BUSINESS LAW

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Preface

Business laws form the backbone of the legal framework that governs commercial activities and transactions. They encompass a broad spectrum of regulations designed to promote fairness, transparency, and accountability in the business world. These laws are essential for safeguarding the interests of various stakeholders, including businesses, consumers, employees, and the general public.

One key area of business law is contract law, which governs the formation and enforcement of agreements between parties. It outlines the rights and obligations of each party, ensuring that contracts are legally binding and enforceable. Contract law also provides remedies in case of breach, such as damages or specific performance.

Intellectual property laws are another crucial aspect of business law, protecting creations of the mind, such as inventions, literary and artistic works, trademarks, and trade secrets. These laws grant exclusive rights to creators, allowing them to profit from their innovations and creations while preventing unauthorized use or exploitation by others.

Employment laws regulate the relationship between employers and employees, covering issues such as wages, working conditions, discrimination, and termination. These laws aim to ensure fair treatment of workers and promote workplace equality and safety.

Tax laws govern the imposition and collection of taxes on individuals and businesses. They outline the various taxes businesses are required to pay, such as income tax, sales tax, and corporate tax, and establish procedures for tax filing, compliance, and enforcement.

Corporate laws provide the legal framework for the formation, operation, and dissolution of corporations. They specify the rights and responsibilities of shareholders, directors, and officers, and promote corporate transparency and accountability.

Business laws also include regulations related to consumer protection, antitrust, securities, and international trade. These laws aim to protect consumers from unfair or deceptive business practices, prevent monopolistic behaviour, regulate financial markets, and facilitate cross-border commerce while ensuring compliance with international treaties and agreements. Overall, business laws play a crucial role in shaping the conduct of business and maintaining the integrity of commercial transactions.

The book of Business Laws provides a comprehensive guide to the legal frameworks governing commercial activities, ensuring compliance and fostering fair and transparent business practices.

–Author

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Introduction to Business Law

An indispensable part of a successful business environment in any country is its legal aspects. They reflect the policy framework and the mind set of the Governmental structure of that country. They ensure that every company is functioning as per the statutory framework of the country. Every enterprise must take into account this legal set up while framing the basic aims and objectives of its company. This is because, it is necessary for efficient and healthy functioning of the organisation and helps it to know about the rights, responsibilities as well as the challenges that it may have to face.

In India, Companies Act, 1956 is the most important law regulating all aspects of a company. It contains provisions relating to formation of a company, powers and responsibilities of the directors and managers, raising of capital, holding company meetings, maintenance and audit of company accounts, powers of inspection and investigation of company affairs, reconstruction and amalgamation of a company and even winding up of a company.

All the transactions of a company are regulated by the Indian Contract Act, 1872. It lays down the general principles relating to the formation and enforceability of contracts; rules governing the provisions of an agreement and offer; the various types of contracts including those of indemnity and guarantee, bailment and pledge and agency. It also contains provisions pertaining to breach of a contract.

The other major legislations are: The Industries (Development and Regulation) Act 1951; Trade Unions Act; the Competition Act, 2002; the Arbitration and Conciliation Act, 1996; the Foreign Exchange Management Act (FEMA),1999; laws relating to intellectual property rights; as well as laws relating to labour welfare.

LEGAL ENVIRONMENT IN INDIA

A business operates its over all activities in environment where legal framework provides a protection to the business for its right and similarly business is also accountable for its duties towards various stakeholders. Constitutional Law of India is the source, root, stem, spirit and guiding factor for creating, maintaining and observing legal environment in the country.

The chapter III conferred certain rights known as fundamental rights (Article 12 to 35) that cannot be taken or reduced by government without due procedure of law and a citizen approaching High Court or Supreme Court can challenge such violation of law.

The constitution of India provides that citizens can enjoy fundamental rights. But when they enjoy them, they should not damage similar rights of the rest of the citizens and national integrity.

The right to approach directly the apex court is also a fundamental right. To strike balance between this two extreme is difficult ask, as the government need to take care of over all and sustainable growth. Implementing this chapter has many time created conflicts with the subsequent chapter that empowers government by prescribing directive principles. Directive Principles in chapter IV has equal footing, which directs State to take such measure to see welfare of common mass.

However it is important to know that one can't approach apex court that can compel government to act accordingly. The government can create exceptions to the general rule, and during conflict, the apex court has delivered judgments harmonizing spirit of both chapters. Article 19 of the Constitution Law of India conferred fundamental right of citizen to operate any business activity in the country, but this right is not absolute per se, the government can bring restrictions within the provisions of other part of The Constitutional Law of India.

Articles 38 and 39 of the Constitution empowers the State should strive to promote public welfare by securing and protecting a social order in which socio-economic justice shall inform all institutions of national life, and ensure that the ownership and control of material resources are so distributed as to subserve the common good.

The operation of the economic system should not result in the concentration of wealth and means of production to the common detriment. Monopolistic and Restrictive Trade Practice Act was enacted in year 1969 (MRTP Act) to observe the directions cited in The Constitutional Law of India.

BUSINESS, CONSUMERS, ECONOMY AND COMPETITION

Profit generated through goods sold or services provided to the consumers are what business aims at. The government plays tutelage role and keeps balance that business survives and grows, consumers get goods and services at competitive rate and national economy also prospers and sustains.

Striking balance between these two extreme require long-term policy and public confidence in government actions. The three players *i.e.*, consumers,

business and government is interconnected and dependent on each other. Therefore if there exists healthy competition amongst the all players, all segment of the society benefits in long term.

Dictionary meaning of 'compete' is to try to be more successful than someone or something else, strive against others where strive means to try hard, struggle, *etc.*, while 'competitive' means wanting very much to win or be more successful than other people. Modern economic legislation is becoming more complex.

It has to take on giant MNCs thriving to drive out small firms from the market. Competition between two un-equal may create situation where small one may whither away in long run. Main areas of competitiveness may be classified as physical competitiveness, intellectual competitiveness, and systemic competitiveness means-attitudes and mindsets that are necessary to fostering a competitive instinct.

Thus government should provide conducive environment that business compete in a fair way and becomes constant innovative force to create and adopt new ideas in producing goods and delivering service. It should also see that in global economy, the benchmark for efficiency and effectiveness is globally competitive. It is something that business should see that they achieve higher benchmark and becomes global leader by establishing higher benchmark.

World Development Report, 2000-01 states, markets work for the poor because poor people rely on formal and informal markets to sell their labour and products, to finance investment, and to insure against risks. Well functioning markets are important ingenerating growth and expanding opportunities for poor people.

Here "Well-functioning" implies markets that work efficiently and without distortions *i.e.*, competitive markets where everyone has the opportunity to participate. However, "competition" is often less understood and easily distorted by the players in the market, even when there are a large number of them. It is therefore that governments enact competition laws to regulate the distortions.

COMPETITION POLICY

Government measures affecting the behaviour of enterprises and the structure of industry are encompassed by competition policy. It covers the broad spectrum of economic policies that have a bearing on competition in the economy, such as trade policy, sectoral regulation, privatization, *etc.*

At the heart of competition policy in many countries is a competition or anti-trust law, which sets down the legal principles and institutions that govern the behaviour of firms in competitive markets including restrictive trade practices, merger scrutiny, provisions to deal with cartels, *etc.*

Competition law can therefore be seen as a legal tool that allows competition principles to be enforced in the governance system. Governmental measures that directly affect the behaviour of enterprises and the structure of industry constitute competition policy. While the law is a piece of legislative enactment to regulate the marketplace, which can be enforced in a court of law, it covers a

whole raft of public policies and even approaches. It is upon economic theory that the need for competition law is founded, Economic theory demonstrates that overall welfare is greatest when there is'perfect competition' in markets. Perfect competition is a theoretical concept and it is not achieved in the real world. However, the closer the market gets to perfect competition, the greater the gains in welfare. This is because competition directs resources in the economy to their most productive uses, and motivates firms to adopt the most efficient processes of production. Competition also ensures that the benefits of improved efficiency do not just lead to increased profits for firms, but reach the consumer as well. That when a company is a monopoly, it receives higher profits at the expense of its customers is demonstrated by economic theory.

These theoretical foundations are backed up by evidence of the way competition policy and law operates in the real world. Competition laws are regularly used to reduce the power of monopolists and to make sure they provide goods and services at fair prices; to make it possible for more efficient rivals to enter markets dominated by a few large firms; and to prevent firms from cooperating with each other to raise prices at the same time or to restrict their supply. Competition also motivates firms to develop new products that will meet consumer needs ahead of their rivals, which contributes to dynamism and growth in the economy and helps firms as well as consumers by ensuring that upstream and downstream businesses operate fairly.

Paradigm Shift in Legal Environment and Reforms

The economic policies India followed for several decades after independence were based on the'command and control regime'. However, in the 1980s, it became clear that many of policies had ceased to serve their objectives. This resulted in the country embarking on the path of economic reforms, which started, more particularly, around 1991. The wide ranging reforms covered areas such as trade policy, industrial policy, reservations for public sector, privatization of state owned enterprises, *etc.* One of the objectives of reform is to allow level-playing field to business entity so as to increase efficiency, maintain global standards that, through healthy competition, may benefit consumers and economy as well as business entity itself.

Role of the Union Government in Reforms

National Common Minimum Programme (NCMP) of the UPA Government quote:

It will not support the emergence of any monopoly that only restricts competition. All regulatory institutions will be strengthened to ensure that competition is free and fair. These institutions will be run professionally.

It also aims on with two objectives:

1. *First*: the corporate should be given hassle-free environment so that they are able to face the competition effectively and contribute to the national economy in the best possible way.

2. *Second*: The conduct of the companies should be fully transparent and they must strike proper balance between the interests of the company on one hand and interests of shareholders, depositors and other stakeholders, on the other.

The appointment of a bureaucratic to head the Competition Commission was provided for by the National Democratic Alliance Government while introducing the CCI. But the apex court stayed this and the Center was asked to consider amendments to the Act. The validity of The Competition Law and authority created under the law was put to test in The Supreme Court. The Supreme Court allowed the Center to bring amendments to the Competition Commission Act as suggested by it, *viz.* that the Chairperson of the Competition Commission of India (CCI) would be an expert and not a judge, and only the chief of an appellate tribunal would be a judicial person.

A three-judge Bench, comprising the Chief Justice, R.C. Lahoti, Justice G.P. Mathur and Justice P.K. Balasubramanyan, was disposing of the petitions filed by advocates Brahma Dutt and R. Gandhi challenging the constitutional validity of the Act. It was said by the bench leaving the issues open that the court could consider the questions raised in the petitions after the Center carried out the amendments proposed by it.

The UPA Government too endorsed the stand of its predecessor and informed the Supreme Court that only a technical expert and not a judge would be the Chairperson of the Competition Commission. In its fresh proposals, the Center, while reiterating that the CCI needed to be a body of experts, said that if at all a judge was included in the CCI, it would be on the strength of his expertise in the field and not because of his judicial background.

It said the CCI, apart from the Chairperson, should have a maximum of six members (a total of seven members). It, however, said there would be an Appellate Tribunal to hear appeals against the orders of the Commission and that this Tribunal would be headed by a sitting or retired Supreme Court judge or a Chief Justice of a High Court.

The other two members would be experts in competition and related matters. The Center also agreed to amend the controversial provision relating to the execution of the orders of the CCI by the High Courts and substituted the High Courts with civil courts. In another modification, the Government said that the CCI would be divested of its power to detain a person in civil prison in the event of contravention of the provisions of the Act. Only after the amended Act was put in place could the legality or otherwise of the provisions be tested. It was the contention of the Bench.

Competition, Consumers and Supreme Court

Prize Chits and Money Circulation Scheme (Banning) 1978 Act-Network marketing.

Whether this multi level marketing is legal or not?-Held, multi-level Marketing results in exploitation of personal influence of each and every

distributor or his close relative. Monopolies and Restrictive Trade Practices Act, s. 36A-Allotment of flats-Demand of extra amount-Relief sought to restrain respondent from canceling allotment of apartments in D.L.F. Beverly, Park, Gurgaon for non payment of extra amount demanded from appellants.

Supreme Court of India observed Telecom Regulatory Authority of India Act, 1997-Ss. 18 and 14-Govt. permitted the Fixed Service Providers to offer WLL with limited mobility-appellants Cellular Mobile Service Providers challenged the decision of the Govt.-appeal against the decision of the Telecom Disputes Settlement and Appellate Tribunal-whether from the judgment of the tribunal, the contentions raised by the appellants can be held to be a substantial question of law, which requires interference with the order of the tribunal? - Held, the conclusion of the tribunal that nothing should be allowed to stand in the way of pursuing the objective of increasing teledensity in the country and that the decision being a policy decision, is not liable to be interfered with by the tribunal, cannot be sustained inasmuch as the main grievance of the cellular operators was to the effect that the tribunal did not consider several materials placed before it on the question of level playing field nor has it given any positive finding on that.-Non-consideration of relevant materials on the issue regarding level playing field and absence of any finding by the tribunal on that score vitiate its ultimate decision and would constitute a substantial question of law within the meaning of Section 18 of the Act, on account of which the Supreme Court can interfere with the decision of the Peico Electronics and Electricals and Another vs. Union of India and others.

- *Restrictive Trade Practice*: MRTP Act, s. 2(o) (ii)-further finding that the impugned trade practice has the effect of imposing on the consumers' unjustified costs or restrictions-required. Held on facts, irrespective of the termination of the Agreement between appellant and R-2, the appellant should take steps to amend a similar clause existing in other agreements of similar nature with the dealers. Also held, commission exceeded its jurisdiction in giving a direction not to give effect to the letter terminating the Agreement and to restore the supplies to the complainant-cannot be sustained in the absence of a finding that the termination of Agreement was contrary to the provisions of the Act or it is a device to circumvent the provisions of the Act so as to perpetuate the restrictive trade practice-cease and desist order.
- *Star India Private Limited vs*: Siti Cable Network Limited and Others Monopolistic and Restrictive Trade Practices Act, 1969-ss. 10 r/w 36B, 12A-Appellants not permitting the complainants and their associates from using the latest technology in telecommunication. Hindustan Ciba Geigy vs. Union of India and others (Supreme Court of India)Date of Judgment: 20/11/2002Monopolies and Restrictive Trade Practices Act, 1969-S. 36A-whether under Section 36A of the Act, causation of loss or injury to the consumer of goods or service is sine qua non for initiation of a proceeding there under-Held, an enquiry can be initiated

against the notice not only when it adopts one or more practices specified therein but also thereby it must cause loss or injury to the consumers. A manifest error was therefore committed by the Commission in holding that the actual loss or injury need to be caused to the consumers.

- *Colgate Palmolive (India) Limited vs*: Monopolies and Restrictive Trade Practices Commission and others (Supreme Court of india) M.R.T.P. Act-S. 36A-Interpretation of-held, for holding a trade practice to be an unfair trade practice, it must be found that it had caused loss or injury to the consumer-Causation or loss or injury is a sine qua non for invoking the principles of Section 36A of the M.R.T.P. Act. The Commission committed a manifest error in holding that the actual loss or injury is not an essential ingredient of the unfair trade practice. A literal meaning should be assigned to a statute unless the same leads to anomaly or absurdity. It is a well established principle of law now.

The Supreme Court considered that in a price-fixing conspiracy, the conduct is illegal and no further enquiry was needed on intent or anti-competitive effect. It pointed out:

The critical analysis in determining whether a particular activity constitutes a per se violation is whether the activity on its face seems to be such that it would always or almost always restrict competition, and decrease output instead of being designed to increase economic efficiency and make the market more rather than less competitive. Hindustan Development Corporation, 1993, 3 SCC 499). These unhealthy trends will henceforth attract severe penalties.

Supreme Court directed under Central Excise Act, the deposit of refundable indirect tax that can't trace the real payee into special account created for over all welfare of consumers. The doctrine of 'unjust enrichment' has given new direction to the practical way when one become unjust rich at expense of others, but could not refund such amount to actual person, such person were directed to deposit in special account under the trusteeship of government, and shall be utilized for benefit of consumers. Similar judgment was delivered to banking institutes to deposit amount accumulated due to rounding off in welfare of physically challenged people.

New Dimensions to Competition Policy

Competition policy is used as and instrument for achieving efficient allocation of resources, technical progress and consumer welfare and of regulating concentration of economic power detrimental to competition. It has different objectives in different countries but some major themes stand out. In most of the countries, it aims at promoting competition by discouraging anti-competitive behaviour. Freedom of trade, freedom of choice, access to markets, and achievement of economic efficiency to maximize consumer welfare is the other commonly expressed objectives of competition policy. The role of competition policy has also expanded in the last two decades to include regulation of

government intervention in the marketplace. Significant advantages to business and consumers may result fro introduction of a comprehensive competition policy. For business, such a policy means fairness as it acts against anti-competitive practices that can drive efficient and well-run companies out of business. It ensures consistency because it is applied by a single authority working to a single set of published rules and a reduction in regulation since it is proactive, efficient and effective which avoids the need to commit manpower and time to devising new rules when new products or markets emerge.

For consumers, lower prices and improved services result from an effective competition policy and law. An improvement in the coverage of competition law and a reduction in the time taken to remove barriers to competition mean a lot for the consumer, in particular the poor. While opportunities for anti-competitive behaviour may be limited in many sectors most of the time by fierce competition between firms, market conditions are constantly changing. It cannot be guaranteed that a particular market will remain very competitive and hence less vulnerable to anti-competitive practices in the long term. Competition policy by being comprehensive, provides a readymade, consistent framework for dealing with anticompetitive behaviour in any sector of the economy. Free and fair competition is one of the pillars of an efficient economy. Competition stimulates innovation and productivity and leads to optimum allocation of resources in the economy. However, some enterprises undermine the market by resorting to anticompetitive practices for individual gain. For example, they may form cartels, or big companies may abuse their dominant position. Such practices, if not checked, can completely nullify or frustrate the gains from competition.

FORCES REINFORCING HEALTHY COMPETITION

There are certain internal as well as international forces working to strengthen the competition in business environment.

Internal Forces

The corporate sector also experienced global competitive environment and presented their voice at different forums. It also realized that to be globally competitive is the only mantra to survive and grow, not for merely businesses but economy as a whole need to be so. In a keynote address Reliance doyen Mr. Mukesh Ambani said: by setting the goal of global leadership before us, we are committing ourselves to climb the Everest of global economy. The task is hazardous, but not impossible to achieve. In my view, competitiveness is critical for a successful assault on this high peak. Our attitude to competitiveness is a barometer of our self-confidence, and efficiency is the most crucial component of competitiveness. Faced with ruthless global competition, we have to worship the goddess of efficiency with unflinching dedication.

He further said: Let us not be afraid of international efficiency. Let us not shy away from global competitiveness. To protect low quality and high cost would induce consumers to procure foreign products in a clandestine manner. A strong Indian economy is the most dependable defence of our national interests. We should be satisfied only when it is ready to withstand global competition. When it makes inroads in foreign markets on its own merit and develops global brands.

International Forces

Many countries have their own competitive laws. And these competitive laws deal with anti-competitive agreements among firms engaged in the same lines and firms with vertical integration. Mexican Competition Law seeks to protect Free Market Participation through elimination of monopolies and monopolistic practices. Anti-Trust laws have been popular in the US. The core objective of competition policy in most countries is to maintain a healthy degree of rivalry among firms in markets for goods and services. South Africa, the Netherlands and the UK have come out with laws radically altering competition regulations. There has been a divergence of views on competition policy in Europe and the US. American law focuses on the consumer whereas in Europe, industry gets the focus. But in both regions, it is distrust of concentration of economic power that competition policy is based on.

WTO acts as a catalyst for creating borderless globally competitive business environment. India as signatory of WTO convention took lead in drafting its environment to suit its duty as such signatory of WTO convention.

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Contract Law

CONTRACT

A contract is an agreement enforceable by law. For a contract to be formed, there must be:

- An agreement
- The agreement should be enforceable by law

An agreement is defined as every promise and every set of promises forming the consideration for each other and a promise is an accepted proposal.

SPECIAL TYPES OF CONTRACTS

Contracts of Indemnity and Guarantee

A contract of indemnity is a contract by which a person promises to save the other from loss caused to him by the conduct of the promisor himself or of any third person. For example, a shareholder executes an indemnity bond favouring the company thereby agreeing to indemnify the company for any loss caused as a consequence of his own act.

The person who gives the indemnity is called the 'indemnifier' and the person for whose protection it is given is called the 'indemnity-holder' or 'indemnified'. A contract of indemnity is restricted to cover the loss caused by the promisor himself or by a third person. The loss must be caused by some human agency. A contract of indemnity does not cover loss resulting from accidents such as fire or perils of the sea.

A contract of 'guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default. Such a contract may be oral or written. A contract of guarantee involves three persons, viz. a person who gives the guarantee is called the 'surety'; the person in respect of whose default the guarantee is given called the 'principal debtor'; and the person to whom the guarantee is given is called the 'creditor'. A contract of guarantee is a conditional promise by the surety that if the principal debtor defaults he shall be liable to the creditor.

Difference between Indemnity and Guarantee

In a contract of indemnity there are two parties *i.e.*, indemnifier and indemnified. A contract of guarantee involves three parties *i.e.*, creditor, principal debtor and surety.

- An indemnity is for reimbursement of a loss, while a guarantee is for security of the creditor.
- In a contract of indemnity the liability of the indemnifier is primary and arises when the contingent event occurs. In case of contract of guarantee the liability of surety is secondary and arises when the principal debtor defaults.
- The indemnifier after performing his part of the promise has no rights against the third party and he can sue the third party only if there is an assignment in his favour. Whereas in a contract of guarantee, the surety steps into the shoes of the creditor on discharge of his liability, and may sue the principal debtor.

Contracts of Bailment and Pledge

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 disposed of according to the directions of the person delivering them is technically termed as 'bailment'.The person delivering the goods is called the 'bailor' and the person to whom the goods are delivered is called the 'bailee'. The examples of a contract of bailment are: delivering a watch or radio for repair; leaving a car or scooter at a parking stand; leaving luggage in a cloak room; delivering gold to a goldsmith for making ornaments; leaving garments with a dry cleaner, *etc.* The essence of bailment is the transfer of possession. The ownership remains with the owner. No bailment is there of any immovable property.

A 'pledge' is a bailment of goods wherein the goods are delivered as a security for payment of a debt or performance of a promise. The bailor is called the 'pledgor' or 'pawnor' and the bailee is called the 'pledgee' or 'pawnee'. Thus, pledge is a special kind of bailment. Pledge can be made only of movable properties. In order to make the pledge legally valid it is essential that the pledgor has the legal right or title to retain the goods.

Difference between Bailment and Pledge

- *Purpose*: A pledge is made for a specific purpose, while bailment can be made for any purpose.
- *Property*: In bailment, the bailee gets only the possession of goods bailed. The ownership remains with the bailor. In the case of pledge, the pledgee acquires a special property in the goods pledged whereby he gets possession coupled with the power of sale, on default.
- *Right of sale*: Bailee can exercise a lien on the goods bailed. He has no right of sale. But in case of a pledge, the pledge can sell the goods after due notice to pawner.

Contracts of Agency

A person employed to do any act or to represent another in dealing with third persosns is technically termed as an 'agent'. The person who employs the agent and for whom such act is done, or who is so represented, is called the 'principal'. The relation between the agent and the principal is called 'Agency'. It is only when a person acts as a representative of the other in the creation, modification or termination of contractual obligations; between that order and third persons that he is an agent. The essence of a contract of agency is the agent's representative capacity coupled with a power to affect the legal relations of the principal with third persons.

There are two important principles upon which contracts of agency are based. *They are*:

- Whatever a person can do personally shall also be allowed to be done through an agent except in case of contracts involving personal services such as painting, marriage, singing, *etc.*
- He who does an act through a duly authorised agent does it by himself *i.e.*, the acts of the agent are considered the acts of the principal.

FORMATION OF A CONTRACT

The process of one party's proposal or offer and its acceptance by another party is essentially involved in the formation of a contract. This generally involves the process of negotiation where the parties apply their minds make offer and acceptance and create a contract.

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

Converting a proposal into a promise needs the acceptance to be:

- *Absolute and unqualified*: Any departure from the terms of the offer or any qualification vitiates the acceptance unless it is agreed to by the person from whom the offer comes. An acceptance with a variation is no acceptance; it is simply a counter proposal.

- *Expressed in some usual and reasonable manner*: If the proposer prescribes any particular manner of acceptance it has to be in that manner and where no manner is prescribed it should be in a usual and reasonable manner.

WHO CAN ENTER INTO A CONTRACT

A person in competent to enter into a contract if he is:

- Of the age of majority according to the law to which he is subject
- Of sound mind (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 judgement as to its effect upon his interests.)

A person is not disqualified from contracting by any law to which he is subject is competent to contract.

Therefore a minor is not competent to contract and an agreement by a minor is void ab initio. He can not ratify an agreement on attaining the age of majority and validate the same. (Void ab initio means it has at no time had any legal validity).

From what has been said above it is clear that minors, persons of unsound mind and persons disqualified by law to which they are subject are incompetent to enter into a contract.

ESSENTIALS OF A VALID CONTRACT

All agreements are contracts if they are made:(i) By the free consent of parties, (ii) For a lawful consideration and object (iii) Not expressly declared to be void.

(i) By the free consent of parties competent to contract

Consent is said to be free if it is not caused by:

- *Coercion*: Consent is said to be caused by coercion when it is obtained by pressure exerted by either committing or threatening to commit an act forbidden by the Indian Penal Code or unlawfully detaining or threatening to detain any property.
- *Undue influence*: A contract is said to be induced by "undue influence" where the relation subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.
- *Fraud*: Means and includes the following acts done with the intention to deceive or to induce a person to enter into a contract.
  - The suggestion that a fact is true when it is not true and the person making the suggestion does not believe it to be true
  - Active concealment of a fact by a person who has knowledge or belief of the fact,
  - Promise made without the intention of performing it.

- *Misrepresentation*: When a person positively asserts that a fact is true when his information does not warrant it to be so, though he believes it to be true, it is misrepresentation. A breach of duty which brings an advantage to the person committing it by misleading the other to his prejudice is also a misrepresentation.
- *Mistake*: Where both parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void. An erroneous opinion as the value of the thing, which forms the subject matter of the agreement, is not deemed as mistake as to a matter of fact. Unilateral mistake, *i.e.*, the mistake in the mind of only one party does not affect the validity of the contract.

(ii) For a lawful consideration and object

Consideration or object is unlawful if:

- It is forbidden by law,
- Is of such a nature if permitted it would defeat the provisions of any law,
- It is fraudulent,
- The court regards it immoral,
- The court regards it opposed to public policy. Every agreement of which the consideration or object is unlawful is void.

(iii) Not expressly declared to be void

VOID AGREEMENTS

- Agreements void if considerations and objects unlawful in parts.
- Agreement without consideration is void, unless it is in writing and registered, or it is a promise to compensate for something done, or is a promise to pay a debt barred by limitation.
- Agreement in restraint of marriage. Every agreement in restraint of the marriage of any person, other than a minor is void. It is the policy of law to discourage agreements, which restrain freedom of marriage. Where a party is restrained from marrying at all, or for marrying for a fixed period or from marrying a particular person, or class of persons, the agreement is void.
- Agreement in restraint of trade. Every agreement, by which one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.
- Agreement in restraint of legal proceedings. Every agreement by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights is void to that extent.
- Agreements for uncertainty. Agreements the meaning of which is not certain, or capable of being made certain, are void.

- Agreements by way of wager/Bet. Agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to be won on wager, or entrusted to any person to bide by the result of any game or other uncertain event on which any wager (betting or gambling) is made. However certain prizes for horseracing are exempted.

Voidability of Agreements without Free Consent

Any consent to an agreement caused by coercion, fraud or misrepresentation being illegal, the agreement thus created is a contract at the option of the party whose consent was so caused. A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.

Exceptions

- If such consent was caused by misrepresentation or by fraud and the party had the means of discovering the truth with ordinary diligence, the contract is not voidable
- A fraud or misrepresentation which does not cause a person to consent to a contract does not render a contract voidable.

BREACH OF CONTRACT

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 the Act, or any other law. If a contrary intension appears from a contract, the representatives of the promisor are bound by promises in the case of death of such promisor before performance.

In a contract the agreement being enforceable by law, each party to the contract is legally bound to perform his part of the obligation. Non-performance of the duty undertaken by a party in a contract amounts to breach of contract, for which he can be made liable.

REMEDIES

When a party to the contract makes a breach of contract, there are two possible alternatives available to the other party. Firstly to bring an action for the breach of contract, and secondly he may bring an action for specific performance of the contract.

COMPENSATION IN CASE OF BREACH

Compensation for Loss or Damage Caused by Breach of Contract

Damages are the most appropriate remedy for the breach of contract. When a contact has been broken, the party who suffers by such breach is entitled to

receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew when they made the contract, to be likely to result from the breach of it. It is important to note that such compensation is not to be given for any remote or indirect loss or damage sustained by reason of the breach.

Compensation for Breach of Contact where Penalty Stipulated for

When a contract has been broken and a sum has been named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether actual damage or loss is proved to have been caused thereby, to receive from the party who as broken the contract reasonable compensation not exceeding the amount so named or, the penalty stipulated for.

Party Rightfully Rescinding Contract Entitled to Compensation

A person who rightfully rescinds a contract is entitled to compensation for any damage, which he has sustained through non-fulfillment of the contract.

SPECIFIC PERFORMANCE

Specific performance is nothing but an actual execution of the contract as agreed between the parties. Specific Performance of any contract may, in the discretion of the court be enforced in the following situations:

- When there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done; or
- When the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief.

Exceptions

The following are the exceptions where compensation would be adequate relief:

- Agreement by a landlord for repair of the rented premises;
- Contract for the mortgage of immovable property;
- Contract for the sale of any goods, for instance machinery or buffaloes. However, a contract to deliver rare coins would be specifically enforceable, as compensation would not constitute adequate relief in such a case;
- An agreement to pay money by installments;
- An agreement for lending money.

Besides these it can be added that a contract which runs into such minute or numerous details or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the court cannot enforce specific performance of its material terms, cannot be specifically enforced.

Another situation when a contract cannot be specifically enforced is where "the contract is in its nature determinable". If the contract can be put to an end by a party to the contract, the contract is said to be determinable.

A contract the performance of which involves the performance of a continuous duty, which the court can not supervise, cannot be specifically enforced.

Persons who Cannot Obtain Specific Performance

- The specific performance of a contract cannot be obtained in favour of a person who could not be entitled to recover compensation for the breach of contract.
- Specific performance of a contract cannot be enforced in favour of a person:
  - Who has become incapable of performing the contract that on his part remains to be performed, or
  - Who violates any essential term of the contract that on his part remains to be performed, or
  - Who acts in fraud of the contract, or
  - Who willfully acts at variance with, or in subversion, of the relation intended to be established by the contract.

INDIAN CONTRACT ACT

We may not be conscious of it that we enter into contract so many times in a day that 'contract' has become an indispensable part of our life. When you purchase milk or newspaper in the morning or go to movie in the evening, you are entering into a contract. Indian Contract Act really codifies the way we enter into a contract, execute a contract, and implement provisions of a contract and effects of breach of a contract. Basically, a person is free to contract on any terms he chooses. The Contract Act consists of limiting factors subject to which contract may be entered into, executed and breach enforced. It only provides a framework of rules and regulations which govern formation and performance of contract. The rights and duties of parties and terms of agreement are decided by the contracting parties themselves. In case of non-performance, there is the court of law to enforce agreement.

Section 1 of Contract Act provides that any usage or custom or trade or any incident of contract is not affected as long as it is not inconsistent with provisions of the Act. In other words, provision of Contract Act will prevail over any usage or custom or trade. However, any usage, custom or trade will be valid as long as it is not inconsistent with provisions of Contract Act. Coming into effect on September 1, 1872, the Act has power in the whole of India except the State of Jammu and Kashmir.

It must be noted that contract need not be in writing, unless there is specific provision in law that the contract should be in writing. [*e.g.*, contract for sale of immovable property must be in writing, stamped and registered. Contracts which need registration should be in writing Bill of Exchange or Promissory Note

must be in writing. Trust should be created in writing Promise to pay a time barred loan should be in writing, as per Limitation Act Contract made without consideration on account of natural love and affection should be in writing]. A verbal contract is equally enforceable, if it can be proved. A contract is enforceable by law and at the same time it is possible to obtain compensation/ damages for breach of contract through Civil Court.

Essential Ingredients of a Contract

A contract, as defined by Contract Act, is an agreement enforceable by law [section 2(h)]. Therefore it is necessary to understand first what 'agreement' is. Every promise and every set of promises, forming the consideration for each other, is an agreement. [section 2(e)]. A person makes a proposal (offer). When it is accepted by other, it becomes a promise. However, promise cannot be one sided. Only a mutual promise forming consideration for each other is 'agreement'. For example, A agrees to pay Rs 100 to B and B agrees to give him a book which is priced at Rs 100. This is set of promises which form consideration for each other.

However, if A agrees to pay Rs 100 to B, but B does not promise anything, it is not 'set of promises forming consideration for each other' and hence not an agreement.

It should be noted that the term 'agreement' as defined in Contract Act requires mutual consideration. Thus, if A invites B to dinner and B agrees to come, it is not an 'agreement' as defined in Contract Act.

Meaning of Proposal

When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal. [section 2(a)]. Thus, a 'proposal' can be to do a positive act or abstinence from act (*i.e.*, negative act). [English Act uses the word 'offer', while Indian Contract Act uses the word 'proposal'. Generally, both words are used inter-changeably. This is not technically correct, as the word 'offer' is not used in Contract Act].

MEANING OF 'PROMISE'

A proposal is said to be accepted when a person the proposal is made to signifies his assent thereto. A proposal, when accepted, becomes a promise. [section 2(b)].

Thus, when a proposal (offer) is accepted, it becomes a 'promise'. As is clear from the definition, only person to whom proposal is made can signify his assent. A proposal cannot be accepted by any other person.

Promisor and Promisee

The person making the proposal is called the "promisor", and the person accepting the proposal is called the "promisee". [section 2(c)].

Reciprocal Promises

Promises which form the consideration or part of the consideration for each other are called reciprocal promises. [section 2(f)].

