration

There are several principles applicable to consideration in contract law. These are:

- Consideration is the price paid for promisor's promise;
- The person who wants to enforce the promise must be the one who has paid for it either the promisee or someone acting on their behalf;
- Consideration does not have to be paid to the promisor. The promisor may allow the consideration to be paid to a third party.
- Consideration does not always have to be a benefit paid to the promisor. It can also be a detriment suffered by the promisee in reliance on the promise;
- Consideration cannot be something that has occurred in the past and predates the promise;
- Consideration must be something valuable in the eyes of the law. However, the value does not have to equal the promisor's promise;
- Reasons for the offer or making an offer or motive for making an offer is completely separate to consideration;

There are some situations where an act, promise or forbearance cannot be taken to be legal consideration in contract law. These situations are where there is some existing duty to do these things, and they are either done either:

1. In performance of an existing duty or
2. In the discharge of an existing duty or ending contractual obligations.

Where parties that are contracting seek to end an obligation under a contract, there must be some consideration for discharging that obligation. Otherwise, the original contractual obligations may still apply. The performance or forbearance that is the consideration for the discharge of the obligation or obligations must be something different to the obligation under the original agreement.

6.3. Legal rules related the consideration

1. Part payment is not good consideration.

2. Consideration must move from the promisee but need not flow to the promisor
3. Consideration must be sufficient but need not be adequate.
4. Consideration cannot be illusory.
5. Consideration must not be past. Past consideration is not good consideration.
6. Moral consideration is not sufficient
7. Performance of existing duties is not good consideration
8. Consideration may move from the promisee or any other person.
9. Under Indian law, consideration may be from the promisee of any other person i.e., even a stranger. This means that as long as there is consideration for the promisee, it is immaterial who has furnished it.
10. It must move at the desire of the promisor. An act constituting consideration must have been done at the desire or request of the promisor. If it is done at the instance of a third party or without the desire of the promisor, it will not be good consideration. For example, "A" saves "B"s goods from fire without being ask him to do so. "A" cannot demand payment for his service.
11. Consideration must be an act, abstinence or forbearance or a returned promise.
12. Consideration may be past, present or future. Past consideration is not consideration according to English law. However it is a consideration as per Indian law.
13. Consideration must be real. Consideration must be real, competent and having some value in the eyes of law. For example, "A" promises to put life to "B"'s dead wife, if "B" pay him Rs.1000/-. "A"'s promise is physically impossible of performance hence there is no real consideration.
14. Consideration must be something which the promisor is not already bound to do. A promise to do something what one is already bound to do, either by law, is not a good consideration since it adds nothing to the previous existing legal consideration.

15. Consideration need not be adequate. Considerations need not necessarily be equal in value to something given. So long as consideration exists, the courts are not concerned as to adequacy, provided it is for some value.
-

Check Your Progress-1

True/False

- a. An agreement in order to be enforceable has sure essential elements.
 - b. There are several principles applicable to consideration in contract law
 - c. Consideration can be illusory
 - d. Consideration need be adequate.
 - e. Executory or future consideration is one that takes the form of a promise to be performed in the future.
-

6.4. Types of Consideration

A Consideration may be:

1. Executory Consideration or Future Consideration,
2. Executed Consideration or Present Consideration, or
3. Past Consideration.

1. Executory or Future Consideration

Executory or future consideration is one that takes the form of a promise to be performed in the future. It is the price promised by one party in return for the other party's promise. For instance, an engagement to marry someone, or a promise to deliver goods, or to render services at a future date.

2. Executed or Present Consideration

Executed or present consideration is one which takes place simultaneously with the promise. The act constituting the consideration is wholly or completely performed.

For instance, if **A** buys a book from a book-seller and pays the price and the book-seller delivers the book to **A** there and then, the consideration in this case is executed or present, since it is performed by both the parties simultaneously.

3. Past Consideration

Past consideration is one which took place and is complete before the promise is made.

6.5 Case Study

Driving Business Excellence with Contract Intelligence for Manufacturing
How four leading manufacturers have stayed out in front with Icertis Contract Intelligence.

Executive Summary

Modern manufacturers face a broad set of challenges that span sourcing, sales, and corporate contracts. They must grapple with rapidly evolving competition, dynamic global supply chains, and shifting regulations. To stay competitive, companies need to become more agile and stay close to both their customers and suppliers. If left unaddressed, these challenges have the potential to lead to higher costs, noncompliance penalties, and dissatisfied customers.

Icertis has implemented company-wide Contract Lifecycle Management (CLM) solutions for some of the world's largest manufacturers, leveraging the Icertis Contract Intelligence (ICI) platform combined with our powerful suite of applications. The ICI platform's ability to integrate with a company's current IT infrastructure enables a seamless user experience across the entire contract lifecycle. The four case studies outlined here explore how the ICI platform has benefitted these companies by enabling greater visibility into contract obligations, accelerating commercial negotiations, increasing compliance, and reducing stakeholder risk.

Icertis is the only contract intelligence platform you can trust to keep your business out in front, now and into the future.

A,B and C enter into a contract, under which A promises both B and C that if B will dig A's garden, he(A) will give Rs. 50 to C. can C compel A to pay the money on B's digging A's garden according to the terms of the contract? Give reason

Let Us Sum Up

In this Unit, you have learned about the following:

1. Consideration is the very essence of a contract. If there is no consideration in an agreement, it is not enforceable by law except in certain cases.
2. That consideration cannot be something that has occurred in the past and predates the promise;
3. That the person who wants to enforce the promise must be the one who has paid for it either the promisee or someone acting on their behalf;

4. Where parties that are contracting seek to end an obligation under a contract, there must be some consideration for discharging that obligation.
5. Consideration must be sufficient but need not be adequate.
6. Consideration may be past, present or future. Past consideration is not consideration according to English law.
7. Consideration must be real. Consideration must be real, competent and having some value in the eyes of law.
8. Executory or future consideration is one that takes the form of a promise to be performed in the future.
9. Executed or present consideration is one which takes place simultaneously with the promise.
10. Past consideration is one, which took place and is complete before the promise is made.

Check Your Progress-2

1. The term "Bailment" means
 - A. A delivery of a thing entrusted for some special purpose or object upon a contract
 - B. Delivery of goods free of cost
 - C. Delivery of goods without cost for welfare of public
 - D. None of above
2. 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 dispose of upon discretion of the delivering person the contract is called
 - A. Indemnity
 - B. Bailment
 - C. Contingent Contract
 - D. None of above
3. In pledge contract, bailee is called
 - A. Pawnor
 - B. Pawnee
 - C. Pledger
 - D. None of above
4. In pledge, bailor is called
 - A. Pawnor
 - B. Pawnee

- C. Both (a) and (b)
 - D. None of above
5. The Bailment of goods as security for payment of a debt or performance of a promise is called:
- A. Pledge
 - B. Bailment
 - C. Contingent contract
 - D. Agreement

Glossary

Consideration:	Something in return
Executed:	Completed
Executory:	Yet to perform
Promisor:	One who agree to do something
Promisee:	To whom the promise made

Answer to Check Your Progress-1

- a-True
 - b-True
 - c-False
 - d-False
 - e-True
-

Answer to Check Your Progress-2

1. A. A delivery of a thing entrusted for some special purpose or object upon a contract
 2. B. Bailment
 3. B. Pawnee
 4. A. Pawnor
 5. A. Pledge
-

Suggested Reading

1. Brannon, I., & Cotti, C. D. (2022). The Need to Reform the McNamara–O’Hara Service Contract Act. Available at SSRN.
2. Chambel, M. J., Lopes, S., & Batista, J. (2016). The effects of temporary agency work contract transitions on well-being. *International Archives of Occupational and Environmental Health*, 89(8), 1215-1228.

Performance of Contract- Quasi Contracts

STRUCTURE

Overview

Objectives

7.1. Introduction

7.2. Meaning of Performance of a contract

7.3. Legal rules related to the performance of contract

7.4. Contracts which need not be Performed

7.5. By whom must Contracts be Performed

7.6. Quasi Contract – Meaning

7.7. Types of Quasi Contract

7.8. Case Study

Let Us Sum Up

Check Your Progress

Glossary

Answers to Check Your Progress

Suggested Readings

Overview

In this Unit, the Meaning of Performance of a contract, Legal rules related to the performance of contract, Contracts which need not be performed, By whom must Contracts be Performed, Various Definition of Quasi Contract and its Meaning, Types of Quasi Contract with examples, Case Study to understand the concept better has been clearly explained.

Objectives

After completion of this unit, you will be able :

- To state the meaning of performance of contract
- To perform contract
- To state the types of performance of contract
- To understand various classification of quasi contract
- To be aware of the rules related performance of contract

7.1.Introduction

Section 27 of Indian contract Act says that “The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or any other law.”

Promises bind the representatives of the promisor in case of the death of the latter before performance, unless a contrary intention appears in the contract.

Thus, it is the primary duty of each contracting party to either perform or offer to perform its promise. For performance to be effective, the courts expect it to be exact and complete, i.e., the same must match the contractual obligations. However, where under the provisions of the Contract Act or any other law, the performance can be dispensed with or excused; a party is absolved from such a responsibility.

7.2. Meaning of Performance of a Contract

The term ‘Performance of contract’ means that both, the promisor, and the promisee have fulfilled their respective obligations, which the contract placed upon them. For instance, A visits a stationery shop to buy a calculator. The shopkeeper delivers the calculator and A pays the price. The contract is said to have been discharged by mutual performance.

The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or any other law. Promises bind the representatives of the promisor in case of the death of the latter before performance, unless a contrary intention appears in the contract.

Thus, it is the primary duty of each contracting party to either perform or offer to perform its promise. For performance to be effective, the courts expect it to be exact and complete, i.e., the same must match the contractual obligations. However, where under the provisions of the Contract Act or any other law, the performance can be dispensed with or excused, a party is absolved from such a responsibility.

Example

A person called **A** promises to deliver goods to B on a certain day on payment of Rs. 1,000/-. A expires before the contracted date. A’s representatives are bound to deliver the goods to B, and B is bound to pay Rs. 1,000/- to A’s representatives.

Types of Performance

Performance, as an action of the performing may be actual or attempted.

Actual Performance

When a promisor to a contract has fulfilled his obligation in accordance with the terms of the contract, the promise is said to have been actually performed. Actual performance gives a discharge to the contract and the liability of the promisor ceases to exist.

For example, A agrees to deliver 10 bags of cement at B's factory and B promises to pay the price on delivery. A delivers the cement on the due date and B makes the payment. This is actual performance. Actual performance can further be subdivided into substantial performance, and partial Performance

Substantial Performance

This is where the work agreed upon is almost finished. The court then orders that the money must be paid, but deducts the amount needed to correct minor existing defect. Substantial performance is applicable only if the contract is not an entire contract and is severable. The rationale behind creating the doctrine of substantial performance is to avoid the possibility of one party evading his liabilities by claiming that the contract has not been completely performed. However, what is deemed to be substantial performance is a question of fact to be decided in both the case. It will largely depend on what remains undone and its value in comparison to the contract as a whole.

Partial Performance

This is where one of the parties has performed the contract, but not completely, and the other side has shown willingness to accept the part performed. Partial performance may occur where there is shortfall on delivery of goods or where a service is not fully carried out.

There is a thin line of difference between substantial and partial performance. The two following points would help in distinguishing the two types of performance.

Partial performance must be accepted by the other party. In other words, the party who is at the receiving end of the partial performance has a genuine choice whether to accept or reject. Substantial performance, on the other hand, is legally enforceable against the other party.

Payment is made on a different basis from that for substantial performance: It is made on quantum *merit*, which literally means as much as is deserved. So, for example, if half of the work has been completed, half of the negotiated money would be payable. In case of substantial performance, the party that has performed can recover the amount appropriate to what has been done under the contract, provided that the contract is not an entire contract. The price is thus, often payable in such circumstances, and the sum deducted represents the cost of repairing defective workmanship.

Attempted Performance

When the performance has become due, it is sometimes sufficient if the promisor offers to perform his obligation under the contract. This offer is known as attempted performance or more commonly as tender. Thus, tender is an offer of performance, which of course, complies with the terms of the contract. If goods are tendered by the seller but refused by the buyer, the seller is discharged from further liability, given that the goods are in accordance with the contract as to quantity and quality, and he may sue the buyer for a breach of contract if he so desires. The rationale being that when a person offers to perform, he is ready, willing and capable to perform. Accordingly, a tender of performance may operate as a substitute for actual performance, and can effect a complete discharge.

In this regard, **Section 38 of Indian Contract Act** says: 'Where a promisor has made an offer of performance to the promisee, and the offer has not been accepted, the promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract.'

For example, A contracts to deliver to **B**, 100 tons of basmati rice at his warehouse, on 6 December 2015. **A** takes the goods to **B**'s place on the due date during business hours, but **B**, without assigning any good reason, refuses to take the delivery. Here, **A** has performed what he was required to perform under the contract. It is a case of attempted performance and **A** is not responsible for non-performance of **B**, nor does he thereby lose his rights under the contract.'

Check Your Progress-1

True/False

- a. Partial performance must be accepted by the other party.
- b. Performance, as an action of the performing may be actual or attempted.

- c. The term 'Performance of contract' means that both, the promisor, and the promisee have fulfilled their respective obligations, which the contract placed upon them.
- d. When no application is to be made by the promisee and no time is specified – Sec 48
- e. When the performance has become due, it is sometimes sufficient if the promisor offers to perform his obligation under the contract.

7.3. Legal Rules Related to the Performance of Contract

1. When no application is to be made by the promisee and no time is specified – Sec 46

In situations where there is no time period specified for the performance of the contract and the promisor has to perform the contract without any request by the promisee, in such a case the promisor must perform the contract within a "reasonable time". Here reasonable time means a fair amount of time that is required to do something conveniently and as soon as the circumstances permit. Hence here time is not important since a specified date for completion is not mentioned but this does not mean that the promisee does not have the right to have the contract performed by the promisor. Also, the term reasonable time depends on the facts and circumstances of the case and will also depend on the nature of the transaction.

Illustration

Srishti takes a loan of Rs.10,000/- from Shivani and says that she will return it to her when she receives her next salary. Here the reasonable time for performance of the contract is after Srishti receives her next salary.

2. When time and place of performance is specified but no application is to be made by the promisee- Section 47

The terms of the contract say that the promisor has to perform the contract without any request by the promisee, on the place specified by the promisee and on the exact date specified by him. In case no specific time is mentioned then the promisor should deliver the goods during the usual hours of business.

Illustration

Ankita promised to deliver goods to Ira on an advance payment of Rs.10,000/-. Ira made the payment and asked Ankita to deliver the goods on 13th of the same month at her office at Tis Hazari.

Since the time is not specified, she should deliver it between 10 am and 5 pm, assuming those are the regular court timings. If Ankita attempts delivery after the business hours, then Ira has the right to not accept the goods and ask Ankita to deliver again during business hours.

3. When Performance is to be made on a proper place and time but an application is to be made by the promisee to the promisor for its performance- Section 48

When the terms of the contract say that a performance of a contract has to be made on a particular day but the promisor will only do so when the promisee makes an application to the promisor on that specific day for performance. Hence, here since it is specifically mentioned in the contract that the promisee has to request the promisor for performance on that specific day, he must do so at the proper place and during the usual business hours as specified by him.

Illustration

Manu agrees to supply Nishant 50 cartons of alcohol on 3rd November at his office. As per terms of the contract, Nishant would have to request Manu for performance. Thus on the due date and within usual business hours, Nishant should request Manu regarding a time and place for the supply of goods.

4. Where no place is fixed and no application has to be made to the promisor by the promisee- Section 49

When the terms of the contract does not specify the place where the goods have to be delivered and that no request has to be made by the promisee for the performance of a contract, in such a situation it is the duty of the promisor to request the promisee of a place reasonable to both where the goods can be delivered and then accordingly perform the contract. The place for the performance of goods implies both the delivery and payment of goods.

Illustration

Sheela entered into a contract for supplying 100 cartons of Gram Flour to Anu on 5th September at a specific price. On the due date of performance, Sheela must apply or request Anu for determining a reasonable place and also make the payment at the same place.

5. When the performance has to be made in the time and manner as specified by the promisee- Section 50

A contract can also exist in which the promisor agrees to perform the contract in a manner and at a place and time prescribed by the promisee.

Illustration

Prankur's son is in the hospital and needs money for his son's operation. Harshil owes money to Prankur and agrees to repay him in at any place or time decided by Prankur. In this case, Prankur has the liberty to ask for the performance of the promise in any manner and at any place or time suited to him.

The consequence of Failure to perform the contract at a fixed time when the time is essential. Section 55 of the *Indian Contract Act, 1872* deals with the effect of failure to perform the contract at a fixed time when the time is essential.

- If an act is not done within the stipulated time, the contract becomes voidable at the option of the promisee provided the Intention of the parties was that time should be of the essence of the contract.

Thus whether time was the essence of the contract depends on the intention of the parties and also on the nature of the contract.

In *Bhudra Chand v. Betts(1915)* the defendant promised to deliver an elephant to the plaintiff for the capture of a wild elephant as a part of Kheda Operations. The contract provided that the elephant would be delivered on the 1st of October, 1910, but the defendant obtained an extension of the time till 6th Oct and yet did not deliver the elephant till 11th. The plaintiff refused to accept the elephant and sued for damages for the breach. It was held that the plaintiff was entitled to recover damages since it was proved that time was the essence of the contract since the defendant had tried to obtain an extension of time.

1. This section says that if it was not the intention of parties to make time of the essence of the contract, the contract does not become voidable by the failure to perform the contract on or before the specified time but the promisee is entitled to claim compensation for any loss caused by the default
2. Finally, the section goes on to say that if time is intended to be of the essence by the parties but performance is accepted on some other time other than the time agreed, compensation cannot be claimed by the promisee unless he gives such a notice to the promisor.

In the case of State of Kerala v. M.A Mathai (2007), it was held that if there are any delays in the performance of reciprocal obligations by an employer, the contractor gets the right to avoid the contract but if he does not avoid the contract and accepts the belated performance, he cannot claim compensation for any loss sustained to him due to delay in performance, unless he gives a notice of the same to the delaying party.

The Intention of the Parties

In Indian law, the question of whether the time is of the essence of the contract or not is determined by the intention of the parties. The intention of the parties can be determined from:

1. The express words used in the contract
2. The nature of the contract itself
3. The nature of the property which forms the subject matter of the contract
4. The surrounding circumstances

It has been held in the case of China Cotton Exporters v. Beharilal Ramcharan Cotton Mills Ltd (1961) that in commercial contracts time is ordinarily of the essence of the contract. Thus It is ordinarily presumed that except in commercial contracts, time is not of the essence in other contracts. This presumption can be rebutted by showing the intention of the parties.

For example, Time is presumed not to be of the essence in contracts relating to immovable property, but of the essence in contracts of renewal of leases.

In M/S Citadel Fine Pharmaceuticals vs M/S Ramaniyam Real Estates Pvt. Ltd. and Ors. (2011), It was held that time was the essence of the contract which was specifically mentioned in clause 10 and the consequences of non-completion are mentioned in *clause 9*. So, from the express terms of the contract and the commercial nature of the transaction and the surrounding circumstances make it clear that the parties intended time to be of the essence of the contract.

However, merely specifying the time at which the contract has to be performed does not make time the essence of the contract. In order to determine this the terms and conditions of the agreement should be read carefully. If the contract in its terms provides that time is the essence of the contract, but other terms of the agreement show that the parties did not intend time to be of the essence, the court has held that time is not of the essence.

For Example, in the Case of Hind Construction Contractors v. State of Maharashtra (1979), the Appellant entered into a contract with the respondent on July 2, 1955, for some construction work with the condition that the contract should be completed within 12 months from the commencement of the work. The Appellant could not complete the work within the stipulated time and the Respondent canceled the contract with effect from August 16, 1956. The Appellant contended that time was not of the essence and further on account of several difficulties, such as excessive rains, lack of proper road and means of approach to the site, the completion was delayed. The Supreme Court, in deciding that time was not of the essence in relied on two clauses in the contract

1. First, there was a power to grant an extension of time on reasonable grounds by the respondent on an application by the appellant. Even though the appellant made an application for extension, the respondent revoked the contract which was wrong.
2. Second, there was a provision to recover penalty/compensation from the appellant at specified rates during the time the work remains unfinished. These two provisions, as per the court, exclude the inference that time was intended to be of the essence of the contract.

Time Can Be Made Essence By Notice

When time is not of the essence in a contract, it can be made so by giving notice to the promisor. The notice must contain clearly that it wants to make time as the essence of the contract and the necessary implications if it is not adhered to. The promisor can also be intimated through the notice that default in the compliance with the terms will lead to the cancellation of the contract. The party serving the notice must himself be bound by it.

Extension of time

Since one party to the contract cannot unilaterally vary the terms of the contract, he also cannot extend the time without the consent of the other party through an agreement. Therefore, time for performance can be extended only by an agreement arrived at between the promisor and promisee. Thus if one party requests the other party for extension of time but the other party does not communicate his acceptance, the time cannot be extended in such a case.

7.4. Contracts Which Need Not Be Performed

For a contract to be invalid it must be under coercion, threat, fraud, undue influence etc. Also, object should not be inconsistent with any other law of a contract. Moreover, performance would not be required under some circumstances which are clearly mentioned in Sections 62 and 63 of the Act. These circumstances are-

- Novation,
- Rescission,
- Alteration,
- Remission.

Novation

The original contract need not be performed if the parties to a contract agree to alter or substitute a new contract. As Novation of contract means to create a new contract while the new contract needs not to be performed and is terminated. Furthermore, the newly substituted agreement would be by the mutual consent of the parties, valid, enforceable and have consideration. Basically, it should fulfill the requirements of a valid contract.

Furthermore, essentials of Section 62 of the Act are-

- Consensus ad idem between the parties to contract.
- Substitution, recession or alteration of a contract that gives rise to a valid new contract.
- Termination of the original contract.
- There should be previous contracts entered in between the parties.

As in Ramdayal Vs Maji Devdiji the Court observed that Novation takes place by introducing new terms in the contract or by introducing new parties. A contract of Novation requires a party to agree or discharge his debt. There can be no Novation unless this can be accomplished.

For example, contract are like in a partnership firm liabilities of the old firm are taken over by the new firm, an agreement of lease is where the tenant gives the lease to another party and makes him responsible for the responsibility and obligations that arise from these agreements etc. For Novation to be in effect, contract's modification must go on to the root of original contract as held by the High Court in case of Juggilal Kamalpat Vs N.V. Internationale

Section 62 – Rescission

It is also under **Section 62** that a party should only be in bilateral terms allowed to rescind a contract. To rescind here means to cancel which means a party to the contract can terminate a contract by mutual consent. When some or all terms are cancelled out of a contract, it is known as rescission of a contract.

As in the case **Union of India Vs Kishorilal Gupta and Bros.** It was held by Calcutta High Court that a contract under Section 62 of the Contract Act can be rescinded only after there has been a breach. Rescission occurs –

- When one party fails to perform the contract or the other party rescind the contract
- Or termination of the contract by the mutual consent of the parties

Alteration in Contract (Section 62)

It happens when the parties enter into a contract and with the mutual assent if one of the parties wants to modify the contract can do so. Hence, once the parties sign the contract they cannot change or modify its terms but only on the situation where both the parties by their mutual consent agreed to the alteration. As in the case **United India Insurance Co. Ltd Vs M.K.J. Corporation** It was held that material alteration is the one which varies the rights and liabilities of the parties ascertained by the deed or it varies the legal effect of the instrument which is originally expressed.

Remission (Section 63)

This Section enables the promisee to agree to dispense with or remit performance of the promise. Remission means waiver and thus the promisee can waive either in full or in part the obligation of the promisor. This Section permits a party who is entitled to the performance of a contract as:

Dispensing with or remitting performance

As the promisee has been authorized to remit with the performance of contract without any consideration, he may fully forego his claim or may agree to a smaller amount in full satisfaction of the whole amount. **For example if A owes Rs 5,000 to B, B may accept only Rs 2000 from A.** It means that if B agrees to accept Rs 2000 in lieu of Rs 5000 from A he then cannot ask A to pay the balance of Rs 3000. As in case **Kapur Chand Godha Vs Himayatlikhan Azamjah** B had executed a

promissory note in favour of A due to which A was offered a sum of Rs 27 lacs in full satisfaction of that note. According to the note first he accepted Rs.20 lacs but later on asked for another 7 lacs and sued B. It was held that the case was completely covered by Section 63.

Extending date for performance

There is nothing strange for the time of performance being extended even if the original agreement had fixed date. Section 63 provides that every promise may extend the time of performance of the contract. As in the case **Keshavlal Lallubhai Patel and Others Vs Lalbhai Trikumlal Mills Ltd**, it was held that a variation in date of performance by express representation by the defendants, agreed to by the forbearance on the part of the plaintiffs.

Accepting any other satisfaction instead of performance

Section 63 permits promisee to accept any other satisfaction in lieu of agreed performance and this would discharge the promisor. **For example**, A owes B under a contract a certain amount of money has not been provided. A without ascertaining the amount gives B in satisfaction and accepts the sum of Rs 2000. This is a discharge of the whole debt, whatever may be its amount. As in case **Union of India Through General Vs Babulal Uttamchand Bhandari**, it was held that the plaintiffs' suit for the balance of the amount was maintainable as the amounts were not accepted in full satisfaction of the claim.

7.5. By whom Must Contracts be Performed

If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself, such promise must be performed by the promisor. In other cases, the promisor or his representatives may employ a competent person to perform it.

Illustrations

A promises to pay B a sum of money. A may perform this promise, either by personally paying the money to B, or by causing it to be paid to B by another; and, if A dies before the time appointed for payment, his representatives must perform the promise, or employ some proper person to do so.

- a. A promises to paint a picture of B. A must perform this promise personally.

7.6. Quasi Contract – Meaning

Quasi Contract laws have been derived from the Latin statement “Nemo debet locupletari ex aliena jactura” which proclaims that no human being should gain an unjust benefit from another’s loss. It was one of the main principles of Roman law.

The word ‘Quasi’ means having some resemblance to but not all. Similarly, Quasi Contract means laws that are like regular contract law but not quite so. A regular contract should have some essential components to be considered valid. It includes offers, acceptance, consideration, two or more parties who are legally and mentally capable etc. Whereas Quasi-contract definition is based more on the principles of natural law such as moral conscience, justice, honesty, duty towards another human being etc.

The main difference between Contract and Quasi Contract is that in the case of the latter, there is no exchange of offer, acceptance, or consideration between two or more parties. However, it is still legally enforceable.

For example, if a package belonging to A is delivered to M, then M is legally obligated to return it to A. If M uses up the contents of the packaging for himself, then A has the right to sue him. In that case, the court can order M to reimburse A under Quasi-contract law.

7.7. Types of Quasi Contract

1. Supply of Necessities (Sec.68)

If a person, incapable of entering into a contract, or anyone whom he is legally bound to support, is supplied by another with necessities suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person.

For example, A supplies B who is a lunatic, with necessities, suitable to his condition in life. A is entitled to be reimbursed from B's property.

2. Payment by an Interested Person (sec. 69)

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

For example B holds land in Bengal, on a lease granted by A, the Zamindar. The revenue payable by A to the govt. being in the arrears,

his land is advertised for sale by the govt. Under the revenue law, the consequences of such sale will be annulment of B's lease. B to prevent the sale and the consequent annulment of his own lease pays to the government the sum due from A. A is bound to make good to B by the amount so paid.

The conditions of the liability under sec. 69 are:

1. The plaintiff should be interested in making the payment. It is not necessary that he should have a legal proprietary interest in the property in respect of which the payment is made. However, often it is used to determine whether plaintiff was interested.
2. Sec. 69 does not invite such judicial limitation that a person who has not an interest in the property can be interested in a payment of that property.
3. The plaintiff himself should not be bound to pay. He should only be interested in making the payment in order to protect his own interest.
4. The defendant should be under legal compulsion to pay.
5. The plaintiff should have made the payment to another person and not to himself.

3. Obligation to pay for Non-Gratuitous Acts (SEC. 70)

When a person lawfully does anything for another person or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the things so done or delivered.

For example 1. A, a tradesman, leaves goods at B's house by mistake. B treats the goods as his own. He is bound to pay for them to A.

For example 2. A saves B's property from fire. A is not entitled to compensation from B, if the circumstances show that he intended to act gratuitously.

Before any right of action under sec. 70 arises, 3 conditions must be satisfied:

1. The thing must have been done lawfully.
2. The person doing the act should not have intended to do it gratuitously.
3. The person for whom the act is done must have enjoyed the benefit of the act[union of India vs. Sita ram, AIR 1977,S.C. 329]

For example, A village was irrigated by a tank. The government effected certain repairs to the tank for its preservation and had no intention to do so gratuitously for the zamindars. The zamindars enjoyed the benefits thereof. Held, they were liable to contribute (**Damodar Mudaliar vs. secretary of state for India, 1894, 18 Mad. 88**).

4. Responsibilities of Finder of Goods (Sec. 71)

A person, who finds goods to another and takes them into his custody, is subject to the same responsibilities as a bailee. He is bound to take as much care of the goods as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value. If he does not, he will be guilty of wrongful conversion of the property. Till the owner is found out, the property in goods will vest in the finder and he can retain the goods as his own against the whole world.

For example F picks up a diamond on the floor on K's shop. He hands it over to K to keep it till true owner is found out. No one appears to claim it for quite some weeks in spite of the wide advertisement in the newspapers. F claims the diamond from K Who refuses to return. K is bound to return the diamond to F who is entitled to retain the diamond against the whole world except the true owner.

5. Mistake or Coercion (Sec. 72)

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

For example A pays some money to B by mistake. It is really due to C. B must refund the money to A. C, however, cannot recover the amount from C is no privity of contract between B and C.

A railway company refuses to deliver up certain goods to the consignee, except upon the payment of an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as is illegally excessive. Sec. 72 does not draw any distinction between a mistake of fact and mistake of law {**D. cawasji & co. vs. state, AIR. 1969 mys.23**}

7.8. Case Study

In P.L.S.A.R.S., Sabapathi Chetty (Deceased) Vs. Krishna Aiyar, the court held that generally, the parties to the tender of performance fix the time and place. The tender of performance should mandatorily be made at the time and place stipulated under the contract. If the performance is

made within the stipulated time and place then the promisor is under no further obligations.

In Startup v. Macdonald, the defendant purchased ten tons of linseed oil to be delivered to the plaintiff within the last fourteen days of the month of March. The plaintiff tendered the defendant at night on the fourteenth day. The defendant however citing the lateness of the tender rejected the acceptance of the tender.

The court, in this case, held that the defendant should be held liable for the breach of the terms of the contract and the contention made by him that the late acceptance of the tender was made could not be entertained because, although the acceptance was made lately still the acceptance, was made before midnight.

In Afovos shipping co. v. R Pagnan, an international contract was entered into by the plaintiff and defendant. The term of the contract provided that the payment which formed the consideration of the contract should reach on the 14th day of the month, however, the defendant repudiated the contract before the 14th day of the month.

The court held that the defendant should have delayed the repudiation of the contract till 14th of the month. Section 138(2) of the Act also provides that the tender must be made under such circumstances so as to allow the other party to get reasonable opportunity to ascertain that the person who is making the tender is capable and willing to fulfil all the conditions mentioned under the contract.

Section 138(3) of the Act provides that the goods which are subjected to tender must be same as mentioned under the description of the tender otherwise the tender will be invalid.

In Dixon v. Clark the court held that the fact that payment was tendered and refused in no ways discharges the debtor from his liability to make good of the payment of a debt.

In Vidya Vati vs Devi Das, the principle of old standing which was given in the above- mentioned case was endorsed. In the debtor was under the obligation of paying back his loan in order to recover the vacant possession of his premises and his tender was also rejected.

However, the court held that debtor was not released from the obligation to pay prior to his recovery of the possession.

Let Us Sum Up

In this unit, you have learned the following:

1. The term 'Performance of contract' means that both, the promisor, and the promisee have fulfilled their respective obligations, which the contract placed upon them.
2. Promises bind the representatives of the promisor in case of the death of the latter before performance, unless a contrary intention appears in the contract.
3. The term 'Performance of contract' means that both, the promisor, and the promisee have fulfilled their respective obligations, which the contract placed upon them.
4. The primary duty of each contracting party to either perform or offer to perform its promise
5. Actual Performance is when a promisor to a contract has fulfilled his obligation in accordance with the terms of the contract, the promise is said to have been actually performed.
6. Substantial performance is where the work agreed upon is almost finished. The court then orders that the money must be paid, but deducts the amount needed to correct minor existing defect
7. Partial performance is where one of the parties has performed the contract, but not completely, and the other side has shown willingness to accept the part performed.
8. Attempted performance is when the performance has become due, it is sometimes sufficient if the promisor offers to perform his obligation under the contract.
9. Novation is the original contract need not be performed if the parties to a contract agree to alter or substitute a new contract.
10. To rescind here means to cancel which means a party to the contract can terminate a contract by mutual consent.
11. Alteration in contract happens when the parties enter into a contract and with the mutual assent if one of the parties wants to modify the contract can do so.
12. Remission enables the promisee to agree to dispense with or remit performance of the promise
13. Quasi Contract laws have been derived from the Latin statement "Nemo debet locupletari ex aliena jactura" which proclaims that no human being should gain an unjust benefit from another's loss.
14. The word 'Quasi' means having some resemblance to but not all

Check Your Progress-2

1. The Consumer protection act 1986 enacted in
 - A. 15 Jun 2005
 - B. 24 Oct 1986
 - C. 24 Dec 1986
 - D. 1 Jan 1986

2. The Consumer protection act 1986 extends to
 - A. The whole India
 - B. The whole India except Nagaland tribal area,
 - C. The whole India except Nagaland tribal area and Jammu and Kashmir
 - D. The whole India except Jammu and Kashmir

3. Appropriate laboratory means a laboratory or organization
 - A. Recognized by Central Government
 - B. Recognized by state government
 - C. Both the above
 - D. None of the above

4. Consumer Protection Act is applicable to
 - A. Immovable goods
 - B. Movable goods
 - C. Specific goods and services
 - D. All goods and services

5. The total number of rights given to consumers as per consumer protection Act is
 - A. 5
 - B. 4
 - C. 6
 - D. 8

Glossary

Rescind: Cancel

Waiver: Sacrifice

Remission: giving up

Novation: Substitution

Quasi : Some resemblance to but not all

Answers to Check Your Progress-1

- a-True
- b-True
- c-True
- d-False
- e-True

Answers to Check Your Progress-2

1. C. 24 Dec 1986
2. D. The whole India except Jammu and Kashmir
3. C. Both the above
4. D. All goods and services
5. C.6

Suggested Reading

1. Narayan, C. L., & Shikha, D. (2013). Indian legal system and mental health. *Indian Journal of Psychiatry*, 55(Suppl 2), S177.
2. Nomani, M. Z. M., Rahman, F., & Alhalboosi, A. K. (2019). Consumer Protection Act, 2019 and its implications for the medical profession and health care services in India. *Journal of Indian academy of forensic medicine*, 41(4), 282-285.

Unit-8

Discharge of Contract- Breach of Contract

STRUCTURE

Overview

Objectives

8.1. Introduction

8.2. Meaning of Discharge of Contract

8.3. Different mode of discharge of contract

8.4. Discharge by performance

8.5. Discharge by mutual consent or agreement

8.6. Discharge by impossibility of performance

8.7. Discharge of contract by operation of law

8.8. Discharge of contract by lapse of time

8.9. Meaning of Breach of contract

8.10. Types of breach of contract

8.11. Case Study

Let Us Sum Up

Check Your Progress

Glossary

Answers to Check Your Progress

Suggested Readings

Overview

In this unit, the Meaning of Discharge of Contract, Different modes of discharge of contract, Discharge by performance, Discharge by mutual consent or agreement, Discharge by impossibility of performance, Discharge of contract by operation of law, and Discharge of contract by lapse of time, Meaning of Breach of contract, Types of breach of contract, and Case Study understand the concept better has been clearly explained.

Objectives

After completion of this unit, you will be able:

- To state the meaning of discharge of contract
- To know the various remedies available under breach of contact
- To state the types of breach of contract
- To understand various classification of discharge of contract

- To be aware of the rules related to discharge and breach of contract

8.1. Introduction

Discharge of a contract implies termination of contractual obligations. This is because when the parties originally entered into the contract, the rights and duties in terms of contractual obligations were set up. Consequently when those rights and duties are put out then the contract is said to have been discharged.

Once a contract stands discharged, parties to it are no more liable even though the obligations under the contract remain incomplete.

8.2. Meaning of Discharge of Contract

The term '*discharge of contract*' refers to a situation when a contract's contractual relationship between the parties comes to an end. It is essentially the end of the parties' contractual relationship. The duties of the party or parties come to an end when a contract is discharged.

This article details out the concept of discharge of contract, highlighting specifically on the discharge of contract by the operation of law and lapse of time.

The phrases "discharge" and "termination of contract" are frequently interchanged. A contract can be discharged by the conduct of the contracting parties or by the operation of law.

However, there is a narrow line that separates the phrases discharge and contract termination. When the parties to a contract perform or discharge their duties and obligations in accordance with the contract, this is known as the discharge of contract.

When contracting parties fail to fulfill their duties or obligations, the contract is terminated.

- **For example**, A threw a party at her house and hired some dancers to perform, promising to pay them their money. The dancers arrived at the gathering to perform.

A pays their payments in accordance with the contract's provisions. Here, the performance of the dancer will amount to the discharge of the contract since the terms of the agreement have been completed. The dancers' failure to perform will result in contract termination.

8.3 Different Modes of Discharge of Contract

A contract is deemed to be discharged, that is, concluded and no longer binding, in the following circumstances:

- Discharge by performance.
- Discharge of Contract by Substituted Agreement.
- Discharge by lapse of time.
- Discharge by operation of law.
- Discharge by Impossibility of Performance.
- Discharge by Accord and Satisfaction.
- Discharge by breach.
- Discharge of Contract

8.4. Discharge by Performance

The discharge of the contract takes place when the obligations of the contract between the parties of the contract come to an end. This also ends the legal validity of the contract. The discharge of the contract is also referred to as the termination of the contract. The best way to discharge a contract is by going in accordance with the terms of the contract until the end of the contract. In addition to that, a contract can be discharged by six other ways. They are:

By Performance

Performance regards to the completion of the deal in accordance with the terms of the contract. To have a closure of the deal, both parties must live up to the end of their bargain. The contract remains open until the parties perform correctly under the contract. The performance can be either actual or attempted.

Actual

Both the parties in a contract must perform, or offer to perform, their promises. Unless The Indian Contract Act, 1872 or any other law excuses or dispenses such performance. The representatives of the promisors are bound by the promises in the case where a promisor dies before performance unless the contract denotes a contrary intention. This is the actual performance.

Illustration: A promises to deliver the goods to B on a particular day with payment of Rs.1,000/-. But A dies before such day. So A's representatives are to deliver the goods to B, in turn, B has to pay Rs.1,000/- to A's representatives.

Attempted

Attempted performance is a tender or form which the promisors predict and perform in the contract. However, an attempted performance should always be:

- Unconditional
- Should be for the complete obligation of the contract
- Formulate at a proper place and time
- A proper person or adequate agent for that person must formulate it

Illustration: The person A contracts to deliver to person B at his warehouse, on a certain day, a 100 bales of cotton of a certain quality. To make an offer of performance, person A must take the cotton to B's warehouse, on that day. The delivered 100 Bales of cotton must be of said quality for person B to be satisfied to contract.

8.5. Discharge by Mutual Consent or Agreement

If all parties to a contract mutually agree to replace the contract with a new one or annul or remit or alter it, then it leads to a discharge of the original contract due to a mutual agreement.

