CONTRACT - II

UNIT 1

INDEMNITY

Meaning of Indemnity

The term 'indemnity' means to make good the loss or to compensate the party who has suffered some loss.

The Contract of Indemnity and Contract of Guarantee are specific types of Contract. The specific provisions relating to these contracts are contained in Sections124 to 147 of the Indian Contract Act, 1872. In addition to these specific provisions, the general principles of contracts are also applicable to such specific contracts.

CONTRACT OF INDEMNITY [SECTION 124]

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".

Example *A* contracts to indemnify *B* against the consequences of any proceedings which C may take against *B* in respect of a certain sum of Rs 200. This is a contract of indemnity.

Meaning of Indemnifier and Indemnity-holder

The person who promises to make good the loss is called the 'indemnifier': In the aforesaid example, ***A is the indemnifier***. The person whose loss is to be made good is called 'indemnity-holder'. In the aforesaid example, ***B is the indemnity-holder.***

Whether Contract of Indemnity Covers the Cases of Loss Caused by the Events or Accidents which do not Depend upon the Conduct of the Promisor or any other Person

If the definition of contract of indemnity as per Section 124 is strictly interpreted, it would not cover the cases of loss caused by the events or accidents which do not depend upon the conduct of the promisor or any other person. In other words, contracts of insurance would be outside the purview of the contract of indemnity. Since the intention of law makers had never been to exclude the contracts of insurance from the purview of contracts of indemnity, the courts in India have decided to apply the same equitable principles that the courts in England do. As per English law, a contract of indemnity is defined as "a promise to save another harmless from loss caused as a result of a transaction entered into at the instance of the promisor." This definition covers a promise to make good the loss arising from any cause whatsoever. Thus, Indian courts follow the English law in respect of contract of indemnity which covers the contracts of insurance also.

RIGHTS OF INDEMNITY HOLDER [SECTION 125]

COMPLIED BY:- **PROF. DIVYADITYA KOTHARI**

An indemnity holder is entitled to recover the following amounts from the indemnifier provided he acts within the scope of his authority.

1) All damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies.

2) All costs which he may be compelled to pay, in bringing or defending such suit if, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorized him to bring or defend the suit.

3) All sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorized him to compromise the

When does the Liability of Indemnifier Commence?

The Indian Contract Act, 1872 is silent on the time of commencement of liability of indemnifier. On the basis of judicial pronouncement of courts, it can be said that the liability of an indemnifier commences as soon as the liability of the indemnity holder becomes absolute and certain. In other words, if the indemnity-holder has incurred an absolute liability even though he has himself paid nothing, he is entitled to ask the indemnifier to indemnify him.

EXAMPLE:- *X* promises to compensate *Y* for any loss that he may suffer by filing a suit against Z. The court orders *Y to* pay Z damages of Rs 5,000. As the loss has become certain, *Y may* claim the amount of loss from *X* and pass it on to Z.

Mode of Contract of Indemnity

A contract of indemnity may be express or implied.

(a) A contract of indemnity is said to be ***express*** when a person ***expressly promises to compensate the other from loss.***

(b) A contract of indemnity is said to be ***implied*** when it is to be ***inferred from the conduct of the parties or from the circumstances of the case.***

Example

X an auctioneer, sold certain goods at the instruction of *Y.* Later on, it is discovered that the goods belong to Z and not Y. Z recovered damages from X for selling his goods. Here, X is entitled to recover the compensation from Y because there was an implied promise to compensate the auctioneer for any loss which he may suffer on the defective title of goods sold by auction. *[Adamson* v. *Jarvis]*

Essential Elements of Contract of Indemnity

In addition to the implied or express promise to indemnify, all the essentials of a valid contract must also be present.

Example :-

X asks Y to beat *Z* and promises to indemnify Y against the consequences. Y beats *Z* and is fined Rs 1,000. Y cannot claim this amount from X because the object of the agreement was unlawful

GUARANTEE

CONTRACT OF GUARANTEE [SECTION 126]

A contract of guarantee is a contract to perform a promise or discharge the liability of a third person in case of his default.

Example X and his friend Y enter a sho and X says to *Z* "Supply the goods required by Y and if he does not pay you, I will." It is a contract of guarantee.

Meaning of guarantee

A formal assurance [typically in writing] that certain conditions will be fulfilled.

PARTIES TO CONTRACT OF GUARANTEE

There are three parties to a contract of Guarantee-Principle debtor, Creditor and Surety.

Meaning of Principal Debtor [Section 126]
The person in respect of whose default the guarantee is given is called the 'Principal debtor'. *Y* is the principal debtor in the aforesaid example.

Meaning of Creditor [Section 126]
The person to whom the guarantee is given, is called the 'creditor'. Z is the creditor in the aforesaid example.

Meaning of Surety [Section 126]
The person who gives the guarantee is called the 'Surety'. X is the surety in the aforesaid example.

ESSENTIAL FEATURES OF A CONTRACT OF GUARANTEE

1. **ALL THE ESSENTIALS OF A VALID CONTRACT**.

However, the following points are worth noting in this regard:
(i) The principal debtor need not be competent to contract. In case the principal debtor is not competent to contract, the surety would be regarded as the principal debtor and would be personally liable to pay.
(ii) Surety need not be benefited. According to Section 127, "Anything done, or any promise made, for the benefit of the principal debtor, may be a sufficient consideration to the surety for giving the guarantee."
(iii) A guarantee need not be in writing. According to Section 126, a guarantee may be *either* oral *or written.*

2. GUARANTEE NOT TO BE OBTAINED BY MISREPRESENTATION [SECTION 142]

Any guarantee which has been obtained by means of misrepresentation made by the creditor, or with his knowledge and assent, concerning a material part of the transaction, is invalid.

3. GUARANTEE NOT TO BE OBTAINED BY CONCEALMENT [SECTION 143]

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

4. TRIPARTITE AGREEMENT

A contract of guarantee is a tripartite agreement between the principal debtor, creditor and surety. There are three contracts as under:

(i) Contract between creditor and the principal debtor out of which the guaranteed debt arises.

(ii) Contract between surety and the principal debtor by which the principal debtor undertakes to indemnity the surety if surety is required to pay.

(iii) Contract between surety and the creditor by which the surety guarantees to pay the principal debtor's debt if the principal debtor fails to pay.

5. THERE MUST BE CONSENT OF ALL THE THREE PARTIES.

Example:- *X sells and delivers goods to Y. X afterwards requests Z to pay in default of Y. Z agrees to do so. Here, Z cannot become surety without the consent of Y.*

6. EXISTENCE OF A LIABILITY

There must be an existing liability or a promise whose performance is guaranteed. Such liability or promise must be enforceable by law. Hence, guarantee can be given only for liability or promise which is enforceable by law. But there is an exception to this rule. The exception is a guarantee given for minor's debt. Though minor's debt is not enforceable by law, yet the guarantee given for minor's debt is valid.

Example:- *X took a loan of Rs 10,000 from Y on 1st January 1993 and paid nothing on*

IS A CONTRACT OF GUARANTEE A CONTRACT OF *UBERRIMAE FIDEI*

A contract of guarantee is not a contract of *uberrimae fidei* (i.e. a contract of absolute good faith) and hence, it is not necessary for the principal debtor or the creditor to disclose all the material facts to the surety before he enters into a contract.

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For Example:- in case of guarantee given to a bank, bank need not inform the surety of matters affecting the credit of principal debtor.

However, the provisions of Sections 142 and 143 give some protection to the surety by making the following guarantee as invalid.

(a) a guarantee obtained by misrepresentation

(b) a guarantee obtained by concealment of material facts.

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DISTINCTION BETWEEN CONTRACT OF INDEMNITY AND CONTRACT OF GUARANTEE

BASIS	CONTRACT OF INDEMNITY	CONTRACT OF GUARANTEE
1. No. of parties	There are two parties-indemnifier and the indemnity-holder.	There are three parties-principal debtor, creditor and surety.
2. No. of contracts	There is only one contract between indemnifier and indemnity-holder.	There are three contracts, one between creditor and principal debtor, second between surety and principal debtor, and third between surety and the creditor
3. Undertaking	The indemnifier undertakes to save the indemnity-holder from any loss.	The surety undertakes for the payment of debts of principal debtor.
4. Nature of liability	The liability of indemnifier is primary and unconditional	The liability of surety is secondary and conditional. Surety's liability is secondary in the sense that the primary liability is of principal debtor. Surety's liability is conditional in the sense that it arises only on default of principal Debtor
5. Nature of event.	The liability arises only on the happening of a contingency.	The liability arises only on the . non-performance of an existing promise or non-payment of an existing debt.
6. Request	The indemnifier need not act at the request of indemnity-holder.	The surety acts at the request of the principal debtor.
7. Right to sue	The indemnifier cannot sue a third party in his own name because of absence of privity of contract between him and a third party. He can sue the third party in his own name if there in an assignment in his favour.	A surety, on discharging the debt of principal debtor, can sue the principal debtor in his own

EXTENT OF SURETY'S LIABILITY:-

In the absence of a contract to the contrary, the liability of a surety is co-extensive with that of the principal debtor. **It means that the liability of a surety is equal to that of the principal debtor unless otherwise agreed.**

COMPLIED BY:- **PROF. DIVYADITYA KOTHARI**

KINDS OF GUARANTEE

Guarantee may be classified under the following two categories:
I. Specific guarantee
II. Continuing guarantee

I. SPECIFIC GUARANTEE

A guarantee which extends to a single debt or specific transaction is called a specific guarantee. The liability of the surety comes to an end when the guaranteed debt is duly discharged or the promise is duly performed.

Example:- X guarantees payment to Y of the price of the five bags of flour to be delivered by Y to Z and to be paid for in a month. Y delivers five bags to Z, Z pays for them. This is a contract of specific guarantee because X intended to guarantee only for the payment of price of the first five bags of flour to be delivered at one time. ***(Kay v. Groves)***

II. Continuing Guarantee

Meaning of Continuing Guarantee [Section 129]:
A Guarantee which extends to a series of transactions is called a 'continuing guarantee'. A surety's liability continues until the revocation of the guarantee.

Example I:- On S's recommendation, C employed P for the collection of rent from his tenants. *S* promised to make good any default made by P This is a contract of continuing guarantee.

Example II:- *A* guarantees payment to *B*, a tea-dealer to the extent of Rs 100, for any tea he may supply to C from time to time. *B* supplies C with tea to the above value of Rs 100, and C pays *B* for it. Afterwards, *B* supplies C with tea to the value of Rs 200. C fails to pay. The guarantee given by *A* was a continuing guarantee, and he is accordingly liable to *B* to the extent of Rs 100.

NOTE: A continuing guarantee may be given for a part of the entire debt or for the entire debt subject to a limit.

REVOCATION OF CONTINUING GUARANTEE

1. **BY NOTICE OF REVOCATION [SECTION 130]**

A continuing guarantee may at any time be revoked by the surety as to the future transactions by notice to the creditor. However, the surety remains liable for the past transactions which have already taken place.

Example *X* gives guarantee to the extent of Rs 60,000 for the loans given from time to time by Y to Z. Y gave a loan of Rs 20,000 to Z. Afterwards, *X* gives notice of revocation. *X* is discharged from all liability to Y for any loan granted after the revocation of guarantee but he is liable to Y for Rs. 20,000 on default of Z.

COMPLIED BY:- **PROF. DIVYADITYA KOTHARI**

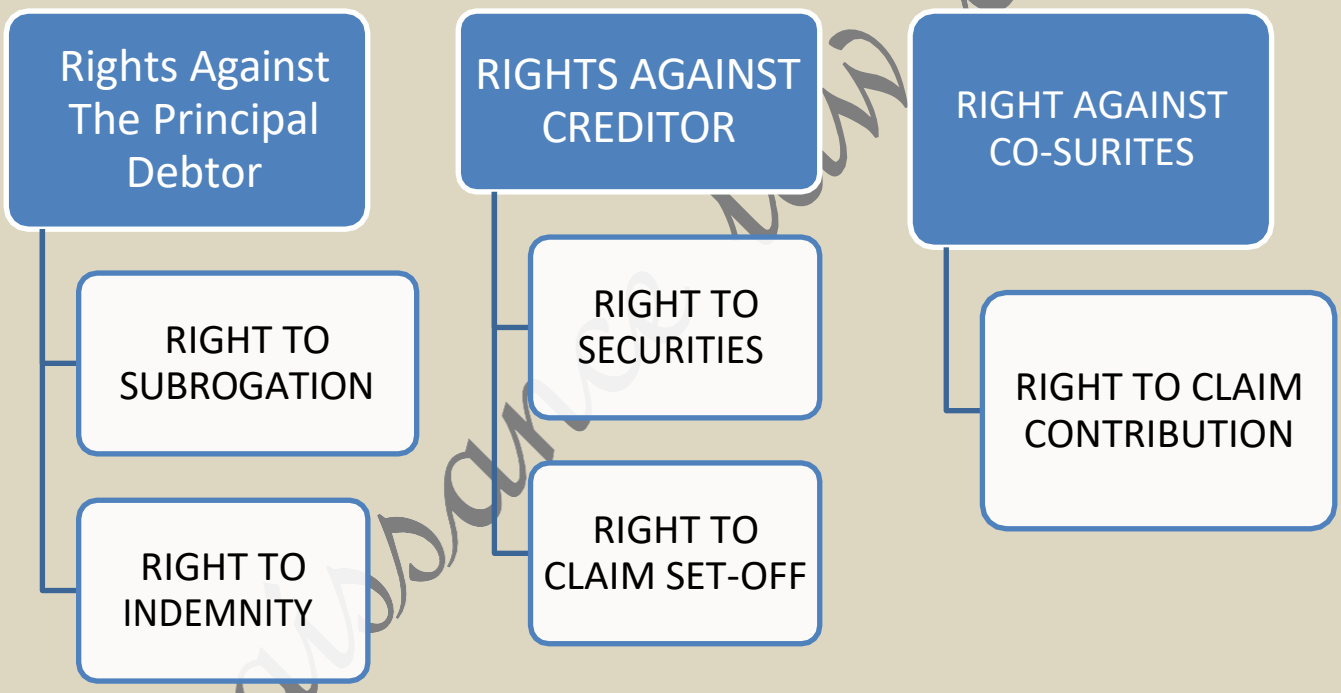
2. BY DEATH OF SURETY [SECTION 131]

In the absence of any contract to the contrary, the death of surety operates as a revocation of a continuing guarantee as to the future transactions taking place after the death of surety. However, the surety's estate remains liable for the past transactions which have already taken place before the death of surety.

3. BY MODES OF DISCHARGING THE SURETY

A continuing guarantee is also revoked in the same manner in which the surety is discharged such as:
(i) Novation [Section 62]
(ii) Variance in terms of contract [Section 133]
(iii) Release or discharge of principal debtor [Section 134]
(iv) When the creditors enter into an arrangement with the principal debtor [Section 135]
(v) Creditor's act or omission impairing surety's eventual remedy [Section 139]
(vi) Loss of security [Section 141]

RIGHTS OF SURETY



I. RIGHTS AGAINST THE PRINCIPAL DEBTOR

(a) Right to Subrogation [Section 140]

On payment of the guaranteed debt or performance of the guaranteed duty; the surety acquires all the rights which the creditor had against the principal debtor. Thus, the surety steps into the shoes of creditor.

(b) Right to Indemnity [Section 145]

In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but not those sums which he had paid wrongfully.

Example I:- B is indebted to C, and *A* is surety for the debt. C demands payment from *A,* and on his refusal sues him for the amount. *A* defends the suit, having reasonable grounds for doing so, but he is compelled to pay the amount of the debt with costs. He can recover from B the amount paid by him for costs, as well as the principal debt.

Example II:- C lends B a sum of money, and *A,* at the request of B, accepts a bill of exchange drawn by B upon *A* to secure the amount. C, the holder of the bill, demands payment of it from *A,* and on *A's* refusal to pay sues him upon the bill. A, not having reasonable grounds for so doing, defends the suit, and has to pay the amount of the bill and costs. He can recover from B the amount of the bill, but not the sum paid for costs, as there was no real ground for defending the action.

Example III:- *A* guarantees to C, to the extent of Rs 2,000, payment for rice to be supplied by C to B. C supplies to B rice of less amount than Rs 2,000 but obtains from A payment of the sum of Rs 2,000 in respect of the rice supplied. *A* cannot recover from B more than the price of the rice actually supplied.

II. RIGHTS AGAINST CREDITOR

(a) Right to Securities [Section 141]

A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and if the creditor loses, or, without the consent of the surety, parts, with such security, the surety is discharged to the extent of the value of the security.

Example I:- C advances to 8 his tenant, Rs 2,000 on the guarantee of A. C has also a further security for Rs 2,000 by a mortgage of Bs furniture. C cancels the mortgage. B becomes insolvent, and C sues A on his guarantee. A is discharged from liability to the amount of the value of the furniture.

Example II:- C, a creditor, whose advances to 8 is secured by a decree, receives also a guarantee for that advance from A. C, afterwards, takes 8's goods in execution under the decree, and then, without the knowledge of *A,* withdraws the execution. *A* is discharged.

Example III *A,* as surety for 8, makes a bond jointly with 8 to C, to secure a loan from C to 8. Afterwards, C obtains from 8 a further security for the same debt. Subsequently, C gives up the further security. *A* is not discharged.

(b) Right to Claim Set Off

The surety has the right to claim set off or counterclaim, if any, which the principal debtor had against the creditors in case the creditors sues him for payment of liability of principal debtor.

III. RIGHT OF CONTRIBUTION AGAINST CO-SURITEIS

Meaning of Co-sureties:- When the same debt or duty is guaranteed by two or more persons, such persons are called as 'co-sureties'.

Right to Claim Contribution:- If a co-surety pays more than his proportionate share of liability, he has a right to claim contribution from the other co-surety or co-sureties.
Right to Share the Security:- If a co-surety obtains any security of principal debtor, the other co-surety (or co-sureties) has (or have) a right to share such security.

Liability of co-sureties is summarized as under:-

WHERE THERE IS NO CONTRACT TO THE CONTRARY	WHERE THE CO-SURETIES HAVE AGREED TO GUARANTEE DIFFERENT SUMS
The co-sureties are liable to contribute equally to the extent of default of principal debtor [Section 146]	The co-sureties are liable to contribute equally subject to the maximum amount guaranteed by each one. [Section 147] They are not liable in proportion to the amount guaranteed by them

NOTE:- Matters Immaterial for the aforesaid Principal
The aforesaid principal regarding the liability of co-sureties is applicable-
(a) whether the sureties are liable jointly or severally.
(b) whether the sureties are liable under the same or different contracts.
(c) whether the sureties are liable with or without the knowledge of each other.

Example I:- A, *Band* C are sureties to *D* for a sum of Rs3,000 lend to *E*. *E* makes default in payment. *A, Band* C are liable, as between themselves to pay Rs 1,000 each.

Example II:- *A, Band* C are sureties to *D* for a sum of Rs 1,000 lent to *E,* and there is a contract between A, *Band* C that *A* is to be responsible to the extent of one-quarter, *B* to the extent of one quarter, and C to the extent of one half. *E* makes default in payment. As between the sureties, *A* is liable to pay Rs 250, *B* Rs 250 and C Rs 500.

Example III:- *A, B* and C as sureties for *D,* enter into three separate bonds, of different amounts-*A* for Rs 10,000, *B* for Rs 20,000 and C for Rs 40,000. The liability of A, *B,* C will be as under if *D* makes default to the extent of (a) Rs 30,000 (b) Rs 40,000 (c) Rs 70,000

NOTE:-Thus, as between the co-sureties there is equality of burden and benefit.

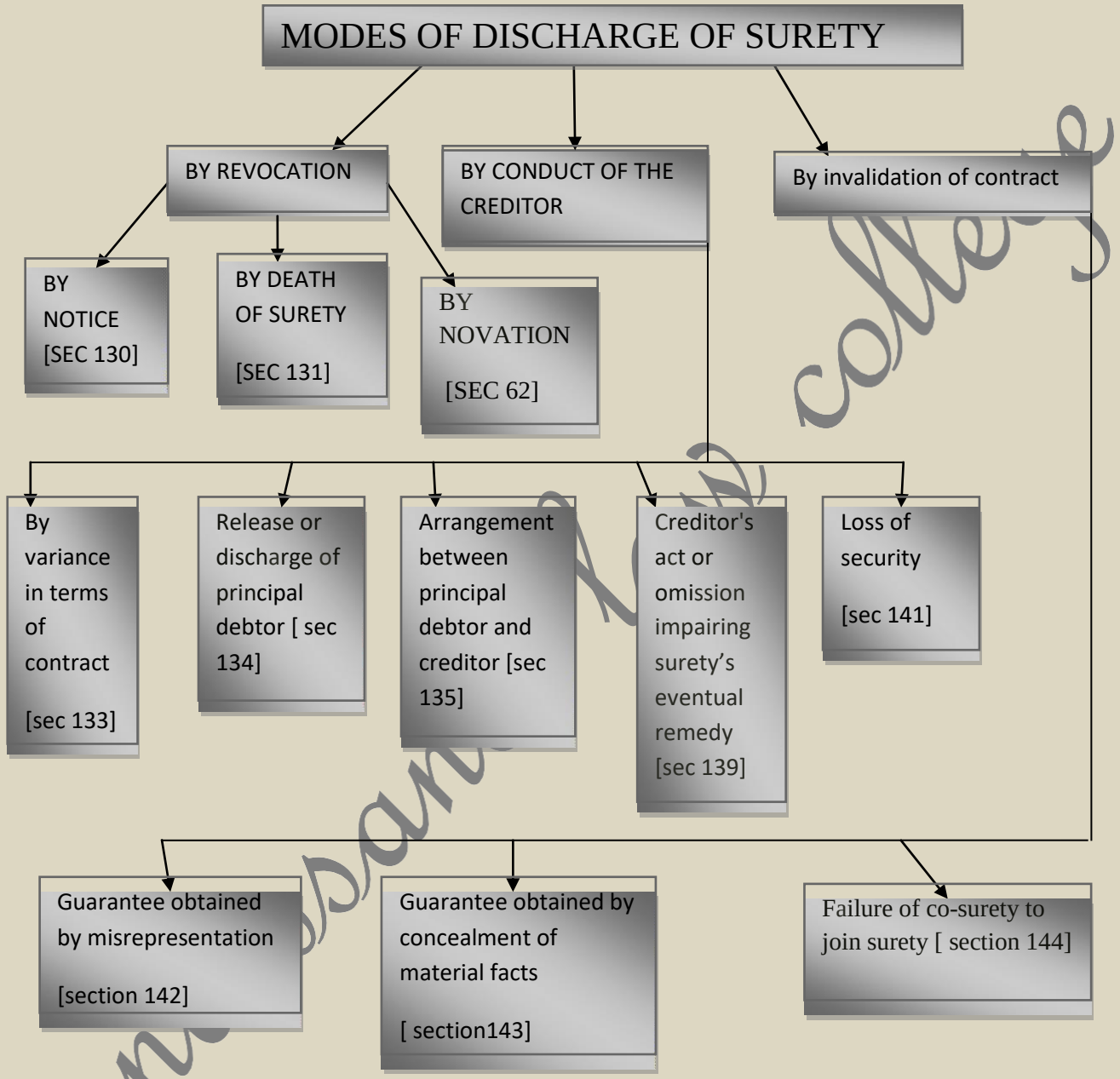
Effect of Release of One Co-surety [Section 138]

Where there are co-sureties, a release by the creditor of one of them does not discharge the others; neither does it free the surety so released from his responsibility to the other sureties. However, under English law the release of one co-surety shall release all the other co-sureties since the liability of co-sureties under English law is only joint and not joint and several.

DISCHARGE OF SURETY

A surety is said to be discharged when his

Liability as surety comes to an end.



BY REVOCATION OF CONTRACT OF GUARANTEE

BY NOTICE [SECTION 130]

A specific guarantee may be revoked by a surety by notice to the creditor if the liability of the surety has not yet accrued. A continuing guarantee may at any time be revoked by the surety as to future transactions by notice to the creditor. However, the surety remains liable for the past transactions which have already taken place.

BY THE DEATH OF SURETY [SECTION 131]

In the absence of any contract to the contrary, the death of a surety operates as a revocation of a continuing guarantee as to future transactions taking place after the death of surety. However, the deceased surety's estate remains liable for the past transactions which have already taken place before the death of the surety but will not be liable for the transactions taking place after the death of surety even if the creditor has no notice of surety's death

BY NOVATION [SECTION 62]

A contract of guarantee is said to be discharged by novation when a fresh contract is entered into either between the same parties *or* between other parties, the consideration being the mutual discharge of the old contract. The original contract of guarantee comes to an end and the surety under original contract is discharged.

BY CONDUCT OF CREDITOR

By Variance In Terms Of Contract [Section 133]

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

Example:- C contracts to lend A Rs 5,000 on the first March. A guarantees repayment. C pays Rs 5,000 to A on the first January. A is discharged from his liability as the contract has been varied in as much as C might sue A for the money before the first of March.

But variation which is not substantial or material or which is beneficial to the surety will not discharge him of his liability. In M.S. *Anirudhan* v. *Thomeo's Bank*, the surety guaranteed overdraft provided by the bank to the prinCipal-debtor only upto Rs 25,000. Subsequently since the bank was willing to provide overdraft only upto Rs 20,000, the principal debtor reduced the amount in the guarantee form to Rs 2,000. On default by the principal debtor the court held the surety liable as the alteration was beneficial to him and it was not of a substantial nature.

BY RELEASE OR DISCHARGE OF PRINCIPAL DEBTOR [SECTION 134]

The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released, or by any act or omissions of the creditor, the legal consequence of which is the discharge of the principal debtor.

Example I A contracts with B for a fixed price to build a house for A within a stipulated time, B supplying the necessary timber. C guarantees A's performance of the contract. B omits to supply the timber. C is discharged from his suretyship.

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

BY ARRANGEMENT [SECTION 135]

A contract between the creditor and principal debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue the principal debtor, discharges the surety, unless the surety assents to such contract.

CASES WHERE SURETY IS DISCHARGED

(i) Where a contract to give time to the principal debtor is made by the creditor with a third person, and not with the principal debtor, the surety is not discharged.

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

(ii) Mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him, does not, in the absence of any provision in the guarantee to the contrary, discharge the surety.

Example:- B owes to C a debt guaranteed by *A*. The debt becomes payable. C does not sue B for a year after the debt has *become* payable. A is not discharged from his suretyship.

(iii) Where there are co-sureties, the release by the creditor of one of them does not discharge the other nor does it free the surety so released from his responsibility to the other sureties. [Section 138]

(d) By Creditor's Act or Omission Impairing Snrety's Eventual Remedy [Section139]

If a creditor does any act which is inconsistent with the rights of the surety, or omits to do an act which is his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.

Example I:- B contracts to build a ship for C for a given sum, to be paid by installments as the work reaches certain stage. A becomes surety to C for B's due performance of the contract. C, without the knowledge of A, pre·pays to B the last two instalments. A is discharged by this prepayment.

Example II:- C lends money to B on the security of a joint and several promissory note, made in *Cs* favour by B, and by A as surety for B, together with a bill of sale of Bs furniture, which gives power to C to sell the furniture, and apply the proceeds in discharge of the note. Subsequently, C sells the furniture, but, owing to his misconduct and willful negligence, only a small price is realized. A is discharged from liability on the note.

(e) Loss of Security [Section 141]

If the creditor loses, or without the consent of the surety, parts with security given to him, the surety is discharged from liability to the extent of the value of security.

Example:- A gave a loan to B on the guarantee of C as well as on the mortgage of Bs furniture. Afterwards, A cancels the mortgage. B becomes insolvent and A sues C on this guarantee. C is discharged from liability to the value of furniture.

BY INVALIDATION OF CONTRACT

(a) Guarantee Obtained by Misrepresentation [Section 142]

Any guarantee which has been obtained by means of misrepresentation made by a creditor or with his knowledge and assent, concerning a material part of the transaction, is invalid.

(b) Guarantee Obtained by Concealment [Section 143]

Any guarantee which a creditor has obtained by means of keeping silence to material circumstances is invalid.

Example:- X employs Y as a clerk to collect money for him. Y fails to account for some of his receipts and X, in consequence calls upon Z to furnish security for his duly accounting. Z gives guarantee for Ys duly account. X does not inform Z about Ys previous conduct. Y, afterwards, makes default. 'z is not liable because the guarantee was obtained by concealment of facts.

(c) Failure of Co-surety to Join a Surety [Section 144]

Where a person gives a guarantee upon a contract that a creditor shall not act upon it until another person has joined in it as co-surety

UNIT 2

BAILMENT

MEANING OF BAILMENT [SECTION 148]

The word bailment is derived from the French word ***'bailler'*** which means ***'to deliver'***. According to section 148, a ***"bailment "*** is 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 off according to the directions of the person delivering them.

Explanation:- if a person already in possession of the goods of another contracts to hold them as bailee, and the owner becomes the bailor of such goods, although they may have been delivered by the way of bailment .hence,

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

EXAMPLES OF BAILMENT :-

a) Ram is going out of station delivers his dog to shyam for proper care.
b) Amit lends his horse to sunil for his riding only without any charge.
c) Anil hires a motor cycle from rahul for riding.
d) Prateek delivers his TV for repairs to an electronics repairman.
e) Leaving your owned property in someone else's possession.

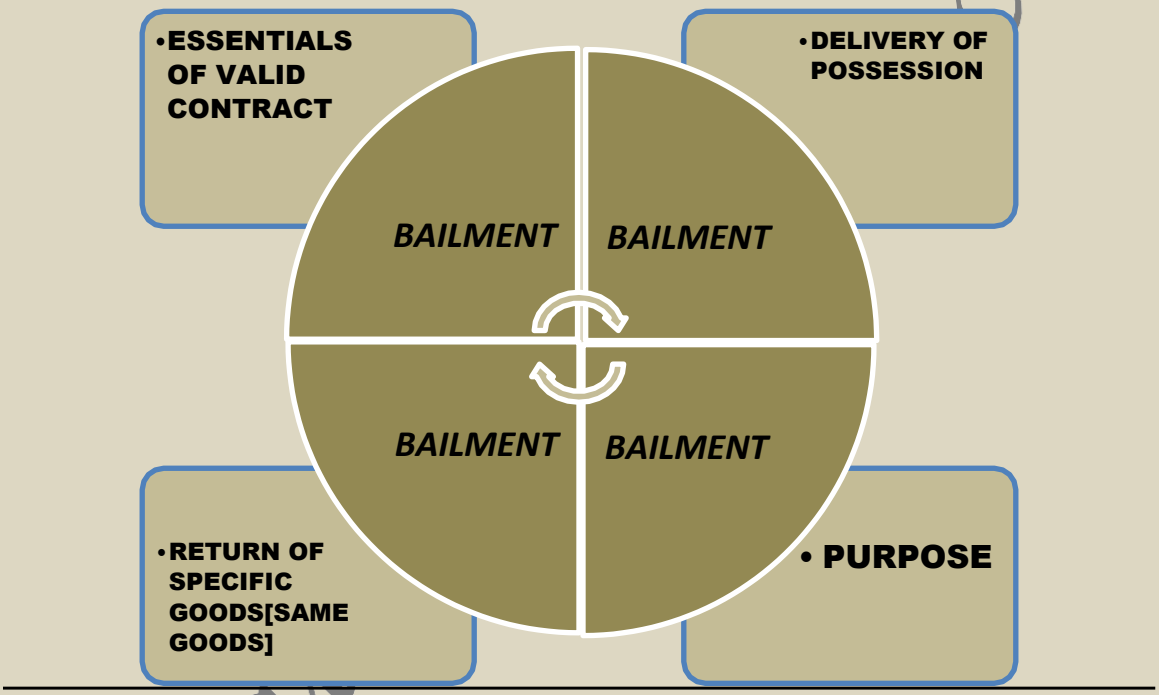
UNDERSTANDING BAILMENT

The temporary placement of control over, or possession of Personal Property by one person, the bailor, into the hands of another, the bailee, for a designated purpose upon which the parties have agreed.The term bailment is derived from the French bailor, "to deliver." It is generally considered to be a contractual relationship since the bailor and bailee, either expressly or impliedly, bind themselves to act according to particular terms. The bailee receives only control or possession of the property while the bailor retains the ownership interests in it. During the specific period a bailment exists, the bailee's interest in the property is superior to that of all others, including the bailor, unless the bailee violates some term of the agreement. Once the purpose for which the property has been delivered has been accomplished, the property will be returned to the bailor or otherwise disposed of pursuant to the bailor's directions.

A BAILMENT IS NOT THE SAME AS A SALE

SALE is an intentional transfer of ownership of personal property in exchange for something of value. A bailment involves only a transfer of possession or custody, not of ownership. A rental or lease of personal property might be a bailment, depending upon the agreement of the parties. A bailment is created when a parking garage attendant, the bailee, is given the keys to a motor vehicle by its owner, the bailor. The owner, in addition to renting the space, has transferred possession and control of the vehicle by relinquishing its keys to the attendant. If the keys were not made available and the vehicle was locked, the arrangement would be strictly a rental or lease, since there was no transfer of possession.

ESSENTIAL ELEMENTS OF BAILMENT



1. **ESSENTIAL OF VALID CONTRACT:**
   A Bialment is usually created by agreement between the bailor and the bailee hence it should contain all essentials of a valid contract viz. Free consent, Parties competent to contract, lawful object and consideration (except without consideration as explained in point no. 5 here) etc. The agreement may be express or implied. In certain cases. It may be quasi contract also for example if someone is finder of lost goods belonging to other.

2. **DELIVERY OF POSSESSION:**
   There must be delivery of goods in form of transfer of possession of goods by bailor to bailee. The term possession here means not just a custody it means temporary transfer of control over the goods also (not ownership). Hence merecustody of goods does not create relationship of bailor and bailee.

> **Illustration 1:** *Ajay went to cinema hall to watch movie, he parked his vehicle in allotted parking slot. A security guard is there to look after. Ajay did not handed over keys. This means this is mere custody not bailment.*

> CASE LAW: KALIPERUMAL V. VISALAKASMI, A.I.R (1938) *In such case a lady engaged a goldsmith for making new jewelry by melting the old one. Every evening she received the unfinished jewelry and put the same into a locked box (retaining keys with herself) kept at the goldsmith's premises. One night the jewelry was stolen from the box. Held, there was no bailment as the goldsmith had re-delivered to the lady (The bailor) the jewelry bailed with him by her .*

Delivery of possession may be actual, symbolic or constructive.

3. **DELIEVERY MUST BE FOR SOME PURPOSE:**
   The delivery of goods from bailor to bailee must be for some purpose. If goods are delivered by mistake to a person , there is no bailment.

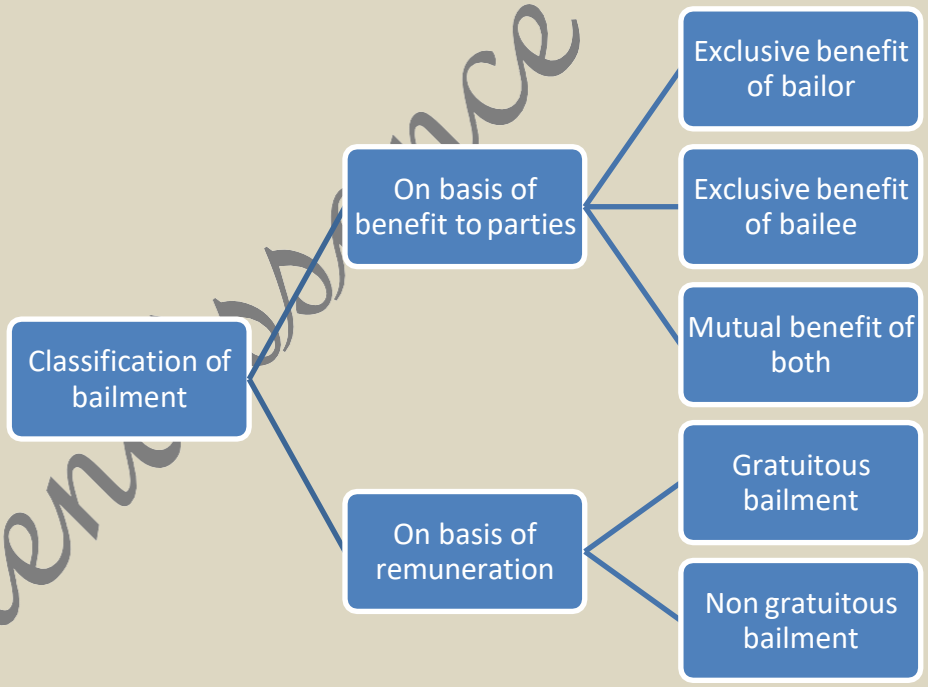
4. **RETURN OF THE SAME GOODS OR DISPOSAL IN ACCORDANCE WITH THE DIRECTIONS OF BAILOR:**
   It is the main purpose of contract that as soon as the purpose is achieved, the same goods shall be returned or disposed of or transformed or altered according to the directions of the bailor. If the goods are not to be specifically returned, there is no bailment.

Goods here mean every kind of movable property other than money and actionable claims. Section 2 (7) of the Sale of Goods Act. Hence there must not be contract of bailment if transfer of possession of immovable property, money or actionable claim is there.

5. **CONSIDERATION IN A CONTRACT OF BAILMENT**:
Generally there is a consideration in a contract of bailment but sometimes it may be without consideration also which is an exception to section 25 of The Indian Contract Act, 1872 that agreement without consideration is void.

Ex: Borrowing book from friend to read involves no consideration but it is a bailment.

CLASSIFICATION OF BAILMENTS



Bailment can be classified on following 2 bases:

❖ **ON THE BASIS OF BENEFIT TO THE PARTIES:**

- **FOR THE EXCLUSIVE OF THE BAILOR:**

For eg: Leaving a pet with neighbor when we are out of the town is a bailment for THE EXCLUSIVE benefits of ours that somebody is taking care of our pet

- **FOR THE EXCLUSIVE OF THE BAILEE:**

For eg: Your friend borrow your bike for some specific purpose, this bailment is from your side(as bailor) for the exclusive benefit of your friend (as bailee).

- **FOR THE MUTUAL BENEFIT OF BOTH:**

For eg: Giving a bike for repair to mechanic in which the consideration passes between the bailor and the bailee.

❖ **ON THE BASIS OF REMUNERATION:**

Bailments may also be classified into:

- **GRATUITOUS BAILMENT:**

It is bailment where no consideration passes between the bailor and the bailee.eg. where you lend your book to a friend free of charge.

- **NON- GRATUITOUS BAILMENT:**

  It is bailment where no consideration passes between the bailor and the bailee. Eg: where you run a library by charging a fee. Someone (may be your friend) get issued some books and he will pay the charges.