Consideration for Promise

It is stated by the definition of 'agreement' itself that the mutual promises should form consideration of each other. Thus, 'consideration' is essential for an agreement. A promise without consideration is not 'agreement' and hence naturally, it is not a 'contract'.

Definition of 'Consideration'

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

Steps Involved in Contract

There are some steps involved in the contract. Proposal and its communication, acceptance of proposal and it communication are the steps. Agreement by mutual promises, Contract Performance of Contract. All agreements are not contract. Only those agreements which are enforceable by law are 'contracts'.

A valid contract calls for the following requirements:

- Offer and its acceptance
- Free consent of both parties
- Mutual and lawful consideration for agreement
- It should be enforceable by law. Hence, intention should be to create legal relationship.

Agreements of social or domestic nature are not contracts:

- Parties should be competent to contract
- Object should be lawful
- Certainty and possibility of performance
- Contract should not have been declared as void under Contract Act or any other law

Communication, Acceptance and Revocation of Proposals

Communication of proposal/revocation/acceptance is vital to decide validity of a contract. It is only when other party receives it that a communication is complete.

Acceptance must be Absolute

For a proposal to be converted into a promise, the acceptance must:

- Be absolute and unqualified;

- Be expressed in some usual and reasonable manner, unless the proposal prescribed the manner in which it is to be accepted.

If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such a manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but if he fails to do so, he accepts the acceptance. [section 7].

Acceptance of offer is complete only when it is absolute and unconditional. Conditional acceptance or qualified acceptance is no acceptance.

Promises, Express or Implied

The promise is said to be express to the degree of the proposal or acceptance of any promise's being made in words. Insofar as such proposal or acceptance is made otherwise than in words, the promise is said to be implied. [section 9]. For example, if a person enters a bus, there is implied promise that he will pay the bus fair.

Voidable Contract

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

- When consent is obtained by coercion, undue influence, misrepresentation or fraud is voidable at the option of aggrieved party *i.e.*, party whose consent was obtained by coercion/fraud, *etc.* However, other party cannot avoid the contract.
- When a contract contains reciprocal promises and one party to contract prevents the other from performing his promise, the contract becomes voidable at the option of the party to prevent. (Section 53). Obvious principle is that a person cannot take advantage of his own wrong.
- When time is essence of contract and party fails to perform in time, it is voidable at the option of other party (section 55). A person who himself delayed the contract cannot avoid the contract on account of (his own) delay.

Void Contract

It is when a contract ceases to be enforceable that a contract which ceases to be enforceable by law becomes void. [Section 2(j)]. Thus, initially a contract cannot be void, *i.e.*, a contract cannot be void ab initio. The simple reason is that in such a case, it is not a contract at all to begin with. Hence, only a valid contract can become void contract due to some subsequent events. *e.g.*, the person dies or property is destroyed or Government imposes a ban, *etc.* A void agreement is void ab initio and never becomes a contract. Being nullity, a void agreement cannot create any legal rights.

What Agreements are Contracts

All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void. Nothing herein contained shall effect any law in force in India and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents. [Section 10].

Who are Competent to Contract

Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject. [Section 11].

Free Consent

Consent of both parties must be free. Consent obtained through coercion, undue influence, fraud, misrepresentation or mistake is not a 'free consent'. Two or more persons are said to consent when they agree upon the same thing in the same sense. [Section 13].

Consent is said to be free when it is not caused by:

- Coercion, as defined in section 15, or
- Undue influence, as defined in section 16, or
- Fraud, as defined in section 17, or
- Misrepresentation, as defined in section 18, or
- Mistake, subject to the provisions of sections 20, 21 and 22.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake. [Section 14].

Void Agreements

An agreement not enforceable by law is said to be void. [Section 2(g)]. Note that it is not 'void contract', as an agreement which is not enforceable by law does not become 'contract' at all.

Following are void agreements:

- Both parties under mistake of fact (section 20)
- Unlawful object or consideration (section 24)
- Agreement without consideration (section 25)
- Agreement in restraint of marriage (section 26)
- Agreement in restraint of trade (section 27)
- Agreement in restraint of legal proceedings (section 28)
- Uncertain agreement (section 29)
- Wagering agreement (section 29)
- Agreement to do an impossible Act (section 56).

These are discussed below.

Obligation of Person who has Received Advantage under Void Agreement or Contract that Becomes Void

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 bound to restore it, or to make compensation for it, to the person from whom he received it.

Contingent Contract

A "contingent contract" is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen. Illustration - A contracts to pay B Rs. 10,000 if B's house is burnt. This is a contingent contract. [Section 31].

Contracts which must be Performed

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 of any other law. Promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract.

Illustrations

- A promises to deliver goods to B on a certain day on payment of Rs. 1,000. A dies before that day. A's representatives are bound to deliver the goods to B, and B is bound to pay Rs. 1,000 to A's representatives.
- A promises to paint a picture for B by a certain day, at a certain price. A dies before the day. The contract cannot be enforced either by A's representative or by B [section 37]. The performance can be 'actual performance' or 'attempted performance', *i.e.*, 'offer to perform'.

Performance of Reciprocal Promises

'Reciprocal promises' is a term denoting promises forming the consideration or part of the consideration for one another.

Classification of a mutual promise can be made in the ways as shown below:

- *Mutual and independent*: Where each party must perform his promise independently and irrespective of whether the other party has performed or willing to perform *e.g.* Seller agrees to deliver on 5th and Buyer agrees to pay on 15th.
- *Conditional and dependent*: Performance of promise by one party depends on prior performance of promise by other party. *e.g.* Buyer agrees to pay for goods 15 days after delivery. Hence, unless seller delivers goods, buyer's liability does not arise.
- *Mutual and concurrent*: Where the promises of both parties must be performed simultaneously. *e.g.*, buyer agrees to pay immediately on delivery of goods *i.e.*, cash payment.

Contracts which need not be Performed

Normally, a contract is expected to be performed. The performance my be actual or by way of tender, *i.e.*, attempted performance. In spite of this it is necessary to note that there are situations in which the contract need not be performed.

The situations are given below:

- Novation, rescission and alteration of contract
- Promisee may dispense with or remit performance of promise
- Effect of neglect of promisee to afford promisor reasonable facilities for performance
- Merger of superior rights with inferior right under contract. This is usually termed as 'discharge of contract'.

Quasi Contracts

'Quasi' means 'almost' or 'apparently but not really' or 'as if it were'. This term is used when one subject resembles another in certain characteristics but there are intrinsic differences between the two. 'Quasi contract' is not a 'contract'. It is an obligation which law created in absence of any agreement. It is based on equity. There are certain relations resembling those created by contract. These are termed as 'quasi contracts'.

These are:

- Supply of necessaries (section 68)
- Payment of lawful dues by interested person (section 69)
- Person enjoying benefit of a gratuitous act (section 70)
- Finder of goods (section 71)
- Goods or anything delivered by mistake or coercion (section 72).

Consequences of Breach of Contract

Compensation is payable for breach of contract. Penalty is also payable if provided in contract. Breach of contract may be actual or anticipatory.

Summary of Principles of Compensation and Damages

Following points are important:

- Compensation for loss or damage is payable. Since the word used is 'compensation', punitive damages cannot be awarded.
- These should be in usual course or known to parties *i.e.*, both parties must be aware
- No compensation for remote and indirect loss or damage
- Same principle applies to quasi contract also.

General Damages

Damages resulting from 'direct and proximate' consequences from breach of contract' are called general damages. Normally, what can be awarded is

compensation for loss or damage which can be directly or proximately attributed to the breach of contract. One way of assessing damages is the difference between the contract price and the market price on date of breach of contract, plus reasonable expenses incurred by him on account of the breach plus cost of suit in court of law.

Consequential Loss or Special Damage

It is due to existence of special circumstances that special damages or consequential damages arise. Such damages can be awarded only in cases where the special circumstances were foreseeable by the party committing the breach or were specifically known to the party. Consequential losses like loss of profit due to breach, which may occur indirectly due to breach cannot be normally awarded unless there are special circumstances which parties were aware. Loss of profit can be awarded only in cases where seller could have foreseen those losses and arose directly as result of breach.

Promisee Should Take Steps to Mitigate the Loss or Damage

In estimating loss or damage, the means available for remedying the inconvenience caused by breach of contract shall be taken into account. This is specifically provided by the explanation to section 73. Thus, promisee should take all reasonable steps to mitigate the losses *e.g.*, if promisor does not supply goods, he should make efforts to procure from alternate sources may be even at higher price, to reduce his losses arising out of breach of contract.

Vindictive or Exemplary Damages

Contract Act has no provision for award of vindictive or exemplary damages. However, these may be awarded by Court under tort under special circumstances *e.g.* Dishonour of cheque by Bank when there was balance in account, as it causes loss of reputation of credit worthiness of person issuing cheque.

Quantum Meruit

'Quantum meruit' literally means 'as much as earned'. A contract may come to an end by breach of contract, or by becoming void and a voidable contract can come to an end by being avoided by the parties involved. In such case, if a party has executed part of contract, he is entitled to get a proportionate amount *i.e.*, 'as much as earned by him'. This is not by way of 'damages' or 'compensation for loss'. The principle is that even when contract comes to a premature end, the party should get amount proportional to the work done/services provided/goods supplied by one party. It is illegal for one party to get enriched at the cost of other.

Contract of Indemnity

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'.

Illustration

A contract 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 the opposite of indemnity. [Section 124].

Contract of Guarantee

A contract to perform the promise, or discharge the liability, of a third person in case of his default is referred to as a 'contract of guarantee'. The person who gives the guarantee is called the "surety"; the person in respect of whose default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor". A guarantee may be either oral or written. [Section 126]. [Person giving guarantee is also called as 'guarantor'. However, 'surety' is the word used by Contract Act for 'guarantor'.]

Contract of guarantee involves three parties. Contract between any two of them is not a 'contract of guarantee'. It may be contract of indemnity. Primary liability is of the principal debtor. Liability of surety is secondary and arises when Principal Debtor fails to fulfill his commitments. However, this is so when surety gives guarantee at the request of principal debtor. If the surety gives guarantee on his own, then it will be contract of indemnity. It is the surety who has all primary responsibilities in such case.

Consideration for Guarantee

Anything done, or any promise made, for the benefit of the principal debtor, may be sufficient consideration to the surety for giving the guarantee.

Illustrations

- B requests A to sell and deliver to him goods on credit. A agrees to do so, provided C will guarantee the payment of the price of the goods. C promises to guarantee the payment in consideration of A's promise to deliver the goods. This is sufficient consideration for C's promise.
- A sells and delivers goods to B. C afterwards requests A to forbear to sue B for the debt for a year, and promises that if he does so, C will pay for them in default of payment by B. A agrees to forbear as requested. This is a sufficient consideration for C's promise. (c) A sells and delivers goods to B. C afterwards, without consideration, agrees to pay for them in default of B. The agreement is void. [Section 127].

Bailment

Bailment being another type of special contract, naturally all basic requirements of contract are applicable. Bailment means act of delivering goods for a specified purpose on trust. The goods are to be returned after the purpose is over. In bailment, possession of goods is transferred, but property *i.e.*, ownership is not transferred. A "bailment" is the delivery of goods by one person

to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the "bailor". Bailee is the person they are delivered to.

Explanation

If a person already in possession of the goods of another, contracts to hold them as a bailee, he thereby becomes the bailee, and owner becomes the bailor, of such goods, although they may not have been delivered by way of bailment. [section 148]. [Thus, initial possession of goods may be for other purpose, and subsequently, it may be converted into a contract of bailment, *e.g.*, seller of goods will become bailee if goods continue in his possession after sale is complete].

Bailment can be only of 'goods'. As per section 2(7) of Sale of Goods Act, 'goods' means every kind of movable property other than money and actionable claim. Thus, keeping money in bank account is not 'bailment'. Asking a person to look after your house or farm during your absence is not 'bailment', as house or farm is not a movable property.

Bailment of Pledges

Pledge is a special kind of bailment. In it the delivery of goods is for purpose of security for payment of debt or performance of a promise. Pledge is bailment for security. Common example is keeping gold with bank/money lender to obtain loan. Since pledge is bailment, all provisions applicable to bailment apply to pledge also. In addition, some specific provisions apply to pledge. 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" and the bailee "pawnee". [Section 172].

Contract of Agency

The concept of agency, a special type of contract, was developed as one man cannot possibly do every transaction himself. Hence, he should have opportunity or facility to transact business through others like an agent.

The principles of contract of agency are:

- Excepting matters of a personal nature, what a person can do himself, he can also do it through agent (*e.g.*, a person cannot marry through an agent, as it is a matter of personal nature).
- A person acting through an agent is acting himself, *i.e.*, act of agent is act of Principal.

Agency being a contract, all usual requirements of a valid contract are applicable to agency contract also. The only exception is their application to the extent excluded in the Act. One important distinction is that as per section 185, no consideration is necessary to create an agency.

Agent and Principal Defined

A person who is employed to do any act for another or to represent another in dealings with third persons is called an agent. The person for whom such act is done, or who is so represented, is called the "principal" [section 182].

Who May Employ Agent

Any person who is of the age of majority according to the law to which he is subject, and who is of sound mind, may employ an agent. [section 183]. Thus, any person competent to contract can appoint an agent.

Who May be an Agent

As between the principal and third persons any person may become an agent, but no person who is not of the age of majority and of sound mind can become an agent, so as to be responsible to his principal according to the provisions in that behalf herein contained. [section 184]. The underlying implication here is that a minor or person of unsound mind can be appointed by a Principal as agent. In such case, the Principal will be responsible to third parties. However, the agent, who is a minor or of unsound mind, cannot be responsible to Principal. Thus, Principal will be liable to third parties for acts done by Agent, but agent will not be responsible to Principal for his (*i.e.*, Agent's) acts.

Consideration not Necessary

No consideration is necessary to create an agency. [section 185]. Thus, payment of agency commission is not essential to hold appointment of Agent as valid.

Authority of Agent

As an agent can act on behalf of the Principal, the former's action can bind the latter.

Agent's Duty to Principal

An agent has following duties towards principal:

- Conducting principal's business as per his directions
- Carry out work with normal skill and diligence
- Render proper accounts [section 213].
- Agent's duty to communicate with principal [section 214]
- Not to deal on his own account, in business of agency [section 215].
- Agent's duty to pay sums received for principal [section 218]
- Agent's duty on termination of agency by principal's death or insanity [section 209].

Remuneration to Agent

Creation of agency does not necessarily call for consideration. However, if there is an agreement, an agent is entitled to get remuneration as per contract.

Rights of Principal

- Recover damages from agent if he disregards directions of Principal
- Obtain accounts from Agent
- Recover moneys collected by Agent on behalf of Principal
- Obtain details of secret profit made by agent and recover it from him
- Forfeit remuneration of Agent if he misconducts the business.

Duties of Principal

- Pay remuneration to agent as agreed
- Indemnify agent for lawful acts done by him as agent
- Indemnify Agent for all acts done by him in good faith
- Indemnify agent if he suffers loss due to neglect or lack of skill of Principal.

Termination of Agency

An agency is terminated by the principal revoking his authority; or by the agent renouncing the business of the agency; or by the business of the agency being completed; or by either the principal or agent dying or becoming of unsound mind; or by the principal being adjudicated an insolvent under the provisions of any Act for the time being in force for the relief of insolvent debtors. [section 201].

In following cases, an agency cannot be revoked:

- Agency coupled with interest (section 202)
- Agent has already exercised his authority (section 203)
- Agent has incurred personal liability.

Classification of Contracts

Express Contract

A contract wherein both the offer and acceptance are made in words, spoken or written.

Implied Contract

A contract which is inferred from the conduct of parties or course of dealings between them.

Quasi Contract

It is a contract which does not arise by virtue of an agreement, express or implied, but the law recognises the contract under certain special circumstances. These contracts are based on the principle of equity, justice and good conscience. The Act describes the obligations arising under these contracts as 'certain relations resembling those created by contracts'.

Some of the transactions that will be considered as 'quasi-contract' under the law are:

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

- When a person finds goods belonging to another person, it is his duty to restore them to the rightful owner;
- A person to whom money is paid or anything delivered, by mistake or under coercion, is liable to repay or return it
- Where necessaries are supplied to a person, who is incompetent to contract such as minors or to someone whom he is legally bound to support, the supplier is entitled to recover the price of the property of the incompetent person, *etc.*

Valid Contract

A valid contract is a 'contract which satisfies all the requirements of the Act'. Such a contract creates rights in personam and is legally enforceable.

3

Partnerships in Business Law

NATURE OF PARTNERSHIPS

The Indian Partnership Act was passed in 1932 to define and amend the law relating to partnership. Indian Partnership Act is one of very old mercantile law. Partnership is one of the special types of Contract. Initially, this was part of Indian Contract Act itself (Chapter IX - sections 239 to 266), but later converted into separate Act in 1932. The Indian Partnership Act is complimentary to Contract Act. Basic provisions of Contract Act apply to contract of partnership also. Basic requirements of contract *i.e.*, legally enforceable agreement, mutual consent, parties competent to contract, free consent, lawful object, consideration, *etc.*, apply to partnership contract also.

Partnership Contract is a 'Concurrent Subject'

'Contract, including partnership contract' is a 'concurrent subject, covered in Entry 7 of List III (Seventh Schedule to Constitution). Indian Partnership Act is a Central Act, but State Government can also pass legislation on this issue. Though Partnership Act is a Central Act, it is administered by State Governments, *i.e.*, work of registration of firms and related matters are looked after by each State Government. The Act is not applicable to Jammu and Kashmir.

UNLIMITED LIABILITY IS MAJOR DISADVANTAGE

The major disadvantage of partnership is the unlimited liability of partners for the debts and liabilities of the firm. Any partner can bind the firm and the

firm is liable for all liabilities incurred by any firm on behalf of the firm. If property of partnership firm is insufficient to meet liabilities, personal property of any partner can be attached to pay the debts of the firm.

Partnership Firm is not a Legal Entity

It may be surprising but true that a Partnership Firm is not a legal entity. It has limited identity for purpose of tax law. As per section 4 of Indian Partnership Act, 1932, 'partnership' is the relation between persons who have agreed to share the profits of a business carried on by all or any one of them acting for all. - - Under partnership law, a partnership firm is not a legal entity, but only consists of individual partners for the time being. It is not a distinct legal entity apart from the partners constituting it - Malabar Fisheries Co. vs. CIT (1979) 120 ITR 49 = 2 Taxman 409 (SC).

Firm Legal Entity for Purpose of Taxation

For tax law, income-tax as well as sales tax, partnership firm is a legal entity - State of Punjab vs. Jullender Vegetables Syndicate - 1966 (17) STC 326 (SC); CIT vs. A W Figgies - AIR 1953 SC 455; CIT vs. G Parthasarthy Naidu (1999) 236 ITR 350 = 104 Taxman 197 (SC). Though a partnership firm is not a juristic person, Civil Procedure Code enables the partners of a partnership firm to sue or to be sued in the name of the firm. - Ashok Transport Agency vs. Awadhesh Kumar 1998(5) SCALE 730 (SC). [A partnership firm can sue only if it is registered].

Partnership, Partner, Firm and Firm Name

"Partnership" is the relation between persons who have agreed to share the profits of business carried on by all or any to them acting for all. - - Persons who have entered into partnership with one another are called individually "partners" and collectively "a firm", and the name under which their business is carried on is called the "firm name". [section 4].

"Business" includes every trade, occupation and profession. [section 2(b)]. Thus, a 'partnership' can be formed only with intention to share profits of business. People coming together for some social or philanthropic or religious purposes do not constitute 'partnership'.

PARTNERS ARE MUTUAL AGENTS

The business of firm can be carried on by all or any of them for all. Any partner has authority to bind the firm. Act of any one partner is binding on all the partners. Thus, each partner is 'agent' of all the remaining partners. Hence, partners are 'mutual agents'.

Oral or Written Agreement

As per normal provision of contract, a 'partnership' agreement can be either oral or written. Agreement in writing is necessary to get the firm registered.

Similarly, written agreement is required, if the firm wants to be assessed as 'partnership firm' under Income Tax Act. A written agreement is advisable to establish existence of partnership and to prove rights and liabilities of each partner, as it is difficult to prove an oral agreement. However, written agreement is not essential under Indian Partnership Act.

Sharing of Profit Necessary

The partners must come together to share profits. Thus, if one member gets only fixed remuneration (irrespective of profits) or one who gets only interest and no profit share at all, is not a 'partner'. Similarly, sharing of receipts or collections (without any relation to profits earned) is not 'sharing of profit' and the association is not 'partnership'. For example, agreement to share rents collected or percentage of tickets sold is not 'partnership', as sharing of profits is not involved. The share need not be in proportion to funds contributed by each partner. Interestingly, though sharing of profit is essential, sharing of losses is not an essential condition for partnership. Similarly, contribution of capital is not essential to become partner of a firm.

Number of Partners

Since partnership is 'agreement' there must be minimum two partners. The Partnership Act does not put any restrictions on maximum number of partners. However, section 11 of Companies Act prohibits partnership consisting of more than 20 members, unless it is registered as a company or formed in pursuance of some other law.

Mode of Determining Existence of Partnership

In determining whether a group of persons is or is not a firm, or whether a person is or is not a partner in a firm, regard shall be had to the real relation between the parties, as shown by all relevant facts taken together. [section 6].

Mutual Agency is the Real Test

The real test of 'partnership firm' is 'mutual agency', *i.e.*, whether a partner can bind the firm by his act, *i.e.*, whether he can act as agent of all other partners.

Partnership at Will

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 "partnership at will". [section 7]. Partnership 'at will' means any partner can dissolve a firm by giving notice to other partners (or he may express his intention to retire from partnership) - - Partnership deed may provide about duration of partnership (say 10 years) or how partnership will be brought to end. In absence of any such term, the partnership is 'at will'. In case of 'particular partnership', the partnership comes to end when the venture for which it was formed comes to end.

Determination of Rights and Duties of Partners by Contract between the Partners

Subject to the provisions of this Act, the mutual rights and duties of the partners of a firm may be determined by contract between the partners, and such contract may be express or may be implied by a course of dealing. Such contract may be varied by consent of all the partners, and such consent may be express or may be implied by a course of dealing. [section 11(1)]. Thus, partners are free to determine the mutual rights and duties by contract. Such contract may be in writing or it may be implied by their actions.

Dutiesand mutual rights of partners - Subject to contract to contrary, partners have duties and mutual rights as specified in Partnership Act-

Every Partner has Right to take Part in Business

Subject to contract between partners (to the contrary), every partner has right to take part in the conduct of the business. [section 12(a)]. Thus, every partner has equal right to take active part in business, unless there is specific contract to the contrary.

Even if authority of a partner is restricted by contract, outside party is not likely to be aware of such restriction. In such case, if such partner acts within the apparent authority, the firm will be liable for his acts.

The Property of the Firm

Subject to contract between the partners, the property of the firm includes all property and rights and interests in property originally brought into the stock of the firm, or acquired, by purchase or otherwise, by or for the firm, or for the purposes and in the course of the business of the firm, and includes also the goodwill of the business. - - Unless the contrary intention appears, property and rights and interests in property acquired with money belonging to the firm are deemed to have been acquired for the firm [section 14].

Partner to be Agent of the Firm

Subject to the provisions of this Act, a partner is the agent of the firm for the purposes of the business of the firm. [section 18].

Implied Authority of Partner as Agent of the Firm

Subject to the provisions of section 22, the act of a partner which is done to carry on, in the usual way, business of the kind carried on by the firm, binds the firm. The authority of a partner to bind the firm conferred by this section is called his “implied authority”. [section 19(1)].

Partners Jointly and Severally Liable Acts of the Firm

Every partner is liable, jointly with all the other partners and also severally, for all acts of the firm done while he is a partner. [section 25]. ‘An act of a firm’

means any act or omission by all the partners, or by any partner or agent of the firm which gives rise to a right enforceable by or against the firm [section 2(a)]. 'Joint and several' means each partner is liable for all acts. Thus, if amount due cannot be recovered from other partners, any one partner will be liable for payment of entire dues of the firm.

Partner by Holding out

'Holding out' means giving impression that a person is partner though he is not. This is principle of 'estoppel'. If a person gives an impression to outsiders that he is partner of firm though he is not partner, he will he held liable as partner, if third party deals with the firm on the impression that he is a partner.

Similarly, if a person retires from the firm but does not give notice of retirement, he will be liable as a partner, if some third party deals with the firm on the assumption that he is still partner.

Minors Admitted to the Benefits of Partnership

A person who is a minor according to the law to which he is subject may not be a partner in a firm, but, with the consent of all the partners for the time being, he may be admitted to the benefits of partnership. [section 30(1)].

Rights of Minor

Minor (who is admitted to benefit of partnership) has a right to such share of the property and of the profits of the firm as may be agreed upon and he may have access to and inspect and copy any of the accounts of the firm. [section 30(2)]. [Since the word used is 'may', it seems that right of minor to inspect accounts can be restricted by agreement among partners].

Minor's Share Liable but not Minor Himself

Such minor's share is liable for the acts of the firm, but the minor is not personally liable for any such act. [section 30(3)].

Reconstitution of a Partnership Firm

A partnership firm is not a legal entity. It has no perpetual existence as in case of a company incorporated under Companies Act. However, the Act gives the partnership limited rights of continuity of business despite change of partners. In absence of specific provision in partnership deed, death or insolvency of a partner means dissolution of the firm. However, partnership can provide that the firm will not dissolve in such case.

Change in partners may occur due to various reasons like death, retirement, admission of new member, expulsion, insolvency, transfer of interest by partner, *etc.* After such change, the rights and liabilities of each partner are determined afresh. This is termed as reconstitution of a firm.

Dissolution of a Firm

A partnership firm is an 'organisation' and like every 'organ' it has to either grow or perish. Thus, dissolution of a firm is inevitable part in the life of partnership firm some time or the other.

Dissolution of a firm without intervention of Court can be (a) By agreement (section 40) (b) Compulsory dissolution in case of insolvency (section 41) (c) Dissolution on happening of certain contingency (section 42) (d) By notice if partnership is at will (section 43). A firm can also be dissolved by Court u/s 44.

Dissolution of Partnership and Dissolution of Firm

The dissolution of partnership between all the partners of a firm is called the dissolution of the firm. [section 39]. As per section 4, Partnership is the relation between persons who have agreed to share profits of business carried on by all or any of them acting for all. Thus, if some partner is changed/added/goes out, the 'relation' between them changes and hence 'partnership' is dissolved, but the 'firm' continues. Hence, the change is termed as 'reconstitution of firm'. However, complete breakage between relations of all partners is termed as 'dissolution of firm'. After such dissolution, the firm no more exists. Thus, 'Dissolution of partnership' is different from 'dissolution of firm'. 'Dissolution of partnership' is only reconstruction of firm, while 'dissolution of firm' means the firm no more exists after dissolution.

Mode of Dissolution of Firm

Following are various modes of dissolution of firm:

- Dissolution by agreement - [section 40].
- Compulsory dissolution in case of insolvency - [section 41]
- Dissolution on the happening on certain contingencies [section 42]
- Dissolution by notice of partnership at will [section 43(2)]
- Dissolution by the court

Consequences of Dissolution of Firm

After firm is dissolved, business is wound up and proceeds are distributed among partners. The Act specifies what the consequences of dissolution of a firm are.

Sale of Goodwill of Firm after Dissolution

Business is attracted due to reputation of a firm. It creates a 'brand image' which is valuable though not tangible. 'Goodwill' is the value of reputation of the business of the firm. Goodwill of a firm is sold after dissolution either separately or along with property of firm. - - As per section 14, property of partnership firm includes goodwill of the firm. - - Goodwill is the reputation and connections which the firm establishes over time, together with circumstances which make the connections durable. This reputation enables to earn profits more than normal profits which a

similar business would have earned. Goodwill is an intangible asset of the firm. In settling the accounts of a firm after dissolution, the goodwill shall, subject to contract between the partners, be included in the assets, and it may be sold either separately or along with other property of the firm. [section 55(1)].

Settlement of Accounts after Dissolution

Accounts are settled after a firm is dissolved as provided in the Act. A firm is said to be 'wound up' only after accounts are fully settled.

Registration of Firms

Registration of firm is not compulsory, though usually done as registration brings many advantages to the firm. Since 'partnership contract' is a 'Concurrent Subject' as per Constitution of India, registration of firms and related work is handled by State Government in each State. Section 71 authorises State Government to make rules for prescribing fees for filing documents with registrar prescribing forms of various statements and intimations are to be made to registrar and regulating procedures in the office of Registrar.

Partner Cannot Sue if Firm is Unregistered

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. [section 69(1)]. Thus, a partner cannot sue the firm or any other partner if firm is unregistered. If third party files suit against a partner, he cannot claim of set off or institute other proceeding to enforce a right arising from a contract. Suit or claim or set off upto Rs 100 can be made as per section 69(4) (b), but it is negligible in today's standards. Criminal proceedings can be filed, but civil suit is not permissible.

Unregistered Firm Cannot Sue Third Party

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 firm. [section 69(2)]. If third party files suit against the unregistered firm, the firm cannot claim set off or institute other proceeding to enforce a right arising from a contract. Suit or claim or set off upto Rs 100 can be made as per section 69(4) (b), but it is negligible in today's standards. Criminal proceedings can be filed, but civil suit is not permissible.

A partnership is the relationship between persons who have agreed to share the profits of a business carried on by all or any of them acting or all. In India it is governed by the Indian Partnership Act, 1932, which extends to the whole of India except the State of Jammu and Kashmir. It came into force on 1st October 1932.

Eligibility

A partnership agreement can be entered into between persons who are competent to contract. Every person who is of the age of majority according to the law to which he is subject and who is of sound mind and is not disqualified from contracting by any law to which he is subject can enter into a partnership.

The following can enter into a partnership:

1. Individual
2. Firm
3. Hindu undivided family
4. Company
5. Trustees
    - *Individual*: An individual, who is competent to contract, can become a partner in the partnership firm. If there are more than two partners in a firm, an individual can be a partner in his individual capacity as well as in a representative capacity as Karta of the Hindu undivided family.
    - *Firm*: A partnership firm is not a person and therefore a firm can not enter into partnership with any firm or individual. But a partner of the partnership firm can enter into partnership with other persons and he can share the profits of the said firm with his other co-partners of the parent firm.
    - *Hindu undivided family*: A Karta of the Hindu undivided family can become a partner in a partnership in his individual capacity, provided the member has contributed his self acquired or personal skill and labour.
    - *Company*: A company is a juristic person and therefore can become a partner in a partnership firm, if it is authorised to do so by its objects.
    - *Trustees*: Trustees of private religious trust, family trust and trustees of Hindu mutts or other religious endowments are juristic persons and can therefore enter into partnership, unless their constitution or objects forbid.

Number of Partners

The number of partners in a firm shall not exceed 20 and a partnership having more than 20 persons is illegal. When there is partnership between two firms, all the partners of each firm will be taken into account. If the partnership is between the karta or member of Hindu undivided family the members of the joint Hindu family will not be taken into account.

Essentials of a Partnership

- *Agreement*: The relationship between partners arises from contract and not status. If after the death of sole proprietor of a firm, his heirs inherit firm they do not become partners, as there is no agreement between them.

- *Sharing of profits*: The partners may agree to share profits out of partnership business, but not share the losses. Sharing of losses is not necessary to constitute the partnership. The partners may agree to share the profits of the business in any way they like.
- *Business*: Business includes every trade, occupation, or profession. There must be course of dealings either actually continued or contemplated to be continued with a profit motive and not for sport or pleasure.
- *Relation between partners*: The partner while carrying on the business of the partnership acts a principle and an agent. He is a principal because he acts for himself, and he is an agent as he simultaneously acts for the rest of the partners.

General Duties of a Partner

Subject to a contract to the contrary between the partners the following are the duties of a partner.

- To carry on the business of the firm to the greatest common advantage. Good faith requires that a partner shall not obtain a private advantage at the expense of the firm. Where a partner carries on a rival business in competition with the partnership, the other partners are entitled to restrain him.
- To be just and faithful. Partnership as a rule is presumed to be based on mutual trust and confidence of each partner, not only in the skill and knowledge, but also in the integrity, of each other partner
- To render true accounts and full information of all things done by them to their co-partners.
- To indemnify for loss caused by fraud. Every partner shall indemnify the firm for loss caused to it by his fraud in the conduct of the business of the firm.
- Not to carry on business competing with the firm. If a partner carries on any business of the same nature as and competing with that of the firm, he shall account for and pay to the firm all profits made by him in that business.
- To indemnify the firm for willful neglect of a partner. A partner shall indemnify the firm for any loss caused to it by his willful neglect in the conduct of the business of the firm.
- To carry out the duties created by the contract. The partners are bound to perform all the duties created by the agreement between the partners.

Rights of the Partners

Subject to a contract to the contrary a partner has the following rights:

- To take part in the conduct and management of the business
- To express opinion in matters connected with the business. He has a right to be consulted and heard in all matters affecting the business of the firm

- To have free access to all the records, books of account of the firm and take copy from them.
- To share in the profits of the business. Every partner is entitled to share in the profits in proportion agreed to between the parties.
- To get interest on the payment of advance. Where a partner makes for his purpose of the business, any payment or advance beyond the amount of capital he has agreed to subscribe, he is entitled to interest thereon at the rate of 6% per annum.
- To be indemnified by the firm against losses or expenses incurred by him for the benefit of the firm.

Restrictions on Authority of a Partner

Restrictions are governed by Contract and by the Partnership Act The partners may by contract extend or restrict the implied authority of any partner.

Under the Partnership Act in the absence of any usage of trade to the contrary, the implied authority of a partner does not empower him to do the following acts:

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

Rights of a Minor

- A person who is a minor according to the law to which he is subject may not be a partner in a firm, but, with the consent of all the partners for the time being, he may be admitted to the benefits of partnership.
- Such minor has a right to such share of the property and of the profits of the firm as may be agreed upon, and he may have access to and inspect and of the accounts of the firm.
- Such minor's share is liable for the acts of the firm, but the minor is not personally liable for any such act.
- Such minor may not sue the partners for an account or payment of his share of the property or profits of the firm
- At any time within six months of his attaining majority, or of his obtaining knowledge that he had been admitted to the benefits of partnership, whichever date is later, such person may give public notice that he has elected to become or that he has elected not to become a partner in the firm, and such notice shall determine his position as regards the firm, provided that, if he fails to give such notice, he shall become a partner in the firm on the expiry of the said six months.