Example: Peter owes Rs. 1, 00,000/- to John and agrees to repay it within one year. They document the debt under a contract. Subsequently, he loses his job and requests John to accept Rs.75,000/- as a final settlement of the loan. John agrees and they make a contract to that effect. This discharges the original contract due to mutual consent.

Check Your Progress-1

True/False

- a. Attempted performance is a tender or form which the promisors predict and perform in the contract.
- b. The phrases "discharge" and "termination of contract" are frequently interchanged.
- c. The term '*discharge of contract*' refers to a situation when a contract's contractual relationship between the parties comes to an end.
- d. The provisions of the law do allow the performance of the contract.
- e. Discharge of a contract implies termination of contractual obligations.

8.6. Discharge by the Impossibility of Performance

If it is impossible for any of the parties to the contract to perform their obligations, then the impossibility of performance leads to a discharge of the contract. If the impossibility exists from the start, then it is impossibility ab-initio. However, the impossibility might also arise later due to:

- An unforeseen change in the law
- Destruction of the subject-matter essential to the performance
- The non-existence or non-occurrence of a particular state of things which was considered a given for the performance of the contract
- A declaration of war
- Example: Peter enters into a contract with John to marry his sister Olivia within one year. However, Peter meets with an accident and becomes insane. The impossibility of performance leads to a discharge of the contract.
- Discharge of a Contract by Lapse of Time
- The Limitation Act, 1963 prescribes a specified period for performance of a contract. If the promisor fails to perform and the promisee fails to take action within this specified period, then the latter cannot seek remedy through law. It discharges the contract due to the lapse of time.
- Example: Peter takes a loan from John and agrees to pay installments every month for the next five years. However, he does not pay even a single installment. John calls him a few times but then gets busy and takes no action. Three years later, he approaches the court to help him recover his money. However, the court rejects his suit since he has crossed the time-limit of three years to recover his debts.

8.7. Discharge of Contract by Operation of Law

The provisions of the law do not allow the performance of the contract. This regards to the changes in the existing laws also. But it does not concern the court order or an agreement. The following are the situations where the law authorizes the termination of the contract:

- Insolvency
- Death

- Alterations in the unauthorized materials
- Merger

Illustration: Michael Jackson had to perform on a world tour. But he was met with an unfortunate death; this made all his contracts void and null.

8.8. Discharge of Contract by Lapse of Time

The Limitation Act, 1963 prescribes a specified period for performance of a contract. If the promisor fails to perform and the promisee fails to take action within this specified period, then the latter cannot seek remedy through law. It discharges the contract due to the lapse of time.

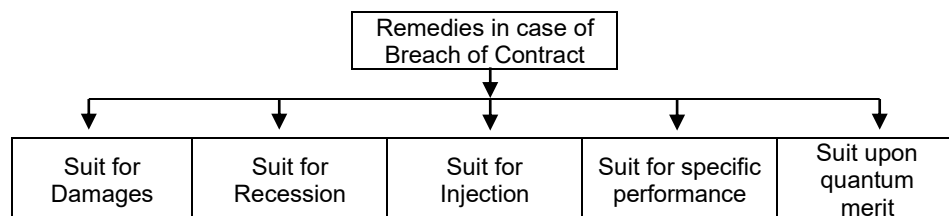
Example: Peter takes a loan from John and agrees to pay installments every month for the next five years. However, he does not pay even a single installment. John calls him a few times but then gets busy and takes no action. Three years later, he approaches the court to help him recover his money. However, the court rejects his suit since he has crossed the time- limit of three years to recover his debts.

8.9. Meaning of Breach of Contract

Parties to a contract are expected to perform their respective promises. If a party breaks his obligation which the contract imposes, there take place “breach of contract.”

- If the contract is bilateral, the party who suffers, by breach has one remedy.
- He can claim relief for breach.
- If the contract is unilateral, the only remedy available to the party who suffers by breach is to claim relief for the breach.

8.10. Remedies of Breach of Contract



1. Suit for Damages

The term “damages” may be defined as the monetary compensation payable by the defaulting party to the aggrieved party for the loss suffered by him.

- The fundamental principle underlying damages is not punishment by compensation.
- Compensation for loss or damage caused by Breach of contract (sec 73).
 - Such damages which naturally arose in the usual course of things from such breach. It related to ordinary damages.
 - Such damages which the parties knew, when they made the contract to be likely to result from the breach-special damages.

Kinds of damages:

1. Ordinary or general damages.
2. Special damages.
3. Exemplary damages.
4. Nominal damages.

a) Ordinary Damages

Ordinary damages are those which flow as a natural consequence in the usual course of things from the breach (i.e.) damages which the parties may be deemed to have known as likely to arise on a breach, even at the time of entering into a contract. It is compensatory in nature.

Example:

A agreed to sell B two bales of cotton at Rs.1000 per bale, the delivery to be given on 15th January. A failed to deliver the goods. The remedy for B would be claim the difference between the market price and the contract price for the same quality of cotton in case the market price is higher than the contract price.

b) Special Damages

- Special damages are those resulting from a breach of contract under some special circumstances.
- It must have been known to both the parties.
- Unlike ordinary damages, special damages cannot be claimed as a matter of right.

Example:

There was a book exhibition at Madurai on 10 June. A publisher handed over books to the carriers and informed them that the book must reach Madurai on or before the date of exhibition. The carrier delivered the book after the exhibition. The publisher is entitled to claim compensation as special damages.

c) Exemplary Damages

- These damages are intended to show the court's strong disapproval of the conduct of the defendant (one sued at court (law)) in committing the wrong.
- These damages are of punishment in nature which is awarded with a view to punish the guilty party for the breach
 - i. In case of breach of promise to marry.
 - ii. Where a banker refuses to honor the cheque in spite of having enough funds with him belonging to the person issuing the cheque. The smaller the amount for which the cheque is dishonored, the greater the insult done and so more the damages awarded.
- It also known as vindictive or punitive damage.

d) Nominal Damages

- Nominal damages are those which are awarded only for name sake, where the injured party has not in fact suffered any loss, the damages awarded for the breach of contract are nominal.

Example:

Where in a contract of sale of goods, if the contract price and the market price are almost the same, at the date of breach of the contract, then the aggrieved party is entitled only to nominal damages.

Example:

D contracted to purchase a Vespa scooter from a dealer E. but he failed to purchase the scooter. However, the demand for Vespa scooter far exceeded the supply and the scooter dealer could sell the scooter agreed to be purchased without loss of profits. The dealer is entitled only to nominal damages.

2. Suit for Rescission

- Rescission means a right not to perform obligation.
- In case of breach of contract, the promise may put an end to the contract.
- In such case, the aggrieved party is discharged from all the obligation under the contract and is entitled to claim compensation for the damages which he has sustained because of the non-performance of the contract.

Example:

A contracts to supply 100 kg of tea leaves for Rs. 8000/- to B on 15th April. If A does not supply the tea leaves on the agreed day, B need not pay the price. B may treat the contract as rescinded and B may also file a suit for rescission and claim damages.

3. Suit For on Injunction

- Injunction is an order of a court restraining a person from doing a particular act.
- It is a mode of securing the specific performance of the negative term of the contract.
- Injunction is a “preventive relief.” It may be mandatory or prohibitory.
- To put it differently, where a party is in breach of negative term of contract, the court may be issuing an injunction (order) restrain him from doing, what he promised not to do.

4. Suit for Specific Performance

- The term “specific performance” may be defined as the actual carrying out the respective obligations of both the parties.
- Sometimes, the damages are not an adequate remedy for breach of the contract. In such cases, the party aggrieved by the breach may bring an action for special performance of the contract.

Example:

A agreed to sell an old painting Mughal price to b for Rs. 5000/-. But subsequently A refused to sell the painting. In this case B may file a suit against A for the specific performance of the contract. And the court may order A to sell the painting to B as agreed.

- It may however, be noted that the party who bring an action for specific performance of the contract may prove the following:
- That he was ready and willing, at all material dates to perform his part of the contract.
- There certain cases as listed below, in which specific performance of the contract shall not be allowed by the court.
- Where the compensation in terms of money is an adequate relief for the non- performance of the contract.
- Where the contract is not fair and just.

Example:

A contracted to sell 10 pieces of ceiling fans to B. but on the due date of performance. A refused to sell the fans. In this case, B cannot obtain the specific performance of the contract as he can easily buy the ceiling fan from some other dealers. Moreover, the compensation in terms of money is also an adequate relief for the non-performance of the contract.

5. Suit upon Quantum Merit:

- Literally the expression "quantum merit" means "as much as earned" in legal sense, it means the 'payment in proportion to the work done (i.e.) a person recover compensation in proportion to the work done by him.
- The person can claim reasonable remuneration for the services rendered by him.
- A general rule, in this connection is that where a party to a contract has not fully performed what the contract demands, a person may recover
- compensation on the basis of "quantum merit."
- The claim on quantum merit must be brought by a party who is not in default.

Example:

In this case A, a firm of printers, agreed to print 1000 copies of book for B, a firm of publishers. Most of the printing refused to complete the work because part of that book contained libelous (defamatory) matter. The publisher refused to pay the price for the work done. The court held that printer could recover the printing charges on quantum merit from the publisher.

8.11. Case Study

The issue before the Calcutta High Court in the landmark case of Mugneeram Bangur and Co.v. Gurbachan Singh (1959) was whether a land-sale contract was discharged and came to an end as a result of intervening or supervening circumstances. The Court had opined that the requisition orders and/or work stoppages that resulted had no effect on or destroyed the foundation or fundamental basis of the contract in question, which cannot be claimed to have been frustrated or discharged as a result. Therefore, the frustration defence was correctly rejected in this case. Due to the lack of a time limit for the construction of roads and other infrastructure, construction may be completed within a reasonable period, which, in light of the foregoing and the circumstances of this

case, may well include the requisition period or other periods that, while uncertain, would be temporary. Contract frustration renders the contract unenforceable and relieves the parties of their contractual duties. Section 65 of the 1872 Act, on the other hand, provides that if an agreement becomes void, the person who obtained any benefit under it is 'obliged' to return it or compensate the person from whom he received it. The question is whether this clause applies to contracts that have been rendered invalid due to frustration. The frustration of a contract happens due to circumstances beyond either party's control or fault, and as a result, a party should not be forced to recompense in such circumstances. However, failing to provide enough compensation may result in the other party suffering a loss.

Let Us Sum Up

In this unit, you have learned about the following:

1. Discharge of a contract implies termination of contractual obligations.
2. The term '*discharge of contract*' refers to a situation when a contract's contractual relationship between the parties comes to an end. It is essentially the end of the parties' contractual relationship.
3. Performance regards to the completion of the deal in accordance with the terms of the contract.
4. The Limitation Act, 1963 prescribes a specified period for performance of a contract.
5. Parties to a contract are expected to perform their respective promises. If a party breaks his obligation which the contract imposes, there take place "breach of contract."
6. If the contract is unilateral, the only remedy available to the party who suffers by breach is to claim relief for the breach.
7. Ordinary damages are those which flow as a natural consequence is the usual course of things from the breach
8. Special damages are those resulting from a breach of contract under some special circumstances.
9. The term "specific performance" may be defined as the actual carrying out the respective obligations of both the parties.
10. Literally the expression "quantum meruit" means "as much as earned" in legal sense, it means the 'payment in proportion to the work done

11. These damages are intended to show the court's strong disapproval of the conduct of the defendant (one sued at court (law)) in committing the wrong.

12. Nominal damages are those which are awarded only for name sake

Check Your Progress

1. The term "Bailment" means
 - A. A delivery of a thing entrusted for some special purpose or object upon a contract
 - B. Delivery of goods free of cost
 - C. Delivery of goods without cost for welfare of public
 - D. None of above
2. 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 upon discretion of the delivering person the contract is called
 - A. Indemnity
 - B. Bailment
 - C. Contingent Contract
 - D. None of above
3. In pledge contract, bailee is called
 - A. Pawnor
 - B. Pawnee
 - C. Pledger
 - D. None of above
4. In pledge, bailor is called
 - A. Pawnor
 - B. Pawnee
 - C. Both (a) and (b)
 - D. None of above
5. The Bailment of goods as security for payment of a debt or performance of a promise is called:
 - A. Pledge
 - B. Bailment
 - C. Contingent contract
 - D. Agreement

Glossary

Discharge : Cancellation

Suit : File a case

Remedies: Solutions

Laps of time: End of time

Quantum Merit : As much as earned

Answers to Check Your Progress-1

a-True

b-True

c-True

d-False

e-True

Answers to Check Your Progress-2

1. A. A delivery of a thing entrusted for some special purpose or object upon a contract
 2. B. Bailment
 3. B. Pawnee
 4. A. Pawnor
 5. A. Pledge
-

Suggested Reading

1. **N.D.Kapoor**, Elements of Mercantile Law, S.Chand& Sons, 2013
2. **Balachandran V.**, Legal Aspects of Business, Tata McGraw Hill, 2020

Block-3: Introduction

The Block-3: Contract Management has been divided in to four Units (Unit-9 to Unit-12). **Unit-9: Contract Management-Special Contracts** deals with Introduction and Why is contract management important?, Stages of Contract Lifecycle Management (CLM), Contract management software, Contract management best practices, Steps to take now to improve contract management, Benefits of contract management software and Case study.

Unit-10: Laws of Agency; Principal-Agent Problem describes about Introduction and Meaning of Agency act, Duties and rights of agent and principal, Kinds of agent, Creation of agency, Termination of agency, Agency Problem and Case study.

Unit-11: Bailment, Pledge, Guarantee and Indemnity explains about the **Introduction** and Essential Features of Contract of Bailment, Kinds of Bailment, Rights and Duties of Bailor and Bailee, Termination of Bailment, Contract of Pledge, Rights, Duties Pawner and Pawnee, Contract of Guarantee, Essentials of a Contract of Guarantee, Kinds of Guarantee, Contract of Indemnity, Essentials of Contract of Indemnity and Case Study.

Unit-12: Sales of Goods – Principles of Sales of Goods presents about the Introduction and the concept of Unpaid seller, Rights of unpaid seller, Different between sales and agreement to sales, Different between sales and agreement to sales, Condition and warranties, Goods, Transfer of ownership and property and Case study.

In all the units of Block -3 **Contract Management**, the Check your progress, Glossary, Answers to Check your progress and Suggested Reading has been provided and the Learners are expected to attempt all the Check your progress as part of study.

Unit-9

Contract Management-Special Contracts

STRUCTURE

Overview

Objectives

9.1. Introduction

9.2. Why is contract management important?

9.3. Stages of Contract Lifecycle Management (CLM)

9.4. Contract management software

9.5. Contract management best practices

9.6. Steps to take now to improve contract management

9.7. Benefits of contract management software

9.8. Case study

Let Us Sum Up

Check Your Progress

Glossary

Answers to Check Your Progress

Suggested Readings

Overview

In this unit, the importance of contract management and the stages of a contract lifecycle management, the software of contract management and the best practices of contract management, and the Steps to improve and the benefits of contract management software has been clearly explained.

Objectives

After completion of this unit, you will be able:

- To state the meaning of contract management
- To know the various stages of contract management system
- To identify the best practices of contract management
- To understand the steps to take now to improve contract management
- To acquire the knowledge of contract management software

9.1. Introduction

Contract Management

Contract management or contract administration is the management of contracts made with customers, vendors, partners, or employees. Contract management includes negotiating the terms and conditions in contracts and ensuring compliance with the terms and conditions, as well as documenting and agreeing on any changes or amendments that may arise during its implementation or execution.

It can be summarized as the process of systematically and efficiently managing contract creation, execution, and analysis for the purpose of maximizing financial and operational performance and minimizing risk.

Contract management or contract lifecycle management (CLM) is the process of managing contracts, from the creation through to execution, and eventually termination or renewal of the contract.

Key activities involved in contract management include contract drafting and clause negotiation, performance analysis to maximize operational and financial performance and risk mitigation; both financial and reputational (e.g., business relationships get damaged by defaulting on contract terms)

The Fundamentals of Contract Management

When two companies wish to do business with each other, a contract specifies the activities entered into by both organizations and the terms through which they will each fulfill their parts of the agreement. Contracts affect business profitability in a very large way due to the emphasis on revenue and expenses.

When a contract is phrased poorly, one organization might lose countless thousands of dollars over a simple technicality they lacked the resources to identify. Effective contract management can ultimately create a powerful business relationship and pave the road to greater profitability over the long term, but only when managed correctly.

Contract management also applies to managing different contracts with freelancers or employees. These occasionally require management and alterations that help both parties. Generally, contract management involves a few key stages. There is the early stage or pre-award phase. This is all the work that takes place prior to a contract being given to someone, whether it is a business or an employee.

The middle stage is when the process is awarded. This includes all the paperwork to make the agreement final. Third, there's the post-award

stage. This is where a lot of contract management and maintenance comes in. Those three basic stages are a simple way of looking at contract management in three phases, but the process is more complicated than that and can be viewed in more stages depending on how detailed a view you're taking.

9.2. Why is Contract Management Important?

Contracts are the foundation of business relationships. They spell out every aspect of a business deal or supplier relationship from start to finish. Contract management is the process of managing contract creation, execution, and analysis to maximize operational and financial performance at an organization, all while reducing financial risk. Organizations encounter an ever-increasing amount of pressure to reduce costs and improve company performance.

Contract management proves to be a very time-consuming element of business, which facilitates the need for an effective and automated contract management system.

9.3. Stages of Contract Lifecycle Management (CLM)

An average contract's lifecycle can be split into two distinct parts, pre-signature and post-signature, each coming with its own challenges and responsibilities.



Pre-Signature:

Pre-Signature encompasses the initial authoring of a contract, negotiations, editing, and approvals. This is largely a cross-departmental undertaking, relying mostly on manual tasks and negotiations.

Contract Initiation:

This is where the need for a contract is identified, and the contract lifecycle begins. Maybe you are starting to work with a new supplier

vendor, there needs to be a contract in place to set the guardrails for the business relationship.

Authoring:

The contract needs to be written. Consider this more of a rough draft than a final product. Doing this by hand can be a tedious and time-consuming process, but solutions like JAGGAER Contracts can automate the process.

Negotiation:

Both parties need to look at the proposed draft and rule out any changes that should be made. Certain clauses will need to be negotiated to ensure that each side is getting maximum value.

Editing:

After all negotiations are through, it's time to finalize those edits. Contract management software really comes in handy here by tracking all changes and allowing for easy comparison between versions.

Approval:

This is typically where the most bottlenecks occur. You need a clear process and set of workflows in place to keep the approvals process running smoothly. This can be aided by contract and workflow automation software.

Post-Signature:

Post-Signature deals with contract management and enforcement, along with the renewal and amendment process. This is ongoing throughout the entire length of the contract and details can easily be missed when dealing with a large volume of varyingly complex contracts.

Execution:

Now that the contract has been signed, it's time to execute the agreement. However, done manually, this can lead to quite a bit of risk and missed opportunities. Contracts can be quite lengthy, and some clauses can be hidden. Using contract management software can easily allow you to identify risky clauses or opportunities for more value.

Tracking:

Tracking performance across the entire contract lifecycle is crucial, not only to ensure compliance and you are getting the most value possible but also to inform you whether this is a contract worth renewing or terminating.

Auditing:

Occasionally, you should run a full audit of all open or recently closed contracts. This will give you an in-depth look at your contract performance, open clauses and what your next steps look like.

Reporting:

Tracking the data is one thing, but without a central and intuitive dashboard or repository the data will be hard to read and analyze. Good CLM software will give a “single source of truth” for your contract data and help to bring actionable insights to guide your decision-making.

Renewing:

While doing manually, companies miss out on renewal opportunities and lose thousands of dollars of potential value. Remember, many companies have upwards of 40,000 open contracts at a time, this makes it extremely difficult to track manually, but with automated workflows, we can always have one eye on upcoming expirations.

Check Your Progress-1

True/False

- a. Contract management or contract administration is the management of contracts made with customers, vendors, partners, or employees.
- b. Contracts are the foundation of business relationships.
- c. The contract needs not to be written.
- d. Occasionally, you should run a full audit of all open or recently closed contracts.
- e. Contract management software is an electronic approach to solving all of these manual problems.

9.4. Contract Management Software

Manual practice of filing contracts is full of inefficiencies and risks that take away from the incredible value that contract management can bring. Contract management software is an electronic approach to solving all of these manual problems. From organizing paperwork, authoring contracts, negotiating and redlining, managing dates, reporting on performance and automating workflows, contract management software can take the friction out of the entire contract lifecycle. Modern AI-Powered contract management can even use the power of AI to take clause authoring, risk management, and prescriptive analytics to the next level. Integrated contract management software can free up

countless man-hours and automate all of the processes associated with managing the contract lifecycle, creating more bottom-line value for a company.



Information about the contract and your contract management process - including both successes and shortcomings - that can help you improve your future agreements.

9.5. Benefits of Contract Management Software

Every business has a unique set of contract management problems and priorities. Determining what type of software your business should implement ultimately comes down to finding the solution that fits your budget, solves for your biggest contract management pain points, and provides a system you and your team will actually use.

No matter what type of solution you choose, here are some of the most significant benefits of contract management software:

1. Single source of truth

Contract management software provides one central location to store all of your organization's contracts, meaning every user knows exactly where to go to find the contract information they need.

Using contract management software prevents the issue of having multiple copies or versions of a contract floating around, which can cause confusion and lead to individuals working off of an outdated version of an agreement.

2. Greater contract visibility and insight

Businesses without contract management software often have to deal with misplaced contracts that are scattered across various desks, shared drives, and filing cabinets. Contract management software gives users the ability to search for any contract, clause, or keyword across your entire contract portfolio, and find exactly what you're looking for in seconds.

3. Reduced risk

Contract Management Software helps to reduce contract risk in a number of ways, including: Making it easier to track contract dates and deadlines - By scheduling alerts for key contract dates and deadlines, you can be sure you'll never get caught off guard when an automatic renewal deadline is approaching or a major contract deliverable is due.

- Providing stakeholders with critical contract insight - Contract management software enables you to run reports based on any metadata of interest, providing increased contract visibility and insight for department heads, leadership teams, and others. Now, the legal team isn't the only group keeping an eye on contract adherence and performance.
- Learning from - and not repeating - previous mistakes - Contract reporting also gives your team an easy way to analyze your portfolio to identify trends in past agreements. By isolating underperforming contracts, you can work to understand what those agreements have in common and look for ways to modify how future contracts are structured.

4. Time saving

One of the most important benefits of contract management software is that it saves our time, which then allows us to focus on higher-value activities. Manual Contract Management is tedious and time-consuming, but the majority of contract management software features are designed specifically to reduce our time.

- An online, searchable repository means you don't have to spend time digging through cabinets to find a contract or re-reading a 75-page agreement to find a specific clause or term
- Automated alerts eliminate the need to manually track important dates for hundreds or thousands of contracts
- Artificial intelligence features automatically identify and tag key pieces of information in your contracts, potentially saving you and your team from spending hundreds of hours manually entering these details
- Electronic signature features allow you to get contracts signed in minutes, reducing the time needed to execute new agreements
- Permission-based user roles give administrators the option of assigning varying levels of access to different groups and users, enabling your colleagues to find answers to their contract-related

questions without requiring your time and attention. Implementing dedicated contract management software streamlines the contract management process and enables key members of the legal department to spend less time on tedious contract management tasks and more time on strategic, high-value initiatives.

Contract administration and contract management represent two different stages of the contracting process, covering the periods before and after a contract is signed and put into effect. To ensure all of your organization's agreements are created, executed, organized, monitored, and optimized according to company standards, it is important to have strong contract administration and contract management processes and systems in place.

9.6. Contract Management - Best Practices

There are many different ways to approach contract management, and a plethora of solutions and methods for accomplishing our contracting goals. Here are seven contract management best practices that are applied to every situation, regardless of the size and complexity of your contract portfolio.

1. Keep all of your contracts in one place

To manage your contracts effectively, you have to know where they are. By keeping all of your organization's contracts in one location, you'll know exactly where to go to find an agreement or track down dates, terms, and other specific contract details.

2. Set and measure contract management KPIs

Setting and measuring contract management KPIs is the best way to determine how your contracts are performing and gives you a way to share that information with internal stakeholders. These KPIs also enable you to identify any ineffective parts of your contract management process and develop strategies to improve by reducing risks, eliminating unnecessary costs, or finding missed opportunities in your agreements.

3. Balance storage security and access

Legal departments and contract managers must find the right balance between contract security and access. Those who use contract management software have a secure online repository to house all of their sensitive contracts, and can easily assign varying levels of access so only specific users and groups can view certain files and folders. This

allows legal teams to share some of the contract management responsibilities without losing control of your repository.

4. Track contract approval time

The quicker you can move a contract through the approval process, the less time it takes to start seeing the value from that agreement. But, in order to optimize that process for greater efficiency, you first must have a system in place for monitoring it. Tracking contract approval time will help you understand your contract cycle and determine whether improvements are needed.

5. Automate contract communications

Today's contract management technology allows legal teams to automate many aspects of the contracting process, especially around communications.

For example, cloud-based repositories allow users to schedule and send specific individuals automated contract alerts and notifications, removing the need for manual reminders and unnecessary emails. And with the modern solutions available, many businesses have eliminated the process of physically sending documents back and forth for wet signatures, instead turning to electronic signature options for immediate action.

6. Conduct regular compliance reviews

One benefit of having a structured contract management process is the ability to improve your organization's compliance with industry regulations.

By regularly monitoring federal, state, and other legal regulations and ensuring your contracts adhere to those laws, you can protect your business from avoidable penalties and fines.

Regularly check for updates to the regulations that pertain to your company, and review active contracts to determine if action is needed to remain compliant.

7. Anticipate evolving business needs

Most businesses and their needs evolve over time, so it's important to anticipate those changes and adjust your contracts accordingly. If your business is growing quickly and you know your needs will be changing in short order, rather than simply renewing contracts for existing services, consider reviewing them closely to determine if it makes more sense to adjust or renegotiate based on your evolving needs.

9.7. Steps to Take to Improve Contract Management

If your contract management process is in need of improvement, or if you don't have a formal process in place at all, these three steps can put you on the fast track to contract management success.

1. Conduct an audit of all things contract related

Before you can start taking steps to solve your biggest contract management problems, you have to understand what those problems are. Conduct a contract management audit that includes all of the stakeholders, resources, and processes across your organization that impact how your contracts are handled from negotiation and creation to execution and management.

2. Develop a formal contract management framework

Using the findings from your audit, you can now put into place a structured approach to managing your contract portfolio. This framework should address every element of the contract management process and clearly define what should be happening at each stage.

The plan should also include things like roles and departments responsible for various contract-related tasks and processes, how contract management performance is measured, and any tools and systems that should be used during the contract management process.

3. Use technology to make it easier

Implementing dedicated contract management software can vastly improve your ability to manage your contract portfolio and all of your organization's contract-related deadlines and deliverables. Once your portfolio reaches a certain size or level of complexity, it becomes next to impossible to effectively track and act on every aspect of your contract management process using only manual tools and systems. With the right contract management software, your organization can regain control of your contract portfolio.

9.8. Case Study

Airtel Streamlines Complex Global Contract Management The global mobile operator wanted to automate and streamline the process of creating and managing contracts for business-critical operations in multiple countries. Icertis helped Airtel standardize its contract creation and approval process and enforce important service level agreements (SLAs) with contractors

The third-largest mobile provider in the world, with operations in more than 20 countries.

Business Challenge

The third-largest mobile provider in the world, with operations in more than 20 countries. A

\$14B global telecommunications company, Airtel outsourced the majority of its critical business operations. All the while, it manually generated a large number of complex contracts in multiple languages with no standardized templates or contract management process, no central storage location and limited visibility across the organization. Icertis delivered high ROI and enabled Airtel to get its contract management operations under control with a rapid implementation. Not monitoring supplier SLAs stringently could impact infrastructure, revenue and customers.

The Solution

Thanks to the flexible and intuitive nature of the Icertis platform, Airtel was able to quickly implement an organization-wide multilingual contract intelligence platform. The company standardized its library of clauses and templates and created a rules-driven selection process

Contracts now live in a central repository that is visible across the organization and includes analytics and reporting capabilities. What's more, Airtel can define SLA terms and capture periodic SLA data from contractors and evaluate that data against contract targets. It also created custom alerts to flag any SLAs at risk of getting off track

The Results

Airtel implemented a single contract intelligence platform at corporate headquarters in just a few months and then rolled it out across 15 countries. Now the organization can proactively track and enforce contract SLAs for better operational performance. With the organization-wide visibility and consistent process provided by the Icertis Contract Intelligence platform, Airtel now enjoys smoother contracting as well as the peace of mind that its contracts are well managed

Let Us Sum Up

In this unit, you have learned about the following:

- Contract management or contract administration is the management of contracts made with customers, vendors, partners, or employees. It can be summarized as the process of

systematically and efficiently managing contract creation, execution, and analysis for the purpose of maximizing financial and operational performance and minimizing risk.

- Contract management or contract lifecycle management (CLM) is the process of managing contracts, from the creation through to execution, and eventually termination or renewal of the contract. An average contract's lifecycle can be split into two distinct parts, pre-signature and post-signature, each coming with its own challenges and responsibilities.
- Traditionally you think of contract management, and you think of a filing cabinet and dozens of folders
- From organizing paperwork, authoring contracts, negotiating and redlining, managing dates, reporting on performance and automating workflows, contract management software can take the friction out of the entire contract lifecycle
- Every business has a unique set of contract management problems and priorities. Determining what type of software your business should implement ultimately comes down to finding the solution that fits your budget, solves for your biggest contract management pain points, and provides a system you and your team will actually use.
- If your contract management process is in need of improvement, or if you don't have a formal process in place at all, these three steps can put you on the fast track to contract management success.
- Implementing dedicated contract management software can vastly improve your ability to manage your contract portfolio and all of your organization's contract-related deadlines and deliverables.

Check Your Progress-2

1. Intellectual Property Rights (IPR) protect the use of information and ideas that are of
 - A. Ethical value
 - B. Moral value
 - C. Social value
 - D. Commercial value
2. The term 'Intellectual Property Rights' covers
 - A. Copyrights

- B. Know-how
 - C. Trade dress
 - D. All of the above
3. The following cannot be exploited by assigning or by licensing the rights to others.
- A. Patents
 - B. Designs
 - C. Trademark
 - D. All of the above
4. The following can be patented
- A. Machine
 - B. Process
 - C. Composition of matter
 - D. All of the above
5. In 'quid-pro-quo', quo stands for
- A. knowledge disclosed to the public
 - B. monopoly granted for the term of the patent
 - C. exclusive privilege of making, selling and using the invention
 - D. None of the above

Glossary

Contract: Agreement

Scalability: Effectiveness

Severity: Risk

Revenue : Income

Vendor : Partner

Answers to Check Your Progress-1

a-True

b-True

c-False

d-True

e-True

Answers to Check Your Progress-2

1. Commercial Value
2. All of the Above
3. Trademark
4. All of the Above
5. Monopoly Granted for the Term of the Patent

Suggested Readings

1. **Balachandran V.**, Legal Aspects of Business, Tata McGraw Hill, 2020
2. **Chakravarty, R., & Gogia, D.** Chakravartys intellectual property law: Ipr. NewDelhi:Ashoka Law House- 2010.

Unit-10

Laws of Agency; Principal-Agent Problem

STRUCTURE

Overview

Objectives

10.1. Introduction

10.2. Meaning of Agency act

10.3. Duties and rights of agent and principal

10.4. Kinds of agent

10.5. Creation of agency

10.6. Termination of agency

10.7. Agency Problem

10.8. Case study

Let Us Sum Up

Check Your Progress

Glossary

Answers to Check Your Progress

Overview

In this unit, the Meaning of Agency act, Duties and rights of agent and principal, Kinds of agent, Creation of agency, Termination of agency and Agency Problem has been clearly explained.

Objectives

After completion of this unit, you will be able:

- To state the meaning of agency
- To know the various types of agency
- To identify the ways of creation of agency
- To understand termination of agency
- To acquire the knowledge of agent and principal problems

10.1. Introduction

Indian Contract Act Sec 182 Defines

Agent: A person employed to do any act for another, or to represent another in dealing with the third party is called an agent. In simple words, an agent is a person who acts on behalf of some other person.

Principal: A person for whom such act is done (or) who is so represented, is called its principal. .In simple words, the principal is a person on whose behalf an agent acts.

Agency: The relationship between an agent & the principal is called agency which may be created by an express (or) implied agreement.

Example:- A appoints B to purchase 100 bags of rice on behalf .In this case A is the principal & B is the agent and the relationship between A & B is known as agency.

Essential of a Contract of Agency:-

An Agreement:-The agreement between the principal & agent is the first requirement of a contract of agency .The agreement may be express (or) implied.

Competency of Principal:- SEC 183 “ any person who is of the age of majority can be appoint as an agent so a minor (or) a person of unsound mind cannot employ an agent.

Sec 183 states that person who is the age of majority and is sound mind can become a principal. Thus a minor cannot act as a principal.

Consideration is Not Necessary:- SEC 185 provides that no consideration is required to create an agency. Generally an agent is remunerated by way of commission for his service rendered.

10.2. Duties and Rights of Agent and Principal

Duties of the Principal

1. To indemnify the agent against the problem of all lawful acts(Sec. 22);
2. To compensate the agent against the problem of acts done in good faith;
3. To indemnify the agent against any injury caused by principals;
4. To pay the agent his commission or other remuneration agreed for his services.

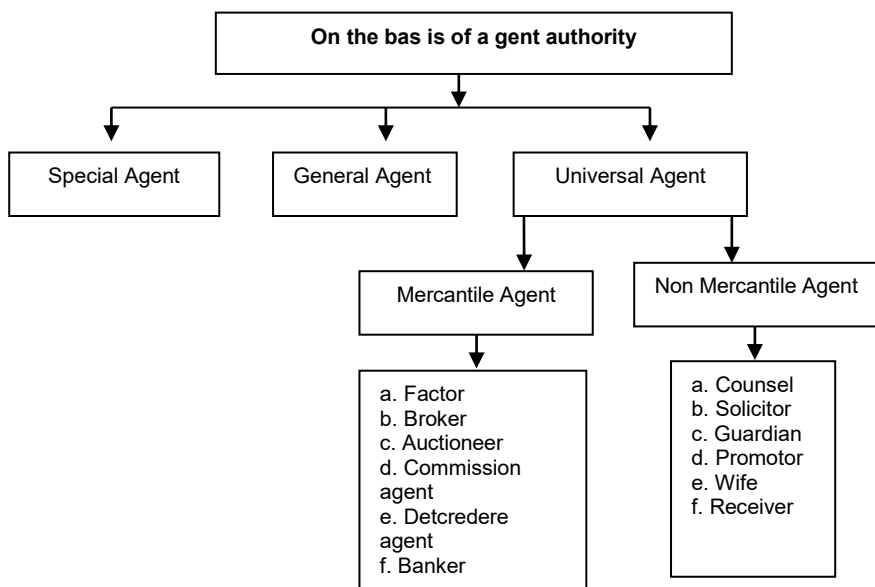
Rights of principal

- To see that the agency business is conducted according to his instructions and to be compensated for loss or any profit accruing owing to deviation from instructions;
- To be entitled to compensation in respect of the direct consequences of agent negligence(careless), want of skill or misconduct(sec 212);

- To get proper account from the agent when demanded by him(sec. 213);
- To repudiate the transaction, if a material fact is canceled by the agent, when dealing on his own account or when dealing by agent on his own account is disadvantageous to the principal(sec. 215);
- To claim any benefit gained by the agent while dealing of his own business (sec. 216).

10.3. Kinds of Agent

The term agent applies to anyone whose authority performs an act for another and includes many classes of persons to whom different manes are given. There may be various types of agents.



1. Special Agent:

A special agent is one who has the authority to do some particular act or represent his principal in some particular transaction. Such an agent has a limited authority and as soon as the act is performed the authority comes to an end. He has no authority to bind the principal in any matter other than that for which he is appointed.

2. General Agent:

A general agent is one who is employed to transact generally all the business of the principal in regard to which he is employed. Such an agent has the authority to do all acts connected with a trade or business. His authority is continuous and it continues till it is withdraw by the

principal. Any limitation on the general authority of the agent is not binding upon third parties unless they have a note of such restrictions.

In the absence of a notice of restriction, third parties have a right to assume certain acts to be within the apparent authority of the agent, whether they are within the scope of actual authority or not.

3. Universal Agent

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

A) Mercantile agent

A mercantile agent is an agent who has the authority to sell goods to consign goods for sale or to buy goods or to raise money on security of the goods on behalf of his principal. Some of the important mercantile agents are:

1. Factor

- He is one to whom the possession of goods is given to sell them.
- He usually sells the goods in his own name.
- He gets remuneration by way of factor age.
- He has wide powers to sell goods, receive payments and give receipts.

2. Broker

- A broker is also an agent appointed by a person to buy or sell goods on his behalf.
- But a broker is not given the possession of the goods.
- He is employed primarily to bring a contractual relationship between his principal and third party.

3. Auctioneer

- He is an agent appointed by a seller to sell his goods by public auction for a reward generally in the form of a commission.
- Primarily he is the agent of the seller.
- When the property has been knocked down, he becomes the agent of the buyer. He has the authority to receive the price of the goods sold and sue for it in his own name.

4. Commission agent:

- A commission agent is similar to a buyer.

- He paid commission on finding out seller or buyer of goods.
- He may or may not be entrusted with goods.
- He is engage to buy or sell goods at the best available terms.
- The duties and responsibilities of a commission agent depend upon his agreement with the principal.

5. Del-cruder agent:

- He is an agent who assumes a special commission for the responsibility of ensuring that the parties with whom his principal is brought into contractual relation will pay the money on due date.
- He occupies the position of a guarantor as well as the agent.
- But his liability is secondary arise only in case of insolvency or failure of principal deals with person about whom he knows nothing.
- However, Del cruder agent is not liable to the buyer for any default on the part of his principal.

6. Banker:

- Banker acts as an agent of the customer when he collects cheques or drafts or bills or buys or sell securities on behalf of his customer is that of debtor and creditor.
- But when the banker buys and sells securities, dividends etc.. on behalf of his customer, he also acts as an agent.

b. Non-mercantile agent:

- As a matter of fact they are agent who does not deal mercantile transaction. Such agents usually perform certain acts which are not done by mercantile agents. Some of the important non-mercantile agents are insurance agents, solicitors, guardian, promoter, wife, estate agents etc.,

Check Your Progress-1

True/False

- a. The agency by holding out is a kind of agency by estoppel.
- b. In simple words, an agent is a person who acts on behalf of some other person.
- c. A general agent is one who is employed to transact generally all the business of the principal in regard to which he is employed.

- d. A commission agent is not similar to a buyer.
- e. An agency may be created by an express agreement.

10.4. Creation of Agency

- By express agreement
- Agency by implied agreement
- Agency by estoppel:
- Agency by holding out
- Agency by necessity
- Husband wife relation
- Agency by operation of law
- Agency by ratification

1. Agency by express agreement:

An agency may be created by an express agreement. In this case, an agent is appointed by an agreement in writing (or) by words of mouth .It may, however , be noted that no particular form (or) set of words is required for the appointment of an agent.

Example: A entered into an agreement with B authorizing him to sell his (A'S) house for a particular amount .This is an express agency as B is appointed between A and B The usual form of written agreement is the “**POWER OF ATTORNEY**” executed on a stamp paper in favour of the agent. The power of attorney is a document which gives an authority to an agent to act , on behalf of the person who gives the authority , in accordance with the terms and conditions mentioned in it.(e-g) selling the land of the principal.