DUTIES OF BAILOR

- **DUTY TO DISCLOSE KNOWN FAULTS:** Whether the bailment is gratuitous or non gratuitous it is the duty of bailor to disclose the known faults about the goods bailed to the bailee. If bailor does not make such disclosure he is responsible to indemnify the bailee for any damage caused to him directly from such faults. Further it should be noted that if the contract of bailment is non gratuitous the duty of bailor is greater. He is responsible even for those faults which are not known to him.

Illustration 1: *Ashok lends a bike to Mukesh which he knows is difficult to control as breaks are not working properly. He does not disclose that braking system of bike is not proper. Mukesh met an accident and injured. Ashok is responsible to Mukesh for damage sustained.*

Illustration 2: *Gagan hires a racing car from Tikuchand to participate in formula-1 racing. The car caught fire during race and Gagan was unable to extinguish it as the fire- fighting equipment was out of order. As such he was injured and suffered loss. Hence Tikuchand is responsible to indemnify Gagan even if it was not in his knowledge that fire –fighting equipment is empty.*

- **DUTY TO BEAR EXPENSES OF BAILMENT:**

❖ **In case of Non-Gratuitous Bailment:** The bailee is bound to bear ordinary and reasonable expenses of the bailment but for any extra ordinary expenses the bailor is responsible.

> **Illustration 1:** *Amit lends his dog to Sumit, a professional dog trainer , for 7 days as he has to attend the marriage outside the town. As Amit is paying charges for it he needs not to pay for ordinary expenses. But if the dog suffers with high fever and Sumit calls Doctor, Amit will have to repay Sumit additional medical expenses, incurred by Sumit.*

❖ **In case of gratuitous bailment:** The goods are to be kept or to be carried, or some work is to be done upon the goods by the bailee for the bailor, the bailor must repay to the bailee all the necessary expenses incurred by him for the purpose of the bailment**(Section 158) .**

> **Illustration 1:** *Amit lends his dog to Sumit, a dear friend, for 7 days as he has to attend the marriage outside the town. As Amit is not any paying charges for bailment he need to pay for ordinary expenses of feeding the dog for 7 days. But if the dog suffers with high fever and Sumit calls Doctor, Amit will have to repay Sumit additional medical expenses also, incurred by Sumit.*

- **TO INDEMNIFY BAILEE:** To Indemnify Bailee for loss in case of **premature termination of gratuitous bailment.** According to **Section 159** in case of gratuitous bailment can be terminated by bailor at anytime even though the bailment was for a specified time or purpose. But in such a case, the loss securing to the bailee from such premature termination should not exceed the benefit he has derived out of the bailment. If the loss exceeds the benefit, the bailor shall have to indemnify the bailee.

> **Illustration 1:** *Pankaj lends his car to Navin, a dear friend of 7 days as Navin has to attend the marriage outside the town. As Navin is not any paying charges for bailment he filled 25 litres petrol in car for his purpose. Suddenly after 3 days Pankaj called Navin to give back car. Navin can demand from Pankaj value of the petrol remained in the car after 3 days.*

- **TO INDEMNIFY THE BAILEE WHEN THE TITLE OF THE BAILOR TO THE GOODS IS DEFECTIVE AND THE BAILOR SUFFERS AS THE CONSEQUENCE:**

  In such situation according to Section 164, the bailor is responsible to the bailee for any loss which the bailee may sustain by reason that the bailor was not entitled to make bailment or to receive back the goods or to give directions resoecting them**(section 164)**

> **Illustration 1:** *Pankaj lends his car to Navin, a customer for 7 days as Navin has to attend the marriage outside the town. As Navin has paid rs 2500 in advance to Pankaj after 3 days police came 7 fetch the car from Navin as it belongs to Ashok , the real owner of the car.*
> *Navin had to arrange a new car for the same purpose for ahigher rent. Now Navin can claim Pankaj in excess of over the benefit derived by him by using the car & in addition to that higher rental paid by Navin for the new car rental.*

- **TO RECEIVE BACK THE GOODS:**

  It is the duty of the bailor to receive back the goods on the expiry of the term of the bailment or when the purpose for which bailment was created has been accomplished. If the bailor refuses to receive back the goods, the bailee is entitled receive compensation from the bailor for the necessary expenses of custody and care

> **Illustration No.1:** *Arvind bailed his dog to Khushboo for 7 Days at the daily charges of Rs.50. Arvind came back to receive dog after 25 days. Arvind has to pay additional charges for 18 Days. If this would have been a gratuitous bailment then also Arvind has to pay ordinary and extra-ordinary expenses for 18 extra days.*

DUTIES OF BAILEE:

1. **To Take Reasonable Care of the Goods Bailed:**

   As per 151 whether the bailment is gratuitous bailee is responsible to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own gods of the same bulk, quality and value as the goods bailed. Further according to section 152 in spite of the bailee's reasonable care, goods are damaged or destroyed in any way; the bailee is not liable for the loss, destruction or deterioration of the thing bailed.

> **Illustration No.1:** *Arvind bailed his DOG to Gagan for 7 days at a daily charges of Rs.50/-. Arvind came to reserve the DOG after 7 days, found that DOG was stolen from the place of GAGAN. If it is proved by GAGAN that he took every reasonable care but still all the Dogs in his place were stolen by a smart thief. GAGAN, will not be responsible but if it is proved by ARVIND that GAGAN was careless (say forget to lock the place at night) GAGAN will be responsible for the same.*

2. Not make any unauthorized use of goods. According to section 154 in case where bailee uses the goods bailed in a manner which is inconsistent with the terms of the contract, he shall be liable for any loss even though he is not guilty of negligence, and even if the damage is the result of an accident (or Act of GOD).

Illustration No. 2: *Amit lends a horse to manish for his riding only. Maneesh allows Neetu (a champion horse rider of the country), to ride the horse. Neetu rides with care, but the horse accidently falls and is injured. Manish is liable to make compensation to Amit for the injury caused to the horse because Manish made unauthorized use of the horse when it met with an accident.*

3. Not mix the goods bailed with his own goods. The bailee must not mix the goods of bailor with his own goods, but must keep them separate from his own goods. If he mixes the bailor's goods with his own goods-
   (a) With the bailor's consent, both shall have a proportionate interest in the mixture thus produced **(Section 155)**;
   (b) Without the bailor's consent, and if the goods can be separated or divided, the bailee is bound to bear the expenses of the separation or division, as well as damage arising from the mixture **(Section 156)**;

Illustration No. 3: *A bails 100 bales of the cotton marked with a particular mark to B.B, without A's consent, mixes the 100 bales with other bales of his own, bearing a different mark. A is entitled to have his 100 bales returned and B is bound to bear all the expenses incurred in the separation of the bales, and any other incidental charges.*

(c) Without the bailor's consent, so that the mixture is beyond separation, the bailor is entitled to be compensated by the bailee for the loss of the goods **(Section 157)**.

Illustration No. 4: *A bails a bag of Farm wheat worth Rs.550 to B.B, without A's consent mixes the wheat with the imported wheat of his own, worth only Rs.250 a bag. B must compensate A for the loss of his wheat.*

If the goods of the bailor get mixed up with the like goods of the bailee,by inadvertence of the bailee or the accident or by an act of God or by thae act of an unauthorised third party, the mixture belongs to the bailor and the bailee in proportion to their shares but the cost of seperation will have to be borne by the bailee.

4. **Not to Set up an Adverse Title (Section117 of the Indian Evidence Act, 1872)**:
   The bailee must hold the goods on the behalf of and for the bailor. He cannot dent the right of the bailor to bail the goods and receive them back. If he delivers the goods bailed to a person other than the bailer, he may prove that such person had a right to them as against the bailor.
5. **To Return any Accretion to the Goods:** In the absence of any contract to the contrary, the bailee is bound to deliver to the bailer, or according to his directions, any increase or profit which may have accrued form the goods bailed **(Section 163)**.

6. **To return the goods:**

It is the duty of the bailee to return or deliver, according to the bailor's directions the goods bailed, without demand, as soon as the time for which they were bailed has expired, or the purpose for which they were bailed has been accomplished **(Section 160)**. If he fails to do so, he is responsible to the bailor for any loss **(Section161)** notwithstanding the exercise of reasonable care on his part.

> **Illustration No.5**: *A delivered some books to B to be bound. He pressed for their return, but B neglected to return them although more than a reasonable time has elapsed. A fire accidently broke out on the B's premises, and the books were burnt. Held, B was liable for the loss although he was not negligent, because of his failure to deliver the books within a reasonable time [Shaw & Co. v. Symmons & Sons, (1917) 1K.B. 799].*

RIGHTS OF BAILOR:-

1. **Enforcement of rights:**
The bailor can enforce by suit all the liabilities or duties of the bailee, as his rights.
2. **Avoidance of contract:**
The bailor can terminate the bailment if the bailee does, with regard to the goods bailed, any act which is inconsistent with the terms of the bailment **(Section 153)**.

> **Illustration No.1**: *A lets horse to B for his own riding only. B uses the horse with a carriage. A can terminate bailment.*

3. **Return of goods lent gratuitously**:
When the goods are lent gratuitously. The bailor can demand their return whenever he pleases even though he lent them for a specified time or purpose. But if the bailee suffers any loss exceeding the benefit actually derived by him from the use of such goods because of premature return of goods, the bailor shall have to indemnify the bailee**(Section 159)**.
4. **Compensation from a wrong-doer**:
If a third person wrongfully deprives the bailee of the use of possession of the goods bailed, or does them any injury, the bailor or the bailee may bring a suit against the third person for such deprivation of injury **(Section 180)**.

RIGHTS OF BAILEE:

The duties of the bailor are the rights of bailee. As such, the bailee can, by suit, enforce the duties of the bailor. The other rights of the bailee are as follows:

1. **Delivery of Goods to one of Several Joint Bailor's of Goods**: If several joint owners of goods bail them, the bailee mat deliver them back to, or according to the directions of, one joint owner without the consent of all, in the absence of the agreement to the contrary **(Section 165).**

2. **Delivery of Goods to Bailor without Title**. If the bailor has no title to the goods, and the bailee, in good faith, delivers them back to, or according to the directions of, the bailor. The bailee is not responsible to the owner is respect of such delivery **(Section 166).**
3. **Right to Apply to Court to Stop Delivery:**
   If a person, other than the bailor, claims goods bailed, the bailee may apply to the court to stop the delivery of the goods to the bailor, and to decide the title to the goods **(Section 167).**
4. **Right of Against Trespassers:**
   If the third person wrongfully deprives the bailee of the use or the profession of the goods bailed to him, he has the right to bring an action against that party. The bailor can also, bring a suit in respect of the goods bailed **(Section 180).**
5. **Bailee's lien:**
   Where the lawful charges of the bailee in respect of the goods bailed are not paid, he may retain the goods. This right of the bailee to retain the goods is known as 'particular lien'.

CONTRACT OF AGENCY

Since it is not always possible for a person to do everything by himself, it becomes necessary to delegate some of the acts to be performed by another person. Such another person is called an agent. The person represented is called the principal. The law relating to agency is contained in Chapter X (Sections 182 to 238) of the Indian Contract Act, 1872.

14.1 MEANING OF CONTRACT OF AGENCY

By a contract of agency, a person employs another person to do any act for him or to represent him in dealing with third persons so as to bind himself by the acts of such another person.

The law of agency is based on the following general rules:

(i) Whatever the principal can do by himself, he may get the same done through an agent, except when the act involved is of personal nature e.g. the principal can¬not ask his agent to become insolvent on his behalf or to marry on his behalf.

(ii) What a person does by another, he does by himself. Thus, the acts of the agent are the acts of the principal.

14.2 AGENT

Meaning of an Agent [Section 182]

An agent is a person employed to do any act for another or to represent another in dealings with third persons. Thus, an agent establishes a contract between such another person and third person.

Who May be an Agent [Section 184]

As between the principal and third persons, any person (whether he has contractual capacity or not) may become an agent. Thus, a minor or a person of unsound mind can also become an agent.

Agent's Responsibility to his Principal (Section 184]

An agent who is not of the age of majority and of sound mind is not responsible to his principal.

Example X hands over to Y, a minor, a TV set worth As 18,500 and instructs him not to sell below Rs 19,000. Y sells the same to Z for Rs 18,000. X will be responsible to Z for the act of Y but Y himself will not be responsible to X since he has no contractual capacity.

Distinction between an Agent and Servant

An agent differs from a servant in the following respects:

Basis of distinction	*An agent*	*Servant*
1. Authority to create contractual relationship	Hehastheauthoritytocreate contractual relationship between the principal and a third party.	He ordinarily has no such authority.
2. Work of several persons	He may work for several principals at a time.	He ordinarily works only for one master.
3. Remuneration	He usually gets commission..	He usually gets salary or wages.

Distinction between an Agent and Independent Contractor

An agent differs from an Independent Contractor in the following respects:

Basis of distinction	*An agent*	*Independent contractor*
1. Control and supervision	He works under the control and	He works independently of *the*

	supervision of the principal.	control of the person for whom he does the work.
2. Personal liability	He is not personally liable for all acts done by him within the scope of his authority.	He is personally liable for all acts done by him.
3. Remuneration	He usually gets commission.	He usually gets the fixed contracted amount or amount at a fixed contracted rate.

14.3 PRINCIPAL

Meaning of Principal [Section 182]

The person for whom act is done by an agent or who is represented in dealings with third persons by an agent is called the principal.

Who may Employ Agent [Section 183]

Any person who is of the age of majority according to the law to which he is subject, and who is of sound mind, may employ an agent. Thus, a minor or a person of unsound mind cannot appoint an agent. It has **been new mai a** minor can appoint an agent to ***minor. [Madan Lal v. Bheru La!]***

14.4 CONSIDERATION FOR AGENCY

Is Consideration for Agency Necessary [Section 185]

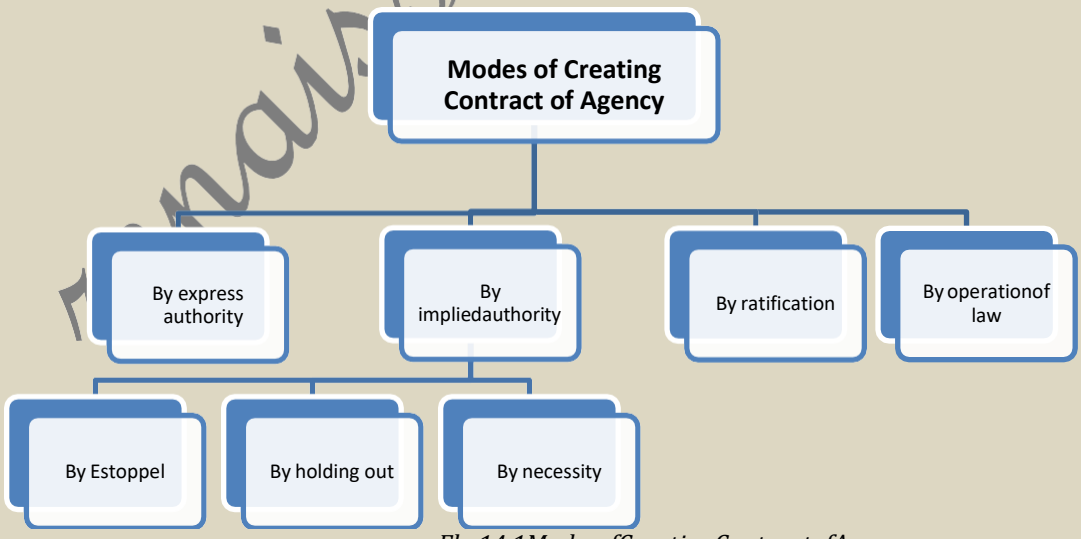
No consideration is necessary to create an agency. Thus, a contract of agency constitutes an exception to the general rule contained in Section 25 that no contract can be valid unless it is entered into for a consideration. It means that there can be a gratuitous contract of agency and a gratuitous agent will be as much bound by his acts as a paid agent.

14.5 TEST OF AGENCY

The true test of agency lies in answering the question whether a person has the capacity to create contractual relationship between the principal and a third party and to bind the principal by his acts. If the answer to this question is yes, there exists the relationship of agency otherwise not.

14.6 CREATION OF AGENCY

The various modes to create the contract of agency are shown below in Fig. 14.1.



Flg.14.1ModesofCreatingContractofAgency

Let us discuss them one by one.
I. Agency by Express Authority [Sections 186 and 187]
An agency by express authority arises when an express authority is given to the agent by spoken or written words.

Example X who owns a shop, appoints Y to manage his shop by executing a power of attorney In Y's favour. Here, the relationship of principal and agent has been created between *X* and Y by an express authority.

II Agency by Implied Authority [Section 187]
An agency which has to be understood from the conduct and behaviour of the parties is called implied agency. It is to be inferred from the circumstances of the case and things spoken or written, or the ordinary course of dealing may be accounted as circumstances of the case.

Example A owns a shop in Shimla, living himself In Calcutta, and visiting the shop occasionally. The shop Is managed by B, and he is In the habit of ordering goods from C In the name of A for the purposes of the shop and of paying for them out of A's funds with A's knowledge. B has an Implied authority from A to order goods from C in the name of A for the purposes of the shop.

Implied agency includes the following:

(a) **Agency by Estoppel** Agency by estoppel arises where a person by his words or conducts induces third persons to believe that a certain person is his agent. The person who induces as such is estopped or prevented from denying the truth of agency. Section 237 of the Act deals with agency by estoppel.

Example X tells Y in the presence and within the hearing of Z that he (X) is Z's agent. Z does not contradict this statement. Later on Y enters into a contract with X believing that X Is Z's agent. In such a case Z is bound by this contract and in a suit between Z and Y, 2 cannot be permitted to Shy that X was not his agent, even though X was not actually his agent.

(b) **Agency by Holding Out** Agency by holding out is almost similar to agency by estoppel. Such agency arises when a person by his past affirmative or positive conduct leads third person to believe that person doing some act on his behalf is doing with authority.

Example X allows Y. his servant to purchase goods for him on credit from Z and later on pays for them. One day X pays cash to Y to purchase goods. Y misappropriates the money and purchases goods on credit from Z. Z can recover the price of his goods from X because X had held out Z as his agent on earlier occasions.

(c) **Agency by Necessity** Agency by necessity arises under the following two conditions:
- (i) There is an actual and definite necessary for acting on behalf of the principal, and
- (ii) It is impossible to communicate with the principal and obtain his consent.
- (iii) The act must have been done in the best interest of the principal.

Example I X consigned some vegetables from Delhi to Bombay by a truck. The truck met with an accident. The vegetable being perishable were sold by the transporter. This sale is binding on X. In this case, the transporter became an agent by necessity. (Sim & Co. v. Midland Rly Co.)
Example II X stored some furniture In Ys house free of charge. Atter three years, Y needed the space occupied by the furniture. He obtained Ks address from his bank and wrote two letters to him but he received no reply. Y then sold the furniture. It was held that the sale was not binding on the owner because there was no emergency which required the sale of furniture. [Sachs v. Milkos]

III. Agency by Ratification (Section 196]

(a) Meaning Agency by ratification is said to arise when a person, on whose behalf the acts are done without his knowledge or authority, expressly or impliedly accepts such acts. Thus, when the principal approves an act of the agent who never had the authority to undertake such an act, it is called Ratification. It is also known as ex-post facto agency i.e. agency arising after the event.

(b) Effect of Ratification [Section 196] The effect of ratification is to make the agent's unauthorised acts as authorised as if they had been performed with the principal's authority. It may also be noted that ratification is tantamount to prior authority. This means that the ratification relates back to the date when the act was done by the agent and not to the date when the principal ratified the act. Hence, the agency is deemed to have come into existence from the time when the agent first acted and not from the time when the principal ratified the act.

Example X the managing director of a company, without prior authority from the company accepted an offer made by Y on behalf of the company. Y later on revoked the offer but the company ratified X's acceptance. It was held that Y is bound by ratification because ratification related back to the time of X's acceptance. (Bolton Partner v. Lambert).

(c) Mode of Ratification [Section 197] Ratification may be express or may be implied by the conduct of the person on whose behalf the acts are done.

Example I A, without authority, buys goods for B. Afterwards B sells them to Con his own account; Bs conduct Implies a ratification of the purchases Made for him by A.

Example II A. without as authority, lends 13's money to C. Afterwards B accepts interest on the money from C. B's conduct implies a ratification of the loan.

(d) Essentials of a Valid Ratification [Sections 198\to 200] The essentials of a valid ratification are shown in Fig. 14.2.

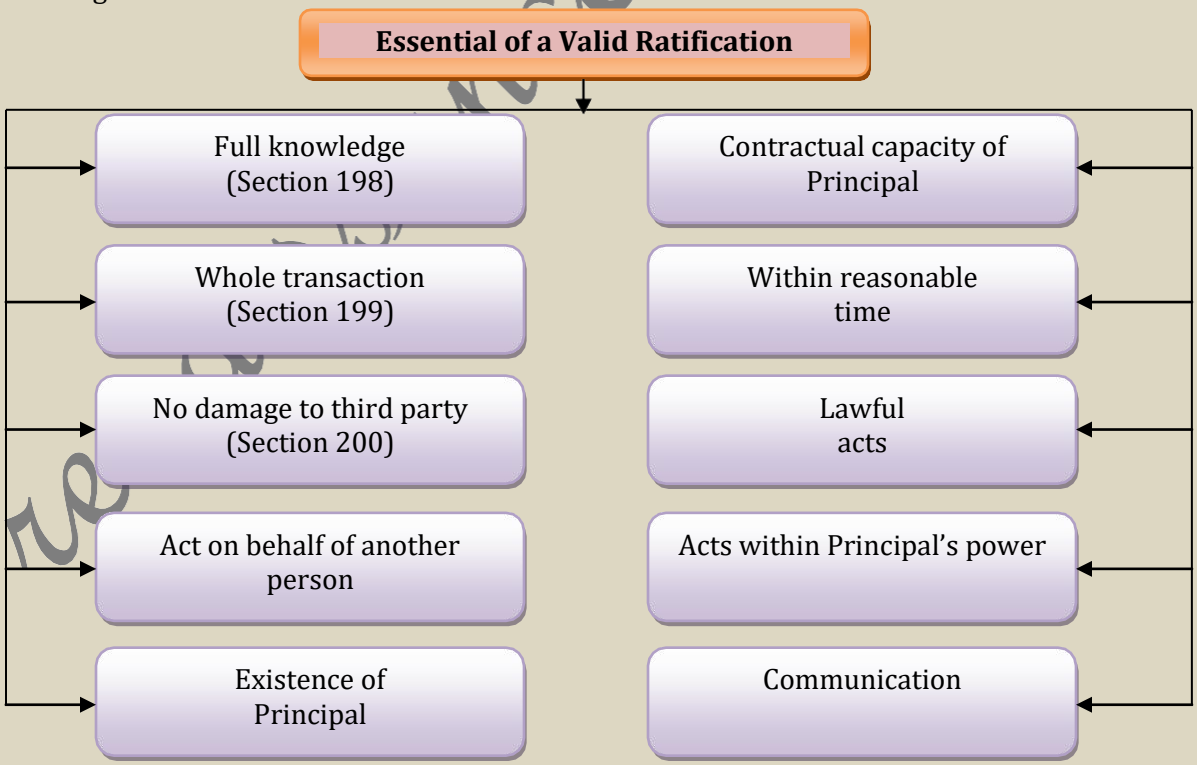


Fig 14.2 Essential of a Valid Ratification

Let us discuss them one by one.

(i) Full Knowledge [Section 198]: No valid ratification can be made by a person whose knowledge of the facts of the case is materially defective.

Example X instructed Y to arrange a house on a reasonable rent in Bombay. Y lets out his own house at a rent which is much higher than the prevailing rentals in that area. X started living in the house. Later on X came to know that the house belonged to Y. Xs ratification is not binding upon himself. [Damodharan Das v. Sheroam Dass]

(ii) Whole Transaction (Section 199): The ratification must be made for the whole transaction and not for a part of transaction. When a person ratifies a part of the unauthorised transaction, it is treated as the ratification of whole transaction.

Example X, without Y's authority buys 100 bales of cotton. Y wants to ratify this transaction to the extent 3f 60 bales and reject the rest. Y cannot do so. If he does so, It will be treated as the ratification of whole transaction of 100 bales.

(iii) No Damage to Third Party (Section 200): An act which has the effect of subjecting a third person to damages or of terminating any right or interest of a third person, cannot be ratified.

Example I X is in possession of a horse belonging to Y. Z without Vs authority demands on behalf of Y the defile% of that horse. X refuses to deliver the horse to Z. Y cannot ratify the demand made by Z so as to make X liable for damages for his refusal to deliver.

Example II X holds a flat on a lease from Y. The lease is terminable on 3 months' notice. Z, without Ys authority gives notice of termination of lease to X. Y cannot ratify the notice given by Z so as to be binding on X.

(iv) Act on Behalf of another Person: The acts done by an agent on behalf of another person can only be ratified. Thus, the acts done by the agent in his own name cannot be ratified.

Example X, without Ys authority or knowledge buys 100 bales of cotton on behalf of Y and buys 50 bales of cotton in his personal name from Z on different dates. Subsequently, the prices of cotton go up. Y wants to ratify the purchase of 150 bales of cotton. He can ratify only the purchase of 100 bales made on his behalf and not the purchase of 50 bales. [Keighley Matted & Co. v. Durant]

(v) Existence of Principal: The principal must be in existence at the time when the act is done in his name.

Example The promoters of a company enter into contract for a company before its incorporation. The company after Incorporation, cannot ratify such contracts because the company was not In existence at the time when the contract was entered Into (Kelner v. Baxter).

(vi) Contractual Capacity: The principal must have contractual capacity both at the time of contract and at the time of ratification,

Example A minor on attaining majority cannot ratify the contracts made on his behalf during his minority.

(vii) Within Reasonable Time: The ratification must be done within a reasonable time, otherwise it will not be binding.

Example X without authority from Y insured his goods against tire. After the policy was taken, the goods were destroyed by fire subsequent to the fire, Y ratified Xs act of insuring the goods and accepted the insurance policy. It was held that the ratification made by Y was not valid because Xs act should have been ratified before the loss of goods. [Grover and Grover Ltd v. Mathews)

(viii) Lawful Acts: Only those acts which are lawful can be ratified.
Example X forges Y's signature on a cheque and withdraws Rs 1,000 from V's bank account. Subsequently, Y ratifies the act of withdrawing money. Such ratification is not valid because forgery is an offence.
(ix) Acts within Principal's Power: Only those acts which are within the principal's power can & be ratified. Thus, an act which is beyond the competence of a principal cannot be ratified.
Example A director of a non-trading and non-banking company borrowed As 1.00,000 on behalf of the company. The company cannot ratify such act of director because it is ultra-vires the Company (i.e. beyond the power of the company).

(x) Communication: The ratification must be communicated to the third party so as to be 'binding on the third party.

Agency thy Operation of Law
Agency lby operation of law is said to arise where the law treats one person as an agent of another.
Example On formation of a partnership, every partner becomes the agent of other partner. Such agency is said to be arisen by operation of law.

14.7 AGENCY RELATIONSHIP BETWEEN HUSBAND AND WIFE
The question whether and to what extent a wife can pledge her husband's credit, may be discussed as under:

Case	Provision
I. where wife lives with her husband	There is a legal presumption that a wife has authority to pledge her husband's credit for necessaries. But the legal presumption can be rebutted in the following cases: (a) Where the goods purchased on credit" are not necessaries. (b) Where the wife is given sufficient money for purchasing necessaries. (c) Where the wife is forbidden from purchasing anything on credit or con-tracting debts. (d) Where the trader has been expressly warned not to give credit to his wife.
II. Where the wife lives apart for no fault don her part	A wife has authority to pledge her husband's credit for necessaries. This legal presumption can be rebutted only in cases (a) and (b), and not in cases (c) and (d).
III. Where wife lives apart for no fault ***1*** on her husband's part	A wife has no authority to pledge her husband'screditeven for necessaries.

Example X was the manager of a hotel where his wile Y was working as manageress. They were living together in the same hotel but they did not have any domestic establishment of their own. Y purchased some clothes from Z or credit. Z demanded the payment from X. It was held that X was not liable to pay because there was no domestic establishment of their own. [Debenham v. Mellon]

14.8 CLASSIFICATION OF AGENTS

The classification of agents has been shown below in Fig. 14.3.

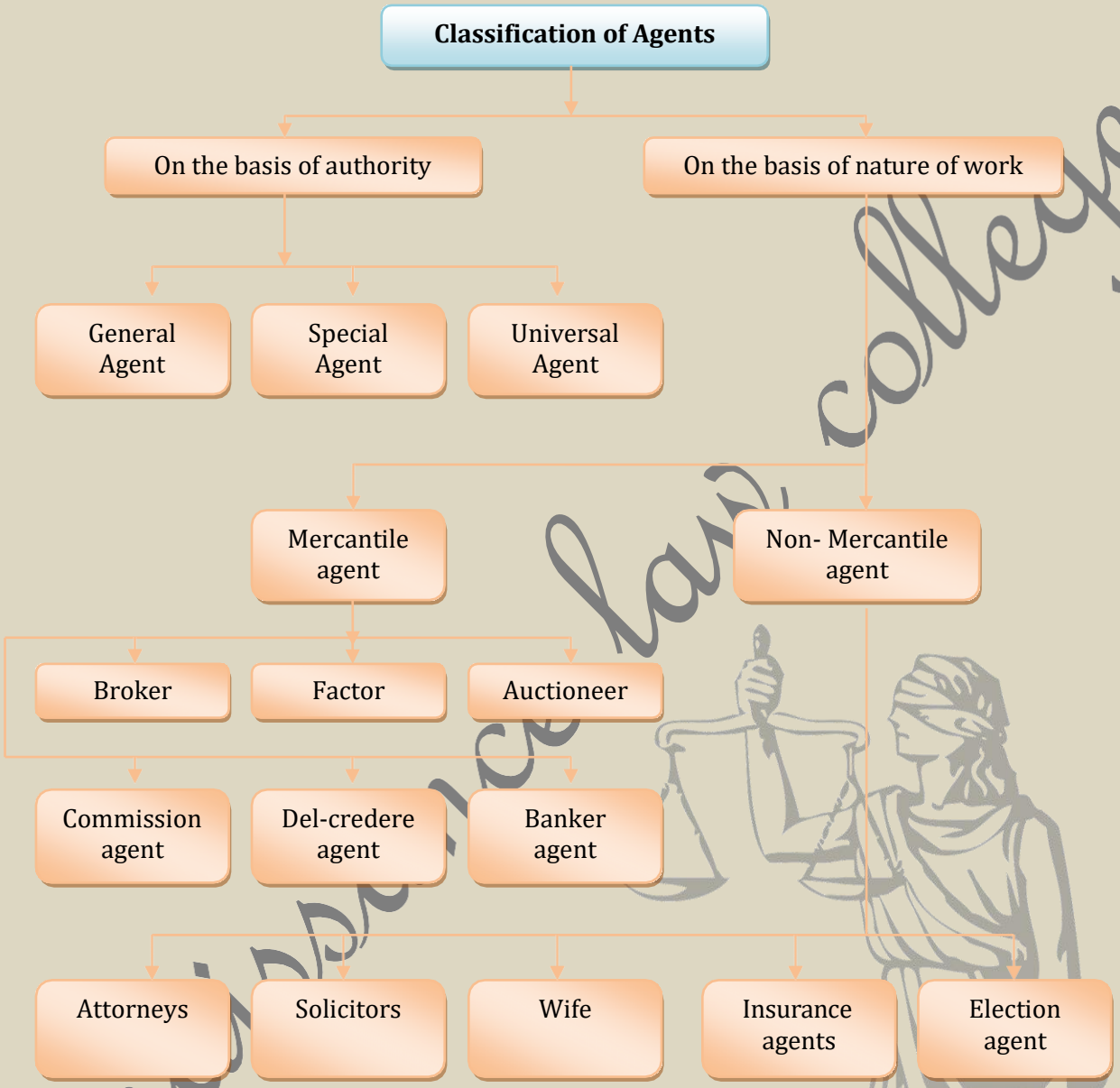


Fig. 14.3 Classification of Agents

Let us discuss them one by one.

(a) **General Agent** A general agent is one who has authority to do all acts in the ordinary course of trade or profession. The authority of a general agent is continuous unless it is terminated.

(b) **Special Agent** A special agent is one who has authority to do a particular act in a particular transaction, The authority of a special agent is limited to that particular act only and his authority conies to an end when that act for which authority was given is performed.

(c) **Universal Agent** A universal agent is one who has authority to do all acts which the principal can lawfully do and delegate. He has an unlimited authority to bind the principal.

(d) **Broker** A broker is one who negotiates and makes contracts between the principal and the third party. He is not entrusted with the possession of goods and hence he has no lien on the goods.

(e) **Factor** A factor is one who is entrusted with the possession of goods and who has the authority to buy, sell or otherwise deal with the goods or to raise money on their security. He has a general lien on the goods.

(f) **Auctioneer** An auctioneer is one who is entrusted with the possession of goods for sale at a public auction. He has only a particular lien on the goods for his charges.

(g) **Commission Agent** The term 'commission agent' is a general term which is used in practice even for a factor or broker.

(h) **Del-credere Agent** A del-credere agent is one who gives guarantee to his principal to the effect that the third person with whom he enters into contracts shall perform his obligation. He gives such guarantee for an extra remuneration which is called the Del-crcdere Commission. For example, an agent who also undertakes the risk of bad debts due to the insolvency of customers to whom the goods were sold on credit, will be called the del-credere agent.

(i) **Banker** Banker acts as an agent of the customer when he collects cheques or drafts or bills or buys or sells securities on behalf of his customers. Ile has at general lien in respect of the general balance of account.

14.9 EXTENT OF AGENT'S AUTHORITY

Meaning of Agent's Authority

An agent's authority means the capacity of the agent to bind his principal.

Meaning of Extent of Agent's Authority

Extent of agent's authority means the scope of authority of an agent. In other words, it means what a person can do as an agent on behalf of his principal, Extent of agent's authority may be discussed under normal circumstances and emergency circumstances.

Extent of Agent's Authority under Normal Circumstances [Section 1881

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

Example I A is employed by B, residing in London, to recover at Mumbai a debt due to B. A may adopt any legal process necessary for the purpose of recovering the debt, and may give a valid discharge for the same.
Example II A appoints B, his agent to carry on his business of a ship-builder. B may purchase timber and other materials, and hire workmen for the purpose of carrying on the business.

Extent of Agent's Authority in Emergency [Section 189]

An agent has authority, in an emergency, to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence. in his own case, under similar circumstances.
Example I A consigns provisions to B at Kolkata, with directions to send them immediately to C, at Cuttack B may sell the provisions at Kolkata, a they will not bear the journey to Cuttack without spoiling.
Example II Where butter was In danger of becoming useless owing to delay in transit and it was Impossible to obtain instructions of the principal, the railway company sold the butter for the best available price. It was held that the principal was bound by this sale. (Sim & Co. v. Midland Rail Co]

14.10 DELEGATION OF AUTHORITY OF AGENT

Can an Agent Delegate his Authority [Section 190]

The answer to this question is given by the Latin maxim 'delegatus non potest delegare, which means that n delegate cannot further delegate. In other words, a person to whom powers have been delegated cannot

delegate them to another. In case of an agency, the agent cannot, further delegate his authority because he himself is a person to whom authority has been delegated by the principal. In the root of agency lies the confidence which a principal reposes in his agent but may not like to repose in the sub-agent who is literally a stranger to him. Section 190 of the Act embodies this principal which provides that an agent cannot lawfully employ an-other to perform acts which he has expressly or impliedly undertaken to perform personally.

Exceptions to the General Rule [Section 190]

There are some exceptions to the general rule that a delegate cannot further del-egate, as follows:

(a) Where the custom of the trade permits delegation, e.g. Article clerks employed by a Chartered Accountant.
(b) Where the nature of the agency requires delegation.
(c) Where the principal permits delegation.
(d) Where the principal knows that the agent intends to delegate but does not object to it.
(e) Where an emergency requires delegation. (f) Where the duties of the agent do not require any personalized skill, confidence or discretion and the work involved is of routine nature.

Meaning of Sub-agent [Section 191]

A sub-agent is a person who is employed by the original agent and who acts under the control of the original agent in the business of agency. Thus, a sub-agent is the agent of the original agent. As between the original agent and the sub-agent, the relationship is that of the principal and agent.

Effects of Appointment of Sub-agent [Sections 192 and 193]

The effects of appointment of a sub-agent may be discussed under the following two heads:
(i) in case of proper appointment
(ii) in case of improper appointment

Basis of comparison	*Where a sub-agent is properly appointed [Section 192]*	*Where t sub-agent is not properly appointed [Section 193]*
1. Is principal bound	The principal is bound by the acts of sub-agent.	The principal is not bound by We acts of sub-agent.
2. Is principal responsible	The principal is responsible for the acts of sub-agent.	The principal is not respons-ible for the acts of sub-agent.
3. Is original agent responsible	The original agent is respons- ible to the principal for the acts of sub-agent.	The original agent is responsible for the acts of sub-agent both to the principal and to the third persons.
4. Is sub-agent responsible	The sub-agent is responsible for his acts to the original agent but not to the principal exception cases of fraud or wilful wrong.	The sub-agent is responsible for his acts to the original agent but not to the principal even in cases of fraud or wilful wrong.

Note: The acts done by a properly appointed sub-agent in the name of original principal may be ratified by the original principal.

Meaning of Substituted Agent [Section 194]

A substituted agent is a person who is named by the agent holding an express or implied authority to name another person. to act for the principal in the business of the agency. Such person is an agent of the principal for such part of the business of the agency as is entrusted to him.

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

Example II A authorizes B. a merchant in Kolkata, to recover the money due to A from C Co. B Instructs D, a solicitor to initiate legal proceedings. against C & Co., for the recovery of the money. 0 is not a sub-agent but is a solicitor for A.

Agent's Duty in Naming such Person [Section 195]

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

Example I A Instructs B. a merchant, to buy a ship for him. B employs a sub-surveyor of good reputation to choose a ship for A. The surveyor makes the choice negligently, and the ship turns out to be unseaworthy and is lost. B Is not, but the surveyor is responsible to A.