- Where any person has been admitted as a minor to the benefits of partnership in a firm, the burden of proving the fact that such person had no knowledge of such admission until a particular date after the expiry of six months of his attaining majority shall lie on the person asserting that fact.
- *Where such person becomes a partner:*
  - His rights and liabilities as a minor continue upto the date on which he becomes a partner, but he also becomes personally liable to third parties for all acts of the firm done since he was admitted to the benefits of the partnership, and
  - His share in the property and profits of the firm shall be the share to which he was entitled as a minor.
- *Where such person elects not to become a partner:*
  - His rights and liabilities shall continue to be those of a minor upto the date on which he gives public notice,
  - His share shall not be liable for any acts of the firm done after the date of the notice, and
  - He shall be entitled to sue the partners for his share of the property and profits.

DISSOLUTION OF A FIRM

A firm may be dissolved in the following manner:

- Dissolution by Court
- Dissolution by agreement
- Dissolution by operation of law
- Dissolution on the happening of certain contingencies
- Dissolution by notice

Dissolution by Court

The court may dissolve a firm at the suit of any partners on any of the following grounds namely:

- *Insanity of a partner*: That a partner has become of unsound mind. The insanity of a partner does not ipso facto dissolve the firm and the next friend or continuing partners has to file suit foe dissolution.
- *Permanent incapacity of a partner*: That a partner has become permanently incapable of performing his duties as partner.
- *Conduct affecting prejudicially the business*: that a partner is guilty of conduct, which is likely to affect prejudicially the carrying on the business of the firm.
- *Breach of partnership agreement*: That a partner willfully or persistently commits breach of agreements relating to the management of the affairs of the firm or the conduct of it's business or otherwise conducts himself in matters relating to the business, that it is not reasonably practical for the other partners to carry on the business with him.

- *Transfer of Interest of a Partner*: That a partner has in any way transferred the whole of his interest in the firm to a third party.
- *Loss*: That the business of the firm cannot be carried on save at a loss
- *Just and Equitable*: On any other ground that renders it just an equitable that the firm should be dissolved.

Dissolution by Agreement

A firm may be dissolved with the consent of all the partners or in accordance with the contract between the partners. The partnership agreement may contain a proviso that the firm will be dissolved on the happening of certain contingency.

Dissolution by Operation of Law

A firm is compulsorily dissolved on the following grounds:

- Insolvency of partners
- By the happening of any event which makes it unlawful for the business of the firm to e carried on.

Dissolution on the Happening of Certain Contingencies

Subject to contract between the partners a firm is dissolved on the happening of the following contingencies.

- If constituted for a fixed term, by the expiry of that term
- If constituted to carry out one or more adventures or undertakings, by its completion.
- By the death of a partner
- On insolvency of a partner

Dissolution by Notice

If the partnership is at will, the same may be dissolved by service of a notice by one partner to dissolve the firm

REGISTRATION

It is not compulsory to register the firm. However there are serious effects of non-registration. No suit to enforce a right arising from a contract or conferred by the Indian Partnership Act shall be instituted in any court by or on behalf of any person suing as partner in a firm against the firm or 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 on the Register of firms as a partner in the firm.

Similarly, no suit to enforce a right rising 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.

Procedure for Registration

The registration of a firm may be effected at any time by sending by post or delivering to the Registrar of Firms of the area in which any place of business of the firm is situated or proposed to be situated, a statement in the prescribed form and accompanied by the prescribed fee, stating:

- The firm name;
- The place or principal place of business of the firm;
- The names of any other places where the firm carries on business;
- The date when each partner joined the firm;
- The names in full and permanent addresses of the partners; and
- The duration of the firm.

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

A firm name shall not contain any of the following words viz. "Crown", Emperor", "Empress", "Empire", "Imperial", "King", "Queen", "Royal", or words expressing or implying the sanction, approval or patronage of Government, except when the State Government signifies its consent to the use of such words as part of the firm name by order in writing.

All the States have framed rules prescribing the forms, fee for registration and verification of the statement. The application for registration has to be made to the Registrar of Firms in the prescribed form. When the Registrar is satisfied that the provisions have been complied with, he shall record and entry of the statement in a register called the Register of Firms and shall file the statement. The Registrar is the competent authority and if he acts bona fide and follows the procedure, his satisfaction cannot be challenged.

CHECKLIST FOR DRAFTING A PARTNERSHIP DEED

A partnership deed should contain the following clauses:

- Name of the parties
  - Nature of business
  - Duration of partnership
  - Name of the firm
  - Capital
  - Share of partners in profits and losses
  - Banking, Account firm
  - Books of account
  - Powers of partners
  - Retirement and expulsion of partners
  - Death of partner
  - Dissolution of firm
  - Settlement of disputes

DRAFTING A PARTNERSHIP DEED

Partnership Deed

This deed of partnership made this..... (give date) day of ..... (give month) 200..(give year) between a, resident of .....(give address) of the one part, and b, resident of ..... (give address) of the second part and c, resident of ? (give address) of the third part.

Now this Deed Witnesseth

That it is hereby mutually agreed that the said A, B, and C shall become partners in the trade or business of ? (Give the nature of business) upon the following terms and conditions:

- The partnership shall commence on the ?(Give date) day of? (Give month) 2000. (Give year) in the name of ? (Give the name of the firm) and shall continue for a period of ? years, until determined in the manner and upon the conditions as hereinafter provided.
- The partnership business shall be that of ? (Give details of the business) and such other business or business as the partners may from time to time unanimously agree upon.
- The capital of the partnership shall be the sum of RS ? (Give the capital) and shall be contributed by the partners in equal shares and shall belong to the partners in such equal shares.
- The profits and losses of the business (including loss of capital) shall be divided and borne by the partners in equal shares.
- That each partner shall be whole time working partner and they shall be paid Rs?. (Specify amount) as salary for services rendered to the partnership business.
- The firm shall maintain all necessary and proper books of account at its office and entries of all receipts, payments and other matters as are usually done and entered in account books, shall be made in the books of account. The bankers of the partnership shall be branch and such other bank or banks as the partners may from time to time unanimously agree upon. (Give the name of the bank and its branch)
- Neither partner shall directly or indirectly engage in any other business.
- *Neither partner shall without the consent of the other partner:*
  - Assign, mortgage or charge his share in the assets or profits of the firm.
  - Draw, accept or indorse any bill of exchange or promissory note on account of the firm.
  - Enter into any bond or become surety for any person or persons or knowingly cause or suffer to be done anything whereby the partnership property may be endangered.
- If either partner commits any act of bankruptcy or any criminal offence or any breach of any of the provisions of this deed any act which would

be a ground for the dissolution of the firm by the court or any partner becomes physically or mentally unfit to attend the business, then in any such case, the other partner may within one month after becoming aware thereof, determine the partnership by notice in writing and in such case he or any other partner shall have the option of purchasing the share of the partner committing breach or default, in the capital and assets of the business.

- All disputes between the partners or the partners and the representatives of a deceased partner in relation to any matter whatsoever touching the partnership affairs or the construction or interpretation of this agreement, and whether before of after the determination of the partnership shall be referred to a single arbitrator to be appointed by and the decision of such arbitrator shall be final and binding. (Give name of the person or authority who will appoint the arbitrator)

In witness whereof the parties hereto have hereunto set their hands the day and year first hereinabove written.

Witnesses Execution

- Signed and delivered by the above named A
- Signed and delivered by the above named B
- Signed and delivered by the above named C

The basic features and how the partnership is formed have been explained above. As far as the management is concerned, there can be different kinds of partnerships such as a partnership at will, Particular Partnership and Joint Ventures. The Law does not permit the formation of a limited partnership or limited liability partnership in India. It is common to appoint a Managing Partner and empower such a person with its powers of day to day management and give such authority to act on the behalf of the firm in terms of the specific authorities and powers conferred upon the Managing Partner. Such a person then binds the firm and other partners on the basic legal principle of mutual agency. The Institute of Chartered Accountants lays down the Standards for accounting and auditing in India. These standards are to be applied, irrespective of the size or type of industry in India.

Settlement of Accounts on Dissolution- When a partnership firm is dissolved, its assets are disposed off, and a partner has unlimited liability as in the case for a sole proprietorship and HUF. The proceeds therefrom are utilized in paying the creditors. If the amount realized by sale of assets is not sufficient to discharge the claims of the creditors in full, the deficiency can be recovered proportionately from the personal properties of the partners. If any partner becomes insolvent, the remaining solvent partners will bear the loss in their capital ratio. In case the assets of the firm are more than sufficient to meet the liabilities in full, then the surplus may be utilized to pay off the loans and capitals contributed by the partners.

S.48 of the Partnership Act, 1932 lays down the following procedure for the settlement of accounts between partners after the dissolution of the firm:

- Losses including deficiencies of capital should be made good out of profits, then out of capital, and if need be, out of personal contributions of partners in their profit sharing ratios in that order.
- The assets of the firm including any sum contributed by partners to make up deficiencies will be applied for settling the debts of the firm, in the following order, subject to any agreement to the contrary;
  - First, in paying of the debts of the firm due to third parties;
  - Then in paying to each partner rateably any advances or loans given by him in addition to or apart from his capital contribution;
  - If any surplus is available after discharging the above liabilities, the capital contributed by the partners may be returned, if possible, in full or otherwise ratably;
  - The surplus, if any, shall be divided among the partners in their profit-sharing ratios.

4

Tort Law: Principles and Practices

CONSTITUENTS OF TORT

The law of torts is an instrument designed for making people adhere to the standards of reasonable behaviour and respect the rights and interests of one another. This it does by protecting interests and by providing for situations when a person whose protected interest is violated can recover compensation for the loss suffered by him from the person who has violated the same. By interest here is meant a claim, want or desire of a human being or group of human beings seeks to satisfy, and of which, therefore, the ordering of human relations in civilized society must take account. It is however, obvious that every want or desire of a person cannot be protected nor can a person claim that whenever he suffers loss he should be compensated by the person who is the author of the loss. Therefore the law determines what interests need protection and it also holds the balance when there is a conflict of protected interests.

Every wrongful act is not a tort. To constitute a tort:

- There must be a wrongful act committed by a person;
- The wrongful act must be of such a nature as to give rise to a legal remedy and;
- Such legal remedy must be in the form of an action for unliquidated damages.

Wrongful Act

An act may look innocent at first sight, but it may become tortuous if it invades the legal right of another person. In Rogers vs. Ranjendro Dutt, the court held that, the act

complained of should, under the circumstances, be legally wrongful, as regards the party complaining. That is, it must prejudicially affect him in some legal right; merely that it will however directly, do him harm in his interest is not enough. Liability for tort arises, therefore when the wrongful act complained of amounts either to an infringement of a legal private right or a breach or violation of a legal duty.

Damage

To speak generally, if a person commits an act that causes injury to another. Then this act is called a tort. The affected person may claim against the perpetrator damages for the tort. In this connection we must have a clear notion with regard to the words damage and damages. The word damage is used in the ordinary sense of injury or loss or deprivation of some kind, whereas damages mean the compensation claimed by the injured party and awarded by the court. Damages are claimed and awarded by the court to the parties. The word injury is strictly limited to an actionable wrong, while damage means loss or harm occurring in fact, whether actionable as an injury or not. The real significance of a legal damage is illustrated by two maxims, namely, Damnum Sine Injuria and Injuria Sine Damno.

Damnum Sine Injuria (Damage without Injury)

It is important to note that there are many acts which are harmful but not wrongful and hence give no right of action to him or her who suffers from their effects. Damage so done and suffered is called Damnum Sine Injuria or damage without injury. Damage without breach of a legal right will not constitute a tort. They are instances of damage suffered from justifiable acts. An act or omission committed with lawful justification or excuse will not be a cause of action though it results in harm to another as a combination in furtherance of trade interest or lawful user of one's own premises. In Gloucester Grammar School Master Case, it had been held that the plaintiff school master had no right to complain of the opening of a new school. The damage suffered was mere damnum absque injuria or damage without injury.

Injuria Sine Damno (Injury without Damage)

Injuria sine damno refers to an infringement of a legal private right without any actual loss or damage. In such a case the person whose right has been infringed has a good cause of action. It is not necessary for him to prove any special damage because every injury imports a damage when a man in hindered of his right. Every person has an absolute right to property, to the immunity of his person, and to his liberty, and an infringement of this right is actionable per se. actual perceptible damage is not, therefore, essential as the foundation of an action. It is sufficient to show the violation of a right in which case the law will presume damage. It logically follows that, in cases of assault, battery, false imprisonment, libel, trespass on land, *etc.*, the mere wrongful act is actionable without proof of special damage.

It no actual damage is proved, the court itself is bound by law to award the plaintiff at least nominal damages. This principle was firmly established by the election case of Ashby vs. White, in which the plaintiff was wrongfully prevented from exercising his vote by the defendants, returning officers in parliamentary election. The candidate fro whom the plaintiff wanted to give his vote had come out successful in the election. Still the plaintiff brought an action claiming damages against the defendants for maliciously preventing him from exercising his statutory right of voting in that election. Lord Holt allowed damages to the plaintiff by saying that there was the infringement of legal right vested in the plaintiff.

Remedy

It is said that the law of torts developed from the maxim'ubi jus ibi remedium' meaning there is no wrong without a remedy. If a man has a right, he must of necessity have a means to vindicate and maintain it and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without remedy; want of right and want of remedy are reciprocal.

Where there is no legal remedy there is no wrong. But even so the absence of a remedy is evidence but is not conclusive that no right exists.

SOME GENERAL CONDITIONS IN TORTS

Act or Omission

To constitute a tort there must be a wrongful act, whether of omission or commission, but not such acts as are beyond human control and as are entertained only in thoughts. An omission is generally not actionable but it is so exceptionally. Where there is a duty to act an omission may create liability. A failure to rescue a drowning child is not actionable, but it is so where the child is one's own. A person who voluntarily commences rescue cannot leave it half the way. It is the duty of the owner of a land to control natural happenings to his own land so that he or she could prevent them from encroaching other's land.

Voluntary and Involuntary Acts

A voluntary act may involve liability while an involuntary act may not. Thus, on this ground, it is important to distinguish a voluntary act from an involuntary one. A self willed act like an encroachment fro business, is voluntary, but an encroachment for survival may be involuntary. The wrongfulness of the act and the liability for it depends upon legal appreciation of the surrounding circumstances.

Malice

The maintenance of an action for tort does not necessarily calls for malice. It is of two kinds, ‘express malice’ (or malice in fact or actual malice) and ‘malice in law’ (or implied malice). The first is what is called malice in common

acceptance and means ill will against a person; the second means a wrongful act done intentionally without just cause or excuse. Where a man has a right to do an act, it is not possible to make his exercise of such right actionable by alleging or proving that his motive in the exercise was spite or malice in the popular sense. An act, not otherwise unlawful, cannot generally be made actionable by an averment that it was done with evil motive. A malicious motive per se does not amount to injuria or legal wrong.

Wrongful acts of which malice is an essential element are:

- Defamation,
- Malicious prosecution,
- Willful and malicious damage to property,
- Maintenance, and
- Slander of title.

Intention, Motive, Negligence and Recklessness

It from the fault and not from intension that the obligation to make reparation for damage caused by a wrongful act. Any invasion of the civil rights of another person is in itself a legal wrong, carrying with it liability to repair it necessary or natural consequences, in so far as these are injurious to the person whose right is infringed, whether the motive which prompted it be good, bad or indifferent. Being done with a bad intent is the proper way not to make a thing which is not a legal injury or wrong actionable.

It is no defence to an action in tort for the wrong doer to plead that he did not intend to cause damage, if damage has resulted owing to an act or omission on his part which is actively or passively the effect of his volition. A want of knowledge of the illegality of his act or omission affords no excuse, except where fraud or malice is the essence of that act or omission. For every man is presumed to intend and to know the natural and ordinary consequences of his acts. This presumption is not rebutted merely by proof that he did not think of the consequences or hoped or expected that they would not follow. The defendant is held liable by law for the natural and necessary consequences of his act. He is held liable no matter he contemplated them or not.

Malfeasance, Misfeasance and Non-Feasance

The term ‘malfeasance’ applies to the commission of an unlawful act. It is generally applicable to those unlawful acts, such as trespass, which are actionable per se and do not require proof of negligence or malice. The term ‘misfeasance’ is applicable to improper performance of some lawful act. The term ‘non-feasance’ applies to the failure or omission to perform some act which there is an obligation to perform.

Fault

Whether one is liable for tort or not generally depends upon something done by one which can be regarded as a fault for the reason that it violates another

man's right. But liability may also arise without fault. Such liability is known as absolute or strict liability. An important example is the rule in Rylands vs. Fletcher thus the two extremes of the law of tort are of non liability even where there is fault or liability without fault. Between these two extremes is the variety of intentional and negligent wrongs to the question whether there is any consistent theory of liability, all that can be said is that it wholly depends upon flexible public policy, which in turn is a reflection of the compelling social needs of the time.

GENERAL PRINCIPLES OF LIABILITY

There are two theories with regard to the basic principle of liability in the law of torts or tort.

They are:

- Wider and narrower theory- all injuries done by one person to another are torts, unless there is some justification recognized by law.
- Pigeon-hole theory- there is a definite number of torts outside which liability in tort does not exist.

Professor Winfield propounded the first theory. According to this, if I injure my neighbour, he can sue me in tort, whether the wrong happens to have a particular name like assault, battery, deceit or slander, and I will be liable if I cannot prove lawful justification. This leads to the wider principle that all unjustifiable harms are tortious. This enables the courts to create new torts and make defendants liable irrespective of any defect in the pleading of the plaintiff. There is some resemblance between this theory and the saying 'my duty is to hurt nobody by word or deed'.

Salmond proposed the second theory. It resembles the Ten Commandments given to Moses in the bible. According to this theory, the present author can injure his neighbour as much as he likes without fear of his suing him in tort provided my conduct does not fall under the rubric of assault, deceit, slander or any other nominate tort. The law of tort consists of a neat set of pigeon holes, each containing a labeled tort. The defendant will be considered to have committed no tort if his wrong does not fit any of these pigeon holes. Thus to conclude, law of torts is a branch of law which resembles most of the other branches in certain aspects, but is essentially different from them in other respects. Although there are differences in opinion among the different jurists regarding the liability in torts, the law has been developed and has made firm roots in the legal showground. The tort law contains well defined elements and conditions of liability. It is this bough of law that the citizens of a state are enabled by to claim redressal for the minor or major damage caused to them. Thus the law has gained much confidence among the laymen and therefore, we cannot deny its necessity, and so, torts in India are necessary and are not overlooked. Law, to be speaking in general term, can be considered as any rule of human conduct accepted by the society and enforced by the state for the betterment of human life. In a wider sense it includes any rule of human action for example, religious, social, political and moral rules of conduct. However only those rules of conduct of

persons which are protected and enforced by the state do really constitute the law of the land in its strict sense. According to Salmond the law consists of rules recognized and acted on by courts of justice.

As has been noted above, we can divide the entire body of law in a state (corpus juris) into two:

1. Civil and
2. Criminal.

Civil law: The term may be used in two senses. In one sense it indicates the law of a particular state as distinct from its external law such as international law. On the other side, in a restricted sense civil law indicates the proceedings before civil courts where civil liability of individuals for wrongs committed by them and other disputes of a civil nature among them are adjudicated upon and decided. Civil wrong is the one which gives rise to civil proceedings, *i.e.*, proceedings which have for their purpose the enforcement of some right claimed by the plaintiff as against the defendant. For example, an action for the recovery of debt, restitution of property, specific performance of a contract, *etc.*, he who proceeds civilly is a claimant or plaintiff demanding the enforcement of some right vested in him and the remedy he seeks is compensatory or preventive in nature.

Criminal law: Criminal laws indicate the proceedings before the criminal courts where the criminal liability of persons who have committed wrongs against the state and other prohibited acts are determined. Criminal proceedings on the other hand are those which have for their object the punishment of the wrong doer for some act of which he is accused. He who proceeds criminally is an accuser or prosecutor demanding nothing for him but merely the punishment of the accused for the offence committed by him.

THE LAW OF TORTS

Tort, compared with the tort of the English law, had a much narrower conception under the Hindu law and the Muslim law. The punishment of crimes in these systems occupied a more prominent place than compensation for wrongs. The law of torts in India is mainly the English law of torts which itself is based on the principles of the common law of England. This was made suitable to the Indian conditions appeasing to the principles of justice, equity and good conscience and as amended by the Acts of the legislature. Torts in India got conceived when British courts began to be established in India.

The expression justice, equity and good conscience was interpreted by the Privy Council to mean the rules of English Law if found applicable to Indian Society and circumstances. The Indian courts before applying any rule of English law can see whether it is suited to the Indian society and circumstances. The application of the English law in India has therefore been a selective application. On this the Privy Council has observed that the ability of the common law to adapt itself to the differing circumstances of the countries where it has taken roots is not a weakness but one of its strengths. Besides this, the Indian courts,

when applying the English law on a particular point, are not restricted to common law. If the new rules of English statute law replacing or modifying the common law are more in consonance with justice, equity and good conscience, it is open o the courts in India to reject the outmoded rules of common law and to apply the new rules. The development in Indian law need not be on the same lines as in England. In M.C. Mehta vs. Union of India, Justice Bhagwati said: we have to evolve new principles and lay down new norms which will adequately deal with new problems which arise in a highly industrialized economy. We cannot allow our judicial thinking to be constructed by reference to the law as it prevails in England or for the matter of that in any foreign country. We are certainly prepared to receive light from whatever source it comes but we have to build our own jurisprudence.

NATURE OF TORTS

TORT AND CRIME

If we trace the origin of tort, it takes roots in criminal procedure. Even today there is a punitive element in some aspects of the rules on damages. However, tort is a species if civil injury is wrong. The distinction between civil and criminal wrongs depends on the nature of the remedy provided by law. A civil wrong is one which gives rise to civil proceedings. A civil proceeding concerns with the enforcement of some right claimed by the plaintiff as against the defendant whereas criminal proceedings have for their object the punishment of the defendant for some act of which he is accused. It is sometimes possible to make the same wrong the subject of proceedings of both kinds.

It is important to note that not every civil wrong is a tort. A civil wrong may be labeled as a tort only where the appropriate remedy for it is an action for unliquidated damages. Thus for example, public nuisance is not a tort merely because the civil remedy of injunction may be available at the suit of the attorney general, but only in those exceptional cases in which a private person may recover damages for loss sustained by him in consequence thereof.

However it has to be born in mind that a person is liable in tort irrespective of whether or not an action for damages has been given against him. The party is liable from the moment he commits the tort. To take up an action for damages is an essential mark of tort and its characteristic remedy. However there may be and often are other remedies also.

Difference between Crime and Tort

Being a civil injury, tort differs from crime in all respects in which a civil remedy differs from a criminal one.

There are certain essential marks of difference between crime and tort they are:

- Tort is an infringement or privation of private or civil rights belonging to individuals, whereas crime is a breach of public rights and duties which affect the whole community.

- In tort the wrong doer has to compensate the injured party whereas in crime, he is punished by the state in the interest of the society.
- In tort the action is brought about by the injured party whereas in crime the proceedings are conducted in the name of the state.
- In tort damages are paid for compensating the injured and in crime it is paid out of the fine which is paid as a part of punishment. Thus the primary purpose of awarding compensation in a criminal prosecution is punitive rather than compensatory.
- The damages in tort are unliquidated and in crime they are liquidated.

Resemblance between Crime and Tort

There is however a similarity between tort and crime at a primary level. In criminal law the primary duty, not to commit an offence, for example murder, like any primary duty in tort is in rem and is imposed by law. The same set of circumstances will in fact, from one point of view, constitute a crime and, from another point of view, a tort. For example every man has the right that his bodily safety shall be respected. Hence in an assault, the sufferer is entitled to get damages. Also, the act of assault is a menace to the society and hence will be punished by the state. However where the same wrong is both a crime and a tort its two aspects are not identical. Firstly, its definition as a crime and a tort may differ and secondly, the defences available for both crime and tort may differ.

The wrong doer may be ordered in a civil action to pay compensation and be also punished criminally by imprisonment or fine. If a person publishes a defamatory article about another in a newspaper, both a criminal prosecution for libel as well as a civil action claiming damages for the defamatory publication may be taken against him. In P. Rathinam vs. Union of India, the Supreme Court observed, in a way there is no distinction between crime and a tort, inasmuch as a tort harms an individual whereas a crime is supposed to harm a society. But then, a society is made of individuals. Harm to an individual is ultimately the harm to the society.

There was a common law rule that when the tort was also a felony, the offender would not be sued in tort unless he has been prosecuted in felony, or else a reasonable excuse had to be shown for his non prosecution. This rule has not been followed in India and has been abolished in England.

Tort and Contract

The distinction between tort and contract says, tortuous liability arises from the breach of a duty primarily fixed by law; this duty is towards persons generally and its breach is redressible by an action for unliquidated damages. A contract is that species of agreement whereby a legal obligation is constituted and defined between the parties to it. It is a legal relationship, the nature, content and consequence of which are determined and defined by the agreement between the parties. At the present day, tort and contract are distinguished from one

another in that, the duties in the former are primarily fixed by law while in the latter they are fixed by the parties themselves. Agreement is the basis for all contractual obligations. "People cannot create tortious liability by agreement. Thus I am under a duty not to assault you, not to slander you, not to trespass upon your land because the law says that I am under such duty and not because I have agreed with you to undertake such duty".

There are often cases in which the same incident gives rise to liability both in contract and in tort. For example, when a passenger whilst traveling with a ticket is injured owing to the negligence of the railway company, the company is liable for a wrong which is both a tort and a breach of a contract. The contractual duty may be owed to one person and the duty independent of that contract to another. The surgeon who is called by a father to operate his daughter owes a contractual duty to the father to take care. If he fails in that duty he is also liable for a tort against the daughter. In Austin vs. G.W. Railway, a woman and her child were traveling in the defendant's train and the child was injured by defendant's negligence. Law held the child entitled to recover damages, because it had been accepted as passenger.

There is a well established doctrine of Privity of Contract under which no one except the parties to it can sue for a breach of it. Formerly it was thought that this principle of law of contract also prevented any action being brought under tortuous liability. But this fallacy was exploded by the House of Lords in the celebrated case of Donoghue vs. Stevenson. In that case a manufacturer of ginger beer had sold to a retailer, ginger beer in a bottle of dark glass. The bottle, unknown to anyone, contained the decomposed remains of a snail which had found its way to the bottle at the factory. X purchased the bottle from the retailer and treated the plaintiff, a lady friend (the ultimate consumer), to its contents. In consequence partly of what she saw and partly of what she had drunk, she became very ill. She sued the manufacturer for negligence. This was, of course, no contractual duty on the part of the manufacturer towards her, but a majority of the House of Lords held that he owed a duty to take care that the bottle did not contain noxious matter and that he was liable if that duty was broken.

The judicial committee of the Privy Council affirmed the principle of Donoghue's case in Grant vs. Australian Knitting Mills Ltd. Thus contractual liability is completely irrelevant to the existence of liability in tort. The same facts may give rise to both.

Another discrepancy between contracts and torts is seen in the nature of damages under each. In contracts the plaintiff will be claiming liquidated damages whereas in torts he will be claiming unliquidated damages. When a person has filed a suit or put a claim for the recovery of a predetermined and fixed sum of money he is said to have claimed liquidated damages. On the other hand when he has filed a suit for the realization of such amount as the court in its discretion may award, he is deemed to have claimed unliquidated damages.

Tort and Quasi-Contract

Quasi contract cover those situations where a person is held liable to another without any agreement, for money or benefit received by him to which the other person is better entitled.

According to the Orthodox view the judicial basis for the obligation under a quasi contract is the existence of a hypothetical contract which is implied by law. But the Radical view is that the obligation in a quasi contract is sui generis and its basis is prevention of unjust enrichment.

Quasi contract differs from tort in that:

- There is no duty owed to persons for the duty to repay money or benefit received unlike tort, where there is a duty imposed.
- In quasi contract the damages recoverable are liquidated damages, and not unliquidated damages as in tort.

Quasi contracts resembles tort and differs from contracts in one aspect. The obligation in quasi contract and in tort is imposed by law and not under any agreement. In yet another dimension quasi contract differs from both tort and contract.

If, for example, A pays a sum of money by mistake to B. in Quasi contract, B is under no duty not to accept the money and there is only a secondary duty to return it. While in both tort and contract, there is a primary duty the breach of which gives rise to remedial duty to pay compensation.

CATEGORIES OF TORTS

The classification of torts is based on two factors:

- The level of intent that must be assessed against the tortfeasor, and
- The interest affected by the tort.

INTENTIONAL TORTS

Intentional torts are any intentional acts that are reasonably foreseeable to cause harm to an individual, and that do so. Intentional torts have several subcategories, including torts against the person, property torts, dignitary torts, and economic torts.

TORTS AGAINST THE PERSON

Torts against the person harm or restrict the person of the plaintiff. Torts against the person include assault, battery, false imprisonment, and intentional infliction of emotional distress.

Property Torts

Property torts involve any intentional interference with the property rights of the plaintiff. Those commonly recognized include trespass to land, trespass to chattels, and conversion.

Dignitary Torts

Dignitary torts are torts that cause no tangible injury to a person or his property, but rather cause intangible harm to his reputation. These may include defamation, slander, libel, misappropriation of publicity, invasion of privacy, and disclosure.

In the United States, the First Amendment places special limitations on the defamation of public figures with respect to issues of public importance. Abuse of process and malicious prosecution are often classified as dignitary torts as well.

Economic Torts

Economic torts include common law fraud and tortious interference with contractual or business relationships.

Negligence

The broadest of the torts, tort of negligence is the basis of most personal injury cases. Its four classic elements are as follows:

- The defendant owed a duty of due care (that is, he is bound to act as a reasonably prudent person under the circumst-ances) to the plaintiff;
- The defendant breached that duty;
- The defendant's breach was the legal and proximate cause of injury to the plaintiff;
- The plaintiff suffered damages as a result of the defendant's actions. These elements are often summarized as the formula of "duty, breach, causation, and damages."

Obviously, whether any given injury can be brought as a negligence claim depends upon whether a lawyer can convince a court that the defendant owed the plaintiff a duty of due care to not inflict the particular injury at issue.

Nuisance

In a tort of nuisance, a plaintiff can sue for most acts that interfere with their use and enjoyment of their land. For example, noise pollution from airports is usually remedied through nuisance claims.

Strict Liability

Strict liability is applied in some countries to ultrahazardous activities, which present such grave dangers that parties engaged in those activities are held liable for injuries resulting therefrom even if they were not negligent. This theory is applied to injuries resulting from things such as the keeping of wild animals, use of explosives, or storage or use of radioactive materials.

In some countries, strict liability is the rule in certain product liability cases, on the theory that only strict liability can force manufacturers to always pursue the safest possible design.

It is also believed necessary to force all parties in the "chain of commerce" to exercise the highest level of due care to ensure that products are in good condition and are not dangerously defective. Also, in some jurisdictions, copyright infringement has been made a strict liability tort by statute.

TORTS AND CRIMINAL LAW

In common law, many torts originated in the criminal law. As noted above, there is still some overlap between crime and tort. For example, in English law an assault is both a crime and a tort (a form of trespass to the person).

The difference that grew up between the two is that in tort it is the victim (or 'claimant' in English law) who will normally initiate any court action and who aims to have a wrong compensated (for example by the payment of damages) or prevented (for example by injunctive relief). Criminal actions are normally for punitive purposes and initiated by a public body or their representative. The fact that incarceration is available as a penalty for crimes, but not for torts. This is another distinction.

Regardless, many jurisdictions retain a punitive element as part of the law of tort via exemplary damages. Some torts may have a public element—for example, public nuisance,—with actions being maintained by a public body. Also, while criminal law is primarily punitive, many jurisdictions have developed forms of monetary compensation or restitution which criminal courts can directly order the defendant to pay to the victim.

TORTS CLAIM

The term 'tortfeasor' is sometimes used to mean a person committing a tort. A tortfeasor may be held liable for injury caused to a third party by the tortfeasor's unreasonable act or, in some cases, failure to act.

Broadly speaking, a plaintiff/injured party must prove the following in order to recover:

- That tortfeasor owed him or her a duty of care;
- That the tortfeasor breached this duty by an act or omission that fell below the standard of care that would be exercised by a reasonable person;
- That the act or omission caused the injury; and
- That the plaintiff was injured as a result.

Negligence in situations involving accidents would be the most common example of a tort. Other examples would include assault, battery, trespass, nuisance, fraud, and infliction of emotional distress.

These later examples include what are known as "intentional torts" where the tortfeasor acted on purpose. There are also torts involving "strict liability" (*e.g.*, products liability) where liability may be assessed against a tortfeasor without regard to "fault" and without having to prove that the tortfeasor acted unreasonably.

CASE STUDIES

DOCTRINE OF CONSTITUTIONAL TORT: EVOLUTION AND EVALUATION

The maxim under the English Common Law was 'The king can do no wrong'. It follows from this that the king was not liable for the wrong of his servants. But, in England the position of old Common law maxim has been changed by the Crown Proceedings Act, 1947. Earlier, the King could not be sued in tort either for wrong actually authorised by it or committed by its servants, in the course of their employment. With the increasing functions of State, the Crown Proceedings Act had been passed, now the Crown is liable for a tort committed by its servants just like a private individual. Likewise, in America, the Federal Torts Claims Act, 1946 provides the principles, which substantially decides the question of liability of State. Many interesting debates have been raised in juridical arena by the question of tortuous liability of state. In India, there is no legislation, which governs the liability of the State for the torts committed by its servants. It is article 300 of the Constitution of India, 1950, which enumerates the liability of the Union or State in tortuous act of the Government. Section 176 of the Government of India Act, 1935 is the origin of the Article 300 of the Constitution. This could be traced back from the Section 32 of the Government of India Act, 1915, the genesis of which can be found in section 65 of the Government of India Act, 1858. Section 65 of the Government of India Act, 1858 provided "All persons and bodies politic shall and may have and take the same suits, for India as they could have done against the said Company."