2. Agency by Implied Agreement:-

An implied agreement is one which arises from the contract, situation (or) relationship of the parties. Whenever one understood to represent (or) act for him, he becomes an implied agent.

Example : A and B Were brothers .A lives in Delhi &B in Chennai. B had flat in Delhi. .A with B'S knowledge let out his flat. A used to realize the monthly rent and remit the amount to B who was accepting the same in this case a is the agent of b through which he is appointed.

An agency by implied agreement includes the following:

1. Agency by estoppel:

Where a person by his conduct or words leads someone to believe that a certain state of affairs exists and induces him to act upon it, he is stopped from denying [refusing] that state of things subsequently.

Accordingly when an agent has without authority done acts (or) incurred obligation, such acts and obligation were within the scope of the agent's authority.

Example: A consigns(handover) goods to B for sale and gives him instruction not to sell under a fixed price .C being ignorant of such instruction enters into a contract with B to buy the goods at price lower than the fixed price. A is bound by the contract.

i. Agency by Holding out:-

The agency by holding out is a kind of agency by estoppel. However, it is something more than estoppel. In this case there is some prior positive (or) affirmative conduct of the principal, which indicates that a certain person was already his agent.

Example: "A" appointed "B" his agent to purchase goods from "C" on credit. After sometime, A terminated the service of B .subsequently. B purchase some goods in A'S name on credit from C. In this case, A is liable to pay the price of the goods purchased by B even after the termination of his authority . This is due to the reason that A did not inform C about the termination of B'S services.

ii. Agency by Necessity:-

An agency may also be created by the necessity of a particular case. Sometimes, extraordinary circumstance may arise in which a person may be compelled to act as an agent of some person without requiring the consent (or) authority of the same person. Such agency is called an agency by necessity. However to constitute a valid agency by necessity she followed conditions must be satisfied.

1. There must be real emergency and necessity to act on behalf of the principle.
2. The agent must not be in a position to communicate with the principle.
3. The agent must act honestly and in interest of principle

Example; A stored some furniture in B's house for free of charge. There after they lost the contacts with each other. After three years B needed the space occupied by the furniture. He obtained A's address from his bank and wrote two letters to him. But he received no reply. B then sold

the furniture. Subsequently A turned out and claimed he furniture from B. It was held that these was no agency by necessity as these was nothing in the nature of an emergency compelling B to sell the furniture.

10.5. Termination of Agency

- The term “termination of agency” may be defined as the end of the relationship of principal and his agent.
- The legal provisions relating to the termination of agency are contained in section 201 to 210 of the Indian Contract Act, and may broadly be grouped under the following two heads:

Termination of agency by act of the parties:

Agreement(mutual) between the principal and agent:

- The agency may be terminated by the mutual agreement between the principal and agent.
- As the parties(i.e.,) the principal and agent are free to make an agreement on agency, they are also at liberty to put an end to it.
- It may be noted that the parties may agree to terminate the agency relationship at any time and at any stage.

Example:

A appointed B, as his agent for the purpose of buying 50 chairs for him in five equal installments. B bought 10 chairs for A. Subsequently, A and B entered into an agreement putting an end to the agency relationship between them. In this case, the agency is terminated.

Revocation by the principal:

- The term “revocation” may be defined as the “cancellation.”
- The principal may revoke the authority of his agent and the revocation puts an end to the agency relationship.
- Sec. 207 provides that revocation may be express or implied from the conduct of the principal or agent respectively.

Example:

A authorized B an auctioneer, to sell his goods by auction. In this case A can B’s authority to cancel the sales of goods at any time before the action is completed by knocking down in favor of highest bidder (attempt to get).

- Revocation is subject to the following conditions;

Revocation operates prospectively:

- Even where the agent has partly exercised his authority, the principal, may cancel it for the future but principal cannot cancel the authority given to the agent as regards such acts and obligations as arise from acts already done in the agency.
- In *Kishni Devi V. State of Rajasthan*, AIR 1992 Raj 24, the Rajasthan high court has also held that the cancel of power of attorney does not affect the transaction already created.

Liability to Compensate:

- Where the agency is created for a fixed period, the principal may revoke (cancel) the agency before the expiry of the fixed period. However the principal may revoke the agency only if there in some sufficient cause for the same.
- The principal must make compensation to the agent for any revocation (cancellation) without sufficient notice.

Notice Proceeding To Revocation:

- Where the agency is continuous or for a fixed period, the principal must give to the agent, a reasonable notice of cancel of agency.
- If such a notice is not given, the principal will be liable to compensate the agent for any suffered by him.

Case: In *J.K. Sayani, V.Bright Bros.* AIR 1980 Mad 162, the reasonable notice for premature termination was not given, the madras high court allowed three month's salary as compensation in lieu of reasonable notice.

Renunciation of Agency Business by the Agent:

- The term "Renunciation" may be defined as the giving up.
- The agent may renounce the business of agency in the same manner in which the principal has right of cancel.
- And the renunciation puts an end to the agency relationship.
- The agent has been given this right to renounce the agency business because a person cannot be compelled to continue as agent against will.
- It may be expressed or implied.

Example: A appointed B as his agent, for the purpose of selling his house. Subsequently B renounces (giving up) the agency by tendering his resignation to A. In this case the agency is terminated by express renunciation by the agent.

Termination of agency by operation of law:

Completion of Agency Business:

- The agency relationship is terminated on the completion of agency business. Thus where an agency is for single transaction, the agency comes to an end on the completion of the transaction.
- It will be interesting to know that on the completion of the business, the agency is automatically terminated.

Death or insanity of the principal or the agent:

- The agency relationship is automatically terminated when either the principal or his agent dies.
- Moreover, the agency is also automatically terminated when either principal or his agent become of unsound mind.

Example: A appoint B as his agent to borrow some money on behalf. Before B borrowed the money, A died. In this case, the agency is automatically terminated and B has no authority to borrow the money.

Insolvency of the principal:

- The agency is terminated when the principal is declared as an insolvent.
- The reason for the same is that on the insolvency of a person, the insolvent is disqualified from entering into contract in respect of his property.

Expiry of time:

- Sometimes, the agency is created for a fixed time.
- In such cases, the agency is terminated on the expiry of that time.
- In this case, it is immaterial whether the purpose of agency is fulfilled or not within that period.

Example: A appointed B, as his agent, for the purpose of collecting money due to him from C. B was appointed for six months only. In this case, the agency is automatically

terminated on the expiry of six months. And thereafter, B will have no authority to collect money from C even if it has not been collected within the previous six months.

Destruction of subject matter of the agency:

- The agency is also terminated when the subject matter of the contract of agency is destroyed.

Example: A appointed B as his agent, for the purpose of purchasing a particular car. Before the purchase, the car was completely destroyed in an accidental fire. In this case, the agency is terminated and B authority to buy the car comes to an end.

Subsequent event rendering the agency lawful:

- Sometime the agency is valid when it is created.
- But it becomes unlawful (void) by happening of some subsequent event. E.g., where the agent and principal reside in different countries and a war is declared between these two countries.
- Similarly the agency may also be declared as unlawful by some Act of legislature.

Example: A wine merchant, appointed b as is agent for the purchase of liquor for him for one year. Subsequently the distillation of liquor was prohibited by an act of parliament and its sale and purchase was also banned. In this case, B's authority to purchase liquor comes to an end.

10.6. Agency Problem

Every organization has its own set of long-term and short-term goals and objectives that it wishes to achieve in a predetermined period. In this context, one must also note that the management's plans may not necessarily align with the stock holders.

The management of an organization may have goals that are most likely derived to maximize their benefits. On the other hand, an organization's stockholders are most likely interested in their wealth maximization. This contrast between the goals and objectives of the management and stockholders of an organization may often become a basis for agency problems. An agency problem is a conflict of interest inherent in any relationship where one party is expected to act in the best interest of another.

- Agency problems arise when incentives or motivations present themselves to an agent to not act in the full best interest of a principal.
- Through regulations or by incentivizing an agent to act in accordance with the principal's best interests, agency problems can be reduced.

10.7. Case Study

Real-World Example of an Agency Problem

In 2001, energy giant Enron filed for bankruptcy. Accounting reports had been fabricated to make the company appear to have more money than what was actually earned.

The company's executives used fraudulent accounting methods to hide debt in Enron's subsidiaries and overstate revenue. These falsifications allowed the company's stock price to increase during a time when executives were selling portions of their stock holdings.

In the four years leading up to Enron's bankruptcy filing, shareholders lost an estimated \$74 billion in value. Enron became the largest U.S. bankruptcy at that time with its \$63 billion in assets.

Although Enron's management had the responsibility to care for the shareholder's best interests, the agency problem resulted in management acting in their own best interest.

What Causes an Agency Problem? Agency problems arise during a relationship between a principal and an agent. Agents are commonly engaged by principals due to different skill levels, different employment positions, or restrictions on time and access.

The agency problem arises due to an issue with incentives and the presence of discretion in task completion. An agent may be motivated to act in a manner that is not favorable for the principal if the agent is presented with an incentive to act in this way.

What Is an Example of Agency Problem? In 2001, energy giant Enron filed for bankruptcy. Accounting reports had been fabricated to make the company appear to have more money than what was actually earned. These falsifications allowed the company's stock price to increase during a time when executives were selling portions of their stock holdings.

When Enron declared bankruptcy, it was the largest U.S. bankruptcy at that time. Although Enron's management had the responsibility to care

for the shareholder's best interests, the agency problem resulted in management acting in their own best interest.

How to Mitigate Agency Problems?

While it is not possible to eliminate the agency problem, principals can take steps to minimize the risk, known as agency cost, associated with it. Principal-agent relationships can be regulated, and often are, by contracts, or laws in the case of fiduciary settings. Another method is to incentivize an agent to act in better accordance with the principal's best interests.

For example, if an agent is paid not on an hourly basis but by the completion of a project, there is less incentive to not act in the principal's best interest.

Let Us Sum Up

In this unit, you have learned about the following:

- A person employed to do any act for another, or to represent another in dealing with the third party is called an agent
- A person for whom such act is done (or) who is so represented, is called is principal. In simple words, the principal is a person on whose behalf an agent acts.
- The relationship between an agent & the principal is called agency which may be created by an express (or) implied agreement.
- A special agent is one who has the authority to do some particular act or represent his principal in some particular transaction.
- A general agent is one who is employed to transact generally all the business of the principal in regard to which he is employed.
- A universal agent is one who is authorized to transact all the business of his principal of every kind and to do all acts which the principal can lawfully do and can delegate.
- A mercantile agent is an agent who has the authority to sell goods to consign goods for sale or to buy goods or to raise money on security of the goods on behalf of is principal. He is one to whom the possession of goods is given to sell them.
- A broker is also an agent appointed by a person to buy or sell goods on his behalf. He is an agent appointed by a seller to sell

his goods by public auction for a reward generally in the form of a commission.

- He is an agent who assumes a special commission for the responsibility of ensuring that the parties with whom his principal is brought into contractual relation will pay the money on due date.
- Banker acts as an agent of the customer when he collects cheque or drafts or bills or buys or sell securities on behalf of his customer is that of debtor and creditor.
- As a matter of fact they are agent who does not deal mercantile transaction. Such agents usually perform certain acts which are not done by mercantile agents.
- An implied agreement is one which arises from the contract, situation (or) relationship of the parties. Whenever one understood to represent (or) act for him, he becomes an implied agent.
- Where a person by his conduct or words leads someone to believe that a certain state of affairs exists and induces him to act upon it, he is stopped from denying [refusing] that state of things subsequently
- The term “revocation” may be defined as the “cancellation.”

Check Your Progress-2

1. Which of the following section in the Negotiable Instruments Act deals with the Bill of Exchange?
 - A. Section 5
 - B. Section 6
 - C. Section 4
 - D. Section 13
2. Which of the followings are not the Negotiable Instruments as defined by the Statute?
 - A. Banker's Note
 - B. Promissory Note
 - C. Bill of Exchange
 - D. Cheques
3. _____ means 'something legally transferable from one person to another for a consideration'.

- A. Instrument
 - B. Negotiable
 - C. Negotiable Instruments
 - D. All of the above
4. _____ means 'a written document by which some legal rights are created in favor of some person'
- a. Instrument
 - b. Negotiable
 - c. Negotiable Instruments
 - d. All of the above
5. Section 6 of the Negotiable Instruments Act defines _____
- A. Cheque
 - B. Bill of Exchange
 - C. Promissory Notes
 - D. Dishonour by non-payment

Glossary

- Estoppel:** Condition
- Agent:** One who work for other
- Principal:** One who assign the work
- Factorage:** Sort of commission
- Revocation:** Cancellation

Answers to Check Your Progress-1

- a-True
- b-True
- c-True
- d-False
- e-True

Answers to Check Your Progress-2

1. A. Section 5
2. A. Banker's Note
3. B. Negotiable
4. A. Instrument
5. A. Cheque

Suggested Reading

1. Basu, D.D. *Introduction to the Constitution of India* - 25/edition
Paperback – 1 January 2021
2. Daniel Albuquerque, *Legal Aspect of Business*, Oxford, 2020.

Unit-11

Bailment, Pledge, Guarantee and Indemnity

STRUCTURE

Overview

Objectives

11.1. Introduction

11.2. Essential Features of Contract of Bailment

11.3. Kinds of Bailment

11.4. Rights and Duties of Bailor and Bailee

11.5. Termination of Bailment

11.6. Contract of Pledge

11.7. Rights, Duties Pawner & Pawnee

11.8. Contract of Guarantee

11.9. Essentials of a Contract of Guarantee

11.10. Kinds of Guarantee

11.11. Contract of Indemnity

11.12. Essentials of Contract of Indemnity

11.13. Case Study

Let Us Sum Up

Check Your Progress

Glossaries

Answers to Check Your Progress

Suggested Readings

Overview

In this unit, the contract of bailment, essential features of bailment contract, kinds of bailment and the rights and duties of bailor and bailee, termination of bailment and contract of pledge, Right, duties of pawner and pawnee, the contract of guarantee, its essentials and the kinds of guarantee are covered and also the essentials of contract of indemnity has been clearly explained.

Objectives

After completion of this unit, you will be able:

- To state the meaning of contract of special contract
- To know the various types of special contracts

- To identify the essential elements of special contract
- To understand rights and duties of the special contract holders
- To acquire the knowledge of bailment, pledge, indemnity and guarantee

11.1. Introduction

The word 'Bailment' is derived from the French word 'Bailer' which means to deliver. The etymological meaning of bailment is "handing over" or "change of possession of goods". In legal sense, it involves change of possession of goods from one person to another for some specific purpose.

Bailment is a delivery of goods on condition that the recipient shall ultimately restore them to the Bailor or dispose of them according to the direction of the Bailee or dispose of them according to the direction of the Bailor.

According To Section 18 of Indian Contract Act, 1872

"It 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 bailor and the person to whom they are delivered is called bailee".

According to English Author David A.G. SARRE

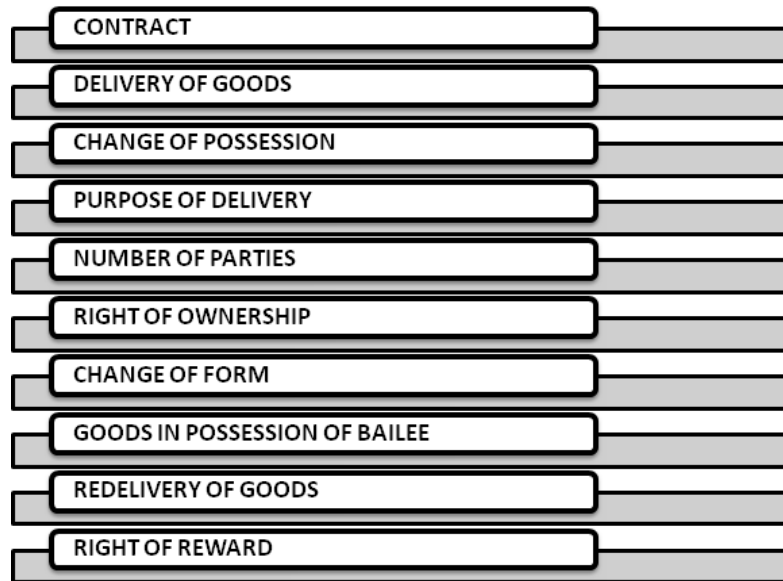
"Bailment is the delivery of goods by one person called the bailor to another, called the bailee on the conditions that same goods shall be redelivered by the bailee to or on the directions of the bailor".

Thus, the contract of bailment is a contract between two persons under which one person called the bailor delivers some goods for some purpose to another, called the bailee on the condition that the same goods shall be returned by the bailee to the bailor or according to his order on the fulfillment of the stated purpose.

Example: If A gives his car to B his neighbor for 10 days, but at the same time he keeps one key with himself and during this period of 10 days he used to take the car.

Now this will not be a case of bailment as A is keeping control over the property bailed.

11.2. Essential Features of Contract of Bailment



Contract

The first condition is that there must be a contract between the two parties for the delivery of goods. Such contract may be expressed or implied, written or oral.

Delivery of Goods

This contract is for the delivery of some movable goods from one person (bailor) to another person (bailee) or to his authorized agent. If the goods are immovable the contract will not be a contract of bailment.

Change of Possession

The possession of goods must be affected by such contract. Mere custody without possession is not a contract of bailment.

Purpose of Delivery

The delivery of the goods is for temporary purposes. It may be for safe-custody, repair and carriage or for gratuitous use by the bailee.

Number of Parties

There is two parties tinder such contract e.g., the bailor and bailee. The person delivering the goods is called the bailor and the person to whom the goods are bailed is called the bailee.

Right of Ownership

In a contract of bailment, the right of ownership remains with an owner (bailor) and is not changed. If the ownership is transferred, the contract will be a contract of sale and is not of bailment.

Change of Form

If the goods bailed are altered in form by the bailee, such as cloth. is converted into a shirt still, the contract is one of bailment.

Goods in Possession of Bailee

The delivery of the goods is not essential if the goods are already in the possession of the person who enters into the contract as bailee.

Redelivery of Goods

Under such contract, the goods are redelivered to the bailor or according to his directions upon the fulfillment of the purpose by the bailee.

Right of Reward

In a contract of bailment, both the parties bailor and the bailee can get a reward but it depends on the nature of the transaction.

11.3. Kinds of Bailment

Bailment for Safe-Custody

When the bailor delivers his goods to the bailee only for keeping it in his safe-custody, the bailment is said to be bailment for safe-custody.

Example: A delivers his camera to B to keep it in his safe-custody for six months. This will be the bailment for safe-custody.

Bailment for Use

If the bailor delivers the goods to the bailee to use it, the bailment will be the bailment for use

Example: A delivers his bicycle to B to use it for two days. This will be the example of bailment for use.

Bailment for Reward

Where the bailment is for use or for safe-custody and the bailee or bailor can charge for his

services, then it will be the case of bailment for.

Example: A delivers his bicycle to B to use it for two days for Rs.50 daily. This will be the bailment for a reward because Bailor (A) will get a reward for the use of a bicycle.

Gratuitous Bailment

Where the bailment is for safe-custody or for use and bailee does not charge anything, the bailment is a bailment for gratuitous.

Example: A delivers his bicycle to his friend B to use it for two days without reward. It will be the case of gratuitous bailment.

Bailment for Lost Goods

When a person finds out the lost goods of another has the same responsibilities as the bailee has against the goods the bailor. such implied bailment will be the case of bailment of lost goods. Under such conditions, the bailee is entitled to retain the goods until he receives compensation for the trouble and expenses he has to bear in order to find but the owner of the lost goods.

Example: A found the lost horse B and redelivered it to B. It will be the bailment for last goods.

Bailment for Pledge

When any moveable goods are given as security for the debt, to creditor by the debtor, it will be bailment for pledge until the repayment

Example: A gets a loan from B and hands over his B as security until the repayment of the loan. It will be the bailment for pledge.

11.4. Rights and Duties of Bailor and Bailee

The person delivering the goods is called the 'Bailor'. He is a party to the contract of bailment.

Duties of a Bailor

To Put Bailee into Possession (Section 149)

The delivery to be bailee may be made by doing anything which has the effect of putting the goods in the possession of the intended bailee or of any person authorized to hold them on his behalf.

To Disclose Material Faults (Section 150)

Section 150 of Indian Contract Act 1872 says that, the bailor is bound to disclose to the bailee faults in the goods bailed, of which the bailor is aware, and which materially interfere with the use of them, or expose the bailee to extraordinary risk; and if he does not make such disclosure, he is responsible for damage arising to the bailee directly from such faults.

Example: A lends a horse, which he knows to be vicious, to B. He does not disclose the fact that the horse is vicious. The horse runs away. B is thrown and injured. A is responsible to B for damage sustained.

To Pay Expenses of Bailment (Section.158)

Section 158 of the Indian Contract Act says that, where, by the conditions of the bailment, the goods are to be kept or to be carried, or

to have work done upon them by the bailee for the bailor, and the bailee is to receive no remuneration, the bailors shall repay to the bailee the necessary expenses incurred by him for the purpose of the bailment.

To Indemnify the Loss (Section 159)

Indemnity means promise to make good the loss. According to Section 159 of the Indian Contract Act 1872 bailor has a duty to indemnify the loss suffered by the bailee under the contract.

To Pay Damages For Non Disclosure (SECTION 150)

Second part of Section 150 of the said Act says that, if bailor does not make disclosure to the bailee faults in the goods bailed, he is responsible for damage arising to the bailee directly from such faults.

Example: A lends a horse, which he knows to be vicious, to B. He does not disclose the fact that the horse is vicious. The horse runs away. B is thrown and injured. A is responsible to B for damage sustained.

To Pay Damages for Defect in Bailor's Title (SECTION 164)

The bailor is responsible to the bailee for any loss which the bailee may sustain the reason that the bailor was not entitled to make the bailment, or to receive back the goods, or to give directions, respecting them.

Rights of a Bailor

As such Indian Contract Act, 1872 does not provide for Rights of a Bailor. But Rights of a Bailor is same as Duties of the Bailee i.e. Rights of Bailor = Duties of Bailee. So the rights of bailor are:

Enforcement of Bailee's Duty

Since the bailor delivers goods to the bailee for some specific purpose, the former, especially in case of **non-gratuitous bailment**, has an elemental right to achieve that purpose or obtain the benefit (i.e., performance) through the latter.

For example, if **X** delivers a suit length to **Y**, his tailor, to stitch a suit for him, **X** (bailor) will see that the tailor does the needful in the desired manner.

Right to claim damages (section 151):

In all cases of bailment, the bailor has the right to claim for damages against the loss, if any, caused to the goods bailed due to the bailee's negligence or misconduct.

Right to Termination of the Contract (Section 153)

If the bailee does not comply with the terms of the contract and acts in a negligent manner in such case the bailor has the right to rescind the contract.

Right to Claim Compensation

If the bailee uses the goods for an unauthorized purpose or mixes the goods which cause loss of goods in such case bailor has the right to claim compensation.

A good example for this is this situation, **A** lets **B** use his car but with a condition that only **B** shall drive. **B** allows **C**, a member of his family, to drive the car. **C** rides with care, but the car meets with some accident. Now **B** is liable to compensate for the damages caused. **Right To**

Demand The Return of Goods

It is the duty of the bailee to return the goods and the bailor has the right to demand the same.

Right to Demand Return of Goods along with Accretion to, If Any

The bailor enjoys the exclusive right to have the goods bailed delivered back to him in safe and sound condition after the time of bailment has expired or the purpose behind the bailment has been achieved. Moreover, in the absence of any contrary term in the contract, the bailor is also entitled to any accretion to the goods bailed if it occurred while the goods were in the custody of bailee.

For example, A leaves his brooding hen in the custody of **B** to be taken care of for a week. The hen has hatched the chicks. **A** is entitled not only to the hen but also to the chicks.

Duties of Bailee

Bailee has to fulfill several obligations as per Indian Contract Act, 1872. That is:

Duty to Take Reasonable Care (Section 151-152)

It is the duty of the bailee to take care of goods as his own goods. He shall ensure all safety measures that are necessary to protect the goods. The standard of care should be such as taken care by a prudent man. The goods shall be taken care of equally whether they are gratuitous or non-gratuitous. The Bailee shall be held liable for payment of compensation if he fails to take due care. But if the Bailee has taken due care and instead of that the goods are damaged then in such a situation

Bailee will not be liable to pay compensation. The Bailee is not liable for the loss of goods due to destruction by fire.

Duty not to make unauthorized use of the goods (section 153-154):

Bailee is duty bound to use the goods for a specific purpose only and not otherwise. If he uses the goods for any other purpose than what is agreed for then the bailor has the right to terminate such bailment or is entitled with compensation for damage caused due to unauthorized use.

Duty not to mix bailor's goods with his own goods (section 155-157):

It is the duty of the Bailee not to mix bailor's goods with his own. But if he wants to do the same then he shall seek consent from the bailor for mixing of goods. If the bailor agrees for the mixing of the goods then the interest in the mixed goods shall be shared in proportion.

In case, Bailee without the consent of bailor mixes the goods with his own then two situations arise: goods can be separated and goods can't be separated. In the former case the Bailee has to bear the cost of separation and in the latter case since there is the loss of the goods, therefore, bailor shall be entitled with damages of such loss.

Duty to return the goods on the fulfilment of purpose (section 160-161):

Bailee is duty bound to return the goods once the purpose is achieved or on the expiry of the time period for which the goods were bailed. But if the Bailee makes default in returning the goods on proper time then he will be responsible with the loss, destruction or deterioration of the goods if any.

Duty to deliver to the bailor increase or profit if any on the goods bailed (section 163): The Bailee has a duty to return the goods along with increase or profit subject to contract to the contrary.

Accretion that has accrued from the bailed goods is the part of the bailed goods and therefore bailor has the right over such accretions if any. And such accretions shall be handed over to the bailor along with the goods bailed.

For instance, A leaves a cow in the custody of B and cow gives birth to the calf. Then B is duty bound to hand over the bailed goods along with accretion to the bailor.

Rights of A Bailee

Right to recover expenses (section 158):

In the contract of Bailment, the Bailee incurs expenses to ensure the safety of goods. The Bailee has the right to recover such expenses from the bailor.

Right to remuneration:

When the goods are bailed to the Bailee he is entitled to receive certain remuneration for services that he has rendered. But in case of gratuitous bailment, the Bailee is not awarded any remuneration.

Right to recover compensation (section 168):

At times a situation arises wherein bailor did not have the capacity to contract for bailment. Such a contract causing loss to the Bailee, therefore the Bailee has the right to recover such compensation from the bailor.

Right to lien (section 170-171):

Bailee has the right over Lien. By this, we mean that if the bailor fails to make payment of remuneration or does not pay the amount due, the Bailee has the right to keep the goods bailed in his possession till the time debtor dues are cleared. Lien is of two types: particular lien and general lien. In the case of Surya Investment Co. v. S.T.C, the court held that expenses incurred by Bailee during preservation of goods under lien shall be borne by bailor.

Right to suit against a wrongdoer (section 180):

After the goods have been bailed and any third party deprives the Bailee of use of such goods, then the Bailee or bailor can bring an action against the third party.

Check Your Progress-1

True/False

- a. A pledge is only a special kind of bailment, and chief basis of distinction is the object of the contract.
- b. The word 'Bailment' is derived from the French word 'Bailer' which means to deliver.
- c. As such Indian Contract Act, 1872 does not provide for Rights of a Bailor.

- d. The goods shall be taken care of equally whether they are gratuitous or non-gratuitous.
- e. Bailee has no right over Lien.

11.5. Termination of Bailment

A contract of bailment can be terminated by any of the following;

- **Accomplishment of Purpose**

When the purpose for which goods were bailed” has been accomplished, the contract of bailment is terminated and goods are returned to the bailor.

- **Expiry of Time**

When the goods are bailed for a fixed time, the contract of bailment is terminated at the expiry of the time fixed.

- **Death of the Party**

A gratuitous bailment is terminated by the death either of the bailor

- **Bailee’s Inconsistent Act**

A contract of bailment ‘is voidable (terminated) at the option of the bailee does any act with regard to the goods bailed’ with the conditions of the bailment

11.6. Contract of Pledge

A pledge is only a special kind of bailment, and chief basis of distinction is the object of the contract. Where the object of the delivery of goods is to provide a security for a loan or for the fulfilment of an obligation, that kind of bailment is pledge.

According To Section 172 of Indian Contract Act, 1872

The bailment of goods as security for payment of a debt or performance of a promise is called “pledge”. The bailor is in this case called the “Pawnor”. The Bailee is called the “Pawnee”.

Example

Joseph is in urgent need of money so he deposits his gold watch to Michael as security for the money lent. This is a case of pledge whereby gold watch is bailed as a security for the amount lent. Here, Joseph is the pawnor and Michael is the pawnee.

Features of Contract of Pledge

Delivery of possession

One of the most basic but important characteristics of the pledge is that there should be the delivery of possession from one party to another. The property pledged should be delivered by the pawner to the pawnee. The delivery of the possession can be either actual or constructive.

In pursuance of the contract

It's an important feature of the pledge is that the delivery of the goods by the pawnor to the pawnee shall be done in pursuance to the contract of pledge. But it's important to note that that the contract for pledge and delivery of goods need not be contemporaneous, in sense that it's not necessary that contract for pledge and delivery has to be done at the same time, the delivery of goods can be done before which ripens the pledge as soon as the advance is made.

Who can pledge

Ordinarily, goods may be pledged either by the owner or any person with the owner's consent. Here, it's essential that the owner's consent is present for making the pledge like if the owner of the good left his possession to the maid & then maid makes the pledge then the pledge won't be a valid one as there was no consent of the owner.

Similarly, when the goods are left in possession of someone for some special purpose then also the goods can be pledged by that person. So to avoid confusion regarding who can pledge and does the consent of the owner is always necessary or not, the Indian Contract Act, have provided section 178 & 179 in that effect.

9.7 Rights of Pawner and Pawnee

A. Right to receive back the goods

The pawnor after the due payment of the debt has the right to receive back the goods which have been delivered to him as security. The underlying principle is that the basic motive of giving security is not to sell tat good to satisfy the claim but to give it as security to ensure that due payment is made.

And once the due payment is made the goods need to be returned. Now if the pawnee has sold the goods or is unable to return the goods then the debt against the pawnee shall be deemed to have been satisfied.

B. Pawnor's right to redeem

Pawnor's right to redeem is stated in section 177 of the Act. Section 177 states that "If a time is stipulated for the payment of the debt, of performance of the promise, for which the pledge is made, and the pawnor makes default in payment of the debt or performance of the promise at the stipulated time, he may redeem the goods pledged at any subsequent time before the actual sale of them; but he must, in that case, pay, in addition, any expenses which have arisen from his default."

The section states that if the pawnor fails in the payment of the debt at a stipulated time then he shall have the option to redeem his security any time before the sale takes place provided he shall be liable to pay the debt amount along with any additional expenses which the pawnee has incurred.

The principle is that Pawnee has the absolute right to redeem the property pledged upon tender of the amount advanced.

Where the Pawnee redeems the good after the fixed period of time, then he shall have extended liability of paying not only the debt amount but also any additional expenses which pawnor has incurred. Another aspect of his section is that, while redeeming of the goods, the pawnor has the right to take back not only the security but also any increase with the security which have taken place during the period of the pledge.

C. Right to suit

This right is indirectly discussed above that Pawnee has the right to sell but after giving reasonable notice. This right entails that the pawnor cannot sell that good as and when he wants but he should give some notice to the pawnor so that if he wants then he can pay the debt amount and free his security. So if the Pawnee makes any unauthorized sales then pawnor has the right to file the suit against that sale.

D. Care & maintenance

The Pawnee has the duty to take proper care and maintenance of the security so that the security doesn't depreciate its values as that would mean that pawnor incurs additional expenditure over & above the debt amount and that would be an injustice to him. Then, in that case, pawnor can ask pawnee to reduce the value of the debt to the amount to which the good has lost his value.

Rights of Pawnee /Pledge / Right of Lien (Sec 173)

When the goods are pledged the Pawnee gets a lien or right of retaining the goods until not only the principal amount is paid but also the Interest

and other expenses which the pawnee had to incurred with regard to keeping the goods pledge.

Rights of Retainer

Pawnee's right to retain the security has been discussed in section 173 & 174 of the Act. Section 173 states that Pawnee has the right to retain the goods not only for the payment of the debt but also for the interest of the debt or for any necessary expenses incurred for the preservation of the goods pledged. Also, section 174 of the Act states that Pawnee doesn't have the right to retain the goods for any other debt other than the one for which the security has been provided by the pawnor.

Right to Extraordinary Expenses

Right to extraordinary expenses has been stated in section 175 of the Act. The section states that "The pawnee is entitled to receive from the pawnor extraordinary expenses incurred by him for the preservation of the goods pledged." This section states that when the pawnor pledges ay good and the pawnee has to bear any extraordinary expenses regarding the preservation of the good, then he pawnee shall have the right to receive such expenses from the pawnor. But for such act, he doesn't have the right to retain the goods to recover them.

Right to Sell

Pawnee's right to sell the lodged goods has been stated in section 176 of the Act. the section states that "If the pawnor makes default in payment of the debt, or performance, at the stipulated time of the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale.

If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor." This section states that in case the pawnor fails in the repayment of the debt then pawnee shall have two options: –

Either bring the suit against the pawnor and retain the goods or,

Sell the goods so pledged after giving reasonable notice of the sale to the pawnor.

It further states if the Pawnee takes the second option then in that case three alternatives arise:-

If the amount received is more than the amount in debt, then, in that case, the pawnee shall pay back the excess amount to pawnor. If the amount received is less than the amount in debt then, in that case, pawnor will still be liable for the remaining of the amount. If the amount received is exactly the same to that of the amount in debt then, in that case, the debt will stand to be discharged.

Duties of Pawnor

Pay the debt: The pawnor is liable to pay the debt or perform his promise as the case may be.

Pay deficit on sale: If the Pawnee sells the goods due to default by the pawnor, the pawnor must pay the deficit.

Pay extra – ordinary expenses: The pawnor is liable to pay to the Pawnee any extraordinary expenses incurred by the Pawnee for preservation of goods.

Disclose faults in goods: The pawnor is liable to disclose all the faults which

- are material for use of the goods; or
- may put the Pawnee to extraordinary risks.

Indemnify the Pawnee: If loss is caused to the Pawnee due to defect in Pawnor's title to the goods, the pawnor must indemnify the pawnee.

Duties of a Pawnee

Not to use the goods: The Pawnee has no right to use the goods. However, he may use the goods, if he has been so authorized by the pawnor.

Return the goods: The Pawnee must return the goods if the pawnor pays the debt or performs his promise.

Take reasonable care: The pawnee must take such care of goods pledged as a man of ordinary prudence would take care of his own goods.

Not to mix goods: The pawnee must not mix his own goods with the goods pledged.

Return increase in goods:

The pawnee must return to the pawnor any accretion to the goods pledged with him.

11.8. Contract of Guarantee

Contract of Guarantee means a contract to perform the promises made or discharge the liabilities of the third person in case of his failure to discharge such liabilities.

According To Section 126 of Indian Contract Act, 1872

“A contract of guarantee is a contract to perform the promise or discharge the liability of the defaulting party in case he fails to fulfill his promise.”

Parties to Contract of Guarantee

There are three parties to the contract of guarantee:

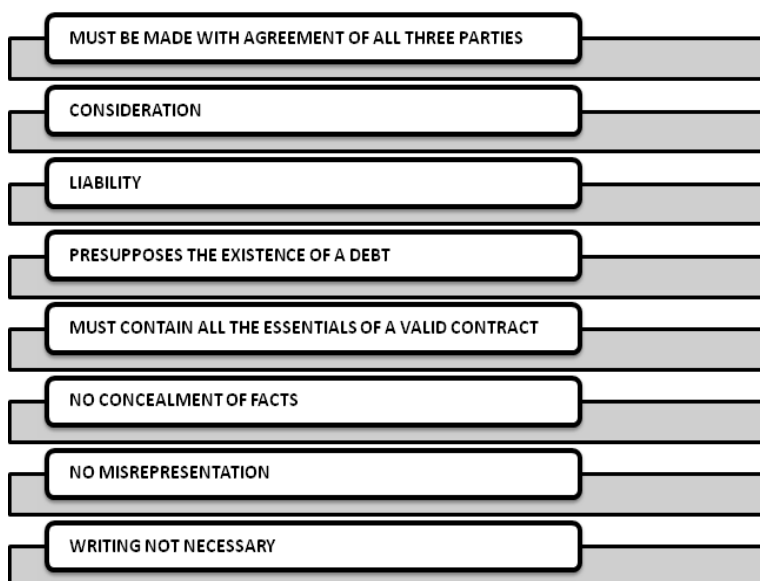
Surety: A surety is a person giving a guarantee in a contract of guarantee. A person who takes responsibility to pay a sum of money, perform any duty for another person in case that person fails to perform such work.

Principal Debtor: A principal debtor is a person for whom the guarantee is given in a contract of guarantee.

Creditor: The person to whom the guarantee is given is known as the creditor.

Example: Mr. X advances a loan of 25000 to Mr. Y and Mr. Z promise that in case Mr. Y fails to repay the loan, then he will repay the same. In this case of a contract of guarantee, Mr. X is a Creditor, Mr. Y is a principal debtor and Mr. Z is a Surety.

11.9. Essentials of a Contract of Guarantee



Must Be Made with the Agreement of all Three Parties

ALL the three parties to the contract i.e. the principal debtor, the creditor, and the surety must agree to make such a contract with the agreement of each other. Here it is important to note that the surety takes his responsibility to be liable for the debt of the principal debtor only on the request of the principal debtor. Hence communication either expressed or implied by the principal debtor to the surety is necessary. The communication of the surety with the creditor to enter into a contract of guarantee without the knowledge of the principal debtor will not constitute a contract of guarantee.

Example

Sam lends money to Akash. Sam is the creditor and Akash is the principal debtor. Sam approaches Raghav to act as the surety without any information to Akash. Raghav agrees. This is not valid.

- **Consideration**

According to *section 127* of the act, anything is done or any promise made for the benefit of the principal debtor is sufficient consideration to the surety for giving the guarantee. The consideration must be a fresh consideration given by the creditor and not a past consideration. It is not necessary that the guarantor must receive any consideration and sometimes even tolerance on the part of the creditor in case of default is also enough consideration.

In *State Bank of India v Premco Saw Mill(1983)*, the State Bank gave notice to the debtor- defendant and also threatened legal action against her, but her husband agreed to become surety and undertook to pay the liability and also executed a promissory note in favor of the State Bank and the Bank refrained from threatened action. It was held that such patience and acceptance on the bank's part constituted good consideration for the surety.

- **Liability**

In a contract of guarantee, the liability of a surety is secondary. This means that since the primary contract was between the creditor and principal debtor, the liability to fulfill the terms of the contract lies primarily with the principal debtor. It is only on the default of the principal debtor that the surety is liable to repay.

- **Presupposes The Existence of A Debt**

The main function of a contract of guarantee is to secure the payment of the debt taken by the principal debtor. If no such debt exists then there is

nothing left for the surety to secure. Hence in cases when the debt is time-barred or void, no liability of the surety arises. The House of Lords in the Scottish case of *Swan vs. Bank of Scotland (1836)* held that if there is no principal debt, no valid guarantee can exist.

- **Must contain all the Essentials of a Valid Contract**

Since a contract of guarantee is a type of contract, all the essentials of a valid contract will apply in contracts of guarantee as well. Thus, all the essential requirements of a valid contract such as free consent, valid consideration offer, and acceptance, intention to create a legal relationship etc are required to be fulfilled.