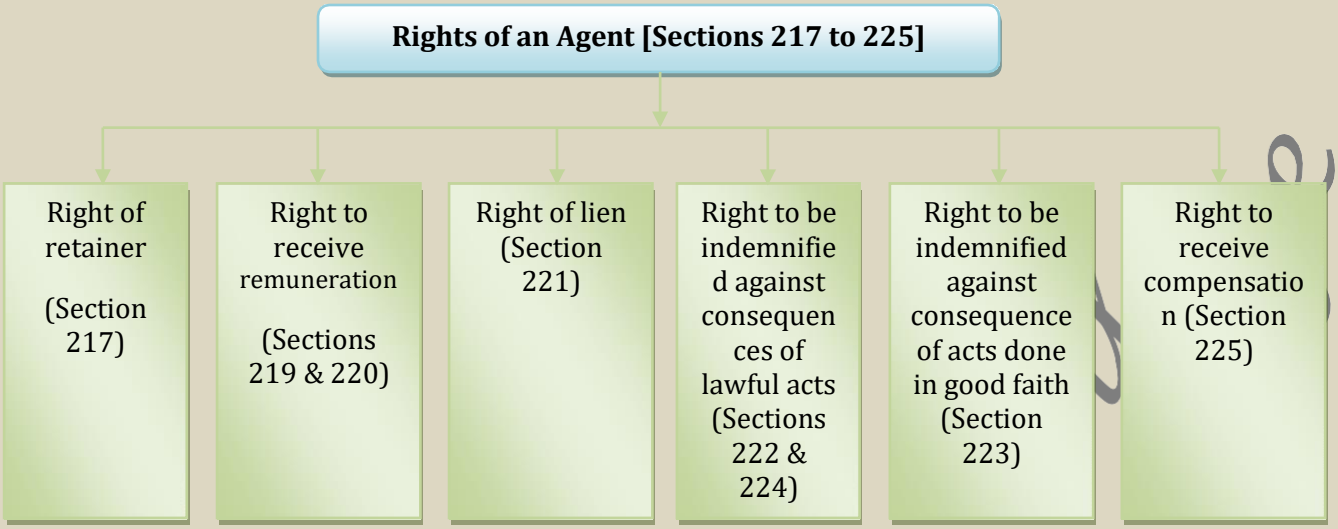
Example II A consigns goods to B. a merchant, for sale. B. in due course employs an auctioneer in good credit to sell the goods of A. and allow the auctioneer to receive the proceeds of sale. The auctioneer afterwards becomes insolvent without having accounted for the proceeds. B is responsible to A for the proceeds.

Distinction between Sub-agent and Substituted Agent

Basis distinction	***Sub-agent***	***Substituted agent***
Work	He works under the control of original agent.	He works under the control of Principal.
Privity	There is no privity of contract between a sub-agent and principal and hence both cannot sue each other except that in case of fraud or wilful wrong committed by a properly appointed sub-agent, the principal can sue sub-agent.	There is a privity of contract between a substituted agent and principal hence both can sue each other.
Original agent's responsibility	The original agent is responsible for the acts or negligence of the sub-agent.	The original agent is not responsible for the acts or negligence of the substituted agent if in selecting such agent he has exercised the same amount of diligence as a man of ordinary prudence would exercise in his own case.

14.11 RIGHTS OF AN AGENT

The rights of an agent are shown in Fig. 14.4.



Let us discuss them one by one.

(a) Right of Retainer [Section 217] An agent has the right to retain, out of any sum received on account of the principal in the business of the agency, all money due to himself in respect of the following:

(i) advance made by him;
(ii) expenses properly incurred by him in conducting such business;
(iii) such remuneration as may be payable to him for acting as an agent.

(b) Right to Receive Remuneration [Sections 219 and 220]

The agent has the right to receive agreed remuneration (if there is an agreement to that effect) or usual remuneration as per the custom of the trade in which he has been employed (if there is no agreement to that effect).

When Agent's Remuneration becomes Due: In the absence of any special contract, payment for the performance of any act is not due to the agent until the completion of such act; but an agent may retain the money received by him on account of goods sold, although the whole of the goods consigned to him for sale may not have been sold, or the sale may not be actually complete.

Now the question arises, 'when does the act complete?' This is a question of fact depending upon the facts and circumstances of each case. In general, the act shall be deemed to have completed when the agent has done what he had undertaken to do even though the contract is not completed.

Example X, an agent Introduced a customer to purchase the principal's property. The sale was sewed and earnest money was paid. The sale could not complete because of customers inability to pay. State whether the agent was entitled to remuneration if

(a) he was appointed to sell a property on the terms that he would be paid commission on the completion of sale,

(b) he was appointed to introduce a customer to purchase the principal's property.

Solution:

Decision:

Case (a):
The agent was not entitled to remuneration because the sale had not been completed. [Luxor (Eastbourne) Ltd. v. Cooper]
Case (b):
The agent was entitled to remuneration because he did what he was required to do, i.e. to introduce a customer to buy the principal's property. [Sheikh Farid Bakst v. Hargulal Singh]

Agent not Entitled to Remuneration for Business Misconduct: An agent who is guilty of misconduct in the business of the agency is not entitled to any remuneration in respect of that part of the business which he has misconducted.

Example I (a) A employs B to recover As 1,00,000 from C, and to invest it in good security. B recovers Rs 1,00,000 and invested As 90,000 on good security, but invested As 10,000 on security which he ought to have known to be bad, whereby A loses As 2,000. B Is entitled to remuneration for recovering As 1,00,000 and for investing As 90,000. He is not entitled to remuneration for investing the As 10.000 and he must make good Rs 2,000 to B.

Example II A employs B to recover Rs 1,000 from C. Through 6's misconduct the money Is not recovered. B is entitled to no remuneration for his services, and must make good the loss.

(c) **Right of Lien [Section 221]** In the absence of any contract to contrary, an agent is entitled to retain goods, papers and other property whether movable or immovable, of the principal received by him, until the amount due to him for commission, disbursement and services in respect of the same has been paid or accounted for to him. Thus, this right of lien arises-
(i) only if there is no contract to the contrary,
(ii) only in respect of those properties the possession of which has been lawfully acquired by the agent,
(iii) only in ,-expect of those properties in respect of which some amount is due to the agent.
Thus, this lien is only a particular lien.

(d) **Right to be Indemnified against Consequences of Lawful Acts [Section 222]** The employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him.

Example I B. at Singapore, under instructions from A of Kolkata, contracts with C to deliver certain goods to him. A does not send the goods to B and C sues B for breach of contract. B informs A of the suit, and A authorises him to defend the suit. B defends the suit, and is compelled to pay damages and costs and incurs expenses. A is liable to B for such damages, costs and expenses.

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

No liability of Employer of Agent to do a Criminal Act (Section 224): Where one person employs another to do an act which is criminal, the employer is not liable to the agent, either upon an express or implied promise, to indemnify him against the consequences of that act.

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

Example II B, the proprietor of a newspaper, publishes at A's request, a libel upon C, in the paper, and A agrees to indemnity B against all the expenses of publication and all costs and damages of any action In respect thereof, B issued by C and has to pay damages, and also Incurs expenses. A is not liable to B upon the indemnity.

(e) Right to be Indemnified against Consequences of Acts done in Good Faith [Section 223]
Where one person employs another to do an act, and the agent does the act in good faith, the employer is liable to indemnify the agent against the consequences of that act, though it causes an injury to the rights of third person.

Example I A, a decree-holder and entitled to execution of B's goods, requires the officer of the court to seize certain goods, representing them to be the goods of B. The officer seizes the goods and issued by C. the true owner of the goods. A is liable to indemnify the officer for the sum which he is compelled to pay to C, in consequences of obeying A's directions.

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

(f) Right to Receive Compensation for Injury Caused by Principal's Neglect [Section 225]
The principal must make compensation to his agent in respect of injury caused to such agent by the principal's neglect or want of skill.

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

14.12 DUTIES OF AN AGENT
The various duties of an agent have been shown in Fig. 14.5.

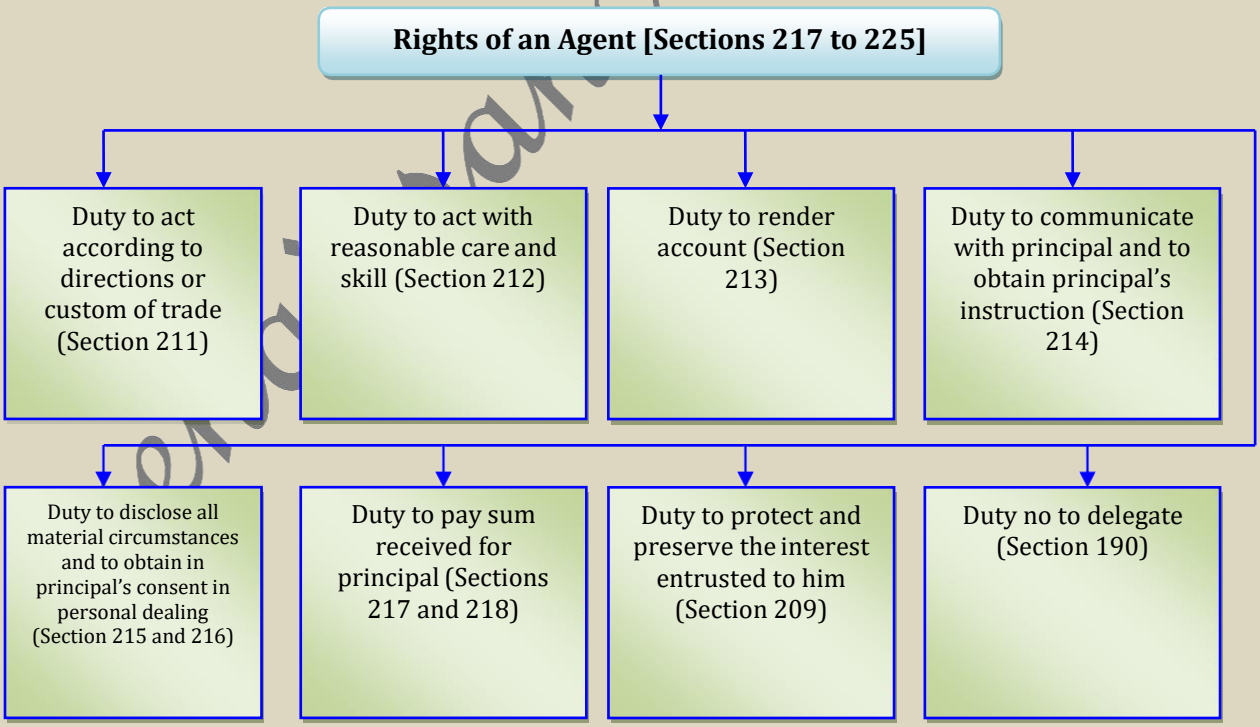


Fig. 14.5 Duties of an Agent

Let us discuss them one by one.

(a) Duty to Act according to the Directions or Custom of Trade [Section 211]

An agent is bound to conduct the business of his principal according to principal's directions or the custom of trade (in the absence of principal's directions).

Consequences of not Performing this Duty: When the agent acts otherwise, and any loss is incurred, he must make it good to his principal and if any profit accrues, he must account for it.

Example I A, an agent who was asked to insure the goods, failed to do so and the goods were destroyed by lire. A was liable to compensate his principal for the loss suffered by him. [Pannalal Jankidas v. Mohan tall

Example II A, an auctioneer, contrary to the usual custom accepted a bill of exchange In payment of the price of goods sold and the bill was dishonoured. A was liable to compensate his principal for the amount of the bill.

(b) Duty to Act with Reasonable Care and Skill (Section 212)

An agent is bound to conduct the business of the agency with reasonable care and skill.

Co sequences of not Performing this Duty: The agent must compensate the principal in respect of the direct consequences of his own neglect, want of skill or misconduct but not in respect of loss or damage which are indirectly or remotely caused by such neglect, want of skill or misconduct.

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

Example II A, an Insurance-broker employed by B to collect an Insurance on a ship, omits to see that the usual clauses are inserted In the policy. The ship is afterwards lost. In consequences of the omission of the clauses nothing can be recovered from the insurers. A Is bound to make good the loss to B.

(c) Duty to Render Accounts (Section 213) An agent is bound to render proper accounts to his principal on demand.

(d) Duty to Communicate with Principal [Section 214] An agent is bound to use all reasonable diligence to establish contact with his principal to obtain his instructions.

(e) Duty to Disclose all Material Circumstances and to obtain Principal's Consent in Personal Dealings [Sections 215 & 216] An agent is bound to disclose all material circumstances which have come to his knowledge on the subject, to the principal and obtain his consent if he desires to deal on his own account in the business of agency.

Consequences of not performing this Duty:

(i) The principal may repudiate the transaction and disclaim all losses [Section 2151

(ii) Tice principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction (Section 216).

Example I A directs B to sell A's estate. B buys the estate for himself in the name of C. A, on discovering that B bought the estate for himself. may repudiate the sale, if he can show that B has dishonestly concealed any material fact, or that the sale has been disadvantageous to him.

Example II A directs B to sell A's estate. B, on looking over the estate before selling It, finds a mine on the estate which Is unknown to A. B informs A that he wishes to buy the estate for himself, but conceals the discovery of the mine. A allows B to buy in Ignorance of the existence of the mine, A on discovering that B knew of the mine at the time he bought the estate, may either repudiate or adopt the sale at his option.

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

Example IV X directed Y an auctioneer to sell his goods. Y sold those goods to Z and received some secret commission from Z in addition to the normal commission from X. It was held that Y was bound to hand over the X the secret commission received from Z. (Andreson v. Ramsay & Co.)

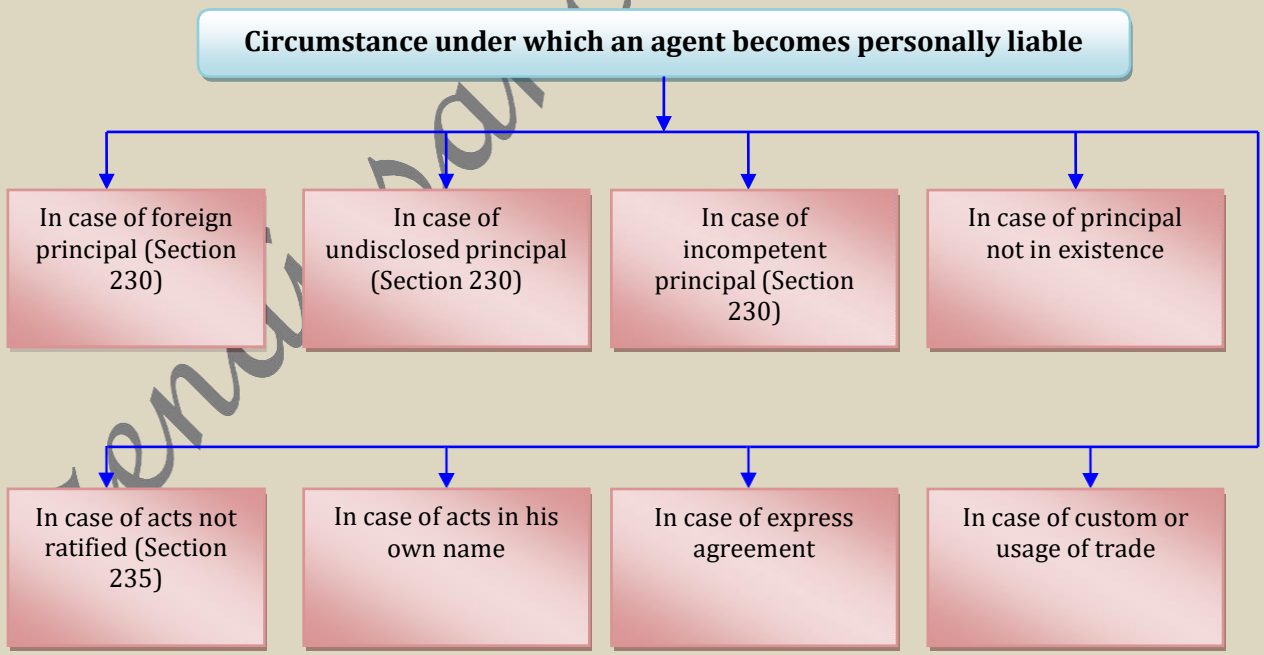
(f) Duty to Pay Sum Received for Principal [Section 218] The agent is bound to pay to his principal all sums received on his account. However, an agent may retain. out of such sums all moneys due to himself in respect of advances made or expenses properly incurred by him in conducting such business, and also such remuneration as may be payable to him for acting as an agent.

(g) Duty to Protect and Preserve the Interest [Section 209] When an agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take, on behalf of the representative of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him.

(h) Duty not to Delegate Authority [Section 190] An agent cannot lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform personally unless custom of trade or the nature of the agency so requires.

14.13 PERSONAL LIABILITY OF AN AGENT General Rule [Section 230]
In the absence of any contract to that effect, an agent cannot personally enforce contract entered into by him on behalf of his principal, nor is he personally bound by them.

When the Agent becomes Personally liable
The circumstances under which an agent becomes personally liable are shown in Fig. 14.6.



Let us discuss them one by one.

(a) In Case of Foreign Principal [Section 230] Where the contract is made by an agent for the sale or purchase of goods for a merchant residing abroad, in the absence of any contract to the contrary, it is presumed that the agent is personally liable for such contracts.

(b) In Case of Undisclosed Principal [Section 230] Where the contract is made by an agent for an undisclosed principal, in the absence of any contract to the contrary, it is presumed that the agent is personally liable.

(c) In Case of Incompetent Principal [Section 230] Where a contract is made by an agent for a person who cannot be sued (e.g. minor, lunatic, foreign ambassador), in the absence of any contract to the contrary, it is presumed that the agent is personally liable.

(d) In Case of Principal not in Existence Where a contract is made by the promoter for a company not yet incorporated, the promoters are personally liable.

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

(f) In Case of Acts in his Own Name Where a contract is made by an agent without disclosing that he is contracting as an agent, the agent is personally liable.
Example X took a loan from Y by executing a hundi in Y's favour. X did not sign the hundl as agent of the firm nor did he disclose to Y the name of his principal. The agent was held personally liable. (Trilok Chanel v. Rameshwar Lai]

(g) In Case of Express Agreement Where a contract made by an agent specifically provides for the personal liability of the agent, the agent will be personally liable.

(h) In case of Custom or Usage of Trade Where there is a custom or usage of trade making the agent personally liable, in the absence of any contract to the contrary, the agent is personally liable.
Example X, a share broker purchased 100 shares As 100 per share and sold the same shares @ As 90 per share on behalf of Y who refused to give the difference. Xis personally liable because It is a custom that a share broker is personally liable for the contracts entered into by him.

14.14 RIGHTS OF PERSON DEALING WITH AGENT

(a) Rights of person Dealing with Agent Personally liable [Section 233] In cases where the agent is personally liable, a person dealing with him may hold either him or his principal or both of them liable.
Example A miters Into a contract with B to sell him 100 bales of cotton, and afterwards discovers that B was acting as agent for C. A may sue either B or C, or both, for the price of the cotton.

(b) Consequences of Inducing Agent or Principal to Act on Belief that Principal or Agent will be held Exclusively Liable [Section 234] When a person who has made a contract with an agent induces the agent to act upon the belief that the principal only will be held liable, or induces the principal to act upon the belief that the agent only will be held liable, he cannot afterwards hold liable the agent or principal respectively.

14.15 POSITION OF PRINCIPAL

The position of principal in respect of contracts entered into by an agent may be discussed under the following heads:

(a) Where the principal is named i.e. where both the existence and the name of the principal are disclosed;

(b) Where the principal is unnamed i.e. where only the existence of the principal has been disclosed but not his name;

(c) Where the principal is undisclosed i.e. where both the existence and the name of the principal are not disclosed. Let us discuss the position of the principal under the various heads one by one.

(a) Where the Principal is Named

Acts of agent	Position of principal
(a) For acts done within the scope of his actual or ostensible authority. [Section 226]	The principal is bound by such acts as if the acts had bccn done by the principal. **Example** A, being Bs agent, with authority to receive money on his behalf, receives from C a sum of money due to B. C is discharged of his obligation to pay the sum in question to B
(b) For unauthorised acts when agent exceeds his authority and the unauthorised acts can be separated from authorised acts. [Section 227]	The principal is bound by his authorised acts only when agent exceeds his authority. **Example** A being owner of a ship and cargo. authorised B to procure an insurance for As 4 crore on the ship. B procured an insurance for As 4 crore on the ship and another for the like sum on the cargo. A is bound to pay the premium for the policy on the ship, but not the premium for the policy on the cargo.
(c) For unauthorised acts when agent exceeds his authority and the unauthorised acts cannot be separated from authorised acts.	The principal is not bound to recognise the entire transaction. **Example** A authorises B to buy 500 sheep for him. B buys 500 sheep and 200 lambs for one sum of As 6.000. A may repudiate the whole transaction.
(d) For notice or information given to agent. [Section 229]	The principal is bound by the notice given to. or information obtained by the agent in the course of business of agency if it had been given to or obtained by the principal. **Example** *A* is employed by *13* to buy from *C* certain goods of which C Is the apparent owner. *B* had some claim against *C* which he wanted to set off against *C* which ho wanted to set off against the price of goods if (a) in the course of negotiation. *A* came to know that the goods really belonged to *U* and *B* was Ignorant of that fact. (b) *A* was, before he was employed by *B.* a servant of *C* and then learnt that the goods really belonged to *0 and B* was Ignorant of that *fact.* ***Solution****: (a)* No, because 1) was bound by *the* knowledge of *A.* (h) Yes, because *B* was not bound by the knowledge of *A as* A obtained the knowledge as C's savant and not as *B's* agent.
(e) For inducing third persons to believe that agent's unauthorised acts were authorised.	The principal is bound by agent's unauthorised acts if he has, by words or conduct, induced such third persons to

[Section 237]	believe that agent's unauthorised acts were authorised acts. **Example I** *A* consigns goods to *B* for sale, and gives him Instructions not to sell under a fixed price. *C.* being ignorant of B's instructions enters into a contract with *B* to buy the goods at a price lower than the reserved price. *A* is bound by the contract. **Example II** *A* entrusts*B* with negotiable instruments endorsed In blank. B sells them to *C* in violation of private orders from *A.* The sale is good.
(f) For misrepresentation made or fraud committed by agent in matters falling within agent's authority. [Section 238]	The principal is liable for such misrepresentation made or fraud committed. **Example I** *A.* being Bs agent for the sale of goods, induces *C* to buy them by misrepresentation. The contract is voidable, as between *B* and *C,* at the option of C. **Example II** *A,* the captain of Bs ship, signs bills of lading without having received on board the goods mentioned therein. The bills of lading are void as between *B* and the pretended consignor.
(g) For misrepresentation or fraud committed by an agent in matters not falling within agent's authority. [Section 238]	The principal is not liable for such misrepresentation or fraud committed.

(b) Where the Principal is unnamed –

The principal is bound by the acts of an agent done within the score of actual or ostensible authority of the agent unless the circumstances of the case suggest the personal liability of the agent. If an agent refuses to disclose his principal's identity, then he becomes personally liable.

(c) Where Principal is Undisclosed –

In case an agent makes a contract with a person who neither knows, nor has reason to suspect that he is an agent, the position of principal, agent and the third party may be discussed as under:

Position of principal	***Position of agent***	***Position of third party***
1. He may obtain the performance of the contract subject to the rights and obligations subsisting between the agent and the other contracting party.	1. He has all rights of an agent as against theprincipal.	I.He has as against the principal same rights as he would have had as against the agent if the agent had been the principal.
2. He can be sued by the third party.	2. He is personally liable to the third party.	2. He may refuse to fulfil the contract under the following circumstances:
		(a) If the principal discloses himself before the contract is completed. And

		(b) if he can show that if he had known who was the principal or if he had known that the agent was not a principal, he would not have entered into the contract.
	3. He can be sued by the thin party.	3. He can sue *either* principal *or* agent or both.
	4. He can sue the third party.	

Example A, who owes Rs 500 to B, sells Rs 1.000 worth o rice to B. A is acting as agent for C in the transaction, but B has no knowledge, nor reasonable ground of suspicion that such is the case. C cannot compel B to take the rice without allowing him to set-off A's debt.

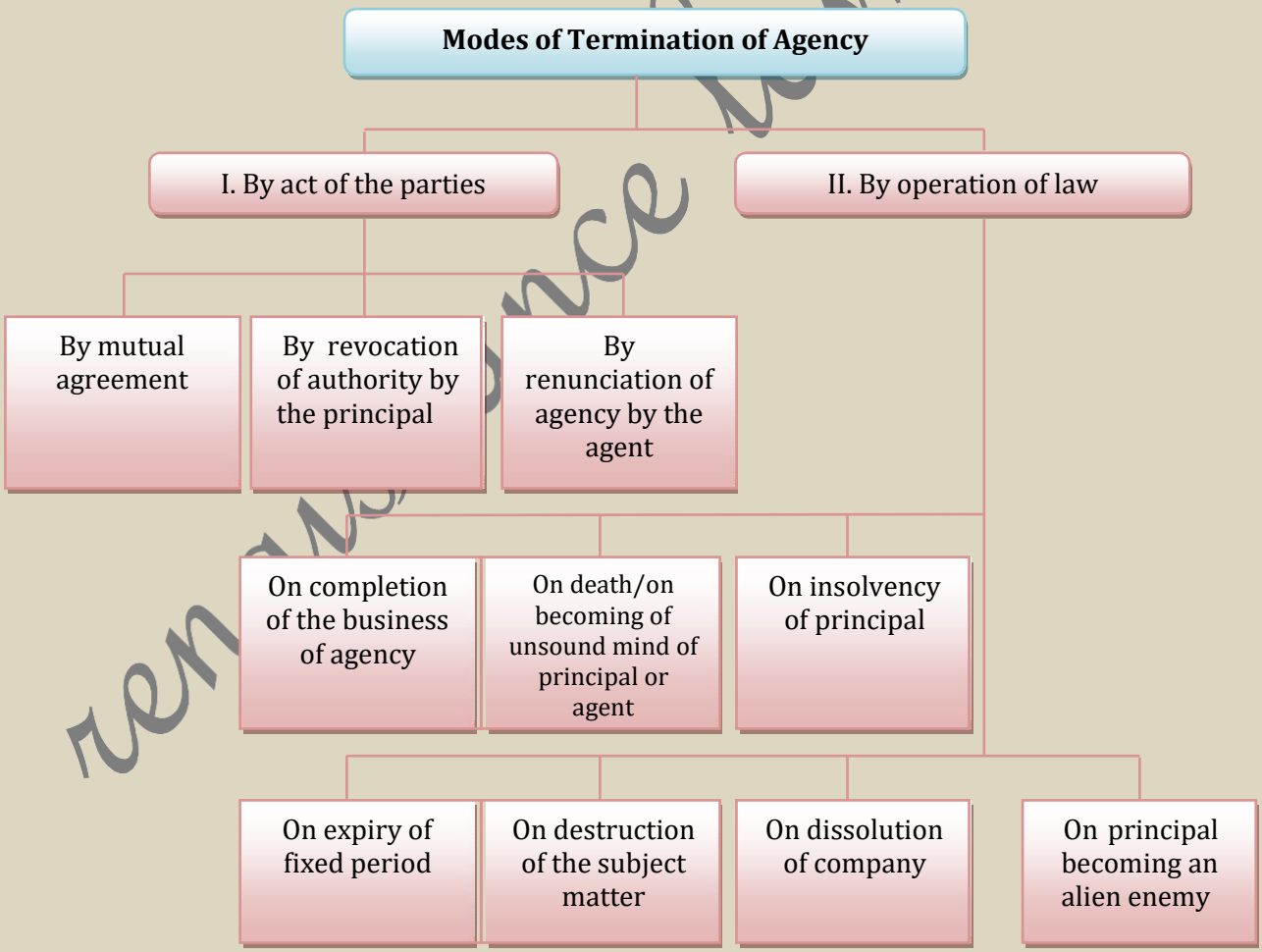
14.16 TERMINATION OF AGENCY

Meaning of Termination of Agency

Termination of agency implies the end of the relationship of principal and agent.

Modes of Termination of Agency

The various mode in which the agency may be terminated have been shown in Fig. 14.7.



Flg.14.7 Modes of Termination of Agency

Let us discuss them one by one.

I. Termination of Agency by Act of the Parties

(a) **By Mutual Agreement** An agency is terminated if the principal and agent mutually agree to do so.

(b) **By Revocation of Authority by the Principal** An agency is terminated if the principal revokes the authority of his agent. It may be noted that the principal may revoke the authority of his agent at any time before the authority has been exercised so as to bind the principal.

(c) **By Renunciation of Agency by the Agent** The agency is terminated if the agent himself renounces the business of agency.

Provisions relating to Revocation or renunciation [Sections 205, 206 and 207]

(i) Compensation for Revocation by Principal, or Renunciation by Agent (Section 205): Where there is an express or implied contract that the agency should be continued for any period of time, the principal must make compensation to the agent, or the agent to the principal, as the case may be, for any previous revocation or renunciation of the agency without sufficient cause [Section 206].

(ii) **Notice of Revocation or Renunciation [Section 206]:** Reasonable notice must be given of such revocation or renunciation, otherwise the damage thereby resulting to the principal or the agent, as the case may be, must be made good to the one by
the other.

(iii) **Revocation and Renunciation may be Expressed or Implied (Section 207]** Revocation and renunciation may be expressed or may be implied in the conduct of the principal or agent, respectively. Example A empowers B to let A's house. Afterwards A lets it himself. This is an implied revocation of B's authority.

II. Termination of Agency by Operation of Law

(a) On Completion of the Business of the Agency [Section 201] An agency is automatically terminated when the business of the agency is completed.
Example X appointed Y to sell his goods. Y sold those goods as per terms of the agency. It was held that the agency is terminated on the completion of sate and the agent has no authority to alter the terms of sate after its completion [Venkatachalam v. Narayanan]. But in Babu Ram v. Ram Dayal, It was held that the agency continues until the payment of the sale proceeds to the principal.

(b) On Death/or on Becoming of Unsound Mind of Principal/Agent [Section 201] An agency is automatically terminated when the principal or agent dies or becomes of unsound mind.
Duty of Agent (Section 2091: The agent is bound to take, on behalf of the representative of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him.

(c) On Insolvency of the Principal [Section 201] An agency is automatically terminated when the principal becomes insolvent because an insolvent person is incompetent to enter into a contract.

(d) On Expiry of Fixed Period An agency is automatically terminated when the fixed term of agency expires even though the business of the agency has not yet completed.

(e) On Destruction of the Subject-matter An agency is automatically terminated when the subject matter of the contract ceases to exist.

(f) On Winding up of Company An agency is automatically terminated when the principal or agent is a company and the company is wound up.

(g) On Principal Becoming an Mien Enemy An agency is automatically terminated when the principal and agent are citizen of two different countries and a war breaks out between these two countries.

Effective Time of Termination of Agent's Authority (Section 208)

Party	Time when termination of agent's authority takes place
I. As regards the agent	When the agent comes to know that his authority has been terminated.
II. As regards the third persons	When they come to know that the agent's authority has been revoked.

III. As regards the sub-agent	When the original agent comes to know that his authority has been terminated.

Thus, termination may be effective at a different time as regards the agent and as regard, the third persons.

Example I A directs B to sell goods for him and agrees to give B five per cent commission on the price fetched by the goods. A, afterwards, by a letter, revokes B's authority. a after the letter is sent but before he receives it, sells the goods for As 10.000. The sale is binding en A and B is entitled to its 500 as his commission.

Example II A, at Chennai, by letter, directs B to sell for him some cotton lying in a warehouse In Bombay and afterwards by a letter, revokes his authority to sell, and directs B to send the cotton to Madras. B, after receiving the second letter, enters into a contract with C, who knows of the first letter, but not of the second, for the sale of him of the cotton. C pays B the money, with which B absconds. Cs payment is good, as against A.

Example III A directs B. his agent, to pay certain money to C. A dies and D being A's executor takes out probate of his will. B, after A's death, but before hearing of it, pays the money to C. The payment is good as against 0, the executor.

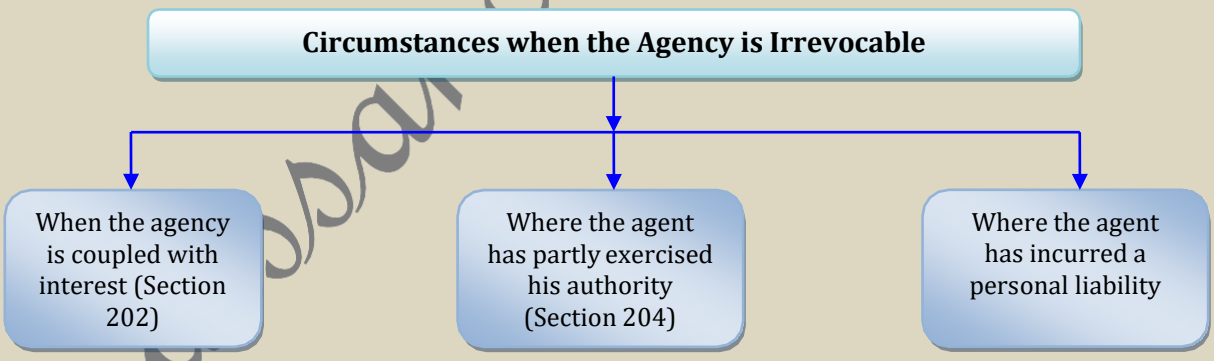
14.17 IRREVOCABLE AGENCY

Meaning of Irrevocable Agency

The term 'Irrevocable Agency' means an agency which cannot be revoked or terminated by the principal.

Circumstances when the Agency is Irrevocable [Sections 202 and 204)

The circumstances when the agency is irrevocable have been shown in Fig 14.8



Flg. 14.8 Circumstances when the Agency is Irrevocable

Let us discuss them one by one.

(a) Where the Agency is Coupled with Interest [Section 202]

Meaning of Agency Coupled with Interest An agency is said to be coupled with interest when the object of creating the agency is to secure some benefit to the agent in addition to his remuneration as agent. It may be noted that an agency cannot be said to be agency coupled with interest in the following cases:

(i) where the interest of the agent arises after the creation of agency;

(ii) where the agency secures a benefit to the agent incidentally though the agency was not created for this object.

No Termination of Agency coupled with Interest [Section 202]: Where the agent has himself an interest in the property which forms the subject matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest.

Example I X consigned 100 bags of wheat to Y who has advanced As 10,000 to X. X authorised Y to sell the wheat and to pay himself As 10,000 out of the proceeds of wheat. Later on, X directed Y not to sell the wheat. Ignoring Xs direction, Y sold the wheat to recover As 10000. X could not revoke his authority because the agency was coupled with interest. Hence. Y could sell the wheat.

Example II X consigned 100 bags of wheat to Y and authorised Y to sell the wheat. Later on Y advanced As 10,000 to X which X failed to pay. X directed Y not to sell the wheal. Ignoring Xs directions. Y sold the wheat to recover As 10.000. X could revoke his authority because the agency was not coupled with interest. Hence Y could not sell the wheat. [Smart v. Sanders]

(b) Where the Agent has Partly Exercised his Authority [Section 204]
The principal cannot revoke the authority given to his agent after the authority has been partly exercised; so far as regards such acts and obligations as arise from acts already done in the agency. Thus, the principal cannot revoke the agent's authority for the acts already done.
Example A authorises B to buy 1,000 bales of cotton on account of A, and to pay for it out of A's money remaining in B's hands. B buys 1,000 bales of cotton in A's name, and so as not to render himself personally liable for the price. A cannot revoke B's authority to pay for the cotton.

(c) Where the Agent has Incurred a Personal Liability The principal cannot revoke the agent's authority for the authorised acts in respect of which the agent has already incurred a personal liability.
Example A authorises B to buy 1,000 bales of cotton on account of A, and to pay for it out of A's money remaining in B's hands. B buys. 1.000 bales of cotton in his own name, so as to make himself personally liable for the price. A cannot revoke B's authority so far as regards payment for the cotton.

THE SALE OF GOODS ACT, 1930

INTRODUCTION

Till 1930, transactions relating to sale and purchase of goods were regulated by the Indian Contract Act, 1872. In 1930, Sections 76 to 123 of the Indian Contract Act. 1872 were repealed and a separate Act called 'The Indian Sale of Goods Act. 1930 was passed. It came into force on 1st July 1930. With effect from 22nd September, 1963, the word 'Indian' was also removed. Now, the present Act is called 'The Sale of Goods Act. 1930'. This Act extends to the whole of India except the State of Jammu and Kashmir.

According to Section 3, the provisions of the Indian Contract Act, 1872 still continue to apply to contracts for the sale of goods except where 'The Sale of Goods Act', 1930 provides for the contrary.

SCOPE OF THE ACT

The Sale of Goods Act deals with 'sale' but not with 'mortgage' (which is dealt with under the Transfer of Property Act, 1882) or 'pledge' (which is dealt with under the Indian Contract Act, 1872). This Act deals with 'goods' but not with other movable property. e.g., actionable claims and money. In other words, this Act does not deal with movable property other than goods, and immovable property.

15.1 MEANING AND ESSENTIAL ELEMENTS OF CONTRACT OF SALE [SECTION 4]

Meaning of Contract of Sale

According to Section 4(1) of the Sale of Goods Act, 1930, "contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price." 'Contract of Sale' is a generic term which includes both a sale as well as an agreement to sell.

Essential Element; of Contract of Sale

The aforesaid definition clearly indicates the essential elements shown below in Fig. 15.1.

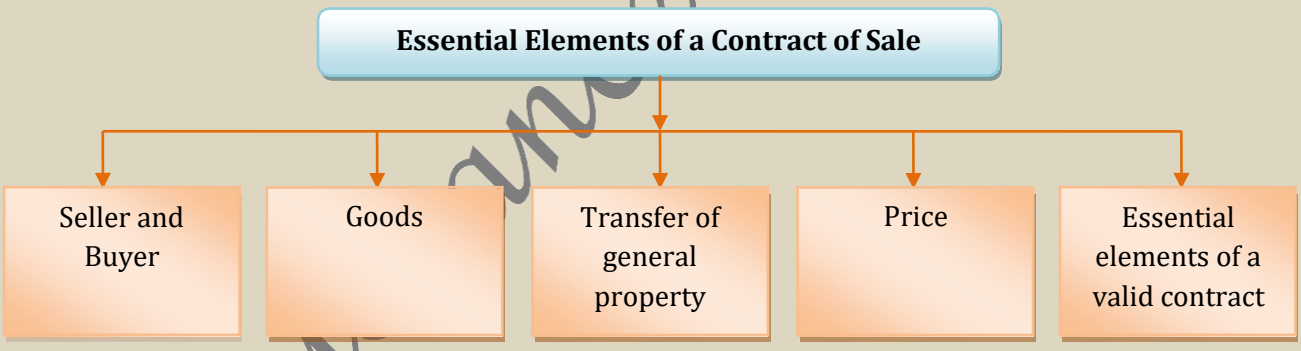


Fig. 15.1 Essential Elements of a Contract at Sale

Let us now discuss these elements one by one.