It will thus be seen that by the chain of enactment beginning with the Act of 1858, the Government of India and Government of each State are in line of succession of the East India Company. To put in another phrase, the liability of the Government is the same as that of the East India Company, before 1858.

Article 300 reads as:

- The Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State any may, subject to any provision which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of powers conferred by this Constitution, sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding provinces or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted.
- If at the commencement of this Constitution –
  - Any legal proceedings are pending to which the Dominion of India is party, the Union of India shall be deemed to be substituted for the Dominion in those proceedings; and
  - Any legal proceedings are pending to which a Province or an Indian State is a party, the corresponding State shall be deemed to be substituted for the province or the Indian State in those proceedings.

It will be clearly seen when Article 3000 is studied that the first part of the Article relates to the way in which suits and proceedings by or against Government may be instituted. It enacts that a State may sue and be sued by the name of the Union of India, a State may sue and be sued by the name of the State. The Second part provides, inter alia, that the Union of India or a State may sue or be sued if relation to its affairs in cases on the same line as that of Dominion of India or a corresponding Indian State as the case may be, might have sued or been sued of the Constitution had not been enacted. The Third part provides that it would be competent to the Parliament or the legislature of State to make appropriate provisions in regard to the topic covered by Article 300(1).

The first case, which seriously discussed the question of Sovereign Immunity, is the Pand O Navigation Company VS. Secretary of State for India, in this case a piece of iron funnel carried by some workmen for conducting repairs of Government steamer hit the plaintiff horse-driven carriage and got injured. The Plaintiffs sued for damage. The plaintiff filed a suit against the Secretary of State for India- in council for the negligence of the servants employed by the Government of India.

It was decided by the Small Causes Court judges that the dockyard servants were negligent, though he expressed some doubt as to whether the plaintiff's coachman had not advanced in the manner that was more than absolutely necessary. He stated the case to the Supreme Court. The Supreme Court delivered a very learned judgement through the Chief Justice. The Supreme Court at Calcutta, speaking through Peackok, CJ held that "the Government will be liable for the actions done by its servants while doing non-sovereign functions but it won't be liable for injuries caused while pursuing sovereign functions.

Similarly in Nobin Chunder Dey vs. Secretary of State, the Calcutta High Court gave full effect to the remarks in rejecting the plaintiff's plea for damage against wrongful refusal to him of a licence to sell certain excisable liquours and drugs resulting in the closure of his business on the ground that grant or refusal of a licence was a sovereign function lying beyond the reach of the tortuous liability of the State. The difference between the sovereign and the non-sovereign functions of the state has since been the basis of a number of judicial pronouncements. On the other hand, in Secretary of State vs. Hari Bhanji, the court has denied any distinction between sovereign and non-sovereign functions and held that where an act is done under the sanction of municipal law and in the exercise of powers conferred by that law, the fact that it is done in the exercise of sovereign function and is not an act which could possibly be done by a private individual does not oust its justiciability.

Keeping in view of uncertainty of State liability and different judicial pronouncements, the Law Commission in its First Report, 1956 highlighted the need for a comprehensive legislation in the pattern of the Crown Proceedings Act, 1947 to fix up tortuous liability of the Government. Based on the Law Commission Report, the Government (Liability in Torts) Bill was presented in the Parliament in the year 1967, but it has not yet become the Law. It is the

liability of the Government towards third parties for the wrongs of its servants, agents and independent contractors employed by it. The Rajasthan High Court, in this state of affairs, after holding the State of Rajasthan liable in tort certified the case fit to be taken to the Supreme Court in State of Rajasthan vs. Mrs Vidyawati. In this case, a Government Jeep knocked down a pedestrian who died in consequence of accident. Rejecting the appeal by the State of Rajasthan on the ground of Sovereign Immunity, the Court ruled that the State is liable for the tort or wrongs committed by its officials. In this case distinction between sovereign and non-sovereign functions was disregarded, but the court observed that the State would not be responsible for the 'Act of State' under Article 300 of the Constitution. Petitioner Vidyawati was awarded a compensation of ₹15000. In this case it was added by the Supreme Court that in modern times, the state has welfare and socialistic functions and the defence of state immunity based on the old feudalistic notions of justice cannot be sustained.

Again a pro-people approach has been adopted by the Apex court in Kasturi Lal vs. State of UP. In this case the Police seized some suspected stolen gold from Plaintiff. Later, it was misappropriated by Head Constable of the Police Station who reportedly fled to Pakistan with the Gold. The Supreme Court held that the State is not liable as impugned act is a sovereign activity. The Court did not find the Vidyawati case having decided anything different from this which according to it, had always been the law since P&O Steam Navigation Company case and was consistently followed. The Court expressed its displeasure with this legal position in a welfare state where the activities of the State had enormously increased and asked the State to take necessary legislative steps to remedy the situation on some such lines as the Crown Proceedings Act, 1947 in England. The court also expressed its distress over the plight of the appellant who could not know his position and get any relief.

Thus, the court not only reversed what appeared to be the legal position after Vidyawati case but also reinforced an additional qualification to the State liability by referring to the statutory powers; in a way holding that State is not liable for any torts committed by its servants in the exercise of statutory powers.

A constitutional bench of the Supreme Court has not overruled or reconsidered Kasturil Lal; in spite of this a great dissatisfaction has been expressed about it in several writings and judicial decisions. Consequently, the court has found escape routes, either by restricting its ratio or by innovating new remedies. An important decision restricting its ratio is N. Nagendra Rao & Company VS. State of A.P. in which the court held the State of Andhra Pradesh liable for the loss caused to the appellant by the negligent exercise of powers by the State officials under the Essential Commodities Act, 1655. The court observed that no civilized system could permit an executive to play with the people of a country and claim to be sovereign. To place the State above the law is unjust and unfair to the citizen. In the modern sense the distinction between sovereign and non-sovereign functions does no exist. The ratio of Kasturi Lal is available to those rare and limited cases where the statutory authority acts as a delegate of such functions for which it cannot be sued in a court of law.

An Evaluation

Devaki Nandan was the real break through landmark case, through which the Supreme Court laid the cornerstone for the novel concept of the Constitutional Tort and Compensatory Jurisprudence. In this case, the petitioner was dragged for twelve years before allowing his pension. Without much discussion in the judgement, the Apex Court awarded ₹25000 as an exemplary cost for harassing the petitioner. The contention of the court was that harassment is intentional, deliberate and motivated.

The petitioner Rudal Shal, in Rudal Shah vs. State of Bihar, was detained illegally in prison for more than fourteen years. He filed Habeas Corpus before the court for his immediate release and inter alia prayed for his rehabilitation cost, medical charges and compensation for illegal detention. After his release, the question before the court was "whether in exercise of jurisdiction under Article 32, the court can pass an order for payment of money? Whether such order is in the nature of compensation consequential upon the deprivation of fundamental right? The affirmative answer of the court to this query was a real acceleration and giant leap in the compensatory-cum-constitutional tort jurisprudence in our legal history.

The importance of Rudal Shah Decision lay in two respects. First, it held that violation of a constitutional right can give rise to a civil liability enforceable in a civil court and; second, it formulates the bases for a theory of liability under which a violation of the right to personal liberty can give rise to a civil liability. The decision focussed extreme concern to protect and presence the fundamental right of a citizen than sovereign and non-sovereign dichotomy.

In the evaluation of compensation jurisprudence in writ courts, the Saheli vs. Commissioner of Police was another milestone. The masterpiece judgement in Vidyawati, which was frozen by Kasturi Lal was rightly quoted in this case. The State was held liable for the death of nine year old child by Police assault and beating. Delhi Administration was ordered to pay compensation of ₹ 75000. The significance of this case is that firstly, the revival of Vidyawati ratio and Second, the Delhi Administration was allowed to recover money from those officers who are held responsible for this incident.

Another landmark judgement was Nilabati Behra vs. State of Orissa awarding compensation to the petitioner for the death of her son in police custody, the court held that a claim in public law for compensation for contravention of human rights and fundamental freedoms, the protection remedy for enforcement and protection of such rights and such a claim based on strict liability made by resorting to constitutional remedy provided for the enforcement of fundamental right is distinct from and in addition to the remedy in private law damages for tort. The court expressly held that principle of sovereign immunity does not apply to the public law remedies under Article 32 and Article 226 for the enforcement of fundamental rights. Kasturi Lal is confined to private law remedies only.

Common Cause, a Registered Society vs. Union of India and Chairman, Railway Board vs. Chandrima Das cases has emphasised the distinction between public and private law and re remedies under the two. It was held "where public functionaries are involved and the matter relates to the violation of fundamental rights or the enforcement of public duties, the remedy would still be available under the public law notwithstanding that a suit could be filed for damages under private law." It has created the possibility of development of public law torts which requires different considerations than the private law torts and which is more suitable for State liability in torts.

It would be worth, in the light of the above discussion, to mention the observation of Apex court in N. Nagendra Rao Company vs. State of AP. The honourable court noted the recommendations of the Law Commission first Report for statutory recognising the liability of the State as had been done in England through the Crown Proceedings Act, 1947 and in the USA through the Federal Torts Claims Act, 1946. Its contentions therefore were that the doctrine of sovereign immunity has no relevance in the present day.

It is unfortunate that the recommendation of the Law Commission made long back in 1956 and the suggestions made by the Supreme Court, have not yet been given effect to.

However there is something unfortunate that the recommendation of the Law Commission made long back in 1956 and the suggestions made by the Supreme Court, have not yet been given effect to. The unsatisfactory state of affairs in this regard is against social justice in a welfare state. In absence of State Liability Legislation, it will be in consonance with social justice demanded by the changed conditions and the concept of welfare state that the courts will follow the recent decision of the Supreme Court rather than Kasturi Lal.

RIGHTS IN TORTS LAW

There is no doubt when saying that water is the most important common resource of the people. A major constituent of all living matter, it is indispensable for survival. Water must be allowed to find its own levels. At the same time it cannot be left unregulated and uncontrolled, for it may descend upon us as rain or floods causing misery.

The uses of water are too manifold to count. Flowing water when used legitimately benefits, but when it overflows and results in flood, it damages the abutting properties. Using water in a manner detrimental to others creates a cause of action which is redressable in a court of law. Regulation and control of water by the state creates rights and obligations between state and subjects as also between states inter-se. A variety of litigation (civil and criminal) results from any violation of such rights.

Violation of water rights is remedied against and these remedies may be both statutory and common law. The statutory remedies are found under the Environmental (Protection) Act, 1986; the Water (Prevention and Control) of Pollution Act, 1974; the Indian Penal Code, 1860; and the Criminal Procedure

Code, 1973. A writ petition can also be filed under Article 32 in the Supreme Court or under Article 226 in the High Court for seeking remedy against violation of water rights. The remedies of common law take the nature of a tort action against the violator of the water right. The term 'common law' is derived from the Latin word lex communis. It is a body of customary law of England based upon judicial decisions. In fact, common law remedies were available against violators of water rights even before statutory laws came into force.

It is at the discretion of the court that injunctions are granted. They are of two kinds, temporary and perpetual. Temporary injunction is regulated by Section 94 and 95 as well as Order 39 of the Code of Civil Procedure, 1908. Perpetual injunctions are regulated by Sections 37 to 42 of the Specific Relief Act, 1963. Most of the water cases in tort law are covered by the categories of nuisance, negligence and strict liability. The act of negligence may also constitute a nuisance if it interferes unlawfully and for a considerably long period of time with the enjoyment of another's right in land or it occasions on the highway a dangerous state of affairs as constructed with a single isolated act. The rule of strict liability as laid down in the case of Rylands vs. Fletcher is usually dealt with as a separate tort, but depending upon the circumstances of each case it can also be considered as an extension of the law of nuisance.

This chapter focuses on how the law of nuisance can b uses in:

- Restoring the water rights of the people in India
- Preventing and controlling water pollution.

If one traces the origin of modern environmental law one will find it take roots in the common law concept of nuisance. The word 'nuisance' is derived from the French word 'nuire' which means to injure, hurt or harm. The term nuisance is incapable of a precise definition, but its concept is well comprehended. Nuisance may be described as an 'unlawful interference with a person's use or enjoyment of land or of some right or in connection with it.' For an interference to be an actionable nuisance, the conduct of the defendant must be unreasonable. There are innumerable causes of nuisance. It can be caused by negligence and there may be cases where the same act or omission may comprise a certain element of either kind, but generally speaking these two classes of action are distinct.

Common law knows two kinds of nuisance.

They are:

1. Private nuisance and
2. Public nuisance.

Private nuisance is the using or authorizing the use of one's property or of anything under one's control, so as to injuriously affect an owner or occupier of property by physically injuring his property or by interfering materially with his leisure, comfort or convenience. Private nuisance affecting water rights includes acts leading to wrongful disturbance of easements, *e.g.*, disturbance of a right to use water from a particular water channel or tank, wrongful escape of water into another's property and so on.

An unreasonable interference with a general right of the public is a public nuisance. Public nuisance is first and foremost a crime because, 'it is a nuisance which is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect a person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large.' Public nuisance is a crime which can be tried summarily or on an indictment which can lead to civil liability towards anyone suffering special damage, while private nuisance is a tort.

For an individual to have private right of action in connection with a public nuisance:

- He must show a particular injury to himself beyond that which is suffered by the rest of the public. He must show that he has suffered some damage more than what the general body of the public had to suffer.
- Such injury must be direct, and not a mere consequential injury; as where one way is obstructed, but another is left open.
- Injury must be of a substantial nature.

A plaintiff, in nuisance action, has a choice between injunction and remedies. It is common for a plaintiff to seek an injunctive relief to stop the defendant from continuing his activity. The defendant, on the other hand, would be more than willing to pay damages rather than give up his activity. Being a discretionary remedy, the granting of injunctions is usually suitable for balancing conflicting interests.

This act of balancing conflicting interests, however, has given rise to innumerable difficulties and uncertainties in practices, which are particularly apparent in water cases dealing with pollution. In private nuisance, damages are awarded when there is interference with the right to the use or enjoyment of land and in some cases both are awarded. Public nuisance, on the other hand, affords protection to persons other then those with an interest in land. In public nuisance damages for personal injury as well as economic loss can be recovered, while in private nuisance it is primarily damage to land and goods which is compensated.

If the nuisance continues, usually an injunction should be granted in some form unless the injury complained of is trivial. Thus, in Nirmal Chandra Sanyal vs. Municipal Commissioners, the discomfort caused to the plaintiff by the construction of the pucca hackney carriage stand in front of his property, which had no proper drain or channel to drain off the excreta of his horses, with the result that the offensive matter drained into and accumulated in a long strip of land in between the pucca stand and the plaintiff's land, was not considered to be a proper relief. In this case, the commissioners of the municipality were directed to keep the strip of land in between the hackney carriage stand and the plaintiff's land clean by providing a suitable pucca drain within six months from the date. It was also held by the court that it the commissioners failed to provide a suitable drain, the plaintiff could get such a drain constructed and the

costs recovered from the commissioners of the municipality. Whether an individual would prefer seeking an injunctive relief or pecuniary relief or both in case of a public nuisance depends on the facts and circumstances of each case. In Syed Muzaffar Hussain vs. Administrator of the Lahore Municipality, there was an old storm water channel in the area known as Gowalmandi which was constructed before that area become densely populated. With increase in population, the need for sanitation grew acute and the municipality adopted the simple expedient of discharging sullage water into the old storm water channel. That this led to two distinct nuisances from which he in particular suffered was the claim of the plaintiff.

Water overflowed into his house with unpleasant results during the rainy season. This was the first nuisance. The second nuisance was created when the water in the channel became stagnant and gave off a stench so offensive that his house became uninhabitable. The plaintiff sought an injunction to restrain the municipality from discharging sullage water into this channel, or in the alternative to compel it either to convert the channel into a suitable drain or to have proper drainage laid down everywhere.

Due to the fact that damages alone must not have given him the desired relief the plaintiff was entitled to an injunction. Strangely, the court in this case held that an injunction could not be given to interfere with the working of government departments and that the committee could not be compelled to make satisfactory drainage arrangements, though it could be restrained from making arrangements which would be negligent or dangerous to health or even interfere with the ordinary comfort of an individual. Finally, considering that the administrator of the Lahore municipality had pleaded separately, an injunction was issued to him to restrain from discharging sullage water into the storm water channel.

In the case mentioned above, no reason was given by the court of why an injunction could not be issued to interfere with the working of a government department and why the government could not be compelled to make satisfactory arrangements. With an increase in the needs of society, the law should also develop accordingly and impose a moral duty (which would take the shape of a legal duty) on the state (in this case the committee) to meet the essential needs of its people. It is possible in certain cases that the comfort of a private individual to an extent suffers in the public interest. But an individual should suffer only when no other arrangement can possibly be made. In the case under discussion it was not shown that no other arrangement for drainage could possibly be made.

It was in fact said that the contemplation of more reasonable arrangements for drainage were already there:

- *In Khurshid Hussain and others vs*: Secretary of State it was held that for private individuals to establish a cause of action with regard to a public nuisance, special damage must be proved, but it may not be essential in all circumstances. The court observed that 'special damage'

in cases of nuisance is that damage which an individual has suffered over and above the inconvenience faced by other members of the public. And in an action for damages in such a case, 'the mere fact that persons did not give any details of the damage which they suffered in no way detracted from the right to succeed in the action if their success or failure depended upon that point.'

- *Briefly, the facts of that case are as follows*: A bundh was created by the government parallel to the railway line on the Futwah Road, south of Patna, to prevent the city and its bazaar from being inundated by water due to an overflowing Poonpoon river. In times of flood the construction of the bundh prevented the water from draining away to the north and the district in which the plaintiff's houses were situated was thereby flooded. The plaintiffs sought a mandatory injunction against the Secretary of State to remove the bundh. Damages were also claimed for the loss suffered.

It was the contention of the court that for the plaintiff to prove that they had a prescriptive right to drain off flood water towards the north and that the erection of the bundh by the defendant had interfered with their right, it is essential to establish a cause of action against the defendant It was further observed that the plaintiffs had no absolute right to have their land kept free from flood water by draining it to the north and flooding these lands. If they got any right, it was subject to drain water. This drain water came through certain defined channels.

Because the plaintiffs could not show that they had a prescriptive right to drain flood water in defined channels, the court negated their claims for injunction and special damages. Similarly, a person cannot claim a right to foul an ordinary drain by discharging into it what was not intended and then place on other persons an obligation to alter the drain in order to remedy the nuisance that he has caused.

It has been held that where a person comes to court complaining of a private nuisance injuriously affecting his property and health then he has a genuine cause of action which in law is based on the maxim sic utere tuo ut alienum non laedas.

- *In Manumal Shamdas vs*: Sahsa-nomal, a well was dug by the defendant in his courtyard to obtain water from an artisan well by using a boring pipe. After inserting the pipe he left the well unfilled, which was continually being filled in with water from the boring pipe. The well and the boring pipes were in close proximity with the wall of the plaintiff's house, which were affected injuriously. The plaintiff filed a suit for a mandatory injunction directing the defendant to close up the well and also claimed damages. The court held that there was definitely a want of care on the part of the defendant who was responsible for the damage incurred by the plaintiff. Accordingly, a mandatory injunction was granted to the plaintiff. It may not be necessary to prove special damage to succeed in an action for private nuisance.

- *In maung thit sa vs*: Maung Nat the court held that where a person is in the enjoyment of a right and another deliberately infringes that right, the person injured can succeed in an action for damages without proving special damage, *i.e.*, whether any damage has been proved to have accrued to him or not. In that case the parties were lessees of adjoining fisheries, the fishery of the plaintiff-appellate being the lower one. For 22 days of the season the defendant-respondent continued placing illegal obstructions to the passage of the fish which reduced the plaintiff's catch. The plaintiff sued the defendant for damages. The court overruled the allegation on the ground that proving special damage was an impossible task in a situation like the present one. It is strange that the action of the defendant in the present case was considered a tort; however the word 'nuisance' as such was not mentioned.

If we closely observe the cases mentioned above, we see that the tort of nuisance in water cases has apparently been underplayed considerably by the judiciary. In several old cases where interference in the right of enjoyment in land or otherwise has been held to be a tort there has been no mention whether the particular tortuous act was a nuisance or not. This uncertain position taken by the judiciary has adversely affected the growth of tort of nuisance. Or having been guided by the principle that not every 'fleeting or evanescent' interference will be an actionable nuisance except one which is substantial and unreasonable, the courts have been hesitant in recognizing the efficacy of this area of tort. Thus, where water flowed over the plaintiff's land but only caused 'trivial injury', the claim of nuisance was rejected. Today, such an approach of the judiciary may not be wise. Different acts give description of the term 'pollution' in different ways. Some describe it as 'nuisance' while others define it either as 'neglect to carry away rubbish' or causing 'water to be corrupted'; some statutes define 'pollution' as 'poisoning' of water.

Tort law treats the act of polluting water as a nuisance. Filthy or dirty water, whether flowing or standing, is hazardous to nearby residents. The situation becomes worse if the concerned authorities do not take any steps to drain off the water from residential localities. The right of throwing filthy water on a neighbour's land is an easement, which can be acquired either by grant or under Section 15 of the Easement Act by prescription. If such right is not acquiesced, the act of polluting amounts to actionable nuisance. A long and immemorial user can acquire a right to pass filthy water and other water on another's land. But he cannot acquire a right to flow dirty water towards the house and well of a neighbour, because it amounts to nuisance.

It was held by the courts in Pakkle vs. P. Aiyaswami that the villagers had an ancient common right to the use of water in the suit tank for their drinking and catering purpose and for the use of cattle. In that case the plaintiff brought an action under nuisance to restrain the defendants from laying salt pans in the bed of the suit tank which had made the water in it useless for bathing, drinking and other purposes. The suit tank belonged to the government. The contention of

the appellant that the suit tank being government property was not the property of the villagers and, therefore, there could be no injunction restraining the defendants from converting the bed of the suit tank into salt pans was negatived by the court.

It was the government alone, it was polluter-defendants' allegation, that could prevent them from doing anything on their property. Basing its decision on the evidence admitted, the court concluded that this action of the polluter-defendants amounted to a nuisance and the plaintiff-villagers were entitled to the injunction prayed for. It also stated that because the plaintiff-villagers had a common right over water in the tank, any interference with that right gave them a cause for action even though the interference was not in respect of the land belonging to the plaintiff.

Each and every riparian owner is entitled by the common law to the continued water flow of a natural stream in its natural condition. However he should do it without any obstruction or pollution or without diminishing in quantity and quality. Every landowner has a natural right to water of natural surface streams which pass his lands in defined channels, and to transmit the water to the land of other persons in its accustomed course. This right belongs to the proprietor of the adjoining lands as a natural incident to the right to the soil itself.

Riparian owners are entitled to use and consume water of the stream for drinking and household purposes, for watering their cattle, for irrigating their land, and for the purpose of manufacture subject to conditions that:

- The use is reasonable;
- It does not destroy or render useless or materially diminish, or affect the application of the water by riparian owners below the stream in the exercise of natural right or their right of easement if any.

The pollution of a natural stream is a wrong, actionable at the instance of any riparian owner past whose land the water so polluted flows. It is fact that the Indian legal system recognises a common law riparian right to unpolluted water. In spite of this, in contemporary litigation concerning water pollutions, there is rare invocation of it. In M.C. Mehta vs. Union of India, the Supreme Court acknowledged the existence of such a right by stating:

In common law the municipal corporation can be restrained by an injunction brought by a riparian owner who has suffered on account of the pollution of the water in river caused by the corporation by discharging into the river insufficiently treated sewage from discharging such sewage. In case of violation of rights affecting non-riparian owners, the rules of English law continue to apply. The aggrieved party is provided a remedy under the tort of'nuisance'. Unlike'negligence' where taking of'reasonable care' is a defence for the defendant, no such defence is necessarily available to a defendant under nuisance.

The present day India is infested with water pollution caused by industry and factories. In earlier times, when the impact of industrial pollution was not so severe, the courts tended to uphold the rights of industrialists to pollute water. The penal sanctions were also not strictly adhered to. But with an increase in

industrialisation, water pollution became a major problem, which could not be handled through criminal or penal sanctions. As the government became more aware of the magnitude of the problem, it restricted the right to pollute by enacting legislations such as the Water (Prevention and Control of Pollution) Act, 1974 (Water Act) and the Environment Protection Act, 1986.

There is no doubt in pointing out the fact that most judicial decisions dealing with water pollution were in favour of the polluters, before the enactment of the Water Act. The reason for this could be attributed to the fact that most polluters were economically and socially well-off. Even when the Water Act came into force, the maximum number of notices and litigation launched by the Central Water Control Board has been against small factories.

All big polluters consequently continue to pollute. Looking at the ineffectiveness of the statutory provisions in prosecuting the big polluters, the Supreme Court in a recent case of Vellore Citizen Welfare Forum vs. Union of India gave relief to the victims of water pollution caused by tanneries by recognising the act of polluting water as causing nuisance to the people.

In this case, a writ petition was filed against the large-scale pollution caused by the tanneries and other industries in the state of Tamil Nadu. The petitioners alleged that untreated effluent was being discharged into agricultural fields, waterways and open land, which ultimately reached the Palar River which is the main source of water supply to the residents of the area. The effluents, besides having spoiled the physico-chemical properties of the soils, had done great hazards to contaminate the groundwater by percolation.

After carefully examining the facts of the case, the Supreme Court, while recognizing the common law right of the people to a clean and healthy environment, awarded compensation to the victims of pollution on the basis of the'precautionary principle' and the'polluter pays principle'-two of the several salient principles of'sustainable development'.

There are three significances of the'precautionary principle' when applied by the courts to Indian condition.

They are:

- That environmental measures taken by the state and the statutory authorities must anticipate, prevent and attack the causes of environmental degradation;
- That where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for posting measures to pre-vent environmental degradation;
- That the ‘onus of proof’ is on the actor or the developer/industrialist to show that his action is environmentally benign.

The polluter pays principle as interpreted by the court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but includes the cost of restoring environmental degradation. By regarding the two afore-mentioned principles as part of the environmental law of the country, the Supreme Court has to some extent conceptualized the common

law remedial measures of awarding compensation to the victims of a tortious action in water pollution cases. The potential of controlling water pollution through the tort of nuisance is shown by the decision given in the Vellore citizen's case. It also reveals the power of the judiciary to compensate victims where their water rights have been affected. It is submitted that in order that a tort, like nuisance, is effective in protecting water rights and preventing and controlling water pollution, the legislature must make the tort of nuisance more specific. It has been observed that in all water cases falling under tort of nuisance there has been no emphasis on the application of the duty principle. The courts have largely been concerned with restraining the defendant from interfering with the plaintiff's right. The tort of nuisance in water law is still in the evolutionary stage. It may cover a variety of situations or just a few specific ones. It may comprise an element of fault, negligence or strict liability or none of these.

Therefore, the legislature should enact a la of nuisance so that specific forms of nuisance could be placed under specific laws so as to increase the utility of tort of nuisance in resolving water related disputes. It is also suggested that if the requirement of proving special damage on the part of the injured party were dispensed with in case of public nuisance then the efficacy of the tort of nuisance in curbing water pollution would be considerably enhanced.

5

Legislation Regarding Real Property

Legislations substantially covers the 'real property' security law. Under Indian Law, the law recognised immovable property, moveable property in corporate property, and intellectual property. The law relating to immovable mortgages and charges is found in the provision of the Transfer of Property Act, 1882, (hereinafter "TP Act") the provisions of Registration Act 1908, and the provisions of Code of Civil Procedure 1908. The property law in India relating to security was developed in over time when and modern day banking was not in view. The TP Act regulates and deals with transfer of property inter vivos rather than transfer by operation of law. Neither the law of succession nor government grants is dealt with by it.

Not being exhaustive, the TP Act only consolidates the law. Consequently, the Courts in exercise of their jurisdiction as courts of equity do lay down principles, not inconsistent with the TP Act. It is in this respect that the Indian Courts are different from those in England. In India there are no separate courts of equity (as in England) and are both courts of law and equity. Accordingly, on some of the important concepts, where equitable doctrines apply, Indian courts have taken a different view. Generally, the TP Act deals with subjects such as essentials of a valid transfer, doctrine of notice, special types of transfer, law relating to priorities, sales, mortgages, lease, exchanges and gifts. The law relating to assignment of actionable claims is also of the TP Act.

There are separate laws for agricultural lands and land ceiling laws and land reform acts by each State which impose ceilings on land holding and use of land holding. When industrial user is to be ensured conversion of agricultural land to non-agricultural land is required and the land rent as an annual rental

value or ground rent changes. Consolidation of holdings and conversion of ribbon rights for industrial purposes requires sanction from the Collector or the authority designated under local laws. The system of land ownership and rights is sufficiently developed to deal with the security lending on land rights. Provisions for lessors, as state authorities giving consent to the lessees lenders for creating mortgage over leasehold properties and for step-in rights are will known in India.

The law in India in relation to movable property and incorporeal or intangible assets and intellectual property is equally well developed. The filing requirements for registering a charge in relation to such property are different than that in relation to immovable property. There are separate authorities constituted under the Trade Marks Act, the Copy Right Act and the Patents Act which would be relevant for securing an interest in intellectual property. Goodwill as an intangible asset and non-compete rights can also be charged by assigning these in favour of the security agent acting on behalf of the lenders/the lenders under either a deed of assignment or a hypothecation. Being treated as movable property, documented rights are capable of being charged by a floating charge under hypothecation.

PRESERVATION OF SECURITY, COSTS AND INTEREST

At present, there is no reasonable ratio between the sum to be actually recovered and the cost incurred therefor. In smaller actions, costs for recovery may sometimes be higher than the amount recovered. Irrespective of recovery, costs will have to be incurred. In certain suits, the court fees/incident fees are higher than 8% of the claim without a ceiling limit, while in others they are fixed amounts usually in the range of about ₹ 15,000-20,000. In the Union Territory of Delhi, the prescribed rate of Court fees is 1% of the claim ad valorem without a ceiling.

This is in addition to all other litigation expenses towards preservation and realisation of security such as employment of security guards, supervision, repairs, *etc.* Since the appointment of the receiver will extend over a number of years, these expenses will be considerable, though unavoidable. Fortunately, these can be recovered as a first charge from the sale proceeds. On an average, these costs work out to about 15% of the claim. The indirect losses include losses due to delay leading to substantial, loss of interest amounts, particularly as the bank is not normally awarded interest on interest after the date of the suit (pendentelite interest may not be awarded by a contract rates).

Though the CPC was amended to permit the awarding of commercial rate of interest, nonetheless, the cost of delay always works to the detriment of the lender and to the benefit of the debtor. Moreover, despite the amendment of the CPC many courts continue to award interest only at the rate of 6% or thereabouts per annum from the date of the suit. Lawyers' expenses can also considerable.

EXECUTION

General Principles of Execution and Problems

Even after a decree is passed, the process of execution and realisation of the decretal amount can be cumbersome and time -consuming. Modes of execution include interalia attachment and sale (the actual mode of sale depending upon the type of property) distrait of movable assets, arrest of the defendants, *etc.* Order 21 of the CPC, provides a variety of options and an exhaustive of rules concerning execution. The general procedure for execution involves the filing of an application for execution which sets out the particulars of the suit and of the decree, the mode of execution as well as the property/person with reference to which execution is sought.

Difficulty in finding a suitable buyer who will pay a price adequate to cover the decree holder's dues, is often a major problem. The delay from the time of institution of the suit till the actual realisation and the enhancement of the costs in the meantime as a result of expenses of preservation of the security is prejudicial. Industrial assets are usually in a dilapidated condition by the time the decree is executed. Plaintiff lenders seek the leave of the Court to empower the court Receiver with the power of sale over the charged property/security.

Other difficulties in the execution process include pendency or winding up proceedings or revival proceedings before the BIFR or other similar actions which statutorily bar execution during the term of operation of these provisions. Also, the obstruction to sale and execution by the labour force and workmen, intervening priorities of Governmental authorities for tax dues, inefficient auction or sale processes resulting in low recovery, charging of unearned premium/ income by lessors/Governmental authorities, are important delaying factors.

After a decree has been obtained by the lender in his favour, steps are required for execution and recovery of the bank dues. Lack of follow up in the matter of execution of the decree can jeopardize the decree holder's interest. Time limits are prescribed which can be extended by an order of the court) for commencing of such execution proceedings. Even if an appeal is filed by the judgement date, the decree holder should nevertheless proceed to apply for execution notwithstanding the pendency of such appeal unless a stay is granted in the interim. Fortunately, the Appellate court usually directs the judgement debtor to make a deposit of the money in the Court as a condition precedent to stay of execution proceedings.

Insolvency of the individual corporate borrower or the commencements of liquidation of a corporate borrower have a profound effect on the lender's recovery suit even if it relates to enforcement of security. In cases of companies, all suits by and against the company automatically stand stayed and can be resumed only after obtaining leave of the company court under Section 446 of the Companies Act, 1956. The Company court can transfer a suit or proceeding to itself (except it is an appeal). Whilst there is enough judicial precedent that a

secured creditor essentially stands outside the winding up and hence must be given leave automatically and as a matter of course, there is considerable delay (sometimes one or two years) in the obtaining of such leave or the leave is granted on a conditional basis only. If the winding up court is in a different State, the delay is even longer.

Moreover, the Court, as condition of granting such leave, the Company Court dealing with the company insolvency frequently directs that the suit proceedings of the secured creditor, wherever filed, should be transferred into the winding up court for decision. This entails considerable delay in the process of transfer of the suit proceeding and also virtually makes the secured creditor become a part of the winding up proceedings. In the wider sense, such consequences are clearly avoidable. The correctness of such directions being passed by winding up courts is presently under challenge in the Supreme Court at the instance of DFI's. In so far as recovery suit not based on security is concerned, they are simple money suits which would probably not receive leave of the winding up court to continue outside the ken of winding up proceedings but the creditor will be requested to prove his claim as an unsecured creditor in winding up along with other unsecured creditors, by filing proof of claims before the Official Liquidator. Whether a secured creditor can file winding up proceedings under the Indian Law?