- **No Concealment of Facts**

The creditor should disclose to the surety the facts that are likely to affect the surety's liability. The guarantee obtained by the concealment of such facts is invalid. Thus, the guarantee is invalid if the creditor obtains it by the concealment of material facts.

- **No Misrepresentation**

The guarantee should not be obtained by misrepresenting the facts to the surety. Though the contract of guarantee is not a contract of *Uberrima fides* i.e., of absolute good faith, and thus, does not require complete disclosure of all the material facts by the principal debtor or creditor to the surety before he enters into a contract. But the facts, that are likely to affect the extent of surety's responsibility, must be truly represented.

- **Writing not Necessary**

A contract of guarantee may either be oral or written. It may be express or implied from the conduct of parties.

11.10. Kinds of Guarantee

Contracts of guarantees may be classified into two types:



Unilateral Contract of Commercial Credit

This is a type of contract of guarantee usually seen in trade transactions. It commonly arises between the wholesale trader and a retail trader. Also, it arises between a retail trader and the customer. In this type of guarantee contract, the goods are delivered against no payment but with an agreement. The agreement between parties is either written or oral. The agreement may or may not have any securities against discharge of the payment on a later date.

Bank Guarantee

This type of guarantee contract is common in the contracts of the Government. Also, it is common in tender for contracts. This type of guarantee contract is a commercial document. The bank guarantee is autonomous and is independent of the contract that is underlying. It is a guarantee from a bank against liabilities.

Letter of Credit

A letter of credit is an instrument which is written by one person to the other about giving of credit. The one who writes the letter, requests the other to give credit to the bearer of the letter or in whose favor the letter is drawn. In the international trade this practice is commonly seen. This can be general letter of credit which is drawn against merchants in general or special letter of credit which is drawn against a specific person with all the information enclosed.

Absolute Performance Bonds

Absolute means perfect and it also means complete. In this type of guarantee contract, the surety pays the amount written in the contract upon the failure to discharge the contract by the person against whom the guarantee is given.

Retrospective Guarantee

When the guarantee is given for an existing obligation or debt, it is called retrospective guarantee.

Prospective Guarantee

When the guarantee is given for a future obligation or debt it is called prospective guarantee.

Specific Guarantee

When a guarantee is given in respect of a single debt or specific transaction and is to come to an end when the guaranteed debt is paid

or the promise is duly performed, it is called a specific or simple guarantee.

Example

S is a bookseller who supplies a set of books to P, under the contract that if P does not pay for the books, his friend K would make the payment. This is a contract of specific guarantee and K's liability would come to an end, the moment the price of the books is paid to S.

Continuing Guarantee

A continuing guarantee is defined under *section 129 of the Indian Contract Act, 1872*. A continuing guarantee is a type of guarantee which applies to a series of transactions. It applies to all the transactions entered into by the principal debtor until it is revoked by the surety. Therefore Bankers always prefer to have a continuing guarantee so that the guarantor's liability is not limited to the original advances and would also extend to all subsequent debts.

Example

On M's recommendation S, a wealthy landlord employs P as his estate manager. It was the duty of P to collect rent every month from the tenants of S and remit the same to S before the 15th of each month. M, guarantee this arrangement and promises to make good any default made by P. This is a contract of continuing guarantee.

The most important feature of a continuing guarantee is that it applies to a series of separable, distinct transactions. Therefore, when a guarantee is given for an entire consideration, it cannot be termed as a continuing guarantee.

Revocation of Continuing Guarantee

So far as a guarantee given for an existing debt is concerned, it cannot be revoked, as once an offer is accepted it becomes final. However, a continuing guarantee can be revoked for future transactions. In that case, the surety shall be liable for those transactions which have already taken place.

A contract of guarantee can be revoked in the following two ways:

By giving a notice (Section 130)

Continuing guarantees can be revoked by giving notice to the Creditor but this applies only to future transactions. Just by giving a notice the surety cannot waive off his responsibility and still remains liable for all the transactions that have been placed before the notice was given by

him. If the contract of guarantee includes a clause that a notice of a certain period of time is required before the contract can be revoked, then the surety must comply with the same as said in *Offord v Davies (1862)*.

Illustration

A guarantees to B to the extent of Rs. 10,000 that C shall pay for all the goods bought by him during the next three months. B sells goods worth Rs. 6,000 to C. A gives notice of revocation, C is liable for Rs. 6,000. If any goods are sold to C after the notice of revocation, A shall not be liable for that.

By Death of Surety(Section 131)

Unless there is a contract to the contrary, the death of surety operates as a revocation of the continuing guarantee in respect to the transactions taking place after the death of surety due to the absence of a contract. However, his legal representatives will continue to be liable for transactions entered into before his death. The estate of deceased surety is, however, liable for those transactions which had already taken place during the lifetime of the deceased. Surety's estate will not be liable for the transactions taking after the death of surety even if the creditor had no knowledge of surety's death.

11.11. Contract of Indemnity

The term Indemnity literally means "Security against loss". In a contract of indemnity one party– i.e. the indemnifier promise to compensate the other party i.e. the indemnified against the loss suffered by the other.

According To English Law

"It is a promise to save a person harmless from the consequences of an act".

Thus it includes within its scope losses caused not merely by human agency but also those caused by accident or fire or other natural calamities.

According To Section 124 of Indian Contract Act

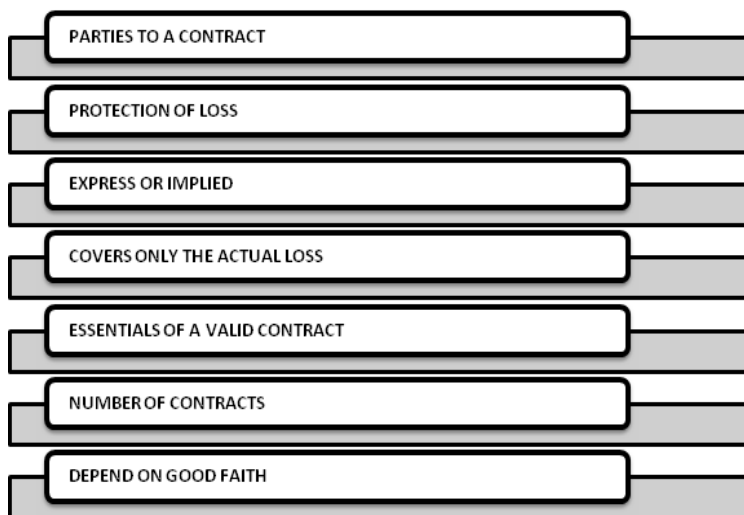
"A contract, by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a contract of indemnity." The definition provided by the Indian Contract Act confines itself to the losses occasioned due to the act of the promisor or due to the act of any other person.

Section 124 deals with one particular kind of indemnity which arises from a promise made by an indemnifier to save the indemnified from the loss caused to him by the conduct of the indemnifier himself or by the conduct of any other person, but does not deal with those classes of cases where the indemnity arises from loss caused by events or accidents which do not depend upon the conduct of indemnifier or any other person.

Example:

A contracts to indemnify B against the 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.

11.12. Essentials of Contract of Indemnity



Parties to a contract:

There must be two parties, namely, promisor or indemnifier and the promisee or indemnified or indemnity-holder.

Protection of loss:

A contract of indemnity is entered into for the purpose of protecting the promisee from the loss. The loss may be caused due to the conduct of the promisor or any other person.

Express or implied:

The contract of indemnity may be express (i.e. Made by words spoken or written) or implied (i.e. Inferred from the conduct of the parties or circumstances of the particular case).

Covers only the actual loss:

It covers only the actual loss may be due to the promisor himself or any other person and it covers only the loss caused by an event mentioned in the contract. The event mentioned in the contract must happen.

Rights of Promisee/ The Indemnified/ Indemnity Holder When Sued

As per Section 125 of the Indian Contract Act, 1872 the following rights are available to the promisee/ the indemnified/ indemnity-holder against the promisor/ indemnifier, provided he has acted within the scope of his authority.

1. Right to recover damages paid in a suit [section 125(1)]

An indemnity-holder has the right to recover from the indemnifier all damages which he may be compelled to pay in any suit in respect of any matter to which the contract of indemnity applies.

- The Damages are
- Ordinary Damages.
- Special Damages
- Explanatory Damages

2. Right to Recover Costs Incurred in Defending a Suit [Section 125(2)]

An indemnity-holder has the right to recover from the indemnifier all costs which he may be compelled to pay in any such suit. When it comes to the quantum of such costs that can be so claimed from the indemnifier, the courts have interpreted this relationship and concluded on various lines so as to iron out the confusions. First is the situation of kinds of costs that arise while defending or fighting a suit in a court of law. In such a case, the indemnity holder, as decided by the courts, would be entitled to reasonably incurred costs.

Such expenses do arise while reducing or ascertaining or resisting the claim. Hence, the cost of such a nature can be recovered. The second situation can be best understood from a hypothetical arrangement. Suppose, the indemnity- holder faces a proceeding for claim over a movable property say a watch. For such a matter, a hotshot lawyer was being engaged and huge travel and food expenses were being incurred by the indemnity holder. The question arises, should such a person be entitled to the costs that the law so benevolently provides to the indemnity- holders. The conscience would say no. And so did the judicial conscience. This was categorically held that only those costs would be

recoverable that are supposed to be incurred by a **prudent man**. This is the reason that the fees of the pleader that the indemnified may ask for should be reasonable. If a vendee has been given indemnity from the vendor of the property against litigation, the former can claim the fees of the lawyer, subject to the condition that the same is **not unreasonable** and beyond basis.

3. Right to Recover Sums Paid Under Compromise [Section 125(3)]

This subpart is similar to that of the second sub-part of costs. But, this situation is being envisaged to arise that under a **compromise**. For this arrangement as well, the promisee would become entitled to such amounts that-The Promisor has specifically authorized the promisee to do it.

The compromise is not to be against the orders of the promisor and the action has been taken in a prudent manner.

Like the principle of *res judicata* could not be brought by the promisor in the case of damages, here as well, the promisor cannot shrug off his/her responsibility that he/she is not liable for paying the amount since he/ she is not a party to the relationship. In the landmark case of **Alla Venkataramanna v. Palacherla Manqamma**, the court laid down the conditions for the claim by the promisee, in this case, to be valid. If the indemnity holder genuinely wants the amount to be recovered, certain conditions with respect to the compromise so effected would have to fulfill:

The compromise should have been put to effect in a bonafide manner. It has been resolved without any sort of collusion. It has not been impeached as an immoral bargain. All these rights would arise in the sole situation of the indemnity holder getting sued at the hands of any third party.

11.13. Case Study

In *P.J. Rajappan v Associated Industries (1983)* the guarantor, having not signed the contract of guarantee, wanted to wriggle out of the situation. He said that he did not stand as a surety for the performance of the contract. Evidence showed the involvement of the guarantor in the deal and had promised to sign the contract later.

The Kerala High Court held that a contract of guarantee is a tripartite agreement, involving the principal debtor, surety and the creditor. In a case where there is evidence of the involvement of the guarantor, the mere failure on his part in not signing the agreement is not sufficient to demolish otherwise acceptable evidence of his involvement in the

transaction leading to the conclusion that he guaranteed the due performance of the contract by the principal debtor. When a court has to decide whether a person has actually guaranteed the due performance of the contract by the principal debtor all the circumstances concerning the transactions will have to be necessarily considered.

Let Us Sum Up

In this unit, you have studied about the following:

- The word 'Bailment' is derived from the French word 'Bailer' which means to deliver. The etymological meaning of bailment is "handing over" or "change of possession of goods".
- A pledge is only a special kind of bailment, and chief basis of distinction is the object of the contract. Where the object of the delivery of goods is to provide a security for a loan or for the fulfillment of an obligation
- The bailment of goods as security for payment of a debt or performance of a promise is called "pledge". The bailor is in this case called the "Pawnor". The Bailee is called the "Pawnee".
- The pawnor after the due payment of the debt has the right to receive back the goods which have been delivered to him as security.
- The term Indemnity literally means "Security against loss". In a contract of indemnity one party – i.e. the indemnifier promise to compensate the other party i.e. the indemnified against the loss suffered by the other.
- As per Section 125 of the Indian Contract Act, 1872 the following rights are available to the promisee/ the indemnified/ indemnity-holder against the promisor/ indemnifier, provided he has acted within the scope of his authority.
- This type of guarantee contract is common in the contracts of the Government. Also, it is common in tender for contracts.
- A letter of credit is an instrument which is written by one person to the other about giving of credit. The one who writes the letter, requests the other to give credit to the bearer of the letter or in whose favor the letter is drawn.

Check Your Progress-2

1. A director's election takes place in a general meeting through a separated Resolution passed by a _____ majority

- [A] single
[B] two-thirds
[C] three-fourths
[D] five-sixths
2. The total managerial remuneration to the directors and the manager in respect of any financial year must not exceed _____ percent of the net profit.
- [A] one
[B] three
[C] eleven
[D] ten
3. Where a company has three directors, the maximum remuneration payable to all of them is _____% of the annual net profit
- [A] 5.
[B] 10.
[C] 20.
[D] 25.
4. A person cannot act as managing director of more than _____ company /companies at a time
- [A] one
[B] two
[C] four
[D] five
5. The partnership entity may be regarded as _____.
- [A] a legal entity .
[B] an accountable entity .
[C] both a legal and accountable entity .
[D] neither a legal nor an accountable entity

Glossary

Bailment: Safe keeping

Pledge: Undertake

Guarantee: Promise

Indemnity: Security

Surety: Assurance

Answers to Check Your Progress-1

- a-True
- b-True
- c-True
- d-True
- e-False

Answers to Check Your Progress-2

1. [A] single
2. [C] eleven
3. [B] 10.
4. [B] two
5. [D] neither a legal nor an accountable entity

Suggested Readings

1. Vinod, K. Singhania, *Direct Taxes Planning and Management*, 2008.
2. Pandey, J.N. *Constitutional Law of India*, 57th Edition, 2020.

Block-4: Introduction

The Block-4: Transfer of Ownership and Property has been divided in to four Units (Unit-12 to Unit-15). Unit-12: Sales of Goods – Principles of Sales of Goods deals with Introduction, Unpaid seller, Rights of unpaid seller, Different between sales and agreement to sales, Different between sales and agreement to sales, Condition and warranties, Goods, Transfer of ownership and property and case study.

Unit-13: **Transfer of Ownership and Property 1882-Performance of Contract explains** about Introduction, Properties that cannot be transferred under Transfer of Property Act, Responsibilities of the seller during transfer of property under Transfer of Property Act, Duties of the buyer during transfer of property under Transfer of Property Act, Rules Regarding Transfer of Property, Performance of Contract, The tender of performance must be made at a proper time and place and Case study.

Unit-14: **Consumer Protection Laws-Law Relating to Business Organizations** describes about Introduction and Rights of Consumers, Duties of a Consumer, Consumer Disputes Redressal Commission, Jurisdiction under the Consumer Protection Act, Remedial Action, Fees for Filing Complaints, Importance of Consumer Protection Act, To Set Up Consumer Grievance Redressal Mechanism, Grievance Redressal Mechanism and Case study.

Unit-15: Partnership Trusts- Company Form of Organization presents about Introduction, Types of business organization, Sole proprietorship, Partnership Act-1932, Formation of Partnership, Procedure for Registration, Corporation, Limited Liability Company (LLC) and Case Study.

In all the units of Block -4 **Transfer of Ownership and Property**, the Check your progress, Glossary, Answers to Check your progress and Suggested Reading has been provided and the Learners are expected to attempt all the Check your progress as part of study.

Unit-12

Sales of Goods – Principles of Sales of Goods

STRUCTURE

Overview

Objectives

12.1. Introduction

12.2. Unpaid seller

12.3. Rights of unpaid seller

12.4. Different between sales and agreement to sales

12.5. Different between sales and agreement to sales

12.6. Condition and warranties

12.7. Goods

12.8. Transfer of ownership and property

12.9. Case study

Let Us Sum Up

Check Your Progress

Glossary

Answers to Check Your Progress

Suggested Readings

Overview

In this unit, unpaid seller and the rights of an unpaid seller , the difference between sales and agreement to sales and sales and hire purchase are covered and also condition and warranties are clearly explained.

Objectives

After completion of this unit, you will be able:

- To state the meaning of sale of contract
- To know the various types of condition and warranties
- To identify the essential elements of sales contract
- To understand the rights of unpaid seller
- To acquire the knowledge of sales , agreement ,hire purchase and caveat emptor

12.1. Introduction

Sale of Goods Act, 1930. [It extends to the whole of India (except the State of Jammu and Kashmir).] It shall come into force on the 1st day of July, 1930.

Definitions.—In this Act, unless there is anything repugnant in the subject or context,—

- “buyer” means a person who buys or agrees to buy goods;
- “delivery” means voluntary transfer of possession from one person to another;
- goods are said to be in a “deliverable state” when they are in such state that the buyer would under the contract be bound to take delivery of them;
- “document of title to goods” includes a bill of lading, dock warrant, warehouse keeper’s certificate, wharfingers’ certificate, railway receipt, ⁵[multimodal transport document,] warrant or order for the delivery of goods and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented;
- “fault” means wrongful act or default;
- “future goods” means goods to be manufactured or produced or acquired by the seller after the making of the contract of sale;
- “goods” means every kind of moveable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale;
- a person is said to be “insolvent” who has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of insolvency or not;
- “mercantile agent” means a mercantile agent having in the customary course of business as such agent authority either to sell goods, or to consign goods for the purposes of sale, or to buy goods, or to raise money on the security of goods;
- “price” means the money consideration for a sale of goods;.

12.2. Unpaid Seller

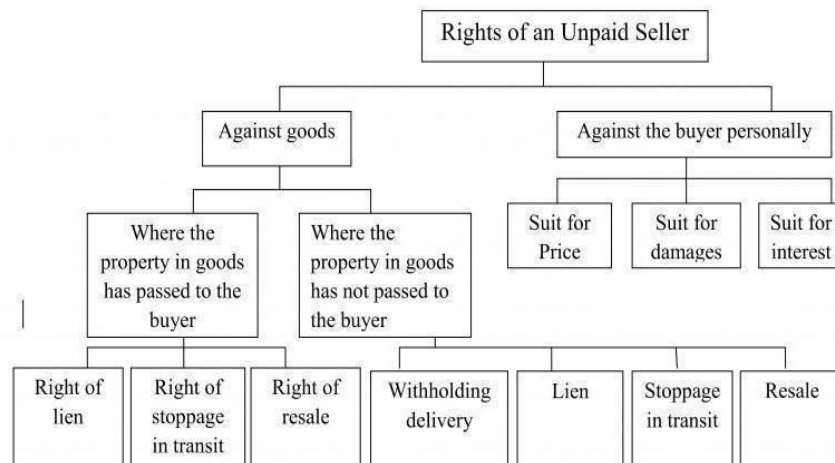
He is the seller to whom:-

- Whole of the price is not paid
- Conditional payment

Bill of exchange/ promissory note/ cheque has been received by seller but it dishonours. Till the time bill of exchange/ promissory note/ cheque is with the seller so, till that time he is only called as seller but when any of the mentioned instruments dishonours then after this seller is called unpaid seller.

Features of an unpaid seller

- Seller must sell the goods on cash basis and must be unpaid (in cash transactions payment becomes due instantly)
- Seller must be unpaid either wholly or party
- The decided period has expired and the price has not been paid to seller
- Seller must not refuse to accept the payment
- Where the price paid through negotiable instrument (bill of exchange/ promissory note/ cheque) and the same has been dishonoured.



Example: A sells his bike to B for Rs. 60,000 and receives a cheque for the price. Till this time seller will only be called as seller. But when subsequently, the cheque is dishonoured due to insufficiency of funds in B's bank account, then only A becomes an unpaid seller

11.3. Rights of an Unpaid Seller

According to sec 45(1) of sale of goods act, seller of the goods is deemed to be unpaid seller: (a) when whole of the price has not been tendered or paid, or (b) when bill of exchange or negotiable instrument has been received as a conditional payment.

Section 45(2) says the term seller include any person who is in position of seller, agent who himself pay or is directly responsible for the price Or an agent of the seller to whom bill of lading has been endorsed, or a consignor or agent who himself paid or is directly responsible for the price and the seller of goods can be deemed to be an unpaid seller if the price become due but they are not paid. He must have an immediate right of action for the price. Bill of exchange or negotiable instrument was received but was dishonoured.

We can broadly classify the rights of an unpaid seller under the following two categories:

- Rights against goods.
- Rights against the buyer personally.
- **Rights Against Goods**

Section 46 of the Sale of Goods Act addresses the rights of an unpaid seller whose property in the goods has not yet been transferred to the buyer. The unpaid seller has the following

3+ 1 = 4 rights:

Right of lien

Right of stoppage of goods in transit

Right to resale the goods

Withholding delivery (When the possession of the goods has not passed to the buyer, the unpaid seller has an additional right of withholding delivery besides the three rights outlined above.)

Here's more about these four rights one by one.

- **What is the Right of Lien**

The right of lien means the right to keep possession of the goods until the seller receives the due price.

Section 47 of the Sale of Goods Act provides that an unpaid seller (as agent or bailee of the buyer) in possession of the goods has the right

to keep possession of the goods until payment or tender of the price in the following cases:

Where the goods have been sold with no stipulation to credit, or where the goods have been sold on credit, but the term of credit has expired, or where the buyer becomes insolvent. Further, section 48 of the Sale of Goods Act provides that despite the partial delivery of goods by the unpaid seller, section 48 authorizes him to exercise his lien right on the rest. In **Grice vs Richardson (1877)**, the sellers had delivered a portion of the three bags of tea under a contract of sale but had not been paid for the rest. Therefore, they could keep them until the buyer paid the price.

- **Termination of Lien**

The unpaid seller of the goods loses his right of lien in the following cases:

When he delivers the goods to a carrier or other bailee for delivery to the buyer without reserving the right of disposal of the goods, or When the buyer or his agent lawfully gets possession of the goods, or When the seller waives his right of lien, or When the buyer disposes of the goods by sale or in any other manner with the consent of the seller, or Where a document of title to goods has been issued or lawfully transferred to any person as buyer or owner of the goods, and the buyer then transfers the document by sale to someone taking it in good faith and for consideration.

- **What is Right to Stoppage of Goods in Transit**

The unpaid seller delivered the goods to the carrier for transmission to the buyer, and in the meantime, the buyer becomes insolvent, then the seller has the right to stop and retain the goods in transit. Thus, the unpaid seller resumes possession of the goods as long as it is in transit.

The unpaid seller can exercise the right of stoppage in transit only if he fulfills the following conditions:

- The seller must have parted with the possession of goods, i.e., the goods must not be in the seller's possession.
- The goods must be in transit.
- The buyer must have become insolvent.

- **Duration of Transit**

As per section 51 of the Sale of Goods Act, the goods are in transit when they are delivered to a carrier or bailee for transmission to the buyer and until the buyer or his agents, on his behalf, take the delivery of those goods.

The unpaid seller loses the right to stoppage in transit in the following cases:

When the goods reach the destination, or

If the buyer or his agent on his behalf receives the goods before they reach their destination, or

If the carrier or other bailee admits to the buyer or his agent that he has the goods on his behalf and continues to possess them after the items arrive at the designated destination, the transit is complete, or

If the carrier or other bailee wrongfully refuses to deliver the goods to the buyer or his agent on his behalf, or

If they deliver part of the product to the buyer or his agent, the unpaid seller may hold the rest of the shipment in transit if the portion transfer does not enable the buyer to relinquish possession of the goods, or

If the seller has consented to the sub-sale or other disposition with the buyer.

Section 52 of the Sale of Goods Act provides that the unpaid seller may exercise his right of stoppage in transit either:

By taking the actual position of the goods, or

By giving notice of his claim to the carrier or other bailee under whose possession the goods are.

- **What Is the Right to Resale the Goods**

As per section 46(1) of the Sale of Goods Act, under the following circumstances, the unpaid seller may resell the goods, if the goods are:

Of a perishable nature, or

When the unpaid seller exercised his right to lien or stoppage in transit and gave notice to the buyer of his intention to resale.

We must note here that in such cases, on reselling the goods, it also entitles the seller to: Recover the difference between the contract price and the resale price from the original buyer as damage.

Keep the profit if the resale price is higher than the contract price. But if the unpaid seller does not give any notice that shall not entitle such unpaid seller to recover such damages, and the buyer can claim the profit on the resale.

- **What Is Withholding Delivery**

As per section 46(2) of the Sale of Goods Act, where the property in goods has not passed to the buyer, the unpaid seller has, besides other remedies, a right to withhold the delivery.

- **Rights against the Buyer Personally**

It is also known as the seller's remedy for the breach of a contract of sale. These rights are as follows:

- Suit for price
- Suit for damages for non-acceptance
- Suit for damages for repudiation of the contract
- Suit for interest
- Let us learn more about these four rights.

- **Suit for Price**

As per section 55 of the Sale of Goods Act, if the property in the goods has passed to the buyer and he neglects or refuses to pay for it according to the contract, the seller may sue him for the price of the goods.

- **Suit for Damages for Non-acceptance**

As per section 56 of the Sale of Goods Act, where the buyer wrongfully neglects or refuses to accept the goods and pay for the goods, the seller may sue him for damages for non- acceptance of the goods. For the measure of damages, section 73 of the Indian Contract Act, 1872 applies.

- **Suit for Damages for Repudiation of the Contract**

As per section 60 of the Sale of Goods Act, if the buyer repudiates the contract before the due date for delivery, the seller may treat the contract as subsisting (maintain, survive, keep active) and wait until

the due date of delivery or treat the contract as rescinded (revoke, cancel) and seek damages for the breach.

- **Suit for Interest**

As per section 61(2) of the Sale of Goods Act, a seller may sue the buyer for interest or special damages in the event of a breach of contract while suing for an amount owed to him.

Check Your Progress-1

True/False

- Hire Purchase system is a system in which the goods are delivered to the purchaser at the time of agreement before the payment of installments.
- Delivery means voluntary transfer of possession from one person to another
- Bill of exchange/ promissory note/ cheque has been received by seller but it dishonours.
- The right of lien means the right to keep possession of the goods until the seller receives the due price.
- The 'contract of sale' is not a generic term which includes both sale and an agreement to sell.

12.4. Difference between Sale and Agreement to Sell

Contract of sale of goods

Under Indian Sale of Goods Act 1930, section 4 (3) deals with the contract of sale and agreement to sell, where it has been clarified that the agreement to sell also come under sale.

BASIS FOR COMPARISON	SALE	AGREEMENT TO SELL
Meaning	When in a contract of sale, the exchange of goods for money consideration takes place immediately, it is known as sale.	When in a contract of sale the parties to contract agree to exchange the goods for a price at a future specified date is known as an agreement to sell.
Nature	It is absolute in nature.	It is conditional in nature.
Type of contract	It is an executed contract.	It is an executory contract.
Transfer of risk	Yes	No

Title	In sale, the title of goods transfers to the buyer with the transfer of goods.	In an agreement to sell, the title of goods remains with the seller as there is no transfer
Consequences of subsequent loss or damage to the goods	Responsibility of buyer	Responsibility of seller
Tax	GST is charged at the time of sale.	No tax is levied.
Suit for breach of contract by the seller	The buyer can claim damages from the seller and proprietary remedy from the party to whom the goods are sold.	Here the buyer has the right to claim damages only.
Right of unpaid seller	Right to sue for the price.	Right to sue for damages.

Essentials of a Valid contract: A contract of sale is a special type of contract, therefore, to be valid, it must have all the essential elements of a valid contract, viz., free consent, consideration, competency of contracting parties, lawful object, legal formalities to be completed, etc. A contract of sale will be invalid if important elements are missing. For instance, if A agreed to sell his car to B because B forced him to do so by means of undue influence, this contract of sale is not valid since there is no free consent on the part of the transferor.

Includes both a 'Sale' and 'An Agreement to Sell': The 'contract of sale' is a generic term which includes both sale and an agreement to sell. The sale is an executed or absolute contract whereas 'an agreement to sell' is an executory contract and implies a conditional sale.

Sale: Where under a contract of sale, the property in goods is immediately transferred from the seller to the buyer, the contract is called a sale. Thus, it is an executed contract.

Agreement to Sell: Where under a contract of sale, the transfer of property in goods is to take place at a future time or subject to the fulfillment of certain conditions, the contract is called an agreement to sell. It is an executory contract. An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods was to be transferred.

12.5. Difference between Sale and Hire Purchasing

Hire Purchase system is a system in which the goods are delivered to the purchaser at the time of agreement before the payment of installments. However, the title of the goods is transferred after the

payment of all installments as per the hire purchase agreement. It is a special system of purchase and sale of goods. Under this system the purchaser pay the price of goods in installments.

Where under a contract of sale, the property in goods is immediately transferred from the seller to the buyer, the contract is called a sale. Thus, it is an executed contract of sale of goods.

Basis difference of	Sale	Hire Purchase
Parties involved	The contract of sale involves two parties: buyer and seller.	The contract of hire purchase involves hire purchaser and hire vendor.
Governing act	The contract of sale is governed by sale of goods act, 1930.	The contract of hire purchase is governed under hire purchase act, 1972.
Transfer ownership of	In a sale, property in the goods is transferred to the buyer immediately at the time of contract.	In hire-purchase the property in the goods passes to the hirer Upon payment installment. Of The last
Position parties of	In a sale the position of the buyer is that of the owner of the goods.	In hire purchase the position of the hirer is that of a bailee till he pays the last installment.
Termination of contract	In the case of a sale, the buyer cannot terminate the contract and is bound to pay the price of the goods.	In the case of hire- purchase the hirer may, if he so likes, terminate the contract by returning the goods to its owner without any liability to pay the remaining installments.
Transfer of title of goods	In the case of a sale, the buyer can pass a good title to a bona fide purchaser from him.	In a hire-purchase, the hirer cannot pass any title even to a bona fide purchaser.
Payment price of	The price is paid in lump sum.	The price installment. Is paid in the

12.6. Conditions and Warranties

Types of Conditions

Expressed Condition

The term defines the statement as a condition which says that something should exist or should be there for the fulfillment of contract. These conditions are generally imperative to the functioning and are done only when both the parties are agreed on the said or expressed condition.

Implied Condition

In this type of contract there are several conditions which are implied to the parties in different kind of contracts of sale. The conditions exist even if they have not been there in contracts. The implied contracts come under the section 14 to 17 of Sale of Goods Act, 1930 which are as follow:

Implied Conditions as Title:

Here are the several conditions which are implied at the time of sale:

One should have the title to sell the goods

In case of selling, at the time of performing contracts one will have the right to sell the contracts. And if the seller has no title to sell the given good then the buyer can refuse to take those goods and then he will entitle to recover full price paid by him.

Implied Condition as to Description:

In section 15, the section says that there must be confirm description about the good. The buyer has the option either to accept or reject the good if the goods do not match with the description given by seller. Example- if A buys a new car from B as he believes it is new and if it is not then A can reject the car. In section 16 (2) the good should be of merchantable quality which means that the goods offered by seller should of quality which would be accept and satisfies reasonable man.

For example- If A orders a bag of wheat from B and it got damage by rain the condition of merchantability get break here by B as now its unfit to use. However the examination may not reveal the defect but it the goods will come out with defect then he has a chance to repudiate the contract even if the goods are approved. In the light of section 17 that is a contract of sale of sample, the implied conditions will be as follows:

The sample product would correspond with the actual product in all the aspects like quality, colour, size etc. The reasonable opportunity should be given to buyer by seller so that he can compare the actual good with sample.

The goods which are free from any type of defect may be rendered as unmerchantable.

Example:

Suppose a car company sold the car in which outer body is made up of aluminum by sample sale and later the bulk was delivered and it was found out that the bulk of car was made up of steel. The buyer was entitled to give damages and return the price.

With reference with section 15, the sale by description and sale by sample, the good which will be supplied to the buyer should be in accordance with description as well as sample. In case of *Nichol v. Godis* (1854) the seller sells one of the refined rape oil. The oil which is delivered was the same which was sold in sample but there was one fault that it was a mixture of other oil too. So it was held that seller was liable to refund the amount and paid damages also.

Warranties

As the term warranties is an additional stipulation over the main purpose of contract. If there is a breach of warranty then the aggrieved or suffered party cannot repudiate the contract and claim the contract. In other words warranty is a stipulation which is not essential to the main purpose of contract and if it will get breach then buyer can only claim the damages.

Kind of Warranties

- **Expressed warranty:** In this the warranty generally both the parties are interested in contracts and warranty is accepted by both the parties expressly.
- **Implied warranty:** In this type of warranty the parties generally assume that the warranties have been incorporated at the time of contract of sale. The warranties which are implied are not specifically mentioned in the contracts.

There are the following implied warranties as follows:

Warranty as to undisturbed possession

In section 14(2) gives the information that the buyer shall enjoy the uninterrupted possession of goods which comes under the implied

warranty. As a matter of fact, if the buyer having got possession of the goods is later disturbed at any point, he can sue the seller for the breach of warranty.

Example

Purchases second hand car from Q and he have no idea that the car which he have purchased is stolen one. After he used the car, he was supposed to return the car. In this, P is entitled to sue Q for the breach of warranty.

Warranty as to freedom from Encumbrances

With reference to section 14(3), in implied warranty the goods which are in favors of third party and is not known by buyer then they shall be free from any charges and encumbrances. In case the buyer comes to know about the fact at the time of entering into the contract then he loses the chance to entitle any claim.

Implied warranty to disclose Dangerous nature of the goods sold

If someone sold the goods which can be inherently dangerous or likely to be dangerous and the buyer of the goods is unaware about it, then it will be consider as the breach of warranty and seller will held liable. At the first place is the duty of seller to inform the buyer about the danger in any circumstances.

Example-

X purchases a horse from Y and the horse is lunatic then it's the duty of Y to inform the X about the danger and whole scenario. While riding, the horse gets an attack because of which X fell down and got fracture. In this, Y is entitled to claim damages to Y.

Difference between Condition and Warranty:

Conditions	Warranties
In this the stipulation can be consider as the basis of contract	In this the stipulations is additional to the main contracts
If the condition get breach then it leads to termination of contracts	If the warranty got breach then the injured party will et the compensation only
If the buyer get agree so the condition can be treated as warranty	Warranty cannot be treated as condition
The injured party can refuse to accept the goods as well as claim damage in case of breach of condition	Only damages can be claimed by injured party in case of breach of warranty

When does Condition sink to the level of Warranty?

The section 13 with the breach of condition sinks to the level of breach of warranty. Here we will discuss some points:

- When the condition is waived by the buyer, then the condition will be considered as warranty
- When the condition would sink to the level of warranty then the buyer himself treat the breach of condition as a breach of warranty.
- Wherein the contract is indivisible and the buyer has accepted the whole or part of goods, the condition is treated as a warranty. Consequently, the contract cannot be repudiated. However, the damages can be claimed

Rule of Caveat Emptor

Statement of caveat emptor:

with reference to section 16 of sale of goods act 1930 states that when any goods supplied then there is no implied condition or warranty as to the quality or fitness of that good which is supplied.

In a case of Court of Appeal Wallis v. Russel (1902) 2 IR 585, it is laid down that caveat emptor also implies that 'the buyer must also take care of goods. This applies on the purchase of the things which buyer can exercise on his own skill and judgment E.g. Book, picture etc. (also known as specific goods), it also applies in the cases where by usage or by a term of contract it is implied that the buyer shall not rely on the skill and judgment of the seller.

12.7. Goods

Goods are defined to mean every type of movable property other than actionable claims and money. The term comprises stock and shares, rising crops, grass, and things attached to, or forming part of the land which are agreed to be severed before sale or under the contract of sale. Stock and shares have been expressly incorporated in the definition of goods primarily to avoid any misunderstanding because they are excluded from the term 'goods' under English Law.

You will have noticed that 'money' and 'questionable claims' have been expressly excluded from the term 'goods'. 'Money' means the legal tender, it excludes old coins and foreign currency, as they can be sold or bought as goods. Sale and purchase of foreign currency is, though, regulated through the Foreign Exchange Regulation Act. 'Actionable

claims' like debts are things which a person cannot create use of, but which can be claimed through him through means of a legal action. Actionable claims cannot be sold or purchased like goods, they can only be assigned. Therefore, you should note the goods contain every type of movable property, i.e., things which can be accepted from one party to another. Though, all such things which form part of the land itself but are agreed to be severed from the land under the contract of sale, are measured as goods. Therefore, grass, rising crops, trees to be cut and their log wood to be delivered are goods as per the definition, likewise things like goodwill, copyright, leasehold, patents, water, gas, electricity are all goods and may be the subject-matter of a contract of sale.

Kinds of Goods

The goods forming subject-matter of the contract of sale may be classified into following kinds as shown in **Figure 16.1.???**

Existing Goods:

As per Section 6 of the Act, existing goods are those goods which are owned or possessed through the seller at the time of contract of sale, the seller is either the owner of goods, or he is in possession of goods. For instance A, a manufacturer of fans, sells a fan to B. It is a contract of sale of existing goods because A owns the fan.

Likewise when a person sells goods possessed but not owned through him such as sale through an agent, it is a sale of existing goods. For instance in the instance, if the manufacturer sends the fans to his agent in Delhi and sells them through the agent it is a sale of existing goods because the dealer possesses the goods, although he is not the owner of them, at the time of the contract of sale.

Example: You want to buy biscuits and you went to the shop and the same was available there. So, here biscuits will be called existing goods.

Specific goods:

These are the goods which are recognized and agreed upon through the parties at the time a contract of sale is made, for instance, a specified watch, ring, or a car.

Example: You want to buy good day biscuit and went to the shop, paid for it and taken the delivery. So, here Good Day biscuits will be called specific goods. As you bought specifically this brand's biscuits.

Ascertained goods:

Though normally used as synonym for specific goods, ascertained goods are planned to contain goods which have become ascertained subsequently to the formation of the contract. When the 'unascertained goods' are recognized and agreed upon through the parties, the goods are described 'ascertained'.

You should note that ascertainment involves unconditional appropriation of the goods as the subject-matter of a scrupulous contract. Therefore when out of a mass of unascertained goods, the quantity contracted for is recognized and set aside for a given contract, the goods are said to be ascertained.

Example: You want to buy good day biscuit and went to the shop, paid for it and later on after paying for it you decided to buy Oreo biscuit so, here this will be the case of ascertained goods because the change is getting done after the sale transaction/ after payment is made.

Unascertained goods:

These are the goods which are not recognized and agreed upon at the time when the contract is made. They are recognized only through account. For instance, A, who owns and Ambassador Car illustrate room, has 50 cars, and agrees to sell any one of them to B. The contract is for unascertained goods, because which scrupulous car shall be sold to B has not been recognized at the time of the contract at sale.

Example: You want to buy any biscuit from the large variety of biscuits available in the shop. So, this will be the case of unascertained goods as you are ready to buy any brand from the large variety available and it's not certain that which brand you will get. The goods are in bulk and not separated yet.

Example: A agrees to sell B, 10 litres of Mustard Oil from the 100 litres of oil available With A. B agrees and paid the price for the same to A. So, here till the time 10 litres oil is separated from the 100 litres of oils available, it will be called unascertained goods. Once, 10 litres is separated then 10 litres will be called ascertained goods

Future Goods:

As per of the Act future goods means goods to be manufactured or produced or acquired through the seller after creation the contract of sale. Therefore , future goods are goods which either are not in subsistence at the time of Contract of sale or they may be in subsistence

when the agreement of their sale is entered upon but have of yet been acquired through the seller through that time.

Example: A goes to buy bike on 11th April, 2020 at the showroom and made payment but A was promised the delivery of bike on 15th May, 2020 due to its unavailability right now. So, here the goods will be in existence in future so, it will be called future goods and there will be an agreement to sell.