(a) Seller and Buyer There must be a seller as well as a buyer. 'Buyer' means a person who buys or agrees to buy goods [Section 2(13)]. 'Seller' means a person who sells or agrees to sell goods [Section 2(13)]. A person cannot be a seller as well as a buyer as a person cannot buy his own goods. That is why distribution of goods among partners on account of dissolution of a firm does not amount to a sale of goods because the partners are joint owners and they cannot be bath sellers and buyers [Stare of Gujarat v. Raman Lal & Co.]. However, one part owner may be a seller and another pan owner may be buyer. Where a person's goods are sold under an execution of decree, a bankrupt may also buy back his own goods from his trustee. [King v. England]

(b) Goods There must be some goods. 'Goods' means every kind of movable property other than actionable claims and money and includes stock and shares, growing crops, grass and things attached to or forming

part of the land which are agreed to be severed before sale or under the contract of sale [Section 2(7)]. It may be noted that the contract relating to actionable claims, immovable property and services are not covered by this Act.

Notes:

(i) The 'actionable claims' mean a claim which can be enforced through the courts of Law, e.g. a debt due from one person to another is an actionable claim.

(ii) The 'money' here mean's the legal tender (i.e. currency of the country) and not old coins.

(c) Transfer of Property Property means the general property in goods, and not merely a special property [Section 2(11)]. General property in goods means ownership of the goods. Special property in goods means possession of goods. Thus, there must be either a transfer of ownership of goods or an agreement to transfer the ownership of goods. The ownership may transfer either immediately on completion of sale or sometime in future in agreement to sell.

(d) Price There must be a price. Price here means the money consideration for a sale of goods [Section 2(10)]. When the consideration is only goods, it amounts to a 'barter' and not sale. When there is no consideration, it amounts to gift and not sale. However, the consideration may he partly in money and partly in goods because the law does not prohibit as such. [Shelden v. Cox]

(e) Essential Elements of a Valid Contract In addition to the aforesaid specific essential elements, all the essential elements of a valid contract as specified under Section 10 of Indian Contract Act, 1872 must also be present since a contract of sale is a special type of a contract. For example, an agreement to sell smuggled gold is not valid because its object is unlawful. [Refer to Practical Problem 1]

Absolute or Conditional

A contract of sale may be absolute or conditional according to the desire of buyer and seller.

Formalities of a Contract of Sale [Section 5]

In connection with the formalities of a contract of sale, the provisions of Section 5 specifically provide only for the following three matters.

(a) Offer and Acceptance A contract of sale is made by an offer to buy or sell the goods for a price and acceptance of such offer.

(b) Delivery and Payment The contract of sale may provide for any of the following combinations:

Option	Delivery	Payment
1	Immediate	Immediate
2	Immediate	By Installments
3	Immediate	At some future date
4	By installments	By installments
5	By installments	Immediate
6	By installments	At some future date
7	At some future date	At some future date
8	At some future date	Immediate
9	At some future date	By Installments

(c) Express or Implied A contract of sale may be made in any of the following modes.

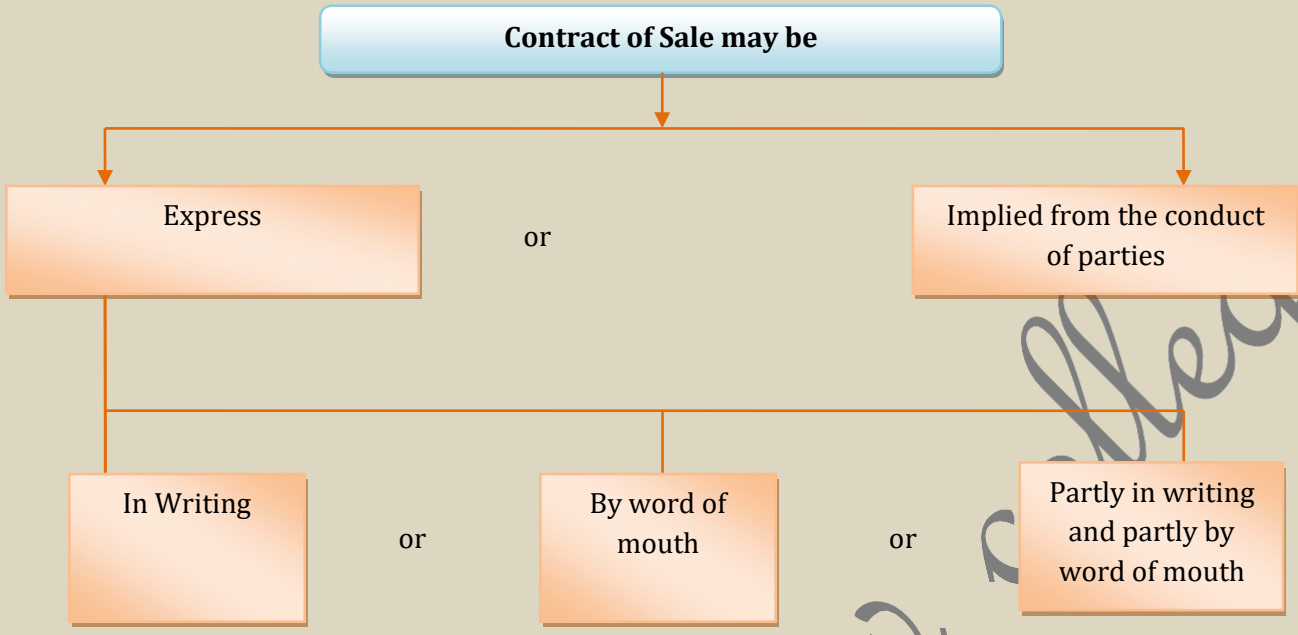


Fig. 15.2 Contract of sale may be

It may be noted that an offer by word of mouth may be accepted in writing and an offer in writing may be accepted by word of mouth.

15.2 DISTINCTION BETWEEN SALE AND AGREEMENT TO SELL –

What does 'Contract of Sale' Include –

The term 'Contract of Sale' includes both a 'sale' and 'agreement to sell' as shown below in Fig. 15.3

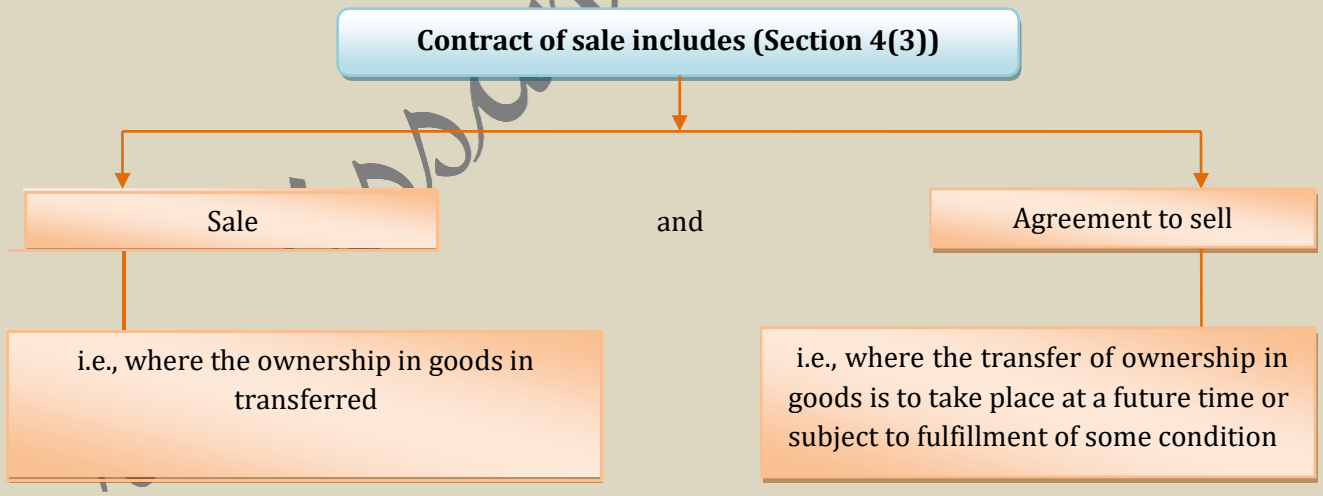


Fig. 15.3 Contract of sale includes (Section 4(3))

When does agreement to sell become sale [Section 4(4)]

An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the ownership in the goods, is to be transferred.

Distinction between Sale and Agreement to Sell

A 'Sale' and an 'Agreement to Sell' can be distinguished as follows:

S.No.	Basis of distinction	Sale	Agreement to sell
1	Transfer of ownership	Transfer of ownership of goods takes place immediately	Transfer of ownership of goods is to take place at a figure time or subject to fulfilment of some condition.
2	Executed contract or Executory contract	It is an executed contract because nothing remains to be done.	It is an executory contract because something remains to be done.
3	Conveyance of property	Buyer gets a right to enjoy the goods against the whole world including seller. Therefore, a sale creates jus in rem (Right against property).	Buyer does not get such right to enjoy the goods. It only Creates fits in personam (Right against the person).
4	Transfer of risk	Transfer of risk of loss of goods takes place immediately because ownership is transferred. As a result. in case of destruction of goods, the loss shall be borne by the buyer even though the goods are in the possession of the seller.	Transfer of risk of loss of goods does not take place because ownership is not transferred. As a result, in case of destruction of goods, the loss shall be borne by the seller even though the goods are in the possession of the buyer.
5	Rights of seller against the buyer's breach	Seller can sue the buyer for the price even though the goods are in his possession.	Seller can sue the buyer for damages even though the goods are in the possession of the buyer.
6	Rights of buyer against the seller's breach	Buyer can sue the seller for damages and can sue the third party who bought those goods, for goods.	Buyer can sue the seller for damages only.
7	Effect of insolvency of seller having possession of goods	Buyer ran claim the goods from the official receiver or assignee because the ownership of goods has transferred to the buyer.	Buyer cannot claim the goods even when he has paid the price because the ownership has not transferred to the buyer. The buyer who has paid the price can only claim rateable dividend.
8	Effect of insolvency of the buyer before paying the price	Seller must deliver the goods to the official receiver or assignee because the ownership of goods has transferred to the buyer. l-k can only claim rateable dividend for the unpaid price.	Seller can refuse to deliver the goods unless be is paid full price of the goods because the ownership has not transferred to the buyer.

15.3 DISTINCTION BETWEEN SALE AND HIRE-PURCHASE AGREEMENT

Meaning of' Hire-purchase Agreement Hire-purchase agreement means an agreement under which goods are let on hire and under which the hirer has an option to purchase them in accordance with the terms of the agreement and includes the agreement under which:

(i) Possession of goods is delivered by the owner thereof to a person on condition that such person pays the agreed amount in periodical installments;
(ii) the property in the goods is to pass to such a person on the payment of the last installment; and
(iii) such a person has a right to terminate the agreement at any time before the property so passes.

Distinction between a Sale and Hire-purchase Agreement

A 'Sale' can be distinguished from a hire-purchase agreement as under:

S.No.	Basis of distinction	Sale	Hire-purchase agreement
1	Regulating law	All contracts of sale are governed by sale of goods act, 1930.	The hire-purchase agreements are governed by Hire purchase act, 1972.
2	Nature of contract	It is contract of sale	It is an agreement of hiring and hence an agreement to sell.
3	Possession of goods	Possession of goods need not necessarily be transferred immediately.	Possession of goods is necessarily transferred immediately.
4	Transfer of ownership of goods	ownership of goods is transferred immediately	Ownership of goods is transferred on the payment of the last installment when the option to purchase is exercised.
5	Right to terminate	The buyer has no right to terminate the contract of sale.	The hire-vendor has a right to repossess the goods if the hirer defaults.
6	Right to repossess the goods	The seller has no right to repossess the goods. He can sue for price.	The hire-vendor has a right to repossess the goods if the hirer defaults.
7	Transfer of good title to third party	The buyer can transfer a good title to third party because ownership of goods has been transferred.	The hirer cannot transfer a good title to third party because ownership of goods has not been transferred.
8	Compulsion as to be in writing	A contract of sale need out necessarily be in writing.	The hire-purchase agreement must be in writing.
9	Benefits of implied conditions and warranties under the sale of goods act	The benefits of implied conditions and warranties are available.	The benefits of implied conditions and warranties are not available.
10	Sales tax	In case of sale of taxable goods, sales tax is levied.	In case of hire of even taxable goods, sales tax is not levied.
11	Treatment of payment made by installment	The payment made by the buyer is treated as payment towards the price of goods.	The payment made by the hire purchases I treated as hire charges for the use of goods till the option to purchase the goods is exercised.

True Test of Hire-purchase Agreement If in an agreement the person taking the goods has an option to terminate the agreement at any time before the transfer of ownership of goods. it will be an agreement of hire purchase. If, in an agreement, the person taking the goods has no option to terminate the agreement. it will be a contract of sale even if the price is payable in installments. [Lee v. Butler]

Example X takes the delivery of a furniture from Y under an agreement which provides for
(a) an immediate down payment of Rs 300.
(b) the balance by way of 12 monthly installments of Rs 100 each,
(c) transfer of ownership on the payment of last installment,
(d) Y's right to or possess the goods in case of non-payment of installments due. Before the 12th Installment was paid, X sold the furniture to Z Can Y recover the furniture from Z?

15.4 DISTINCTION BETWEEN SALE AND CONTRACT FOR WORK AND LABOUR
In a contract for work and labour, the rendering of the service and exercise of skill is the essence of contract even though there may be delivery of goods. In a contract of sale, the delivery of goods is the essence of the contract although some labour on the part of the seller might also have been exercised. It may be noted that the Sale of Goods Act does not apply to contracts for skill and labour.
Example I X engaged an artist to paint a portrait and supplied canvas, paint and other necessary articles. It was a contract for work and labour and not a contract of sale because the substance of the contract was the artist's skill and not the delivery of material. (Robinson v. Graves]

Example II X purchased a portrait painted by a famous artist. It was a contract of sale and not a contract for work and labour because the substance of the contract was the delivery of portrait.

Example III A restaurant provides food and drinks to its customers In the restaurant. II Is essentially in the nature of service and not a transaction of sale because the customers come there not to buy the food and drinks but to find bodily satisfaction that service of food In the setting of a restaurant can afford to give. (Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi)

Example IV A customer takes home a supply of certain food and drinks from the restaurant. It is a contract of sale and not a contract of work and labour because the substance of the contract is the delivery of foods and drinks.

Example V The contract for the construction of coaches on the under frames supplied by the Railways was held to be a contract for work and labour and not for sale. (State of Gujarat v. Variety Body Builders (1976) S.C. 2108)

Example VI A dentist agreed to supply an artificial denture to fit the mouth of a patient, material being wholly supplied by the Dentist. Held, fl was a contract of sale. (Lee v. Griffin)

15.3 MEANING AND TYPES OF GOODS
Meaning of Goods [Section 2(7)]
Goods means every kind of movable property other than actionable claims and money, and includes the following:
(a) Stock and shares
(b) Growing crops, grass and thing attached to or forming part of the land which arc agreed to be served before sale or under the Contract of Sale.
Examples of Goods: Old rare coins, stock, shares, debentures, goodwill, patents, trademark, copyright, water, gas, electricity, grass, growing crops, trees to be cut and their log wood delivered etc.
Things excluded from the term 'goods': The term 'goods' does not include the following:

(a) Actionable claim, which means a claim to any debt or any beneficial interest in movable property not in possession. Such claims cannot be sold or purchased like goods, they can only be assigned, e.g., a debt due from one person to another;
(b) Money, which means the legal tender and not the old rare coins;
(c) Immovable property.

Types of Goods [Section 6]
The goods which form the subject of a contract of sale may be classified into following categories as shown below in Fig. 15.4.

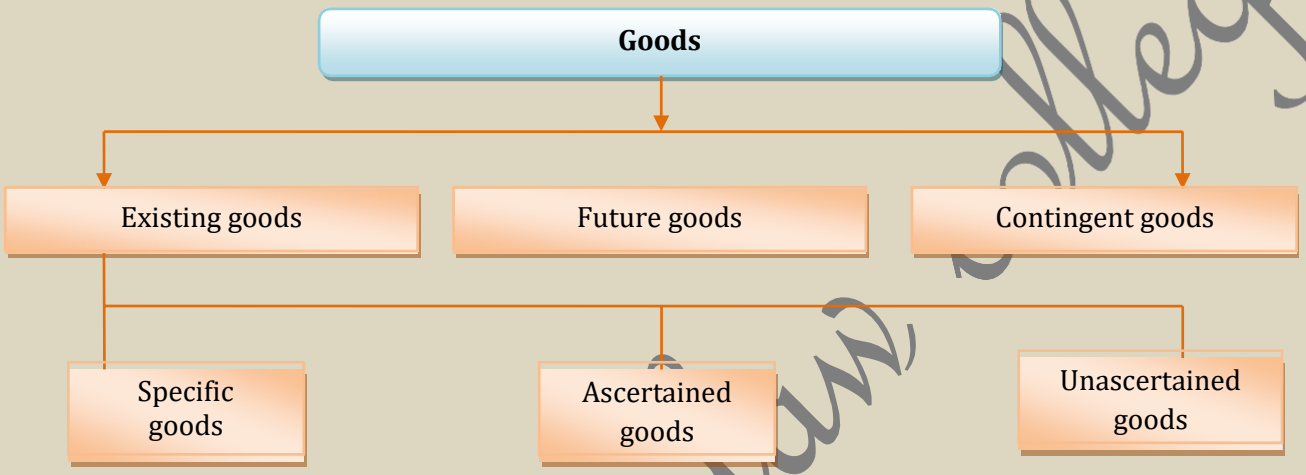


Fig. 15.4 Types of Goods

Let us discuss these types of goods one by one:
(a) **Existing Goods** Existing goods mean the goods which are either owned or possessed by the seller at the time of contract of sale. The existing goods may be specific or ascertained or unascertained as follows:
(i) Specific Goods [Section 2(14)]: These are the goods which are identified and agreed upon at the time when a contract of sale is made-For example, a specified TV, VCR, Car, Ring.
(ii) Ascertained Goods: Goods are said to be ascertained when out of a mass of unascertained goods, the quantity extracted for is identified and set aside for a given contract. Thus, when pan of the goods lying in bulk are identified and earmarked for sale, such goods are termed as ascertained goods.
Unascertained Goods: These are the goods which are not identified and agreed upon at the time when a contract of sale is made. e.g. goods in stock or lying In lots.

Example X goes to a Maruti car showroom where 10 Maruti cars have been displayed. X agrees to buy one Maruti car 800 and the seller agrees to sell. Here, 10 cars will be classified as imam:
i. 10 cars are unascertained goods before the identification of a particular car to be sold.
ii. 9 cars are unascertained goods after the identification of 1 particular car to be sold. Such one particular car to be sold is ascertained goods.
iii. 1 particular car identified and agreed upon at the time when the contract of sale is made is specific goods and other 9 cars are unascertained goods.

(b) **Future Goods [Section 2(6)]** Future goods mean goods to be manufactured or produced or acquired by the seller after the making of the contract of sale. There can be an agreement to sell only. There can be no sale in respect of future goods because one cannot sell what he does not possess.

Example X agrees to sell to Y all the crops to be grown at his farm In Haryana during the year 2,000 season for a sum of Rs 1,00,000. This is an agreement to sell future goods and not a sale.
Notes:
(i) The contracting patties are not discharged on non-acquisition or non-production of future goods.
(ii) The future goods are neither in existence nor in possession of the seller at the time of contract of sale whereas the unascertained goods are in existence and in possession of the seller at the time of contract of sale.

(c) **Contingent Goods [Section 6(2)]** These are the goods the acquisition of which by the seller depends upon a contingency which may or may not happen. Example X agrees to sell to Y all the crops to be grown at Z's farm in Haryana during the year 2,000 season for a sum of Rs 1,00,000 if Z sells the same to X. This is an agreement to sell contingent goods because the availability of crops depends on its sale by 1 Note: The contracting parties are discharged on non-acquisition of contingent goods.

15.6 EFFECT OF DESTRUCTION OF GOODS
The effect of destruction of goods can be discussed under the following two heads:
(a) In Case of Contract of Sale [Section 7] The contract of sale is void if the following three conditions are satisfied: (i) There must be a contract of sale for specific goods. (ii) The goods must have perished or become so damaged as no longer to answer to their description in the contract, before making of the contract. (iii) The seller must not be aware about die destruction of goods. The aforesaid provision is based on the principle of impossibility of performance of the contract.
Example X sold to Y all 700 bags of cement lying in his Delhi's godown. State the legal position (I) if unknown to X, all bags had been stolen before the contract was made. (II) it unknown to X, the cement had becomes stone as a result of heavy rainfall, (Ill) if unknown to X, 109 bags had been stolen at the time of making the contract.
Solution:
Case I: The contract, is void because the goods have perished before making of the contract.
Case II: The contract is void because the goods became so damaged as no longer to answer to their description.
Case III: The contract has become void and Y cannot be compelled to accept 591 bags because the contract was indivisible. [Barron Lane & Ballard Lid v. Phillips & Co]

(b) In Case of an 'Agreement to Sell' [Section 8] An agreement to sell becomes void if the following four conditions are satisfied:
(i) There must be an agreement to sell specific goods;
(ii) The goods must have perished or become so damaged as no longer to answer to their description in the agreement;
(iii) There must not be any fault of seller or buyer,
(iv) The risk must not have passed to the buyer, i.e. the goods must have perished before the agreement to sell becomes sale.

Example I X agrees to sell a particular horse to Y on the expiry of 8 days. The horse was delivered on trial for 8 days. However, the horse died on the third day, without any fault of either seller o- buyer. This agreement became void and X could not recover the price from Y. (Elphick v. Barnes)

Example II X agrees to sell some specific goods to Yon the expiry of 8 days. However, the goods were requisitioned by the Government on the third day. This agreement becomes void.

Example III X agreed to sell to Y 10 tons of potatoes to be grown on his land. X sowed sufficient land to grow more than 10 tons of potatoes. But without any fault on X's part, a disease attacked the crop and only

about eight tons of potatoes could be grown. It was held that the agreement to sell has become void. [Howell v. Coupland]

Note: The provision of Sections 7 and 8 are applicable only in case of specific goods and not in case of unascertained goods. If unascertained goods are destroyed either before or after making the agreement. the contract shall not become void. An agreement to sell certain unascertained goods shall not become void even if the entire stock of unascenained stock is destroyed. For example, X agrees to sell 100 bags of cement out of 700 bags lying in his godown. The entire cement had become stone. The contract is not void because the contract was for unascertained goods and not for specific goods. Hence, X must deliver 100 bags of cement or pay damages for the breach.

15.7 PRICE OF GOODS

Meaning [Section 2(10)] Price means the money consideration for a sale of goods.

Modes of Determining Price [Section 9(1)] There are three modes of determining the price as under: (a) It may be fixed by the contract; or (b) It may be left to be fixed in an agreed manner, or (c) It may be determined by the course of dealing between the parties. Thus, the price need not necessarily be fixed at the time of sale.

Consequences of not Determining the Price in Any of the Mode [Section 9(2)] Where the price is not determined in accordance with Section 9(1), the buyer must pay the seller a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case. It may be noted that a reasonable price need not be market price.

Consequences of not Fixing Price by Third Party [Section 10(1)] The agreement to sell goods becomes void if the following two conditions are fulfilled. (a) If such agreement provides that the price is to be fixed by the valuation of a third party, and (b) If such third party cannot or does not make such valuation.

Duty of Buyer

A buyer who has received and appropriated the goods, must pay a reasonable price therefor.

Right of Party not at Fault to Sue

Where such a third party is prevented from making the valuation by fault of the seller or buyer, the party not at fault may maintain a suit for damages against the party in fault.

Example X agrees to sell 100 bags of cement to Y at a price to be fixed by Z and to be delivered in 4 equal installments. Y receives a delivery of 25 cement bags. State the legal position
(a) If 2' refuses to value the goods and fix the price,
(b) if Z is prevented from fixing the price by the fault of X,
(c) it Z is prevented for fixing the price by the fault of Y.

Solution:

Case (a): The agreement to sell becomes void. But Y must pay a reasonable price for 25 cement bags.
Case (b): The agreement to sell becomes void. But Y must pay a reasonable price for 25 cement bags. However, Y may maintain a suit for damages against X.
Case (c): The agreement to sell becomes void. But Y must pay a reasonable price for 25 cement bags. However, X may maintain a suit for damages against Y. 4

Earnest v. Advance Payment

Earnest means security for the due performance of the contract. Advance payment means the payment of the price of the goods in advance which is to be adjusted against the ultimate total price of the goods. If the

contract is not or cannot be performed by the fault of the buyer, the seller may forfeit the earnest and not the advance payment. The party not at fault may maintain a suit for damages against the party in fault.

15.8 STIPULATION AS TO TIME [SECTION 11]

Stipulation as to time of payment is not deemed to be an essence of a contract of sale unless a different intention appears from the terms of the contract.

Other Stipulation as to Time Whether any other stipulation as to time is of the essence of the contract or not depends on the teens of the contract.

15.9 CONDITIONS AND WARRANTIES

It is usual for both seller and buyer to make representations to each other at the time of entering into a contract of sale. Some of these representations are mere opinions which do not form a part of contract of sale. Whereas some of them may become a part of contract of sale. Representations which become a part of contract of sale are termed as stipulations which may rank as condition and warranty e.g. a mere commendation of his goods by the seller doesn't become a stipulation and gives no right of action to the buyer against the seller as such representations are mere opinion on the part of the seller. But where the seller assumes to assert a fact of which the buyer is ignorant, it will amount to a stipulation forming an essential part of the contract of sale.

Meaning of Stipulation [Section 12(1)]

A stipulation in a contract of sale of goods may be a condition or warranty [Section 12(1)].

Meaning of Condition [Section 12(2)]

A condition is a stipulation-

(a) which is essential to the main purpose of the contract, and

(b) the breach of which gives the aggrieved party a right to terminate the contract.

Example X asked a car dealer to suggest him a car suitable for touring purposes. The dealer suggested a 'Buggati Car'. Accordingly, X purchased it but found it unsuitable for touring purpose. In this case, suitability of car for touring purpose was a condition of contract. X was, therefore entitled to reject the car and have refund of the price paid. [Baldry v. Marshall]

Meaning of Warranty [Section 12(3)]

A warranty is a stipulation-

(a) which is collateral to the main purpose of the contract, and

(b) the breach of which gives the aggrieved party a right to claim damages but not a right to reject goods and to terminate the contract.

Example X asked a car dealer to suggest him a good car and while suggesting the car, the dealer said that it could run for 20 km per litre of petrol. But the car could run only 15 kms per litre of petrol. In this case, the statement made by the seller was a warranty. X was therefore not entitled to reject the car but he was entitled to claim the damages.

How to Determine Whether Stipulation is a Condition or Warranty [Section 12(4)]

Whether stipulation is a contract of sale is condition or a warranty depends in each case on the construction of the contract. Stipulation may be a condition though called a warranty in the contract.

Distinction Between Condition and Warranty

A condition can be distinguished from a warranty as under:

S.No.	Basis of distinction	Condition	Warranty
1	Essential vs. Collateral	It is a stipulation which is essential to the main purpose of the contract.	It is a stipulation which is only collateral to the main purpose of the contract.
2	Right in case of breach	The aggrieved party can terminate the contract.	The aggrieved party can claim damages but cannot terminate contract.
3	Treatment	A breach of condition can be treated as a breach of war- flinty. For example. a buyer may like to retain the goods and claim only damages.	A breach of warranty cannot be treated as a breach of condition.

When Condition to be Treated as Warranty [Section 13]

In the following three cases, a breach of a condition is treated as a breach of a warranty:

(a) where the buyer waives a condition; once the buyer waives a condition, he cannot insist on its fulfillment e.g. accepting defective goods or beyond the stipulated time amounts to waiving a condition.

(b) where the buyer elects to treat breach of the condition as a breach of warranty; e.g. where he claims damages instead of repudiating the contract.

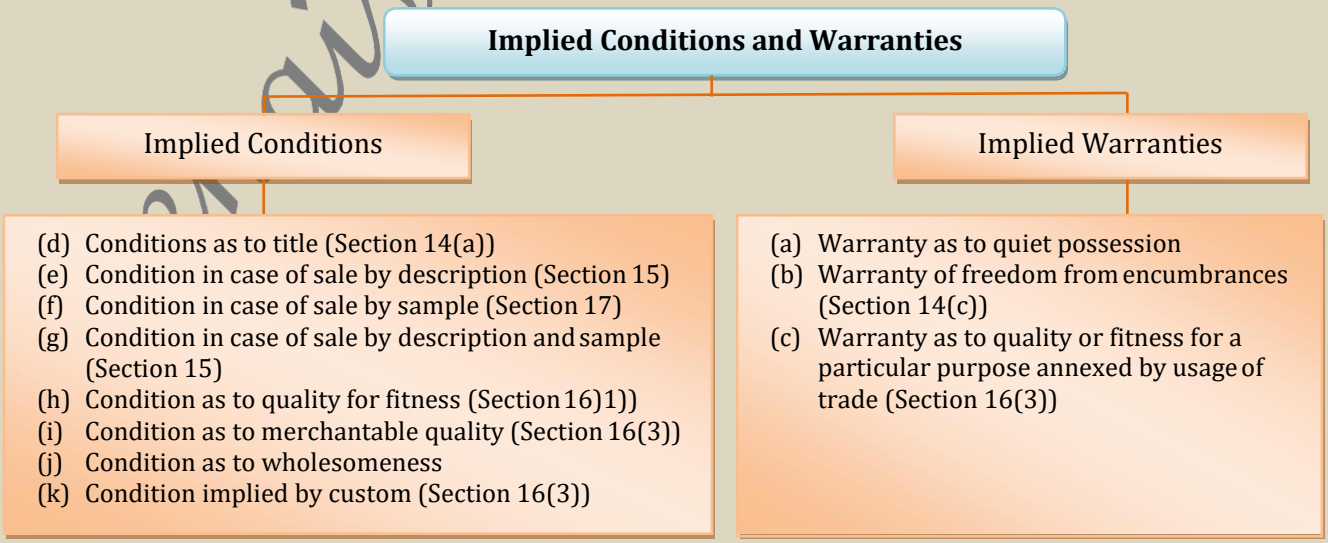
(c) where the contract is not severable and the buyer has accepted the goods or part thereof, the breach of any condition by the seller can only be treated as a breach of warranty. It can not be treated as a ground for rejecting the goods unless otherwise specified in the contract. Thus, where the buyer after purchasing the goods finds that some condition is not fulfilled. he cannot reject the goods. He has to retain the goods entitling him to claim damages.

Express and Implied Conditions and Warranties

In a contract of sale of goods, conditions and warranties may be express or implied.

(a) Express Conditions and Warranties These are expressly provided in the contract. For example, a buyer desires to buy a SONY TV Model No. 2062. Here, model no. is an express condition. In an advertisement for Khaitan fans, guarantee for 5 years is an express warranty.

(b) Implied Conditions and Warranties These are implied by law in every contract of sale of goods unless a contrary intention appears from the terms of the contract. The various implied conditions and warranties have been shown below.



Implied Conditions and Warranties

Let us discuss them one by one.
Implied Conditions [Sections 14(a), 15(1), 16(1), 16(2), 16(3), 17]

(a) Condition as to Title [Section 14(a)] There is an implied condition on the part of the seller that
(i) in the case of a sale, he has a right to sell the goods, and
(ii) in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass.

Note: The term 'right to sell. is wider than 'right to pass ownership'.
Example I X purchased a car from Y. After 6 months Z, the true owner of car, demanded It from X. X had to return it to its true owner. X was entitled to recover the full price even though several months had passed. [Rowland v. Dived]

Example II X purchased from Y tins of condensed milk bearing the label 'N BRAND.' It is proved that there was an infringement of trademark. X had to remove the labels and sold the tin at a loss X was entitled to sue V' for breach of implied condition that Y had the right to sell. [Niblett Ltd. v. Confectioner's Materials Co.]

Example III X (a buyer in Chor Bazaar) purchased some stolen goods from Y a thief. Z, the true owner of stolen goods, demanded it from X. X had to return It to its true owner. X Is not entitled to sue Y because the knowledge of the buyer has negatived the implied condition as to title.

(b) Sale by Description [Section 15] Where there is a contract of sale of goods by description, there is an implied condition that the goods shall correspond with description. The main idea is that the goods supplied must be same as were described by the seller. Sale of goods by description include many situations as under:
(i) Where the buyer has never seen the goods and buys them only on the basis of description given by the seller.
Example X bought a reaping machine from Y who described it to be one year old and used only to cut 50 to 60 acres but X found that the machine extremely old. X was entitled to reject the machine because machine did not correspond with the description given by the seller. [Varley v. Whipp.]
(ii) Where the buyer has seen the goods but he buys them only on the basis of description given by the seller.
Example The buyer bought after seeing certain goods which were described by the seller as "dating from seventeenth century' but he found them of eighteenth century. The buyer was entitled to reject the goods because goods did not correspond with the description given by the seller. [Nicholson and Vam v. Smith Marriott]
(iii) Where the method of packing has been described.
Example X purchased from Y 5000 tins of canned fruit to be packed in cases each containing 50 tins but Y supplied cases containing 25 tins. X was entitled to reject the goods because the goods were not packed according to the description. [Moore & Co. v. Landauer & Co.)

Note: If the goods do not correspond with the description but such goods are fit for buyer's purpose, even then the buyer may reject the goods and the seller cannot take the defense by saying that the goods will serve the buyer's purpose. IA was v. Ranaason & Sons]

(c) Sale by Sample [Section 17] A contract of sale is a contract for sale by sample when there is a term in the contract, express or implied, to that effect. Such sale by sample is subject to the followingthree conditions:
(i) The goods must correspond with the sample in quality.

(ii) The buyer must have a reasonable opportunity of comparing the bulk with the sample.
(iii) The goods must be free from any defect which renders them unmerchantable and which would not be apparent on reasonable examination of the sample. Such defects are called latent defects and are discovered when the goods are put to use. It may be noted that the seller cannot be held liable for apparent or visible defects which could be easily discovered by an ordinary prudent person.

Example X bought from Y certain quantity of worsted coating equal to sample. The coating was equal to sample but due to a latent defect, the cloth was found to be unfit for making coats. The buyer was entitled to reject the goods because the defect contained in the sample was not apparent on reasonable examination of the sample. [Drummond & Sons v. Van liven]

(d) Sale by Sample as well as by Description [Section 15] If the sale is by sample as well as by description, the goods must correspond with the sample as well as the description.
Example X bought from Y foreign refined rapeseed oil which was warranted to be equal to sample. The oil supplied was equal to the sample. The sample was actually a mixture of rapeseed oil and hemp oil. X was entitled to reject the goods because the goods supplied did not correspond with the description. [Nichol v. Godts]

(e) Condition as to Quality or Fitness [Section 16(1)] There is no implied condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale. In other words, the buyer must satisfy himself about the quality as well as the suitability of the goods. This is expressed by the maxim caveat emptor (let the buyer beware).
Exception to this Rule: There is an implied condition that the goods shall be reasonably fit for a particular purpose described if the following three conditions are satisfied:
(i) The particular purpose for which goods are required must have been disclosed (expressly or impliedly) by the buyer to the seller. Note: This condition need not be fulfilled if the goods can be used only for a particular purpose.
(ii) The buyer must have relied upon the seller's skill or judgement.
(iii) The seller's business must be to sell such goods. Note: The condition cannot be invoked against a casual seller.

Example I X purchased a hot water bottle from Y. retail chemist. X asked Y if it would stand boiling water. The Chemist told him that the bottle was meant to hold hot water. The bottle burst when water was poured into it and injured his wife. The chemist is liable to refund the price and pay damages because bottle was unfit for the purpose for which it was purchased. [Priest v. Last]
Example II X asked a car dealer to suggest rum cur suitable for touring purposes. The dealer suggested a 'Bugged Car.' Accordingly, X purchased it but found It unsuitable for touring purpose. The car deafer is liable for broach of condition as to Illness because X who relied upon his skill and judgement is entitled to reject the car and have refund of the price paid. [Baldly v. Marshall]
Example III X bought a refrigerator without asking the dealer whether it Is fit to make ice. Refrigerator failed to make ice. The dealer is liable to refund the price because refrigerator was unfit for the purpose for which it was meant for and the buyer was not required to disclose this particular purpose. [Evens v. Stella Benjamin]
Example IV X bought a set of false teeth from Y a Dentist. But the set was not fit for Xs mouth. X rejected the set of teeth and claimed the refund of price. It was held that X was entitled to do so as the only purpose for which he wanted the set of teeth was not fulfilled. [Dr. Beretto v. T.R. Prue.)

Circumstances under which Condition as to Fitness not Applicable (Provision to Section 16(1)1:
(i) Where the buyer fails to disclose to the seller any abnormal circumstances.

Example X bought tweed coat and found unfit for her abnormally sensitive skin. The seller was not liable because the cloth was fir for anyone with a normal skin and she did not inform the seller about her abnormally sensitive skin. (Griffiths v. Peter Conway Ltd.]

(ii) Where the buyer buys a specified article under its patent or other trade name and does not rely upon the skill and judgement of the seller.

Example X asks a chemist to supply 'Boumvita' as health drink. He found no improvement in his health in spite of its prolonged use. He is not entitled to claim any compensation because there was no condition as to fitness because goods are bought under patent name.

Tutorial Note: The implied condition as to fitness for a particular purpose applies to goods whether or not the buyer has examined the goods.

(f) Condition as to Merchantable Quality [Section 16(2)] Where the goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be of merchantable quality. The expression 'merchantable quality' means that the quality and condition of the goods must be such that a man of ordinary prudence would accept them as the goods of that description. Goods must be free from any latent or hidden defects.

Example I X bought from a dealer a bottle of wine. While opening its cork in the normal manner, the bottle broke off and injured Xs hands. X was entitled to claim damages because the bottle was not of merchantable quality. (Morelli v. Fitch & Gibbons]

Example II X a dealer sold a plastic catapult to B. While using the catapult In the usual manner, it broke due to the fact that the materials used in its manufacture were unsuitable. As a result the boy who was using was blinded in one eye. The seller was liable because the goods were not of merchantable quality. [Godley v. Perry]

Example III X bought some cooking coal from Y a coal dealer for his domestic use. However, the coal contained an explosive substance which exploded and caused injury to X. It was held that the coal was not of merchantable quality as it was not fit for using as cooking coal. X was entitled to claim damages from Y. [Wilson v. Rickett Cackerrel & Co.)