The question whether a secured creditor can petition for winding up in spite of having full security was considered by the Calcutta High Court and it was held that a secured creditor could do so/however, the court would entertain the petition only if a case is made out that the security would not be sufficient and hence to the extent of the shortfall the secured creditor has locus to maintain a winding up action.

On a winding up action is commenced, the transfer of shares or property, would be subject to the test of fraudulent preference. The doctrine of relation back is also applied for testing transfers made six months prior to the order for an admission of a winding up action. Transfers of shares even on a pledge, if shares were not registered in the pledges name would be void Employees and directors stand discharged from employment unless the Official Liquidator seeks to employ them for future activities. The Official Liquidator can conduct the business of the Company to benefit the unsecured creditors and realise better value.

EFFECT OF INSOLVENCY PROCEEDINGS

Section 529 of the Companies Act deals with the application of insolvency rules in winding up of insolvent companies. This section applied to all kinds of winding up, and is must be noted only to an insolvent company. Insolvency rules means the provisions of the two insolvency Acts. As a combination these *viz.*, the Presidency Towns Insolvency Acts and the Provincial Towns Insolvency Act. Acts cover the whole of India and the rules of insolvency as stated hereinabove are applied to Company winding up. The expression ‘winding up’

of an insolvency company is meant the winding up of the company which is placed is liquidation on the basis that it is insolvent, that is to say it is unable to pay its debts as and when they become payable.

Thus it is clear that the formal pronouncement of admission of a winding up at in respect of the corporate debtor, would lead to all application of the rules under the Insolvency Acts. Restrictions shall be imposed on the transfer of the debtor's assets, or the ordinary procedure of security enforcement. The formal pronouncement of an insolvency administration on will be akin to the adjudication of insolvency.

The effect is described by Section 446 of the Companies Act: When a winding up order has been made or the official liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced, or if pending at the date of winding up order shall be proceeded with, against the company, except by leave the Court and subject to such terms as the court may impose. *As per Section 453 of the Companies Act*: A receiver shall not be appointed of assets of the hands of a liquidator except by or with the leave of the Court.

PERSONAL PROPERTY AND BAILMENTS

TRANSFER PROPERTY THROUGH WILL

AN act of taking over the ownership of the title of the assets and property left by a deceased by his legal heirs after his demise is known to be the transfer by succession. Generally, as per prevailing law of the land, the ownership of the title of the property left by the deceased is transferred in the name/s of his legal heirs after duly verifying their antecedents. However, the owner of the property has the right to identify the beneficiaries of his choice, by specifying the ratio of their respective shares of his self acquired assets and properties in the will, which can be bequeathed during his life time.

Although not mandatory but to be on the safer side for avoiding any litigation and dispute over the authenticity of will, the documents is, generally, preferred to get registered in the office of the Sub-Registrar of the area. Such a will, executed and registered in the presence of registering authority, is known as registered will. However, a will can be in a shape of a verbal statement and in shape of a written statement supported by, at least, two witnesses of persons of reputation, social status and standing. Such a will is called unregistered will. And if a person dies without leaving any will, it is called intestate death.

CATEGORY OF LEGAL HEIRS

Legal heirs are normally categorised in to four categories. Mother and children of the deceased comes in to the A category of legal heirs in case of male and whereas husband and children in case of a Hindu female falls under this category.

In the event of none of the legal heirs of category A is alive the assets are distributed equally among category B of legal heirs comprising of brothers,

sisters and father of the deceased male and parents-in-law, brothers and sisters of her husband in case of married Hindu female provided that the property and assets has been inherited by her from her in laws. However, if the property has been inherited by her from her parents than the assets shall be transferred to her parents' side after her death provided that none among her children and husband is alive to stake the claim of the property.

In case none of the legal heirs of both the categories mentioned above is alive to stake the claim than the ownership of title of assets and properties left behind by the deceased gets transferred to the third category, which is further categorised into two categories namely "agnates" and "cognates". Agnates are the nearest kin among the blood relations/adopted from male's side and cognates are the nearest kin among the blood relations/adopted from female's side. A female member shall be the last link of chain of descendents among the agnates as well as cognates category.

In case any one of the legal heirs of a person predeceases him then wife and the children of the deceased shall automatically be the legal owners of his share of properties provided that the assets and properties are inherited and not self-acquired one.

However, in case of self-acquired assets the possessor/owner has full right to declare the beneficiaries of his assets after his demise in a will during his life time.

TRANSFER OF PROPERTY IN THE NAMES OF LEGAL HEIRS

On the Basis of Registered will

After the death of a person, his/her legal heirs may apply to the revenue authority of the area concerned for the transfer of the respective shares of the assets and properties left by the deceased, in their names. The application giving details of the legal heirs as well as beneficiaries mentioned in the registered will left by the deceased shall also be annexed by a few below mentioned documents, such as:

- Photocopy of will duly notarized,
- Translated copy of the will in English, if it is in other language,
- Liability affidavit of the beneficiaries to certify and affirm to abide by the rules and regulations governing the property and to pay the arrears towards the property,
- Indemnity bond from the beneficiaries of the will to indemnify the revenue department from any fraudulent transfer,
- Original death certificate of the deceased owner,
- Photographs of the beneficiaries.

On receipt of this set of documents the revenue department, after verifying the given information, issues a transfer letter in favour of the beneficiaries of the will of the deceased.

Transfer on the Basis of Unregistered will

In this case the application for the transfer of property along with following documents shall have to be submitted with the revenue authorities:

- Photocopy of the will duly notarized,
- Translated copy of the will in English, if it is in other language,
- Liability affidavit of the beneficiaries,
- Affidavits of attesting witnesses to the will,
- Original death certificate,
- No objection certificate from all those legal heirs who are not the beneficiaries of the will,
- Photographs of the beneficiaries,
- Indemnity bond of the beneficiaries

In both the above cases the department may issue a public notice, in case of doubt, especially in case of unregistered will, in the local dailies in regional as well as English languages, at the cost of the transferees, for inviting objections, if any, to the transfer of property on the basis of will.

Transfer on the Basis of Registered will Outside Family

In case where the registered will happens to be in favour of a person/s from outside the family, an additional document of affidavits from the attesting witnesses to the will shall have to be attached along with the documents detailed above in case of registered will.

Transfer in Case of Intestate Death

In this case as discussed earlier, all the legal heirs of the deceased become the beneficiaries of the left over assets and properties in equal shares and the application for transfer from all the legal heirs along with an indemnity bond, liability affidavit from the beneficiaries and their photographs shall be submitted to the revenue authorities for effecting the transfer. In this case issuance of a public notice inviting objections, if any, to the transfer of the assets in favour of the transferees in the two local dailies, one in English and other in regional language, becomes imminent. After the expiry of notice period of 40 days from the date of its publication, the applicant again applies to the revenue authorities along with the proof of the publication for the transfer of the property. The concerned department issues a final letter of transfer in favour of the beneficiaries, in case no objection is filed by any claimant.

SECURED FINANCING SECURITY OVER REAL PROPERTY

Under the Indian Transfer of Property Act, 1982 the term "mortgage' is defined under Section 58(a) as follows:

A mortgage is a transfer of interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt or the performance of an engagement which may given rise to a pecuniary liability.

The following are the forms of a mortgage recognised in India:

- Simple mortgage
- Mortgage by conditional sale
- Usufructuary mortgage
- English mortgage
- Mortgage by deposit of title deeds (Equitable mortgage)
- Anomalous mortgage.

Different rights and liabilities in each of the six cases are attached by property law. Some of the rights and liabilities are briefly discussed below: In a simple mortgage, the mortgagor should personally undertake to repay the mortgage money and parties must expressly or impliedly agree that in the event of the mortgage or failing to repay according to his contracts, the mortgagee shall have a right to case the mortgage property to be sold, in this form of mortgage there is no possession nor is there an absolute transfer of the interest. Its enforcement can only be brought about by suing and not without Court intervention.

In a mortgage by conditional sale, there is ostensibly a sale with the condition that on default in payment of the mortgage money by a certain date, the sale would become absolute and on such payment being made, the sale can be avoided. The use of this form is very rare from a banker's perspective.

Usufructuary mortgage involves delivery of possession or an undertaking on the part of the mortgagor to deliver it, and, secondly, the use of the usufruct until the mortgage dues is pad off. Banking security creation rarely makes use of this too.

An English mortgage (or as is popularly known "legal mortgage") is a transaction by which a mortgagor binds himself to repay the mortgage money on a certain date, and transfers the mortgage property absolutely to the mortgagee subject only to a condition that the mortgagee will retransfer it to the mortgage or upon payment of the mortgage money as agreed.

The following are the three essential of an English mortgage:

1. The undertaking to pay
2. The property is absolutely transferred, and
3. The transfer is subject to provision that the property would be reconveyed on redemption of the debt due.

The operative words are the same as those of an absolute conveyance. A right of sale without intervention of court is generally included as a covenant in the mortgage deed in order to enable the mortgagee to realise the mortgage money. This is a characteristic feature of an English mortgage. This right of an English mortgagee is recognised by the Transfer of Property Act. This form of mortgage has a high stamp duty incidence in most states in India.

"Equitable" mortgage or mortgage by deposit of title deeds. To facilitate the mercantile community in raising money with minimum stamp incidence after investigation of title and preparation in specified, notified towns such as Mumbai, Chennai, Calcutta and several others a corporate borrower is permit this mode

of creating a mortgage. This special mode envisages that the debtor deposits the title deeds of his immovable property, where ever situate, with the creditor or his duly authorized agent with the specific intention of creating a security for the debt. This act of deposit creates a valid mortgage upon all properties comprised in the title deeds, the mortgage does not require any writing or registration and can be entirely oral.

The bargain or agreement is not reduced in writing but a unilateral parole record of how the mortgage by deposit of title deeds was made is recorded. Forms recording the creation of a charge are recorded with the Registrar of Companies. It has substantially all the advantages of any of the other forms of mortgage. Hence, a holder of a registered instrument does not take priority. Thought a formal writing is not necessary, in actual practice a written memorandum is made after the deposit of title deeds, and separately confirmed by a letter communication by the corporate borrower. Such a memorandum states the fact of the deposit and the creation of the mortgage and does not require registration. However, if the memorandum is in itself the contract of mortgage, then it must be registered and stamped.

The test is that the document should not constitute the 'bargain" between the parties. If it does, then is requires registration and this also clearly focuses the question of payment of stamp duty. Except in certain states which have expressly sought to levy of stamp duty on a memorandum evidencing a deposit of title deeds, most States in India do not so provide or have established several relations in respect of bank and financial institutions related transactions for project finance loan. Anomalous mortgage is basically a residual category. In India, several kinds of mortgages based on local practices and molded by custom or the whim of the creditor are in existence. Mortgage which does not fall within any of the five categories described above is anomalous. These forms are also rarely if at all use in banking transactions.

PLEDGE

A pledge, a form of bailment in India, is recognised as a part of the law of contract and not property law. It envisions physical delivery of the pledged property being given to the pledgee. The right to property vests in the pledgee only so far as it is necessary to secure the debt. A pledgee has a right without intervention of the court to realise the security and if necessary, to sue upon the debt and retain the goods as collateral. If he sells the same without intervention of the court, he is required to give a reasonable notice of the intended sale to the pledger. The pledgee is bound to apply the sale proceeds towards satisfaction of the debt and pay over the surplus to the pledger. Generally, the law of pledges is well developed in India and the experience in relation to its enforcement has been successful. Form the point of view of working capital finance by the bank, certain special types of credit such as open credit system and key-loan system are typically secured by pledges. This from of lending security is applied to move able property of the corporate borrower.

HYPOTHECATION

A hypothecation of tangible goods is also a favourite method of securing advanced from banks. A hypothecation is a mortgage of movables, unlike a pledge, there is no possession, and there is "constructive possession." Both in a pledge and hypothecation, legal possession is given but, in a pledge there terms of the hypothecation, the floating charge of the creditor is crystallized and enforcement is resorted to. Once the charge crystallizes or a Receiver is appointed by the creditor the right to deal with the hypothecated property is severely restricted and regulated through the court action or the Receiver appointed.

PLEDGE OF SHARES

Shares are regarded as movable property/goods and, in fact, are also covered by the Sale of Goods, Act, 1930. Having regard to some special modes of transfer for shares described in the Companies Act, a pledge can be created only with delivery of the share certificates and blank transfer deeds executed in the Statutory from duly signed and stamped by the transferor. Such pledge of shares is recognised as valid security over personal property of shares. The enforcement over a pledge of shares transfers the property in the shares.

GUARANTEES

The law relating to guarantees is contained in the Indian Contract Act, 1872. Guarantees are usually sought by banks when dealing with partnership firms or private companies. Financial institutions also require corporate or other guarantees in certain cases, including cases where security cannot be created, as assets have not come into existence or the final security cannot be validly created. The law of contract recognizes that a guarantee constitutes a separate cause of action and, is actionable at the instance of the beneficiary even without commencement of proceedings against the principal debtor. Moreover, as the guarantee grants a separate cause of action to the beneficiary, it can form the basis and subject matter of a separate proceeding for recovery.

Depending upon the manner in which the guarantee is worded, the guarantor would not be discharged even in the case of winding up or insolvency of the corporate borrower as principal debtor or other similar circumstances. There are special rules regarding principal debtor or other similar circumstances. There are special rules relate to the waiver by or discharge of the guarantor in the event of the creditor and the principal debtor agreeing to any variations without the consent of the surety. These statutory provisions are subject to contract to the contrary.

Inadequacy of particulars of the assets and net worth of individual guarantors is a major deficiency in successful enforcement of guarantees, particularly since decrees against guarantors even if obtained cannot be easily executed in the absence of corporate asset information about the guarantor. In case of inter bank guarantee or to a financial institution in respect of the performance of

obligation by a borrower, Indian courts have strictly enforced their performance and excused their implementation only in rare circumstances for fraud only. Bank guarantees are regarded seriously by courts and, the guarantor is not easily discharged or excused.

SECURITY IN RESPECT OF HIRED ASSETS

Hiring of assets, as a form of asset finance has manifested itself basically in the form of equipment leases and hire purchase contracts, both being forms of bailment. Despite stiff levies of sales tax, and recently, even on stamp duty for leases of movable property, these instrument remains popular particularly since it provides almost the entire finance for the asset. Subject to furnishing of security deposit or margin payments The Hire Purchase Act, 1972 was enacted, but an account of vociferous objection by the 'transport lobby' and others is not notified till date, (though there are indication that the same may be brought into effect shortly).

The law relating to hire purchase and equipment leases continues to be a branch of law of bailment, (part of the law of contract). There are obvious practical problems in recovery of lease rentals and for resuming possession of leased property in the event of the transaction becoming a default case. Except assets such as motor vehicles or other stand-alone items like computers, typewriters, *etc.*, industrial equipment leases in relation to plant and machinery or other such items are most problematic for recovery of physical possession as are inextricably linked with the rest of the factory, and frequently also are special purpose assets, not easily saleable nor reusable by other lessees or hires.

There is scope for special legislation in respect of the law governing hire purchase and equipment leases particularly in order to provide recovery and enforcement. There are also nagging doubts in relation to the enforceability of covenants concerning payment of lease rentals during the "non-cancelable" or fixed period of the lease/hire purchase, contract requiring such payment regardless of prior termination by reason of breach or default or otherwise.

With flourishing hire purchase and leasing finance activity, leasing and hire purchase companies themselves are significant borrowers from banks and financial institutions. The nature of security which can be given by a leasing company (a borrower to the bank/financial institution) has several problems attached to it. Whilst the leasing company is the legal owner of the asset, it does not have possession and the asset is subject to the terms of the hire purchase/ lease agreement and therefore to rights of "third parties" (possessory rights).

The leasing company has documented covenants regarding actual control in respect of the location of the assets but since the asset is moveable it may frequently be mobile on a continuing basis without adequate reporting to the Lessor. Security for the Lenders of the Lessor Company in respect of such transactions have usually been structured as a hypothecation of the underlying tangible assets owned by the leasing company (subject to the lease/hire purchase agreement), together with a separate hypothecation of the receivables on the

lease/hire purchase contracts, such security may either be taken by the bank directly or by trustees acting on behalf of the bank or the lenders particularly as this offers some advantage in relation to stamp duty in some state.

The enforceability and recoverability of the bank's advances from such assets, and the two fold security on the underlying assets and the receivables, has not adequately tested and there are no major judicial pronouncement and a number of practical problems could arise. In the recent securities scam, a few prominent leasing and financial services companies have become insolvent and their various properties attached" under special legislation's introduced on that behalf as they had traded in securities with notified persons. The effect of the transactions of security between the lender and the lessees/hirers, are pending consideration and judicial determination in recovers proceedings where a number of highly complex legal issues are to be determined.

TRUST RECEIPTS

Trust receipts are executed by customers when they take delivery of the bill of lading or goods from the bank before payment of the amounts due. The customer than holds the goods or trust proceeds in trust for the bank and if the customer fails to deliver the goods or sale proceeds to the bank, then it becomes liable to the bank for criminal breach of trust. Trust receipts offer criminal remedies in case of a breach of trust and can be very effective. In practice, however, financial institutions by the very nature of their term finance, rarely use this form of security, though commercial banks are know to employ this security in some transactions. These are enforceable securities.

SHIP MORTGAGE

A ship mortgage is required to be registered under the Merchant Shipping Act, 1958 in a statutory form. The mere fact of the mortgage does not by itself confer the power to sell without court's intervention; but the statutory form is limited in scope and inflexible in practice. Therefore a deed of covenant or a collateral agreement is also executed conferring various rights. Moreover, under the Merchant Shipping Act, in addition to the permissions required at the stage of creating a mortgage from the Indian Shipping Registry/Central Government, fresh approvals of the Central Government are also necessary at the stage of enforcement for charging the Register of Shipping.

This is a major deterrent in accepting ship mortgages having rights in accordance with international practice where ship financiers deal with standard Gibraltar type mortgages and nothing less. In a recovery action an admiralty court judgement operates as a judgement in "rem" and the transfer of title in the ship takes place free of encumbrances and liens, (but in exercise of the right of private sale). Several institutions like IFC (W) ICICI and the Development Bank of Singapore, *etc.*, hold shipping mortgages over Indian registered ships.

There is a detailed system of registration and stamp duty in this country for any of three types of security taken by financiers:

STAMP DUTY

Under the Constitution of India, the power to legislate relation to stamp duty is distributed between the Union and the State Governments. Stamp duties other than duties or fees collected by means of judicial stamps, but not including rates of stamp duty, are in the Concurrent list (*i.e.*, on which both the Union and the State can legislate). The rates of stamp duty in respect of "bills of exchange cheques, promissory notes, and other like instruments are exclusively in the Union list.

Fixation of Rates of duty in respect of documents other than those specified in the provisions of List I, are within the competence of the State Legislature "Stamp duties other than duties or fees collected by means of judicial stamps but not including rates of Stamp duties are matters of Common legislature powers of the Union and the States in the Concurrent list. The Indian Stamp Act, 1899 is the Central Legislation, which applies all over India, and on certain types of documents, with local amendments. Each state has also enacted its own laws.

The taxable event or subject is the execution of the 'instrument' and not the transaction. There is no residual entry, in any of this legislation and therefore a document for which no rate of duty is prescribed is not stampable. Documents Stampable under Indian Law executed outside the territory of India become liable to stamp duty upon their entry into the State. Differential duty is payable in States which prescribe a higher rate of duty than the one applicable in the State execution. Consequences of inadequate stamping include inadmissibility in evidence, impounding of the document, liability to duty, penalty (upto 10 times the correct duty) and possible prosecution.

Legal innovativeness has unfortunately had to be deployed in order to side step these unreasonable levies based on short-sighted policies. The impact of such duties in restricting development by choking financial transactions, and movement of capital has been underestimated. The Indian Registration Act, 1908 provides both for compulsory and optional registration. Compulsory registration operates as public notice. Compulsory registration essentially pertains to interests in immovable properties and documents which are compulsorily registrable, which if not so registered do not affect rights in the immovable property and are inoperative. The Registration Act concerns documents and not the transaction. The Indian Registration Act concerns registration of a document and not the transaction. The Indian Registration Act does not deal with registration of company charges which is dealt with under the Companies Act.

The Registration Act provides for a method of public registration of documents so as to inform the public regarding legal rights and obligations arising and affecting particular properties and to perpetuate documents which may afterwards be of legal importance, and also to prevent fraud. Stamp laws by contrast are purely fiscal enactments; where as the Registration Act has a number of additional objectives such as conservation of evidence assurance of title, publicity documents, and preventing fraud. The Registration Act operates

in close proximity to the sphere governed by the Transfer of Property Act and Stamp Act, particularly since the Registration administration is authorized to impound inadequately stamped documents.

The Companies Act, which has also prescribed filing particulars of a company charge proceed on the doctrine of notice, as such charges are subject to public inspection, and constitute proof of creation of the charge against the Official Liquidator or receiver.

In so far as "charge" or security interests" created properly believed to be movable, but in fact immovable in nature, non–registration of documents can be fatal to the enforceability of the security transactions. Certain provisions of the General Clauses Act, 1963, also contain important definitional matters relating to description of "movable" and immovable "properties and to that extent need to be read with these legislations. If so far as transaction relating to lending by bank and financial institutions are concerned, the compulsorily registrable nature of certain types of mortgages and creation of security interests, is relevant. Moreover, priorities of different mortgagees and security, interest are also regulated by the Act, based on registrability and time of registration.

The registration procedures are archaic and lately computerization and microfilming and other mechanized mode of information storage are being implemented.

The rates of interest are regulated by money lending laws and laws of usury. Requirement to register as a moneylender in each state is quite normal and can affect the enforceability of a transaction.

- The information in relation to the nature of security over the assets of a corporate borrower have been explained above.

In addition, in relation to a debenture, the procedures in India contemplate that a debenture can be secured by a charge over immovable property created by either a legal mortgage or an equitable mortgage by deposit of title deeds. A debenture trust deed is executed which specifies the manner in which the agent and trustee acts on behalf of all the beneficiaries or holders of the debentures, convenes meetings of debentures holders and institutes legal proceedings on behalf of all the debenture holders. The right to institute legal proceedings is available to the debenture trustee and not to individual debenture holders.

As a trustee the debenture holder is obligated by law to take action. The Securities Exchange Board of India has also prepared rules and regulations for registration of a debenture trustee and for its duties, obligations and a code of conduct. Any breach of such obligations may result in a cancellation of the certificate to carry on the activity as a debenture trustee. It is only a registered debenture trustee, who can accept the role of an agent and trustee for debenture holders in relation to a publicly offered debenture.

Lenders in India are also known to avail of liens by way of negative liens where undertakings not to perform certain acts or dispose of shareholding or create a security in relation to some of the licenses and approvals or authorities are awarded. Statutory licenses are not transferable and only a negative lien

can, therefore, be taken by way of an undertaking. These forms are also common in India and are employed by financiers. Under the Transfer of Property Act the priority of charges are determined by either the suit where the mortgage is instituted or the company court where the claims are to be adjudicated.

A senior charge and a junior charge receive priority in accordance with the nature of the charge, the date of creation of the charge, the ceiling of charges, the upgradation of charges, *etc.* These are regulated by the terms of the charge and the registration of filings thereof.

ENFORCEMENT OF SECURITIES

- When a corporate borrower is in financial difficulties and a secured debt has become due, would it be usual or customary for a secured lender and/or the corporate borrower to attempt to negotiate a suitable arrangement for repayment and/or refinancing before the secured lender invokes legal enforcement methods?
- When a corporate borrower is in financial difficulty and a secured debt has become due, the secured creditor through its monitoring division normally invites the corporate borrower to propose a mode by which the accounts can be regularized and the delays in payment, or non-performance of the contractual obligations in relation to the financing agreements or the security documents in relation to the security are performed or regularized.

This would result in a novation of the schedule of payments or some of the terms and conditions of the financing agreements or the security agreements. It is also likely that the interest could be funded as a funded debt with a zero coupon rate, compound interest waived, penal interest waived and rescheduling of principle and interest done in a rearranged financing agreement.

Refinancing of secured lenders occurs only when one of the secured lenders in a consortium does not agree to continue with the lending and seeks to move out of the consortium. Refinancing, is rarely done by the same set of lenders unless there is an enhanced facility or an augmented project which is being done by way of balancing equipment being added or a new unit being added to achieve technical parameters.

In cases which are covered by Schedule-I of the Industries Development and Regulation Act, 1951, the Board of Industrial and Financial Reconstruction appoints an operating agency from one of the public financial institutions or the senior nationalized banks, to prepare a scheme of novation or arrangement whereby the banks could reschedule their debt or refinance the corporate borrower instead of enforcing their charges or liquidating the company.

The normal recovery procedures are available under the Code of Civil Procedure for enforcement of the contractual rights under a mortgage, hypothecation, pledge, lien, debenture trust deed, *etc.* For certain notified banks and financial institutions, the Recovery of Debts Due to Banks and Financial Institutions Act of 1993 is a summary remedy available. There are public money

recovery acts or State Financial Corporation Acts which are recoursed by the State Financial Corporations and banks for summary procedures for recovery of money claims secured by the corporate borrower.

SECURITIES

The various remedies available to security holders to enforce their securities under the law of this country are:

Private Sale

The right of private sale though a very limited remedy, is conferred on the mortgagee under certain circumstances mentioned in Section 69 of the Transfer of Property Act. The remedy is unavailable if any of the parties is a Hindu, Mohammedan or Buddhist or a member of any other race of a prescribed tribe. Further, the mortgaged property should be in a notified area and it is necessary for the mortgage deed to confer a power of sale. In any case, a notice to recall or demand of the outstanding is required. A mandatory statutory notice period of three months has also to expire before the power can be validly exercised. These procedures are usually set out in the documents of loan and security executed between the borrower and the power should usually be exercised with care so as to obviate any subsequent challenge on the grounds that the creditor did not act with care, or in breach of the law.

The procedure for the sale of realisation would involve and advertising for or inviting purchase bids in case of sale by public auction or may be conducted by private treaty if a suitable buyer is located. In the case of movable properties, the mortgagee creditor will give delivery of the property and pass title to the same extent that the mortgagor could do in exercise of such a power of sale. The same is usually adequate for conferring the ownership on the purchaser. In so far as the sale of immovable properties in exercise of a right of private sale is concerned, it would be necessary for the mortgagee to execute a conveyance/ deed of indenture duly stamped/registered for transferring title. The mortgagee will give only such covenant in relation to title as the mortgagee can give including, in respect of mortgagee's actions in the meanwhile.

The danger in exercise of this power is that the Defendant could challenge the right of sale on the ground that the same was improperly exercised and can further claim damages. Moreover, from a purchasers' point of view any Court sale in a mortgage action offers, (at least as a matter of perception), more certainty as to title and therefore also fetches the seller (mortgagee) a better price too.

Private Receiver

Section 69A of the Transfer of Property Act confers the power of appointing of a private receiver in an English mortgage. The person who is to be appointed as Receiver must be named in the mortgage deed, or an appointed as Receiver must be named in the mortgage deed, or an application needs to be made to the Court for such appointment. The powers of a private receiver are limited to

receiving income of the mortgaged property generally or in part thereof. A private receiver being an agent of the mortgagor as such, the mortgagor is liable for the receivers' acts and defaults, unlike in the case of a court receiver who, being an official of the Court, is not an agent of any of the parties. Nonetheless, the private receiver is technically accountable to the mortgagee rather then mortgagor. His powers are very limited and he is considerably disadvantaged by not being in a position to exercise wide powers conferred on a Court Receiver as prescribed under Order 40, Rule 1 of the CPC.

In the case of smaller loans and agricultural loans appointment of a private receiver can be subject to major impediments. There are also additional practical difficulties in the appointment of a private receiver and sale of the security. Diverse practical enforcement problems exist and generally, the experience has been that despite the power conferred by the mortgage documentation, it is difficult in practice to appoint a receiver or sell the security without the Court's intervention. In bank lending, this is largely due to the manner in which these powers are implemented in practice rather than the problem with the legislation itself.

One of the controversies which persists is whether the private receiver can sell without court intervention, the property hypothecated, to the mortgagee, if a specific power in that behalf is conferred. There is a division of opinion on this score, since there may be inadequate publicity and inadequate choice of purchasers. At any rate, care thus has to be taken whilst drafting the mortgage, hypothecation, debenture trust to ensure reservation in favour of banks and financial institutions, the right to appoint receivers who may, among other things, be empowered to dispose of the security realizing the dues.

In Indian conditions, lenders themselves appear to be reluctant to resort to their power to take possession of their collateral without court intervention.

In practice, some of the difficulties "perceived" by the lenders with reference to a private receiver are as follows:

- Lack of availability of persons to act as private receivers and fixing their remuneration,
- Even those which are available are inexperienced,
- Employee abuse, violence and harassment by labour
- Possibility of court actions against the lender by defendants contending that the private receiver has acted in excess of authority.
- Reluctance of law enforcement agencies such as the police to readily assist the private receivers in controlling unruly behaviour of taking possession. (Police authorities readily assist court appointed receiver)
- High fee of the receiver.
- Other co-lenders who may approach a court may obtain a court receiver, who would then immediately displace the private receiver.

On the other hand a Court Receiver has the advantage of:

- Court protection and backing
- The appointment is respected by the Borrower and its employees as also by third parties.

- The Court Receiver is an effective tool of a secured creditor when it seeks the appointment of Receiver, who will hold to the exclusion of official liquidator and remain outside the winding-up.
- Greater ability of the Court Receiver to seek police help
- Interference with the possession of a Court Receiver would be construed as interference with the possession of the courts since the property is custodian legis.
- Availability of existing institutions such as the Court Receiver attached to the Bombay High Court with experienced staff (unlike in the case of private receiver)

The Recovery of Debts due to Banks and Financial Institutions Act disappoints in as much as it does not even provide for the appointment of a receiver, nor is there any arrangement for preservation and realisation of the property. There is clearly a need for a provision in the legislation or, for the separate flotation of a corporation, conferring specialized receivership services, (much on the lines in Western countries). If such a body is state sponsored, its shareholding would probably be held by the financial institutions. In such a case conflict of interest would arise since, these institutions and banks would have cases pending with such bodies.

To sum up, a constructive and realistic re-look at the system of private receivers without intervention of courts is required, which needs some additional strengthening. It would, however, be a fair comment to state that the problems are as much a result of defective implementation as due to archaic legislation.

Sale by Pledge

A sale by a pledgee is possible only in respect of personal property. Typically, the pledge is in respect of tangible movable such as finished/semi-finished goods, shares and securities or items of machinery. The pledgee under Indian law has actual possession and not merely constructive possession as is in the case of a hypothecation. This right of the pledgee to sell the pledged security is reasonable effective in Indian conditions particularly in relation to the pledge of securities or goods which are otherwise easily disposable by sale. Under the Indian Contract Act, a notice by the pledgee to pledger of the intention to sell is mandatory, without which the can be declared invalid.

Special Remedies for Certain Specific Creditors

- *State Financial Corporation Act, 1951 (SFC Act)*: State Financial Corporation ("SFC") have certain special remedies in case their borrower (being an industrial concern) is in default in repayment of any loan, advanced or guarantee. Accordingly, the SFC shall have the right to take over the management or possession of the concern including the right to transfer the secured property by the lease or sale. This power is exercisable without the intervention of the Court. Under Section 31 of the SFC Act, if the borrower (an industrial concern) or a guarantor are in default in respect of any payment obligation towards the SFC then it

can apply to the Court for an order for the sale of the secured property, and for enforcement of the liability of any surety, for transfer of management of the concern to the SFC and also for injunctive reliefs restraining the concern from transferring or removing the plant and machinery. Section 32 of the SFC Act which has to be read conjuctively with Section 31 there of provides for a summary mode of trial with a show cause notice procedure being followed and also a hearing.

The court is empowered to aggregate and adjudicate upon the claim in accordance with the provisions of the Civil Procedure Code. After investigation, the Court may pass appropriate orders the legal effect of proceedings under Sections 31/32 of the SFC Act has been construed by the Supreme Court as constituting proceedings for speedy summary recovery but are not suit proceedings. Accordingly, the power of a court when deciding cases under Section 31/32 of the SFC Act cannot be extended for conferring reliefs in favour of other co-lenders, as can be done in a mortgage suit. A separate suit by pari passu lenders requires to be instituted.

- The Industrial Reconstruction Bank of India Act, 1984 (now renamed as Industrial Investment Bank of India)

The IRBI (Now IIBI) which set up under the IRBI Act (now IIBI Act) with a view to enable it to function as a principal credit and reconstruction agency for industrial revival, has been conferred certain special powers.

These special powers include the following:-

- Creation of a"declaratory charge' by operation of law (Section 37 of the IRBI Act;
- Power to take over the management or possession of the industrial concern and to transfer the same by way of lease or sale of the property secured (similar to Section 28 of the SFC Act);
- Enforcement of claims by approaching a court under a special petition (section 40 being similar to Sections 31 and 32 of the SFC Act),

- *Nominee Directors*: Some special powers are also conferred on some institutions including powers to appoint nominee directors, on the board of the borrower companies. Statutory DFI's such as IDBI, IRBI (now IIBI) are conferred such powers by law, whereas other non –statutory DLF's like ICICI, exercise this power as a matter of contract.

A secured creditor does not normally participate in a winding up. Under the rules of insolvency it has three rights:

- A secured creditor can remain outside winding up.
- A secured creditor can relinquish its security and participate in the winding up; or
- A secured creditor may value its security and offer the official liquidator to make payment for such valued security before placing the same in the hotch-pot and the secured creditor can then prove for the residue as an unsecured creditor in winding up.

It is only such a secured creditor which does not have a valid security or is short of security, which attempts a winding up of a corporate borrower. Winding up as an option rarely resorted to by a secured creditor as it normally prefers to remain outside winding up. Under Indian law and the Companies Act, workers statutory charge has also been created whereby the unpaid wages in arrears, also receive a prorated payment along with secured creditors. They statutorily participate in the security to the extent of unpaid wages till the date of winding up when they are discharged by operation of law. The official liquidator represents their interest in any security claim.

Presently there are moves a foot in India whereby fixed deposit holders and inter-corporate deposit holder where companies have raised deposits from the public, are to receive a statutory charge upto 15% of the receivables. The C.M. Vasudev Committee Report has made this recommendation to the Reserve Bank of India but no rules or law has yet been formulated for this purpose.