Contingent Goods:

Contingent Goods are the goods the acquisition of which through the seller depends upon contingency which may or may not happen. For instance, A agrees sell to B a sure painting only if C, its present owner, sells it to him. Here the contract is for the sale of contingent goods as the availability of the painting depends its sale through C.

Example: A milk man agrees to sell 5kg of milk provided cow yields the milk. This will be called a contract of contingency goods as it is dependent on the condition of cow yielding the milk:

If cow yields the milk then sale will be completed

If cow doesn't yield the milk then sale will not be completed

Effect of destruction of goods

You have learnt that a contract becomes void on the destruction of the subject- matter. Likewise a contract of sale becomes void on the destruction of goods. We can revise the effect of destruction of goods under following two heads.

Goods perishing before creation of the contract: Sometimes, the goods might, have perished before creation of the contract of sale. In such a situation the contract of sale is void.

Section 7 of the Act gives that a contract for the sale of specific goods is void, if at the time when the contract was made, the goods have without the knowledge of the seller, perished or become so damaged as no longer answer to their account in the contract. This is based on the principle of impossibility of performance of the contract. Therefore , the contract of sale shall avoid on the destruction of goods, if the following circumstances are satisfied:

- It necessity be a contract of sale for specific goods;
- The goods necessity have perished before creation of the contract; and

- The seller need not be aware in relation to the destruction of goods.

The contract is divisible and only a part of the goods are lost, then the contract remnants valid for that part which is in good condition.

12.8. Transfer of Ownership and Property

In the Sale of Goods Act, the word property is used for the 'ownership'. When the goods are sold, it is the property in the goods which is transferred to the buyer, term 'property in the goods' should not be confused with the physical 'possession of goods'.

A person may be in possession of goods but he may not be the owner of those goods. For instance, an agent, or servant or a bailee may be in possession of goods, but is not the owner because the property in the goods does not vest in him, he is holding the goods for his principal master or the bailor. Likewise, a person may be the owner of the goods but he may not be in possession of goods, for instance, the principal, master or bailor may not be in possession of the goods but the property in goods vests in him. Therefore, the transfer of possession of goods is not the similar thing as the transfer of ownership, you will notice that the, ownership of the goods may pass with or without the transfer of possession.

Rules Concerning Transfer of Ownership

You learnt the importance of knowing the time of transfer of ownership from seller to buyer. Now the after that significant thing is to determine the time of transfer of ownership. The rules concerning the transfer of ownership are contained in Sections 18 to 24 of the Sale of Goods Act, 1930.

The common rule is that the 'property in goods is transferred to the buyer at such time as the parties intend it to be transferred'. Therefore the whole question of transfer of ownership is left to the intention of the parties. The parties are free to fix any time for the, transfer of ownership from seller to the buyer. But sometimes the intention of the parties may not be clear from the contract itself. In such cases, the intention could be ascertained just as to the rules laid down in Section 20 to 24 of the Sale of Goods Act.

For the purposes of knowing the time of passing of ownership from seller to the buyer, the goods have been classified into three classes, viz., Specific or ascertained goods, Generic or unascertained goods; and

Goods sent 'on approval' or 'on sale or return' foundation, Let us now talk about the rules for each of the class separately.

In Case of Specific or Ascertained Goods

Specific goods means goods recognized and agreed upon at the time a contract of sale is made. Just as to Section 19(1) of the Act where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. It further gives that for the purpose of ascertaining the intention of the parties regard shall be had to the conditions of the contract, the conduct of the parties and the circumstances of the case.

For knowing the intention of the parties with respect to the time when the property in the goods is to pass to the buyer, the following rules are applicable:

Specific goods in a deliverable state: Where there is an unconditional contract for the sale of specific goods and the goods are in a deliverable state, the property in the goods passes to the buyer when the contract is made, you should note that it is immaterial whether the time of payment of the price or the time of delivery of goods or both, is postponed (Section 20). On analyzing this section you discover that the ownership shall pass at the time of creation the contract if the goods are specific, the contract is an unconditional one, and the goods are in a deliverable state.

Through an unconditional contract we mean that there is no condition concerning the transfer of ownership of goods. For instance, A sells some specific goods in a deliverable state to B on the condition that the property in the goods shall pass only when B accepts the bills of exchange. This is a conditional contract and the property in goods shall be transferred only when the condition is fulfilled.

Another significant point in this section is that the goods necessarily be in a deliverable state. Now the question arises as to when goods can be said to be in a deliverable state, just as to Section 2(3) of the Act, goods are said to be in a deliverable state when they are in such state that the buyer would, under the contract, be bound to take delivery of them.

In easy words it means that the goods are in such a condition that the buyer can take absent the goods then and there. It is possible when the goods are ready and the seller is not required to do anything with the goods.

Examples:

A offers to sell his car to B for Rs 60,000 the price to be paid after 20 days. B accepts the offer and a contract is made. The property in the car passes to B immediately when *the seller had*. Therefore, it can be stated that a person who is not the owner of the goods cannot create a third person owner of the goods. But the rule is subject to some exceptions where seller may confer a better title than what he himself possesses. These exceptions are as follows:

Title through estoppel: You are already well-known with the principle of estoppel. Applying this principle to a contract of sale of goods, when the owner of the goods, through his statement or conduct, leads the buyer to consider that the seller has the power to sell later on he may be estopped from denying the seller's power to sell.

For instance: A says to B, in the attendance of C that he (A) is the owner of the goods and C, who is the real owner of the goods does not contradict the statement. B buys the goods from A. Here, B will get a better title. In this instance if the real owner C wishes to deny A's power to sell the goods The (C) may be estopped from doing so. When the contract is made, the payment of the price is immaterial.

A selects some books from B's book- shop and agrees to pay the price on the first day of the after that month" and the books are to be delivered at A's home on the following day. As a result of an accidental fire in the shop, the books selected through A were destroyed. A shall be liable to pay the price, as the property in the books has passed from B to A on creation of the contract. You should note that in this case neither the price has been paid nor the goods have been delivered, even then the ownership has passed from seller to the buyer.

Sale Through Non-Owners

You learnt the rules concerning the transfer of ownership from the seller to the buyer, wherein you have noted that once the goods are sold, the buyer becomes the owner of such goods. Here we have presumed that the seller is the owner of the goods. Now what will happen if it turns out that the seller was not the owner of the goods? Our answer will be that since the seller was not the owner, so, the buyer does not become the owner thereof.

The common rule as to transfer of property is that it is only the owner of the goods who can transfer the ownership in the goods to the buyer. In easy words, a person who is not the owner of the goods cannot sell them and transfer the ownership to the buyer even though the buyer has

purchased them in good faith and for value. No one can sell the goods and provide a good title thereof unless he is the owner of such goods. This common rule is expressed through the maxim: "Nemo dat quid non ha-bet", which means that "no one can provide what he himself has not got". So, if a person deals with the goods of another person and without the owner's power, such transaction is of no value in the eyes of law. If the seller's title is defective, the buyer's title will also be defective.

This is so because the buyer acquires his title to the goods from the seller. For instance, A discovers a ring of B and sells it to C who buys it in good faith and for value. The true owner (B) can recover the ring from C, since A had no title to the ring. This common rule is contained in Section 27 of the Act which lays down that. Subject to the provisions of this Act and of any other law for the time being in force, where goods are sold through a person who is not the owner thereof and who does not sell them under the power as, with the consent of the owner, the buyer acquires no better title to the goods than what Sale through a mercantile agent: Where a mercantile agent is, with the consent of the owner, in possession of the goods or of a document of title to the goods, and he sells those goods in the ordinary course of business as a mercantile agent the buyer will get a good title to the goods provided he (the buyer) buys them in good faith and for value.

Section 2(9) defines a mercantile agent as an agent having-in the customary course of business as such agent power either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods. In a sale through mercantile agent the buyer will acquire a good title to the goods only if the following circumstances are satisfied:

- The goods are sold through a mercantile agent who is in possession of goods or of a documents of title to the goods with the consent of the owner;
- The agent sells the goods in the ordinary course of his business as a mercantile agent;
- The buyer necessity have acted in good faith i.e., the buyer necessity have no knowledge that the agent had no power to sell.

Sale through person in possession under voidable contract: Just as to Section 29 of the Act, where a seller is' in possession of goods under a voidable contract, and he sells the goods to a bona fide buyer before the contract is rescinded the buyer gets a good title to the goods. This exception is limited to contract of sale of goods obtained under a

contract voidable under Section 19 or 19A of the Contract Act, i.e., voidable on the ground of coercion, undue power misrepresentation or fraud. For the application of this exception it is necessary that:

- The seller necessarily be in possession of goods under a voidable contract;
- The goods necessarily be sold before the contract is rescinded; and the buyer need buy in good faith and without notice of the seller's defect of title.

Sale through seller in possession after sale: Sometimes, the buyer after buying the goods, leave them with the seller. Section 30(1) of the Act gives that where a person having sold the goods continues or is in possession of the goods or of the documents of the title of the goods, after sale and he resells the similar goods to another buyer, the buyer shall get a good title to the goods provided the buyer buys them in good faith and without notice of the previous sale.

12.9. Case Study

In *Barrow Lane & Ballard*

v. Philips, A agreed to sell to B a parcel of 700 bags of groundnuts lying in his godown. Strange to A, 10 bags had been stolen at the time of the contract. A, so, tendered delivery of the parcel containing 591 bags. It was held that the contract had become void and B cannot be compelled to accept 591 bags because the contract was indivisible.

Goods perishing before sale but after agreement to sell: It is also possible that the goods might perish after an agreement to sell is made but before it becomes a sale. In this connection Section 8 of the Act gives that in an agreement to sell specific goods, the agreement becomes void if the goods are destroyed without any fault of the seller or the buyer.

This rule is based on the information that it was only an agreement to sell and the goods were lost before the passing of the risk. In *Eliphic v, Barnes*, a horse was delivered on trial for eight days. Though, the horse died on the third day, without any fault of either the seller or buyer. It was held that this agreement is void and the seller could not recover the price from the buyer.

You should note that Section 7 and 8 are applicable only in case of specific goods. So, if unascertained goods are destroyed either before or after creation of the agreement, the contract shall not become void. Therefore, in an agreement to sell unascertained goods, even if the

whole stock of goods is destroyed, the contract shall not become void and the seller will have to perform his promise.

Let Us Sum Up

In this unit, you have learned about the following:

- “Buyer” means a person who buys or agrees to buy goods;
- “delivery” means voluntary transfer of possession from one person to another; “fault” means wrongful act or default;
- “future goods” means goods to be manufactured or produced or acquired by the seller after the making of the contract of sale;
- The subject matter of a contract of sale must be goods. Every kind of movable property except actionable claims and money is regarded as ‘goods’.
- The term ‘price’ is ‘the money consideration for a sale of goods’.
- Hire Purchase system is a system in which the goods are delivered to the purchaser at the time of agreement before the payment of installments.
- It is a special system of purchase and sale of goods. Under this system the purchaser pay the price of goods in installments.
- He is the seller to whom:- Whole of the price is not paid,
- Conditional payment
- As the term warranties is an additional stipulation over the main purpose of contract. If there is a breach of warranty then the aggrieved or suffered party cannot repudiate the contract and claim the contract.
- Caveat emptor is a Latin term that means "let the buyer beware." Similar to the phrase "sold as is," this term means that the buyer assumes the risk that a product may fail to meet expectations or have defects.
- Goods are defined to mean every type of movable property other than actionable claims and money.
- These are the goods which are recognized and agreed upon through the parties at the time a contract of sale is made, for instance, a specified watch, ring, or a car.
- As per Section 6 of the Act, existing goods are those goods which are owned or possessed through the seller at the time of

contract of sale, the seller is either the owner of goods, or he is in possession of goods.

- As per of the Act, “future goods” means goods to be manufactured or produced or acquired through the seller after creation the contract of sale.
- Contingent Goods are the goods the acquisition of which through the seller depends upon contingency which may or may not happen.
- In the Sale of Goods Act, the word property is used for the 'ownership'. When the goods are sold, it is the property in the goods which is transferred to the buyer, term 'property in the goods' should not be confused with the physical 'possession of goods'.

Check Your Progress-2

1. Section 203 of the Companies Act 2013 deals with_____.
 - A. Managing director,
 - B. Company secretary
 - C. Chief Financial Officer
 - D. All of the above
2. Section 123 of the Companies Act 2013 deals with_____.
 - A. Unpaid Dividend Account
 - B. Declaration of dividend
 - C. Remuneration of auditors
 - D. Auditors to attend general meeting
3. What is the punishment for the company if any of the provisions of sections 139 to 146 is contravened?
 - A. Fine of Rs. 25000 up to 3 lakh rupees.
 - B. Fine of Rs. 20000 up to 2 lakh rupees
 - C. Fine of Rs. 25000 up to 5 lakh rupees.
 - D. Fine of Rs. 10000 up to 5 lakh rupees.
4. Section 270 of the Companies Act 2013 deals with_____.
 - A. Rehabilitation and insolvency fund
 - B. Declaration of dividend
 - C. Remuneration of auditors
 - D. Modes of winding up

5. When did The Companies Act 2013, come into force_____?
- A. 01 April 2013
 - B. 01 March 2014
 - C. 01 May 2013
 - D. 30th August 2013
-

Glossary

Caveat emptor: Let the buyer beware

Goods: Products

Warranty: Duration of the product

Unpaid seller: The seller who yet to pay money

Guarantee: Assurance given to the part of products

Answers to Check your Progress-1

- a-True
 - b-True
 - c-True
 - d-True
 - e-False
-

Answers to Check your Progress-2

1. B. All of the above
 2. D. Declaration of dividend
 3. C. Fine of Rs. 25000 up to 5 lakh rupees.
 4. D. Modes of winding up
 5. D. 30th August 2013
-

Suggested Reading

1. Balachandran V., Legal Aspects of Business, Tata McGraw Hill, 2020.
2. Daniel, Albuquerque, Legal Aspect of Business, Oxford, 2020.

Unit-13

Transfer of Ownership and Property 1882 Performance of Contract

STRUCTURE

Overview

Objectives

13.1. Introduction

13.2. Properties that cannot be transferred under Transfer of Property Act

13.3. Responsibilities of the seller during transfer of property under Transfer of Property Act

13.4. Duties of the buyer during transfer of property under Transfer of Property Act

13.5. Rules Regarding Transfer of Property

13.6. Performance of Contract

13.7. The tender of performance must be made at a proper time and place

13.8. Case study

Let Us Sum Up

Check Your Progress

Glossary

Answers to Check Your Progress

Suggested Readings

Overview

In this unit, the properties that cannot be transferred, the responsibilities of a seller, duties of a buyer and rules regarding transfer of property in the transfer of property act, Performance of contract and tender of performance has been clearly explained.

Objectives

After completion of this, unit you will be able:

- To state the meaning of transfer of property act.
- To know the various types of property transfers
- To identify the responsibilities of the seller during transfer of property under transfer of property act.

- To understand the Duties of the buyer during transfer of property under Transfer of Property Act.
- To acquire the rules related to transfer of ownership act.

13.1. Introduction

Under the Indian legal system, properties are divided into two categories-movable and immovable. The **Transfer of Property Act (ToPA)**, 1882, which came into force on July 1, 1882, deals with the aspects of transfer of properties between living beings. One of the oldest laws in the Indian legal system, the Transfer of Property Act is an extension of the law of contracts and runs parallel to the succession laws. For those planning to transfer their immovable property, knowing the key aspects of the Transfer of Property Act is quite important.

Scope of the Transfer of Property Act

Parties: Under the Transfer of Property Act, a transfer of property can be effectuated by an act of two or more parties or an act by the operation of the law.

Type of property: The Transfer of Property Act is applicable primarily on transfer of immovable property from one living being (inter vivos) to another. Also, the Act is applicable on property transfer by individuals, as well as by companies. However, the Transfer of Property Act is applicable to acts of parties and not on transfers applicable by the law.

What does 'transfer' mean under the Transfer of Property Act ?

The term transfer includes transfer through sale, mortgage, lease, actionable claim, gift or exchange. The Act does not cover transfers by the operation of law, in the form of inheritance, forfeiture, insolvency, or sale through the execution of a decree. The Act is also not applicable on the disposal of properties through wills and does not deal with cases of succession of property.

Types of property transfer under the Transfer of Property Act

The Transfer of Property Act talks about six types of property transfers:

- Sale
- Lease
- Mortgage
- Exchange
- Gift
- Actionable claim

Who can transfer property under Transfer of Property Act?

Section 7 of the Transfer of Property Act lays down the rules, vis-à-vis people who are legally eligible to transfer their property.

‘Every person competent to contract and entitled to transferable property, or authorised to dispose of transferable property not his own, is competent to transfer such property, either wholly or in part and either absolutely or conditionally, in the circumstances, to the extent and in the manner, allowed and prescribed by any law for the time being in force,’ the section reads. Under the Indian Contract Act, 1872, a person must be at least 18 years of age and have a sound mind, to be eligible to enter into a contract.

13.2. Properties that cannot be transferred under Transfer of Property Act

In terms of immovable property, one cannot transfer a property that one expects to inherit in future, states the Transfer of Property Act.

Example: Ram expects that his maternal uncle, who had no children of his own, would bequeath his property to him and he transfers his right in the property to his son, the transaction would be held invalid.

A leaser can also not transfer his right to re-entry into a leased property, under the Transfer of Property Act.

Example: Ram leases his plot to Mohan and puts in a clause in the lease agreement that he would have the right to re-enter, if the rent is not paid for over three months, then, he alone will have the right to do so. He cannot pass on his right to re-enter to, say, Ganesh, his associate.

A real estate developer who has entered into a joint development agreement (JDA) with a land owner, to build a project on the latter’s land, is also not allowed to transfer the ownership of the project thus created under the provisions of the ToP Act. The implications of the JDA are restricted only to the development part of the project. The builder will have to get a general power of attorney to sell the project on behalf of the owner. Even in this scenario, the land owner will be the one providing the conveyance deed to the prospective buyers of the project.

The Act also prohibits the transfer of easement rights – a right to use someone else’s land or property in some way. These include the rights of way (passage), the rights of light, the right of water, etc.

Example: Ram has a right of passage over the land belonging to Mohan. Ram decides to transfer this right of way to Ganesh. As this is a transfer of an easement right, it is invalid.

One can also not transfer one's interest in a property, restricted in its enjoyment.

Example: If a house is lent to Ram for his personal use, he cannot transfer his right of enjoyment to Mohan.

A right to future maintenance is only for the personal benefit of the person to whom it is granted. Hence, this right cannot be transferred. A tenant having a non-transferable right of occupancy, cannot alienate or assign his interests in the occupancy. Similarly, a farmer of an estate that has defaulted in paying revenue, cannot assign his interest in the holding. The same is true of a lessee of an estate under the management of a court of wards. Transfer of property through verbal/oral agreement under Transfer of Property Act

Section 9 of the Transfer of Property Act says that property transfers could be affected though an oral agreement, unless the law explicitly states that a written agreement must be prepared to conclude the transaction. In the case of immovable property of value less than Rs 100, such transfers may be made either through a registered instrument or by delivery of the property. This means that practically no immovable property can be transferred in the name of another individual without executing a written document.

However, oral arrangements do not typically work, except for partition of property among family members, where the family members can enter into a verbal agreement and divide the property for practical purposes. Exchange of property often requires written agreements for the transaction to be legally valid. This is true for sale, gifts, leases, etc.

Transfer of property to an unborn child under Transfer of Property Act

- A person who is planning to bequeath his property to more generations than one, will have to keep the provisions of the Transfer of Property Act in mind, while doing so. This becomes imperative to avoid legal complications at a later stage.
- Under the provisions made in Section 13 and Section 14 of the Transfer of Property Act, the transfer of a property directly in favour of an unborn child is prohibited. For this to happen, the person intending to make the transfer will first have to transfer it

in favour of a person who is alive on the date of transfer. The property will have to vest in the name of this person, till the time that the unborn child comes into existence. Basically, the interest of the unborn child in a property must be preceded by a prior interest.

- **Example:** Suppose Ram transfers his property to his son Mohan and thereafter, to his unborn grandchild. In case he was not born before the death of Ram, the transfer would not be valid. The transfer would be valid, if the child is born before Ram passes away and the interest of the property vests in Mohan, till the child is born.

13.3. Responsibilities of the Seller during Transfer of Property under Transfer of Property Act

- Section 54 of the Act talks about the responsibilities of the seller of a property:
- To disclose to the buyer any material defect in the property.
- To provide to the buyer on his request for examination, all documents of title relating to the property.
- To answer to the best of his information, all relevant questions put to him by the buyer with respect to the property or the title.
- To execute a proper conveyance of the property, when the buyer tenders it to him for execution at a proper time and place, on payment or tender of the amount due in respect of the price.
- To take as much care of the property and all documents, which are in his possession, as an owner of ordinary prudence would take of such property, between the date of the contract of sale and the delivery of the property.
- To give the buyer possession of the property.
- To pay all public charges and rent accrued with respect to the property, up to the date of the sale.
- To discharge all encumbrances on the property then existing.

Duties of the buyer during transfer of property under Transfer of Property Act

- To disclose to the seller any fact about the property, of which the buyer is aware of but has reason to believe that the seller is not

aware of and which materially increases the value of such interest.

- To pay the purchase money to the seller at the time and place of completing the sale.
- To bear any loss arising from the destruction, injury or decrease in value of the property not caused by the seller, where the ownership of the property has passed on to the buyer.
- To pay all public charges and rent, which may become payable on the property, the principal monies due on any encumbrances subject to which the property is sold and the interest thereon afterwards accruing due, where the ownership of the property has passed on to the buyer.

Check your Progress-1

True/False

- a. Under the Indian legal system, properties are divided into two categories-movable and immovable.
- b. A right to future maintenance is only for the personal benefit of the person to whom it is granted.
- c. To disclose to the buyer any material defect in the property.
- d. A right to future maintenance is only for the personal benefit of the person to whom it is granted.
- e. When the transfer of property/ ownership in goods takes place from buyer to seller.

13.4. Rules Regarding Transfer of Property

When the transfer of property/ ownership in goods takes place from seller to buyer. For this purpose we have two heads:

- Specific goods and ascertained goods (for both of them rule is same) Unascertained goods and future goods (for both of them rule is same) 1. Specific goods and ascertained goods (for both of them rule is same)

1. Deliverable State

- The specific/ ascertained goods must be in deliverable state which means the state in which buyer can't refuse the delivery of the goods and bound to take the delivery of the goods. **Example:**

Polished furniture is ready for purchase at the showroom. Here, furniture is in deliverable state.

- **Rules:** The ownership/property in goods is said to be transferred immediately from the seller to the buyer at the time of contract.

2. Non- Deliverable State

- The specific/ ascertained goods are not in deliverable state which means some work is still required to be finished before the delivery can be given to the buyer.

- **Example:**

Polishing of furniture is required before delivery of the goods. So, here goods will be in deliverable state once the polishing is completed.

- **Rule:**

The ownership/property in goods is said to be transferred from the seller to the buyer once the goods are in deliverable state and the notice for the same is given by seller to the buyer. Till the time it's in non-deliverable state, then the ownership lies with the seller only.

3. Price / weight/ measurement of the goods yet to be determined

- Pricing/ weight/ measurement of the specific/ ascertained goods is not known at the time of contract so, till the time it is not known the ownership remains with the seller.

- **Rules:**

The ownership/property in goods is said to be transferred from the seller to the buyer at the time when price/ weight/ measurement of the goods is determined and the notice for the same is given by seller to the buyer.

4. Where goods are delivered on Basic Rules: Approval

- The property in goods passes from seller to the buyer:
- When buyer gives his approval or acceptance to the seller or does any other act of giving approval to the transaction like, consumes the goods, resells the goods to third party etc.
- When buyer does not gives his approval or acceptance to the seller but retains the goods without giving the notice of rejection beyond the time fixed for the return and if no time is fixed, after the expiry/ lapse of the reasonable time.

5. Unascertained goods and future goods (for both of them rule is same) Ascertainment of Goods

- Firstly, unascertained goods need to be ascertained, then only the ownership transfers from seller to the buyer. Till the time goods are unascertained the ownership remains with the seller.
- **Example:** A agrees to sell B, 10 litres of Mustard Oil from the 100 litres of oil available with
- A. B agrees and paid the price for the same to A. So, here till the time 10 litres oil is separated from the 100 litres of oils available, it will be called unascertained goods and property in goods does not pass to B. It remains with A (seller).
- **Rule:** Firstly, goods need to be ascertained, then only the ownership transfers from seller to the buyer. Till the time goods are unascertained the ownership remains with the seller. b) Unconditional Appropriation of Goods Seller and buyer mutually selects the goods for the buyer without any condition attached to it or gives consent mutually for selecting the goods.

6. Essentials of Valid Appropriation:

- Selection of goods
- Selection of goods
- may be based on sample or description provided
- Goods must be in deliverable state
- Consent by buyer and seller- express or implied Nemo Dat Quod Non-Habet (Sale by Non Owners)

Basically, Nemo Dat Quod Non-Habet” means that seller should have the ownership of goods in order to sell them to the buyer. But, there are few exceptions to it (which means even non-owners can sell even if they don't have the ownership of goods).

Exceptions to Nemo Dat Quod Non-Habet:

1. Sale by estoppel

- A statement or conduct leads the buyer to believe that the person selling the goods has the authority to sell them. And the actual owner doesn't show any objection regarding the sale transaction. This will be considered sale by estoppel if below mentioned conditions are fulfilled:

- The actual owner don't show any objection regarding the sale transaction à Buyer acted in good faith (buyer don't have any doubt)

2. Sale by mercantile agent

- Mercantile agent is a person who is appointed by principal to do some acts on his behalf. So, mercantile agent can sell the goods on behalf of principal even if he is not the actual owner of the goods. But below mentioned conditions should be fulfilled by mercantile agent:
- Possession of goods with consent of principal à Acting in ordinary course of business (following lawful ways to sell the goods)
- Buyer acted in good faith (buyer don't have any doubt)
- No notice of no authority to sell given by principal

3. Sale by joint owner

- **Example:** There are two persons A & B who jointly owns a Gold Bar. They will be called joint owners. Here, both of them are owners. Ownership is divided between them. If one owner want to sell gold bar then below mentioned conditions needs to be fulfilled:
- Sole possession of goods with other joint owners consent
- Buyer acted in good faith (buyer don't have any doubt)
- No notice of no authority to sell

4. Sale by person in possession of goods under voidable contract

- We have already done voidable contract. Now only explaining this point here. If the cheated party do not take any action then the other party who has obtained the goods by coercion undue influence etc. can sell the goods provided below mentioned conditions are fulfilled: Possession of goods under voidable contract (through coercion, undue influence etc) by other party
- Goods sold before contract is cancelled by cheated party
- Buyer acted in good faith (buyer don't have any doubt)

5. Sale by seller in possession of goods after sale

- **Example:** A has sold goods to B however A has not made delivery of goods to B that means A still possesses the goods

and sold the same goods to C. Here, this is only possible that A can sell goods to C if below mentioned conditions are fulfilled:

- Continues to have the possession of goods (that means A still has the possession of goods which is being sold to B. And now he is selling it to C)
- Buyer has no knowledge of the previous sale (that means C does not have the knowledge of sale between A and B)
- Buyer acted in good faith (buyer- C in this case, don't have any doubt)

6. Sale by buyer before transfer of ownership

- **Example:** A has not sold the goods to B but only delivered the goods to B that means only the possession of goods is transferred. So, here this does not make "B" a buyer and "A" a seller. There is only bailer (A) and bailee (B) relation created and A remains the actual owner.
- But still B sold the goods to C, and this transaction is valid if the below mentioned conditions are followed and hence, C will become the actual owner of the goods:
- Buyer (B) possesses goods with the consent of seller (A)
- New buyer (C) has no knowledge of the transaction happened between A and B
- New buyer acted in good faith (buyer don't have any doubt)

7. Sale by unpaid seller

- An unpaid seller can take the goods back and resell those goods even if, now unpaid seller is not the actual owner.
- **Example:** A sold and delivered goods to B. But B didn't paid the amount to A for goods. So, here A can take back the goods from B and resell them to another person even if now he is not the actual owner.
- **Exceptions :** under other acts/ provisions In this case, official receiver or liquidator of an insolvent person is not the actual owner but still can make the sale of goods/ property of insolvent person
- **Finder of goods :** If finder of goods is not able to find the actual owner of the goods or the expenses to be borne by finder of the goods is very high to keep the goods safe, then finder of the

goods has the right either to dispose off those goods or sell them to another person even if finder of the goods is not the actual owner

8. Sale by pawnee under pledge

- **Example:** A (Pawnor) has taken loan from B (Pawnee) for Rs. 10,000 by pledging the GOLD as security. If A does not repay the amount to B then B has the right to recover the amount of loan by selling gold to another person even if B is not the actual owner of

13.5. Performance of Contract

The term “offer” has been defined under Section 2(a) of the Indian Contract Act, 1872. An offer is an expression of willingness made by a person to do or abstain from doing any act or omission with a view to obtaining the assent of the person to whom such an offer of act or abstinence is made.

The term performance in its literal sense means the performance of a task or action. In its legal sense “performance” means the fulfillment or the completion of the obligations which they have towards the other party by virtue of the contract entered into by them. For example, ‘A’ and ‘B’ enter into a contract, the terms of the contract state that A has to deliver a book to B on payment of the consideration of five hundred rupees. Here, B pays to A rupees five hundred and as stipulated in the contract, A delivers him the book.

Section 37 of the Contract Act talks about performance. According to the Section, there are two types of performance which are:

Actual performance: Actual performance of the contract means the actual discharge of the liability or obligation which a person has undertaken to perform and there remains no other task which he is obliged to discharge under the promise. He is said to have made the actual performance of the promise.

Attempted performance: At times when the performance becomes due. The promisor is not able to discharge his obligation or perform his duty because he is prevented by the promisee in doing so. This situation where the promisor actually intended to perform his obligation or discharge his duty but is prevented from doing so by an intervening disability is known as the attempted performance of a promise. Attempted performance is also known as tender. A tender can be of two types:

Tender of goods and services: The discharge of the contract to deliver goods and services is completed when the goods are tendered for acceptance in accordance with the terms of contract. If the goods and services so tendered are not accepted they are to be taken back by the offer or and he is discharged from his liability.

Tender of money: Where the debtor tenders the money which is to be paid to the creditor but the debtor refuses to accept the money. The debtor is not discharged from the liability to pay back the money. Therefore, a tender of money can never result in the discharge of debt.

13.6. The Tender of Performance Must Be Made At A Proper Time and Place

- Section 38(2) of the Act mandates that the tender of performance should necessarily be made at a time and place and under such circumstances so as to afford the person to whom the offer is made a reasonable opportunity to ascertain that the offer or is able and bound to do whatever he has promised under the terms of contract to do.
- In P.L.S.A.R.S., Sabapathi Chetty (Deceased) Vs. Krishna Aiyar, the court held that generally, the parties to the tender of performance fix the time and place. The tender of performance should mandatorily be made at the time and place stipulated under the contract. If the performance is made within the stipulated time and place then the promisor is under no further obligations.
- In Startup v. Macdonald, the defendant purchased ten tons of linseed oil to be delivered to the plaintiff within the last fourteen days of the month of March. The plaintiff tendered the defendant at night on the fourteenth day. The defendant however citing the lateness of the tender rejected the acceptance of the tender. The court, in this case, held that the defendant should be held liable for the breach of the terms of the contract and the contention made by him that the late acceptance of the tender was made could not be entertained because, although the acceptance was made lately still the acceptance, was made before midnight.
- In Afovos shipping co. V. R Pagnan, an international contract was entered into by the plaintiff and defendant. The term of the contract provided that the payment which formed the consideration of the contract should reach on the 14th day of the month, however, the defendant repudiated the contract before

the 14th day of the month. The court held that the defendant should have delayed the repudiation of the contract till 14th of the month.

- Section 138(2) of the Act also provides that the tender must be made under such circumstances so as to allow the other party to get reasonable opportunity to ascertain that the person who is making the tender is capable and willing to fulfil all the conditions mentioned under the contract. Section 138(3) of the Act provides that the goods which are subjected to tender must be same as mentioned under the description of the tender otherwise the tender will be invalid.
- In *Dixon v. Clark* the court held that the fact that payment was tendered and refused in no ways discharges the debtor from his liability to make good of the payment of a debt.
- In *Vidyavati vs Devi Das*, the principle of old standing which was given in the above- mentioned case was endorsed. In the debtor was under the obligation of paying back his loan in order to recover the vacant possession of his premises and his tender was also rejected. However, the court held that debtor was not released from the obligation to pay prior to his recovery of the possession.

13.7. Case Study

Haji Abdul Rehman Haji Mahomed, the court, in this case, explained the situations in which the tender becomes conditional. According to the court, when a tender does not follow the terms of the contract which were originally drafted and agreed upon by the parties, the tender becomes conditional. The reason for making it a necessary is because of the fact that it is not reasonable to compel a party to accept the modified or altered terms of contract which were not initially agreed upon by the parties. For example, if A offers to pay B a certain sum of money if B agrees to sell certain goods to him. It is a conditional tender and therefore it is invalid. Similarly in a case where A sent a single cheque for two items, only one of which was due at the time, while the other was payable after some time. The cheque being one and indivisible could be accepted as whole or not at all. It was held that the promisee was within his right in rejecting cheque.

In the case of *M. Kamalakannan v. M. Manikandan*, there was a contract between the plaintiff and the defendant for the sale of the property. The plaintiff, in this case, retained some part of the money

which was stipulated under the terms of the contract in order to compel the defendant for the performance of some of the obligations like vacating the property which was occupied by the tenants and handing over the vacant property to the plaintiff. The contention by the defendant was that non-payment of some part of the consideration resulted in the infringement of the terms of the contract.

In *Geo-Group Communications INC v. IOL Broadband Ltd*, the parties to the contract signed an agreement and they fully acted the terms of the agreements so much so that there arose no further need for the documents to be executed any further. The agreement was described as one of the preliminary and tentative drafts made for the purpose of discussion and deliberation only. When the contract was challenged in the court of law, the court held that the agreement was valid and it entitles the claimant for relief.

Let Us Sum Up

In this unit, you have learned the following:

- Under the Indian legal system, properties are divided into two categories – movable and immovable. The Transfer of Property Act (ToPA), 1882, which came into force on July 1, 1882, deals with the aspects of transfer of properties between living beings.
- The term ‘transfer’ includes transfer through sale, mortgage, lease, actionable claim, gift or exchange.
- Every person competent to contract and entitled to transferable property, or authorised to dispose of transferable property not his own, is competent to transfer such property, either wholly or in part and either absolutely or conditionally, in the circumstances, to the extent and in the manner, allowed and prescribed by any law for the time being in force,’ the section reads.
- In terms of immovable property, one cannot transfer a property that one expects to inherit in future, states the Transfer of Property Act.
- Section 9 of the Transfer of Property Act says that property transfers could be affected though an oral agreement, unless the law explicitly states that a written agreement must be prepared to conclude the transaction
- To disclose to the seller any fact about the property, of which the buyer is aware of but has reason to believe that the seller is not aware of and which materially increases the value of such interest.

- Pricing/ weight/ measurement of the specific/ ascertained goods is not known at the time of contract so, till the time it is not known the ownership remains with the seller.
- A statement or conduct leads the buyer to believe that the person selling the goods has the authority to sell them
- The term “offer” has been defined under Section 2(a) of the Indian Contract Act, 1872. An offer is an expression of willingness made

Check Your Progress-2

1. Bailment means _____ .
 - A. temporary delivery of goods
 - B. permanent delivery of good
 - C. part delivery of good
 - D. None
2. In the contract of bailment the person delivering the goods is called _____ .
 - A. Bailor
 - B. Bailee
 - C. Seller
 - D. agent
3. Lien means _____ .
 - A. to retain goods in his possession
 - B. rights to sell the goods
 - C. right to purchase the goods
 - D. right to destroy the goods
4. When goods are lent to a person to be used by him on free of cost. That is _____ . Contract.
 - A. Como datum
 - B. Pawn
 - C. Hire
 - D. Gift.
5. The person to whom goods are delivered temporally is _____ .
 - A. Baliee
 - B. Bailor
 - C. Purchaser
 - D. user

Glossaries

Transfer:	Exchange of ownership
Property:	Movable & immovable goods
Performance:	Execution
Position:	Ownership of the goods
Business:	Commercial

Answers to Check Your Progress-1

- a-True
 - b-True
 - c-True
 - d-True
 - e-False
-

Answers to Check Your Progress-2

1. A. temporary delivery of goods
 2. A. bailor
 3. A. to retain goods in his possession
 4. A. como datum
 5. A. bailee
-

Suggested Reading

1. **Khan, A. U., & Debroy, B.** Intellectual property rights beyond: an Indian perspective on the debate on IPR protection and the Wto. Kottayam: DC School Press. -2005
2. **LexisNexis.** "The Code of Civil Procedure", 1908 (Palmtop Edition) Hardcover – 22 April2016

Unit-14

Consumer Protection Laws-Law Relating to Business Organizations

STRUCTURE

Overview

Objectives

14.1. Introduction

14.2. Rights of Consumers

14.3. Duties of a Consumer

14.4. Consumer Disputes Redressal Commission

14.5. Jurisdiction under the Consumer Protection Act

14.6. Remedial Action

14.7. Fees for Filing Complaints

14.8. Importance of Consumer Protection Act

14.9. To Set Up Consumer Grievance Redressal Mechanism

14.10. Grievance Redressal Mechanism

14.11. Case study

Let Us Sum Up

Check Your Progress

Glossary

Answers to Check Your Progress

Suggested Readings

Overview

In this unit, the rights and duties of consumers, the grievance redressal commission, remedial action to be taken and the fees for filing complaints, the importance of consumer protection act and setting up a grievance redressal mechanism has been clearly explained.

Objectives

At the end of this unit you will be able:

- To state the meaning of consumer protection act
- To know the various rights of consumer
- To identify the grievances redressal machineries
- To understand the procedure of filling complaint

- To acquire the knowledge of State, District and National Forum

14.1. Introduction

Consumer Protection Act 1986 is a law to protect the interests of the consumers. This act was inevitable to resolve a large number of pending consumer complaints in consumer courts across the country. This is a Central Govt. Act applicable in all states of India, to provide for the protection of the interests of consumers and for that purpose to make provision for the establishment of consumer councils and other authorities for the settlement of consumers' disputes and for matters connected therewith.

The act has the provision of the Establishment of the CCPA which will protect, promote and enforce the rights of consumers. The CCPA will regulate cases related to unfair trade practices, misleading advertisements, and violation of consumer rights. The CCPA will have the right to impose a penalty on the violators and passing orders to recall goods or withdraw services, discontinuation of the unfair trade practices and reimbursement of the price paid by the consumers. The Central Consumer Protection Authority will have an investigation wing to enquire and investigate such violations. The CCPA will be headed by the Director-General.

Who can file a complaint?

According to SECTION 2(1)(b) a complainant can be a person who is:

- A consumer, or
- Any voluntary consumer association registered under the Companies Act of 1986 or under any other law for the time being in force, or
- The Central Government or any State Government, who or which makes a complaint, or One or more consumers, where there is more than one consumer they shall have the same interest for filing a collective complaint, or
- In the case of death of a consumer, his legal heir or representative who or which makes a complaint.

How to file a complaint?

The very first step before filing a complaint, the aggrieved party should do is to send a notice to the service provider from whom the goods were purchased or the service was availed informing him about the defects in the goods or the deficiency in the service or unfair practice. This notice

is sent to the trader or the aggrieved party in order to see if that company or trader is willing to give the compensation or offer any other remedy. If in case the trader or service provider is not willing to provide with any remedy, the aggrieved party shall go ahead with filing a formal complaint.