Circumstances under which Condition as to Merchantable Quality not Applicable

(Provision to Section 16(2)1: There shall be no implied conditions as regards defects which the buyer could have discovered if the buyer has examined the goods.

Example X purchased glue from Y. The glue was packed in barrels and every facility was given to X for its examination but X did not examine the contents. X could not reject the goods by saying that they are not merchantable because opportunity of examining the goods was given to X but he did not examine. [Thomett & Fobs v. Beers & Sons)

Notes: (i) The implied condition as to merchantable quality applies to goods whether or not the goods am sold under a patent or trade name.

(ii) The implied condition as to merchantable quality applies to goods whether or not the buyer relies on the skill and judgement of the seller.

(g) Condition as to Wholesomeness In case of eatables or provisions or food-stuffs. there is an implied condition as to wholesomeness. Condition as to whole someness means that the goods shall be fit for human consumption.

Example X bought milk from Y's dairy. The milk contained typhoid terms. X's wife consumed milk, became infected and died. Y was liable for damages because the milk was not fit for human consumption [Frost v. Aylesbury Dairy Co. Ltd.)

(h) Condition Implied by Custom [Section 16(3)] Condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

Example X sold certain drugs by auction to Y. In case of sale by auction, there was a trade custom to declare any sea damage in the goods. But the goods were sold without such declaration. Such goods were found to be sea damaged. It was held Y could reject the goods and claim the refund of the price because the sale without such declaration meant that the goods were free from any sea damage. [Jones v. Bowden)

Implied Warranties [Sections 14(b), 14(c), and 16(3)]

(a) Warranty as to Quiet Possession [Section 14(b)] There is an implied warranty that the buyer shall have and enjoy quiet possession of the goods. The reach of this warranty gives buyer a right to claim damages from the seller.

Example X sold a second hand Radio to Y who spent Rs 100 on the repairs of this radio. This radio was seized by the police as it was a stolen one. Y filed a suit against X for the recovery of damages for breath of warranty of quite possession including the cost of repairs. It was held that Y was entitled to recover the same [Mason v. Burnanghan4

(b) Warranty of Freedom from Encumbrances [Section 14(c)] There is an implied warranty that the goods are free from any charge or encumbrance in favour of any third person if the buyer is not aware of such charge or encumbrance. The breach of this warranty gives buyer a right to claim damages from the seller.

Example X borrowed Rs 500 from Y and hypothecated his radio with Y as security. Later m X sold this radio to Z who bought in good faith. Here, Z can claim damages from X because his possession is disturbed by Y having a charge.

(c) Warranty as to Quality or Fitness for a Particular Purpose which may be Annexed by the Usage of Trade [Section 16(3)]

(d) **Warranty to Disclose Dangerous Nature of Goods In case of goods** of dangerous nature the seller must disclose or warn the buyer of the probable danger. If the seller fails to do so, the buyer may make him liable for breach of implied warranty.

Example X purchased a tin of disinfectant powder which required to be opened with special corn. X% wile while opening the tin was Injured as the powder flow into her eyes. Held, the seller was liable for the injury sustained by X% wife because of breach of warranty (Clarke v. Army and Navy Cooperative Society Ltd. (1903) 1 KB 155)

15.10 MEANING AND EXCEPTION TO THE DOCTRINE OF CAVEAT EMPTOR

Meaning of the Doctrine of Caveat Emptor [Section 16]

The expression 'Caveat Emptor' means 'let the buyer beware.' The doctrine of caveat emptor has been given in the first pan of Section 16 which reads as under

"Subject to the provisions of this Act and any other law for the time being in force, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale".

In other words, it is not part of the seller's duty to point out defects of the goods which he offers for sale, rather it is the duty of the buyer to satisfy himself about the quality as well as the suitability of the goods.

Example Pigs were sold subject to all faults and the seller knew that the pigs were suffering from swore-fever but he did not inform the buyer about this defect. The seller was not liable for damages because there was no implied warranty. (Ward v. Hobbs)

Exceptions to the Doctrine of Caveat Emptor

The doctrine of caveat emptor is subject to the following exceptions shown in Fig. 15.5.

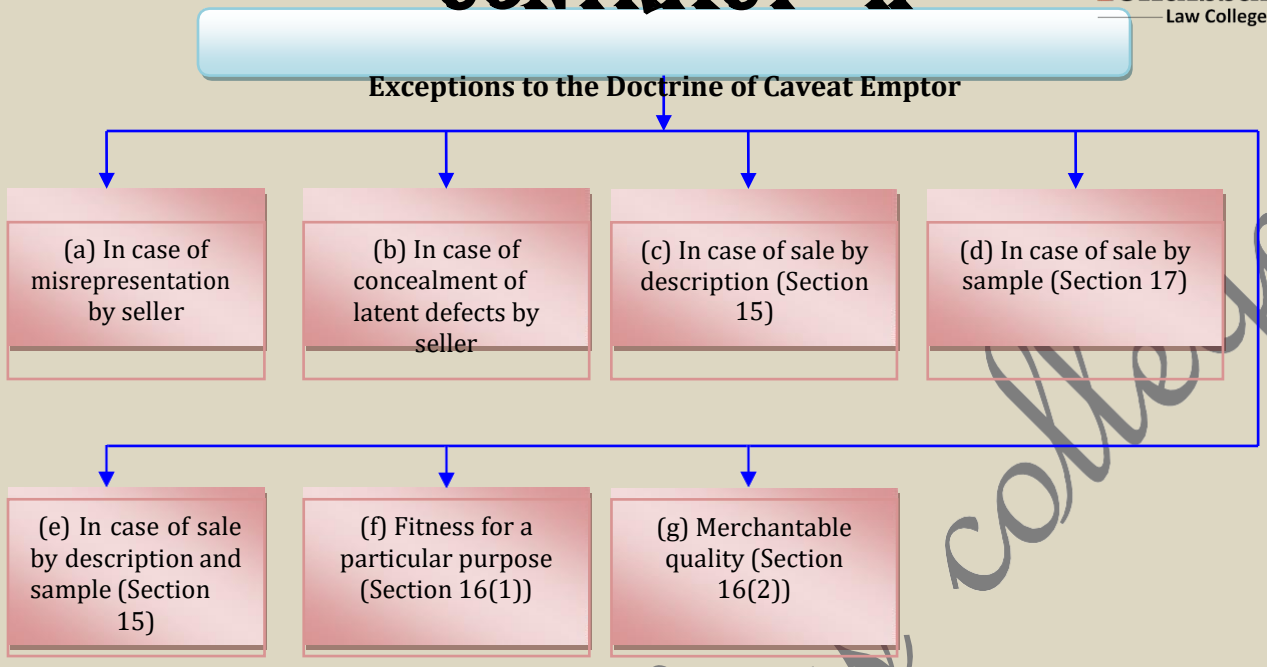


Fig. 15.5 Exceptions to the Doctrine of Caveat Emptor

(a) **In Case of Misrepresentation by the Seller** Where the seller makes a misrepresentation and the buyer relies on that representation.

(b) **In Case of Concealment of Latent Defect** Where the seller knowingly conceals a defect which would not be discovered on a reasonable examination.

(c) **In Case of Sale by Description [Section 15]** Where the goods am sold by description and the goods supplied by the seller do not correspond to the description.

(d) **In Case of Sale by Sample [Section 17]** Where the goods are sold by sample and the goods supplied by the seller do not correspond with the sample.

(e) **In Case of Sale by Sample as well as Description [Section 15]** Where the goods are sold by sample as well as description and the goods supplied do not correspond with sample as well as description.

(f) **Fitness for a Particular Purpose [Section 16(1)]** Where the seller or a manufacturer is a dealer of the type of goods sole by him and the buyer has disclosed the purpose for which goods are required and relied upon the seller's skill or judgement.

(g) **Merchantable Quality (Section 16(2))** Where the goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or producer or not), there is an implied condition that goods shall be of merchantable quality.

Relevance of Caveat Emptor

The rule of Caveat Emptor appeared to play an important role in the past when trade was conducted on local scale and the buyer had every opportunity to examine the goods before buying. However, in the modem context, the rigours of the rule have been mitigated because of global dimensions of trade, government legislations on consumer protection, professional management, intense competition and consumer awareness. In fact, the rule of caveat emptor should be replaced by the rule of 'caveat vendor' (Let the seller beware).

15.11 MEANING AND SIGNIFICANCE OF PASSING OF PROPERTY

Meaning of Passing of Property

Passing of property implies transfer of ownership and not the physical possession of goods. For example, where a principal sends goods to his agent, he merely transfers the physical possession and not the ownership of goods. Here, the principal is the owner of the goods but is not having possession of goods and the agent is having possession of goods but is not the owner.

Significance of Passing of Property

The time of transfer of ownership of goods decides various rights and liabilities of the seller and the buyer. Thus, it becomes very important to know the exact time of transfer of ownership of goods from seller to buyer to answer the following questions:

(a) Who shall bear the risk: It is the owner who has to bear the risk and not the person who merely has the possession.
(b) Who can take action against third party: It is the owner who can take action and not the person who merely has the possession.
(c) Whether a seller can sue for price: The seller can sue for the price only if the ownership of goods has been transferred to the buyer.
(d) In case of insolvency of a buyer whether the official receiver or assignee can take the possession of goods from seller: The Official Receiver or Assignee can take the possession of goods from seller only if the ownership of goods has been transferred to the buyer.
(e) In case of insolvency of a seller whether the official receiver or assignee can take the possession of goods from buyer: The official receiver or assignee can take the possession of goods from buyer only if the ownership of goods has not been transferred to the buyer.

15.12 RULES RELATING TO PASSING OF PROPERTY (OR TRANSFER OF OWNERSHIP) FROM SELLER TO BUYER

For the purposes of ascertaining the time at which the ownership is transferred from seller to the buyer, the goods have been classified into the following three categories:

(a) Specific or ascertained goods
(b) Unascertained goods
(c) Goods sent 'on approval' or 'on sale on return' basis.

Rules Relating to the Transfer of Ownership of Specific Goods or Ascertained Goods [Sections 19-22]

Meaning of Specific Goods [Section 2(14)]

Specific goods mean goods identified and agreed upon at the time when a contract of sale is made.

General Rule [Section 19(1)]

The ownership of specific goods or ascertained goods is transferred to the buyer at such time as the parties intend, it to be transferred.

Ascertainment of the Intention [Sections 19(2), 19(3), 20, 21, 22, 23] For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case [Section 19(2)1. Unless a different intention appears, the following rules are applicable [Section 19(3)]:

S.No.	Case	Time when the ownership is transferred
I	Where there is an unconditional contract for sale of specific goods in a deliverable state (Section 20) Notes:	When the contract is made (Refer to example I)

	(i) Unconditional contract means a contract containing no condition regarding the transfer of ownership. (ii) Deliverable state means such state that the buyer would be bound to take delivery of the goods under the contract. (iii) It is immaterial whether the time of payment of the price or the delivery of goods, or both is postponed.	
II	Where there is a contract for sale of specific goods not in a deliverable state (Section 21)	When the goods are put into a deliverable state and the buyer has notice thereof. (Refer to example II) **Note**: Where the seller undertakes to put the goods on rail or any other means of transportation, the ownership shall remain with the seller till the goods are loaded. (Underwood Ltd. v. Burgh)
III	Where there is a contract for sale of specific goods in a deliverable state but the seller has to do some act to ascertain the price (Section 22)	When the seller has done that act to ascertain the price and the buyer has notice thereof. (Refer to Example III)

Example I X bought from Y a heap of wheat the weight of which Is 1,000 kg at the rate of As 8 per kg, and agrees to pay the price on the first day of the next month and the wheat is to be delivered at X's godown on the following day. A fire broke out and the entire quantity of wheat was destroyed. In this case X is liable to pay the price because the ownership of wheat has transferred from Y to X on making the contract even though the price has not been paid and the goods have not been delivered.
Example II X bought from Y a heap of wheat (weight 100 kg) at the rate of As 8 per kg. and Y had to put the wheat in bags to deliver it to X. Y fined some bags in Xs presence, but before the remainder could be filled, a fire broke out and the entire quantity of wheat was destroyed. In this case, X is liable to pay the price for the wheat which was put into bags because the ownership in respect of these goods has passed when le has put the wheat in bags and the buyer has notice thereof. [Rugg v. Minett]
Example III X bought from Y a heap of wheat at a rate of As 8 per kg and Y had to weigh the wheat. Before weighing was completed, the wheat was destroyed by fire. In this case, X is not liable to pay the price because the ownership of goods has not passed from Y to X. Pigmy v. Email]

Rules Relating to the Transfer of Ownership of Unascertained Goods and Future Goods [Sections 18 and 23)
Meaning of Unascertained Goods Unascertained goods means goods which have not been identified and agreed upon at the time when contract of sale is made. Meaning of Future Goods [Section 2(6)] Future goods means goods to be manufacture-xi or produced or acquired by the seller after the making of the contract of sale.
Rules (Sections 18 and 23) The ownership of unascertained goods is transferred to the buyer when the following two conditions are fulfilled:
(a) the goods must have been ascertained.
Note: Ascertainment is the process of identifying the goods to be sold to the buyer. It is an unilateral act and is usually done by the seller alone.
(b) the goods must have been unconditionally appropriated by the seller or the buyer with the consent of the other.

Nole:

(i) Appropriation means an act involving the selection of goods with the intention of using the goods in performance of the contract.

(ii) The consent of the seller or the buyer as to appropriation may be express or implied and may be given before or after die appropriation is made.

(iii) Where the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer and dots not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

(iv) The contract to sell unascertained goods is not a complete sale. It is merely an agreement to sell.

Example I X agreed to sell 100 bags of wheat to Y out of his Mock of 500 bags. A fire broke out and the entire quantity of wheat was destroyed. Stale who shall bear the loss and why in each of the following alternative cases?

(a) If no bag had been separated before fire for the purposes of delivery to Y;

(b) 11 100 bags had been separated before fire with Vs consent.

Solution:

Case (a): X shall bear the loss because the ownership has not transferred to Y as the goods were not ascertained.

Case (b): Y shall bear the loss because the ownership has transferred to Y as the goods were ascertained.

Example II X agreed to sell to Y the oil to be produced by him. The oil was filled by X into the bottles supplied by Y. Here, the ownership passed when the oil was filled into the bottles because the buyer gave his consent to the appropriation by supplying the bottles. [Langton v. Higgins)

Rules Relating to the Transfer of Ownership of Goods Sent 'on Approval' or 'on sale or Return' basis [Section 24]

Meaning Goods sent 'on approval' or 'on sale or return' basis mean those goods in respect of which the buyer has option either to return or retain.

Rules The various rules relating to the transfer of ownership of such goods have. been given below.

S.No.	*Case*	*Time when the ownership is transferred*
(a)	When the buyer signifies his approval or acceptance	When the approval or acceptance is communicated to the seller.
(b)	When the buyer does some act adopting the transaction	When the act of adoption is done.
(c)	When the buyer fails to return the goods (i) If a time has been fixed for the return of goods (ii) If no time has been fixed for the return of goods	On the expiry of fixed time. On the expiry of the reasonable time. **Note**: What is a reasonable time is a question of fact depending upon the facts and circumstances of each case.

Example I X delivers some goods to Y on "Sale or return- for t nays. State the legal position in each of the following alternative cases:

Casa (a) such goods are destroyed by fire on the third day itself without any fault of Y.

Case (b) Y Informs X on telephone on the third day itself that he has accepted the goods and immediately after the receiver is put off, the goods are destroyed by fire.

Case (c) such goods are further delivered by Yon the third day itself to Z and then by Z to A on similar terms. The goods are stolen while in the custody of A. Case (d) Y neither returns nor gives notice of rejection even alter the expiry of 7 days.
Goods are destroyed by fire on the eighth day.
Case (e) Y retains the goods but gives the notice of rejection on the expiry of 7 days. Goods are destroyed by fire on the eighth day.

Solution:
Case (a): X shall bear the loss because the ownership has not yet passed to the buyer. [Elphick v. Barnes]
Case (b): Y shall bear the loss because the ownership has passed to the buyer. Case (c): X can recover the loss from Y because the ownership passed to Y as Y has adopted the transaction by delivering the goods to Z. Y can recover the loss from Z because the ownership has passed to Z as Z has adopted the transaction by delivering the goods to A. Z cannot recover the loss from A because the ownership has not yet passed. [Gene v. Winkel]
Case (d): Y shall bear the loss because the ownership has passed to the buyer. Case (e): X shall bear the loss because the ownership has not yet passed.
Example II X delivered some jewellery to Y on 'sale or return' without specifying any time for its return in case of non-acceptance. State the legal position In each of the following alternative cases:
Case (a) If Y pledges the jewellery with Z.
Case (b) If X makes it clear that the goods are to remain his property until paid for. Before Y pays the price, he pledges the jewellery with Z.
Case (c) If Y neither accepts nor rejects within one month and aka a month a burglary takes place in Y's house and the jewellery Is stolen.
Solution:
Case (a): X can recover the price of the jewellery from Y because ownership has passed to Y as Y had adopted the transaction by pledging the jewellery with Z But X cannot recover the jewellery from Z. [Kirkham v. Attenborough]
Case (b): X can recover the jewellery from Z because the pledge was not valid as the ownership has not yet transferred to Y. [Weiner v. Smith]
Case (c): X can sue Y for the price of the jewellery because a reasonable time to reject has expired. As such, the ownership has transferred to Y. [Hooghly Chinsurah Municipality v. Spence Ltd.]

15.13 RESERVATION OF RIGHT OF DISPOSAL

Right of Seller to Reserve the Right of Disposal of the Goods [Section 25(1)]
Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the sellermay reserve the right of disposal of the goods until certain conditions are fulfilled.

Transfer of Ownership In Case of Reservation of Right of Disposal [Section 25(1)]
In such a case, the ownership of goods will not be transferred to the buyer until the conditions imposed by the seller are fulfilled even if the goods have already been delivered to the buyer or to a carrier or other bailee for the purpose of transmitting the same to the buyer.

Mode of Reservation
The seller may reserve the right of disposal of goods either expressly or by impli¬cation. In the following two cases, the seller is deemed to have resolved the right of disposal to himself.

(a) **In case of Goods Deliverable to the Order of Seller or his Agent [Section 25(2)]** Where the goods are shipped or delivered to a railway administration for carriage and by the bill of lading or railway receipt, as the case may be, they are deliverable to the order of seller or his agent.

Example X sold some goods to Y with the terms that the goods shall be sent by railway. The goods were destroyed in the course of journey. State the legal position (i) if railway receipt is taken in the name of X.

(ii) if railway receipt is taken in the name of Y but is sent through Bank, (iii) If railway receipt is taken in the name of Y and is sent to him.

Solution:

Cases (i) and (ii): X will have to bear the loss because the ownership has not yet been transferred. [General Papers Ltd. v. P Mohideen & Sons]

Case WO: Y will have to bear the loss because the ownership has already been transferred.

(b) In case of Drawing a Bill of Exchange [Section 25(3)] Where the seller of goods draws on the buyer for the price of the goods and sends the bill of exchange together with the bill of lading or railway receipt, the ownership of goods will not be transferred to the buyer until the buyer honours the bill of exchange. The buyer must return the bill of lading or the railway receipt if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading or the railway receipt, the ownership of goods will not be transferred.

Example X sold some goods to Y, took the bill of lading in Vs name and drew a Bill of Exchange on Y and delivered bill of lading and Bill of exchange to his banker with the Instruction to deliver the bill of lading to Yon his accepting and paying the amount of the bin. Initially, Y refused to accept the offer and sold the goods to Z. It was held that the banker was liable to Y for making the wrongful sato to Z because the ownership was transferred to Y when he offered to pay the amount. Wirabita v. Imperial Ottoman Bank)

15.14 RISK PRIMA FACIE PASSES WITH PROPERTY [SECTION 26]

Meaning of General Rule

Risk means the liability to bear the loss if the goods are lost or damaged. The general rule is that the risk follows ownership. In other words, risk and ownership go together. This general He implies that it is the owner of the goods who has to bear the loss and not the person who merely has the possession of goods. Thus, this general rule can be summarised as under:

Example I X selects some books from Y's books shop and agrees to pay the price after 20 days and the books are to be delivered at Ks house on the following day. Those books were destroyed as a result of fire in the shop. The loss is to be borne by X because at the time of loss of books. he had become the owner of the books even if the delivery has not been made and the price has not been paid.

Example II X selects some books from Y's book shop and asks the seller whether he can return after 2 days if he does not like. The seller agrees but asks the buyer to deposit the price of those books. The buyer agrees thereto. On the very same day, the books were destroyed as result of tire in Xs house. The loss is to be born by Y because at the time of loss of books, he was the owner of the books even if the delivery has been made.

Exceptions to the General Rule

The general rule that the risk follows the ownership is subject to the following two exceptions:

(a) Agreement to the Contrary Where the parties have made an agreement to the contrary.

Example X sold goods to Y with the term that the goods shall be sent by railway and during the transit the goods shall be the property of the seller but they shall be at the risk of the buyer. During the transit the goods were destroyed by an accident. Hare Y will have to bear the loss though the ownership of the goods is with X. [M. Champalal v. C.P. Shah]

(b) Delayed Delivery Where the delivery has been delayed through the fault of either buyer or seller, the party in fault has to bear the loss which might not have occurred but for such fault.

Example X contracted to sell 100 tons of apple juice to Y. X crushes the apples, puts juice In corks and keeps them ready for delivery. Y took the delivery of part of the juice but made a default to accept the remaining juice. The juice became unfit for consumption. Y will have to bear the loss. [Demby Hamilton & Co. Ltd. v. Barden]

(c) Usage of Trade Risk and ownership may be separated by usage of trade. No Effect on Duties as a Bailee: This general rule shall not affect the duties or liabilities of the seller or the buyer as bailee of goods for the other party even when the risk has passed.

15.15 SALE BY NON-OWNERS

Mining of General Rule

TIM general rule is expressed by the latin maxim "Namo dat quad non label, "which means that "no one can give what he does not himself possess." If the seller's 1114 to the goods is defective, the buyer's title will also be defective because the Wylie acquires his title to the goods from the seller. Hence, the seller cannot give II beau title to the buyer than he himself has.

Example X stole a TV and delivered it to Y, an auctioneer. Y sold the TV to Z at auction. It wee hold that Z obtained no title to the TV because X had no title to it. Roo v. Byes]

Exceptions to the General Rule

The circumstances under which a seller can give a better title than what he himself has, have been shown in Fig. 15.6.

Let us discuss these exceptions one by one.

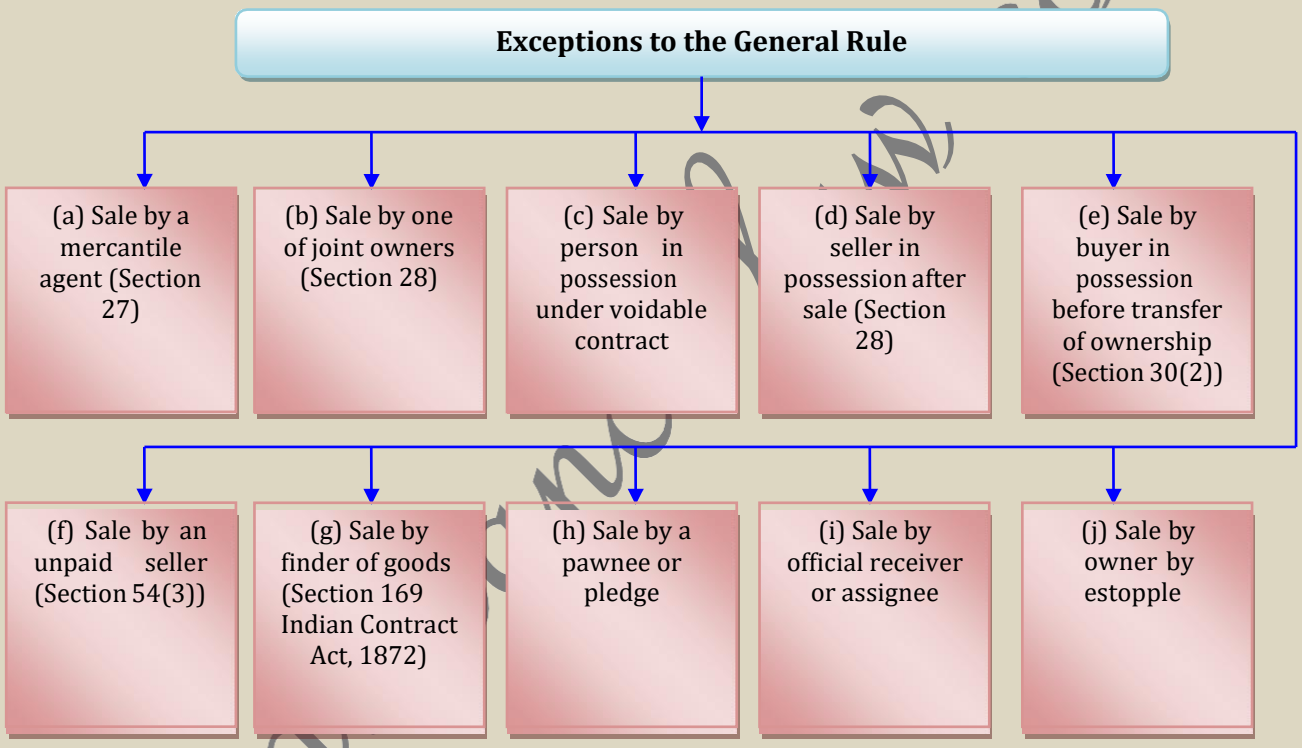


Fig. 15.6 Exceptions to the General Rule

The various exceptions to the general rule and the conditions for their application are summarised as follows:

Exception to the general rule	***Conditions to be Milled before a buyer gets a good ark to the goods***
(a) Sale by a mercantile agent [Section 27]	(i) The agent must be in possession of gootLs or a document title (e.g., Railway receipt, Bill of Lading) to the goods with the consent of the owner. (ii) The agent must have sold the goods in the or-dinary course of business as a mercantile agent.

	(iii) The buyer must have acted in good faith. (iv) The buyer must have no knowledge that the seller had no authority to sell. Example P, the owner of the car Instructed an agent A to sell his car at not less than Rs 50,000. But A sold the car to B for Rs 40,000 and misappropriated the money. B acted in good faith and without notice of the above instruction to agent. Here, B got a good title to the car and the real owner P cannot recover the car from B. [Folkes v. King]
(b) Sale by one of the joint owners [Section 280]	(i) The joint owner must be in the sole possession of goods with the consent of other co-owners. (ii) The buyer must have bought the goods in good faith. (iii) The buyer must have no knowledge that the seller had no authority to sell. **Example** X, Y and Z were the co-owners of some goods. X was in the possession of those goods with the consent of 11 and Z X sold those goods to B who bought them in good -Faith and without notice that X had no author¬ity to sell. In this case, B got a good title to the goods and I' and Z cannot recover the goods from B.
(c) Sale by a person in possession under voidable contract	(i) The seller must be in possession of goods under a contract voidable u/s 19 or 19A of Indian Contract Act, 1872 on ground of coercion, undue influence, misrepresentation or fraud. (ii) The goods must have been sold before the contract is rescinded. (iii) The buyer must have bought the goods in good faith. (iv) The buyer must have no knowledge that the seller's tide is defective. **Example** X, by fraud obtained the possession of a diamond ring from Y. X sold the ring to B before Y rescinded the contract. B bought the ring In good faith and without notice of X's defective title. B got a good tale and Y cannot recover the ring from B. [Phillips V. Brooks)
(d) by seller In possession male [Section 30(1)]	(i) The seller must be in possession of goods or of a document of title to the goods, in the capacity of a seller and not in any other capacity such as bailee. (ii) The buyer must have bought the goods in good faith. (iii) The buyer must have no knowledge about the previous sale. **Example** X sold two TV sets to Y with the terms that one to be delivered Immediately and another to be delivered after 2 days. Later on, Y delivered the first TV to X for some minor repair. X resold the first TV to P and the second to 0. Both P and 0 bought In good faith and without notice of the previous sale. Here, 0 got a good title to the TV but P did not get good title because X was in the possession of TV in the capacity of a bailee and not in the capacity of a seller.
(e) by a buyer in possession before the transfer of ownership [Section 30(2)]	(i) The buyer must be in possession of the goods or a document of title to the goods, with the consent of the original seller and must have bought or agreed to buy the goods. (ii) The new buyer must have bought the goods in good faith.

	(iii) The new buyer must have no knowledge about any lien or other right of the original seller in respect of goods. Example X takes the delivery of a furniture, from Y under an agreement which provides for (a) an immediate down payment of Rs 300, (b) the balance by way of 12 monthly installments of Rs 100 each, (c) transfer of ownership on the payment of last Installment, (d) Y's right to repossess the goods In case of non-payment of Installments due. Before the 12th installment was paid, X sold the furniture to Z. Can Y recover the furniture from 2? State your answer in each of following cases. Case (a): If the agreement does not provide for any other stipulation. Case (b): If the agreement also provides that X can return the goods. Solution: Case (a): Y cannot recover the furniture from Z because it was a contract of sale (as X was not having any option to return but was under compulsion to buy) and not hire-purchase agreement. Case: (b): Y can recover the furniture from Z because it was a hire-purchase agreement (as X was having an option to return) and hence, X was not having any title to it. **Note**: A buyer (being hirer in case of a hire purchase agreement) cannot transfer a valid title to the new buyer because an 'option to buy dots not amount to an 'agreement to buy'.
(f) Sale by an Unpaid Seller [Section 54(3)]	An unpaid seller must have exercised his right of lien or stoppage in transit.
(g) Sale by a Finder of Goods [Section 162 of Indian Contract Act 1872]	(i) The owner cannot be found with reasonable diligence: or (ii) The owner, if found refuses to pay the lawful charges of finder; or (iii) If the goods are in danger of perishing or of losing the greater part of its value; or (iv) If the lawful charges of the finder in respect of the thing found amounts to two third of its value.
(h) Sale by a pawnee or pledgee	(i) The pawnor or pledger must have made a default in the payment of the debt or the performance of the promise at the stipulated time. (ii) The paw net or pledgee must have given a reasonable notice to the pawnor or pledger.
(i) Sale by Official Receiver or Assignee or Liquidator	The involvement person must be the owner of goods.
(j) Sale by owner by estoppels	The owner of the goods by his statement or con-duct must have lead the buyer to believe that the seller has the authority to sell. **Example** X told Y, a buyer In the presence of Z that he (X) is the owner of the TV. But Z remained silent though the TV belonged to him. Y bought the TV from X Here. Y will get a valid title to the TV even though X had no title to the TV because Z by his own conduct is prevented from denying X's authority to sell the TV.

15.16 DELIVERY

Meaning of Delivery [Section 2(2)]

Delivery means the voluntary transfer of possession from one person to another.

Mode of Delivery [Section 33]

Delivery of goods may be made-
(a) by doing anything which the parties agree shall be treated as delivery, or (b) by doing anything which has the effect of putting the goods into the buyer's or his authorised agent's possession.

Types of Delivery

The delivery of goods may be of the following three types:

(a) **Actual Delivery** Delivery is said to be actual where the goods are physically handed over to the buyer or his authorised agent. For example, X sells to Y 100 bags of wheat lying in Z's warehouse. X orders Z to deliver the wheat to Y. Z delivers to Y. In this case there is an actual delivery of goods.

(b) **Symbolic Delivery** Delivery is said to be symbolic where some symbol of the real possession or control over the goods is handed over to buyer. For example. X sells to Y 100 bags of wheat lying in Zs warehouse and hands over the key of Es warehouse to Y. In this case, there is symbolic delivery of goods.

(c) **Constructive Delivery** Delivery is said to be constructive where a person who is in possession of the goods, acknowledges to hold the goods on behalf of the buyer. For example, X sells to Y 100 bags of wheat lying in Z's warehouse. Y orders Z to deliver the wheat to Y. Z agrees to hold the 100 bags of wheat on behalf of Y and makes the necessary entry in his books. In this case, there is constructive delivery of goods.

Rules as to Delivery (Sections 32 to 39]

The various rules as to delivery have been shown below in Fig. 15.7.

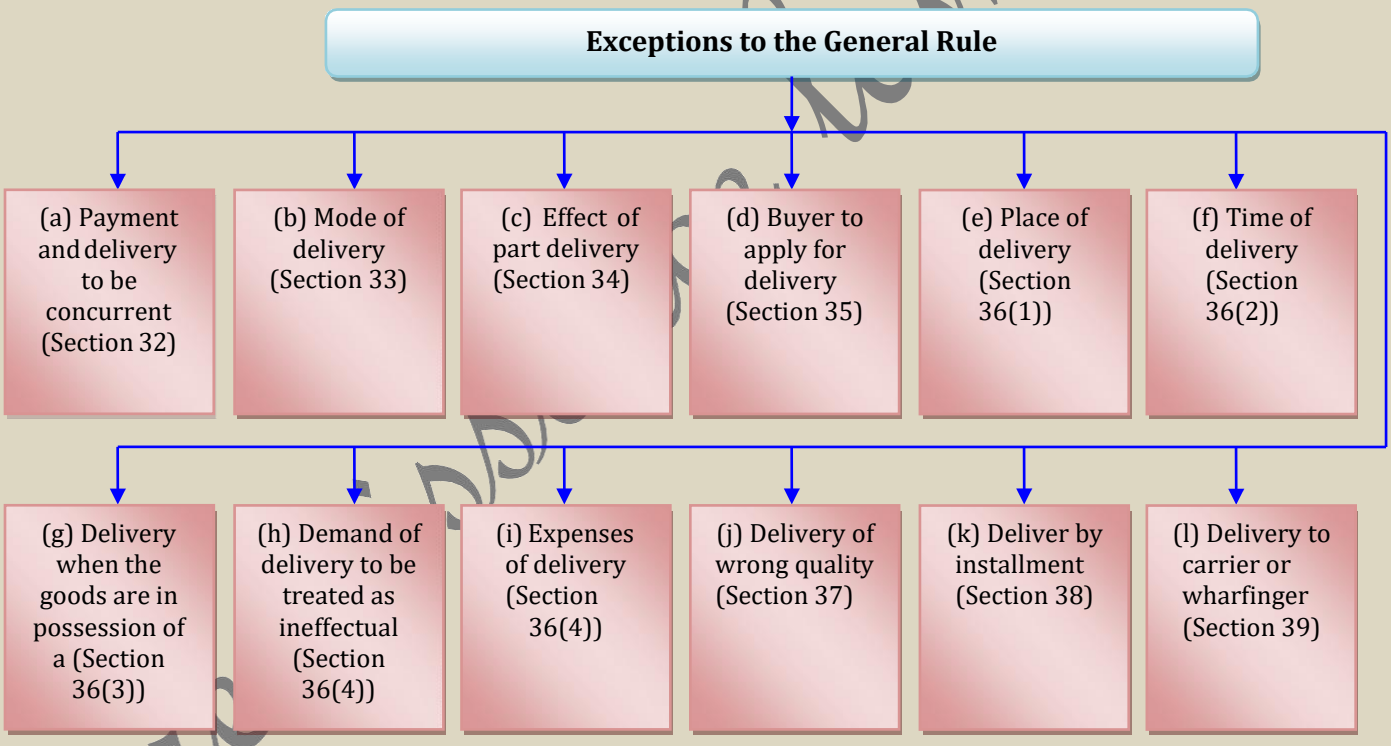


Fig. 15.7 Rules as to Delivery

Let us discuss the rules one by one.

(a) Payment and Delivery to be Concurrent [Section 32] Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer and the buyer must be ready and willing to pay the price.

(b) Mode of Delivery [Section 33] Delivery must have the effect of putting the goods into the buyer's or his authorised agent's possession.

(c) Effect of Part Delivery [Section 34] A delivery of part of goods with an intention of giving the delivery of the whole amounts to the delivery of the whole for the purpose of transfer of ownership of goods, but a delivery of part of goods with an intention of separating it from the whole lot does not amount to the delivery of the whole of the goods.

(d) Buyer to Apply for Delivery [Section 35] Unless otherwise agreed, the seller of the goods is not bound to deliver them until the buyer applies for delivery.

(e) Place of Delivery [Section 36(1)] The various rules as to the place of delivery are summarised as under:

Case	*Place at which goods are to be delivered*
(a) Where there Is a contract as to the time of delivery	At the agreed place.
(b) Where there is no contract as to the place of delivery	
(a) In case of sale	At the place at which the goods are at the time of sale.
(b) In case of an agreement to sell	
(i) in respect of existing goods	At the place at which the goods are at the time of agreement to sell.
(ii) in respect of future goods	At the place at which the goods are manufactured or produced.

(f) Time of Delivery [Section 36(2)] The various rules as to the time of delivery are summarised as under.

Case	*Time within which goods are to be delivered*
(a) Where there Is a contract as to the time of delivery	Within the time agreed.
(b) (b) Where there is no contract as to the time of delivery	Within the reasonable time. **Note**: What is a reasonable time is a question of fact depending upon the facts and circumstances of each case.

(g) Delivery when the Goods are in Possession of a Third Party [Section 36(3)] Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller unless and until such third person acknowledges to the buyer that he holds the goods on his behalf However, this provision shall not affect the operation of the issue or transfer of any document of title to goods.

(h) Demand of Delivery to be Treated as Ineffectual [Section 36(4)] Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

(i) Expenses of Delivery [Section 36(5)] Unless otherwise agreed, the expenses of putting the goods into a deliverable state shall be borne by the seller.

(j) Delivery of Wrong Quantity [Section 37] Subject to any usage of trade, special agreement or course of dealing between the parties, the rules as to the delivery of wrong quantity are summarised as under:

Case	*Rights available to the buyer*
I. Short delivery, i.e., where the seller delivers a quantity of goods less than contracted for	(a) The buyer may accept the goods so delivered, or (b) The buyer may reject the goods.
II. Excess delivery, i.e., where the seller delivers a quantity of goods larger than contracted for	(a) The buyer may accept the goods so delivered, (b) The buyer may reject the whole, or (c) The buyer may accept the contracted. quantity and reject the excess.
III. Mixed delivery, i.e., where the seller delivers the goods contracted for mixed with goods of different	(a) The buyer may reject the whole, or (b) The buyer may accept the goods which arc

description **Note**: The mixing of goods with inferior quality does not amount to mixing of goods of different description. (11arnarain v. M/s Radha Krishan Naraindas]	in accordance with the contract and reject the rest.

Notes:
(i) The buyer may not be allowed to reject the goods in case of negligible short or excess delivery.
(ii) In case of short or excess delivery if the buyer rejects the whole quantity, the contract is not treated as cancelled. The seller still has the right to tender again the quantity of goods, as per contract and the buyer is bound to accept the same. [Vilas Udyog Lid. v. Prag Vanaspati Products.]