The procedure for recovery of monies through an ordinary civil suit or a mortgage suit is the institution of a plant with documentary evidence of the nature of the mortgage and the notice issued and the total statement of account duly certified is filed in the court of original jurisdiction or before the Debt Recovery Tribunal for notified banks and financial institutions.

Upon written statement being filed the amount is adjudicated. As interim measures in a civil suit a court receiver can take possession of the property so that the promoters or the Board can no longer interfere with the corporate properties and security of the secured lenders. In summary proceedings where the debt is attempted or where no advance is permitted to be filed or no leave to file a written statement is granted, a decree can be drawn up for the amount and execution proceedings can commence. In execution the assets against which the execution has to take place have to be ascertained. Where the security is enumerated in the mortgage this is comparatively easy but in those cases where the security is indeterminate or is a floating charge, the ascertainment of such security by a Commissioner or a receiver is required. In an unsecured claim which results in a money decree or an executable judgement, the judgement debtor is required to file a statement of assets against which the execution can proceed. Injunctions and attachments before judgement are also quite common under ordinary civil law.

Effectiveness of Judicial System

- How effective is the judicial or court system for the purpose of enforcing secured property rights?

The procedure under the judicial or Court system for the enforcing of security and recovery of debts is reflected in the filing of the recovery suits. The procedure is as follows:

Suit Procedure

Suit of a civil nature are filed in Civil Courts. Suits are required to be filed in the court having territorial and pecuniary jurisdiction over the subject matter in

accordance with established legal principles. Filing of suits entails the presentation of a plaint, in accordance with the forms generally prescribed under the code of Civil Procedure, 1908. The plaint is required to set out names, description and addresses of the parties, facts constituting the cause of action, facts showing that the court has Jurisdiction, reliefs sought and a statement of the value of the subject matter of the suit for the purpose of Jurisdiction and court fees. In actual practice may more details and facts are set out.

Before commencement of an action by way of a suit for recovery, it is usual to issue a demand notice recalling/demanding outstanding amounts.

Upon institution of the suit by filing the plaint and compliance with procedural requirements in the court's registry, summons is issued to the defendant to answers the plaint. In the case of summary suit, the form of the summons is different. The defendant is required to submit his defence in the form of a written statement before the returnable date of summons, complete discovery of documents including the process of inspection of documents Leave to defend is required to be granted in a summary proceeding. The law of discovery of documents including the process of inspection of documents. The laws of discovery are not as wide ranging as those in the Western Countries.

At the time of trial, the issues are framed, evidence recorded (oral and documentary) and usually, extensive verbal arguments are advanced. The Court would then record it s judgements accepting or rejecting the case of the plaintiffs.

Summary Suits

The summary procedure is prescribed under order 37 of the Civil Procedure Code, (CPC) for certain types of commercial actions. The summary procedure relates to recovery of dues on negotiable instruments, deeds (other then penalties) liquidated demands, arising on a written contract or under an enactment, and enforcement of guarantees (guarantee sums) on such debts and liquidated damages. Order 37 applies to all High Courts and City Civil Courts (including District Courts) the summary procedure is not applicable to suits involving the enforcement of a security and are applicable to a money suit or claim only. Mortgage suits continue to be governed by Order 34 of the CPC.

Accordingly, Order 37 has very limited utility to banks and financial institutions which have security and it is generally invoked only in respect of suits on guarantees or promissory notes. In a summary suit, (similar to provision s of Order 14 of U. K. Supreme Court practice) the right of the defendant to defend a suit is not automatic. The plaintiff is required to issue a 'summons for judgement" within a prescribed time frame. In reply thereto, the defendant may file an affidavit setting out reasons why the suit should be permitted to be defended.

It is only if the court comes to the conclusion that, "triable issues" arise or that the defendant has a real and substantial defence that leave to defend is granted. Usually, such leave is refused or conditional leave to defend is granted with the condition being that the defendant is required to deposit a sizeable

amount of the claim in court as a condition of being permitted to defend the action. In some cases, even unconditional leave to defend is granted if the defendant has cogent case. Summary suits generally operate on a faster time table than regular suit proceedings.

Suit for Enforcement of Security

Suits involving enforcement of security (whether on personal property or real property) form part of composite actions for recovery of the debts and for the enforcement of the security. The plaint would also contain suitable submissions and reliefs pertaining to the security. For mortgage suits, there are statutorily prescribed form in which a preliminary mortgage decree is to be passed, fixing a period of redemption during which the defendant may redeem the mortgage.

If not, a final mortgage decree would be passed extinguishing the equity of redemption. The reliefs sought in the suit would include those for enforcement of the mortgage, interlocutory reliefs (which would include appointment of a receiver, grant of an injunction against alienation of assets, attachment of receiver, grant of an injunction against alienation of assets, attachment before judgement, *etc.* In a mortgage suit, even if other pari passu lenders are not co-plaintiffs, they may be joined as formal defendants as the court has the power to ascertain and declare the correct amounts due in favour of each party who have an interest in the limitation for that party as a defendant, even though he can obtain a declaration. Suitable reliefs are therefore sought. It is also the practice, to seek interlocutory relief such as the appointment of court receiver, attachment before judgement of properties and even injunctive reliefs. These suits get blocked by the ingenious and often fraudulent defences propagated with substantial degree of success by the borrowers and their lawyers. The typical defences are as follows:

Typical Defences

Typical defences in suits filed by banks/financial institutions include:

- Objections to jurisdiction on territorial or pecuniary grounds or inadequate payment of court fee.
- A bar of limitation,
- Disputing the authority, of competence of official declaring the plaint.
- Improper computation of the statement of claim including application of incorrect interest rates (as periodic revisions of interest merely notified by the bank not having been approved bilaterally),
- Documents being incomplete by reason of defective execution or inadequate particulars and therefore being unenforceable.
- Security being invalid or unenforceable by reasons of inadequate stamping and for want of registration,
- Improper from of security for *e.g.*, security by way of hypothecation over what is in reality immovable property.

- Official liquidator impeaching the security on the ground that the charge is not registered in accordance with company law,
- Want of statutory approvals required for creation of security *e.g.*, ULCRA permission, approval under Income Tax, 1961 approval under Foreign Exchange Regulation Act, 1973 (where the lender is a non-resident),
- Bank having lost or parted with the security (bank's liability for negligence) and therefore a counter claim by the defendant against the Plaintiffs.
- Lender having been responsible for the sickness (or poor financial condition) of the borrower by reason of their the bank having committed various breaches of promise to lend or by virtue of excessive interference in the affairs of the bank or choking of working capital facilities leading to disruption of business and therefore causing losses.
- Surety claiming discharge, by material alteration in the guarantee or in direct negotiations by the bank with the principal debtor without the consent of surety.
- Surety claiming to be discharged by reasons of nationalization or Takeover of the principal debtor,
- Invocation of provisions of the SICA or Relief undertaking statutes in diverse states, which result in suspension of some aspects of the recovery action and execution, for a duration of time.
- Interest being questioned as being usurious.
- Exchange fluctuations being questioned as incorrect, and based on unfavourable.
- Liquidator questioning the rate of interest on the ground that it is penal,
- The scope and extent of the charge being questioned by other co- shares or banks and financial institutions questioning their respective securities.

The effectiveness of the suits is severely dented by the time frame involved.

Time Frame

Generally, the time frame with respect to suits is similar in most Courts, though it is possible that typical milestones in litigation may differ from court to court. A trial in the first instance usually takes 8 to 12 years to come up for hearing for the first time from the date of institution of the suit in most Courts. Presently, in the Bombay High Court the delay period for the first trial is about 12 –15 years.

Thereafter, an appeal is filed before a Division Bench of two judges of the High Court, a further period of 2 to 3 years at least is involved. If an appeal is filed before the Supreme Court thereafter (which is usually done if stakes are high), an additional delay of 10 to 12 years is clearly possible so that a delay of about 25 years from the date of original institution of a suit till final determination is usual.

There are exceptions and sometimes, suits are expedited for earlier hearing where a question of public importance is involved. On the other hand a further slippage of the above time table is possible and a suit may well take around 30 years to be ultimately disposed off by the Supreme Court.

In certain commercial cities such as Bombay, the position regarding suit filed by banks and financial institutions is slightly better, and not as depressing, under Chapter XV of the Bombay High Court Rules", commercial causes" are treated as a separate class of suits. Commercial causes, include causes arising out of ordinary transactions of merchants, bankers and traders whether of a simple or complicated nature" and include amongst others, "banking transactions". There is a separate trial list of commercial causes and, one judge is specially assigned to hear such cases. The court, may be in respect of such cases, and for the speedy determination of such suits also the time- table is somewhat faster. However, this kind of special treatment to commercial causes is not available in all courts.

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Aspects of Product Liability Law

Purchase of goods, by a person, for "commercial purpose" does not confer upon him the title of a "consumer", as defined under Section 2 (1)(d) of the Consumer Protection Act, 1986. The words "for any commercial purpose", as laid down in the definition clause, are intended to be wide enough to cover, within its ambit, all cases where goods are purchased for being used in any activity directly intended to generate profits.

The exception, as appended to the Explanation Clause of Section 2(1)(d), however, excludes goods bought and services availed for the purposes of earning livelihood by means of self-employment. For example, an EPBAX system was purchased by the complainant company for better management of its business. Owing to certain inherent defects in the system, it stopped working properly. It was held that the complainant company does not fall within the purview of the exception to the definition of "commercial purpose".

TWO IMPORTANT CURRENT TRENDS IN PRODUCT LIABILITY LAW

The laws relating to product liability, in India, have been constantly evolving, by way of judicial interpretations and amendments, to become one of the most important socio-economic legislations for the protection of consumers. The legislation, in respect of product liability in India, though was enacted to protect the interest of consumers but the same was, earlier, construed narrowly, thereby frustrating the object sought to be achieved. Recently the Courts adopted a pro-consumer approach and with this the trend has changed.

Indian Courts now have taken to awarding compensation and damages which are more punitive than compensatory in nature. In Wheels World vs. Pradeep Kumar Khurana, the complainant, a doctor by profession, complained to the respondent about deficiency in service in not repairing, free of charge, a technical fault, which occurred during warranty period, in his new Montana car and then not delivering the same for a period of 4 years. A sum of Rs. 30, 000/- with interest @ 18% per annum from 2/7/1988 to 7/5/1992, was awarded as compensation, in favour of the complainant for his suffering, both professionally and otherwise, on account of non availability of car for a period of 4 years. Further interest, at the same rate for the same period, was also awarded on an amount of Rs. 82, 000/-, being the price of the car as well as an amount of Rs. 55, 00/- towards costs and, last but not the least, an amount of Rs. 50, 000/, which was deposited by the Respondent on account of stay of imprisonment, was also awarded to the petitioner.

Now breakneck competition is rolling the market process, and consequently companies are adopting what the MRTP Act seeks to curb 'unfair trade practices'. The Courts, in an effort to curb such practices, in a plethora of cases, have held against companies making false representations, in advertisements and otherwise, for the purposes of selling its goods. In Proctor and Gamble Home Products Ltd, Hindustan Lever Ltd, the Commission restrained the company from making false, exaggerated and misleading claims about its "New Ceramides Sunsilk extra Treatment Shampoo". In a similar decision, in Hindustan Oil Co. case, the claim of the company that its cooking gas units, by use of kerosene, saved 30 percent against the LPG system was held to be false and misleading and, therefore, advertisement to that effect was restrained by the Commission.

At present, the Indian Consumer Law, in compliance with international obligations, comprehensively, provides for liability for defective goods and/or services as also for unsafe, hazardous and unfair trade practices. The Courts, too, with a view to effectively implement the enacted legislations, are adopting a constructive approach so as to bring effective harmonization of the enacted legislations and, thereby, according protection to consumers.

LIABILITY FOR MANUFACTURING OR DISTRIBUTING DEFECTIVE PRODUCT

The product liability law, in India, apart from the civil liability, also imposes criminal liability in case of non-compliance with the provisions of each of the below mentioned Acts. The said Acts are in addition to and not in derogation of any other laws in force, which implies that an action imposing penal liability can be simultaneously initiated along with a claim under civil law.

Criminal remedy for supply of defective product arises under various statutes, namely:

- The Foods Adulteration Act, 1954
- The Food Safety and Standards Act, 2006
- The Drug & Cosmetics Act, 1940

- The Indian Penal Code, 1860
- The Standards of Weights and Measure Act, 1976

Each of the aforesaid Acts provides for imposition of fine and/or imprisonment in case of supply of defective products or adulterated consumables.

The Food Safety and Standards Act, 2006 is the most recent legislation which comprehensively deals with food and safety standards which are to be complied with by manufacturers and producers, non-compliance of which imposes a liability, upon defaulters, of fine, extending upto Rs. Ten Lakhs and/or imprisonment.

On the other hand, the provisions of Indian Penal Code, in respect of product liability, are attracted when the element of cheating and fraud can be attributed to such defects. For example, in the case of Smt.

Uma Deepak vs. Maryti Udyog Ltd. & Ors, the Complainant alleged that the car sold by the opposite party was not only accidental but the price, for the same, was also overcharged. The Court, in response to the allegations made by the complainant, directed arrest of the Directors as well as the manager of the dealers/agents who sold the said defective car to the complainant and remanded them to judicial custody. Subsequent thereto, the said officers of the opposite party were released on bail and were directed to replace the disputed car with a new car.

The provisions of The Standards of Weights and Measures Act, 1976 are attracted in case of any false packaging, weight or measure which does not conform to the standards established by or under the said Act.

Owing to the principle of "strict liability", the element of mens rea is not to be considered, in determining criminal liability, under each of the aforesaid laws.

The Supreme Court in the case of Sarjoo Prasad Vs State of Uttar Pradesh, pointed out that "mens rea" in same state of a guilty knowledge of adulteration of food is not necessary to be proved for an offence under the Food and Adulteration Act, 1954.

ACTIONS TAKEN IN RESPECT OF MARKETING AND SALE OF DEFECTIVE PRODUCTS

The Consumer Dispute Redressal Forum and the MRTP Commission are the competent authorities for adjudicating and deciding matters pertaining to product liability. Since the Consumer Forum is vested with the power of awarding compensations and damages in cases of defects in products, the complainant can pray for replacement of defective product, as well as compensation and damages before the said authority.

The said forum, however, does not have the jurisdiction to restrain or direct, by way of injunction or otherwise, any party from carrying on any activity in any manner. The power in respect thereof, however, is vested with the MRTP Commission. An aggrieved party can, for the purpose of restraining a practise which is unfair or monopolistic, take recourse to the MRTP Commission for a

direction to that effect. Before the Consumer Forum and the MRYP Commission, the aforesaid actions are independent of each other and therefore they can be initiated simultaneously.

Last but not the least, a criminal action, simultaneously, can also be initiated against supply of defective product if a prima facie case is established to show elements of cheating and fraud.

A criminal action under the Food and Adulteration Act and The Food Safety and Standards Act, 2006 shall lie if the consumable is adulterated or is, otherwise, not as per the standards laid thereto.

Criminal liability for manufacturers and producers of medicinal products or cosmetics etc, which do not adhere to the prescribed standards, is provided for by the Drugs and Cosmetic Act, 1940.

A consumer association, on behalf of aggrieved consumers, where there is more than one, can directly approach the Consumer Forum for the redressal of disputes pertaining to supply or manufacturing of defective product and the MRTP, as well, for bringing to the notice of the Commission trade practices which are monopolistic or unfair.

INJURED PERSONS JOINING TOGETHER TO BRING A SINGLE CLAIM

Section 12 of the Consumer Protection Act, 1986 expressly provides for filing of consumer complaints by consumer associations as well as a single complaint by one or more consumers. It states that:

- A complaint in relation to any goods sold or delivered or agreed to be sold or delivered or any service provided or agreed to be provided may be filed with a District Forum by-
  - …….
  - Any recognized consumer association whether the consumer to whom the goods sold or delivered or agreed to be sold or delivered or service provided or agreed to be provided is a member of such association or not;
  - One or more consumers, where there are numerous consumers having the same interest, with the permission of the District Forum, on behalf of, or for the benefit of, all consumers so interested;
  - The Central or the State Government, as the case may be, either in its individual capacity or as a representative of interests of the consumers in general.

The Explanation, as appended to section 12, defines "recognised consumer association" as any voluntary consumer association registered under the Companies Act, 1956 or any other law for the time being in force.

The MRTP Act too, under Section 36-B, provides for filing of a complaint by any trade association or a consumer or a registered consumers association, irrespective of the consumer being a member of that consumers association.

REQUIREMENT TO NOTIFY AUTHORITIES IN RESPECT OF POTENTIAL SAFETY DEFECTS IN CONSUMER PRODUCTS

The standardization law in India is governed by:

- The Bureau of Indian Standards Act, 1986 (hereinafter referred to as "BIS"),
- Agmark Grading and Standardisation under Agricultural Produce (Grading & Marking) Act, 1937 (in respect of agricultural commodities) and The Food Safety and Standards Act, 2006.

The mandatory requirement of notifying safety standards is with respect to food items under The Food Safety and Standards Act, 2006 only. There is, however, no mandatory requirement of such notification under the BIS and Agmark Grading and Standardisation under Agricultural Produce Act, 1937, but, if a manufacturer/producer is desirous to grade their commodities under Agmark or BIS, they have to obtain Certificate of Authorisation or Certification Mark, respectively. Since the said certifications acknowledge the safety and health standards in a product, majority of manufacturers/producers, therefore, certify their products under the aforesaid Acts.

It is made obligatory by the Food Safety and Standards Act 2006 for the Food Authority to regulate and monitor the manufacture, processing, distribution, sale and import of food so as to ensure safe and wholesome food. The said Authority clearly sets out standards which are to be maintained with respect to food items and non-adherence of the same makes the defaulter liable to imprisonment and exorbitant fine. A similar legislation, namely the Fruit Products Order, 1955 enacted under the Essential Commodities Act, 1955, supplements the Food and Safety Act and, inter alia, sets out quality standards, in relation to fruit products, sweetened aerated water, *etc.*, as also sanitary requirements of factory manufacturing fruit products.

On the other hand, quality standards for agricultural commodities are set out by the Agmark system. Then this system sets out this standard, they considered their intrinsic quality as the basis. Standards are harmonised with international standards keeping in view the WTO requirements. Certification of agricultural commodities is carried out for the benefit of producer/manufacturer as well as the consumer. While Certification of adulteration prone commodities viz. Butter, Ghee, Vegetable Oils, Ground-Spices, Honey, Wheat Atta, *etc.*, is very popular, blended edible vegetable oils and fat spread, on the other hand, are compulsorily required to be certified under Agmark.

Under the BIS Act, such specification which hints at the nature, quality, strength, purity, composition, quantity, dimensions, weight, grade, durability, origin, age, material, mode of manufacture, or other characteristic which distinguishes it from any other article or process, shall be applied to any substance, artificial or natural, or partly artificial or partly natural, whether raw or partly or wholly processed or manufactured. The BIS offers numerous certification schemes, like the Product Certification Scheme, whereby

manufacturers of products interested in producing their products as per relevant Indian Standards are permitted to use the Standard Mark of the Bureau (the popular ISI mark) on their products after obtaining a licence from the Bureau.

The manufacturer possessing the necessary manufacturing and testing facilities for the product as also follow the quality assurance scheme of the Bureau, in addition to payment of necessary fees as stipulated is the pre-requisites for obtaining a licence. The scheme, though, is voluntary in nature but, the government has made ISI marking compulsory for about 136 products which affect the health and safety of consumers or are products of mass consumption like LPG Cylinders, Food Colours and Additives, Cement, Packaged Drinking Water, *etc.*. Yet another scheme is the Certification for Indian Importers, wherein, the Government has stipulated compulsory approval, form BIS, for certain category of products before they are imported into India.

The Agmark, on one hand, aims at promotion of Grading and Standardisation of agricultural and allied commodities, and whereas, the BIS provides for standardisation, marking and quality certification of goods, in general. Both the Acts, however, empower the authorities to search and seize goods which, inspite of obtaining certification, do not confirm to the prescribed standards, as well as those for which certification has not been obtained and such marks, as to quality and standard, have been falsely applied. The Acts also provide for imprisonment and/or fine for non-adherence of any of the provisions contained therein.

TWO ILLUSTRATIVE PRODUCTS RECALLS HIGHLIGHTING A PARTICULAR FEATURE OF PRODUCT LIABILITY LAW

There was a public outrage when an independent NGO, by the name of Centre for Science and Environment (CSE), alleged against cola giants 'Pepsi' and "Coca-Cola" that their soft drinks contained pesticide residues and were, thus, hazardous and not safe. It was a case which blew the lid off the matter when it released a report on pesticide residues in 12 major cold drink brands sold in and around Delhi. That regulations for pesticide levels in soft drinks are weak in the country was pointed out by CSE.

Neither the Prevention of Food Adulteration Act, 1954, nor the Fruit Products Order explicitly deals with the subject. The study also highlighted the fact that India has no standards to define "clean" or "potable" water, and asked the Union government to put in place legally enforceable water quality norms. The expose sent Coca-Cola and Pepsi-Co, whose products were found to be contaminated, into a tizzy. Even an unprecedented joint press conference was addressed by the two archrivals and they rejected CSE's findings.

On August 22, 2003, the Union Government tabled a motion in the Lok Sabha for the constitution of the committee. Significantly, it was the first ever Joint Parliamentary Committee (JPC) to have been constituted on a public health issue in post-independence India.

It was required by the committee's terms of reference to ascertain the veracity of CSE's study. The terms of reference also suggested criteria for evolving suitable standards for soft and other beverages. After almost six months of deliberation, during which parties-including CSE and the cola companies-were heard out, the panel presented its report in parliament on February 4, 2004. It lauded the organisation's effort to draw attention to issues concerning public health, concluding that.." CSE stands corroborated on its finding pesticide residue in the carbonated water".

In view of the finding of the Committee, the State Government, in some States, directed the said brands to withdraw their entire stock of aerated drinks from various schools in certain parts of the country.

In the case of Cadbury India Ltd vs. L. Niranjan, the complainant purchased a Cadbury chocolate for presenting it as a birthday gift. Unfortunately, when the said chocolate was opened, it was found that chocolate was infested with worms and fungus.

As it was a birthday party, the situation became unpleasant. He, therefore, approached the District Forum, Bangalore for compensation.

The District Forum, on basis of the application filed by the complainant, sent the product to the Public Health Institute analysis and the report was obtained. Its being infested with worms was depicted by the report.

Pursuant to the finding of the Public Health Institute, Cadbury was directed to take all precautions that unauthorized persons do not carry out the business of selling such perishable articles which may become hazardous for the health, if not properly preserved. In compliance of the directions of the Court, Cadbury withdrew all its stock from the market and also supplied refrigerators to all its retailers so that the chocolate can be preserved for a longer time and does not become unfit for human consumption after a certain period. It was held further by the court that, not only the Local Authority should take action and verify such chocolates but also it is the duty of the manufacturer that such things do not occur.

If a manufacturer or supplier does not have premises or employees based in your country, but its products are sold there, is it still at risk of facing civil claims there? In what circumstances?

The jurisdiction of a Court, under Section 11 of the Consumer Protection Act, is decided:

- Where the opposite party, actually and voluntarily, resides or carries on business or has a branch office or personally works for gain, or
- ……
- Cause of action, wholly or in part, arises.

If a manufacturer or supplies does not have a branch office in India, but its products are being sold in India, then, in accordance with clause a) and c), as aforementioned, such manufacturer or supplier will be liable under the applicable law.

Yet another enabling provision which would, inspite of the manufacturer/ supplier not having a branch office in India, vest jurisdiction in a Court in India is Section 14 of the MRTP Act, which states, as under

Section 14: Orders where party concerned does not carry on business in India

Where any practice substantially falls within monopolistic, restrictive, or unfair, trade practice relating to production, storage, supply, distribution or control of goods of any description or the provisions of any services and any party to such practice does not carry on business in India, an order may be made under this Act with respect to that part of the practices which is carried on in India.

LIABILITY SYSTEMS

What systems of product liability are available (*i.e.*, liability in respect of damage to persons or property resulting from the supply of products found to be defective or faulty)? Is liability fault based, or strict, or both? Does contractual liability play any role? Can liability be imposed for breach of statutory obligations *e.g.*, consumer fraud statutes?

In India, there is no special statute, which deals with product liability related claims.

Product Liability claims may, however, be made under:

- The Consumer Protection Act, 1986 (the "CPA");
- The Monopolies and Restrictive Trade Practices Act, 1969 (the "MRTP Act");
- Common law principles for negligence, *etc.*; and
- Breach of contract.

(i) It was to adjudicate claims of consumers for any 'defect' in goods that Consumer Forums at the District, State and National level have been specifically constituted under the CPA. A 'defect' has been defined as meaning "any fault, imperfection or shortcoming in the quality, quantity, potency, purity or standard which is required to maintained by or under any law for the time being in force or under any contract, express or implied, or as is claimed by the trader (which includes the manufacturer) in any manner whatsoever in relation to any goods."

However, persons/entities who had purchased goods for 'commercial purpose' (other than those persons who have purchased goods for using them to earn their livelihood by means of self employment) are excluded from the scope of CPA; they cannot institute proceedings under the CPA even if there is any 'defect' in the goods purchased by them for using the goods for commercial purposes. The jurisdictional Consumer Forum, on arriving at a finding of defect in goods, may direct one or more of the following:

- To remove the defect;
- To replace the goods with new goods of similar description which shall be free from any defect;
- To return to the complainant the price;
- To pay such amount as may be awarded as compensation to the consumer for the loss or injury suffered by the consumer due to the negligence of the opposite party;
- To discontinue the unfair trade practice or the restrictive trade practice or not to repeat them;
- To cease and desist manufacture of hazardous goods;
- To pay such sums as orders if injury/loss is suffered by a large number of consumers not identifiable conveniently;
- To issue corrective advertisement for neutralizing effect of misleading advertisement;
- Not to offer the hazardous goods for sale;
- To withdraw the hazardous goods from being offered for sale;
- To provide for adequate costs to parties (the Complainant).

Till date the Supreme Court has not made a clear pronouncement on whether the liability under the CPA is strict or fault based. However, failure to conform to the standards required under any law, contract or representations of the trader are sufficient to constitute a defect. Furthermore, under Section 14 of the CPA as explained hereinabove, it is only the remedy of compensation that requires the claimant to necessarily prove negligence. In the case of Abhaya Kumar Panda vs. Bajaj Auto [(1991) 2 CPJ 644], the Orissa State Commission directed repair of the goods, even though there was no intentional defect. Consumer forums may thus not accept the defence of negligence.

Under the CPA, contractual liability has a role to play in product liability claims. Courts in India have upheld limitation of liability clauses, which parties have specifically agreed to in the contract (see judgment of Supreme Court in Bharathi Knitting Company vs DHL Worldwide Express Courier (1996) 4 SCC 704). However, such clauses may be struck down if found to be unconscionable in nature.

(ii) An MRTP Commission has been established by the MRTP Act. MRTP Commission has the power among others to enquire into 'unfair trade practices'. With reference to goods, the "false representation that the goods are of a particular standard, quality, quantity, grade, composition style or model", would constitute an unfair trade practice ("UTP").

In such a case, the MRTP Commission may direct:

- Discontinuation of the UTP;
- Declare void or modified any agreement relating to the UTP; and
- Any information, statement or advertisement relating to such UTP shall be disclosed, issued or published. In addition, compensation may also be awarded for any loss or injury suffered in respect of the UTP.

(iii) According to the principles of common law, provided it is shown that there was breach of a duty to take care, and injury or loss has resulted from such breach, claims for negligence may be brought. In case of defective products, claims may also be brought against suppliers, in addition to the manufacturer, if fault can be attributed to such suppliers.

(iv) It is the terms of the contract that the liability, in cases of contract, would depend on. As the rule of privity of contract applies in India, the manufacturer of defective products would be liable only if he is a party to the said contract.

Who bears responsibility for the fault/defect? The manufacturer, the importer, the distributor, the "retail" supplier or all of these?

Any person who trades in the goods, including a manufacturer may, under the CPA, be held liable. Thus, proceedings may jointly be initiated against a manufacturer, distributor and a retail supplier of the goods. In a case of a manufacturing defect, where proceedings were initiated against the manufacturer and the distributor, but the defect was attributable to the manufacturer, the Supreme Court held that the manufacturer alone would be liable and not the distributor.

However, this decision is not an authority for the proposition that the manufacturer alone would be liable. A distributor or retail supplier may also be made liable on the ground that he had warranted that the goods are free from defects. In cases of a UTP before the MRTP Commission, the person making the false representation qua the goods would be liable. In case of a common law action for negligence, the negligent party would be liable. It is the party committing the breach that the liability for breach of contract would fall upon.

In what circumstances is there an obligation to recall products, and in what way may a claim for failure to recall be brought?

No specific statutory provisions are available in India whereby defective products may be recalled, except with respect to hazardous goods. The CPA provides that the jurisdictional Consumer Forum may direct withdrawal of hazardous goods from being offered for sale.

Do criminal sanctions apply to the supply of defective products?

There is no imposition of criminal sanctions for the supply of defective products per se. However, sector or product specific statutes with respect to products such as drugs, cosmetics, food etc impose criminal sanctions for any defects in the products. In addition, the affected party can file a complaint alleging criminal negligence; however, the degree of proof is strict in case of criminal proceedings and the onus would be on the complainant.

CAUSATION

Who has the burden of proving fault/defect and damage?

Such burden is on the claimant: What test is applied for proof of causation? Is it enough for the claimant to show that the defendant wrongly exposed the

claimant to an increased risk of a type of injury known to be associated with the product, even if it cannot be proved by the claimant that the injury would not have arisen without such exposure?

Determination of causation in India is done on the basis of the 'but-for test' as evolved in England. The 'but-for test' means that if the damage would not have resulted but for the defendants wrongful act, it would be taken to have been caused by the wrongful act. Conversely, if the damage would have happened just the same, wrongful act or no wrongful act, then the defendant would not be liable. Such a test is conducted on the basis of balance of probabilities.

What is the legal position if it cannot be established which of several possible producers manufactured the defective product? Does any form of market-share liability apply?

So far, in India no market share liability principle has been considered or evolved. Under the CPA and the MRTP Act, it is not the manufacturer alone who may be proceeded against for the defect in a product. There may be an implied if not express warranty on the supplier of the defective products, that the goods are free from defects. Failure to comply with warranty may invite orders for removal of the defect or replacement of the goods.

It is necessary to establish in actions for negligence that the damage has been caused by the defendant. However, Courts in India have held that where the Plaintiff is unaware as to which of two or more persons is liable, he may call both for an explanation. If the defendants are unable to explain, an adverse inference may be drawn against them, holding them liable. In such a situation it may be held by courts that the defendants are jointly and severally liable for the damage.

Does a failure to warn give rise to liability and, if so, in what circumstances? What information, advice and warnings are taken into account: only information provided directly to the injured party, or also information supplied to an intermediary in the chain of supply between the manufacturer and consumer? Does it make any difference to the answer if the product can only be obtained through the intermediary who owes a separate obligation to assess the suitability of the product for the particular consumer, *e.g.*, a surgeon using a temporary or permanent medical device, a doctor prescribing a medicine or a pharmacist recommending a medicine? Is there any principle of "learned intermediary" under your law pursuant to which the supply of information to the learned intermediary discharges the duty owed by the manufacturer to the ultimate consumer to make available appropriate product information?

There has been no imposition of any specific obligations regarding providing sufficient warnings with respect to products in the CPA or the MRPT Act. However, product specific legislations require certain warnings to be stated on the product labels such as foods, insecticides, *etc.*

Liability may arise out of failure to warn, if it can be shown that the manufacturer or the supplier was under an obligation to warn of defects, latent or patent. Such an obligation would be inferred from the facts and circumstances

of any given case. The Supreme Court in Rajkot Municipality Corporation vs Manjulben Jayantilal Nakum, (1997) SCC 552, has observed that in cases of a nonfeasance (which may include an omission to inform) several factors would have to be considered and the matter was examined in detail.

However, where a complainant has by his acts created a danger or is in the know of a defect, then the duty of care would include the duty to warn. The provision of all information supplied to any purchaser of a product would be ascertained to see whether it is false. In the event the information provided is false, it would constitute a UTP, for which appropriate relief as stated above may be awarded by the Consumer Forums and the MRTP Commission.

India has not yet seen any evolution of learned intermediary. General principles of negligence would therefore govern such situations where information is provided to an intermediary and not to the ultimate consumer. The requisite duty of care as inferred from the facts and circumstances of the case would determine the liability of a manufacturer and an intermediary in such cases.

DEFENCES AND ESTOPPEL

A purchaser buying goods for a commercial purpose or for resale cannot make any CPA claim. Courts in India have also upheld limitation of liability clauses whereby manufacturers/suppliers may limit their liability. No specific defences have been prescribed in the CPA or the MRTP Act. However, except in situations where Courts infer a situation of strict liability, defences applicable in the law of negligence such as the lack of any duty, contributory negligence etc would continue to be applicable.

Is there a state of the art/development risk defence? Is there a defence if the fault/defect in the product was not discoverable given the state of scientific and technical knowledge at the time of supply? If there is such a defence, is it for the claimant to prove that the fault/defect was discoverable or is it for the manufacturer to prove that it was not?

There is no state of the art/development risk defence that has been statutorily enacted or judicially developed in India. However, the defence would be relevant where fault is sought to be attributed to the manufacturer/supplier, *etc.*

Is it a defence for the manufacturer to show that he complied with regulatory and/or statutory requirements relating to the development, manufacture, licensing, marketing and supply of the product?

The manufacturer/supplier would be assisted by compliance with regulatory and/or statutory requirements in establishing that it has exercised due and reasonable care. However, whether it serves as a valid defence would depend on the facts of each case. Further, in a CPA or an MRTP claim, if the "defect" stems from a misrepresentation made by a manufacturer/supplier to consumer/ purchaser, of standards higher than those required by any statute, such claims would still be maintainable. In cases of breach of contract, the terms of the contract would determine whether liability if any accrues.