- The next step is to file a formal complaint under the Consumer Protection Act of 1986. Here the aggrieved party does not need to hire a lawyer in order to file a complaint. He can file the complaint on his own.

The aggrieved party just needs to write down the following contents on a plain paper:

- Name, description and the address of the complainant and of the opposite party or parties
- Facts relating to the complaint and time and venue where it arose
- All the possible documents in support of the allegations contained in the complaint
- The relief or the remedy claimed by the complainant
- The complaint should consist of signatures of the complainant or his authorized agent
- The next step after the drafting of the complaint is to choose the appropriate authority under which the complaint is to be filed. The complainant shall choose the authority according to pecuniary jurisdiction of his complaint i.e. the total value of the goods or services and the compensation claimed by him. It is to be noted here that the complainant can also file an online complaint on www.consumerhelpline.gov.in

14.2. Rights of Consumers

The Consumer Protection Act has recognized six rights of a consumer which are:

Right to Safety

This right refers to as the right to be protected against the marketing of goods and services which are hazardous to life and property of the consumers. This right has a very wide scope of application, for instance, this right is available in the areas of electrical appliances, healthcare, automobile, pharmaceuticals, housing, travel etc. Nowadays, each and every field has an office for researchers who research and experiment and launch new products and appliances accordingly. Most of these

products are not tested by the producers which prove to be harmful to the consumer. Therefore, after the implementation of this act, there is a mandate for each and every field to get all their products which are a danger to the life to be carefully tested and validated before launching it to the market.

Right to Information

It refers to the right of a consumer to be informed of the quality, quantity, potency, purity, standard and price of the goods and services being sold by the shopkeeper. This right is given to the consumer in order to protect them from the various unfair trade practices conducted by the seller in order to earn more profits. Therefore, it is an obligation on the seller to provide the consumer with all the relevant information of the product he wishes to purchase.

Right to Choose

It is defined in the act as the right to be assured, wherever possible, to have access to a variety of goods and services at competitive prices. It is very common to find one product being sold at different possible prices by different sellers. This reflects the age of market competition which is found in almost all the countries. Therefore it is the right of all the consumers to purchase any product at any price which according to him is the best. A consumer cannot be forced to purchase a product of some particular brand or quality.

Right to be heard

It is referred to as the right to be heard and to be assured that consumers' interests will receive due consideration at appropriate forums. This right was introduced for a consumer in order to ensure that all the complaints and issues of the consumers are heard duly under the appropriate authority. This is because of this right that almost all the big selling companies have a separate department known as the customer service to help the consumers in case of any dispute or any complaint regarding the quality or quantity of the product.

Right to seek Redressal

If any consumer has been exploited by the seller or faced any unfair trade practices he can seek redressal i.e. compensation or damages under this right. This right ensures that all the issues of the consumers are dealt with and justice is done to him. A proper redressal mechanism has been set up by the government of India such as the consumer

courts and forums at district and national level which is discussed later in this article.

Right to Consumer Education

It is the right of each and every person who is a citizen of India to have knowledge about all the laws and policies relating to the consumer. Therefore it is made sure the material regarding the consumer-related laws is easily available all over India but there is still a major part of the population who is not aware of his laws and rights. This is the reason many awareness programmes have been organized by the government of India such as 'jago grahak Jago' and the camps organized by various lawyers in the remote areas of the country.

14.3. Duties of a Consumer

- On purchasing of goods or hiring of any services, it is the duty of the consumer to pay for the same.
- While purchasing something it is his duty to check weights, balances, prices etc. and also to give a careful reading to the labels.
- It is the duty of the consumer to update himself about the various consumer protection schemes.
- Duty to be careful while purchasing and not to fall in the trap of misleading information and advertisements.
- It is the duty of the consumer to not purchase anything from the black markets.
- It is the duty of the consumer to be aware of his rights and duties and also spreading the awareness of the same among others.
- It is the consumers' duty to file a complaint if the goods which he purchased are defective.
- Each and every consumer should secure the bills of the goods purchased or the services availed so that if in the future he finds the goods or services to be defective he can easily file a complaint against the same and can prove it.

14.4. Consumer Dispute Redressal Commission

- The act has the provision of the establishment of the Consumer Disputes Redressal Commissions (CDRCs) at the national, state and district levels.
- The CDRCs will entertain complaints related to;

- i. Overcharging or deceptive charging
- ii. Unfair or restrictive trade practices
- iii. Sale of hazardous goods and services which may be hazardous to life. Sale of defective goods or services.

Check Your Progress-1

True/False

- a. The complaint should consist of signatures of the complainant or his authorized agent.
- b. The act has the provision of the Establishment of the CCPA which will protect, promote and enforce the rights of consumers.
- c. On purchasing of goods or hiring of any services, it is the duty of the consumer to pay for the same.
- d. The Consumer Protection Act has recognized five rights of a consumer.
- e. The National CDRC will hear complaints worth more than Rs.20 crores.

14.5 Jurisdiction under the Consumer Protection Act

- The act has defined the criteria of Consumer Disputes Redressal Commission (CDRCs). The National CDRC will hear complaints worth more than Rs. 10 crores.
- The State CDRC will hear complaints when the value is more than Rs 1 crore but less than Rs 10 crore.
- While the District CDRC will entertain complaints when the value of goods or service is up to Rs 1 crore

14.6 Remedial Action

It may be noted that a complaint to a redressal agency may be filed by:

- **Removal of Defects**– if the consumer after conducting a proper test by using the product finds the product to be defective then the authority can pass an order of removing the defects in the product.
- Replacement of goods
- Refund of the price paid by the consumer while purchasing the product.

- **Award of Consumption**– a consumer can demand compensation from the trader or service provider if because of his negligence the consumer has suffered some physical or any other loss.
- **Removal of Deficiency in Service**– the authority can pass orders for removal of the deficiency if there is any deficiency in delivery of the service, for instance, if the consumer has applied for a loan and has fulfilled all the formalities but the bank is making unnecessary delay in sanctioning the loan, then the court can pass orders to sanction the loan.
- **Discontinuance of Unfair/ Restrictive Trade Practice**– if a complaint is filed by the consumer against any unfair trade practice in the market, the authority can order an immediate withdrawal of such practice and can also pass an order for banning such trade practice.
- Stopping of sale of hazardous goods
- Withdrawal of hazardous goods from the market.
- Payment of the adequate cost

14.7 Fees for Filing Complaints

The complainant needs to pay the prescribed court fees according to the pecuniary value of his case. Following are the fee details of the court fees:

For District forums

Up to Rs. 1 lakh: Rs. 100/- between Rs. 1-5 lakh: Rs. 200/-

Between Rs. 5-10 lakh: Rs. 400/-

Above Rs. 10 lakh and up to Rs. 20 lakh: Rs. 500/-

For State Commissions

Above Rs. 20 lakh but less than Rs. 50 lakh: Rs. 2,000/- Above Rs. 50/- lakh and up to Rs. 1 crore: Rs. 4,000/-

For the National Commission

A standard amount of Rs. 5,000/-

The Forum under which the complaint has been filed by the aggrieved party is under a mandate to provide the resolution to the parties within a period of 30 days. If it fails to adhere with the same the party can move to the next commission.

Penalties

The Consumer Commissions are authorized to impose penalties on trader or person against whom complaint is made if he fails to comply with the order of the redressal agency. The penalty or punishment may involve imprisonment for a period not more than 3 years or a fine of not more than 10 thousand rupees or both.

Appeal

An appeal is a legal instrument which enables persons dissatisfied with the findings of a consumer court to approach a higher court to present his case and seek justice. In the context of consumer forums:

An appeal can be made with the state commission against the order of the district forum within 30 days of the order, which is extendable for further 15 days (Section 15)

An appeal can be made with the National Commission against the order of the state commission within 30 days of the order or within such time as the National Commission allows (Section 19)

- An appeal can be made with the Supreme Court against the order of the National Commission within 30 days of the order or within such time as the Supreme Court allows (Section 23)

14.8. Importance of Consumer Protection Act

Consumer ignorance – consumer protection provides information to ignorant customers regarding rights and remedies available to them. It spreads awareness so that consumers can know about the various redressal agencies where they can approach to protect their interests.

Unorganised consumers: – in developing countries like india, consumers are not organized. They are very few consumers' organization which is working to protect the interest of the consumer.

Exploitation of consumers: – now a day's consumer is the kingpin of the market but then also there is a lot of exploitation of consumer as businessmen use various unfair trade practices to cheat and exploit consumers.

Importance of consumer protection from businessmen's point of view:

- **Social responsibility:** –a businessman has a social obligation towards various groups and customer is one of the important groups. It is the responsibility of a businessman to provide quality goods at a reasonable price.

- **Moral justification:** –ethics was part of the profession only but today ethics is playing a very important role in business also. Moral value practised by the businessmen adds glory to businessmen.
- **Government intervention:**-if businessmen want to avoid the intervention of govt. Then they should not involve in unfair trade practices. Government intervention may spoil the image of business so businessmen should involve in the activities to protect the interest of the consumer.

Importance of consumer protection:

- **To organize consumers:** Indian consumers are scattered over a wide geographical area. They are not well organized. They have low power and businessmen exploit consumers. Here we need consumer protection.
- **Provide market information:** the majority of the consumers have no information about quality, type, price, and other marketing facilities. Many customers buy without product knowledge and this make them suffer losses.
- **Importance of physical safety:** Indian markets are over flooded with products. The products may be adulterated and maybe health hazardous. This may endanger their life and due to this a consumer needs to be protected.
- **Avoiding monopoly:** consumer protection is very important in terms of avoiding monopoly. A monopoly is the crown of the modern market. Most of the organizations, irrespective of various restrictions follow monopoly practice. Due to this consumers get affected and need to be protected.
- **Prevention from malpractices:** business malpractices are rapidly growing in the modern market. Businessmen follow unfair trade practices, restrictive trade practices and monopolistic trade practices and consumer protection plays a vital role.
- **Misleading advertisements:** many organizations deliberately cheat consumers through wrong or misleading advertisements. This will protect consumers from getting exploited.
- **Informing consumers about their basic rights:** The majority of the consumers are ignorant. They do not know about consumer rights. Consumer movements inform consumers about their rights and protect their interests and rights.

14.9. Steps to Set Up Consumer Grievance Redressal Mechanism

The consumer protection act aims at set up of the grievance redressal forums to deal with the complaints of the consumers. In India, there are three tier mechanism adopted for the same:

District Forum:

It is established in each district by the state government. Only those complaints can be filed at this level where the value of goods/services and the compensation claimed is less than Rs. 5 lakhs.

Such complaints may be lodged either by the consumer so deceived or through any recognized consumer association. Sample of goods is sent for testing to an approved laboratory. The opposite party is duly informed and is given chance to file its representation. An appeal can be filed against such order to the State Commission within 30 days.

State Commission:

Only those complaints can be filed with a State Commission where the value of goods or services and compensation claimed is between Rs. 5,00,000/- and Rs. 20,00,000/-. As mentioned above, appeals against the orders of any District Forum can be filed before such Commission.

The State Commission after being satisfied that the goods were defective can issue an order directing the opposite party to either remove the defect; or replace the goods; or return the price paid; or pay compensation to the consumer for loss or injury.

The aggrieved party can appeal against such order to the National Commission within 30 days.

National Commission:

This Commission is set up by the Central Government under the president ship of a Judge of the Supreme Court. All complaints pertaining to those goods or services and compensation whose value is more than Rs. 20 lacs can be filed.

Also, appeals against the order of State Commission can be filed before the National Commission.

How to file a complaint?

The very first step before filing a complaint the aggrieved party should do is to send a notice to the service provider from whom the goods were

purchased or the service was availed informing him about the defects in the goods or the deficiency in the service or unfair practice. This notice is sent to the trader or the aggrieved party in order to see if that company or trader is willing to give the compensation or offer any other remedy. If in case the trader or service provider is not willing to provide with any remedy, the aggrieved party shall go ahead with filing a formal complaint.

The next step is to file a formal complaint under the Consumer Protection Act of 1986. Here the aggrieved party does not need to hire a lawyer in order to file a complaint. He can file the complaint on his own.

The aggrieved party just needs to write down the following contents on a plain paper:

- Name, description and the address of the complainant and of the opposite party or parties
- Facts relating to the complaint and time and venue where it arose
- All the possible documents in support of the allegations contained in the complaint
- The relief or the remedy claimed by the complainant
- The complaint should consist of signatures of the complainant or his authorized agent
- The next step after the drafting of the complaint is to choose the appropriate authority under which the complaint is to be filed. The complainant shall choose the authority according to pecuniary jurisdiction of his complaint i.e. the total value of the goods or services and the compensation claimed by him. It is to be noted here that the complainant can also file an online complaint on www.consumerhelpline.gov.in

To Describe Remedial Action and Penalties

The objective of Consumer Protection Act, 1986 is to provide the remedial actions for the aggrieved consumer and also laid down the penalties for sellers engaging in unfair trade practices. **It may be noted that a complaint to a redressal agency may be filed by:**

Removal of Defects– If the consumer after conducting a proper test by using the product finds the product to be defective then the authority can pass an order for removing the defects in the product or for replacement of goods or refund of the price paid by the consumer while purchasing the product.

Award of Consumption– A consumer can demand compensation from the trader or service provider if because of his negligence the consumer has suffered some physical or any other loss. **Removal of Deficiency in Service**– The authority can pass orders for removal of the deficiency if there is any deficiency in delivery of the service, for instance, if the consumer has applied for a loan and has fulfilled all the formalities but the bank is making unnecessary delay in sanctioning the loan, then the court can pass orders to sanction the loan.

Discontinuance of Unfair/ Restrictive Trade Practice– If a complaint is filed by the consumer against any unfair trade practice in the market, the authority can order an immediate withdrawal of such practice and can also pass an order for banning such trade practice.

Stopping of sale of hazardous goods, withdrawal of hazardous goods from the market and payment of the adequate cost

Penalties

The Consumer Commissions are authorized to impose penalties on trader or person against whom complaint is made if he fails to comply with the order of the redressal agency. The penalty or punishment may involve imprisonment for a period not more than 3 years or a fine of not more than 10 thousand rupees or both.

14.10. Grievance Redressal Mechanism

The Consumer Protection Act proposes three-tier redressal mechanism: quasi-judicial machinery at the National, state and district level. The jurisdiction of each consumer redressal forum has been described under this act.

District Consumer Disputes Redressal Forum

Each and every district has a District Consumer Disputes Redressal Forum. According to Section 11 of this act, this forum has the jurisdiction to entertain complaints and disputes only where the value of the goods or services and the value of the compensation claimed do not exceed Rs. 20 Lakhs.

The District Forum shall have the same powers as that of a civil court in the following matters:

- In the summoning and enforcing of attendance of any defendant or witness
- In examining the witness on an oath
- In receiving the evidence on affidavit

- In any other matter which may be prescribed

Demanding of the report of concerned analysis or test from the appropriate laboratory or from any other authorized relevant source.

In discovering and producing any document or other material objects which are producible as evidence in the forum.

The District forum shall consist of a President i.e. the head of the commission who is or has been or is qualified to be a district judge and two other members possessing a bachelor's degree from a recognized university and one of them shall be a woman. The members of a commission shall be the persons of ability, integrity and standing and have adequate knowledge and experience regarding the field of a consumer. Each and every member of the district forum shall either hold the office for a term of 5 years or up to the age of 65 years, whichever is earlier.

State Consumer Disputes Redressal Commission

Each and every State has a State Commission. According to Sec-17 of the act, the pecuniary jurisdiction of a State Commission for entertaining complaints or issues where the value of goods or services and the value of the compensation claimed exceeds Rs. 20 Lakhs but is less than Rs. 1 crore.

The State Commission shall consist of a President and the other two members. The President shall be a person who is or has been qualified to be a Judge of High Court and the other two members shall possess a bachelor's degree from a recognized university. Out of two members, one shall be a woman.

The members of a commission shall be the persons of ability, integrity and standing and have adequate knowledge and experience regarding the field of a consumer.

Each and every member of the district forum shall either hold the office for a term of 5 years or up to the age of 67 years, whichever is earlier.

National Consumer Disputes Redressal Commission

The National Commission was instituted in 1988. It is headed by a sitting or retired Judge of the Supreme Court of India. According to Sec-21 of the act, the pecuniary jurisdiction of a National Commission for entertaining complaints or issues where the value of goods or services and the value of the compensation claimed is more than Rs. 1 crore.

The National Commission has been constituted with various powers such as:

It has the powers of administrative control over all the State Commissions. It can call all the State Commissions or any one of them for periodical returns regarding the institution, disposal and pendency of cases.

It can adopt a uniform procedure in the hearing of the matters.

It can provide a speedy grant of copies of documents to the parties.

It also has a general power of overseeing the functioning of the State Commissions and the District Forums.

It has the power of providing prior service of the copies of the documents produced by one party to the opposite parties.

In addition to the President of the commission, it shall consist of 4 other members, out of which at least one shall be a woman.

All of these members shall fulfill the following conditions to be able to qualify as a member in the National Commission:

Their age should not be less than 35 years of age.

They shall possess a bachelor's degree from a recognized university.

They shall be a person of ability, integrity and standing and have adequate knowledge and experience regarding the field of a consumer.

Every member of the commission shall hold office for a term of 5 years or up to the age of 70 years whichever is earlier.

Procedure Followed on Admission of Complaint

1. The District Forum shall, on receipt of a complaint, if it relates to any goods, –
 - a. refer a copy of the complaint to the opposite party mentioned in the complaint directing him to give his version of the case within a period of thirty days or such extended period not exceeding fifteen days as may be granted by the District Forum;
 - b. here the opposite party on receipt of a complaint referred to him under clause (a) denies or disputes the allegations contained in the complaint, or omits or fails to take any action to represent his case within the time given by the District Forum, the District Forum shall proceed to settle the

consumer dispute in the manner specified in clauses (c) to (g);

- c. where the complaint alleges a defect in the goods which cannot be determined without proper analysis or test of the goods, the District Forum shall obtain a sample of the goods from the complainant, seal it and authenticate it in the manner prescribed and refer the sample so sealed to the appropriate laboratory along with a direction that such laboratory make an analysis or test whichever may be necessary, with a view to finding out whether such goods suffer from any defect alleged in the complaint or from any other defect and to report its findings thereon to the District Forum within a period of forty-five days of the receipt of the reference or within such extended period as may be granted by the District Forum;
- d. before any sample of the goods is referred to any appropriate laboratory under clause (c), the District Forum may require the complainant to deposit to the credit of the Forum such fees as may be specified, for payment to the appropriate laboratory for carrying out the necessary analysis or test in relation to the goods in question;
- e. the District Forum shall remit the amount deposited to its credit under clause (d) to the appropriate laboratory to enable it to carry out the analysis or test mentioned in clause (c) and on receipt of the report from the appropriate laboratory, the District Forum shall forward a copy of the report along with such remarks as the District Forum may feel appropriate to the opposite party;
- f. if any of the parties disputes the correctness of the findings of the appropriate laboratory, or disputes the correctness of the methods of analysis or test adopted by the appropriate laboratory, the District Forum shall require the opposite party or the complainant to submit in writing his objections in regard to the report made by the appropriate laboratory;
- g. the District Forum shall thereafter give a reasonable opportunity to the complainant as well as the opposite party of being heard as to the correctness or otherwise of the report made by the appropriate laboratory and also as to the objection made in relation thereto under clause (f) and issue an appropriate order under section 14.

2. The District Forum shall, if the complaint received by it under section 12 relates to goods in respect of which the procedure specified in sub-section (1) cannot be followed, or if the complaint relates to any services, –
 - a. refer a copy of such complaint to the opposite party directing him to give his version of the case within a period of thirty days or such extended period not exceeding fifteen days as may be granted by the District Forum;
 - b. where the opposite party, on receipt of a copy of the complaint, referred to him under clause (a) denies or disputes the allegations contained in the complaint, or omits or fails to take any action to represent his case within the time given by the District Forum, the District Forum shall proceed to settle the consumer dispute, –
 - i. on the basis of evidence brought to its notice by the complainant and the opposite party, where the opposite party denies or disputes the allegations contained in the complaint, or
 - ii. on the basis of evidence brought to its notice by the complainant where the opposite party omits or fails to take any action to represent his case within the time given by the Forum.
3. No proceedings complying with the procedure laid down in sub-sections (1) and (2) shall be called in question in any court on the ground that the principles of natural justice have not been complied with.
4. For purposes of this section, the District Forum shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit in respect of the following matters, namely :
 - (i) the summoning and enforcing attendance of any defendant or witness and examining the witness on oath;
 - (ii) the discovery and production of any document or other material object producible as evidence;
 - (iii) the reception of evidence on affidavits;
 - (iv) the requisitioning of the report of the concerned analysis or test from the appropriate laboratory or from any other relevant source;

- (v) issuing of any commission for the examination of any witness; and
- (vi) Any other matter which may be prescribed.

5. Every proceeding before the District Forum shall be deemed to be a judicial proceeding within the meaning.

Limitation Period for Filing Complaint

Filing of a complaint– the complainant can file a case against the trader or the service provider only within two years from the date on which the cause of action arose. The forum may entertain the case in case of delay only if the complainant gives sufficient cause.

Appeal to the State Commission– According to sec-15 of the act an appeal can be filed to the State Commission by any person who is aggrieved by an order passed by the District Forum within a period of thirty days from the date of an order, in a form and manner prescribed under the act.

If an appeal is filed after the expiry of the period of limitation the State Commission has the discretion to entertain that appeal if the complainant shows sufficient cause for not filing an appeal within the limitation period.

Appeal to the National Commission– According to sec-19 of the act an appeal can be filed to the National Commission by a person aggrieved by the order passed by the State Commission within 30 days from the date of receipt of order. The appeal is to be accompanied by a copy of an affidavit.

Appeal to the Supreme Court of India– According to sec-23 of the act an appeal may be referred to the Supreme Court of India by the party aggrieved by the order passed by the National Commission within a period of 30 days from the date of order passed.

Revision Petition to the National Commission– Sec-21(b) of the act vests the power in the National Consumer Disputes Redressal Commission to call for the records and pass appropriate orders in any consumer dispute which is either pending or has been decided by the State Commission.

The National Commission can exercise its revisional jurisdiction only if it appears to the commission that the State Commission has acted illegally or with irregularity or outside its jurisdiction. Such a Revision Petition can be filed within a period of 90 days from the date of the order passed by the aggrieved party.

14.11. Case Study

1. Manjeet Singh Vs. National Insurance Company Ltd. & Anr:

In this case, the appellant had purchased a second - hand truck under a Hire Purchase agreement. The vehicle was insured by the respondent insurance company. One day when he was driving the truck, a passenger asked him to stop the truck and give him a lift. When he stopped the truck, the passenger brutally assaulted the driver and fled with the vehicle.

An FIR was lodged and the respondent finance company was intimidated about the theft. However, the insurance company rejected the claim on the ground of breach of terms of the policy. The complainant approached District Consumer Disputes Forum, State Commission and National Commission to compensate him for the loss. All of them had rejected the case. So, finally he approached the Supreme Court.

Judgment: The Supreme Court held that the appellant was not at all in fault. It can be considered as a breach of the policy, but not a fundamental breach to bring the insurance policy to an end and terminate the insurance policy. The two - judge bench of Supreme Court directed the respondent insurance company to pay 75% of the insured amount along with 9% interest p.a. from the date of filing the claim. The court also directed the insurance company to pay sum of Rs. 1, 00, 000 as compensation.

2.National Insurance Company Ltd. Vs. Hindustan Safety Glass Works Ltd. & Anr.

In this case, the insurance company had refused to compensate the respondent because of damage caused due to heavy rain during a mentioned period. The Insurance Company admittedly denied relief to the insured on the basis of one of the conditions of the policy which stated that National Insurance would not be liable for any loss or damage 12 months after the event of the loss or damage to the insured. The insured filed a complaint with the National Commission under the provisions of the Consumer Protection Act, 1986.

Judgment: The National Commission held that the claim made by the insured is actionable. It also observed that the goods were insured at the time of incident and he asked for the claim next day. It rejected all the contentions urged by National Insurance and ordered the insurance company to award an amount of Rs. 21, 05,803.89 with interest at 9% per annum.

3.Karnataka Power Transmission Corporation (KPTC) Vs. Ashok Iron Works Private Limited

Ashok Iron Works, a private company which manufactures iron had applied for obtaining electricity from the state's power generation company - the Karnataka Power Transmission Corporation (hereinafter KPTC) for commencing its iron production. In spite of paying charges and obtaining confirmation for the supply of 1500 KVA energy in February 1991, the actual supply did not begin until ten months later, in November 1991. This delay incurred a huge loss for Ashok Iron Works. This company had filed a complaint to the Belgaum Consumer Dispute Forum and later Karnataka High Court.

The legal argument by KPTC was that the complaint was not maintainable as the consumer Protection Act 1986 excludes commercial supply of goods. It also made an argument that the company in engaged in manufacturing iron and intended to use it for commercial consumption which is excluded under the Act. He also said that, the complainant is not a 'person' under Section 2(1)(m) of the Act, 1986.

Judgment: In this case, Supreme Court gave his rulings. The Supreme Court mentioned the General Clause Act that includes a private company within the purview of the definition of a "Person." It was also held that the supply of electricity by the KPTC to a consumer would be covered under Section 2(1)(o) being 'service.'

Also, if the electrical energy consumer is not provided to a consumer in time as is agreed upon, then under Section (2)(1)(g), then there can be a case for deficiency in service. Therefore, the clause stating "supply" of goods for commercial purpose would not be applied. The Supreme Court sent this case back to District Forum forretrial on these grounds.

4. Indian Medical Association Vs. V.P. Shantha and others: A writ petition was filed by the Indian Medical Association seeking Supreme Court to declare that the Consumer Protection Act doesn't apply to the medical profession.

Indian Medical Association validated that medical professionals are governed by a separate Code of Ethics. Thus medical negligence can be dealt with by medical experts in their own jurisdiction; the Consumer Protection Act shouldn't be applied. The writ petition involved two questions as given below:

- **Whether a medical practitioner can be regarded as rendering 'service' under the Consumer Protection Act 1986?**

5. If medical services are rendered free, then would it be considered under the Act?

Judgment: The Court held that District, State and National Consumer Forums can summon experts in the field of medicine, examine evidence and protect the interest of consumers. Doctors and hospitals who render service without any charge would not fall within the ambit of "service". In a government hospital, where services are provided free of charge - the Consumer Protection Act would not be applied. However, if customers are being provided for free to the poor, then it shall be covered as a service under the act. In case the insurance policy company pays for the treatment on behalf of the customer, then it will be covered under the Act.

5. *Sehgal School of Competition Vs. Dalbir Singh*: In is one of the landmark consumer protection act cases and judgments. A student was asked to deposit lump sum fees of Rs. 18,734/- for coaching of medical entrance examination for the next two years. This amount was deposited by the student in two complete installments. However, the student realized that the quality of the coaching institute was not upto the mark and therefore sought a refund for the remaining period which was further refused by the coaching institute. The appellant lodged a case against Sehgal School of Competition before National Commission. While Sehgal School of Competition submitted records that showed good results of the institute and alleged that it was wrong to observe that the coaching services are substandard.

Judgment: National Commission stated that fees once paid shall not be refunded is an unfair trade practice. It quoted UGC guidelines declaring that even if a student has not attended a single class, an amount of Rs.1000/- can get deducted and proportionate charges for hostel fees, etc, and the balance amount could be refunded. State Consumer Forum, mentioned that not just the balance amount of fee, but also a higher compensation for legal costs as well as the pain that the student had to undertake, could be availed in such cases.

6. *Sapient Corporation Employees Provident Fund Trust Vs. HDFC & Ors*: It is one of the remarkable consumer protection act cases. This consumer protection act case happened when a wrongful debit happened from a bank account. The complainant trust - Sapient Corporation Employees Provident Fund Trust maintained an account with the respondent HDFC Bank. The bank received instructions from the Employee Provident Fund Organisation (EPFO) that mentioned order of payment of Rs. 1.47 crores against the trust, and that no other

payments from the trust's account are made until EPFO's liability has not been settled by the trust. However, the trust issued an instruction to the HDFC bank not to debit any amount until further communication as they wanted to seek a stay order. However, in payment of the statutory due to EPFO, the bank, after giving due time, debit the account with an amount of R.1.47 crores.

The challenged this transaction as a deficiency in service and demanded the amount debited along with interest, damages, and legal expenses. Trust lodged the complaint against the HDFC before the National Commission on the ground that bank committed default by paying an amount payable as a statutory due.

Judgment: The National Commission dismissed the argument of the complainant saying that bank informed the trust as its customer and gave them due time. So, it cannot be said that EPFO conducted deficiency in services. For this false litigation, the National Commission had imposed a penalty of Rs. 25,000 on the complainant trust to be paid to the HDFC Bank.

7. Delhi Development Authority Vs. D.C. Sharma: In this consumer protection act case, DC Sharma (respondent) a Government servant had paid an initial amount for the allotment of a DDA plot of Rs. 5 Lakhs in 1997. He requested for the extra time to pay installments as he wanted to avail loan facility from his office.

Meanwhile, he realized that the plot allotted to him through a draw of lots has already been allotted to another person two years ago. Due to this negligence of the DDA, the respondent approached the District forum that dismissed this case. Subsequently, the state Consumer forum was approached that passed an order in favor of the respondent.

Judgment: National Commission stated that when the plot was already allotted to someone else back in 1995, then why DDA took no steps in correcting its own error in the allotment. It directed DDA to pay an alternate plot of same kind or pay escalate price of Rs. 30 Lakhs.

8. V.N. Shrikhande Vs. Anita Sena Fernandes

The petitioner - Anita Sena, who was a nurse by profession underwent a stone removal surgery from her gall bladder but claimed that she continued to experience pain. After 9 years, it was detected that the reason behind this was that a gauge was left in her abdomen by the surgeon who operated her.

This required a second surgery. Therefore, she filed the charges for negligence and compensation of Rs.50 Lakhs was demanded by the petitioner. She filed the case against the doctor for his negligence before Supreme Court.

Judgment: Supreme Court rejected the case on limitation and evidentiary grounds. The court held that when nurse was working in the same hospital where the surgery happened. Then, in the past nine years, why did not she contact the doctor. During the discovery of gauge in the abdomen, appropriate action could have been taken on an immediate basis without requiring the respondent to pay. But she chose to consume pain killers. Her long silence dismissed the complaint and she was entitled to no compensation.

9. Nizam Institute of Medical Sciences v Prasanth S. Dhananka & Ors

This consumer protect act case arises out of a complaint of medical negligence where a 20-year- old engineering student was admitted to the Nizam Institute of Medical Sciences (NIMS) after he complaint about the acute chest pain. After several tests and x - rays, a tumor was revealed. Though, it could not be diagnosed whether the tumor was malignant or not, therefore, the patient was advised to undergo surgical removal of the same. After the surgery, the patient developed paralysis. There was a complete loss of control over the lower limbs and other related complications also raised leading to urinary tract infections, bedsores, etc.

The family of the patient held NIMS and the State of Andhra Pradesh statutorily liable (being a government hospital) liable for this utmost negligence. Family also claimed that no pre-operative tests conducted, no neurosurgeon was present during operation. Consent was only taken for the tumor excision, but the doctors also removed ribs, tumor mass and destroyed blood vessels leading to condition of paralysis.

Judgment: Based on the evidence, Supreme Court held that a huge negligence was made out on the part of doctors and the hospital. Hence, the court awarded damages worth Rs. 1 crore to compensate present and prospective medical expenses and suffering of life.

Let Us Sum Up

In this unit, you have studied about the following:

- Consumer Protection Act 1986 is a law to protect the interests of the consumers.

- The act has the provision of the Establishment of the CCPA which will protect, promote and enforce the rights of consumers.
- This right refers to as the right to be protected against the marketing of goods and services which are hazardous to life and property of the consumers.
- It refers to the right of a consumer to be informed of the quality, quantity, potency, purity, standard and price of the goods and services being sold by the shopkeeper.
- It is defined in the act as the right to be assured, wherever possible, to have access to a variety of goods and services at competitive prices.
- It is referred to as the right to be heard and to be assured that consumers' interests will receive due consideration at appropriate forums.
- If any consumer has been exploited by the seller or faced any unfair trade practices he can seek redressal i.e. compensation or damages under this right.
- It is the right of each and every person who is a citizen of India to have knowledge about all the laws and policies relating to the consumer.
- The National CDRC will hear complaints worth more than Rs. 10 crores Caveat emptor – Let the buyer beware

Check Your Progress-2

1. Trade mark
 - A. is represented graphically
 - B. is capable of distinguishing the goods or services of one person from those of others
 - C. may include shapes of goods or combination of colours
 - D. All of the above
2. Symbol of Maharaja of Air India is
 - A. Copyright
 - B. Patent
 - C. Trademark
 - D. All of the above
3. In India, the literary work is protected until
 - A. Lifetime of author
 - B. 25 years after the death of author
 - C. 40 years after the death of author
 - D. 60 years after the death of author

4. Design does not include
 - A. features of shape
 - B. composition of lines or colours
 - C. mode or principle of construction
 - D. None of the above
5. Which of the following is (are) included in Geographical indications of Goods
 - A. Handicraft
 - B. Foodstuff
 - C. Manufactured
 - D. All of the above.

Glossary

Goods: Products

Warranty: Duration of the product

Unpaid seller: The seller who yet to pay money

Guarantee: Assurance given to the part of products

Answers to Check Your Progress-1

- a-True
 - b-True
 - c-True
 - d-False
 - e-False
-

Answers to Check Your Progress-2

- 1.D
 - 2.C
 - 3.D
 - 4.C
 - 5.D
-

Suggested Reading

1. **Ravinder Kumar**– Legal Aspect of Business. – Cengage Learning, 2nd Edition-2011.
2. **Richard Stim**, Intellectual Property- Copy Rights, Trade Marks, and Patents, Cengage Learning, 2008.

Unit-15

Partnership Trusts- Company Form of Organization

STRUCTURE

Overview

Objectives

15.1. Introduction

15.2. Types of business organization

15.3. Sole proprietorship

15.4. Partnership Act 1932

15.5. Formation of Partnership

15.6. Procedure for Registration

15.7. Corporation

15.8. Limited Liability Company (LLC)

15.9. Case Study

Let Us Sum Up

Check Your Progress

Glossary

Answers to Check Your Progress

Suggested Readings

Overview

In this unit, the types of business organisations and the partnership act, the formation of partnership and procedure for registration, corporation Limited Liability Company has been clearly explained.

Objectives

After completion of this unit, you will be able:

- To state the meaning of forms of business
- To know the various forms of business
- To identify the advantages and disadvantages of business organization
- To understand the procedure to create partnership business
- To acquire the rules related to partnership act 1932

15.1. Introduction

Most production and distribution activities are carried out by millions of people in different parts of the country by constituting various kinds of organizations.

These organizations are based on some form of ownership. This choice affects a number of managerial and financial issues, including the amount of taxes the entrepreneur would have to pay, whether the entrepreneur may be personally sued for unpaid business bills, and whether the venture will die automatically with the demise of the entrepreneur.

Business organization is the single-most important choice you'll make regarding your company. What form your business adopts will affect a multitude of factors, many of which will decide your company's future. Aligning your goals to your business organization type is an important step, so understanding the pros and cons of each type is crucial.

Your company's form will affect:

- How you are taxed
- Your legal liability
- Costs of formation
- Operational costs

There are four main types of business organization:

- Sole proprietorship,
- Partnership,
- Corporation, and
- Limited Liability Company, or LLC.

Below, we give an explanation of each of these and how they are used in the scope of business law.

15.2. Types of Business Organisation

Sole Proprietorship and Partnership are the main types of Business organization. The concept of Sole Proprietorship and Partnership and its advantages and disadvantages are explained in detail below:

15.3. Sole Proprietorship

Sole proprietorship or individual entrepreneurship is a business concern owned and operated by one person. The sole proprietor is a person who

carries on business exclusively by and for himself. He alone contributes the capital and skills and is solely responsible for the results of the enterprise. In fact sole proprietor is the supreme judge of all matters pertaining to his business subject only to the general laws of the land and to such special legislation as may affect his particular business.

The salient features of the proprietorship are as follows:

- Single ownership
- One man control
- Undivided risk
- Unlimited liability
- No separate entity of the business
- No Government regulations.

Advantages:

1. **Simplicity** – It is very easy to establish and dissolve a sole proprietorship. No documents are required and no legal formalities are involved. Any person competent to enter into a contract can start it. However, in some cases, i.e., of a chemist shop, a municipal license has to be obtained. You can start business from your own home.
2. **Quick Decisions** – The entrepreneur need not consult anybody in deciding his business affairs. Therefore, he can take on the spot decisions to exploit opportunities from time to time. He is his own boss.
3. **High Secrecy** – The proprietor has not to publish his accounts and the business secrets are known to him alone. Maintenance of secrets guards him from competitors.
4. **Direct Motivation** – There is a direct relationship between efforts and rewards. Nobody shares the profits of business. Therefore, the entrepreneur has sufficient incentive to work hard.
5. **Personal Touch** – The proprietor can maintain personal contacts with his employees and clients. Such contacts help in the growth of the enterprise.
6. **Flexibility** – In the absence of Government control, there is complete freedom of action. There is no scope for difference of opinion and no problem of co-ordination.

Disadvantages:

- No incentive to work hard may be careless and inefficient.
- Increases risk and liability of the sole proprietor.
- No financial stake-business at the mercy of the assistant.
- Danger of disclosure of business secrets.
- No addition to goodwill.
- Lack of responsibility.
- Problem of capital unsolved.
- Increased expense.
- May leave the business and set up competition.

Sole proprietorship is suitable in the following cases:

- Where small amount of capital is required e.g., sweet shops, bakery, newsstand, etc.
- Where quick decisions are very important, e.g., share brokers, bullion dealers, etc.
- Where limited risk is involved, e.g., automobile repair shop, confectionery, small retail store, etc.
- Where personal attention to individual tastes and fashions of customers is required, e.g., beauty parlour, tailoring shops, lawyers, painters, etc.
- Where the demand is local, seasonal or temporary, e.g., retail trade, laundry, fruit sellers, etc.
- Where fashions change quickly, e.g., artistic furniture, etc.
- Where the operation is simple and does not require skilled management.

Thus, sole proprietorship is a common form of organisation in retail trade, professional firms, household and personal services. This form of organization is quite popular in our country. It accounts for the largest number of business establishments in India, in spite of its limitations.

15.4. Partnership

As a business enterprise expands beyond the capacity of a single person, a group of persons have to join hands together and supply the necessary capital and skills. Partnership firm thus grew out of the limitations of one man business. Need to arrange more capital, provide

better skills and avail of specialisation led to the growth to partnership form of organisation.

According to Section 4 of the Partnership Act, 1932 partnership is “the relation between persons who have agreed to share the profits of a business carried on by all or anyone of them acting for all”. In other words, a partnership is an agreement among two or more persons to carry on jointly a lawful business and to share the profits arising there from. Persons who enter into such agreement are known individually as ‘partners’ and collectively as ‘firm’.

Characteristics of Partnership:

- i. Association of two or more persons — maximum 10 in banking business and 20 in non-banking business
- ii. Contractual relationship—written or oral agreement among the partners
- iii. Existence of a lawful business
- iv. Sharing of profits and losses
- v. Mutual agency among partners
- vi. No separate legal entity of the firm
- vii. Unlimited liability
- viii. Restriction on transfer of interest
- ix. Utmost good faith.