(k) Delivery by Installments [Section 38] Unless otherwise agreed, the buyer of goods is not bound to accept delivery by instilments.
The question whether the aggrieved party can repudiate the whole contract or not depends upon the terms of the contract and the circumstances of each case where-
(i) The goods are to be delivered in installments;
(ii) The installments are to be separately paid for;
(iii) The seller makes no delivery or defective delivery in respect of one or more installments, or the buyer neglects or refuses to take delivery of or pay for one or more installments.

(I) Delivery to Carrier or Wharftnger [Section 39] Where the seller is authorised or required to send the goods to the buyer. delivery of the goods to carrier (whether named by the buyer, or not) for the purpose of transmission to the buyer, or delivery of the goods to wharfinger custody, is prima facie deemed to be a delivery of the goods to the buyer [Section 39(1)1. The seller is further required to perform the following two duties also.

(a) **To make a reasonable contract with the carrier or wharfinger:** Unless otherwise authorised by the buyer, the seller shall make a reasonable contract with the carrier or wharfinger on behalf of the buyer. If the seller omits to do so, and the goods are lost or damaged in course of transit or whilst in the custody of the wharfInger, the buyer may decline to treat the delivery to the carrier or wharfinger as a delivery to himself, or may hold the seller irresponsible for damages [Section 39(2)1.

(b) **To give notice to the buyer to enable him to insure the goods:** Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, in circumstances in which it is usual to insure, the seller must inform the buyer to enable higt to insure them during their sea transit, and if the seller fails to do so, the goods shall be deemed to be at his risk during such transit [Section 39(3)]

Example X agrees to sell 100 tons of 'Basmati rice to Y at Rs 40,000 per ton. State the legal position in each of the following alternative cases:
Case (a) If X delivers 8 tons of Basmati rice.
Case (b) If X delivers 12 tons of Basmati rice.
Case (c) If X delivers 10 tons of Basmati rice and 2 tons of Dehraduni rice. Case (d) II X delivers 10 tons of Basmati rice of which 2 tons of inferior quality.
Case (e) If X delivers 8 tons of Basmati rice in April and the remaining 2 tons in the first week of May.
Casa (0 If X delivers 10 tons of Basmati rice at Y's godown. Y refuses to accept them era neither returns nor informs the seller that he refused to accept the goods.
If X delivers 10 tons of Basmati rice at Vs godown. Y refuses to accept them and Inform the seller about his intention but does not return the goods.
Case (h) It X is ready to deliver but Y refuses to take delivery and repudiates the contract.

Case (1) If X delivers 10 tons of Basmati rice and Y resells the rice to Z. When the rice are delivered to Y, he inspected a sample of it and sends it to 1 rejects It as not having according to sample. Y rejects the goods.
Case (j) If X delivers 10 tons 1 kg of Basmati rice and does not charge the buyer with excess quantity.

Solution:
Case (a): Y has two options: 0) he can reject the goods or (ii) he can accept the goods. [Beck etc. v. Synzmanoski]
Case (b): Y has three options, (i) he can reject the whole, (ii) he can accept the whole, or (iii) he can accept 10 tons and can reject 2 tons. If he accepted 12 tons, he must pay for them at the contract rate. lautiffe v. Harrison'
Cave (c): Y has two options: (i) he can reject the whole or (ii) he can accept 10 tons of Basmati rice and can reject 2 tons of Dehraduni rice. [London Plywood Ltd. v. Nasik Oak Ltd.]
Case (d): Y has two options: (i) he can accept the whole, or (ii) he can accept 8 tons of Basmati rice of superior quality and can reject 2 tons of Basmati rice of interior quality.
It may be noted that Y cannot reject the whole because mixing of goods with inferior quality does not amount to mixing of goods of different description. [Harnarain v. Mis Radha Krishan Naraindas]
Case (e): Y can reject the whole lot of 10 tons because he is not bound to accept delivery in instalments. [Renter v. Sala]
Case (f): Y is deemed to have accepted the goods after a lapse of reasonable time.
Case (g): Y is not deemed to have accepted the goods because he has informed the seller about his intention.
Case (h): X can sue Y for price and for damages.
Case (i): Y's act in inspecting the sample and then sending the rice to Z was an acceptance and he could not afterwards reject it. [Perkins v. Bell]
Case (j): Y is not entitled to reject the whole quantity of what because the excess delivery of 1 kg was so trivial as to be wholly insignificant. [Shipton Anderson & Co. v. Weil Brothers & Co. Ltd.]

Acceptance of Delivery [Section 42]
Delivery does no amount to acceptance of goods. Acceptance is something more than mere receipt of goods by the buyer. It means the final assent by the buyer that he has received the goods under, and in performance of the contract of sale. The buyer is deemed to have accepted the goods under the following circumstances:
(a) When he intimates to the seller that he has accepted the goods, or
(b) When the goods have been delivered to him and he does any act in relation to them which shows that he has accepted them (for example resale or pledge of goods by buyer), or
(c) When he does not inform the seller that he has rejected the goods and retains the goods beyond a reasonable time.

Duties and Liabilities of Buyer [Sections 43 and 44]
The duties and liabilities of buyer in various cases arc as under:

Case	*Duties and liabilities of buyer*
(a) Where the goods are delivered to the buyer and he refuses to accept them	The buyer must. inform the seller that he refuses to accept them.
(b) Where the seller is ready and willing to deliver the goods and requests the buyer to take delivery and the buyer does not, lake delivery of goods within a reasonable time after such request.	The buyer is liable to the seller for- (i) any loss caused by his neglect or refusal to take delivery, and (ii) a reasonable charge for the care and custody of goods.

15.17 RIGHTS OF AN UNPAID SELLER

Meaning of an Unpaid Seller (Section 45(1)(2)]

The seller of goods is deemed to be an 'unpaid seller'—

(a) When the whole of the price has not been paid or tendered.

(b) When a bill of exchange or other negotiable instrument (such as cheque) has been received as conditional payment, and it has been dishonoured [Section 45(1)].

The term 'seller' includes any person who is in the position of a seller (for instance, an agent of the seller to whom the bill of lading has been endorsed, or a consignor or agent who has himself paid, or is directly responsible for the price) (Section 45(2)]

Notes:

(i) The seller shall be called an unpaid seller even when only a small portion of the price remains to be paid.

(ii) It is for the non-payment of the price and not for other expenses, that a seller is termed as an unpaid seller.

(iii) Where the goods have been sold on credit, the seller cannot be called as an unpaid seller during the credit period unless the buyer becomes insolvent. On the expiry of credit period if the price remains unpaid, then only the seller will become an unpaid seller.

(iv) Where the full price has been tendered by the buyer and the seller has refused to accept it, the seller cannot be called as unpaid seller.

Example State whether the seller is an unpaid seller or not in each of the following alternative cases:

Case (a) X sold some goods to Y for Rs 10,000. Y paid Rs 9.900 but failed to pay the balance.

Case (b) X sold some goods to Y for Rs 10,000 and received a cheque for the lull price as conditional payment. On presentment, the cheque was dishonoured by the Bank.

Case (c) X sold some goods to Y for As 10,000 on a credit of one month. One month has not yet expired.

Case (d) X sold some goods to 11 for As 10,000 on a credit of one month and one month has expired and the price remains unpaid.

Case (e) X sold some goods to Y for As 10,000 on a credit of one month. Y became insolvent during the period of credit

Solution:

Case (a): X is an unpaid seller because the full price has not been paid.

Case (b): X is an unpaid seller because the cheque received as conditional payment has been dishonoured.

Case (c): X is not an unpaid seller because the credit period has not yet expired and the buyer has not yet become insolvent.

Case (d): X is an unpaid seller because the price remains unpaid even after the expiry of credit period.

Case (e): X is an unpaid seller because the buyer has become insolvent.

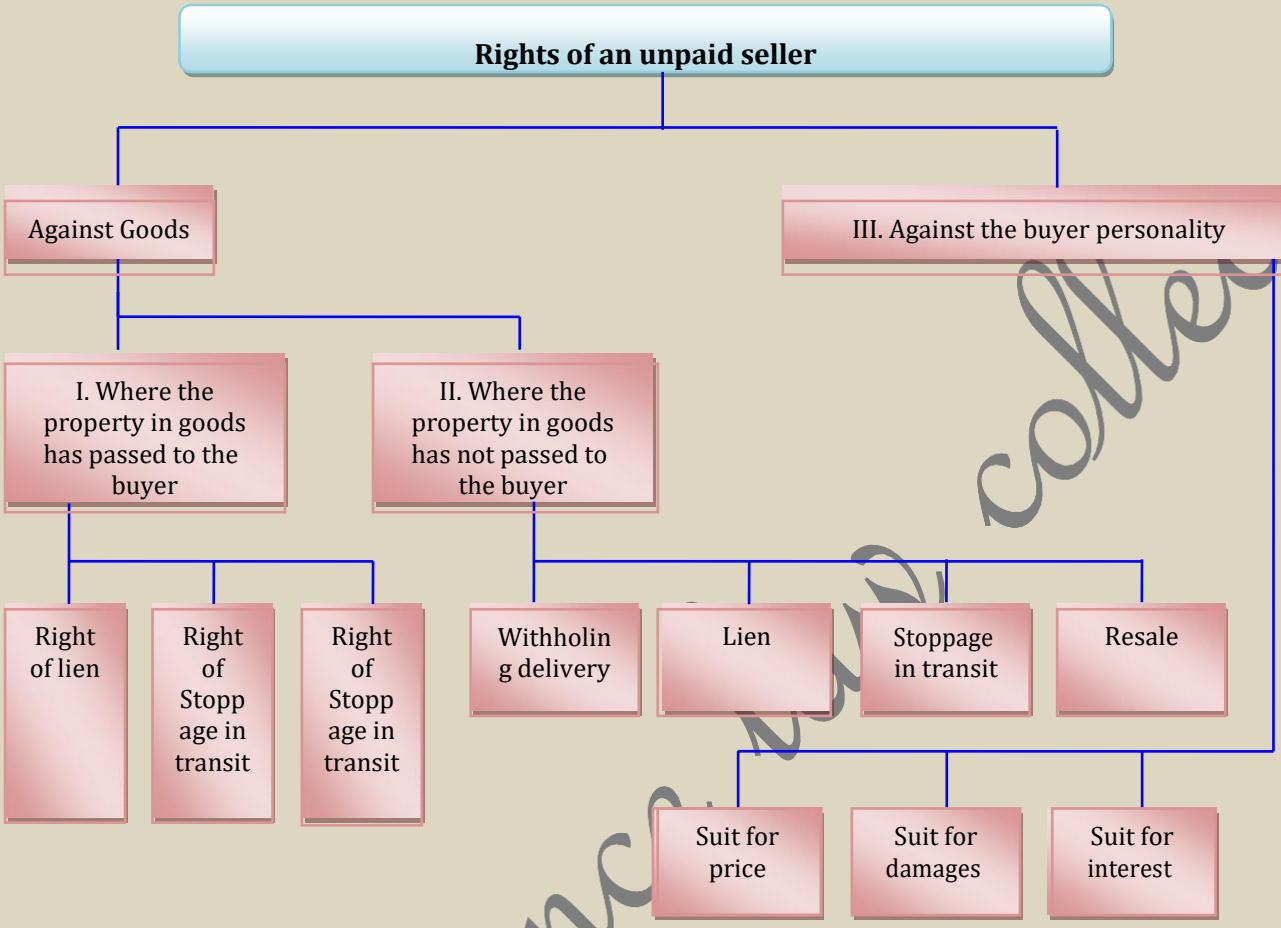
Rights of an Unpaid Seller [Sections 46-52, 54-56, 60-61]

The rights of an unpaid seller can broadly be classified under the following two categories:

I. Rights against the goods

II. Rights against the buyer personally

The various rights of an unpaid seller have been shown in Fig. 15.8.



Flg.15.8 Rights of an Unpaid Seller

Let us discuss these rights one by one.

I. Rights against the Goods where the Property in the Goods has Passed to the Buyer

(a) Right of Lien [Sections 47-49]

Meaning of Right of Lien: The right of lien means the right to retain the possession of the goods until the full price is received.

Three Circumstances Under Which Right of Lien can be Exercised [Section 47(1)] The unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases namely:

(i) Where the goods have been sold without any stipulation to credit:
(ii) Where the goods have been sold on credit, but the term of credit has expired; and
(iii) Where the buyer becomes insolvent.

Other provisions regarding right of lien (Sections 47(2), 48, 49(2)]

(i) The seller may exercise his right of lien, even if he possesses the goods as agent or bailee for buyer [Section 47(2)].
(ii) Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien [Section 48]. In other words, in case of part delivery, this right of lien can be exercised only where part delivery is not intended as delivery of the whole.

(iii) The seller may exercise his right of lien even though he has obtained a decree for the price of the goods [Section 49(2)].

Circumstances under which right of lien is lost [Sections 49(1) and 53(1)] The unpaid seller losses his right of lien in the following cases:

(i) When he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods [Section 49(I)(a)].
(ii) When the buyer or his agent lawfully obtains possession of the goods [Section 49(l)(b)].
(iii) When the seller waives his right of lien [Section 49(I)(c)).
(iv) When the buyer disposes of the goods by sale or in any other manner with the consent of the seller [Section 53(I)].
(v) Where document of title to goods has been issued or lawfully transferred to any person as buyer or owner of the goods and that person transfers the document by way of sale, to a person who takes the document in good faith and for consideration. [Proviso to Section 53(I)].

Example State whether a right of lien can be exercised in each of the following alternative cases:
Case (a) X sold goods to Y for Rs 10,000 without any stipulation as to credit and the price remains unpaid.
Case (b) X sold goods to Y for As 10,000 on a credit of 1 month and the period of credit has expired.
Case (c) X sold goods to Y for As 10,000 on a credit of I month and Y became insolvent during the period of credit.
Case (d) X of Delhi, sold goods to Y of Mumbai for As 10,000 and delivered the same to the railway for the purpose of transmission to the buyer. The railway receipt was taken In the name of Y and sent to Y.
Case (e) X sold goods to Y for Rs 10.000 and Ys agent lawfully took the delivery of goods.
Case (f) X sold goods to Y for As 10,000 and expressly waived his tight of lien.
Case (g) X sold 10 tons of wheat to Y for Rs 1,00,000 and Y resold 8 tons of wheat out of 10 tons to Z. Y instructed X to deliver 8 tons of wheat to Z. Y then became insolvent.
Case (h) X of Delhi sold some goods to Y of Mumbai and took the railway receipt in his own name and sent the railway receipt to his agent.
Case (i) X of Delhi sold some goods to Y of Mumbai and took the railway receipt in the name of Y and it was sent by X to his agent.

Solution:
Care (a): Yes, because the price has not been paid.
Case (b): Yes, because the term of credit has expired and the price remains un-paid.
Case (c): Yes, because the buyer has become insolvent.
Care (d): No, because the delivery to the carrier prima facie amounts to the delivery to the buyer himself and the right of disposal of the goods has not been reserved as the railway receipt has been sent to buyer [Section 49(1)(a)f.
Case (e): No, because buyer's agent has lawfully taken the delivery of the goods [Section 49(1)(b)].
Case (f): No, because seller has waived his right of lien [Section 4910(01-
Case (g): X can exercise his right of lien only against 2 tons of wheat and not against 8 tons of wheat.
Case (h): Yes, because the seller is deemed to have reserved the right of disposal of the goods by sending the railway receipt to his own agent.
Case (i): Yes, because the seller is deemed to have reserved the right of disposal by sending the railway receipt to his own agent.

(b) Right of Stoppage of Goods in Transit
Meaning of Right of Stoppage of Goods in Transit: The right of stoppage in transit means the right of stopping the goods while they are in transit to regain possession and to retain them till the full price is paid.

Lord Cairns Li in case of Schotsmans v. Lances and Yorks Rly. had made the following observation in this regard:
"The essential feature of stoppage in transit is that the goods should be in the possession of a middleman or some other person intervening between the vendor who has parted with and the purchaser who has not received them."

Conditions raider which Right of Stoppage in Transit can be Exercised /Section:
501: The unpaid seller can exercise the right of stoppage in transit only if the following conditions are fulfilled:

(i) The seller must have parted with the possession of goods, i.e.. the goods must not be in the possession of seller.
(ii) The goods must be in the course of transit.
(iii) The buyer must have become insolvent.

Note: The buyer is said to be insolvent when he has ceased to pay his debts in ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of insolvency or not.
Note: The seller's right of stoppage in transit is based on the principle that one man's goods shall not be applied to the payment of other man's debt. [Lord Reading in Booth Steamship Co Ltd. v. Cargo Fleet Iran Co.]

Duration of Transit [Section 51(1)]: Goods are deemed to be in course of transit from the time when they are delivered to a carrier or other bailee for the purpose of transmission to the buyer, until the buyer or his agent in that behalf takes delivery of them from such carrier or other bailee.

Note: The carrier must hold the goods in the capacity of an independent person and not in the capacity of an agent for the seller or buyer. If the carrier holds the goods as an agent for the seller, there is no question of exercising the right of stoppage in transit because the seller can exercise his right of lien. If the carrier holds the goods as an agent for the buyer, the seller cannot exercise the right of stoppage in transit because the delivery to the carrier amounts to delivery to buyer.

Circumstances under which Right of Stoppage is Lost [Sections 51 and 53(1)]: The right of stoppage in transit is last when transit conies to an end. Transit comes to an end in the following cases:

(i) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination [Section 51(2)].
(ii) If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee for the buyer or his agent, even if a further destination for the goods may have been indicated by the buyer [Section 51(3)1.
(iii) When goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case, whether goods are in the possession of the master as a carrier or as agent of the buyer [Section 5I(5)].
(iv) Where the carrier or other bailee wrongfully refuses to deliver the goods to the buyer or his agent in that behalf [Section 51(6)].
(v) Where part delivery of the goods has been made to the buyer or his agent in that behalf, the remainder of the goods may be stopped in transit and such part delivery has not been given in such circumstances as to show an agreement to give up possession of the whole of the goods [Section 51(7)1.
(vi) Where the sub-sale or other disposition by the buyer has been done with seller's consent [Section 53(1)].

(vii) Where a document of title to goods (e.g., bill of lading or railway receipt) has been issued or lawfully transferred to any person as buyer and that person transfers the document by way of sale to a person who takes the document in good faith and for consideration [Provision to Section 53(1)].

How to Exercise Right of Stoppage. In Transit [Section 52(1)]:

The unpaid seller may exercise his right of stoppage in transit in anyone of the following two ways:

(i) by taking actual possession of the goods, or

(ii) by giving notice of his claim to the carrier or other bailee who possesses the goods.

Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case, the notice to be effectual shall be given at such time and in such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.

Duty of Carrier [Seaton 51(2)]: When notice of stoppage in transit is given by tae for to the carrier or other bailee in possession of the goods. he shall redeliver the goods to or according to the directions of the seller. The expenses of such redelivery be borne by the seller.

Distinction between Right of Lien and Right of Stoppage in Transit

S.No.	*Basis of distinction*	*Right of lien*	*Right of stoppage in transit*
1	Possession of goods	The goods must be in actual possession of the seller.	The goods must he in the possession of' a carrier or other bailee who is acting as an independent person.
2	Solvency	The right can be exercised even when the buyer is solvent but refuses to pay the price.	This right can be exercised only when the buyer has become insolvent.
3	End vs. Commencement on delivery to carrier	This right comes to an end when the seller delivers the goods to a carrier.	This right commences only when the seller delivers the goods to a carrier.
4	Purpose	The purpose of right is to retain possession of the goods.	The purpose of this right is to regain the possession of the goods.
5	Mode of exercising the right	This right can be exercised by the seller himself.	This right can be exercised by the seller through the carrier or the other bailee.

Right of Stoppage in Transit as an Extension of the Right of Lien: The right of stoppage in transit is an extension of the right of lien in the sense that the right of stoppage in transit begins when the right of lien ends and the purpose of the right of stoppage in transit is to regain possession of the goods.

Effect of Sub-sale or Pledge by Buyer (Section 53]

General Rule: The unpaid seller's right of lien or stoppage in transit is not affected by any sale or other disposition of the goods by the buyer [Section 52(1)].

Example X sold 10 tons of wheat to Y for As 1,00,000. Y resold 8 ton of wheat out of 10 tons to Z and instructed X to deliver 8 tons of wheat to Z. X delivered 5 tons of wheat to 1 Later on when Y did not pay the price, X refused to make further deliveries to 1 It was held that X was entitled to refuse further delivery of oil to Z [Mordaunt Bros. v. The British Oil & Cake Mills Ltd.]

Exceptions to the General Rule: There are two exceptions to the aforesaid rule as under:

(i) Where the sub-sale or other disposition by the buyer has been done with the consent of the seller;

(ii) Where a document of title to goods (e.g., hill of lading or railway receipt) has been issued or lawfully transferred to any person as buyer and that person transfers the document by way of sale to a person who takes the document in good faith and for consideration.

Rights of Unpaid Seller in case of Transfer of Document by way of Pledge [Proviso to Sections 53(1) and 53(2)]

(i) Where the transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or stoppage in transit can only be exercised subject to rights of the transferee.

(ii) Where the transfer is by way of pledge the unpaid seller may require the pledgee to have the amount secured by the pledge satisfied in the first instance, as far as possible, out of any other goods or securities of the buyer in the hands of the pledgee and available against the buyer.

Example X of Delhi sold some goods to Y of Mumbai and took the railway receipt in the name of 'land sent to Y. State whether a right of stoppage in transit can be exercised in each of the following alternative cases:
Case (a) Before the goods reach Mumbai, Y became Insolvent.
Case (b) When the goods reached Mumbai, Y asked the railways to carry them to Calcutta. In the meantime Y became insolvent.
Case (c) When the goods reached Mumbai, the railway officials inform Y that the goods are lying at the station at Y's risk. Y became insolvent in the mean-time.
Case (d) Y handed over railway receipt to Z in return for a loan. Z took the railway receipt in good faith and for consideration. Before the goods reach Mumbai, Y became insolvent.
Case (e) Before the goods reach Mumbai, 1' became insolvent. I, assigned the railway receipt for As 10,000 to Z who knew about the Y's insolvency.
Case (f) Y assigned the railway receipt to Z to borrow As 10.000 on the security of railway receipt. Before the goods reach Mumbai, Y became insolvent.
Solution:
Case (a): Yes, because the goods are still in transit [Section 50].
Case (b): No, because the transit came to an end when Y asked the railways to carry the goods to Kolkata [Section 51(2)].
Case (c): No, because the transit came to end when the railway official informed Y that the goods are lying at Y's risk [Section 51(3)].
Case (d): No, because the transfer was by way of sale and Z took the railway receipt in good faith and for valuable consideration and hence, Z got a good tide [Section 53(1)].
Care (e): Yes, because Z has not acted in good faith and hence. Z did not get a good title [Section 53(1).
Case (f): Yes, but subject to rights of Z. In other words, X can get back the railway receipt after paying Rs 10.000 to Z (Section 53(2)].

(c) Right of Resale [Sections 46(1) and 54] An unpaid seller can resell the goods under the following three circumstances:

(i) Where the goods are of a perishable nature.

(ii) Where the seller expressly reserves a right of resale if the buyer commits a default in making the payment.

Note: As a result of this resale, the original contract will be terminated but the seller will haven right to claim damages [Section 54(4)].
(iii) Where the unpaid seller who has exercised his right of lien or stoppage in transit gives a notice to the buyer about his intention to resell and buyer does not pay or tender within a reasonable time.

Effects of Resale with or without Notice [Sections 54(2) and (3)]: The effects of ode with or without notice are summarised as under:

S.No.	*Rights*	*In case of resale after notice*	*In case of resale without notice*
1	Unpaid seller's right to recover the loss on the sale	Available	Not available
2	Original buyer's right to recover the profit on resale	Not available	Available
3	New buyer's (who buys in resale) right to acquire a good title	Available	Available

Example X sold 10 tons of rice to Y at a rate of As 40,000 per ton on a credit of one month. One month expired but Y did not pay. State the legal position In each of the following alternative cases:
Case (a) If X resold 10 tons of rice to Z at a rate of As 50,000 per ton after giving a notice of resale to Y.
Case (b) If X resold 10 tons of rice to Z at a rate of As 30.000 par ton after giving a notice of resale to Y.
Case (c) If X resold 10 tons of rice to Z at a rate of As 50,000 per ton without giving a notice of resale to Y.
Case (d) If X resold 10 tons of rice to Z at a rate of As 30,000 without giving a notice of resale to Y.

Solution:
Case (a): X is entitled to keep the profit of Rs 1.00,000 with himself because the buyer cannot be allowed to take advantage of his own wrong i.e., breach of contract [Section 54(2)]. Z shall get a good title against Y [Section 54(3)].
Case (b): X is entitled to recover the loss of Rs 1,00,000 from Y [Section 54(2)]. Z. shall get an good title against Y [Section 54(3)].
Case (c): Y is entitled to the profit of Rs 1,00,000 [Section 54(2)]. However, Z shall get a good title against Y [Section 54(3)].
Cave (d): X is not entitled to recover the loss of Rs 1,00,000 [Section 54(2)). However. Z shall get a good title against Y [Section 54(3)).

II. Rights against the Goods Where the Property in the Goods has not Passed to the Buyer [Section 46(2)]
Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and coextensive with his rights of lien and stoppage in transit where the property has passed to the buyer [Section 46(2)].

III. Rights against the Buyer Personally
In addition to the rights against the goods, unpaid seller has the following rights against the buyer personally:
(a) Suit for Price [Section 55(1)] Where under a contract of sale, the property in the goods has passed to the buyer and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may sue him for the price of goods.
Where under a contract of sale the price is payable on a certain day irrespective of delivery and the buyer wrongfully neglects or refuses to pay such price, the seller may sue him for the price although the property in the goods has not passed and the goods have not been appropriated to the contract.

(b) Suit for Damages for Non-acceptance [Section 56] Where the buyer wrong-fully neglects or refuses to accept the goods and pay for the goods, the seller may sue him for damages for non-acceptance of the goods.

(c) Suit for Damages for Repudiation of the Contract [Section 60] Where buyer repudiates the contract before the due date of delivery, the seller may either treat the contract as subsisting and wait till the due date of delivery or he may treat the contract as rescinded and sue for damages for the breach.

(d) Suit for Interest [Section 61(2)] In case of breach of contract on the part of the buyer, while filing a suit for the price, the seller may sue the buyer for interest from the date of the tender of the goods or from the date on which the price was payable.

15.18 RIGHTS OF BUYER

The rights available to the buyer have been shown below in Fig. 15.9.

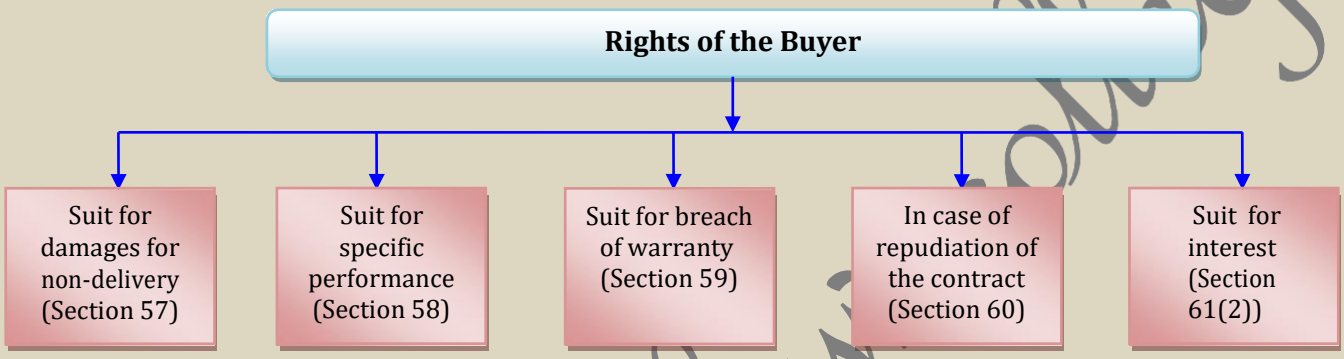


Fig. 15.9 Rights of the Buyer

Let us discuss these rights one by one.

(a) **Suit for Damages for Non-delivery [Section 57]** Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may sue the seller for damages for non-delivery.

(b) **Suit for Specific Performance [Section 58]** In any suit for breach of contract to deliver specific or ascertained goods, the court may direct that the contract shall be performed specifically.

(c) **Suit for Breach of Warranty [Section 59]** Where there is a breach of warranty by the seller, or where the buyer elects or is compelled to treat any breach of million on the part of the seller as a breach of warranty, the buyer is not by n only of such breach of warranty entitled to reject the goods, but he may-
(i) set up against the seller the breach of warranty in diminution or extinction of the price; or
(ii) sue the seller for damages for breach of warranty.

Note: The fact that a buyer has set up a breach of warranty in diminution or extinction of the price does not prevent him from suing for the same breach of warranty if he suffered further damage. [Section 59(2)]

Example X sold a second hand Radio to Y who spent Rs 100 on the repair of this radio, bar radio was seized by the police as it was a stolen one. Y filed a suit against X for recovery III damages for breach of warranty of quite possession including the cost of repairs. It was lurid gut Y was entitled to recover the same. (Mason v. Bunningham)

(d) Right to Treat the Contract as Rescinded or Operative in Case of Repudiation of Contract by Seller before due Date [Section 60] Where seller repudiates the contract before the date of delivery. the buyer may either treat the contract as subsisting and wait till the date of delivery. or he may treat the contract as rescinded and sue for damages for the breach.

(e) Suit for Interest [Section 61(2)] In case of breach of the contract on the part of the seller, the buyer may sue the seller for interest from the date on which the payment was made.

15.19 AUCTION SALE [SECTION 64]

Meaning of Auction Sale

Auction sale means a public sale where intending buyer assemble at one place and offer the price at which they are ready to buy the goods. The offer of the price if known as 'bid' and the person making the hid is known as the 'bidder.' The owner 01 the goods may himself sell them by auction or appoint a person to sell the goods by auction on his behalf. The person so appointed is known as 'auctioneer.' The relationship between the owner of the goods and the auctioneer is that of the principal and agent. In an auction the goods are sold to the highest bidder. It may be noted that an advertisement to sell the goods by auction is simply an invitation to the public to make offers and not an offer to sell. That is why the intending buyers have no right to sue the auctioneer if auctioneer cancels or postpones the sale by auction.

Rules Regarding Sale by Auction [Section 64]

The various rules regarding sale by auction are given as follows:

(a) Where goods are put up for sale in lots, each lot is prima fade deemed to be the subject of a separate contract of sale [Seeds 64(1)].

(b) A sale is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner. For example, by saying one, two and three, Of by shouting going. going, grim etc [Section 64(2)].

(c) Until the announcement of completion of sale is made, any bidder may withdraw his bid [Section 64(2)].

(d) A right to bid may be reserved expressly by or on behalf of the seller and, where such right is expressly so reserved, the seller or anyone person on his behalf may bid at the auction [Section 64(3)].

(e) Where a sale is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to hid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person, and any sale contravening the rule may be treated as fraudulent by the buyer [Section 64(4)].

(f) A sale may be notified to be subject to a reserve or upset price [Section 64(5)]. The term 'reserve' or 'upset' price may be defined as the minimum price below which the auctioneer will not sell the goods put up for auction sale.

(g) If a seller makes use of pretended bidding to raise the price, the sale is voidable4it the option of the buyer [Section 64(6)].

Notes:

(i) An auctioneer can refuse to accept even the highest bid because 'bid' is only an offer which may or may not be accepted by the auctioneer.

(ii) An agreement between the bidders not to bid against each other is called the knock-out agreement. Under such agreement, it is agreed that only one person will hid and anything obtained by him shall be shared by all privately. Such agreements are lawful unless the intention of the parties to the agreement is to defraud a third party.

(iii) Damping, which is intended to discourage the bidders from bidding is an unlawful act.

(iv) Puffers (also known as By-bidders or White Bonnets or Decoy Ducks) are persons who are appointed by the seller for the purpose of raising the price. The seller can appoint only one puffer.

Example At an auction sale, C made the highest bid for an article of P. State the legal position in each of the following alternative cases:

Case (a) If C withdrew the bid before the fall of the hammer though he knew that one of the condition of the sale was bid once made cannot be withdrawn'.

Case (b) If P refused to accept the highest bid. The sale was not notified subject to a reserve price.

Case (c) If P appointed two persons A and B, to bid on his behalf. The sale was notified subject to a right to bid.

Case (d) If C was allowed to take it away on (i) giving a cheque for the price (ii) signing an agreement that ownership should not pass to him until the cheque was cleared. The cheque was dishonoured but In the meantime C sold the article to Z.

Case (e) If the sale was notified subject to a reserve price and the auctioneer by mistake accepted the CS highest bid (which was lower than the reserve price) by striking the hammer. Later, auctioneer refused to deliver the goods.

Solution:

Case (a): Cs bid was an offer to buy and he was entitled to withdraw his bid before the sale is completed as per express provision of Section 64(2) (Payne v. Cara Such a condition in an auction sale was inoperative because it was against the provisions of the law. [Champa Lal v. Jaigopal]

Case (b): C's bid was an offer to buy which may or may not be accepted by the auctioneer. Hence, P could refuse to accept the highest bid. [Fenwick v. Macdonald]

Case (c): It amounts to fraud and sale is voidable at the option of the buyer because the seller could appoint only one person to bid on his behalf. [Section 64(3) and Section 64(6)]. Here intention of the seller was not to protect his interest but to raise the price. [Thornett v. Bathes]

Case (d): Z had a good title because the property passed to Con the fall of the hammer (Domani v. Skinner]. The ownership of specific goods in a deliverable state passes on the completion of contract of sale.

Case (e): The sale was not valid and C was not entitled to goods. It was held that the auctioneer could not effectively accept such a bid (which was lower than reserve price) because he could not make a contract so as to bind his principal to accept less than the reserve price. [Mows v. Fortesque]

Liabilities of an Auctioneer

On the basis of various decisions taken by the court, it can be said that an auctioneer is liable for damages in the following cases:

(a) If the auctioneer had no authority to sell the goods. [Anderson v. Creall & Sons Led.]

(b) If there is a defect in principal's title. [Benton v. Cowbell Parker & Co.]

(c) If the auctioneer refuses to give the possession on the payment of the price.

(d) If the buyer's possession is disturbed by his principal or himself.

INDIAN PARTNERSHIP ACT, 1932

Partnership is one of the specific contracts which was a part of the Indian Contract Act. 1872. In 1930, however, the provisions relating to partnership contract were repealed and a separate Act called the Indian Partnership Act, 1932 was passed which is in force till today. It extends to the whole of India except the State of Jammu and Kashmir. It has come into force on the 1st day of October 1932 except Section 69, which came into force on the 1st day of October 1933.

The provisions of the Indian Contract Act, 1872 also apply to firms except where the Indian Partnership Act, 1932, specifically provides to the contrary (Section 3).

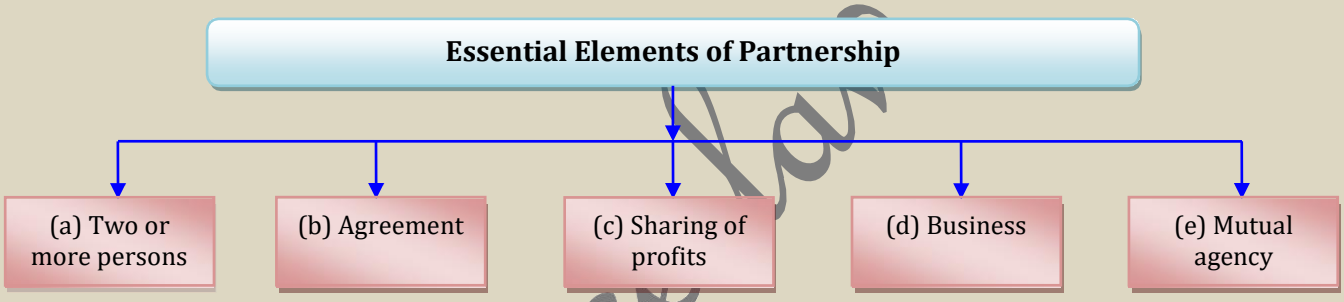
16.1 MEANING AND ESSENTIAL ELEMENTS OF PARTNERSHIP [SECTION 4]

Meaning of Partnership [Section 4]

Partnership is the relation between two or more persons who have agreed to share profits of a business carried on by all or any of them acting for all.

Essential Elements of Partnership

The aforesaid definition clearly indicates the essential elements of partnership as below:



Let us now discuss these elements one by one.

(a) Two or more Persons - There must be at least two persons to form a partnership and all such persons must be competent to contract. According to Section 11 of the Indian Contract Act, 1872, every person except the following, is competent to contract:

(i) Minor
(ii) Persons of unsound mind (e.g. lunatics, idiots), and
(iii) Persons disqualified by any law to which they are subject (e.g., alien enemies, insolvents).

However, the Partnership Act is silent about the maximum number of members that a partnership may have. It is Section 11 of the Companies Act which gives us the maximum limit. It states that any association having a membership of more than 10 in case of banking business or 20 in case of non-banking business must be registered as a corporate body failing which it would become an illegal association.

Problem 1

Two brothers X (age 18 years), Y (age 17 years), decide to form a partnership. Can they do so?
Solution: Section to which the given problem relates: Section 4.
Decision: No.
Reason: There must be at least two persons and such persons must be competent to contract. In the given case, Y is not competent to contract because he is a minor. Hence, there is only one person X who alone cannot form a partnership.
[Leading case: Shivaram v. Gauri Shankar]

Problem 2
Three brothers, X (age 19 years), Y (age 18 years) and Z (age 17 years), decide to form a partnership with a provision that Z will share the profits only.
Solution: Section to which given problem relates: Section 4.
Decision: No.
Reason: All the persons entering into partnership agreement must be competent to contract. Z is not competent to contract because he is a minor. It may be noted that no partnership can be formed with a minor partner. But after the formation of partnership, a minor can be admitted to the benefits of partnership with the consent of all other partners of the firm as per the provisions of Section 30 of the Act. [Leading case: Shivaram v. Gauri Shankar]

(b) Agreement - There must be an agreement to form a partnership. This agreement may be express (whether written or oral) or implied. This essential element is further clarified under Section 5. Section 5 provides that the relation of partnership arises from contract and not from status. That is why; a Hindu undivided family carrying on a family business is not considered a partnership. The reason is that the coparceners of a Hindu undivided family acquire interest in the business because of their status (i.e., birth) in the family and not because of any agreement between them. Thus, partnership is voluntary and contractual in nature.