Can claimants re-litigate issues of fault, defect or the capability of a product to cause a certain type of damage, provided they arise in separate proceedings brought by a different claimant, or does some form of issue estoppel prevent this?

The re-litigation of issues arising between the same parties is barred by the doctrine of res judicata. It is not applicable to separate proceedings, by different claimants. Concept of 'class action' has not evolved in India, therefore even if a large number of persons affected institute a 'class action' a decision in such 'class action' would not bind others similarly situated, if they are party to the 'class action. Therefore, the principle of res judicata would apply only to persons who had instituted proceedings, previously.

The decision in the previous proceedings may serve as a precedent in the subsequent proceedings. However, it would be open to the parties to contend that the precedent is distinguishable, has applied an incorrect principle of law, is in violation of applicable procedural law, or that there is new evidence to prove or repudiate the claim of a defect, or that the earlier decision is vitiated by an abuse of process or fraud, *etc.*

Precedents delivered by the higher Court is binding on subordinate Courts and in case of precedent by a coordinate Court, it has only persuasive value.

Can defendant's claim that the fault/defect was due to the actions of a third party and seek a contribution or indemnity towards any damages payable to the claimant, either in the same proceedings or in subsequent proceedings? If it is possible to bring subsequent proceedings is there a time limit on commencing such proceedings?

The answer is an emphatic 'yes'. It is open to the defendant, to contend that a third party is liable and make him a party to the proceedings. Where proceedings were initiated against the manufacturer and the dealer for a manufacturing defect under the CPA, the Supreme Court [Hindustan Motors vs N. Siva Kumar, (2000) 10 SCC 654] held that the manufacturer alone would be liable as he was responsible for the defect. However, in a subsequent case wherein a CPA claim was made towards a defective car, the Supreme Court [Jose Phillip Mampillil vs Premier Automobiles, (2004) 2 SCC 278] held that both the manufacturer and the dealer were jointly and severally liable for the defect as the dealer should have refused to deliver a defective car. It was held herein that the dealer may claim reimbursement from the manufacturer it were entitled to so claim in law.

Subsequent proceedings will have got to make such claims. Moreover, the CPA and MRTP Act do not entertain such claims of reimbursement. They would have to be made in courts of civil judicature. Such claims would have to be brought within a period of three years from the date of award of relief to any purchaser of defective goods.

Can defendants allege that the claimant's actions caused or contributed towards the damage?

Yes. However, such defences would not apply in cases where principles of strict liability apply, *i.e.*, where the goods are inherently dangerous, *etc.*

PROCEDURE

Is the trial by a judge or a jury?

India has no jury system. All trials are conducted by judges, based on pleadings, appreciation of evidence led by parties and based on the provisions of law and binding precedents.

Does the court have power to appoint technical specialists to sit with the judge and assess the evidence presented by the parties (*i.e.*, expert assessors)?

It is the nature of Indian courts not to appoint technical specialist to sit with the judges to assess the evidence.

They play no judicial role. However, they may be appointed to assist the Court where their technical skill and expertise is required to arrive at an informed decision. Their evidence may be received on affidavit or they may appear before the courts as expert witnesses to testify on the basis of their knowledge as experts in the concerned field.

Typically in CPA claims, where a claimant alleges a defect which cannot be determined without a proper analysis or test of the goods, a sample of the defective goods is sent to a Government designated laboratory which in turn provides its report to the Consumer forum.

Is there a specific group or class action procedure for multiple claims? If so, please outline this. Are such claims commonly brought?

The provisions of Order 1 Rule 8 of the Civil Procedure Code, 1908 (procedure code for civil action including action under common law) while being applicable to Civil Courts have also been made applicable to the Consumer Forums and the MRTP commissions.

As per the said provisions, where there are numerous persons having the same interest in the dispute, one of such persons may with the permission of the Court sue on behalf of all persons so interested.

Courts in India have also evolved the concept of Public Interest Litigations ("PILs") whereby any person in public interest may either approach the High Courts or the Supreme Court seeking relief on behalf of the affected persons. However, such claims are usually made against public authorities. Courts in India have in a few cases awarded relief under PILs against private parties invoking the principles of strict and absolute liability where inherently dangerous goods were involved.

Can claims be brought by a representative body on behalf of a number of claimants *e.g.*, by a consumer association?

CPA and MRTP claims may be made by consumer associations that are registered under the Companies Act or any other law in force in India.

How long does it normally take to get to trial?

It generally takes between one and four years for CPA and MRPT claims to decide. However, time frames would depend more so on the complexity of the case as well as the conduct of the parties. Disputes before civil courts generally take four to six years to decide.

Can the court try preliminary issues, the result of which determines whether the remainder of the trial should proceed? If it can, do such issues relate only to matters of law or can they relate to issues of fact as well, and if there is trial by jury, by whom are preliminary issues decided?

Yes. Preliminary issues can be raised on questions of law.

What appeal options are available?

One appeal, in CPS claims, is allowed against each order. Appeals from the District Forum lie to the State Commission and from the latter to the National Commission. In addition, on a question of law, a Revision petition is maintainable before the National Commission, in respect of a case originally decided by District Forum. Appeals against the orders of the National Commission may be made to the Supreme Court. It is before the Supreme Court that appeals against the orders of the MRTP Commission lie.

Depending on the pecuniary limit, appeals may be made against orders of the Civil Court to a higher Civil Court. Thereafter, to a High Court and ultimately the Supreme Court, however appeals to High Court and Supreme Court would be maintainable, only if a question of law is raised and not on appreciation of evidence or facts.

Does the court appoint experts to assist it in considering technical issues and, if not, may the parties present expert evidence? Are there any restrictions on the nature or extent of that evidence?

See the second question above in this section.

Are factual or expert witnesses required to present themselves for pre-trial deposition and are witness statements/expert reports exchanged prior to trial?

Either of the parties, during trial, may call expert witnesses to depose. Witness statements if any are recorded in open court. They are not exchanged prior to the trial. If any expert report is submitted to the Court, a copy of that is submitted to the other parties involved in the proceedings.

What obligations to disclose documentary evidence arise either before proceedings are commenced or as part of the pre-trial procedures?

The complainant is required to produce all documents at the time of instituting proceedings, which it sues or relies upon, and which are in its possession or power. Such documents are enumerated in a list of documents and submitted to the Court, with a copy thereof. However, additional documents can be filed at a later stage, with the permission of the Court.

TIME LIMITS

Are there any time limits on bringing or issuing proceedings?

See the next question.

If so, please explain what these are. Do they vary depending on whether the liability is fault based or strict?

Does the age or condition of the claimant affect the calculation of any time limits and does the Court have a discretion to disapply time limits?

Per Section 24-A of the CPA, claims must be brought within two years from the date on which the cause of action arises. Claims under MRTP Act, of negligence and breaches of contract must be brought within a period of three years.

To what extent, if at all, do issues of concealment or fraud affect the running of any time limit?

Explanation of delay would find valid grounds on concealment and fraud. Further Section 17 of the Limitation Act, 1963 provides that the limitation period for any civil action or application begins to run from the date of discovery of the fraud, and in the case of a concealed document from the date the complainant or the applicant had the means of producing or compelling the production of the concealed document.

DAMAGES

What types of damage are recoverable *e.g.*, damage to the product itself, bodily injury, mental damage, damage to property?

Law has no specific statutory prescription of recoverable damages. However, courts in India may award damages towards:

- The actual pecuniary loss sustained;
- The indirect pecuniary loss such as loss of profits, *etc.*;
- Value of time loss if applicable;
- Mental agony, suffering if any; and
- Bodily suffering, if any.

Can damages be recovered in respect of the cost of medical monitoring (*e.g.*, covering the cost of investigations or tests) in circumstances where the product has not yet malfunctioned and caused injury, but it may do so in future?

The history of Indian courts has not so far known any court in the country to have been confronted with such an issue of damages in respect of any product per se where a product has not yet malfunctioned but may cause injury in future.

However, in the case of Union Carbide Corporation, *etc.* vs Union of India [(1991) 4 SCC 584], the Supreme Court was confronted with a challenge to the settlement arrived at between the Union of India and Union Carbide Corporation for compensation to the victims due to the leak of Methyl Isocyanate (MIC) which was toxic in nature.

One of the grounds of challenge was the terms of settlement did not take into account compensation towards medical monitoring and surveillance for a large section of the population for whom the diseases would still be asymptomatic but likely to become symptomatic later having regard to the character and the potentiality of the risks of exposure.

The Supreme Court directed Union Carbide Corporation to bear the expenses towards setting up of a specialised medical and research equipment for the people of Bhopal (the affected region) exposed to the MIC for ensuring medical surveillance by periodical medical check up for gas related afflictions. Courts

in India, therefore, may award damages towards the costs of medical surveillance. Before awarding damages the courts observe the nature of the damage and the product involved.

Are punitive damages recoverable? If so, are there any restrictions?

Punitive damages are recoverable. No specific restrictions have been prescribed but they are awarded in order to punish the wrong doer and generally so in situations where the conduct of the wrong doer has been oppressive, arbitrary, malicious, *etc.*, or calculated to make a profit over and above the compensation payable to the aggrieved. Punitive damages are rarely seen in Indian courts.

Is there a maximum limit on the damages recoverable from one manufacturer *e.g.*, for a series of claims arising from one incident or accident?

There is no such limit.

COSTS/FUNDING

Can the successful party recover:

- Court fees or other incidental expenses;
- Their own legal costs of bringing the proceedings, from the losing party?

Courts in India have the power to award costs towards court fees and other legal costs. The quantum of costs to be awarded is left to the Courts discretion.

Is public funding *e.g.*, legal aid, available?

Legal aid in the form of free legal services is available under the Legal Services Authority ("LSA") Act, 1987.

If so, are there any restrictions on the availability of public funding?

Only persons specified in Section 12 of the LSA Act are entitled to legal aid, provided that the concerned authority is satisfied that such person prima facie has a case to prosecute or defend.

The persons entitled to legal aid are listed below:

(a) A member of a Scheduled Caste or Scheduled Tribe;
(b) A victim of trafficking in human beings or beggar as referred to in Article 23 of the Constitution;
(c) A women or a child;
(d) A mentally ill or otherwise disabled person;
(e) A person under circumstances of undeserved want such as being a victim of a mass disaster, ethnic violence, caste atrocity, flood, drought, earthquake or industrial disaster;
(f) An industrial workman;
(g) In custody, including custody in a protective home within the meaning of clause (g) of section 2 of the Immoral Traffic (Prevention) Act, 1956 (104 of 1956), or in a juvenile home within the meaning of clause (j) of section 2 of the Juvenile Justice Act, 1986 (53 of 1986), or in a psychiatric hospital or psychiatric nursing home within the meaning of clause (g) of section 2 of the Mental Health Act, 1987 (14 of 1987); or

(h) In receipt of annual income less than rupees nine thousand or such other higher amount as may be prescribed by the State Government, if the case is before a court other than the Supreme Court, and less than rupees twelve thousand or such other higher amount as may be prescribed by the Central Government, if the case is before the Supreme Court.

Is funding allowed through conditional or contingency fees and, if so, on what conditions?

No. Conditional or contingency fee is not permitted in India.

UPDATES

Please provide, in no more than 300 words, a summary of any new cases, trends and developments in Product Liability Law in your country.

The CPA in its Section 3 has the provision that the Act is in addition to and not in derogation of any other law. The Supreme Court in Secretary, Thirumurugan Co-operative Agricultural Credit Society vs M. Lalitha, [(2004) 1 SCC 305] has interpreted the above provision to mean that the remedies provided under the CP Act are in addition to the remedies provided under other statutes. Hence, the fact that a remedy is specifically provided for under another statute would not necessarily oust the jurisdiction of the appropriate authority under the CP Act. It has been further held that if forums under one statute and the CP Act are approached, then it is for the appropriate authority to permit the parties to opt between the consumer forum and the other forum, depending on the facts and circumstances of the case.

The manufacturer of the vehicle, in Maruti Udyog vs. Susheel Kumar Gabgotra [(2006) 4 SCC 644] had stipulated a warranty clause limiting its liability to merely repair the defects found if any. In view of this clause, the Supreme Court reversed the findings of the National Commission to replace the defective goods and held that the liability of the manufacture was confined to repairing the defect. Compensation was, however, awarded for travel charges to the complainant, which was incurred due to the fault of the car manufacturer.

In order to maintain a claim under the CPA, the complainant must show that he is a "consumer" as defined thereunder. By virtue of the definition, the CPA from its very inception excluded a user of the goods for a commercial purpose. With respect to services, however, the exclusion was brought in only by way of the CP Amendment Act, 2002. Prior to such period no such exclusion operated. In the case of Amtrex Ambience vs Alpha Radios, (1996) 1 CPJ 324 (NC), the National Commission relying on the unamended definition of a consumer with respect to services, held that where a suppliers provides goods used for commercial purposes, and a defect arises in the warranty period, the commercial user would during the warranty period still be considered as a consumer, since providing of warranty is considered as a provision of services.

The National Commission has in the cases of Madhuri Govilkar vs Hindustan Petroleum Corporation, (2006) 4 CPJ 338 (NC), and Super Computer Centre

vs. Globiz Investment Pvt. Ltd. (2006) 3 CPJ 256 (NC) continued to rely on the Amtrex case above, to hold that the position remains the same. It is submitted that these cases have not considered the amended definition of a consumer with respect to services. A commercial user of the services too is not entitled to avail of the remedies provided under the CPA. However, until overturned by the National Commission or a higher judicial authority, this position continues to be the law.

7

Essential Elements of a Valid Contract

Section 10 of the Indian Contract Act, 1872 provides that "all agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are nothereby expressly declared to be void".

The essential elements of a valid contract are:

(i) An offer or proposal by one party and acceptance of that offer by another party resulting in an *agreement-consensus-ad-idem.*
(ii) An intention to create legal relations or an intent to have legal consequences.
(iii) The agreement is supported by lawful consideration.
(iv) The parties to contract are legally capable of contracting.
(v) Genuine consent between !he parties.
(vi) The object and consideration of the contract is legal and is not opposed to public policy.
(vii) The terms of the contract are certain.
(viii) The agreement is capable of being performed Le., it is not impossible of being performed.

Therefore, to form a valid contract there must be (1) an agreement, (2) based on the genuine consent of the parties, (3) supported by consideration, (4) made for a lawful object, and (iv) between the competent parties.

OFFER OR PROPOSAL AND ACCEPTANCE

One of the early steps in the formation of a contract lies in arriving at an agreement between the contracting parties by means of an offer and acceptance.

Thus, when one party (the offeror) makes a definite proposal to another party (the offeree) and/the offeree accepts it in its entirety and without any qualification, there is a meeting of the minds of the parties, and a contract comes into being, assuming that all other elements are also present.

What is an *Offer or* a *Proposal?* An offer is a proposal by one person, whereby he expresses his willingness to enter into a contractual obligation in- return for a promise, act or forbearance. Section 2(a) defines proposal or offer as "when one person signifies to another his willingness to do or abstain from doing anything with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal."

RULES GOVERNING OFFERS

A valid offer must comply with the following rules:

(a) An offer must be clear, definite, complete and final. It must not be vague. For example, a promise to pay an increased .price for a horse if it proves lucky to promiser, is too vague and is not binding.

(b) An offer must be communicated to the offeree. An offer becomes effective only when it has been communicated to the offeree so as to give him an opportunity to accept or reject the same.

(c) The communication of an offer may be made by express words-oral or written-or it may be implied by conduct. A offers his car to B for Rs. 10,000. It is an express offer. A bus plying on a definite route goes along the street.
This is an implied *offer* on the part of the owners of the bus to carry passengers at the scheduled fares for the various stages.

(d) The communication of the offer may be general or specific. Where an offer is made to a specific person it is called *specific offer* and it can be accepted only by that person. But when an offer is addressed to an uncertain body of individuals Le. the world at large, it is a *general offer* and can be accepted by any member of the general public by fulfilling the condition laid down in the offer. The leading case on the subject is *Carlill* v. *Carbolic Smoke Ball Co.* The company offered by advertisement, a reward of £ 100 to anyone who contacted influenza after using their smoke ball in the specified manner. Mrs. Carlill did use smoke ball in the specified manner, but was attacked by influenza. She claimed the reward and it was held that she could recover the reward as general offer can be accepted by anybody. Since this offer is of a continuing nature, more than one person can accept it and can even claim the reward. But if the offer of reward is for seeking some information or seeking the restoration of missing thing, then the offer can be accepted by one individual who does it first of all. The condition is that the claimant must have prior knowledge of the reward before doing that act or providing that information.

Example: A advertise in the newspapers that he will pay rupees one thousand to anyone who restores to him his lost son. B without knowing of this reward

finds A's ost son and restore him to A. In this case since B did not know of the reward, he cannot claim it from A even though he finds A's lost son and restores him to A. In India also, in the case of *Harbhajan Lal* v. *Harcharan Lal* (AlA 1925 All. 539), the same rule was applied. In this case, a young boy ran away from his father's home. The father issued a pamphlet offering a reward of As. 500 to anybody who would bring the boy home. The plaintiff saw the boy at a railway station and sent a telegram to the boy's father. It was held that the handbill was an offer open to the world at large and was capable to acceptance by any person who fulfilled the conditions contained in the offer. The plaintiff substantially performed the conditions and was entitled to the reward offered.

An Offer must be Distinguished from:

(a) *An invitation to treat or an invitation to make* an *offer: e.g.*, an auctioneer's request for bids (which are offered by the bidders), the display of goods in a shop window with prices marked upon them, or the display of priced goods in a self-service store or a shopkeeper's catalogue of prices are invitations to an offer.

(b) A *mere statement of intention: e.g.*, an announcement of a coming auction sale. Thus a person who attended the advertised place of auction could not sue for breach of contact if the auction was cancelled *(Harris* v. *Nickerson* (1873) L.A. 8 QB 286).

(c) A *mere communication of information in the course of negotiation: e.g.*, a statement of the price at which one is prepared to consider(negotiating the sale of piece of land *(Harvey* v. *Facey* (1893) A.C. 552).

An offer that has been communicated, properly continues as such until it lapses, or until it is revoked by the offeror, or rejected or accepted by the offeree.

LAPSE OF OFFER

Section 6 deals with various modes of lapse of an offer. It states that an offer lapses if:

(a) It is not accepted within the specified time (if any) or after a reasonable time, if none is specified.

(b) It is not accepted in the mode prescribed or if no mode is prescribed in some usual and reasonable manner, *e.g.*, by sending a letter by mail when early reply was requested

(c) The offeree rejects it by distinct refusal to accept it;

(d) Either the offerer or the offeree dies before acceptance;

(e) The acceptor fails to fulfill a condition precedent to a acceptance.

(f) The offeree makes a counter offer, it amounts to rejection of the offer and an offer by the offeree may be accepted or rejected by the offeror.

REVOCATION OF OFFER BY THE OFFEROR

An offer may be revoked by the offeror at any time before acceptance. Like any offer, revocation must be communicated to the offeree, as it does not take

effect until it is actually communicated to the offeree. Before its actual communication, the offeree, may accept the offer and create a binding contract. The revocation must reach the offeree before he sends out the acceptance.

An offer to keep open for a specified time(option) is not binding unless it is supported by consideration.

ACCEPTANCE

A contract emerges from the acceptance of an offer. Acceptance is the act of assenting by the offeree to an offer. Under Section 2(b) of the Contract Act when a person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted becomes a promise.".

Rules Governing Acceptance:

(a) Acceptance may be express Le. by words spoken or written or implied from the conduct of the parties.

(b) If a particular method of acceptance is prescribed offer must be accepted in the prescribed manner.

(c) Acceptance must be unqualified and absolute and must correspond with all the terms of the offer.

(d) A counter offer or conditional acceptance operates as a rejection of the offer and causes it to lapse, *e.g.*, where a horse is offered for Rs. 1,000 and the offeree counter-offers Rs. 990, the offer lapses by rejection.

(e) Acceptance must be communicated to the offeror, for acceptance is complete the moment it is communicated. Where the offeree merely intended to accept but does not communicate his intention to the offeror, there is no contract. Mere mental acceptance is not enough.

(f) Mere silence on the part of the offeree does not amount to acceptance. Ordinarily, the offeror cannot frame his offer in such a way as to make the silence or inaction of the offeree as an acceptance. In other words, the offeror can prescribed the mode of acceptance but not the mode of rejection. In *Felthouse* v. *Bindley* (1865), F offered by letter to buy his nephew's horse for £ 30 saying: "If I hear no more about him I shall consider the horse is mine at £ 30". The nephew did not reply, but he told an auctioneer who was selling his horses not to sell that particular horse because it was sold to his uncle. The auctioneer inadvertently sold the horse. *Held:* F had no claim against the auctioneer because the horse had not been sold to him, his offer of £ 30 not having been accepted.

(g) If the offer is one which is to be accepted by being acted upon, no communication of acceptance to the offeror is necessary, unless communication is stipulated for in the offer itself. Thus, if a reward is offered for finding a lost dog, the offer. is accepted by finding the dog after reading about the offer, .and it is unnecessary before beginning to search for the dog to give notice of acceptance to the offeror.

(h) Acceptance must be given within a reasonable time and before the offer lapses or is revoked. An offer becomes irrevocable by acceptance.

An acceptance *never* precedes an offer. There can be no acceptance of an offer which is not communicated. Similarly, performance of conditions of an offer without the knowledge of the specific offer, is no acceptance. Thus in *Lalman Shukla* v. *Gauri Duff* (1913) where a servant brought the boy without knowing of the reward, he was held not entitled to reward because he did not know about the offer.

STANDING OFFERS

Where a person offers to another to supply specific goods, up to a stated quantity or in any quantity which may be required, at a certain rate, during a fixed period, he makes a standing offer. Thus, a tenderto supply goods as and when required, amounts to a standing offer.

A standing offer or a tender is of the nature of a continuing offer. An acceptance of such an offer merely amounts to an intimation that the offer will be considered to remain open during the period specified and that it will be accepted from time to time by placing order during the period specified quantities. Each successive order given, while the offer remains in force, is an acceptance of the standing offer as to the quantity ordered, and creates a seperate contract. It does not bind either party unless and until such orders are given.

Where P tendered to supply goods to L upto a certain amount and over a certain period, L's order did not come up to the amount expected and P sued for breach of contract *Held:* Each order made was a separate contract and P was bound to fulfill orders made, but there was no obligation on L to make any order to all *(Percival Ltd.* v. *L.C.C. (1918).*

TICKETS

Tickets purchased for entrance into places of amusement, or tickets issued by railways or bus companies, clock-room tickets, and many other contracts set out in printed documents contain numerous terms, of many of which the partly receiving the ticket or document is ignorant. If a passenger on a railway train receives a ticket on the face of which is printed this ticket is issued subject to the notices, regulations and conditions contained, in the current timetables of the railway", the regulations and conditions referred to are deemed to be communicated to him and he is bound by them whether or not he has read them. He is bound even if he is illiterate and unable to read them. But it is important that the notice of the conditions is contemporaneous with the making of the contract and not after the contract has been made.

CONTRACTS BY POST

Contracts by post are subject to the same rules as others, but because of their importance, these are stated below separately:

(a) An offer by post may be accepted by post, unless the offero(indicates anything to the contrary.

(b) An offer is made only when it actually reaches the offeree and not .before, *i.e.*, when the letter containing the offer is delivered to the offeree.
(c) An acceptance is made as far as the offeror is concerned, as soon as the letter containing the acceptance is posted, to offeror's correct address; it binds the offeror, but not the acceptor. An acceptance binds the acceptor only when the letter containing the acceptance reaches the offeror. The result is that the acceptor can revoke his acceptance before it reaches the offeror.
(d) An offer may be revoked before the letter containing the acceptance is posted. An acceptance can be revoked before it reaches the offeror.

CONTRACTS OVER THE TELEPHONE

Contracts over the telephone are regarded the same in principle as those negotiated by the parties in the actual presence of each other. In both cases an oral offer is made and an oral acceptance is expected. It is important that the acceptance must be audible, heard and understood by the offeror. If during the conversation the telephone lines go, "dead" so that the offeror does not hear the offeree's word of acceptance, there is no contract at the moment. If the whole conversation is repeated and the offeror hears and understands the words of acceptance, the contract is complete *(KanhaiyalaJv. Dineshwarchandra* (1959) AIR, M.P. 234).

INTENTION TO CREATE LEGAL RELATIONS

The second essential element of a valid contract is that there must be an intention among the parties that the agreement should be attached by legal consequences and create legal obligations. If there is no such intention on the part of the parties, there is no contract between them. Agreements of a social or domestic nature do not contemplate legal relationship. As such they are not contracts. A proposal or an offer is made with a view to obtain the assent to the other party and when that other party expresses his willirness to the act or abstinence proposed, he accepts the offer and a contract is made between the two. But both offer and acceptance must be made with the intention of creating legal relations between the parties. The test of intention is objective. The Courts seek to give effect to the presumed intention of the parties. Where necessary, the Court would look into the conduct of the parties, for much can be inferred from the conduct. The Court is not concerned with the mental intention of the parties, but rather with what a reasonable man would say, was the intention of the parties, having regard to all the circumstances of the case. For example, if two persons agree to assist each other by rendering advice, in the pursuit of virtue, science or art, it cannot be regarded as a contract. In commercial and business agreements, the presumption is usually that the parties intended to create legal relations. But this presumption is rebuttable which means that it must be shown that the parties did not intend to be legally bound.

CONSIDERATION

Need for Consideration: Consideration is one of the essential elements of a valid contract. The requirement of consideration stems from the policy of extending the arm of the law to the *enforcement of mutual promises of parties. A mere promise is not enforceable at law. For example, if A promises to make a gift of Rs. 500 to B, and subsequently changes his mind, B cannot succeed against A for breach of promise, as B has not given anything in return. It is only when a promise is made for something in return from the promisee, that such promise can be enforced by law against the promisor. This something in return is the consideration for the promise.*

DEFINITION OF CONSIDERATION

Sir Fredrick Pollock has defined consideration "as an act or forbearance of one party, or the promise thereof is the price for which the promise of the other is bought." It is "some right, interest, profit, or benefit accruing to one party or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other" *(Currie* v. *Misa* (1875) L.R. 10 Ex. 153).

Section 2(d) of the Indian Contract Act, 1872 defines consideration thus: "when at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise". The fundamental principle that consideration is essential in every contract, is laid down by both the definitions but there are some important points of difference in respect of the nature and extent of consideration and parties to it under the two systems of law:

(a) *Consideration at the desire of the promisor:* Section 2(d) of the Act begins with the statement that consideration must move at the desire or request of the promisor. This means that whatever is done must have been done at the desire of the promisor and not voluntarily or not at the desire of a third party. If A rushes to B's help whose house is on fire, there is no consideration but a voluntary act. But if A goes to B's help at B's request, there is good consideration as B did not wish to do the act gratuitously.

(b) *Consideration may move from the promisee or any other person:* In English law, consideration must move from the promisee, so that a stranger to the consideration cannot sue on the contract. A person seeking to enforce a simple contract must prove in court that he himself has given the consideration in return for the promise he is seeking to enforce.

In Indian law, however, consideration may move from the promisee or any other person, so that a stranger to the consideration may maintain a suit. In *Chinnaya* v.*Ra,maya* (1882) 4 Mad. 137, a lady by a deed of gift made over certain property to her daughter directing her to pay an annuity to the donor's brother as had been done by the donor herself before she gifted the property. On the same day, her daughter executed in writing in favour of the donor's brother

agreeing to pay the community. Afterwards the donee (the daughter) declined to fulfil her promise to pay her uncle saying that no consideration had moved from him. The Court, however, held that the uncle could sue even though no part of the consideration received by his niece moved from him. The consideration from her mother was sufficient consideration.

PRIVITY OF CONTRACT

A stranger to a contract cannot sue both under the English and Indian law for want of privity of contract. The following illustration explains this point. In *Dunlop Pneumatic Tyre Co.* v. *Selfridge Ltd.* (1915) A.C. 847. D supplied tyres to a wholesaler, X, on condition that any retailer to whom X re-supplied the tyres should promise X, not to sell them to the public below D's list price. X supplied tyres to S upon this condition, but nevertheless S sold the tyres below the list price. *Held:* There was a contract between D and X and a contract between X and S. Therefore, D could not obtain damages from S, as D had not given any consideration for S's promise to X nor was he party to the contract between D and X. Thus, a person who is not a party to a contract cannot sue upon it even though the contract is for his Gift. A, who is indebted to B, sells his property to C, and C he purchaser of the property, promises to payoff the debt to B. In case C fails to pay B, B has no right to sue C for there is no privity of contract between B and C.

The leading English case on the point is *Tweddle* v. *Atkinson* (1861) 1 Band Section 393. In this case, the father of a boy and the father of a girl who was to be married to the boy, agreed that each of them shall pay a sum of money to the boy who was to take up the new responsibilities of married life. After the demise of both the contracting parties, the boy (the husband) sued the executors of his father-in-law upon the agreement between his father-in-law and his father. *Held:* the suit was not maintainable as the boy was not a party to the contract.

Exception to the doctrine of privity of contract: Both the Indian law and the English law recognize certain exceptions to the rule that a stranger to a contract cannot sue on the contract. In the following cases, a person who is not a party to a contract can enforce the contract:

(i) A beneficiary under an agreement to create a trust can sue upon the agreement, though not a party to it, for the enforcement of the trust so as to get the trust executed for his benefit. In *Khawaja Muhammad* v. *Hussaini Begum,* (1910) 32 All. 410, it was held that where a Mohammedan lady sued her father-in-law to recover arrears of allowance payable to her by him under an agreement between him and her own father in consideration of her marriage, she could enforce the promise in her favour insofar as she was a beneficiary under the agreement to make a settlement in her favour, and she was claiming as beneficiary under such settlement.

(ii) An' assignee under an assignment made by the parties, or by the operation of law (*e.g.*, in case of death or insolvency), can sue upon the contract for the enforcement of his rights, title and interest. But a mere nominee

(Le., the person for whose benefit another has insured his own life) cannot sue on the policy because the nominee is not an assignee.

(iii) In cases of family arrangements or settlements between male members of a Hindu family which provide for the maintenance or expenses for marriages of female members, the latter though not parties to the contract, possess an actual beneficial right which place them in the position of beneficiaries under the contract, and can therefore, sue.

(iv) In case of acknowledgement of liability, *e.g.*, where A receives money from B for paying to C, and admits to C the receipt of that amount, then A constitutes himself as the agent of C.

(v) Whenever the promisor is by his own conduct stopped from denying his liability to perform the promise, the person who is not a party to the contract can sue upon it to make the promisor liable.

(vi) In cases where a person makes a promise to an individual for the benefit of third party and creates a charge on certain immovable property for the purpose, the third party can enforce the promise "though, he is stranger to the contract.

KINDS OF CONSIDERATION

Consideration may be:

(a) *Executory or future* which means that it makes the form of promise to be performed in the future, *e.g.*, an engagement to marry someone; or

(b) *Executed* or present in which it is an act or forbearance made or suffered for a promise. In other words, the act constituting consideration is wholly or completely performed, *e.g.*, if A pays today Rs. 100 to a shopkeeper for goods which are promised to be supplied the next day, A has executed his consideration but the shopkeeper is giving executory consideration - a promise to be executed the following day. If the price is paid by the buyer and the goods are delivered by the seller at the same time, consideration is executed by both the parties.

(c) Past which means a past act or forbearance, that is to say, an act constituting consideration which took place and is complete (wholly executed) before the promise is made.

According to English law, a consideration may be executory or executed but never past. The English law is that past consideration is no consideration. *The Indian law recognizes all the above three kinds of consideration.*

Rules Governing Consideration:

(a) Every simple contact must be supported by valuable consideration otherwise it is formally void subject to some exceptions.

(b) Consideration may be an act of abstinence or promise.

(c) There must be mutuality Le., each party must do or agree to do something. A gratuitous promise as in the case of subscription for charity, is not enforceable. For example, where A promises to subscribe Rs. 5,000 for the repair of a temple, and then refuses to pay, no action can be taken against him.

(d) Consideration must be real, and not vague, indefinite, or illusory, *e.g.*, a son's promise to "stop being a nuisance" to his father, being vague, is no consideration.
(e) Although consideration must have some value, it need not be adequate Le., a full return for the promise. Section 25 (Exp. II) clearly provides that "an agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate." It is upon the parties to fix their own prices. For example, where A voluntarily agreed to sell his motor car for Rs. 500 to S, it became a valid contract despite the inadequacy of the consideration.
(f) Consideration must be lawful, *e.g.*, it must not be some illegal act such as paying someone to commit a crime. If the consideration is unlawful, the agreement is void.
(g) Consideration must be something more than the promisee is already bound to do for the promisor. Thus, an agreement to perform an existing obligation made with the person to whom the obligation is already owed, is not made for consideration. For example, if a seaman deserts his ship so breaking his contract of service and is induced to return to his duty by the promise for extra wages, he cannot later sue for the extra wages since he has only done what he had already contracted for: *Stilk* v. *Myrick* (1809).

LAWFUL CONSIDERATION OF CONTRACT ACT

According to Section 2(d), Consideration is defined as: "When at the desire of the promisor, the promisee has done or abstained from doing, or does or abstains from doing, or promises to do or abstain something, such an act or abstinence or promise is called consideration for the promise. "Consideration" means to do something in return. In short, Consideration means *quid pro quo i.e.*, something in return.

An agreement must be supported by a lawful consideration on both sides. Essentials of valid considerations are:

- *It must move at the desire of the promisor:* An act constituting consideration must have been done at the desire or request of the promiser. If it is done at the instance of a third party or without the desire of the promisor, it will not be good considsration. For example "A" saves "B"'s goods from fire without being ask him to do so. "A" cannot demand payment for his service.
- *Consideration may move from the promisee or any other person:* Under Indian law, consideration may be from the promisee of any other person ie, even a stranger. This means that as long as there is consideration for the promisee, it is immaterial, who has furnished it.
- Consideration must be an act, abstinence or forbearance or a returned promise.
- *Consideration may be past, present or future:* Past consideration is not consideration according to English law. However it consideration

as per Indian law. Example of past consideration is, "A" renders some service to "B" at latter's desire. After a month "B" promises to compensate "A" for service rendered to him earlier. When consideration is given simultaneously with promise, it is said to be present consideration. For example "A" receives Rs.50/- in return for which he promises to deliver certain goods to "B". The money "A" receives is the present consideration. When consideration to one party to other is to pass subsequently to the maker of the contract, is said to be future consideration. For example. "A" promises to deliver certain goods to "B" after a week. "B" promises to pay the price after a fortnight, such consideration is future.