Merits of Partnership:

The partnership form of business ownership enjoys the following advantages:

1) Ease of Formation:

A partnership is easy to form as no cumbersome legal formalities are involved. An agreement is necessary and the procedure for registration is very simple. Similarly, a partnership can be dissolved easily at any time without undergoing legal formalities. Registration of the firm is not essential and the partnership agreement need not essentially be in writing.

2) Larger Financial Resources:

As a number of persons or partners contribute to the capital of the firm, it is possible to collect larger financial resources than is possible in sole proprietorship. Creditworthiness of the firm is also higher because every

partner is personally and jointly liable for the debts of the business. There is greater scope for expansion or growth of business.

3) Specialisation and Balanced Approach:

The partnership form enables the pooling of abilities and judgment of several persons. Combined abilities and judgment result in more efficient management of the business. Partners with complementary skills may be chosen to avail of the benefits of specialisation. Judicious choice of partners with diversified skills ensures balanced decisions. Partners meet and discuss the problems of business frequently so that decisions can be taken quickly.

4) Flexibility of Operations:

Though not as versatile as proprietorship, a partnership firm enjoys sufficient flexibility in its day- to-day operations. The nature and place of business can be changed whenever the partners desire. The agreement can be altered and new partners can be admitted whenever necessary. Partnership is free from statutory control by the Government except the general law of the land.

5) Protection of Minority Interest:

No basic changes in the rights and obligations of partners can be made without the unanimous consent of all the partners. In case a partner feels dissatisfied, he can easily retire from or he may apply for the dissolution of partnership.

6) Personal Incentive and Direct Supervision:

There is no divorce between ownership and management. Partners share in the profits and losses of the firm and there is motivation to improve the efficiency of the business. Personal control by the partners increases the possibility of success. Unlimited liability encourages caution and care on the part of partners. Fear of unlimited liability discourages reckless and hasty action and motivates the partners to put in their best efforts.

7) Capacity for Survival:

The survival capacity of the partnership firm is higher than that of sole proprietorship. The partnership firm can continue after the death or insolvency of a partner if the remaining partners so desire. Risk of loss is diffused among two or more persons. In case one line of business is not successful, the firm may undertake another line of business to compensate its losses.

8) Better Human and Public Relations:

Due to number of representatives (partners) of the firm, it is possible to develop personal touch with employees, customers, government and the general public. Healthy relations with the public helps to enhance the goodwill of the firm and pave the way for steady progress of the business.

9) Business Secrecy:

It is not compulsory for a partnership firm to publish and file its accounts and reports. Important secrets of business remain confined to the partners and are unknown to the outside world.

Demerits of Partnership:

1) Unlimited Liability:

Every partner is jointly and severally liable for the entire debts of the firm. He has to suffer not only for his own mistakes but also for the lapses and dishonesty of other partners. This may curb entrepreneurial spirit as partners may hesitate to venture into new lines of business for fear of losses. Private property of partners is not safe against the risks of business.

2) Limited Resources:

The amount of financial resources in partnership is limited to the contributions made by the partners. The number of partners cannot exceed 10 in banking business and 20 in other types of business. Therefore, partnership form of ownership is not suited to undertake business involving huge investment of capital.

3) Risk of Implied Agency:

The acts of a partner are binding on the firm as well as on other partners. An incompetent or dishonest partner may bring disaster for all due to his acts of commission or omission. That is why the saying is that choosing a business partner is as important as choosing a partner in life.

4) Lack of Harmony:

The success of partnership depends upon mutual understanding and cooperation among the partners. Continued disagreement and bickering among the partners may paralyse the business or may result in its untimely death. Lack of a central authority may affect the efficiency of the firm. Decisions may get delayed.

5) Lack of Continuity:

A partnership comes to an end with the retirement, incapacity, insolvency and death of a partner. The firm may be carried on by the remaining partners by admitting new partners. But it is not always possible to replace a partner enjoying trust and confidence of all. Therefore, the life of a partnership firm is uncertain, though it has longer life than sole proprietorship.

6) Non-Transferability of Interest:

No partner can transfer his share in the firm to an outsider without the unanimous consent of all the partners. This makes investment in a partnership firm non-liquid and fixed. An individual's capital is blocked.

7) Public Distrust:

A partnership firm lacks the confidence of public because it is not subject to detailed rules and regulations. Lack of publicity of its affairs undermines public confidence in the firm.

The foregoing description reveals that partnership form of organization is appropriate for medium- sized business that requires limited capital, pooling of skills and judgment and moderate risks, like small scale industries, wholesale and retail trade, and small service concerns like transport agencies, real estate brokers, professional firms like chartered accountants, doctor's clinics or nursing homes, attorneys, etc.

Check Your Progress-1

True/False

- a. Sole proprietorship or individual entrepreneurship is not a business concern owned and operated by one person.
- b. A partnership is easy to form as no cumbersome legal formalities are involved.
- c. A partnership firm can be registered at any time by filing a statement in the prescribed form.
- d. No partner can transfer his share in the firm to an outsider without the unanimous consent of all the partners.
- e. A partnership firm can be formed through an agreement among two or more persons.

15.5. Formation of Partnership

A partnership firm can be formed through an agreement among two or more persons. The agreement may be oral or in writing. But it is desirable that all terms and conditions of partnership are put in writing so as to avoid any misunderstanding and disputes among the partners. Such a written agreement among partners is known as Partnership Deed. It must be signed by all the partners and should be properly stamped. It can be altered with the mutual consent of all the partners.

A partnership deed usually contains the following details:

- (i) Name of the firm.
- (ii) Names and address of all the partners.
- (iii) Nature of the firm's business.
- (iv) Date of the agreement.
- (v) Principal place of the firm's business.
- (vi) Duration of partnership, if any.
- (vii) Amount of capital contributed by each partner.
- (viii) The proportion in which the profits and losses are to be shared.
- (ix) Loans and advances by partners and interest payable on them.
- (x) Amount of withdrawal allowed to each partner and the rate of interest.
- (xi) Amount of salary or commission payable to any partner.
- (xii) The duties, powers and obligations of all the partners.
- (xiii) Maintenance of accounts and audit.
- (xiv) Mode of valuation of goodwill on admission, retirement or death of a partner.
- (xv) Procedure for dissolution of the firm and settlement of accounts.
- (xvi) Arbitration for settlement of disputes among the partners.
- (xvii) Arrangements in case a partner becomes insolvent.
- (xviii) Any other clause(s) which may be found necessary in particular kind of business.

Registration of Firms:
The Partnership Act, 1932 provides for the registration of firms with the Registrar of Firms appointed by the Government. The registration of a

partnership firm is not compulsory. But an unregistered firm suffers from certain disabilities. Therefore, registration of a partnership is desirable

15.6. Procedure for Registration

A partnership firm can be registered at any time by filing a statement in the prescribed form. The form should be duly signed by all the partners. It should be sent to the Registrar of Firms along with the prescribed fee.

The statement should contain the following particulars:

1. Name of the firm.
2. Principal place of its business.
3. Name of other places where the firm is carrying on business.
4. Names in full and permanent addresses of all the partners.
5. Date of commencement of the firm's business and the dates on which each partner joined the firm.
6. Duration of the firm, if any.
7. Nature of the firm's business.

On receipt of the statement and the fees, the Registrar makes an entry in the Register of Firms. The firm is considered to be registered when the entry is made.

The Registrar issues a Certificate of Registration. Any change in the above particulars must be communicated to the Registrar of Firms within a reasonable period of time so that necessary alterations may be made in the Register of Firms. The register is open for inspection on payment of a nominal fee.

15.7. Corporation

Chief Justice John Marshall of U.S.A defined a company in the famous Dartmouth College case as "an artificial being, invisible, intangible and existing only in contemplation of law; being the mere creature of law it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence; and the most important of which are immortality and individuality.

"Thus, a company is an artificial legal person having an independent legal entity.

Merits of Company Organisation:

The company form of business ownership has become very popular in modern business on account of its several advantages:

1.Limited Liability:

Shareholders of a company are liable only to the extent of the face value of shares held by them. Their private property cannot be attached to pay the debts of the company. Thus, the risk is limited and known. This encourages people to invest their money in corporate securities and, therefore, contributes to the growth of the company form of ownership.

2.Large Financial Resources:

Company form of ownership enables the collection of huge financial resources. The capital of a company is divided into shares of small denominations so that people with small means can also buy them. Benefits of limited liability and transferability of shares attract investors. Different types of securities may be issued to attract various types of investors. There is no limit on the number of members in a public company.

3.Continuity:

A company enjoys uninterrupted business life. As a body corporate, it continues to exist even if all its members die or desert it. On account of its stable nature, a company is best suited for such types of business which require long periods of time to mature and develop.

4.Transferability of Shares:

A member of a public limited company can freely transfer his shares without the consent of other members. Shares of public companies are generally listed on a stock exchange so that people can easily buy and sell them. Facility of transfer of shares makes investment in company liquid and encourages investment of public savings into the corporate sector.

5.Professional Management:

Due to its large financial resources and continuity, a company can avail of the services of expert professional managers. Employment of professional managers with managerial skills and little financial stake results in higher efficiency and more adventurous management. Benefits of specialisation and bold management can be secured.

6.Scope for Growth and Expansion:

There is considerable scope for the expansion of business in a company. On account of its vast financial and managerial resources and limited liability, company form has immense potential for growth. With continuous expansion and growth, a company can reap various

economies of large scale operations, which help to improve efficiency and reduce costs.

7.Public Confidence:

A public company enjoys the confidence of public because its activities are regulated by the government under the Companies Act. Its affairs are known to public through publication of accounts and reports. It can always keep itself in tune with the needs and aspirations of people through continuous research and development.

8.Diffused Risk:

The risk of loss in a company is spread over a large number of members. Therefore, the risk of an individual investor is reduced.

9.Social Benefits:

The company organisation helps to mobilise savings of the community and invest them in industry. It facilitates the growth of financial institutions and provides employment to a large number of persons. It provides huge revenues to the Government through direct and indirect taxes.

Demerits of Company:

A company suffers from the following limitations:

1. Difficulty of Formation:

It is very difficult and expensive to form a company. A number of documents have to be prepared and filed with the Registrar of Companies. Services of experts are required to prepare these documents.

It is very time-consuming and inconvenient to obtain approvals and sanctions from different authorities for the establishment of a company. The time and cost involved in fulfilling legal formalities discourage many people from adopting the company form of ownership. It is also difficult to wind up a company.

2. Excessive Government Control:

A company is subject to elaborate statutory regulations in its day-to-day operations. It has to submit periodical reports. Audit and publication of accounts is obligatory. The objects and capital of the company can be changed only after fulfilling the prescribed legal formalities.

These rules and regulations reduce the efficiency and flexibility of operations. A lot of precious time, effort and money have to be spent in

complying with the innumerable legal formalities and irksome statutory regulations.

3. Lack of Motivation and Personal Touch:

There is divorce between ownership and management in a large public company. The affairs of the company are managed by the professional and salaried managers who do not have personal involvement and stake in the company. Absentee ownership and impersonal management result in lack of initiative and responsibility. Incentive for hard work and efficiency is low. Personal contact with employees and customers is not possible.

4. Oligarchic Management:

In theory the management of a company is supposed to be democratic but in actual practice company becomes an oligarchy (rule by a few). A company is managed by a small number of people who are able to perpetuate their reign year after year due to lack of interest, information and unity on the part of shareholders. The interests of small and minority shareholders are not well protected. They never get representation on the Board of Directors and feel oppressed.

5. Delay in Decisions:

Too many levels of management in a company result in red-tape and bureaucracy. A lot of time is wasted in calling and holding meetings and in passing resolutions. It becomes difficult to take quick decisions and prompt action with the consequence that business opportunities may be lost.

6. Conflict of Interests:

Company is the only form of business where in a permanent conflict of interests may exist. In proprietorship there is no scope for conflict and in a partnership continuous conflict results in dissolution of the firm. But in a company conflict may continue between shareholders and board of directors or between shareholders and creditors or between management and workers.

7. Frauds in Promotion and Management:

There is a possibility that unscrupulous promoters may float a company to dupe innocent and ignorant investors. They may collect huge sums of money and, later on, misappropriate the money for their personal benefit. The case of South Sea Bubble Company is the leading example of such malpractices by promoters.

Moreover, the directors of a company may manipulate the prices of the company's shares and debentures on the stock exchange on the basis of inside information and accounting manipulations. This may result in reckless speculation in shares and even a sound company may be put into financial difficulties.

8. Lack of Secrecy:

Under the Companies Act, a company is required to disclose and publish a variety of information on its working. Widespread publicity of affairs makes it almost impossible for the company to retain its business secrets. The accounts of a public company are open for inspection to public.

9. Social Evils:

Giant companies may give rise to monopolies, concentration of economic power in a few hands, interference in the political system, lack of industrial peace, etc.

15.8. Limited Liability Company (LLC)

According to the Limited Liability Partnership Act, 2008, an LLP is a body corporate formed and incorporated under this Act. It is a legal entity separate from that of its members.

Features:

1. An LLP must be registered under the LLP Act 2008.
2. It is a body corporate having a separate entity of its own.
3. It has perpetual succession. Any change in its members does not affect its existence, rights and liabilities,
4. Any individual or a body corporate can be a partner in an LLP.
5. Every LLP must have at least two partners.
6. There must be at least two designated partners and one of them must be a resident in India.
7. An LLP must maintain proper books of accounts as per the double entry system.
8. An LLP must file with the Registrar a Statement of Account and solvency along with its annual return in the prescribed form.

Merits:

- a. An LLP enjoys stability as changes in partners do not affect its existence.

- b. The liability of an LLP and its partners is limited.
- c. A body corporate and a foreigner can be partners in an LLP.
- d. An LLP can raise a large amount of funds as there is no restriction on the number of members and risk involved is limited.

Demerits:

- a. Time and money are involved in the formation and registration of an LLP.
- b. There is less flexibility of operations because an LLP has to comply with certain legal formalities.
- c. There is lack of business secrecy as an LLP has to file the prescribed documents with the Registrar. Its accounts are open to the public for inspection.

The LLP gives an entrepreneur the twin benefits of limited liability and a flexible internal structure. It is also free from dividend distribution tax and minimum alternate tax.

15.9. Case Study

Landmark case in this regard is the case of V. Subramaniam Vs. Rajesh Raghuvandra Rao, wherein a state amendment in regards to the registration of Partnerships was challenged on the grounds of being Unconstitutional.

Facts of the Case:

The case originated in the city civil court of Bombay wherein the appellant prayed for the dissolution of the unregistered partnership between appellant and the respondent. A defence in the case involved that the suit was not maintainable according to the Sub-section (2A) of the section 69 of the Indian Partnership Act, 1932.

The Bombay City Civil Court held the view that this sub-section introduced by the Maharashtra Amendment to the Act, being the Maharashtra Act No. 29 of 1984 was unconstitutional as it was in violation of Articles 14 and 19(1) (g) of the Constitution of India. Then the City Civil Court made reference to the High Court under Section 113 of Code of Civil Procedure. The High Court impugned the judgement and held the section to be not violative of the Constitution of India. This decision of the High Court has been further appealed in the present case.

Issues: Whether sub-section 2a of section 69 inserted by the Maharashtra amendment violates article 300a of the constitution of India? Whether sub-section 2A of Section 69 inserted by the Maharashtra Amendment violates Article 14 of the Constitution of India? Whether sub-section 2A of Section 69 inserted by the Maharashtra Amendment violates Article 19(1) (g) of the Constitution of India?

Rule: Code of Civil Procedure, 1908 (CPC) - Section 113.

Constitution of India - Article 14, Article 19, Article 19(1), Article 19(1) (g), Article 300A.

Indian Partnership Act, 1932 - Section 69, Section 69(1), Section 69 (3). Analysis: Backdrop of the case. The Section 69(1) & (2) of the Partnership Act[3] originally read as follows:

69. Effect of non-registration. No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm:

No suit to enforce a right arising from a contract shall be instituted in any court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of firms as partners in the firms. The Sub-section 2A which was introduced by the Maharashtra Amendment 1984 states as follows: (2A) No suit to enforce any right for the dissolution of a firm or for accounts of a dissolved firm or any right or power to realize the property of a dissolved firm shall be instituted in any court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or have been a partner in the firm, unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm: Provided that the requirement of registration of firm under this Sub-section shall not apply to the suits or proceedings instituted by the heirs or legal representatives of the deceased partner of a firm for accounts of a dissolved firm or to realize the property of a dissolved firm.

Let Us Sum Up

In this unit, you have learned about the following:

- Most production and distribution activities are carried out by millions of people in different parts of the country by constituting various kinds of organizations
- Business organization is the single-most important choice you'll make regarding your company
- Sole proprietorship or individual entrepreneurship is a business concern owned and operated by one person.
- Where personal attention to individual tastes and fashions of customers is required, e.g., beauty parlour, tailoring shops, lawyers, painters, etc.
- Chief Justice John Marshall of U.S.A defined a company in the famous Dartmouth College case as "an artificial being, invisible, intangible and existing only in contemplation of law; being the mere creature of law it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence; and the most important of which are immortality and individuality.
- As a business enterprise expands beyond the capacity of a single person, a group of persons have to join hands together and supply the necessary capital and skills. Partnership firm thus grew out of the limitations of one man business
- There is a possibility that unscrupulous promoters may float a company to dupe innocent and ignorant investors.

Check Your Progress-2

1. An act of a firm means:
 - A. Any partner or agent of the firm which gives rise to a right enforceable by or against the firm
 - B. Any act by all the partners
 - C. Any omission by all the partners
 - D. All of the above
2. Partnership is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. Does it mean that losses are not shared:
 - A. A minor may be admitted in partnership, only for the profits, but he cannot share in losses.
 - B. It also depends on the partnership agreement. A person may share the profits but may not share in losses.

- C. Sharing of profits also include losses (negative profits)
 - D. All of the above.
3. Where no provision is made by contract between the partners for the duration of their partnership, or for the determination of their partnership, the partnership is called as:
 - A. Particular partnership
 - B. Partnership for a fixed term
 - C. partnership at will
 - D. None of the above
 4. What information shall be given to the Registrar of Firms by a registered partnership firm:
 - A. New opening/closing of the existing branch, if any.
 - B. Change in the name of and address of the partner (s)/change in the constitution of the firm.
 - C. What there is change in the name of the firm or in location of the principal place of business.
 - D. All of the above.
 5. Who can inspect the Register and filed documents at the office of the Registrar:
 - A. Any Government servant
 - B. The Partners of the firm
 - C. The partners of the other firms
 - D. Any person

Glossary

Partnership:	Firm
Limited stock:	Partial
Partnership deed:	Partnership document
Corporation:	Company
Sole Proprietorship:	Individual business

Answer To Check Your Progress-1

- a-False
- b-True
- c-True
- d-True
- e-True

Answer to Check Your Progress-2

1. D. All of the above.
2. D. All of the above.
3. C. partnership at will
4. D. All of the above.
5. D. Any person

Suggested Reading

1. **Kumar, Ravinder.** Legal Aspect of Business. Cengage Learning, 2nd Edition-2011.
2. **Stim, Richard.** Intellectual Property- Copy Rights, Trade Marks, and Patents, Cengage Learning, 2008.

The Block-5: Introduction

The Block-5: Copyrights and Trademarks has been divided in to 2 Units (Unit-16 and Unit-18). **Unit-16: Protecting the Property of Business** explains about the Introduction, Concept of Property, Theories of Property, Tangible and Intangible Property, Theories of intellectual property rights law, Remedial Action and Case Study.

Unit-17: Copyright, Trademark, Secret, Geographical Indications Alternate Dispute Resolutions deals with Introduction, Copyrights Act-1957, Trademark Act -1999, The Patent Act -1970, The Design Act- 2000, Trade secret, the Geographical Indications 1999, Utility models and Case Study.

In all the units of Block -5 **Introduction to Legal and Business Environment**, the Check your progress, Glossary, Answers to check your progress and Suggested Reading has been provided and the Learners are expected to attempt all the Check your progress as part of study.

Unit-16

Protecting the Property of Business

STRUCTURE

Overview

Objectives

16.1. Introduction

16.2. Concept of Property

16.3. Theories of Property

16.4. Tangible and Intangible Property

16.5. Theories of intellectual property rights law

16.6. Remedial Action

16.7. Case Study

Let Us Sum Up

Check Your Progress

Glossary

Answers to Check Your Progress

Suggested Readings

Overview

In this unit, the concept and theories of property and tangible and intangible property, the theories of intellectual property rights and remedial action has been clearly explained.

Objectives

After completion of this unit, you be able:

- To state the meaning property
- To understand the various types of property
- To state the features, scope and characteristics of law
- To understand the concept of theories of property
- To know various intellectual property law

16.1. Introduction

Human Beings are distinguished from animals by the intellectual capability endowed on them by the Almighty. The Human Beings have thus elevated themselves to the present 'Civilized State' solely on account of exercise of their intellectual capabilities.

The property which comes into existence by application of human intellect is termed as Intellectual Property. It is product of

1. Intellectual Capabilities and
2. Labour.

Intellectual Property relates to information which can be incorporated in tangible objects and reproduced in different locations. For Example, Patents, Designs, Trade Marks and copyright. The rights accrued on the owner of such property (Intellectual Property) are termed as Intellectual Property Rights (IPR).

As stated above, Intellectual Property (IP) refers to the creations of the human mind, like inventions, literary and artistic works, and symbols, names, images and designs used in commerce. It can be divided into two categories:-

1. Industrial property, which includes inventions (patents), trademarks, industrial designs, and geographic indications of source; and
2. Copyright, which includes literary and artistic works such as novels, poems and plays, films, musical works, artistic works, such as, drawings, paintings, photographs and sculptures, and architectural designs. Rights related to copyright include those of performing artists in their performances, producers of phonograms in their recordings, and those of broadcasters in their radio and television programs.

Intellectual property rights protect the interests of creators by giving them property rights over their creations.

The most noticeable distinction between Intellectual Property and other forms of properties is that:- Intellectual Property is intangible, that is, it cannot be defined or identified by its own physical parameters. It must be expressed in some discernible way to be protectable.

Generally, it encompasses four separate and distinct types of intangible properties, namely

- a. Patent
- b. Trademark
- c. Copyright and
- d. Trade Secret

which are collectively referred to as “Intellectual Property.”

However, the scope and definition of Intellectual Property is constantly evolving with the inclusion of newer forms under the ambit of Intellectual Property. In recent times,

- a. Geographical Indications
- b. Protection of plant varieties
- c. Protection for semi-conductors and integrated circuits, and
- d. Undisclosed Information have been brought under the umbrella of Intellectual Property.
- e. Intellectual Property Rights are like any other property rights. They allow the creators (or owners) of Patents, Trademarks or Copyrighted works (as the case may be) to benefit from their own respective work or investment in a creation. These rights are outlined in Article 27 of the Universal Declaration of Human Rights, which provides for the right to benefit from the protection of moral and material interests resulting from authorship of scientific, literary or artistic productions. The importance of Intellectual Property was first recognized in the Paris Convention for the Protection of Industrial Property (1883) and the Berne Convention for the Protection of Literary and Artistic Works (1886). Both treaties are administered by the World Intellectual Property Organization(WIPO).
- f. In short, Property Rights in ideas are no different than the ownership of houses, cars and other forms of private property. The rhetoric it builds upon seems convincing at first i.e. you ought to be the exclusive owner of your idea to have the incentive to develop it, the very same way you ought to be the exclusive owner of your land to have incentive to develop it.

16.2. Concept of Property

The term “property” signifies the subject matter over which the right of ownership or any less right carved out of ownership is exercised. It has a very wide connotation, it not only includes money and other tangible objects of some value, but it also includes the intangible rights which are considered to be a source or an element of income or wealth. It includes the rights and interests which a human possesses over land (and chattel) and which is to the exclusion of all others. It is the right to enjoy and to dispose of certain things in the way that he pleases to, provided that such use is not prohibited by law. However, there are certain things over which property rights by any single individual (or an entity) cannot

be exercised. This includes the sea, the air and the like as they cannot be appropriated. Everyone has a right to enjoy them, but no one has an exclusive right over them.

It is clear, thus, that in case of personal property no person other than its owner, who has an exclusive right over it, can claim any right to use it, or to hinder the owner from disposing it of, so that the property which is considered as an exclusive right over things, contains not only a right to use, but also a right to dispose of such property.

Property can be classified into

a. Real property

The property which is fixed permanently to one location is termed as real property. Real property includes within its ambit land, any construction on the land, things growing on the land or existing under the face of land.

b. Personal property.

Personal property is a property belonging to person and in case of personal property no person other than its owner, who has an exclusive right over it, can claim any right to use it, or to hinder the owner from disposing it of, so that the property which is considered as an exclusive right over things, contains not only a right to use, but also a right to dispose of such property.

Property can also be divided into

a) Absolute property

Absolute property is the one which is owned without any qualification or restriction whatsoever. In case of sale the moment sale deed is executed the transferee becomes absolute owner of the property.

b) Qualified property

A qualified property consists of special, conditional or interest upon the subject matter. The owner of the qualified property lacks the complete bundle or sets of right bestowed upon the absolute owner. Rights of bailee are one of the suitable examples related to qualified property.

Property can further be divided into

a) Corporeal

A corporeal property signifies a property which is perceptible to the senses, such as, land, house, goods, merchandise and the like.

Incorporeal property

Incorporeal property consists of legal rights, as choses-in-action, easements, and the like.

As regards standard definition of the term property, there are different definitions of the term 'Property' provided in different statutes in India. For instance Section 2(c) of the Benami Transactions (Prohibition) Act, 1988 defines Property as, "Property means property of any kind, whether movable or immovable, tangible or intangible, and includes any right or interest in such property."

Section 2(11) of the Sale of Goods Act, 1930 defines 'Property' as "Property means the general property in goods, and not merely a special property."

Check Your Progress-1

True/False

- a. According to Jenks, all are allowed to have an unrestricted use of his property, to the detriment to others.
- b. The property which comes into existence by application of human intellect is termed as Intellectual Property.
- c. Incorporeal property consists of legal rights, as choses-in-action, easements, and the like.
- d. The term "property" signifies the subject matter over which the right of ownership or any less right carved out of ownership is exercised.
- e. Historical theory of the origin of the property was propounded by Bentham and Henry Maine was well known supporter of this theory.

16.3. Theories of Property

Different theories laid down on the subject of concept of "Property" are as follows:

- Historical Theory of Property;
- Labour Theory (Spencer);

- Psychological Theory (Bentham);
- Functional Theory (Jenks, Laski);
- Metaphysical Theory
- Philosophical Theories (Property as a means to Ethical Ends and Property as an End in itself).

a. Historical Theory

Historical theory of the origin of the property was propounded by Bentham and Henry Maine was well known supporter of this theory. According to the Historical theory of Property, the concept of Private Property grew out of joint property. It has following main features

- i. Private property has witnessed slow and steady growth
- ii. It grew out of collective or joint property
- iii. First stage of development consisted of natural possession
- iv. Second stage of development resulted in juristic possession
- v. Final and last stage of development lead to evolution of concept of ownership

In the words of Henry Maine, "Private Property was chiefly formed by the gradual disentanglement of the separate rights of individual from the blended rights of the community". In the earlier days, the ownership rights over property were vested in large societies which were chiefly Patriarchal societies. However, with the disintegration of societies and families, there was a gradual evolution of the concept of individual rights. Roscoe Pound in his theory has also pointed out the fact that the earliest form of property was in the nature of group property and it was later on when families partitioned that the existence of individual property came to be recognised.

b) Labour Theory (Spencer)

This theory of property is also known as 'Positive Theory' was propounded by Spencer. The underlying principle basis of this theory is that labour of the individuals is the foundation of property. The theory advocates that a thing (res) is a property and it belongs to the person who takes the pain of bringing into existence. Spencer, who developed the theory on the principle of 'equal freedom', has stated that property is the result of individual labour, and therefore, no person has a moral right to property which he has not acquired by his personal effort.

c) Psychological Theory (Bentham)

Bentham propounded this theory. According to this theory, Property came into existence on account of the acquisitive instinct of the human beings. Every individual has a desire to own and have into his possession things which is the factor responsible for bringing Property into existence. According to Bentham, Property is altogether a conception of mind and thus it is nothing more than an expectation to derive certain advantages from the object according to one's capacity.

Roscoe Pound also supports Bentham on this school of thought and has observed that the sole basis of conception of Property is the acquisitive instinct of individual which motivates him to assert his claim over objects in his possession and control.

d) The Sociological Theory / Functional Theory (Jenks and Laski)

This theory is also known as the 'sociological theory of property'. It assumes that the concept of Property should not only be confined to private rights, but it should be considered as a social institution securing maximum interests of society. Property is situated in the society and has to be used in the society itself.

According to Jenks, no one can be allowed to have an unrestricted use of his property, to the detriment to others. He thus states that the use of property should conform to the rules of reason and welfare of the community.

According to Laski, who also supports this school of thought, Property is a social fact like any other, and it is the character of social facts to alter. Property has further assumed varied aspects and is capable of changing further with the changing norms of society.

e) The Metaphysical Theory

Kant and Hegel propounded this theory. According to Kant "A thing is rightfully mine when I am so connected with it that anyone who uses without my consent does me an injury. "According to Hegel, "property is the objective manifestation of the personality of an individual. In other words property in an object on which person has liberty to direct his will". Kant observed that law of property does not merely seek to protect possessions where there is an actual physical relation between the possessor and the object, but it goes beyond and considers the personal will of the individual more important in the concept of the property.

f) Property is the creation of the State

The origin of 'Property' is to be traced back to the origin of 'Law' and the 'State'. Jenks observed that Property and Law were born together and would die together. It means that Property came into existence when the State framed Laws. As per this theory, Property was non-existent before Law. According to Rousseau, 'it was to convert possession into property and usurpation into a right that Law and State were founded.' The first who enclosed a piece of land and said – this is mine – he was the founder of real society. He insisted on the fact that property is nothing but a systematic expression of degrees and forms of control, use and enjoyment of things by persons that are recognized and protected by law. Thus, the conclusion is that property was a creation of the State.

16.4. Tangible and Intangible Property

1. Tangible Property

The term 'Tangible property' refers to any type of physical property that can generally be moved (i.e., it is not attached to real property or land), touched or felt. It generally includes items such as furniture, clothing, jewelry, art, writings, household goods etc.

2. Intangible Property

Intangible property on the other hand refers to some personal property that cannot actually be moved, touched or felt, but instead it represents something of value, such as, negotiable instruments, securities, service and intangible assets, including goodwill etc.

3. Intellectual Property

Intellectual property is a property which comes into existence by application of human intellect. It is referred as "Bauddhik sampada" in the Indian Context. Bauddhik means related to buddhi or intellect and word sampada means property. When word buddhi gets combined with sampada it amounts to bauddhik Sampada.

The person who is owner of Intellectual property is provided bundle of rights related to the property which has come into existence by application of his intellect. These rights collectively are termed as intellectual Property rights.

Intellectual Property is a term which refers to and indicates a number of distinct types of creations of the mind for which law confers certain property rights upon its creator. The jurisprudence developed on the concept of 'Property' has made it abundantly clear that property does not just encompass tangible things, like a house, a car, furniture, currency,

investment etc and that these assets are not the only kind of property which are subject matter of protection by law. There are many other forms of intangible properties which are known with the term 'intellectual property' that have been recognized by the law and thus granted protection against any kind of infringement by a person other than its rightful owner or a person authorised by such rightful owner.

Under the Intellectual Property Law, the owners of such intangible property have been granted and conferred with certain exclusive rights over their respective intangible assets/works, these include, musical, literary and artistic works; discoveries and inventions; and words, phrases, symbols, and designs, etc. Patent, Trademark, Copyright, and Designs rights are the broad four main categories of intellectual properties, though the domain of such assets is expanding with the passage of time.

Exclusive rights are provided to the owners as a reward of the intellect, time, money, skill etc. they used for creation of intellectual property.

16.5. Theories of Intellectual Property Rights

The term "intellectual property rights law" is a very broad term and it now includes and refers to a cluster of legal doctrines that regulate the uses of different sorts of ideas and insignia.

- i. The law of copyright protects different forms of expression which are original, including those contained in novels, movies, musical compositions, and computer software programs.
- ii. Patent law on the other hand protects different kinds of inventions as also some discoveries provided it satisfies the essential conditions for a Patent.
- iii. The Trademark law is framed to protect 'words', 'symbols' etc. that help the consumers identify and distinguish the goods and services of different manufacturers and service providers.
- iv. The Trade-secrets law which is a fairly new branch of Intellectual Property Rights law is intended to protect commercially valuable information for instance, soft-drink formulas, confidential marketing strategies, etc. that the companies would like to conceal and protect from their competitors.

The revenues of many businesses now depend substantially on the Intellectual Property that they possess and the steps that they adopt to protect them. Increasing number legal professionals are also specializing in this particular branch of law. Further, the legislatures around the world are also busy in framing and revising their intellectual

property laws. As a result of these emerging trends, scholarly interest in this particular field of law has risen dramatically in the recent years.

Law reviews and journals as also those related to the subject of economics and philosophy, are increasingly focusing on including articles deploying “theories” of intellectual property. There are many writings which have commented upon the differences and the contest amongst the four.

a. Utilitarian Theory

Utilitarian Theory has been advocated by economist such as Bentham and Mill and its primary focus is upon attainment of greatest good for greatest number. It says that the any policy made and implemented by any authority should have power of ensuring greatest good for greatest number. Greatest good here refers to utmost welfare and greatest number refers to masses.

The utilitarian guideline says that:-

- a. Lawmakers’ beacon when shaping property rights should be the “maximization of net social welfare”. This is essentially the utilitarian thought.
- b. In respect of the subject of intellectual property, the school of thought requires that the lawmakers must strike an optimal balance between, the power of exclusive rights to stimulate the creation of inventions and works of art on the one hand, and, the partially offsetting tendency of such rights to curtail widespread public enjoyment of those creations, on the other.
- c. The danger expressed in respect of this theory is that the creators of such products will be unable to recoup their “costs of expression” i.e. the time and effort devoted by them to writing or composing and the costs of negotiating with publishers or record companies, since copyists are likely to undercut them and persons bear a very low cost of production and thus they can offer identical products to the consumers at a very low price resulting in a loss to the creators of the products.
- d. If this happens, it will disincentive the creators from making any socially valuable intellectual product.
- e. This can however be avoided by allocating to the creators (for limited times) the exclusive right to make copies of their creations. The creators of works that are valuable to the consumers will be empowered to charge prices (for allowing

anyone to access to their works) which shall be substantially greater than they could in a competitive market. This rationale put forward by the utilitarian thinkers has been used to shape specific doctrines within the field.

b. Natural Right Theory / Labour Theory (Locke's Theory)

The Natural Right Theory emanates from the proposition that “a person who labors upon resources that are either un-owned or “held in common” has a natural property right to the fruits of his or her efforts and that the state has a duty to respect and enforce that natural right”. This idea has been elaborated in the writings of John Locke and is also applicable to the subject of intellectual property, wherein the raw materials in the form of facts and concepts do seem in some sense to be “held in common” and where labor contributes substantially to the value of the finished product. Lockean property entitlements

- a. Right to use without harm
- b. Right to transfer the property
- c. Right of exclusive usage of the property

c) Personality Theory

Personality theory finding place in the writings of Kant and Hegel is that private property rights are crucial to the satisfaction of some fundamental human needs. The law makers thus must create and allocate entitlements to resources in a way that best enables people to satisfy such needs. From this perspective, Intellectual Property Rights may be justified either on the ground that they shield from appropriation or modification artifacts through which authors and artists have expressed their “wills” (an activity thought central to “personhood”).

Justin Hughes, taking inspiration from Hegel's Philosophy of Right, laid down following guidelines concerning the proper shape of an Intellectual Property regime (See Hughes, “Philosophy of Intellectual Property”):

- a. We should be more willing to accord legal protection to the fruits of highly expressive intellectual activities, such as the writing of novels, than to the fruits of less expressive activities, such as genetic research.
- b. Because a person's “persona” -- his “public image, including his physical features, mannerisms, and history” -- is an important “receptacle for personality,” it deserves generous legal protection, despite the fact that ordinarily it does not result from labor.

- c. Authors and inventors should be permitted to earn respect, honor, admiration, and money from the public by selling or giving away copies of their works, but should not be permitted to surrender their right to prevent others from mutilating or misattributing their works.

d) Achievement of just and attractive culture theory

The fourth approach is based on the proposition that property rights, in general, and intellectual property rights, in particular, can and should be shaped with the objective to help achieve a just and attractive culture. The approach has some similarities with the utilitarianism, but does not agree to deploy a vision for a society richer than the conceptions of “social welfare” deployed by utilitarians. An appropriate illustration can be found in Neil Netanel’s essay, titled as “Copyright and a Democratic Civil Society.” Netanel begins by describing a picture of “a robust, participatory, and pluralist civil society,” collaborating with “unions, churches, political and social movements, civic and neighborhood associations, schools of thought, and educational institutions.” In such a world described, all persons would enjoy some degree of financial independence coupled with considerable responsibility in shaping their local social and economic environments. Such a civil society is vital, Netanel claims, to the perpetuation of democratic political institutions. Such a society shall not, however, emerge spontaneously; it has to be nourished by the Government.

16.6. Case Study

Win Medicare Pvt Ltd. v. K. Pharmaceutical Works 126 (2006) DLT 651 Badar Durrez Ahmed, J. Brief Facts:

Plaintiff is the manufacturer of BETADINE and also the owner of the design of the bottle and the labels. Defendant also manufactured similar product and marketed the same. The shape of the bottle and the artwork, color combination of the labels etc., were identical with that of the plaintiff. Plaintiff sued for infringement and consequent damages.

Decision: Suit decreed.

Reason: A comparison of the bottles, of the plaintiff and defendant, clearly shows that the defendant substantially copied the bottle of the plaintiff. Thereby the defendant has adopted an identical and/or substantially similar getup, layout and color combination on its “Povidone Iodine Solution” bottle labels which would amount to the infringement of the copyright which vests with the plaintiff in the said

label. In these circumstances, the act and conduct of the defendant would amount to passing off and, therefore, the suit is decreed.

Let Us Sum Up

In this unit, you have learned about the following:

- Human Beings are distinguished from animals by the intellectual capability endowed on them by the Almighty.
- Intellectual Property relates to information which can be incorporated in tangible objects and reproduced in different locations.
- Intellectual Property (IP) refers to the creations of the human mind, like inventions, literary and artistic works, and symbols, names, images and designs used in commerce
- Intellectual Property Rights are like any other property rights. They allow the creators (or owners) of Patents, Trademarks or Copyrighted works (as the case may be) to benefit from their own respective work or investment in a creation.
- The rhetoric it builds upon seems convincing at first i.e. you ought to be the exclusive owner of your idea to have the incentive to develop it, the very same way you ought to be the exclusive owner of your land to have incentive to develop it.
- This includes the sea, the air and the like as they cannot be appropriated. Everyone has a right to enjoy them, but no one has an exclusive right over them.
- Historical theory of the origin of the property was propounded by Bentham and Henry Maine was well known supporter of the this theory According to the Historical theory of Property, the concept of Private Property grew out of joint property.
- Every individual has a desire to own and have into his possession things which is the factor responsible for bringing Property into existence
- This theory is also known as the 'sociological theory of property'. It assumes that the concept of Property should not only be confined to private rights, but it should be considered as a social institution securing maximum interests of society.
- Kant and Hegel propounded this theory. According to Kant "A thing is rightfully mine when I am so connected with it that anyone who uses without my consent does me an injury.

- The origin of 'Property' is to be traced back to the origin of 'Law' and the 'State'. Jenks observed that Property and Law were born together and would die together.
- Intellectual property is a property which comes into existence by application of human intellect. It is referred as "Bauddhik sampada " in the Indian Context.