(c) Business - There must exist a business. According to Section 2(b), the term 'Business' includes every trade, occupation and profession. For example, when two or more persons agrees to share the income of it joint property (e.g.. rent from a building). It does not amount to a partnership because there does not exist any business. Similarly, an association created for charitable, religious or social purpose cannot be regarded as partnership because there does not exist any business. It may also be noted that an agreement to carry on business at a future time does not result in partnership unless that time arrives and the business is started. [R.R. Sorna, v. Reuben]

Problem 3
Ten major persons form an association to which each member contributes Rs 10,000. The purpose is to produce medicines for free distribution to poor patients. Is them a valid partnership?
Solution: Section to which the given problem relates: Section 4. Decision: No.
Reason: There is no intention to carry on the business and to share the profits thereof.

(d) Sharing of Profits – There must be sharing of profits. Unless otherwise agreed, sharing of profits implies sharing of losses as well. It may also be noted that sharing of profits is a prima facie evidence and not a conclusive evidence of partnership. That is why, everyone who shares the profits of business need not necessarily be a partner. For example, a manager who receives a particular share in the profits of a business as part of his remuneration is simply an employee and not a partner (for more details, see Explanations I and II to Sec. 6 discussed at p. 16.4).

(e) Mutual Agency – There must exist a mutual agency relationship among the partners. 'Mutual Agency' relationship means that each partner is both an agent and a principal. Each partner is an agent in the sense that he has the capacity to bind other partners by his acts done. Each partner is a principal in the sense that he is bound by the acts of other partners. Such mutual agency relationship in case of a firm of X, Y and Z has been shown in Fig. 16.2.

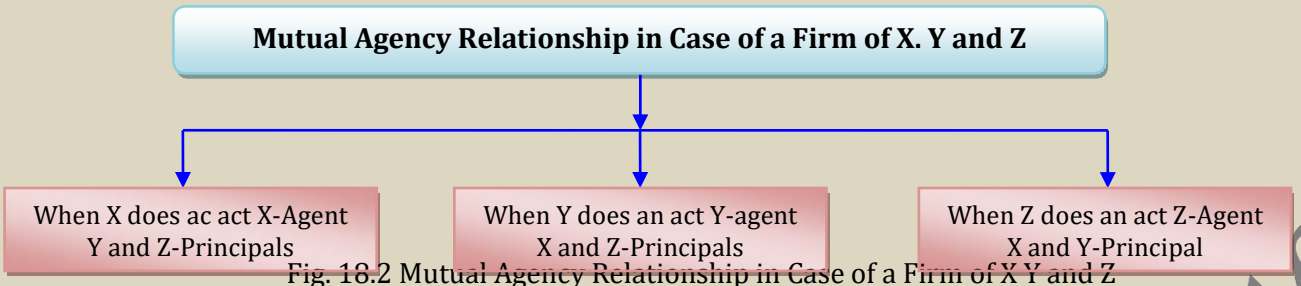


Fig. 18.2 Mutual Agency Relationship in Case of a Firm of X Y and Z

The mutual relationship of agency is emphasised in Section 18 of the Indian Partnership Act, which reads as under:
"Subject to the provision of this Act, a partner is the agent of the firm for the business of the firm."

Moreover, the use of the words 'carried as by all or by any of them acting for all, in Section 4 of the Act clearly emphasises agency relationship.

Because of the existence of mutual agency relationship amongst the partners, the law of partnership is also regarded as an extension of the general law of agency. It may be noted that the mutual agency relationship distinguishes a partnership from co-ownership and simple agreement for sharing profits.

16.2 MEANING OF 'PARTNER', 'FIRM' AND 'FIRM NAME' [SECTION 4]

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'.

16.3 MAXIMUM LIMIT ON NUMBER OF PARTNERS [SECTION 11 OF THE COMPANIES ACT, 1956]

According to Section II of the Companies Act, 1956, the maximum limit is as under:-

(a) In case of a partnership firm carrying on a banking business-10
(b) In case of a partnership firm carrying on any other business-20

If the number of partners exceeds the aforesaid limit, the partnership firm becomes an illegal association.
Note: These statutory limits do not apply to a Hindu Undivided Family. However in case of amalgamation of two or more firms these limit apply.

[Refer to Practical Problems 4 to 7]

16.4 NATURE OF A PARTNERSHIP FIRM

A partnership firm is not a person in the eyes of law [except under Section 2(31) of the Income Tax Act, 1961]. It has no separate legal entity apart from the partners constituting it [Malabar Fisheries Co. v. CIT]. Thus, firs themselves cannot enter into a contract for partnership though their partners can. For example, two firms, namely, M/s A&B and M/s X&Y, themselves cannot form a new partnership though the partners of the individual firms can form a partnership.

16.5 TEST OF PARTNERSHIP [SECTION 6]

According to Section 6, "In determining whether a group of persons is or is not a firm, regard shall be had to the real relation between the parties as shown by all relevant facts taken together." The real relation between the partners can be ascertained as under:

I	If there is an express contact	The real relation is ascertained from the terms of partnership contact.
II	If there is no express contract	The real relation is ascertained from all the relevant factors such as contract of parties, books of accounts, statement of

		employees etc.

The Section 6 is based on the principle laid down in an important case of Cox v. Hickman (1860). The analysis of this section reveals that the following is the true test of partnership:

(a) The partnership is determined from the real relation between partners and such relation must show the existence of mutual agency relationship, and
(b) The sharing of profit is prima facie evidence but not a conclusive test of partnership.

A group of persons shall be regarded as partnership if the real relation between the partners shows that all essential elements of partnership are present.

Cases where the Partnership Relation does not Exist [Explanations I and II to Section 6]
The two cases where the partnership relation does not exist are given below:
(a) Joint owners of some property sharing profits or gross returns arising from the property [Explanation 1 to Section 6).
Example X and Y jointly purchased a building and contributed capital equally to convert the building into a hotel. They let it out on a rent of As 1,00,000 per annum and share the rental Income equally.
Decision: X and Y are regarded as co-owners and not partners. Reason: X and Y do not have mutual agency relationship. [Leading case: Govind Nair v. Maga]

(b) **Persons sharing the profits but not having mutual agency [Explanation 11 to Section 6]** - The sharing of profits is prima facie evidence. This statement is true in the sense that some persons though sharing the profits of a business are not regarded as partners since they do not have mutual agency relationship. Such persons are:
(i) a lender of the firm (who has lent money) who receives a share of profits: [Mallow Mantle & Co. v. The Court of Wards)
(ii) a widow or child of a deceased partner who receives a share of profits; [I.T. Commissioner v. Kesharmal Keshardeo]
(iii) a servant or an agent who receives a share of profits as part of his remuneration; and [Munshi Abdul Latif v. Gopeshwar Chattoraj)
(iv) a person who receives a share of profits in consideration of sale of business or goodwill of the business. [Rawlinson v. Clarke]

Conclusion: The true test of partnership is not the sharing of profits but the existence of mutual agency relationship, i.e., the capacity of a partner to bind other partners by his acts done in firm's name and be bound by the acts of other partners in firm's name. [Refer to Practical Problems 8 to 16]

Who are not partners?
In addition to the persons sharing the profits but not having mutual agency relationship
(as listed in aforesaid Para (b)), the following persons are not treated as partners:
(a) Members of a Hindu undivided family (HUF) carrying on family business.
(b) Burmese Buddhist husband and wife carrying on a business.
Thus, partnership can be presumed when (a) there is an agreement to share the profits of a business and (b) the business must be carried on by all or by any of them acting for all. Even when the exclusive power and control is vested with one partner under an agreement, partnership shall be presumed to exist. [K.D. Kamath & Co. v. Commissioner of Income Tax, l972, 82 ITR 680 (SC)]

16.6 PARTNERSHIP AND CO-OWNERSHIP
Co-ownership means joint ownership of some property. The two or more persons who own some property jointly arc called co-owners. As per Explanation I to Section 6, the joint owners of some property sharing profits or gross returns arising from the property do not become partners.

Example - Two sons who inherit a building from their father, let it out on a rent of Rs 10,000 per annum and share the rental income equally, are regarded as co-owners. If, however, they enter into an agreement to run a hotel in that building and share the income thereof, they will be regarded as partners.

The partnership and co-ownership can be distinguished as under:

Basis of distinction	*Partnership*	*Co-ownership*
1. Agreement	It arises from an agreement.	It may or may not arise from agreement.
2. Business	It is formed to carry on a business.	It may or may not involve carrying on a business.
3. Profit or loss	It involves profit or loss.	It may or may not involve profit or loss.
4. Mutual agency	Partners have a mutual agency relationship.	Co-owners do not have a mutual agency relationship.
5. Name of persons involved	The persons who form partnership are called partners	The persons who own some property jointly are called co-owners.
6. Maximum limit	The maximum limit of partners is 10 for a banking business and 20 for any other business.	There is no maximum limit of co-owners.
7. Transfer of interest	A partner cannot transfer his share to a stranger without the consent or other partners.	A co-owner can transfer his share to a stranger without the consent of other co-owners.
8. Right to claim partition	A partner has no right to claim partition of property but he can sue the other partners for the dissolution of the firm and accounts.	A co-owner has the right to claim partition of property.
9. Lien on property	A partner has a lien on the partnership property for expenses incurred by him on behalf of the firm.	A co-owner has no such lien.

16.7 PARTNERSHIP AND HINDU UNDIVIDED FAMILY (HUF)

According to the Hindu Law, "Hindu undivided family is a family which consists of all persons lineally descended from a common ancestor and includes their wives and unmarried daughters." Three successive generations in the male line (son, grandson, and great-grandson) who inherit the ancestral property are called 'Coparceners'.

The property which a man inherits from any of his three immediate mule ancestors (i.e.. his father, grandfather and great grandfather), is called 'ancestral property'.

There are two schools of Hindu Law—Dayabhaga and Mitakshara. Under Dayabliaga School of Law, which is applicable to West Bengal and Assam, a son acquires an interest in the ancestral property only after the death of his father. Under Mitakshara School of Law, which is applicable to whole of India (except West Bengal and Assam), each son acquires by birth an interest in the ancestral property. The partnership and Hindu undivided family can be distinguished as under:

Basis of distinction	*Partnership*	*Hindu undivided family*
1. Agreement	It arises from an agreement.	It arises by status or operation of law.
2. Regulating law	It is governed by the Indian Partnership Act. 1932.	It is governed by Hindu Law.
3. Name of the persons involved.	The persons who form partnership are called 'partners'.	The persons who are the members of the HUF are called 'Coparceners'.
4. Maximum limit	The maximum limit of partner is 10 for a banking business and 20 for any other business.	There is no maximum limit of coparceners.
5. Admission of new members	A person can be admitted to the existing partnership with the consent of all other partners.	A male person becomes a member merely by his birth.
6. Minor members	A minor can be admitted to the benefits of partnership with the consent of all the partners.	A male minor becomes a member merely by his birth.
7. Transfer of interest	A female can become a full fledged partner.	A female does not become member merely by her birth.
8. Implied authority	Each partner has implied authority to bind the firm by acts done in the ordinary course of the business of the firm.	Only the Karla has implied authority.
9. Liability of members	The liability of all the partners is unlimited,	Only Karta's liability is unlimited and the liability of the other coparceners is limited only to their shares in the family property.
10. Right to demand ace- aunts	Each partner has a right to inspect and copy the account books and ask for the account of profits and losses.	The coparceners have no right to ask for the account of past dealings.
11. Effect of death of a member	Unless otherwise agreed partnership is dissolved on the death of any partner.	The Hindu undivided family continues to operate even after the death of a coparcener.

Partnership and Company

A company is an artificial person created by law having separate legal entity, perpetual succession, limited liability and a common seal.

Basis of distinction	*Partnership*	*Company*
1. Legal entity	A firm doesn't enjoy separate legal existence. Partners are collectively termed as a firm and individually as partners.	It has a separate legal existence. A company is separate from its members.
2. Liability	The liability of partners is unlimited.	Liability of its members is limited to the extent of the value of shares held by them.
3. Tenure	It does not enjoy a long lease of	It enjoys perpetual existence. Even an atom

	life. Death, sickness, retirement of partners may affect its existence so as to dissolve it. Dissolution may take place on flimsy grounds.	bomb cannot destroy a company unless it is wound up under the due process of law. Winding up may take years.
4. Number of members	Minimum number of partners is two. Maximum may be ten (in case of banking business) or twenty (in case of non- banking business).	A public company must have a minimum 7 members to start with. However, there is no limit on the maximum number of members of a company.
5. Transfer of interest	A partner cannot transfer his share without the consent of other partners.	A member may transfer his shares as and when he likes. There is no restriction on transfer of shares.
6. Agency	Each partner represents the other partners so as to bind and be bound to others.	There is no agency relation-ship among members of a company as they do not bind each other with their actions.
7. Distribution of profits	Profits are distributable among partners as per the partnership deed.	There is no such compulsion that profits must be distributed. Only when the dividends are declared that the members get a share of profits.
8. Management	The entire management lies with all the partners.	Members cannot participate in management unless appointed as directors. However, members may attend and vote at meetings while making the appointment of Directors, Auditors etc.
9. Properly	Property of the finis the joint property of all its partners.	Property of the company is not the properly of its members as the company and members have separate legal existence.

16.8 PARTNERSHIP DEED

A partnership is formed by an agreement. This agreement may he express (i.e., oral or in writing) or implied. Though the law does not expressly require that the partnership agreement should be in writing, it is desirable to have it in writing in order to avoid any dispute with regard to the terms of the partnership. The document which contains the term of a partnership as agreed among the partners is called 'partnership deed'. The deed is required to be duly stamped as per the Indian Stamp Act, 1889 and duly signed by all the partners. The partnership deed contains various provisions relating to various matters such as:

(a) Name of the firm.
(b) Names and addresses of all partners
(c) Nature and place of business
(d) Date of commencement of partnership
(e) Duration of partnership
(f) Amount of capital of each partner
(g) Profit sharing ratio
(h) Interest on capital
(i) Interest on drawings

(j) Interest on loan advanced by a partner to the firm
(k) Salary or commission payable to any partner
(I) Method of valuation of goodwill and other assets and liabilities in case of admission or retirement or death of a partner
(m) Settlement of accounts in case of retirement/death of a partner or dissolution of firm

Notes:
(i) The partnership deed must not contain any term which is in contravention with the provisions of the Indian Partnership Act.
(ii) The terms laid down in the partnership deed may be varied by the consent of all the partners.

16.9 REGISTRATION

Meaning of Registration

Registration means getting the partnership registered with the Registrar of Firm of the area in which the place of business of the firm is situated or proposed to be situated.

Procedure for Registration [Sections 58 and 59]

The practical steps involved in the registration of a firm are given below in Exhibit 16.1.

Exhibit 16.1 Practical Steps Involved in the Registration of a Firm
Step 1 Obtain a Statement in the prescribed form from the office of the Registrar of Firms of the area in which any place of business of the firm is situated or proposed to be situated. Step 2 State the following information in the statement: (a) the name of the firm; (b) the principal place of the firm; (c) the names of other places where the firm carries on business: (d) the date when each partner joined the firm: (e) the names in full and permanent addresses of the partner. (f) the duration of the firm. Step 3 Get the statement duly verified and signed by all the partners or by their authorised agents. Step 4 File the Statement alangwith prescribed fees with the Registrar of the Finns oldie area. Step S Obtain a Certificate from the Registrar.

Note: When the Registrar is satisfied that the provisions of Section 58 have been duly complied with, he shall record an entry of the Statement in the register called 'Register of Firms' and file the statement. He shall then issue a certificate of registration [Section 59].

It may be noted that if any change is made in the particulars filed with the Registrar, the same should be duly notified to the Registrar so that he can incorporate the same in the 'Register of Firms'.

Time of Registration

Since the registration of a firm is not compulsory, it can be effected at any stage, i.e., at the time of its formation or at anytime thereafter. Section 69(2) provides that no suit can be filed by or on behalf of an unregistered firm in a court. This means the firm must be got registered before any suit is filed in a court.
When does Registration becomes Effective [Section 58]

Registration becomes effective from the date of filing of the duly signed and verified statement alongwith the prescribed form and not from the date of issue of certificate of registration since the act of the Registrar in recording an entry of the statement in the Register of Firms is only a clerical act. [J.R. and O.M. Contractors v. Income Tax Commissioner]

Is the Registration of Finn Compulsory?

Under the Indian Partnership Act 1932, the registration of a firm is not compulsory. But, indirectly, by creating certain liabilities (also termed as effects of non-registration u/s 69) from which an unregistered firm suffers, the law has made the registration of firms desirable. The effects of non-registration of a firm are as follows:

(a) No suit by a partner against the firm or the other partner [Section 69(1)] A partner of an unregistered firm cannot file a suit against the firm or any partner of the firm to enforce any right arising from contract. For example, if a partner of an unregistered firm is not paid his share of profits, he cannot claim it through the court.

Note: Section 69(1) prohibits the institution of civil suit and not the criminal suit.

(b) No suit by the firm against third parties [Section 69(2)] An unregistered firm cannot tile a suit against a third party to enforce any right arising from contract. For example, if an unregistered firm has sold some goods to a customer, it cannot file a suit against the customer for the recovery of the price of goods. On the other hand, if any unregistered firm has purchased some goods from a supplier; such supplier can file a suit against the firm for the recovery of the price of goods. Thus, it is only a suit by the unregistered firm or its partners against a third party, which is prohibited and not a suit by the third party against the unregistered firm or its partners. It may be noted that this disability can be removed by getting the firm registered before filing the suit. In case of Puran Mal v. Central Bank of India, it was held that a subsequent registration could not cure the defect that existed at the time of filing the suit.

(c) No right to claim set off in excess of As 100 [Section 69(3)] An unregistered firm or any partner thereof cannot claim a set of (if value exceeds Rs 100) in proceeding instituted against the firm by a third party to enforce a right arising from a contract. For example, if an unregistered firm owes Rs 10,000 to X, a third party, X owes Rs 1,000 to such firm, X files a suit against the firm for the recovery of Rs 10,000. In this case, an unregistered firm cannot say that Rs 1,000 should be adjusted against Rs 10,000.

Rights not Affected by Non-registration

(a) Rights of unregistered Jinn or partners thereof

(i) Right of firm or partner of a firm having no place of business in India [Section 69(4)(a)].
(ii) Right to file a suit or claim of set-off if the value of suit does not exceed Rs 100 [Section 69(4)(b)].
(iii) Right of a partner to site (a) for the dissolution of the firm, (b) for the accounts of a dissolved firm, or (c) for claiming share of the assets of a dissolved firm [Section 69(3)(a)].
(iv) Right to enforce a right arising otherwise than out of a contract, e.g. infringement of a Patent right by a third party. The firm may file a suit to restrain the third party from misusing the Patent right.

(b) Right of a third party to file a suit against the unregistered firm or partners thereof

(c) Power of an Official Assignee or Receiver or Court to realise tire property of an insolvent partner [Section 69(3)(14)].

Example X and Y purchased a taxi and they were plying it in partnership. The firm was not registered. Alter 1 year. X sold the taxi without Y's consent and did not pay anything to Y. Y filed a suit against X to recover his share in the sale proceeds. X defended the suit on the ground that the firth was not registered. It was held that the suit was maintainable because it was for the realisation of the assets of a dissolved firm. [Basant Lal v. Chiranjit Lal]

[Refer to Practical Problems 17 to 22]

16.10 DURATION OF PARTNERSHIP

On the basis of duration, the partnership can be either Partnership at will or Particular Partnership.

Partnership at Will (Section 7]

When there is no provision in partnership agreement for duration of the partnership, the partnership is called 'Partnership at Will'. A partnership at will may be dissolved by any partner by giving a notice in writing to all other partners of his intention to dissolve the firm.

Particular Partnership [Section 8]

When a partnership is formed for a specific venture or for a particular period, the partnership is called a 'Particular Partnership'. Such partnership comes to an end on the completion of the venture or on the expiry of the period. If such partnership is continued after the expiry of term or completion of the venture, it is deemed to be a partnership at will. A particular partnership may be dissolved before the expiry of the term or completion of the venture only by the mutual consent of all the partners.

16.11 TYPES OF PARTNERS

Meaning of Active Partner, Sleeping Partner, Nominal Partner, Partner in Profits only, Sub-Partner

A person, who deals or intends to deal with a firm, must know who the partners are and to what extent each partner is liable. To ascertain the extent of partner's liability, it becomes necessary to know the various types of partners which are given in Exhibit 16.2:

Exhibit 16.2 Types of Partners

Actual or ostensible partner	*Sleeping or dormant partner*	*Nominal partner*	*Partner in profits only*	*Sub-partner*
He takes an active pan in the conduct of the business.	He does not take an active pan in the conduct of the business.	He lends his name to the firm without having any real interest in the firm. He neither contrib. tries to the capital nor shares the profits or takes part in the conduct of the business of the firm.	He shares the profits only and not losses,	He is a third person with whom a partner agrees to share his profits derived from the firm.
He along with other partners is liable to third panics for all the acts of the firm.	He along with other partners is liable to third panics for the acts of the firm.	He along with other partners is liable to third panics for all acts of the firm as if lie is an actual partner.	He along with other partners is liable to third parties for all the acts of the firm.	He has no rights against the firm nor is he liable for the acts of the firm.
He must give public notice of his retirement.	He need not give public notice of his retirement.	He must give public notice of his retirement.	He must give public notice of his retirement.	There is no question of public notice at all since he is a third person and not a partner.
His insanity or permanent incapacity to perform his duties	His insanity or permanent incapacity to perform his	His insanity or permanent incapacity to perform his	His insanity or permanent incapacity to perform his duties	His insanity or permanent incapacity to perform his duties

may be a ground for the dissolution of the firm.	duties is no ground for the dissolution of the firm.	duties is no ground for the dissolution of the firm.	may be a ground for the dissolution of the firm.	is no ground for the dissolution of the firm since he is a third person and not a partner.

Partner by Estoppel or Holding Out [Section 28(1)]

A person is held liable as a partner by estoppel or holding out if the following two conditions are fulfilled:

(a) He must have represented himself to be a partner by word spoken or written or by his conduct (such type of representation may be called as active representation), or
He must have knowingly permitted himself to be represented as a partner (such type of representation may be called as tacit representation); and

(b) The other person acting on the faith of such representation must have given credit to the firm. It is immaterial whether the person so representing to be a partner, is aware or not that the representation has reached the other person.

Example I Ram, a sole proprietor of Ram Shyam & Co. employed Shyam as manager. Ram introduced Shyam as his partner to S. a supplier of goods. Shyam remained silent. Treating Shyam a partner S supplied the goods on credit. Ram failed to pay the price of goods. S filed a suit against both Ram and Shyam for the recovery of the price. Here, Shyam is liable as a partner by holding out because he has knowingly permitted himself to be represented as a partner and the S the4supplier has acted on the faith of such representation. [Martyn v. Grag]

Example II Patudi, a renowned sportsman assumed the honorary presidentship of a publishing business which brings out a sports magazine because other partners requested him to do. S a supplier gave credit to this firm in the bona tide belief that Patudi was a partner in a firm. Here, Patudi is liable as a partner by holding out because he has knowingly permitted himself to be represented as a partner and the supplier has acted on the faith of such representation.

Position of a Retiring Partner as Partner by Holding Out [Section 28(2)]

Where, after the retirement of a partner, the firm uses the retired partner's name as a partner, the retired partner who has not given public notice of his retirement, is held liable on grounds of holding out to third parties who give credit to the firm on the faith that he is still a partner.

Exceptions to the Principle of Holding Out [Sections 28(2) and 34]

The principle of holding out does not apply in the following cases:

(a) Where, after the death of a partner, the firm uses the deceased partner's name as a partner. the estate of the deceased partner or his legal representatives cannot be held liable for acts of the firm done after his death. It may be noted that a public notice of a partner's death is not required.

(b) The estate of the insolvent partner cannot be held liable for the acts of the firm done after the date of the order of adjudication [Section 341. It may be noted that a public notice of a partner's insolvency is not required.

16.12 POSITION OF MINOR AS A PARTNER

Since a minor is not capable of entering into a contract, an agreement by or with a minor is void ab-initio (Mohni Bibi v. Dharamdas Ghosh). Since partnership is formed by an agreement, a minor cannot enter into a partnership agreement, on the basis of the general rule than a minor cannot be a promisor, but can be a promisee or a beneficiary, Section 30 of the Indian Partnership Act 1932, provides as under:

"With the consent of all the partners for the time being, a minor may be admitted to the benefits of partnership."

An analysis of the above provision highlights the following three conditions:

(a) Before admission of a minor as a partner, there must be an existence of partnership;

(b) There must be mutual consent of all the partners;
(c) A minor can be admitted only to the benefits of partnership.

Note: There cannot be a partnership consisting of all the minors or of one major and all other minors. [Shivaram v. Gourishankar]

Rights and Liabilities of' a Minor Partner before Attaining Majority

The various rights and liabilities of a minor partner before attaining majority are shown below in Exhibit 16.3.

Exhibit 16.3 Rights and Liabilities of a Minor Partner before Attaining Majority

Rights	Liabilities
(a) He has a right to share the profits and property of the firm in accordance with the agreement. [Section 30(2)] (b) He has at right to have access to, and inspect and copy, any of the accounts of the firm. But he does not enjoy such rights in respect, of books other than account books. (Section 30(2)1 (c) He has a right to file a suit for his share of profits or the property of the firm when he is not given his due share of profits. However, he can exercise this right only when he decides to sever his connections with the firm [Section 30(4)].	(a) He is liable only to the extent of his share in the profits and the property of the firm. He is not personally liable to third parties. [Section 30(3)] (b) He cannot be declared insolvent on declaration of firm's insolvency, his share vests in the Official Receiver or Official Assignee.

Rights and Liabilities of a Minor Partner on Attaining Majority
[Sections 30(5), (6), (7)]

Within six months of date of his attaining majority or date of his obtaining knowledge that he had been admitted to the benefits of firm, whichever is-later, the minor partner has to exercise his option whether or not to become a partner. Such option is required to be exercised by giving a public notice within the said six months. If he fails to give a public notice, he is deemed to have become a partner in the firm on the expiry of the said six months [Section 30(5)1. The various rights and liabilities of a minor partner on his attaining majority are given below in Exhibit 16.4.

Exhibit 16.0 Rights and liabilities of a Minor Partner on his Attaining Majority

When he elects to become a partner	*When he elects not to become a partner*
(a) He becomes personally liable to third parties for all acts of the firm since he was admitted to the benefits of partnership (Section 30(7)(a)]. (b) His share in the property and profits of the firm remains the same as he was entitled as a minor [Section 30(7)(b)].	(a) His rights and liabilities continue to be those of minor up to the date of giving public notice (Section 30(8)(a)I. (b) His share is not liable for any acts of the firm done after the date of the public notice [Section 30(8)(b)]. (c) He is entitled to sue the partners for his share of the property and profits in the firm [Section 30(8)(c)].

16.13 PROPERTY OF THE FIRM

Meaning of Property of the Firm [Section 14]

Unless otherwise agreed by the partners, the property of the firm includes:

(a) all properties, rights and interests originally brought to the common stock of the firm,

(b) the property acquired by purchase or otherwise by or for the firm.

(c) the property acquired with money belonging to the firm, and

(d) the goodwill of the business of the firm. The Act does not define the term goodwill. But it is understood in the sense of value of reputation of the firm judged in respect of its capacity to bring super profits due to general public patronage. It is a pan of the partnership property and can be sold either separately or alongwith the other property of the firm [Section 55(1)].

Example X, Y and Z are partners. X bought three plots of land—one in firm's name, one in his own name, one in the name of a fictitious person with money belonging to the firm. All the plots of land will be treated as the property of the firm.

Use of the Property of the Firm [Section 15]

Unless otherwise agreed by the partners, the property of the firm shall be held and used by the partners exclusively for the purposes of the business of the firm.

[Refer to Practical Problem 23]

16.14 MUTUAL RIGHTS AND DUTIES

The mutual rights and duties of partners are governed by (a) the Partnership Agreement and (b) the Partnership Act. The various provisions of the Partnership Act governing the mutual rights and duties of partners are summarised below:

Provisions of Sections 9 and 10	*Provisions of Sections II, 12, 16 to 25*
(a) These provisions lay down the mandatory duties of partners	(a) These provisions lay down the general rights and duties.
(b) These provisions cannot be changed by an agreement amongst the partners.	(b) These provisions can be changed by an agreement amongst the partners

Mandatory Duties of Partners [Sections 9 and 10]

The mandatory duties are:

(a) to carry on the business of the firm to the greatest common advantage,

(b) to be just and faithfull to each other, i.e. every partner should act in good faith. Good faith requires that a partner should not deceive the other partner by concealment of material facts.

(c) to render true accounts and full information of all things affecting the firm to any partner or his legal representative.

(d) to indemnify (i.e., to make good or to compensate) the firm for loss caused to it by his fraud in the conduct of the business of the firm.

General Duties of Partners [Sections 12(b), 13(a), 13(b), 13(1), 15, 16(a), 16(b)]

The general duties of partners as provided in the Act are subject to the agreement by partners. They can be changed by an agreement amongst the partners. Unless otherwise agreed by the partners, every partner has the following duties:

(a) **To attend deligently [Section 12(b)]:** Every partner is bound to attend deligently (i.e. carefully) to his duties in the conduct of his business.

(b) **Not to claim remuneration for taking part [Section 13(a)]:** A partner is not entitled to receive remuneration for taking part in the conduct of the business.

(c) **To contribute equally to the losses [Section 13(b)]:** A partner must contribute equally to the losses sustained by the firm.

(d) **To indemnify the firm [Section 13(f)]:** A partner must indemnify (i.e., compensate) the firm for any loss suffered by the firm due to his wilful neglect in the conduct of the business of the firm. The

term 'wilful neglect', is something more than a mere 'negligence' and has been described as 'culpable negligence'.

(e) **To hold and use firm's property for business purpose [Section 15].** The partners must hold and use the firm's property for the purposes of the business.

(f) **To account for and pay the personal profits from transactions firm etc. [Section 16(a)]:** Every partner must account for and pay to the firm the profits earned by him from any transaction of the firm or from the use of firm's property, business connection or name. If a partner is entrusted with the job of buying sugar for the firm and he supplies sugar to the firm at a higher price from personal supplies held by him, he is liable to account for profits made (Bentlay v. Crawen (1853)18Beave.

(g) **To account for and pay the personal profits from a competing business [Section 16(b)]:** Every partner must account for and pay all profits earned by him in the competing business. It may be noted that Section 11(2) permits the partners to enter an agreement restraining a partner from carrying on any business other than the business of the firm so long as Ile is a partner.

[Refer to Practical Problems 24 to 27]

Rights of Partners [Sections 12(a), 12(c), 12(d), 13(b) to 13(e), 31 to 33, 36. 37, 40]

The rights of partners as provided in the Act are subject to the agreement by partners. They can be changed by an agreement amongst the partners. Unless otherwise agreed by the partners, every partner has the following rights:

(a) **Right to take part [Section 12 (a)]:** Every partner has a right to take part in the conduct of the business.

(b) **Right to express opinion [Section 12(c)]:** Every partner has the right to express his opinion before the matter is decided. All matters except the change in the nature of the business, may he decided by a majority of the partners. The change in the nature of the business may be made only with the unanimous consent of all the partners.

(c) **Right to have access to books [Section 12(d)]:** Every partner has a right to have access to and to inspect and copy any of the books of the firm.

(d) **Rights to share profits equally [Section 13(b)]:** A partner is entitled to share the profits of the business of the firm equally.

(e) **Right to receive interest on capital out of profits [Section 13(c)]:** If the partnership agreement provides for the payment of interest on capital, the interest on capital shall be payable only out of profits. In other words, if there are losses, interest on capital will not be allowed.

(f) **Right to claim interest on advances [Section 13(d)]:** A partner is entitled to claim interest on advances made by him to the firm 6t 6% p.a. Interest on advances is payable whether there are profits or losses. It may be noted that the partner is not entitled to interest after the date of dissolution of firm unless otherwise agreed.

(g) **Right to be indemnified [Section 13(e)]:** A partner has a right to recover from the firm the payments made and liabilities incurred by him:

(i) in the ordinary and proper conduct of the business, and

(ii) in doing act in emergency for the purpose of protecting the firm from loss if he has acted in a manner as a person of ordinary prudence would have acted in similar circumstances in his own case.

(h) **Right to prevent the introduction of a new partner [Section 31]:** Every partner has the right to prevent the introduction of a new partner without the consent of all the existing partners.

(i) **Right to retire [Section 32]:** Every partner has the right to retire with the consent of all other partners and in the case of a partnership at will, by giving notice to that effect in writing to all the other partners.

(j) **Right not to be expelled [Section 33]:** Every partner has the right not to be expelled from the firm by any majority of partners unless such power is conferred by partnership agreement and is exercised in good faith. Thus expulsion may be exercised subject to the following conditions.

(a) It must be approved by majority of the partners.
(b) It Must be exercised in good faith without any private animosity.
(c) The concerned partner must be given an opportunity to make a representation.

(k) **Right to carry on competing business [Section 36(1)]:** Every outgoing partner has a right to carry on a competing business and to advertise such business. But, he cannot (i) use the firm's name; (ii) represent the firm, or (iii) solicit the firm's customers.

(l) **Right to share subsequent profits [Section 37]:** Every outgoing partner or the estate of any partner who ceased to be a partner has the right to claim either a share in the subsequent profits of the firm or interest @ 6% p.a. on his share in the firm's propertytill the accounts are finally settled.

(m) **Right to dissolve the partnership [Section 40]:** Every partner has the right to dissolve the partnership with the consent of all partners and in the case of a partnership at will, by giving notice to that effect in writing to all the other partners.

16.15 RELATION OF PARTNERS WITH THIRD PARTIES [SECTION 18]

The relations of partners with third parties are governed by the mutual agency relationship existing among the partners. According to Section 18, "every partner is an agent of the firm for the purposes of the business of the firm." In other words, every partner has the capacity to bind other partners by his acts done in firm's name. Therefore, all partners are liable to third parties for the acts of every partner.

[Refer to Practical Problem 28]

16.16 IMPLIED AUTHORITY OF A PARTNER [SECTION 19]

The authority of a partner means the capacity of a partner to hind the firm by his act. This authority may be express or implied. The authority conferred on a partner by mutual agreement is called 'express authority'. The authority conferred on a partner by the provisions of Section 19 of the Indian Partnership Act is called 'implied authority'. Reading together Sections 19(1) and 22. Implied authority covers those acts of partners which fulfill the following three conditions:

(a) The act must relate to the normal business of the firm;
(b) The act must have been done in the usual way of carrying on the business of the firm;
(It may be noted that the question as to what is usual and what is unusual in a business depends on the nature of business and the usage of trade, e.g. taking loan is considered as usual activity in case of a trading concern but unusual activity in case of a professional concern of solicitors.)
(c) The act must be done in the firm's name or in any other manner expressing or implying an intention to bind the firm.

A firm was engaged in trapping elephants. One of the partners of the firm hired out an elephant without the consent of the other partners. Held, the act fell within the implied authority of the partner [Mathuranath v. Bageshwari Rani]

Example A, B, C, D and E are partners of a banking lint State the legal position of firm for the following acts of partners:

(a) A borrows money in the name of the firm,
(b) B orders for a certain quantity of wine, on the firm's letter head.
(c) C receives money from a borrower of a firm and utilised this amount for personal use without informing other partners about the receipt of this money.
(d) D borrows money on his own credit by giving his own promissory note and utilizes subsequently this amount for firm's use.

Solution:

Analysis of Partner's Acts whether Satisfying the Conditions of Section 19

Partner's act	*Whether the act done relates to the normal business*	*Whether the act has been done in the usual way*	*Whether the act has been done in firm's name or with an intention to bind*

	of the firm		*fine*
A's act	Yes	Yes	Yes
B's act	No	Yes	Yes
C's act	Yes	Yes	Yes
D's act	Yes	Yes	No

Decision and reason:

(a) The firm is liable for the acts of A and C. Their acts fall within the scope of implied authority because all the conditions of Section 19 have been

(b) The firm is not liable for the acts of B and D. Their acts do not fall within the scope of implied authority because all the conditions of Section 19 have not been fulfilled.

Acts within the Implied Authority

An implied authority of a partner of a trading firm include the following acts:

(a) To purchase goods of the kind that are used in the business of the firm;
(b) To sell the goods of the firm;
(c) To settle accounts with the persons dealing with the firm;
(d) To receive payment of the debts due to the firm and issue receipts for the same;
(e) To engage servants for the business of the firm;
(f) To engage a lawyer to defend an action brought against the firm;
(g) To borrow money for the purpose of the firm's business;
(h) To pledge the goods of the firm as security for the repayment of borrowings made for the purpose of firm's business;
(i) To draw, accept, endorse Bill of Exchange and other negotiable instruments in the name of the firm.

Restrictions on the Implied Authority of a Partner [Sections 19 and 20]

He restrictions on the implied authority of a partner may be discussed under the following two heads: (I) Statutory Restrictions and (II) Restrictions imposed by mutual agreement.

I. Statutory Restrictions [Section 19(2)] In the absence of any usage or, custom of trade to the contrary, the implied authority of a partner does not empower him to do the following acts namely-

(a) To submit a dispute to arbitration relating to the business of the firm;
(b) To open a Bank Account on behalf of the firm in partner's own name;
(c) To compromise or relinquish any claim or portion of the claim by the firm;
(d) To withdraw a suit or proceedings filed on behalf of the firm;
(e) To admit any liability in a suit or proceedings against the firm;
(f) To acquire immovable property on behalf of the firm;
(g) To transfer immovable property belonging to the firm; and
(h) To enter into partnership on behalf of the firm.

[Refer to Practical Problem 30]

Note: A partner can do any of the above-mentioned acts only if he is expressly authorised to do that act or the usage or custom of the trade permits him to do that act.

For example, a partner may open a Bank Account on behalf of the firm in his own name if he is expressly authorised to do so by mutual agreement.

Liability of the Firm for the Restricted Acts of Partner

The firm is not liable to third party for the above mentioned restricted acts of a partner whether or not the person dealing with the flan knew about such restrictions.

II. Restrictions Imposed by Mutual Agreement [Section 20] - The partners of a firm by mutual agreement may extend or, restrict the scope of implied authority of any partner. But a third party is not bound by any such restriction unless it has the, knowledge of such restriction. In other words, the firm is liable to third party only if the third party has no knowledge of the restrictions.