- *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.
- *Consideration must be something which the promiser 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.
- *Consideration need not be adequate:* Consideration need not be necessarily be equal to value to something given. So long as consideration exists, the courts are not concerned as to adequacy, provided it is for some value.

The consideration or object of an agreement is lawful, unless and until it is:

1. *Forbidden by law:* If the object or the consideration of an agreement is for doing an act forbidden by law, such agreement are void. For example,"A" promises "B" to obtain an employment in public service and "B" promises to pay Rs one lakh to "A". The agreement is void as the procuring government job through unlawful means is prohibited.
2. *If it involves injury to a person or property of another:* For example, "A" borrowed Rs. 100/- from "B" and executed a bond to work for "B" without pay for a period of 2 years. In case of default, "A" owes to pay the principal sum at once and huge amount of interest. This contract was held void as it involved injury to the person.
3. *If courts regards it as immoral:* An agreement in which consideration or object of which is immoral is void. For example, An agreement between husband and wife for future separation is void.
4. *Is of such nature that, if permitted, it would defeat the provisions of any law:*
5. Is fraudulent, or involves or implies injury to the person or property of another, or
6. *Is opposed to public policy:* An agreement which tends to be injurious to the public or against the public good is void. For example, agreements

of trading with foreign enemy, agreement to commit crime, agreements which interfere with the administration of justice, agreements which interfere with the course of justice, stifling prosecution, maintenance and champerty.

7. *Agreements in restrained of legal proceedings:* This deals with two category. One is, agreements restraining enforcement of rights and the other deals with agreements curtailing period of limitation.
8. *Trafficking in public offices and titles:* Agreements for sale or transfer of public offices and title or for procurement of a public recognition like padma vibhushan or padma sree, *etc.*, for monetary consideration is unlawful, being opposed to public policy.
9. *Agreements restricting personal liberty:* Agreements which unduly restricts the personal liberty of parties to it are void as being opposed by public policy.
10. *Marriage brokerage contact:* Agreements to procure marriages for rewards are void under the ground that marriage ought to proceed with free and voluntary decisions of parties.
11. *Agreements interfering marital duties:* Any agreement which interfere with performance of marital duty is void being opposed to public policy. An agreement between husband and wife that the wife will never leave her parental house.
12. Consideration may take in any form-money, goods, services, a promise to marry, a promise to forbear, *etc.*

Contract Opposed to Public Policy can be Repudiated by the Court of law even if that contract is beneficial for all of the parties to the contract- What considerations and objects are lawful and what not-Newar Marble Industries Pvt. Ltd. Vs. Rajasthan State Electricity Board, Jaipur, 1993 Cr. L.J. 1191 at 1197, 1198 [Raj.]- Agreement of which object or consideration was opposed to public policy, unlawful and void-

What better and what more can be an admission of the fact that the consideration or object of the compounding agreement was abstention by the board from criminally prosecuting the petitioner-company from offence under Section 39 of the act and that the Board has converted the crime into a source of profit or benefit to itself.

This consideration or object is clearly opposed to public policy and hence the compounding agreement is unlawful and void under Section 23 of the Act. It is unenforceable as against the Petitioner-Company.

COMPETENT TO CONTRACT

Section 11 of The Indian Contract Act specifies that every person is competent to contract provided:

1. He should not be a minor *i.e.*, an individual who has not attained the age of majority *i.e.*, 18 years in normal case and 21 years if guardian is appointed by the Court.

2. He should be of sound mind while making a contract. A person who is usually of unsound mind, but occasionally of sound mind, can make a contract when he is of sound mind. Similarly if a person is usually of sound mind, but occasionally of unsound mind, may not make a valid contract when he is of unsound mind.
3. He is not a person who has been personally disqualified by law to which he is subject.

FREE CONSENT

According to Section 14, "two or more persons are said to be consented when they agree upon the same thing in the same sense (*Consensus-ad-idem*).

A consent is said to be free when it is not caused by coercion or undue influence or fraud or misrepresentation or mistake.

Elements Vitiating free Consent:

1. *Coercion (Section 15):* "Coercion" is the committing, or threatening to commit, any act forbidden by the Indian Penal Code under(45,1860), or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement. For example, "A" threatens to shoot "B"if he doesn't release him from a debt which he owes to "B". "B" releases "A" under threat. Since the release has been brought about by coercion, such release is not valid.
2. *Undue influence (Section 16):* "Where a person who is in a position to dominate the will of another enters into a contract with him and the transaction appears on the face of it, or on the evidence, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in the position to dominate the will of the other."
   (Section 16(2)) States that "A person is deemed to be in a position to dominate the will of another;
   - Where he holds a real or apparent authority over the other. For example, an employer may be deemed to be having authority over his employee. An income tax authority over to the assessee.
   - Where he stands in a fiduciary relationship to other, For example, the relationship of Solicitor with his client, spiritual advisor and devotee.
   - Where he makes a contract with a person whose mental capacity is temporarily or permanently affected by the reason of age, illness or mental or bodily distress"
3. *Fraud (Section 17):* "Fraud" means and includes any act or concealment of material fact or misrepresentation made knowingly by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto of his agent, or to induce him to enter into the contract. Mere silence is not fraud. A contracting party is not obliged

to disclose each and everything to the other party. There are two exceptions where even mere silence may be fraud, one is where there is a duty to speak, then keeping silence is fraud. or when silence is in itself equivalent to speech, such silence is fraud.

4. *Misrepresentation (Section 18):* "Causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement".
5. *Mistake of fact (Section 20):* "Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void". A party cannot be allowed to get any relief on the ground that he had done some particular act in ignorance of law. Mistake may be bilateral mistake where both parties to an agreement are under mistake as to the matter of fact. The mistake must relate to a matter of fact essential to the agreement.

PERFORMANCE OF CONTRACTS

The promise under a contract can be performed, as the circumstances may permit, by the promisor himself, or by his agent or his legal representative.

1. *Promisor himself:* "The contracts which involve the exercise of personal skill must be performed by the promisor himself.
2. *Agent:* "Where personal skill is not required, the promisor may appoint his agent to perform it.
3. *Representatives:* "On the death of the promisor, the legal heirs of the promisor must perform the contract unless a contrary intention appears in the contract.
4. *Third persons:* "When a promisee accepts performance from a third person, he cannot afterwards enforce it against promisor".
5. *Joint promisors:* "When two or more persons have made a joint promise, all such persons must jointly fulfil the promise, unless a contrary intention appears from it". A contract may be discharged by performance, by agreement or consent, by impossibility, by lapse of time, by operation of law or by breach of contract. When both parties fulfill their respective obligation arising under the contract, within the time and manner prescribed in such case the parties are discharged. A contract may also be discharged by further agreement or consent. A contract may also discharge by lapse of time.

AGENCY

In law, the relationship that exists when one person or party (the principal) engages another (the agent) to act for him, *e.g.*, to do his work, to sell his goods, to manage his business. The law of agency thus governs the legal relationship in which the agent deals with a third party on behalf of the principal. The competent agent is legally capable of acting for this principal vis-a-vis the third party. Hence, the process of concluding a contract through an agent involves a

twofold relationship. On the one hand, the law of agency is concerned with the external business relations of an economic unit and with the powers of the various representatives to affect the legal position of the principal. On the other hand, it rules the internal relationship between principal and agent as well, thereby imposing certain duties on the representative (diligence, accounting, good faith, *etc.*).

Under section 201 to 210 an agency may come to an end in a variety of ways:

(i) By the principal revoking the agency – However, principal cannot revoke an agency coupled with interest to the prejudice of such interest. Such Agency is coupled with interest. An agency is coupled with interest when the agent himself has an interest in the subject-matter of the agency, *e.g.*, where the goods are consigned by an upcountry constituent to a commission agent for sale, with poor to recoup himself from the sale proceeds, the advances made by him to the principal against the security of the goods; in such a case, the principal cannot revoke the agent's authority till the goods are actually sold, nor is the agency terminated by death or insanity.

(ii) By the agent renouncing the business of agency;

(iii) By the business of agency being completed;

(iv) By the principal being adjudicated insolvent (Section 201 of The Indian Contract Act. 1872)

The principal also cannot revoke the agent's authority after it has been partly exercised, so as to bind the principal (Section 204), though he can always do so, before such authority has been so exercised (Sec 203).

Further, as per section 205, if the agency is for a fixed period, the principal cannot terminate the agency before the time expired, except for sufficient cause. If he does, he is liable to compensate the agent for the loss caused to him thereby. The same rules apply where the agent, renounces an agency for a fixed period. Notice in this connection that want of skill continuous disobedience of lawful orders, and rude or insulting behaviour has been held to be sufficient cause for dismissal of an agent. Further, reasonable notice has to be given by one party to the other; otherwise, damage resulting from want of such notice, will have to be paid (Section 206). As per section 207, the revocation or renunciation of an agency may be made expressly or impliedly by conduct. The termination does not take effect as regards the agent, till it becomes known to him and as regards third party, till the termination is known to them (Section 208).

When an agent's authority is terminated, it operates as a termination of subagent also. (Section 210).

8

Law of Sale of Goods

DEFINITION OF SALE OF GOODS ACT

The Sale of Goods Act 1979 is an Act of the United Kingdom which regulates contracts in which goods are sold and bought. The Sale of Goods Act performs several functions. Buyer is a person that who wants to buy something from seller and seller is a person that sells out something that a buyer wants. To purely define Sales of Goods Act, it is a contracts in which goods are sold and bought, it means whereby the seller transfer the property in the goods to the Buyer for a consideration called price.

The Sale of Goods Act lays down a small number of compulsory legal rules concerned with an array of presumptions and implied terms, which aim to reflect the commercial expectations in the most commonly agreed sales contracts. In the absence of contrary agreement these terms will govern a contract within the Act's remit. Now that the law has imposed more responsibility on the seller which will be able to protect all buyers, because, nowadays, the modern law has proved that buyers has become more and more driven to rely on the honesty, skill and judgment of the seller. In many situations, the rules contained in the act only apply where the parties have failed to make express arrangements as to their obligations.

Definition sale of goods

A contract of sale is a legal contract an exchange of goods, services or property to be exchanged from seller to buyer for an agreed upon value in money paid or the promise to pay same. It is a specific type of legal contract.

Meaning of Goods

In Section 61, good includes all personal chattels but excludes all the services or chooses in action or money. Products of the soil are generally sold with a view to severance and though they may sometimes be of the nature of land for the purpose of the Law of Property (Miscellaneous Provisions) Act 1989, they are usually goods within the meaning of the Act of 1979. Nor would crops sold with the land on which they are growing because they are not in such a case to be 'severed before sale or under the contract of sale' as section 61 requires. Goods may be: Existing goods: goods actually in existence when the contract is made. They may be either specific or unascertained in the sense that they have yet to be appropriated to the contract (section 5(1)).

Future goods, goods yet to be acquired or manufactured or grown by the seller (section 5(1)) as in Sainsbury V Street. Where the seller agreed to dell to the buyers a crop of some 275 tons of barley to be grown by him on his farm.

Specific goods, goods identified and agreed upon at the time the contract of sale is made (section 61(1)). The sale of a raincoat at a market stall.

Unascertained goods: as where A agrees to sell to B 200 bags of flour from a stock of 2000 lying in A's warehouse. The main problem in examination terms arises in question which is concerned with when ownership in such goods passes from seller to buyer. This problem will be considered below.

Terms Implied by the Sale of Goods Act

These terms are implied into the contracts that including in the sale of goods act. The defendant will be given an action for the damages if they breach the terms of sale of goods act. Where the slightness of the breach renders it unreasonable for a non-consumer buyer to reject the goods, for breach of the implied terms as to description, quality or fitness or sample, then the buyer can only claim damages for a breach of warranty. This amendment moderates the traditionally strict approach of English Law to contractual breach in a commercial context.

Implied Condition as to Title

In Section 12(1), there is an implied condition on the part of the sales that in the case of:

A sale, he has the right to sell the goods if the situations show a different intention.

An agreement to sell, he will have the right to sell the goods at the time when the property is to pass.

Section 12(1) provides that, unless the circumstances show a different intention, there is an implied condition on the part of the seller that in a case of a sale he has the right to sell the goods, and that in the case of an agreement to sell, he will have the right to sell the goods at the time when the property is to pass (Rowland v Divall) held that the rejection of the goods is found to be in breach of s 12 will allow the buyer to recover full price paid, with no payment for the buyer's use of

the goods. In the case of Rowland v Divall (1923), plaintiff bought a car from defendant and used it for several months. It then realized that defendant has no title to this car and the plaintiff is bound to return it back to the true owner. He sued defendant for recover back the purchase-money that he had paid as on a total failure of consideration. The court held that he is entitled to recover the whole of it price because the consideration for the use of car had totally failed.

Section 12(1) might be construed as meaning that the seller must have the power to give ownership of the goods to the buyer, but if the goods can only be sold by infringing a trade mark, the seller has no right to sell for the purposes of s 12(1). For instance, the case of Niblett v Confectioners' Materials Co, a firm who dealt in confectioners' materials agreed in writing to sell condensed milk in tins and of a price including insurance and freight from New York to London. Payment was made in case on receipt of the shipping documents and the defendants were paid the price. There were 1,000 cans which bore labels with the word 'Nissly' on them. This make Nestle Company notice about it and recommended that this was a breach of its registered trade mark. The defendants were required to remove the name and brand in order to be able to sell the goods without being sued by Nestle for infringement of trade mark. They could only sell them at a loss without any mark.

Held by the court of appeal, that the seller were in breach of the implied condition set out in section 12(1) of the sales of good Act. A person who can sell goods only by infringing a trade mark has no right to sell, even though he may be the owner of the goods.

SALES OF GOODS ACT, 1930

Indian Sale of Goods Act 1930 is a Mercantile Law. The Sale of Goods Act is a kind of Indian Contract Act. It came into existence on 1 July 1930. It is a contract whereby the seller transfers or agrees to transfer the title (ownership) in the goods to the buyer for consideration. It is applicable all over India, except Jammu and Kashmir. The goods are sold from owner to buyer for a certain price and at a given period of time.The name Indian is removed from the act with effect from 23 September 1963 hence the act name is now Sale of Goods act 1930.

Definition

"" According to section 6 of the Indian sales of goods act, a contract of sales means such contract by which the seller transfer the title or ownership of the goods to the buyer or makes an agreement to transfer it against a fixed price ""

1. Buyer A person who buys or agrees to buy goods.Section-2(1).
2. Seller A person who sells or agrees to sell goods.section-2(13)
3. Goods Every kind of movable property other than actionable things and money,includes stocks and share, growing crops and grass and things attached to or forming to a part of land which is agreed to be severed before the sale or under the contract of sale.section-2(7)

4. Existing goods Goods which are in existence at the time of contract of sale.section-6
5. Future goods Goods which are to be manufactured/produced by seller after making contract of sale.section-2(6)
6. Specific goods Goods which are identified & agreed upon at the time of contract of sale has been made..section-6(2)

Sale by Auction

(1) In a sale by auction if goods are put up in lotseach lot is the subject of a separate sale.
(2) A sale by auction is complete when the auctioneer so announces by the fall of the hammer or in other customary manner. Where a bid is made while the hammer is falling in acceptance of a prior bid the auctioneer may in his discretion reopen the bidding or declare the goodssold under the bid on which the hammer was falling.
(3) Such a sale is with reserve unless the goods are in explicit terms put up without reserve. In an auction with reserve the auctioneer may withdraw the goods at any time until he announces completion of the sale. In an auction without reserve, after the auctioneer calls for bids on an article or lot, that article or lot cannot be withdrawn unless no bid is made within a reasonable time. In either case a bidder may retract his bid until the auctioneer's announcement of completion of the sale, but a bidder's retraction does not revive any previous bid.
(4) If the auctioneer knowingly receives a bid on the seller's behalf or the seller makes or procures such a bid, and notice has not been given that liberty for such bidding is reserved, the buyer may at his option avoid the sale or take the goods at the price of the last good faithbid prior to the completion of the sale. This subsection shall not apply to any bid at a forced sale.

Hire Purchase

Hire purchase (abbreviated HP, colloquially sometimes never-never) is the legal term for a contract, in which a purchaser agrees to pay for goods in parts or a percentage over a number of months. In Canada and the United States, a hire purchase is termed aninstallment plan although these may differ slightly as in a hire purchase agreement the ownership of the good remains with the seller until the last payment is made. Other analogous practices are described as closed-end leasing or rent to own.

The hire purchase agreement was developed in the United Kingdom in the 19th century to allow customers with a cash shortage to make an expensive purchase they otherwise would have to delay or forgo.

For example in cases where a buyer cannot afford to pay the asked price for an item of property as a lump sum but can afford to pay a percentage as a deposit, a hire-purchase contract allows the buyer to hire the goods for a monthly

rent. When a sum equal to the original full price plus interest has been paid in equal installments, the buyer may then exercise an option to buy the goods at a predetermined price (usually a nominal sum) or return the goods to the owner.

If the buyer defaults in paying the installments, the owner may repossess the goods, a vendor protection not available with unsecured-consumer-credit systems. HP is frequently advantageous to consumers because it spreads the cost of expensive items over an extended time period. Business consumers may find the different balance sheet and taxation treatment of hire-purchased goods beneficial to their taxable income. The need for HP is reduced when consumers have collateral or other forms of credit readily available.

These contracts are most commonly used for items such as cars and high value electrical goods where the purchasers are unable to pay for the goods directly.

Standard Provisions

To be valid, HP agreements must be in writing and signed by both [parties]. They must clearly lay out the following information in a print that all can read without effort:

1. A clear description of the goods
2. The cash price for the goods
3. The HP price, *i.e.*, the total sum that must be paid to hire and then purchase the goods
4. The deposit
5. The monthly installments (most states require that the applicable interest rate is disclosed and regulate the rates and charges that can be applied in HP transactions) and
6. A reasonably comprehensive statement of the parties' rights (sometimes including the right to cancel the agreement during a "cooling-off" period).
7. The right of the hirer to terminate the contract when he feels like doing so with a valid reason.

The Seller and the Owner

If the seller has the resources and the legal right to sell the goods on credit (which usually depends on a licensing system in most countries), the seller and the owner will be the same person. But most sellers prefer to receive a cash payment immediately.

To achieve this, the seller transfers ownership of the goods to a Finance Company, usually at a discounted price, and it is this company that hires and sells the goods to the buyer. This introduction of a third party complicates the transaction. Suppose that the seller makes false claims as to the quality and reliability of the goods that induce the buyer to "buy". In a conventional contract of sale, the seller will be liable to the buyer if these representations prove false. But, in this instance, the seller who makes the representation is not the owner who sells the goods to the buyer only after all the installments have been paid.

To combat this, some jurisdictions, including Ireland, make the seller and the finance house jointly and severally liable to answer for breaches of the purchase contract.

Implied Warranties and Conditions to Protect the Hirer

The extent to which buyers are protected varies from jurisdiction to jurisdiction, but the following are usually present:

1. The hirer will be allowed to enjoy quiet possession of the goods, *i.e.*, no-one will interfere with the hirer's possession during the term of this contract
2. The owner will be able to pass title to, or ownership of, the goods when the contract requires it
3. That the goods are of merchantable quality and fit for their purpose, save that exclusion clauses may, to a greater or lesser extent, limit the Finance Company's liability
4. Where the goods are let by reference to a description or to a sample, what is actually supplied must correspond with the description and the sample.

The Hirer's Rights

The hirer usually has the following rights:

1. To buy the goods at any time by giving notice to the owner and paying the balance of the HP price less a rebate (each jurisdiction has a different formula for calculating the amount of this rebate)
2. To return the goods to the owner — this is subject to the payment of a penalty to reflect the owner's loss of profit but subject to a maximum specified in each jurisdiction's law to strike a balance between the need for the buyer to minimize liability and the fact that the owner now has possession of an obsolescent asset of reduced value
3. With the consent of the owner, to assign both the benefit and the burden of the contract to a third person. The owner cannot unreasonably refuse consent where the nominated third party has good credit rating
4. Where the owner wrongfully repossesses the goods, either to recover the goods plus damages for loss of quiet possession or to damages representing the value of the goods lost.

The Hirer's Obligations

The hirer usually has the following obligations:

1. To pay the hire installments
2. To take reasonable care of the goods (if the hirer damages the goods by using them in a non-standard way, he or she must continue to pay the installments and, if appropriate, recompense the owner for any loss in asset value)
3. To inform the owner where the goods will be kept.

4. A hirer can sell the products if, and only if, he has purchased the goods finally or else not to any other third party.

It is pretty much similar to instalment but the main difference is of ownership.

The Owner's Rights

The owner usually has the right to terminate the agreement where the hirer defaults in paying the installments or breaches any of the other terms in the agreement. This entitles the owner:

1. To forfeit the deposit
2. To retain the installments already paid and recover the balance due
3. To repossess the goods (which may have to be by application to a Court depending on the nature of the goods and the percentage of the total price paid)
4. To claim damages for any loss suffered.

Hire Purchase in Australia

Hire purchases are commonly used by businesses (including companies, partnerships and sole traders) in Australia to fund the purchase of cars, commercial vehicles and other business equipment.

Under Australian Taxation Office rules, businesses who account for GST on an accruals basis are entitled to claim an Input Tax Creditfor all of the GST contained in the purchase price of the goods on their next Business Activity Statement.

Hire purchase is also commonly known as *commercial hire purchase* and *corporate hire purchase* (both abbreviated to *CHP*) in Australia.

Hire Purchase in Malaysia

Hire purchases agreement are commonly known as H.P agreement in Malaysia and it is used by financial institutions in Malaysia to fund the purchase of consumer goods, vehicles and other business equipment and industrial machinery. In Malaysia, The legislation governing hire purchase transactions is the Hire Purchase Act 1967, which came into force on 11 April 1968 after hire purchase became popular in the acquisition of expensive consumer goods such as cars, business equipment and industrial machinery.

Purchasing cars is the most common type of hire purchase agreement in Malaysia and the repayment could served up to 9 years from the date of agreement been executed.

TRANSFER OF PROPERTY IN GOODS

The property in the goods is said, to be transferred from the seller to the buyer when the latter acquires the proprietary rights over the goods and the obligations linked thereto. 'Property in Goods' which means the ownership of goods, is different from ' possession of goods' which means the physical custody or control of the goods.

The transfer of property in the goods from the seller to the buyer is the essence of a contract of sale. Therefore the moment when the property in goods passes from the seller to the buyer is significant for following reasons:

a. *Ownership:* The moment the property in goods passes, the seller ceases to be their owner and the buyer acquires the ownership. The buyer can exercise the proprietary rights over the goods. For example, the buyer may sue the seller for non-delivery of the goods or when the seller has resold the goods, *etc.*
b. *Risk follows ownership:* The general rule is that the risk follows the ownership, irrespective of whether the delivery has been made or not. If the goods are damaged or destroyed, the loss shall be borne by the person who was the owner of the goods at the time of damage or destruction. Thus the risk of loss prima facie is in the person in whom the property is.
c. *Action Against Third parties:* When the goods are in any way damaged or destroyed by the action of third parties, it is only the owner of the goods who can take action against them.
d. *Suit for Price:* The seller can sue the buyer for the price, unless otherwise agreed, only after the gods have become the property of the buyer.
e. *Insolvency:* In the event of insolvency of either the seller or the buyer, the question whether the goods can be taken over by the Official Receiver or Assignee, will depend on whether the property in goods is with the party who has become insolvent.

Essentials for Transfer of Property — The two essentials requirements for transfer of property in the goods are:

1. *Goods must be ascertained:* Unless the goods are ascertained, they (or the property therein) cannot pass from the seller to the buyer. Thus, where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained
2. *Intention to PASS Property in Goods must be there:* In a 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 regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

PERFORMANCE OF CONTRACT OF SALE

Performance of a contract of sale implies a duty of the seller to deliver the goods, and of the buyer to accept the delivery of the goods and make payment in accordance with the terms of the contract (sec. 31).

Delivery of Goods: 'Delivery' has been defined as voluntary transfer of possession of goods from one person to another. How is Delivery Made? Delivery of goods sold may be made by doing anything which the parties agree shall be treated as delivery or which has the effect of putting the goods in the possession of the buyer or of any person authorized by him (Sec. 33).

MODE OF DELIVERY

1. *Actual delivery:* Actual delivery means physical transfer of goods by the seller to the buyer. The delivery may be made by the agent of the seller to the agent of the buyer.
2. *Symbolic delivery:* Where the goods are bulky, it is usual for the seller to give symbolic delivery. For example, where the timber is lying in a warehouse, the delivery of key is regarded as symbolic delivery which has the effect of putting the buyer in possession or actual control of the goods. It should be noted that the key must give complete access to the goods. If for example, the key of a room in which the goods are kept is given but the key of the main gate or door is not given, it is not regarded as a valid delivery
3. *Constructive delivery:* In place of actual or symbolic delivery, the goods may be delivered without any change in their actual or visible custody. For example, where the goods at the time of sale are in possession of a third person and such third person acknowledges to the buyer that he holds the goods on his (buyer's) behalf, the delivery is called constructive delivery.

Example: A sells to B 100 bags of rice lying in C's warehouse. C acknowledges to B that he is holding these 100 bags on behalf of B. It is constructive delivery by A to B.

RULES REGARDING DELIVERY

1. *Delivery by whom and to whom (Sec. 31):* It is the duty of the seller to deliver the goods and of the buyer to accept and pay for the goods delivered.
2. *Delivery and payment are concurrent conditions (Sec. 32):* Unless otherwise agreed, delivery of goods and payment of price are concurrent conditions, *i.e.*, at the same time or reciprocally.
   The seller shall be ready and willing to deliver the goods and the buyer shall be ready and willing to pay the price in exchange for delivery of the goods.
3. *Mode of delivery (Sec. 33):* This has been discussed in detail in earlier paragraphs. The delivery may be actual, symbolic or constructive. The parties may agree to any mode of delivery expressly or impliedly.
4. *Effect of part delivery (Sec. 34):* A delivery of part of the goods, in the process of the delivery of the whole, has the same effect, for the purpose of passing the property in such goods, as a delivery of the whole. However, delivery of part of the goods, with an intention of severing it from the whole, does not operate as a delivery of the remainder.

EXAMPLE

A ship arrived at the port laden with a cargo of wheat. The owner endorsed the bill of lading to A. The master of the ship reported to the customs that the

cargo was for A. Next day, A made entry of the wheat in his name at the customs house. Thereupon, part of the cargo was delivered to A. Held, this constituted a delivery of the whole [Slubey v. Hey ward].

5. Delivery to be made on request of the buyer (Sec. 35): Apart from any express contract, a seller is not bound to deliver the goods unless and until requested by the buyer.
   If the seller fails to deliver the goods on the application of the buyer, the seller is guilty of breach of contract.
6. Place of delivery [Sec. 36(1)]: In the absence of an agreement, express or implied, the goods sold are to be delivered at the place at which they are at the time of sale. The goods agreed to be sold are to be delivered at the place at which they are at the time of the agreement to sell, or if not then in existence, at the place at which they are manufactured or produced.
7. Time of delivery: If any time is specified by the parties, the goods must be delivered by that time.
   (i) If the seller is bound to send the goods to the buyer and no time has been fixed by the parties, the goods must be delivered within a reasonable time [Sec. 36(2)]. What is reasonable time is a question of fact in each case?
   (ii) The demand for delivery should be made at a reasonable hour. What is a reasonable hour is a question of fact?
8. Delivery of goods in possession of third persons [Sec. 36(3)]: Where the goods at the time of sale are in possession of a third person, there is no delivery by the seller to the buyer unless such third person acknowledges to the buyer that he holds the goods on his behalf.
   It should be noted that this rule does not affect the transfer of goods by means of a document of title of goods, *e.g.*, where goods have been sold by a bill of lading, consent of the third party is not necessary.
9. Expenses of delivery: Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state shall be borne by the seller. In case the buyer is compelled to pay these expenses, he can recover the same from the seller.
10. Effect of delivery of wrong quantity (Sec. 37)
    (i) *Short Delivery [Sec. 37(1)]:* Where the seller delivers lesser quantity than contracted for, the buyer has the option to accept or reject the whole. Naturally, when he accepts, he must pay for them at the contract price.
    Example: A ordered B to supply 10 bags of rice. B supplied only 6 bags. A is at liberty to accept 6 bags or to reject them. When he accepts them, he must pay for the 6 bags at the contracted price.
    Example: A ordered B to supply 10 bags of rice. B supplied 15 bags. A has the option to accept 10 bags and pay for them. He may accept even 15 bags and pay for him. He is entitled to reject the whole [Cunliffe v. Harrison],

It should be noted that the right to reject the goods in excess of the contract does not apply where the variation is negligible. This is due to the reason that the law does not take account of trifles, *i.e.*, the Court applies the maxim de minimise non curat lex.

(ii) *Delivery of mixed goods [Sec. 37(3)]:* Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or may reject the whole.

Example: Certain specific articles of China were ordered. The seller in addition sent some of his articles of China. Held, the buyer could reject the whole [Levy v. Green.]

These rules can be modified by a contract expressly or implied, *i.e.*, usage or custom of the trade [Sec. 37 (4)].

11. *Delivery by instalment (Sec. 38):* Unless otherwise agreed, the buyer of goods is not bound to accept delivery in installments. He may, if he so desires, refuse the goods.

Example: 25 tons of pepper October/November shipment was sold. The seller shipped 20 tons in November and 5 tons in December. Held, the buyer was entitled to reject the whole [Reuter v. Sala],

In case there is a contract for the sale of goods to be delivered by stated installments which are to be paid for separately and the buyer or seller commits a breach in respect of one or more installments. In such a case a question arises as to whether the buyer or seller can treat it as a breach of the whole contract, or a severable breach giving rise to a claim for compensation.

The answer to this question would depend upon facts and circumstances of each case. However, the following factors should be kept in mind:

(i) The quantum of breach which it bears to the contract as a whole.
(ii) The degree of probability that it will be repeated [Maple Flock Co. Ltd. v. Universal Products Ltd.
(iii) The nature of breach whether it goes to the root of the transactions.

12. *Delivery to carrier or wharfinger (Sec. 39):*

(i) *Unconditional delivery to carrier or wharfinger means delivery by buyer (sec. 39):* Where in pursuance of a contract of sale, the seller is authorized or required to send the goods to the buyer, delivery of goods to a carrier for the purpose of transmission to the buyer or to a wharfinger for safe custody is prima facie deemed to be a delivery of the goods to the buyer.

(ii) *Seller's duty to reasonably secure goods before delivery [Sec. 39(2)]:* Where the goods are delivered to a carrier or wharfinger, it is the duty of the seller to reasonably secure the responsibility of the carrier for the safe delivery of the goods. In case the seller fails to do so, he will be liable to make good the loss suffered by the buyer.

Example: B, at Agra orders A, who lives at Calcutta, three casks of oil to be sent to him by railway. A takes three casks of oil directed to B to the railway station and leaves them there without conforming to the rules which must be complied with in order to render the railway company liable for their safe carriage. The goods are lost on the way. There has not been a sufficient delivery to charge B in a suit for the price. [Clarke v. Hutchin].

(iii) Seller's duty to inform the buyer to get the goods insured in case the goods involve a sea transit [Sec. 39(3)]: Where the goods are sent by the seller to the buyer by a route involving sea transit, the seller is bound to give such notice to the buyer as may enable him to insure the goods during sea transit. Failure to do so will mean that the goods are at the seller's risk during the transit and the seller will have to make good the loss suffered by the buyer.

13. *Acceptance of delivery by the buyer:*
    (i) *Buyer's right to examine the goods [Sec. 41)]:* Where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

When is buyer deemed to have accepted the delivery of goods? (Sec. 42): A buyer is deemed to have accepted the goods:

(i) When he intimates to the seller that he has accepted them, or
(ii) When he does an act in relation to such goods which is inconsistent with the ownership of the seller.

The buyer has the following options:

(i) *Short delivery:* Lesser quantity than ordered for. He may accept or reject the whole.
(ii) *Excess delivery:* More quantity than ordered for. He may accept the quantity asked and pay for the same or reject the whole.
(iii) *Delivery of goods ordered mixed with other goods not ordered:* He may accept the goods ordered and reject the rest or the whole.

11. The buyer is not bound to accept the delivery by installments.
12. Unconditional delivery to the carrier or wharfinger means delivery to the buyer. In this case, the seller should:
    (1) Reasonably secure the goods, and
    (2) In case of goods involving sea route, the seller should inform the buyer to get the goods insured.

UNPAID SELLER AND WHAT ARE ITS RIGHTS?

Section 45 lays down that a seller is unpaid:

(1) When the whole of the price has not been paid or tendered.
(2) When a negotiable instrument or a bill of exchange has been received as conditional payment and the condition in which it was received has not been fulfilled by reason of the dishonor of the instrument or otherwise.

BUSINESS LAWS

"Business Laws" provides a comprehensive overview of the legal framework governing business activities, serving as an indispensable resource for students, professionals, and entrepreneurs. This authoritative text covers a wide range of legal topics relevant to the business environment, offering practical insights and analysis to help readers navigate complex legal issues. The book begins by exploring fundamental concepts of business law, including contracts, torts, agency, and business organizations. It then delves into more specialized areas such as commercial transactions, intellectual property rights, employment law, and international trade regulations. Through clear explanations and illustrative examples, readers gain a deeper understanding of how these legal principles apply to real-world business scenarios. With its practical approach, "Business Laws" emphasizes the importance of compliance and risk management in today's competitive business landscape. It highlights key legal considerations for business operations, including legal requirements for starting and operating a business, resolving disputes, and protecting intellectual property. Whether used as a textbook in business law courses or as a reference guide for practitioners, this book equips readers with the knowledge and tools needed to make informed legal decisions and effectively navigate the legal complexities of the business world. It empowers individuals and organizations to conduct their business affairs with confidence, integrity, and legal compliance.

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