Check Your Progress-2

1. _____ rights are recognised and enforced at law.
 - A. Legal
 - B. Moral
 - C. Natural
 - D. Ethical
2. The judicature Act of 1873 did not abolish _____, but abolish rules of its conflict.
 - A. Law
 - B. Equity
 - C. Law or equity
 - D. Law and equity
3. Personal rights are _____.
 - A. Inheritable
 - B. Uninheritable
 - C. Inheritable or uninheritable
 - D. Neither inheritable or uninheritable
4. The law is derived mainly from two sources. Judge-made law is known as:
 - A. Statute law or legislation
 - B. Common law
 - C. Rule of law
 - D. Supreme law
5. Law made by Parliament is known as:
 - A. Supreme law
 - B. Common law
 - C. Rule of law
 - D. Statute law or legislation

Glossaries

Movable : Portable

Immovable: Permanent

Intellectual: Creation of human mind

Protection : Security

Bauddhik : Buddhi or intellect

Sampada : property

Answer to Check Your Progress-1

a-False

b-True

c-True

d-True

e-True

Answer to Check Your Progress-2

1. A. Legal

2. D. Law and equity

3. B. Uninheritable

4. B. Common law

5. D. Statute law or legislation

Suggested Reading

1. **Balachandran V.**, Legal Aspects of Business, Tata McGraw Hill, 2020
2. **Chakravarty, R., & Gogia, D.** Chakravartys intellectual property law: IPR. NewDelhi:Ashoka Law House- 2010.

Unit-17

Copyright, Trademark, Secret, Geographical Indications

STRUCTURE

Overview

Objectives

17.1. Introduction

17.2. Copyrights Act 1957

17.3. Trademark Act 1999

17.4. The Patent Act 1970

17.5. The Design Act 2000

17.6. Trade secret

17.7. The Geographical Indications 1999

17.8. Utility models

17.9. Case Study

Let Us Sum Up

Check Your Progress

Glossary

Answers to Check Your Progress

Suggested Readings

Overview

In this unit, various acts such as copyrights act, trademark act, patents act, design act and the geographical indications has been clearly explained.

Objectives

After completion of this unit, you will be able:

- To state the meaning of IPR
- To understand various Intellectual Property
- To compare copy rights, Trade mark, Patents act
- To Know the design, model and geographical identification
- To identify the way to protect the intellectual property

17.1. Introduction

Intellectual property (IP) refers to the creations of the human mind like inventions, literary and artistic works, and symbols, names, images and designs used in commerce. Intellectual property is divided into two categories:

- a. Industrial property, which includes inventions (patents), trademarks, industrial designs, and geographic Indications of source; and
- b. Copyright, which includes literary and artistic works such as novels, poems and plays, films, musical works, artistic works such as drawings, paintings, photographs and sculptures, and architectural designs. Rights related to copyright include those of performing artists in their performances, producers of phonograms in their recordings, and those of broadcasters in their radio and television programs. Intellectual property rights protect the interests of creators by giving them property rights over their creations.

17.2. Copyrights Act 1957

Copyrights protect original works of authorship, such as literary works, music, dramatic works, pantomimes and choreographic works, sculptural, pictorial, and graphic works, sound recordings, artistic works, architectural works, and computer software. With copyright protection, the holder has the exclusive rights to modify, distribute, perform, create, display, and copy the work.

Section 14 of the Act defines the term Copyright as to mean the exclusive right to do or authorize the doing of the following acts in respect of a work or any substantial part thereof, namely

In the case of literary, dramatic or musical work (except computer program):

- a. reproducing the work in any material form which includes storing of it in any medium by electronic means;
- b. issuing copies of the work to the public which are not already in circulation;
- c. performing the work in public or communicating it to the public;
- d. making any cinematograph film or sound recording in respect of the work; making any translation or adaptation of the work.

Further any of the above mentioned acts in relation to work can be done in the case of translation or adaptation of the work.

In the case of a computer program:

- a. to do any of the acts specified in respect of a literary, dramatic or musical work; and
- b. to sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer program. However, such commercial rental does not apply in respect of computer programs where the program itself is not the essential object of the rental.

In the case of an artistic work:

- i. reproducing the work in any material form including depiction in three dimensions of a two dimensional work or in two dimensions of a three dimensional work;
- ii. communicating the work to the public;
- iii. issuing copies of work to the public which are not already in existence;
- iv. including work in any cinematograph film;

making adaptation of the work, and to do any of the above acts in relation to an adaptation of the work. In the case of cinematograph film and sound recording:

- i. making a copy of the film including a photograph of any image or making any other sound recording embodying it;
- ii. selling or giving on hire or offer for sale or hire any copy of the film/sound recording even if such copy has been sold or given on hire on earlier occasions; and
- iii. communicating the film/sound recording to the public. In the case of a sound recording:
 - To make any other sound recording embodying it
 - To sell or give on hire, or offer for sale or hire, any copy of the sound recording
 - To communicate the sound recording to the public.

17.3. Trademark Act 1999

A trademark is a word, phrase, symbol, or design that distinguishes the source of products (trademarks) or services (service marks) of one

business from its competitors. In order to qualify for protection, the mark must be distinctive. For example, the Nike “swoosh” design identifies athletic footwear made by Nike.

Although rights in trademarks are acquired by use, registration with the Trademark Office under the Trademark Act, 1999 allows you to more easily enforce those rights. Before registering your trademark, conduct a search of federal and state databases to make sure a similar trademark doesn't already exist. This trademark search can help you reduce the amount of time and money you could spend on using a mark that is already registered and trademarked.

The Trade Marks Act 1999 (“TM Act”) provides, inter alia, for registration of marks, filing of multi class applications, the renewable term of registration of a trademark as ten years as well as recognition of the concept of well-known marks, etc. It is pertinent to note that the letter “R” in a circle i.e. ® with a trademark can only be used after the registration of the trademark under the TM Act.

Trademarks mean any words, symbols, logos, slogans, product packaging or design that identify the goods or services from a particular source. As per the definition provided under Section 2 (zb) of the TM Act, “trade mark” means a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colors.

The definition of the trademark provided under the TM Act is wide enough to include non-conventional marks like color marks, sound marks, etc. As per the definition provided under Section 2 (m) of the TM Act, “mark” includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colors or any combination thereof.

History of Trade mark

The law of trademarks is also now modernized under the Trademarks Act of 1999. A trademark is a special symbol for distinguishing the goods offered for sale or put in the market by one dealer from another. In India, the trademarks were protected for more than four decades as per the provisions of the Trade and Merchandise Mark Act, 1958. India joined the World Trade Organisation from its inception. One of the agreements in that related to the Intellectual Property Rights (TRIPS). In December, 1998 India acceded to the Paris Convention.

Also, The Trade Mark bill which was introduced in 1994, is the result of vast modification made in Trade and Merchandise Marks Act, 1958. The said modification can be called modernisation made for easy trading and commercial practices, to increase trading overseas by globalisation and bring investment from overseas and most importantly to make trademark management system as simple as possible and more recognition of the same in judicial system.

The bill could not be passed but pointed out the areas where the huge changes were required, thereafter the Trademarks Bill of 1999 was introduced with the fresh review of the required development in various area, such as trade and commercial practices, globalisation etc., the same was later passed in the Parliament and replaced with Trade and Merchandise Act, 1958 with assent of the President on the date of 30th December, 1999; the introduction of Trade Marks Act, 1999 has been proved to be very fruitful to India for going global in trade and commerce area.

The salient features of the Act mainly includes as follows:

1. Earlier only goods and services covered was by the way of registration, but in this Act the infringement has broaden the meaning as it also includes unauthorized use of similar mark or confusingly similar mark where the goods and services which are very similar and create confusion or chance of confusion stands.
2. Even though where the unauthorized use of trademark is made of any well -known trademark of India and the interest of the owner is any way infringed, the action of infringement can be taken against the same.
3. Further, it gave more power to police by authorizing them to seize infringing material without any warrant issued.

The trademarks can be broadly classified into following five categories:

- Generic
- Descriptive
- Suggestive
- Arbitrary
- Invented/Coined

Explanation :-

1. Generic marks means using the name of the product for the product, like "Salt" for salt.

2. Descriptive marks means the mark describing the characteristic of the products, like using the mark “Fair” for the fairness creams.
3. Suggestive marks means the mark suggesting the characteristic of the products, like “Habitat” for home furnishings products.
4. Arbitrary marks means mark which exist in popular vocabulary, but have no logical relationship to the goods or services for which they are used, like “Blackberry” for phones.
5. The invented/ coined marks means coining a new word which has no dictionary meaning, like “Adidas”.

The strongest marks, are thus the easiest to protect, are invented or arbitrary marks. The weaker marks are descriptive or suggestive marks which are very hard to protect. The weakest marks are generic marks which can never function as trademarks.

India follows the NICE Classification of Goods and Services for the purpose of registration of trademarks. The NICE Classification groups goods and services into 45 classes (classes 1-34 include goods and classes 35-45 include services). The NICE Classification is recognized in majority of the countries and makes applying for trademarks internationally a streamlined process. Every business entity, seeking to register trademark for a good or service, has to choose from the appropriate class, out of the 45 classes.

While adopting any mark, the business entity should also keep in mind and ensure that the mark is not being used by any other person in India or abroad, especially if the mark is well- known. It is important to note that India recognizes the concept of the “Well-known Trademark” and the principle of “Trans-border Reputation”.

Examples of well-known trademarks are Google, Tata, Yahoo, Pepsi, Reliance, etc. Further, under the principle of “Trans-border Reputation”, India has afforded protection to trademarks like Apple, Gillette, Whirlpool, Volvo, which despite having no physical presence in India, are protected on the basis of their trans-border reputation in India.

Check Your Progress-1

True/False

- a. Intellectual property rights protect the interests of creators by giving them property rights over their creations.
- b. The law of trademarks is also now modernized under the Trademarks Act of 1999.

- c. India follows the NICE Classification of Goods and Services for the purpose of registration of trademarks.
- d. The definition of the word “Invention” in the Patents Act, 1970 includes the new product as well as new process.
- e. The trademarks can be broadly classified into six categories

17.4 The Patent Act 1970

A patent grants proprietary rights on an invention, allowing the patent holder to exclude others from making, selling, or using the invention. Inventions allow many businesses to be successful because they develop new or better processes or products that offer competitive advantage on the marketplace. One could get a patent by filing a patent application with the Patent Office in India.

Patent, in general parlance means, a monopoly given to the inventor on his invention to commercial use and exploit that invention in the market, to the exclusion of other, for a certain period. As per Section 2(1) (j) of the Patents Act, 1970, “invention” includes any new and useful;

- art, process, method or manner of manufacture;
- machine, apparatus or other article;
- substance produced by manufacture, and includes any new and useful improvement of any of them, and an alleged invention;

The definition of the word “Invention” in the Patents Act, 1970 includes the new product as well as new process. Therefore, a patent can be applied for the “Product” as well as “Process” which is new, involving inventive step and capable of industrial application can be patented in India.

The invention will not be considered new if it has been disclosed to the public in India or anywhere else in the world by a written or oral description or by use or in any other way before the filing date of the patent application. The information appearing in magazines, technical journals, books etc, will also constitute the prior knowledge. If the invention is already a part of the state of the art, a patent cannot be granted. Examples of such disclosure are displaying of products in exhibitions, trade fairs, etc. explaining its working, and similar disclosures in an article or a publication.

History of Patent

The first step of the patent in India was Act VI of 1856. The main objective of the legislation was to encourage the respective inventions of

new and useful manufactures and to induce inventors to reveal their inventions and make available for public. The Act was repealed by Act IX of 1857 as it had been enacted without the approval of the British Crown. Fresh legislation was enacted for granting 'exclusive privileges' was introduced in 1859 as Act XV of 1859. This legislation undergoes specific modifications of the previous legislation, namely, grant of exclusive privileges to useful inventions only, an extension of priority period from 6 months to 12 months.

The Act excluded importers from the definition of an inventor. The Act was then amended in 1872, 1883 and 1888. The Indian Patent and Design Act, 1911 repealed all previous acts. The Patents Act 1970, along with the Patent Rules 1972, came into force on 20 April 1972, replacing the Indian Patent and Design Act 1911. The Patent Act is basically based on the recommendations of the report Justice Ann. The Ayyangar Committee headed by Rajagopala Iyengar. One of the recommendations was the allowance of process patents in relation to inventions related to drugs, drugs, food and chemicals. Again The Patents Act, 1970 was amended by the Patents (Amendment) Act, 2005 regarding extending product patents in all areas of technology including food, medicine, chemicals and microorganisms.

Following the amendment, provisions relating to exclusive marketing rights (EMR) have been repealed, and a provision has been introduced to enable the grant of compulsory licenses. Provisions related to pre-grant and anti-post protests have also been introduced.

It is important to note that any invention which falls into the following categories is not patentable:

- a. frivolous,
- b. obvious,
- c. contrary to well established natural laws,
- d. contrary to law,
- e. morality,
- f. injurious to public health,
- g. a mere discovery of a scientific principle,
- h. the formulation of an abstract theory,
- i. a mere discovery of any new property or new use for a known substance or process, machine or apparatus,

- j. a substance obtained by a mere admixture resulting only in the aggregation of the properties of the components thereof or a process for producing such substance,
- k. a mere arrangement or rearrangement or duplication of known devices,
- l. a method of agriculture or horticulture, and inventions relating to atomic energy or the inventions which are known or used by any other person, or used or sold to any person in India or outside India.

The application for the grant of patent can be made by either the inventor or by the assignee or legal representative of the inventor. In India, the term of the patent is for 20 years. The patent is renewed every year from the date of patent.

Duration of the Protection

The general rule is that protection must be granted until the expiration of the 50th year after the author's death. There are, however, exceptions to this general rule. In the case of anonymous or pseudonymous works, the term of protection expires 50 years after the work has been lawfully made available to the public, except if the pseudonym leaves no doubt as to the author's identity or if the author discloses his identity during that period; in the latter case, the general rule applies.

In the case of audiovisual (cinematographic) works, the minimum term of protection is 50 years after the making available of the work to the public ("release") or—failing such an event—from the creation of the work. In the case of works of applied art and photographic works, the minimum term is 25 years from the creation of such a work.

Procedure of Patent

- Step 1: Write about inventions (idea or concept) with each and every detail. Collect all information about your Invention such as:
 1. Field of Invention
 2. What does the Invention describe
 3. How does it work
 4. Benefits of Invention

If you worked on the Invention and during the research and development phase, you should have some call lab records which are duly signed with the date by you and the concerned authority.

- Step 2: It must involve a diagram, drawing and sketch explains the Invention Drawings and drawings should be designed so that the visual work can be better explained with the invention work. They play an important role in patent applications.
- Step 3: To check whether the Invention is patentable subject or not.

Not all inventions can be patentable, as per the Indian Patent Act there are some inventions which have not been declared patentable (inventions are not patentable).

- Step 4: Patent Discovery : The next step will be to find out if your Invention meets all patent criteria as per the Indian Patent Act-
 1. The invention must be novel.
 2. The Invention must be non- obvious.
 3. The Invention must have industrial applications.
- Step 5: File Patent Application : If you are at a very early stage in research and development for your Invention, then you can go for a provisional application. It offers the following benefits:
 1. Filing date.
 2. 12 months' time for filing full specification.
 3. Lesser cost.

After filing a provisional application, you secure the filing date, which is very important in the patent world. You get 12 months to come up with the complete specification; your patent application will be removed at the end of 12 months.

When you have completed the required documents and your research work is at a level where you can have prototypes and experimental results to prove your inventive move; you can file the complete specification with the patent application.

Filing the provisional specification is an optional step if you are in the stage where you have complete knowledge about your Invention you can go straight to the full specification.

- Step 6: Publication of the application : Upon filing the complete specification along with the application for the patent, the application is published 18 months after the first filing.

If you do not wish to wait until the expiration of 18 months from the filing date to publish your patent application, an initial publication request may

be made with the prescribed fee. The patent application is usually published early as a one-month form request.

- Step 7: Request for Examination : The patent application is scrutinized only after receiving a request for an RFE examination. After receiving this request, the Controller gives your patent application to a patent examiner who examines the patent application such as the various patent eligibility criteria:
 1. Patent subject
 2. Newness
 3. Lack of clarity
 4. Inventory steps
 5. Industrial application
 6. By enabling

The examiner makes the first examination report of the patent application upon a review for the above conditions. This is called patent prosecution. Everything that happens for a patent application before the grant of a patent is usually called patent prosecution.

The first examination report submitted to the Controller by the examiner usually includes prior art (existing documents prior to the filing date) that are similar to the claimed invention and is also reported to the patent applicant.

- Step 8: Answer the objections : Most patent applicants will receive some type of objections based on the examination report. The best thing is to analyze the examination report with the patent professional (patent agent) and react to the objections in the examination report.

This is an opportunity for an inventor to communicate his novelty over the prior art in examination reports. Inventors and patent agents create and send a test response that tries to prove that their Invention is indeed patentable and meets all patent criteria.

- Step 9: clearance of objections : The Controller and the patent applicant is connected for ensuring that all objections raised regarding the invention or application is resolved and the inventor has a fair chance to prove his point and establish novelty and inventive steps on other existing arts. Upon receiving a patent application in order for grant, it is the first grant for a patent applicant.

- Step 10: Once all patent requirements are met, the application will be placed for the grant. The grant of a patent is notified in the Patent Journal, which is published periodically.

Grounds for opposition

An application for a patent may be opposed by either a prior grant or a subsequent grant by any person on the grounds specified in s 25 (1) and 25 (2) of the former Act. No other grounds stated in the Act can be taken to oppose the patent. Some major opposition grounds, common to both pre-grant and post-grant opposition, are mentioned below:

1. The Invention was published previously in India or elsewhere or was claimed previously in India.
2. The Invention is the formation of a part of the prior public knowledge or prior public use or traditional knowledge of any community.
3. The Invention is obvious and lacks an inventive step.
4. The Invention does not constitute an invention within the meaning of the Act, or the Invention is not patentable under the Act.
5. Failure to disclose information or furnishing false information relating to foreign by the applicant.

Pre-Grant Protest: Section 25 (1) of the Patent Act and Rule 55 of the Patent Rules, 2003 provide the procedure to be followed for pre-grant opposition. Pre-grant opposition can be initiated by anyone after the application is published and before the patent is granted. If a request for examination is filed to oppose the application, the Controller considers representation only. If a request for examination has not been made by the applicant, it is possible for the opponent as an interested person to first file a request for examination under Section 11B, and then file a pre-grant opposition.

Post-grant opposition: The procedure is followed to oppose the grant under Section 25 (2) of the Patents Act, 1970 and Rule 55A to 70 of the Patent Rules, 2003. A Post-grant opposition can be filed by any person interested in any of the specific grounds before a period of one year from the date of publication of the grant of the patent. Unlike a pre-grant protest, a pre-grant protest must be filed by an individual and not by a person. The expression (people interested) is defined under section 2(t) of the Patents Act, 1970 wherein a person/party is engaged, or is

conducting research in the same field with which the Invention (which is to be opposed) is concerned.

Remedies for Patent Infringement

Patent infringement lawsuits can result in significantly higher losses than other types of lawsuits. Some laws, such as the Patent Act, allow plaintiffs to recover damages. Patent infringement is the illegal manufacture or usage of an invention or improvement of someone else's invention or subject matter who owns a patent issued by the Government, without taking the owner's consent either by consent, license or waiver. Several remedies are available to patent owners in the event of an infringement. Measures available in patent infringement litigation may include monetary relief, equal relief and costs, and attorneys' fees.

Monetary Relief: Monetary relief in the form of compensatory damages is available to prevent patent infringement:

1. Indemnity compensation – A patent owner may have lost profits for infringement when they established the value of the patent.
2. Increased damage – Up to three times, compensation charges can be charged in cases of will or violation of will.
3. The time period for damages – The right to damages can be claimed only after the date when the patent was issued and only 6 years before the infringement claim is filed.

Equitable relief: Orders are issued by the court to prevent a person from doing anything or Act. Injunctions are available in two forms:

1. Preliminary injunction – Orders made in the initial stage of lawsuits or lawsuits that prevent parties from doing an act that is in dispute (such as making a patent product)
2. Permanent injunction – A final order of a court which permanently ceases certain activities or takes various other actions.

17.5. The Design Act 2000

Science and technology started boosting up in the beginning of 20th century, and the urge to provide more reliable judicial system came in place for better protection of this field and for the protection of the industrial designs. The steps were required to be taken to promote more and more development in design industry by providing protection under registered design. Though it was very essential to protect the design only to the extent it was required and not any more than that and to

allow use of available design for free too. The current Act is in line with the TRIPS agreement and therefore line with globalization of trade and commerce.

The Industrial product basically includes two factors, i.e. artistic work and functioning part of the product. Though in Design Act only artistic work is covered and not functioning part of the product, though the artistic work should be unique and not usual. For example, table with for legs and top would not be considered as design, but the table with unique top and unique style of bottom can be registered.

Day by day industrial design becoming daily part of the life of the consumer by catching consumers eyes through unique designs. For the same reason, it has become essential to provide protection to such industrial designs.

The salient features of the Design Act, 2000 can be drawn as follows:

1. definition of the terms “article”, “design” has been given vide scope.
2. the scope is given to the term “prior publication”.
3. Introduction of provision for delegation of powers of the Controller to other officers and stipulating statutory duties of examiners.
4. Provision of identification of non-registrable designs.
5. Provision for substitution of applicant before registration of a design.
6. Substitution of Indian classification by internationally followed system of classification.
7. Provision for inclusion of a register to be maintained on computer as a Register of Designs.
8. Provision for restoration of lapsed designs.
9. Provisions for appeal against orders of the Controller before the High Court instead of Central Government.
10. Revoking of period of secrecy of two years of a registered design.
11. Providing for compulsory registration of any document for transfer of right in the registered design.

12. Introduction of additional grounds in cancellation proceedings and provision for initiating the cancellation proceedings before the Controller in place of High Court.
13. Enhancement of quantum of penalty imposed for infringement of a registered design.
14. Provision for grounds of cancellation to be taken as defence in the infringement proceedings to be in any court not below the Court of District Judge.
15. Enhancing initial period of registration from 5 to 10 years, to be followed by a further extension of five years.
16. Provision for allowance of priority to other convention countries and countries belonging to the group of countries or inter-governmental organizations apart from United Kingdom and other Commonwealth Countries.

Provision for avoidance of certain restrictive conditions for the control of anticompetitive practices in contractual licenses

17.6. Trade Secret

It may be confidential business information that provides competitive edge to an enterprise. Usually these are manufacturing or industrial secrets and commercial secrets. These include sales methods, distribution methods, consumer profiles, and advertising strategies, lists of suppliers and clients, and manufacturing processes. Contrary to patents, trade secrets are protected without registration.

Trade secret may be in the form of a

- a. formula
- b. practice
- c. process
- d. design
- e. instrument
- f. pattern
- g. commercial methods
- h. compilation of information not generally known

A trade secret can be protected for an unlimited period of time but a substantial element of secrecy must exist so that, except by the use of improper means, there would be difficulty in acquiring the information.

Considering the vast availability of traditional knowledge in the country, the protection under this will be very crucial in reaping benefits from such type of knowledge.

17.7 The Geographical Indications of Goods (Regulations and Protection Act, 1999)

Geographical Indication (GI) is a tag or sign used on products for indicating their specific place of origin. It specifies the characteristics, qualities and reputation assumed to be in the product because of its linkage to a particular geographical location. Any sign can be used as a GI only when it has the ability of identifying a product to be originating from a particular place. It can be used for following mentioned things –

- a. Agricultural products e.g. Alphonso Mango, Nagpur oranges
- b. Food stuffs e.g. Roquefort cheese is the unique blue cheese from France
- c. Wine and spirits e.g. Tequilla made from blue agave plant growing in the city of Tequila, Mexico
- d. Handicrafts e.g. Mahdubani Paintings, Kanchipuram Sarees
- e. Industrial products e.g. Darjeeling tea.

Until recently, Geographical indications were not registrable in India and in the absence of statutory protection; Indian geographical indications had been misused by persons outside India to indicate goods not originating from the named locality in India.

Patenting turmeric, neem and basmati are the instances which drew a lot of attention towards this aspect of the Intellectual property. Mention should be made that under the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), there is no obligation for other countries to extend reciprocal protection unless a geographical indication is protected in the country of its origin. India did not have such a specific law governing geographical indications of goods which could adequately protect the interest of producers of such goods.

To cover up such situations it became necessary to have a comprehensive legislation for registration and for providing adequate protection to geographical indications and accordingly the Parliament has passed a legislation, namely, the Geographical indication of Goods (Registration and Protection) Act, 1999. The legislation is administered through the Geographical Indication Registry under the overall charge of the Controller General of Patents, Designs and Trade Marks.

The salient features of this legislation are as under:

- a. Provision of definition of several important terms like “geographical indication”, “goods”, “producers”, “packages”, “registered proprietor”, “authorized user” etc.
- b. Provision for the maintenance of a Register of Geographical Indications in two parts- Part A and Part B and use of computers etc. for maintenance of such Register. While Part A will contain all registered geographical indications, Part B will contain particulars of registered authorized users.
- c. Registration of geographical indications of goods in specified classes. Prohibition of registration of certain geographical indications.
- d. Provisions for framing of rules by Central Government for filing of application, its contents and matters relating to substantive examination of geographical indication applications.
- e. Compulsory advertisement of all accepted geographical indication applications and for inviting objections.
- f. Registration of authorized users of registered geographical indications and providing provisions for taking infringement action either by a registered proprietor or an authorized user.
- g. Provisions for higher level of protection for notified goods.
- h. Prohibition of assignment etc. of a geographical indication as it is public property.
- i. Prohibition of registration of geographical indication as a trademark.
- j. Appeal against Registrar’s decision would be to the Intellectual Property Board established under the Trade Mark legislation.
- k. Provision relating to offences and penalties.
- l. Provision detailing the effects of registration and the rights conferred by registration.
- m. Provision for reciprocity powers of the registrar, maintenance of Index, protection of homonymous geographical indications etc.

17.8. Utility Models

A utility model is an exclusive right granted for an invention, which allows the right holder to prevent others from commercially using the protected invention, without his authorization for a limited period of time. In its

basic definition, which may vary from one country (where such protection is available) to another, a utility model is similar to a patent. In fact, utility models are sometimes referred to as “petty patents” or “innovation patents.”

Only a small but significant number of countries and regions provide the option of utility model protection. At present, India does not have legislation on Utility models.

The main differences between utility models and patents are the following:

The requirements for acquiring a utility model are less stringent than for patents. While the requirement of “novelty” is always to be met, that of “inventive step” or “non-obviousness” may be much lower or absent altogether. In practice, protection for utility models is often sought for innovations of a rather incremental character which may not meet the patentability criteria.

The term of protection for utility models is shorter than for patents and varies from country to country (usually between 7 and 10 years without the possibility of extension or renewal).

In most countries where utility model protection is available, patent offices do not examine applications as to substance prior to registration. This means that the registration process is often significantly simpler and faster, taking on an average six months.

Utility models are much cheaper to obtain and to maintain. In some countries, utility model protection can only be obtained for certain fields of technology, and only for products but not for processes.

Utility models are considered suitable particularly for SMEs that make “minor” improvements to, and adaptations of, existing products. Utility models are primarily used for mechanical innovations.

The “Innovation patent,” launched in Australia some time back was introduced as a result of extensive research into the needs of small and medium-sized enterprises, with the aim of providing a “low-cost entry point into the intellectual property system.”

17.9. Case Study

SHONSHAH, the Plaintiff has filed this suit against CURUDIT, the defendant for permanent injunction in respect of Sitagliptin Phosphate Monohydrate or any other salt of Sitagliptin in any form, alone or in combination that infringes the claimed Plaintiff’s Patent No. 209816. The defendants were selling Sitagliptin Phosphate monohydrate under the

brand PITA and Sitagliptin Phosphate Monohydrate and Metformin Hydrochloride under the brand name PITA –ZET.

Defendant had filed written statement-cum-counter claim wherein, had prayed for revocation of the suit patent. Defendant has alleged that it does not infringe the suit patent since:

- i. It lacks inventive step
- ii. Invention claimed lacks industrial applicability within the meaning of section 64(1)(g) of the Act. Invention disclosed was physically and chemically unstable in nature and was incapable of being used in solid dose formulations;
- iii. Disclosure was insufficient within the meaning of Section 64(1)(h) as complete specification was not disclosed regarding the preparation of Sitagliptin base so as to enable a person in India, possessing average skill and knowledge to work the invention,
- iv. Any claim of the complete specification is not fairly based on the matter disclosed in the specification, thus, violated section 64(1)(i) of the Act.

Based on the above facts, answer the following:

Let Us Sum Up

In this unit, you have learned about the following:

- Intellectual Property (IP) refers to the creations of the human mind like inventions, literary and artistic works, and symbols, names, images and designs used in commerce.
- Intellectual property is divided into two categories: Industrial property, which includes inventions (patents), trademarks, industrial designs, and geographic indications of source; and Copyright, which includes literary and artistic works such as novels, poems and plays, films, musical works, artistic works such as drawings, paintings, photographs and sculptures, and architectural designs.
- A trademark is a word, phrase, symbol, or design that distinguishes the source of products (trademarks) or services (service marks) of one business from its competitors. In order to qualify for patent protection, the mark must be distinctive. For example, the Nike “swoosh” design identifies athletic footwear made by Nike.
- A patent grants proprietary rights on an invention, allowing the patent holder to exclude others from making, selling, or using the

invention. Inventions allow many businesses to be successful because they develop new or better processes or products that offer competitive advantage on the marketplace.

- The Designs Act, 2000 has been enacted essentially to balance these interests and to ensure that the law does not unnecessarily extend protection beyond what is necessary to create the required incentive for design activity while removing impediments to the free use of available designs.
- Copyright is a well-recognized form of property right which had its roots in the common law system and subsequently came to be governed by the national laws in each country.
- Copyright is a right given by the law to creators of literary, dramatic, musical and artistic works and producers of cinematograph films and sound recordings. In fact, it is a bundle of rights including, inter alia, rights of reproduction, communication to the public, adaptation and translation of the work.
- Under the Copyright Act, 1957 copyright subsists throughout India in the following classes of works: Original literary; dramatic, Musical and artistic works; Cinematograph films; and Sound recordings.
- A trade secret can be protected for an unlimited period of time but a substantial element of secrecy must exist so that, except by the use of improper means, there would be difficulty in acquiring the information. Considering the vast availability of traditional knowledge in the country, the protection under this will be very crucial in reaping benefits from such type of knowledge.
- A utility model is an exclusive right granted for an invention, which allows the right holder to prevent others from commercially using the protected invention, without his authorization for a limited period of time.

Check Your Progress-2

1. Antoyodaya jurisprudence also means
 - A. Anti-poor jurisprudence
 - B. Anti-government jurisprudence
 - C. Pro-poor jurisprudence
 - D. D. Pro- government Jurisprudence

2. Corporations are of two kinds
 - A. Corporate Aggregate and Corporate Binding
 - B. Corporate Dual and Corporate individual
 - C. Corporate aggregate and Corporate Sole
 - D. Corporate Solicitor and Corporate Sovereign
3. As per Analytical Jurisprudence, Sanction means
 - A. Acquiescence
 - B. Punishment
 - C. Agreement
 - D. permission
4. Who introduced the concept of Pure theory of Law?
 - A. Holland
 - B. Salmond
 - C. Austin
 - D. Hans Kelson
5. "Prudentia", means_____.
 - A. Skill
 - B. Knowledge
 - C. Skill or knowledge
 - D. Wise

Glossaries

Utility:	Design
Trade Secret:	Formula or process of business
Patent:	Invention
Trade mark:	Symbol, color, logo
Copy rights:	literary, dramatic, musical and artistic works

Answer to Check Your Progress-1

- a-True
- b-True
- c-True
- d-True
- e-False

Answer to Check Your Progress-2

1. C. Corporate aggregate and Corporate Sole
2. C. Pro-poor jurisprudence
3. B. Punishment
4. D. Hans Kelson
5. C. Skill or knowledge

Suggested Reading

1. **Kumar, Ravinder.** Legal Aspect of Business. Cengage Learning, 2nd Edition, 2011.
2. **Stim, Richard.** Intellectual Property- Copy Rights, Trade Marks, and Patents, Cengage Learning, 2008.

Annexure- Case Studies

Case Study - 1

- a. A forced to B to enter into a contract at the point of pistol. What remedy is available to B. If he does not want to be bound by the contract?
- b. C orally offered to pay A, an auto mechanic, Rs. 50/- for testing a used car which C was about to purchase from D. Agreed and tested the car. C paid A Rs.50/- in cash for his services. Is the agreement between C and A (a) express or implied,(b)executed or executory,(c) valid, void, voidable or unenforceable?

Case Study - 2

- a).Are the following offers valid?
1. A garment store gave the following advertisement in a newspaper: special sale for tomorrow only. Men's Night suits reduced from Rs. 200/- to Rs.100/-."
 2. P says to Q, "J will sell you a camera." P owns three different types of cameras of various prices.
 3. An auctioneer displays a refrigerator before a gathering in an auction sale.
 4. A advertises in The Statesman that he would pay Rs.200/- to anyone who finds a returns his lost dog.
- b). A,B and C enter into a contract, under which A promises both B and C that if B will dig A's garden, he(A) will give Rs. 50/- to C. can C compel A to pay the money on B's digging A's garden according to the terms of the contract? Give reason

Case Study -3

- a) .A enters into a contract with B for buying B's car as agent for C without B's authority. B repudiates the contract before C comes to know of it. C subsequently ratifies the contract and sues to enforce it. Advice B.
- b). A, a merchant, entrust B, his agent, with a bill of lading relating to certain goods and instructs B not to sell the goods for less than a certain price, and not to give credit to D. B sells the goods to D for less than that price and gives D three months credit. Advise A.

Case Study -4

a). A engaged B, an auctioneer, to sell some property on the terms that he should receive his due commission of Rs. 500/-. B, however, received secretly Rs.200/- as commission from the purchaser. Discuss the rights of A and B.

b). A, who owes B Rs. 20,000/-, appoints B as his agent to sell his landed property at Meerut and after paying himself(B)What is due to him, to hand over the balance to A.B invites offers. (a) Can A revoke this authority delegated to B? (b) Is B's authority terminated if A dies or become insane?

Case Study-5

a). A policeman, thinking that the driver of a bus was drunk, ordered him to leave the bus. The conductor asked a man in the street to drive the bus to its destination, a kilometer away. He drove the bus negligently and a passenger received injuries. Is the proprietor liable?

b).A to sell a horse to B who tells A that he (B) needs the horse for riding to Mumbai immediately. The horse is ill at the time of agreement .What are the rights of A and B?

Case Study - 6

A). B agrees to buy A's furniture at a price to be fixed by C, a furniture dealer. C refuses to oblige A and B and fixes no price .On A's refusal to sell, can B legally compel him to sell the furniture for any price?

b).A , a farmer, simply exhibits oats in his farm. B buys the oats in the belief that they are old oats. In fact they are new oats. B wants to return the oats and refuses to pay the price. Decide.

Case Study- 7

a). The sale of pure ghee was warranted only equal to sample. T he ghee tendered corresponded to the sample, but was adulterated with 25%groundnut oil. Are the buyers bound to accept?

b). A contracts to sell B a piece of silk, B thinks that it is Indian silk. A knows that B thinks so, but knows that it is not Indian silk. A does not correct b's impression. B afterwards discovers that it is not Indian silk. Can he repudiate the contract?

Case Study- 8

a). 5 persons are the only members of a private company. All of them go in a boat on pleasure trip into the open sea. The boat capsizes and all the 5 die being drowned .Does the private company cease to exist?

b).A husband and wife, who were the only 2 members of a private limited company, are shot dead by dacoits. Does the company also die with them?

Case Study -9

a). The promotion of a company, before its incorporation, enter into an agreement with P to buy a plot of land on behalf of the company. After incorporation the company refuses to buy the said plot of land. Has P any remedy either against the promoters or against the company?

b). "Six/Seven of the signatures to the memorandum of Association of a company were forged .The Memorandum was duly presented, registered and a certificate of incorporation was issued .Can the existence of the company be subsequently attacked on the ground that the registration was void." Decide.

Case Study -10

a).The Express Newspaper (Pvt.)Ltd ., Leading publishers of newspapers and weeklies, sold its undertaking to a new company, Andhra prabha(Pvt.) Ltd. consequent upon the Government adopting certain recommendations of the wage board for improvement in terms of service and salaries of the working journalists. Shall the registration of the company be declared void on the plea that new company was formed for the purpose of evading the new obligations imposed by the Wage board?

b). B offers to sale his car to A for Rs.95,000/-. A accepts to purchase it for Rs.94,000/-. B refuse to sale the car for Rs.94,000/-. Subsequently A agrees to purchase the car for Rs.95,000/- but B refuses to sale. A sues for the specific performance of contract will he succeed?

Model End Semester Examination Question Paper

Master of Business Administration (MBA)

Course Code: **DCMBA-15**

Course Title: **Legal and Business Environment**

Max. Marks: 70

Time: 3 hours

PART – A (10x2 =20 Marks)

Answer any TEN questions out of TWELVE questions

[All questions carry equal marks]

1. Define law.
2. List out the significance of business law
3. Define contract.
4. What is consideration?
5. Discuss the duties and rights of agent.
6. Compare bailment and pledge.
7. Summarize the rights of consumer.
8. Infer the term "Doctrine of caveat emptor".
9. What do you mean by sole trader?
10. Explain the term intellectual property.
11. Write a short note on trade secret.
12. Discuss the copy rights.

PART – B (5X8=40 Marks)

Answer any FIVE questions out of SEVEN questions

[All questions carry equal marks]

13. Categorize the classification of contract.
14. Describe the termination of agency.
15. Explain the rights of unpaid seller.
16. Elaborate the consumer redressal machinery in detail.
17. Discuss the various business firms.
18. Analyze the IPR in detail.
19. Explain the alternate dispute resolution.

PART - C (1x10=10 Marks)

CASE STUDY (Covering the Whole Course)

20. Case Study: Contract Dispute in the IT Sector

Background: ABC Software Solutions Pvt. Ltd. (ABC Software) is a software development company based in India. They entered into a contract with XYZ Corporation, a multinational corporation, to provide custom software development services. The project was significant, with a stipulated completion date.

Incident Details

Project Delays: As the project progressed, it became apparent that ABC Software was falling behind schedule. The delays were due to unexpected technical challenges and resource constraints.

Unilateral Termination: In frustration, XYZ Corporation unilaterally terminated the contract, citing non-performance and missed deadlines.

They also withheld a significant portion of the payment, arguing that the delays had caused them financial losses.

Contract Terms: The contract between ABC Software and XYZ Corporation contained clauses related to deadlines, performance guarantees, and termination. It also had a dispute resolution clause, which required parties to attempt mediation before litigation.













Questions:

- (1). Explain the importance of contracts in business transactions and the relevance of the Indian Contract Act in regulating these agreements. How does it define and enforce the elements of a valid contract?.
- (2). Analyze the reasons behind the project delays and XYZ Corporation's decision to unilaterally terminate the contract. What rights and remedies do parties have when one side fails to perform its contractual obligations?.
- (3). Discuss the key clauses in the contract between ABC Software and XYZ Corporation, including those related to deadlines, performance guarantees, and dispute resolution. How can these clauses help in resolving the dispute?.
- (4). Explain the concept of anticipatory breach of contract and whether it applies in this case. Can XYZ Corporation unilaterally terminate the contract based on perceived non-performance?.
- (5). Evaluate the dispute resolution clause, which requires mediation before litigation. How can mediation be beneficial in resolving contract disputes, and what steps should the parties take to initiate the mediation process?.

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