Example X, Y and Z are partners in a trading firm. They decide that no partner shall have the right to borrow beyond Rs 20,000 without the consent of other partners. X without consulting Y and Z borrows from W Rs 25.000 in the name of the firm and utilised the same in paying of the firm's debts. The firm is liable to pay Wit W is unaware of the restriction but It will not be liable to pay W d W was aware of such restriction.

Implied Authority and Third Parties [Sections 20, 23 to 27]
All partners are liable to third parties for all acts of a partner which fall within the scope of his implied authority. Their liability to third parties in various cases are summarised as under:
(a) Effect of Restriction on Implied Authority [Section 20] - The partners of a firm by mutual agreement, may extend or restrict the scope of implied authority of any partner. But, the third party is not bound by any restriction imposed on the implied authority of a partner unless it has the knowledge of such restriction. For example, X, Y and Z are partners in a trading firm. By an agreement, they decided that no partner shall have the right to buy goods beyond the value of Rs 1,00,000 without the consent of other partners. A third party who had no knowledge of such restriction sold goods worth Rs 2,00,000 to X who did not consult his other partners about this transaction. The firm is liable to pay the full amount to the third party.

Note: The above-mentioned extension or restriction is only possible with the consent of all the partners. Any one partner or even a majority of the partners, cannot restrict or extend the implied authority. [Refer to Practical Problem 311

(b) Effect of Admissions by a Partner [Section 23] - Any admission or representation (e.g., acknowledgement signed by a partner) by a partner is sufficient evidence against the firm if the following two conditions are fulfilled:
(i) Such admission or representation must relate to the affairs of the firm; and
(ii) Such admission or representation must be made in the ordinary course of business.

Notes:
(a) In the opinion of the Calcutta, Bombay and Allahabad High Courts, an acknowledgement signed by a partner in connection with partnership debt will extend the period of limitation against the firm under the Limitation Act. The High Court of Madras, however, has taken the view that the special authority must be proved.
(b) The provisions of Section 23 would not apply after the dissolution of the firm [Premji Dossa 10 Bombay 358].

(c) **Effect of Notice to an Acting Partner [Section 24]** - Any notice to a partner operates as a notice to the firm if the following three conditions are fulfilled:
(i) Such notice must relate to the affairs of the firm;
(ii) Such notice must be given to a working partner and not to a sleeping partner.
(iii) There must not be any fraud committed by the partners and the third party against the firm. [Refer to Practical Problem 33]

(d) **Contractual Liability [Section 25]** - Every partner is liable jointly with other partners and also severally (i.e., individually) for all those acts of the firm which have been done while he was a partner.
Example X, Y and Z were partners in a firm when infringement of a trademark took place. X retired. Later on, damages arising out of the alleged infringement arose after the dissolution of the firm. It was held that all the partners who were members of the firm at the time when infringement of a trademark took place, were liable. /Thomas Bear & Sons v. Ralia Ram]

[Refer to Practical Problem 35]

(e) **Liability of the Finn for Wrongful Acts of a Partner [Section 26]** - The firm is liable to the same extent as the partner for any loss or injury caused to any third party or any penalty by the wrongful act or omission of a partner if either of the following two conditions is fulfilled:

(i) Such wrongful act or omission must have been done by a partner while he was acting in the ordinary course of business of the firm, or

(ii) Such wrongful act or omission must have been done by a partner with the authority of the other partners.

Note: The term 'wrongful act' includes fraud or negligence of the partners.
Example X, Y, Zara partners in a magazine business. X allows the publication of a defamatory article about a prominent person 'Sharad Pawar', without checking its validity. Sharad Pawar files a suit against the firm. The firm will be liable for this act of the editor partner on the following two grounds:
(I) Such act caused loss of goodwill to Sharad Pawar,
(II) Such act was done in the usual course of business.

[Refer to Practical Problem 36]

(f) **Liability of Firm for Misappropriation by Fanner [Section 27] -** The firm is liable to the third parties in the following two cases of misappropriation by a partner:

Case	Condition
a) Where a partner receives money or property front a third person and misapplies it. b) Where a firm, in the course of its business, receives money or property from a third person and the same is misapplied by any of its partners.	a) The receipt of money or other property by a partner must be an act within the scope of his apparent authority. b) The partner must have misapplied while the property was in the custody of firm.

Notes:
(i) The provisions of Section 26 deals with general wrongful act or defaults of a partner, whereas Section 27 deals with one particular wrong, i.e. misapplication of money or property by a partner.
(ii) Under Clause (a) of Section 27, it is not necessary that the property must have actually come into the custody of the firm whereas under Clause (b) of Section 27, it is necessary.
Example X, Y and Z are partners in a trading firm. W, a debtor of the firm, repays his debt of As 5,000 to X who does not inform Y and Z about the repayment and misuses the money. W would be discharged of the debts on account of payment made to X because whatever is done by a partner, in the ordinary course of partnership business and within the scope of his authority, is deemed to have been done by him only as an agent for the other partners and it Is immaterial whether or not the other partners have notice of this act.

[Refer to Practical Problems 37 and 38]

Partner's Authority in Emergency [Section 211
A partner's authority in an emergency covers those acts which fulfil the following two conditions:

(a) The act must be done to protect the firm from loss; and

(b) The act must be such as a prudent man would undertake under similar circumstances in his own case.

It may be noted that these acts do not form part of the implied authority of the partner but, nevertheless, they would bind the firm. A partner's authority in an emergency is similar to that of an agent in similar circumstances u/s 189 of the Indian Contract Act.

Example X, Y and Z are partners in a trading firm. By an agreement, they decided that no partner would have authority to sell goods of the firm above the value of Rs 50,000 without the consent of other partners. Owing to a sudden slump in the market, the prices crashed. One partner, in order to save the firm from loss, sold all the stock worth Hs 5,00,000 without consulting any other partner. Such an act would bind the firm.

16.17 RECONSTITUTION OF A FIRM

The reconstitution of a firm takes place when there is any change in the composition of the partnership. The various ways in which a firm is reconstituted are shown below in Fig. 16.3.

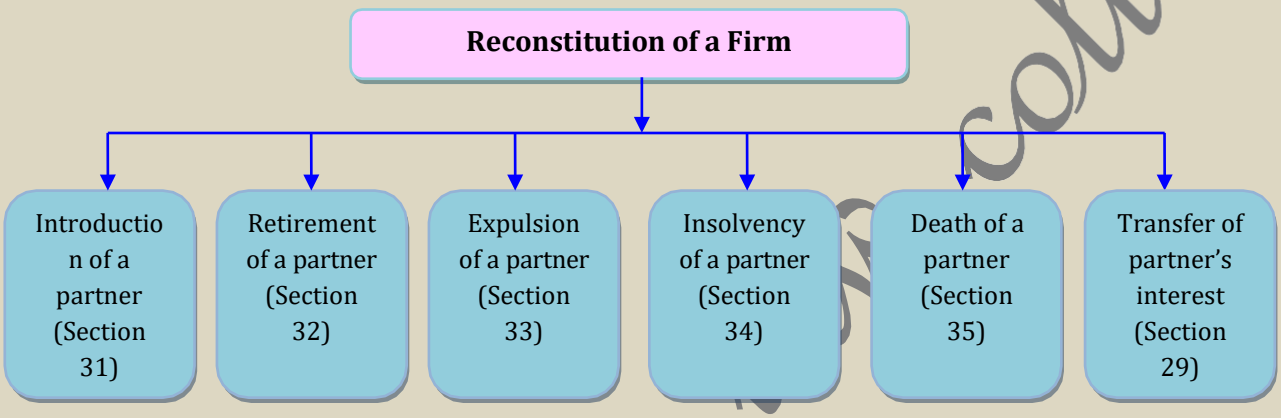


Fig. 16.3 Reconstitution of a Firm

1. Introduction of a Partner [Section 31] Subject to provisions of Section 30 (regarding minor partner), a person may be admitted as a partner either-

(i) with the consent of all the existing partners, or

(ii) in accordance with a contract already entered into between the existing partners for the admission of a new partner.

Example The partnership agreement between X and Y provides that X could introduce into partnership any of his sons on attaining the age of majority. X decides to admit his son (who has attained majority) as a partner. Y refused to consent, Y's consent is not required since the clause in the partnership agreement operated as consent [Leading case: Byrne v. Reid]

Liability of an Incoming Partner for Finn's Acts done before his Admission An incoming partner is not liable for all the acts of the firm done before his admission. This general rule has two exceptions which are as follows:

(i) An incoming partner is liable for the acts done before his admission if (a) the new firm assumes the liabilities of the old firm, and (b) the creditors accept the new firm as their debtor and discharge the old firm from its liability.

(ii) A minor who, on attaining majority decides to become a partner, is liable for all acts of the firm done since he was admitted to the benefits of partnership.

Liability of an Incoming Partner for Firm's Acts done after his Admission - An incoming partner is liable for all the acts of the firm done after his admission.

2. Retirement of a Partner [Section 32] - A partner may be retire from the firm in any of the following ways:

(i) with the consent of all the other partners; or
(ii) in accordance with an express agreement among the partners; or
(iii) in the case of partnership at will, by giving a notice to all other partners of his intention to retire.

Note: In case of a partnership at will, a partner may retire by notice even if the pending contracts have not been completed. [Keshav Lal v. Bhai Lai]

Liabilities of a Retiring Partner - The liabilities of a retiring partner may be discussed as under:

(a) For Firm's acts before his retirement [Section 32(2)]	He continues to be liable to third party unless he is discharged for the same by a tripartite agreement between him, third party and the partners of the reconstituted firm.
(b) For Firm's acts after his retirement [Section 32(3), (4)]	He continues to be liable to third party (other than one who deals with the firm without knowing that he was a partner) until public notice of his retirement is given either by himself or any of the other partners. This liability of a retiring partner is based on the principle of holding out.

Rights of a Retiring Partner (Section 36 and 37) – A retiring partner has the following two rights –

(a) Right to carry on competing business [Section 36]	He may carry on a business competing with that of the firm and may advertise such business but unless otherwise agreed he cannot- (i) use the firm's name; (ii) represent himself as carrying on firm's business; (iii) solicit the old customers.
Right in case of no final settlement of accounts [Section 37]	He at his option, is entitled to claim, either of the following: (i) such share of profits earned after his retirement which is attributable to the use of his share of the property of the firm, or (ii) Interest at the rate of 6% p.a. on the amount of his share in the property. **Notes**: This right is available to a retiring partner even if only a part of his property is used in the business. Ramakrishna Ayyar v. Muthu-swami Ayyar] This right is also available to the legal representatives of a deceased partner.

3. Expulsion of a Partner [Section 33] - A partner may be expelled if the following three conditions are satisfied:
(a) the power to expel a partner must have existed in a contract between the partners;
(b) the power must have been exercised by a majority of the partners, and
(c) the power must have been exercised in good faith without any private animosity.
(d) The affected partner must be given an opportunity to make a representation before being dismissed.

The expulsion, without the satisfaction of the aforesaid conditions, is said to be an irregular expulsion which is null and void. The partner who has been wrongly expelled, has a right to claim re-installment as a partner and not to recover damages for wrongful expulsion.

The rights and liabilities of an expelled partner are the same as those of a retired partner. [Section 33(2)]

4. Insolvency of a Partner [Section 34] - The effects resulting from the insolvency of a partner are summarized below:

(a) He ceases to be a partner on the date of the orders of adjudication:
(b) Unless otherwise agreed, the firm is dissolved; [Section 42(d)]
(c) His estate is not liable for firm's acts done after the date of the order,
(d) Firm is not liable for his acts done after the date of the order.

Note: No public notice is required on the insolvency of a partner. [Section 45]

[Refer to Practical Problem 45]

5. Death of a Partner [Sections 35 and 42(c)] - Unless otherwise agreed by the partners, a firm is dissolved on the death of a partner [Section 42(c)]. Where under the contract a firm is not dissolved by the death of a partner, the estate of the deceased partner is not liable for any act of the firm done after the date of his death [Section 35].

Note: No public notice is required on the death of a partner. (Section 45]

Example X was a partner in a firm. The firm ordered goods in X's life time but the delivery of the goods was made after X's death. In such a case, X's estate would not be liable for this debt because there was no debt due in respect of such goods in X's life time. (Leading case: Beget v. Miller]

6. Rights of Transferee of a Partner's Share [Section 29] - A partner may transfer his interest in the firm by sale, mortgage or charge fully or partially. The rights of such a transferee are as follows:

(a) During the continuance of the partnership	He is entitled to receive the share of the profits of the transferring partner and the account of profits agreed to by the partners. He is not entitled (a) to interfere with the conduct of the business (b) to require accounts; (c) to inspect the hooks of the firm.
(b) On the dissolution of firm or on the retirement of the transferring partner	He is entitled to receive (a) the share of the assets of the transferring partner and (b) an account as from the date of the dissolution for the purpose of ascertaining the share.

Sub-partnership: A sub-partnership arises when a partner of a firm agrees to share his share in the firm, with a stranger. It was assumed in Venkatratnam v. Venkatratnum (AIR 1944, Madras, 394) that a sub-partner is a transferee within the meaning of Section 29. Thus, the rights of a sub-partner are the same as those of a transferee of partner's share under Section 29.

7. Effect of the Change in the Constitution of the Firm on Continuing Guarantee [Section 38] - A continuing guarantee is a guarantee which extends to a series of transactions. Unless otherwise agreed by the partners, a continuing guarantee given to a firm or to a third party in respect of the transaction of a firm is revoked as to the future transactions from the date of any change in the constitution of the firm.

[Refer to Practical Problem 47]

8. Rights and Duties of Partners after Change in the Firm [Section 17] - The rights and duties of the partners of the reconstituted firm shall be the same as they were before the change in the firm. Section 17 provides for the following three types of changes in the firm:

(a) Where there is a change in the Constitution of the firm. [Section 17(a)]
(b) Where the firm continues after the expiry of the term of the firm. [Section 17(b)]
(c) Where the firm carries on an additional undertaking. [Section 17(c)]

16.18 DISSOLUTION OF FIRM [SECTIONS 39 TO 47]

Meaning of Dissolution The term 'dissolution' stands for discontinuation. Under the Indian Partnership Act, 1932, the dissolution may be either of Partnership or of a firm.

Meaning of Dissolution of Partnership Dissolution of partnership refers to the change in the existing relations of the partners. The firm continues its business after being reconstituted. This may happen on admission, retirement or death of a partner or change in profit sharing ratio in the firm

Example X, Y and Z are partners in a firm. X retires. The partnership between X Y and Z comes to an end and new partnership between Y and Z comes into existence. This new partnership between Y and Z shall be known as 'reconstituted firm'. Thus, on retirement of partner, the old partnership stands dissolved, but the firm continues its business with the remaining partners le and Z.

Meaning of Dissolution of Firm - Dissolution of a firm means the dissolution of partnership between all the partners of a firm. In such a situation, the business of the firm is discontinued, its assets are realized, the liabilities are paid off and the surplus (if any) is distributed among the partners according to their rights.

Distinction between Dissolution of Partnership and Dissolution of a Firm - The dissolution of a partnership and dissolution of a firm can be distinguished as follows:

Basis of distinction	*Dissolution of partnership*	*Dissolution of firm*
1. Termination of old partnership and formation of nest, partnership	Old partnership comes to an end and a new partnership comes into existence.	Old partnership comes to an end but no new partnership comes into existence.
2. Constitution of business under firm's name	The business continues under firm's name.	The business does not continue under firm's name.
3. Revaluation vs. Realisation	Revaluation account is prepared.	Under firm's dissolution, Realisation account is prepared.

Thus, dissolution of firm involves dissolution of partnership but dissolution of partnership may not lead to dissolution of firm.

Modes of Dissolution of a Firm [Sections 40 to 44] - The dissolution of a firm may take place either without the order of the court or by an order of the court. The circumstances under which dissolutions take place are shown below.

Dissolution without the Order of the Court [Sections 40 to 43] - Dissolution of firm without the order of the court may take place in the following ways:

(a) Dissolution by mutual agreement [Section 40]: - A firm may be dissolved by mutual agreement among all the partners.

Note: Even a firm for a fixed duration may be dissolved by mutual agreement.

[Refer to Practical Problem 48]

(b) Compulsory dissolution [Section 41]: A firm is compulsorily dissolved in the following two circumstances:

(i) If all the partners, or all but one partner of the firm are declared insolvent; [The reason is that there must be at least two persons to continue a firm and such persons must be competent to contract].

(ii) If some event takes place which makes it unlawful for the firm's business to be carried on.

Example X a resident In India and Y a resident in Pakistan, are partners in a trading firm. War breaks out between India and Pakistan. In such a situation, on outbreak of war, it becomes unlawful for the business of the firm to be carried on.

Note: The illegality of one or more business but not all businesses would not necessitate the dissolution of the firm.

[Refer to Practical Problems 49(a), (b) and 50]

(c) Dissolution on the happening of certain contingencies [Section 42]: Unless otherwise agreed by partners, a firm is dissolved on the happening of any of the following four contingencies:

(i) On the expiry of the fixed term for which the firm was constituted;

(ii) On completion of the venture(s) or undertaking(s) for which the firm was constituted;

Dissolution of a Firm

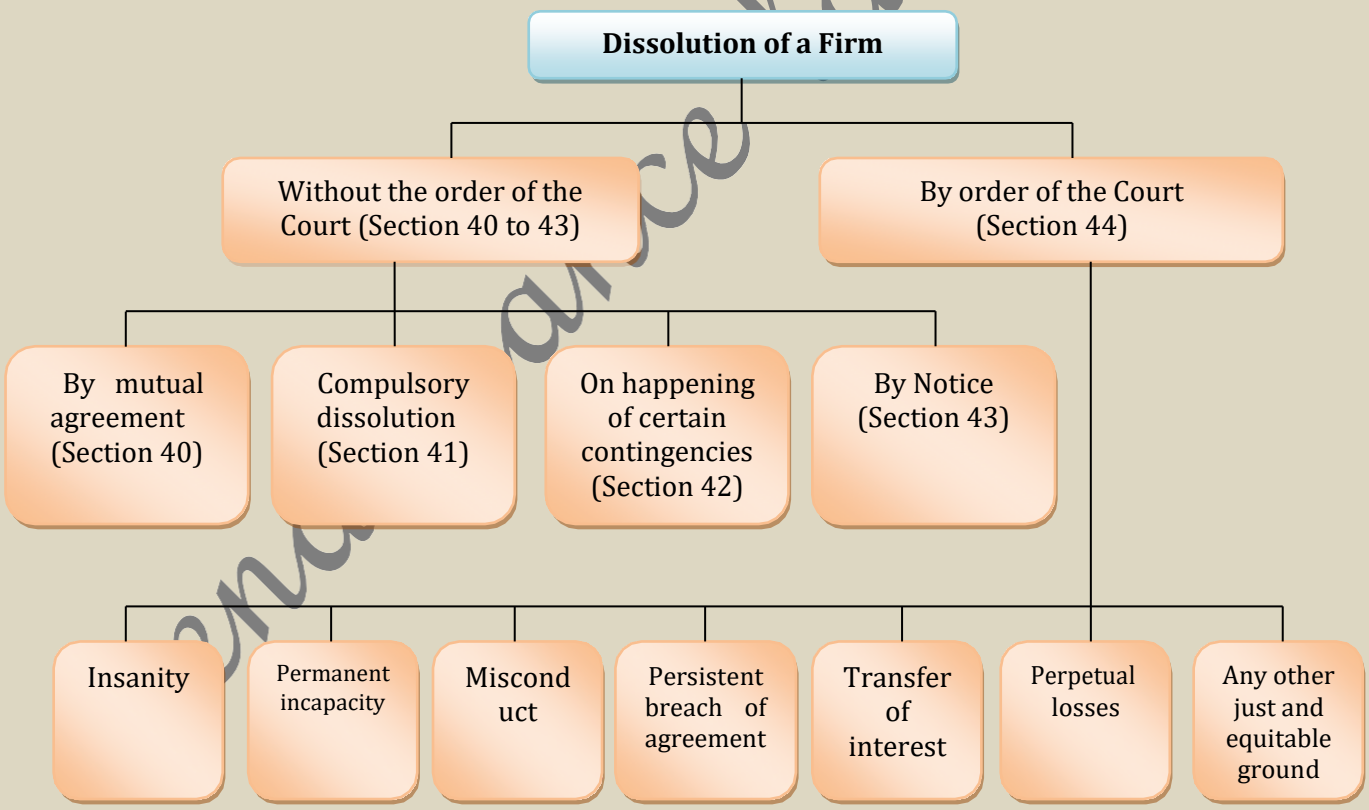


Fig. 16.4 Modes of Dissolution of a Firm

(iii) On the death of a partner; and

(iv) On the insolvency of a partner.

Note: If all the partners or all but one partner of the firm are dead, the firm shall be compulsorily dissolved even if the partnership agreement provided that the firm shall not be dissolved on the death of a partner. The reason is that there must be at least two partners to continue a firm.

[Refer to Practical Problems 49(c) and 51]

(d) Dissolution by notice [Section 43]: Where the partnership is at will, the firm may be dissolved by any partner giving notice in writing to all other partners of his intention to dissolve the firm. The firm is dissolved from the date of dissolution mentioned in the notice or if no date is mentioned, as from the date of the communication of the notice.

Note: Notice once given cannot be withdrawn without the consent of all other partners. [Jones v. Lloyd)

[Refer to Practical Problem 52]

Dissolution by an Order of Court [Section 44]

This section deals with those grounds on which the court may, on the receipt of petition by a partner, order for the dissolution of the firm. These grounds are:

(a) Insanity (Section 44(a)J: When a partner has become of unsound mind, the court may allow dissolution of the firm on a suit by any partner of the firm. However, temporary sickness is no ground for dissolution of partnership. Similarly, a dormant partner's insanity will be no ground to seek dissolution under this head us such partner has hardly any duties to perform.

Note: In this particular case only, the petition may be filed either by any other partner or the next friend of the insane partner.

(b) **Permanent Incapacity [Section 44(b]:** When a partner [i.e., an actual partner and not a sleeping partner) has become permanently incapable of performing his duties as a partner, any other partner may apply for dissolution. Such permanent incapacity may result from physical disablement, illness etc.

(c) **Misconduct [Section 44(c)]:** When a partner is guilty of misconduct which is likely to adversely affect the carrying on of the business, the court may allow dissolution. The court may order the dissolution of a firm on account of misconduct of any partner other than the one filing a suit for dissolution. It is not necessary that the misconduct must relate to the business of the firm e.g. in Carmichael v. Evans (I. Ch. 486), a partner of the firm was convicted on account of travelling without ticket in Rail, the court ordered the firm to be dissolved on petition by other partners as such act of the partner was detrimental to the interest of the firm.

Similarly, in Abbot v. Grump (1870) 5 Bang. L.R. 109, the court ordered the firm to be dissolved on account of adultery committed by one partner against the wife of the other partner. Dissolution was ordered as such act of adultry would adversely affect the mutual trust and confidence among partners.

(d) **Persistent Breach of Agreement [Section 44(d)]:** When a partner willfully or persistently (i.e., frequently) commits breach of agreement in matters relating to the business of the firm, any other partner may seek for dissolution of the firm. Embezzlement, fraudulent breach of trust, or keeping erroneous accounts may be sufficient ground for the court to order dissolution of the firm, e.g. a partner as a matter of routine holding more cash than allowed under the partnership deed, refusal to show accounts despite repeated requests, would be a sufficient ground to uphold dissolution. However, the partner seeking dissolution must not be a party to such misconduct.

(e) **Transfer of Interest [Section 44(e)]:** When a partner has transferred the whole of his interest in the rum to a third party or allowed his share to be charged on account of a decree passed by a court towards payment of liabilities of that partner or allowed his share to be sold in the recovery of arrears of land revenue, it would be sufficient to attract dissolution.

(f) **Perpetual Losses:** Where the business of the firm cannot be carded on except at a loss, the court may order dissolution of the firm.

(g) **Any other Just and Equitable Ground [Section 44(f)]:** Where the court is satisfied that it is just and equitable to dissolve the firm it may allow dissolution using its discretionary power to meet the

ends of justice. Examples of such grounds include continued quarrelling between the partners, refusal to meet on matters of business. Complete deadlock in management due to partners not on speaking terms or lack of confidence and good faith between partners.

Note: The right of a partner to file a suit for dissolution on any of the above seven grounds cannot be excluded by any agreement to the contrary.
[Hardit Singh v. Mukha Singh]

[Refer to Practical Problem 531

16.19 RIGHTS AND LIABILITIES OF A PARTNER ON DISSOLUTION
Rights of a Partner on Dissolution [Sections 46, 51 to 53]
The various rights of a partner on dissolution are as follows:
(a) Partner's General Line [Section 46]: Every partner or his representative is entitled-
(i) to have the firm's property applied in payment of the firm's debts, and
(ii) to have the surplus distributed amongst the partners or the representatives according to their respective rights.
(b) Right to Claim the Return of Premium on Premature Winding Up [Section 51]: If a partner joined a firm for a fixed term and had paid a premium and the firm is dissolved before the fixed term, he is entitled to return of the premium. The amount of premium will depend upon (i) the terms upon which he became a partner, and (ii) the length of the time during which he was a partner. However, such a partner cannot claim any return of the premium in the following three circumstances:
(i) When the dissolution is due to the death of partner,
(ii) When the dissolution is mainly due to the misconduct of the partner who paid the premium; or
(iii) The dissolution is according to an agreement which had no provision for the return of premium or any part thereof.

[Refer to Practical Problem 541

(c) Rights of a Partner in Case of Dissolution on Account of Fraud or Misrepresentation [Section 52]: Where the partnership is rescinded on grounds of fraud or misrepresentation, the aggrieved partner, besides other rights under other provisions, has the following rights:
(i) He has a right of lien on the surplus assets after the payment of firm's debts, for any sum paid by him for purchase of a share in the firm or for any capital contributed by him;
(ii) He is entitled to rank as a creditor of the firm in respect of any payment made by him towards firm's debts;
(iii) He is entitled to be indemnified by the partners) guilty of fraud or misrepresentation against all the debts of the firm.

(d) Right to Restrain from Use of Firm Name or Firm Property [Section 53]: Unless otherwise agreed by the partners, every partner or his rep tentative may restrain any other partner or his representative from carrying on a similar business in the firm name or from using the property of the firm for his own benefit till the affairs of the firm are completely wound up.

Liabilities of a Partner on Dissolution [Sections 45 and 47]
The various liabilities of a partner on dissolution are as follows:
(a) Continuing Liability for Acts of Partners Done After Dissolution (Section 45) - Until a public notice is given of dissolution, the partners continue to be liable for any act done by any of them after dissolution and such act is deemed to be an act done before the dissolution.
Example X. Y and Z are partners in a trading firm. They executed a dissolution deed to dissolve the firm as from 1st March but did not give public notice till 31st March. On 20th March, X borrowed Rs 20,000 In the firm's name. The firm is liable.

Exceptions The following shall not be liable for acts done after the dissolution of the firm even though the public notice has not been given:

(i) the estate of a deceased partner;
(ii) the estate of an insolvent partner;
(iii) a sleeping or dormant partner who has retired from the firm.

[Refer to Practical Problem 55]

(b) Continuing authority of Partners After Dissolution [Section 47] - After the dissolution of a firm, the authority of a partner to bind the firm and the other mutual rights and obligations of the partners continue, so far as may be necessary-

(i) to wind up the affairs of the firm, and
(ii) to complete the unfinished transactions pending at the date of dissolution.

16.20 SETTLEMENT OF ACCOUNTS [SECTIONS 48, 49 AND 55]

Unless otherwise agreed by the partners, the accounts of a dissolved firm shall be settled according to the provisions of Sections 48, 49 and 55. These provisions are as follows:

(a) Treatment of Losses [Section 48(a)] Losses including deficiencies of capital are to be paid in the following manner:

(i) First out of profits;
(ii) Then out of capital:
(iii) Lastly by partners individually in their profit-sharing ratio. [Section 48(a)] [Refer to Practiced Problem 56]

(b) Application of Assets [Section 48(b)] - The assets of the firm (including the sums, if any, contributed by the partners to make up the deficiencies of capital) shall be applied in the following manner and order

(i) in paying firm% debts to the third parties;
(ii) in paying to each partner rateably what is due to him on account of advances;
(iii) in paying to each partner rateably what is due to him on account of capital;
(iv) the residue, if any, shall be divided among the partners in their profit-sharing ratio. [Section 48(b)].

[Refer to Practical Problem 57]

(c) Payment of Firm's Debts and Partner's Private Debts [Section 49] - Where there are firm's debts and partner's private debts, the following provisions shall apply:

(i) Firm's properly shall be applied first in payment of firm's debts then the surplus, if any, shall be applied in the payment of partner's private debts to the extent to which the concerned partner is entitled to share in the surplus; and

(ii) Partner's private property shall be applied first in payment of his private debts and the surplus, if any, in payment of firm's debts if firm's liabilities exceed the firm's assets. [Section 49]

[Refer to Practical Problem 58]

DISTINCTION BETWEEN FIRM'S DEBTS AND PRIVATE DEBTS

Firm's Debts and Private Debts can be distinguished as under

Basis of distinction	Firm's debts	Private debts
1. Who incurs	Firm's debts are incurred by the lint.	Private debts are incurred by a partner in the individual capacity of a house-hold and not in the capacity of a partner of a firm.
2. Who is liable	For Firm's debts, all partners are jointly and severally	For private debts, only the concerned partner is liable.

	liable.	
3. Application of Firm's property	For firm's debts, firm's property shall be applied first.	For private debts, only the share of concerned partner in the excess of firm's property over firm's debts can be applied.
4. Application of private property	For firm's debts, only the excess of partner's private property over his private debts can he applied.	For private debts, private property shall be applied first.

TREATMENT OF LOSS ARISING DUE TO INSOLVENCY OF A PARTNER

The Capital Account of a partner may show a debit balance after making-all adjustments (including the share of any profit or loss on realisation and the receipts from his private estate, if any). It may be noted that the private estate of each partner is applied first to pay off his private debts and the surplus (i.e. excess of private estate over private debts), if any, is applied to pay off the firm's debts. If a partner having a debit balance in his Capital Account is unable to bring in the necessary cash to make up the deficiency, he is said to be an insolvent partner. The h-recovered debit balance is called the loss arising due to the insolvency of a partner. Now the question arises, should this loss be regarded as an ordinary loss (which is shared by the partners in their profit sharing ratio) or an extraordinary one? This issue was involved in the leading case of Garner v. Murray (1904).

DECISION IN GARNER V. MURRAY

Justice Joyce held that the loss arising due to the insolvency of a partner must be distinguished from an ordinary loss (including realisation loss). Unless otherwise agreed, the decision in Garner v. Murray requires-

(a) that the solvent partners should bring in cash equal to their respective shares of the loss on realisation;

(b) that the solvent partners should bear the loss arising due to the insolvency of a partner in the ratio of their Last Agreed Capitals.

The Last Agreed Capital should be interpreted as under:

Case	*Meaning of Last Agreed Capital*
(a) In case of Fixed Capitals	Last Agreed Capital means the Fixed Capital (as given in the Balance Sheet) without any adjustment.
(b) In case of Fluctuating	Last Agreed Capital means the Capital after making adjustments for past accumulated reserves, profits or losses, drawings, interest on capitals, interest on drawings, remuneration to a partner, etc. to the date of dissolution bar before making adjustment for profit or loss on realisation.

(d) Sale of Goodwill [Section 55] - Unless otherwise agreed by the partners, the goodwill shall be included in the assets and may be sold either separately or alongwith other property of the firm. In case of sale of goodwill of dissolved firm, the rights of buyer and seller are as under:

Rights of a buyer	*Rights of a seller*
(i) to use the times name. (ii) to represent himself as carrying on the business of the old firm.	(i) to carry on a business competing with that of the buyer. (ii) to advertise such business. But subject to agreement between hint and the buyer, he is not entitled (a) to use the firm's name, (b) to represent himself as carrying on business of the old

(iii) to solicit the old customers	firm, or (e) to solicit the old customers.

It may be noted that any partner may enter into an agreement with the buyer of goodwill that such partner will not carry on any business similar to that of the dissolved firm within a specified period or within the specified local limits. Such agreement shall be valid if restrictions imposed are reasonable.
Note: Though such an agreement is in restraint of trade and is void under Section 27 of the Indian Contract Act but Section 55(3) of the Indian Partnership Act permits and declares such agreements as valid.

[Refer to Practical Problem 55]

16.21 PUBLIC NOTICE (SECTION 72)

When a Public Notice is Required to be Given

A public notice is required to be given in the following three cases:
(a) on the retirement or expulsion of a partner, or
(b) on the dissolution of the firm,
(c) on the election to become or not to become a partner by a minor on his attaining majority.

When a Public Notice is not Required to be Given

A public notice is not required to be given in the following two cases:
(a) on the death of a partner;
(b) on the insolvency of a partner.

Mode of Giving Public Notice

The mode of giving public notice is given as under.

in ease of a registered firm	*In case of an unregistered firm*
(a) It must be given by publication in the Official Gazette. (b) It must be given by publication in at least one vernacular newspaper circulating in the district where the firm to which it relates has its place or principal place of business. (c) It must be given to the Registrar of Finns.	(a) It must be given by publication in the Official Gazette. (b) It must be given by publication in at least one vernacular newspaper circulating in the distinct where the firm to which it relates has its place or principal place of business.

Consequences of not Giving a Public Notice

If a public notice is not given in cases in which it is required to be given, the consequences will be as follows:

Case	*Consequences*
(a) On election to become or not to become a partner by a minor on his attaining majority	Minor is deemed to have become a partner on the expiry of 6 months [Section 30(5)].
(b) On retirement of a partner	Retiring partner and the other partners continues to be liable as partner to the third parties for firm's acts done after retirement [Section 32(3)].
(c) On expulsion of a partner	The expelled partner and the other partners continue to be liable to third parties for firm's acts done after his expulsion (Section 33(2)).
(d) On dissolution of a firm	All the partners continue to be liable to third parties for firm's acts done after the dissolution of firm [Section 45].

Conti....

UNIT 1- CONTRACT OF INDEMNITY

The literal meaning of the term "Indemnity" means "Security against loss"

CAN BE DEFINED AS,

- "a duty to make good any loss damage or liability incurred by another",

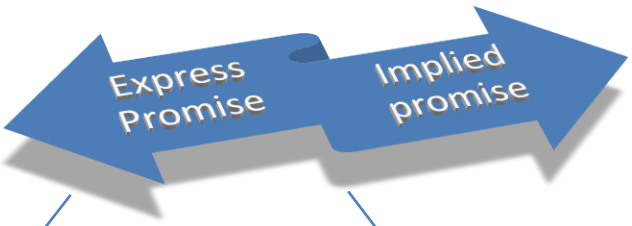
OR ALTERNATIVELY,

- "the right of an injured party to claim reimbursement for its loss, damage or liability from a person who has such duty

According to the Indian Contract Act, 1872, Section 124 which provides that "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".

NATURE OF CONTRACT OF INDEMNITY

Contract of Indemnity sets out:



Express indemnity, is a written agreement where the term and condition are such that the concerned parties abide are usually indicated e.g. insurance indemnity contracts, construction contracts, agency contracts etc.

Implied indemnity seems not to be covered under Section 124 of the Indian Contract Act.
On the other hand, Implied contracts is obligation to indemnify that are not in the written form but arises from certain circumstances or by the conduct of the parties involved e.g. agent-principle business relationship.

Special Cases of Implied Indemnity in Indian Contract Act:	1) U/s 69 if a person who is interested in payment of money which another is bound by law to pay and therefore pays it, he is entitled to be indemnified. For instance – if a tenant pays certain electricity bill to be paid by the owner, he is entitled to be indemnified by the owner.
	2) Section 145 provides for right of a surety to claim indemnity from the principal debtor for all sums which he has rightfully paid towards the guarantee.
	3) Section 222 provides for liability of the principal to indemnify the agent in respect of all amounts paid by him during the lawful exercise of his authority.

PARTIES TO CONTRACT OF INDEMNITY

- Indemnifier (Promisor): the person who make good the loss
- Indemnified or Indemnity-Holder (Promisee): the person whose loss is to be made good

Rights of Indemnified or Indemnity Holder [Section 125]:

1. Recovery of loss:

The indemnity holder has a right to recover all the losses from the indemnifier, which has been promised to pay under the contract.

Illustration: A car insured with the insurance company against loss due A's car gets accident. Now A has a right to recover the loss company suffered by him due to this accident.

2. Recovery of damage:

The indemnity holder has a right to recover all the damages from the indemnifier which he has to pay in a suit by third party related to subject matter of the indemnity and indemnifier has promised under the contract to compensate him.

Illustration: A has got insured his cat with insurance company and company has promised to pay any loss suffered by A due to the insured car. B is injured by A's car and A has to pay RS 10000 to B under court's order. Now A has right to recover the amount of damage form the insurance company.

3. Recovery of cost of suit:

The indemnity holder has a right to recover ali the costs, which he has to spend on bringing or defending any suit related to indemnity with the permission of the indemnifier.

Illustration: A got his car insured with an insurance company against all sort of accidental loss. A's car got an accident with B's truck and A has to spend Rs1000 in order to sue against B for the recovery of cars damages behalf of the insurance company Now A Will be entitled to recover cost Sufi as well as damages from the Insurance company.

4. Recovery of cost of compromise;

The Indemnity holder is entitled to recover the sum of more paid by him for any compromise made in case of any suit by third provided that It IS not contrary to such contract. **Illustration:** A got his car insured with the insurance company and the insurance company has promised to compensate A for losses or damages suffered by A due to Insured car A's car got accident mth B's car and in an act. taken by B, A has to compose by paying Rs. 5000 to B. Now A is entitled to recover this cost of compromise form the insurance company.

Rights of Indemnifier:

After compensation of the indemnity holder, indemnifier reserves the right to all the ways and means by which the indemnifier could have safeguarded himself from the loss.

The contract act is silent about the rights of indemnifier in a contract of Indemnity. But it is assumed that under such contract, the indemnifier has the same rights as the surety has according to section 140 and 141 n a contract of guarantee.

So the indemnifier has all the rights which the creditor has against the principal debtor and is entitled to the benefits of every security which the creditor has against the principal debtor whether he knows about such security or not.

Where one person has agreed to indemnify the other, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss. **[Simpson v Thomson]**

Principle of Subrogation is applicable because it is an essential part of law of indemnity and is based on equity and the Contract Act contains no provision in contravention with **[Maharaja Shri Jarvat Singhji v Secretary of State for India]**

Illustration

A gets his car insured With the insurance company against an annual premium of Rs20000 for all sort of accidental Josses Now Insurance company (indemnifier) has a legal right to get Rs.20000 from A, otherwise, a company will not be responsible for any sort of loss.

LANDMARK CASE LAW

ADAMSON vs. JARVIS [1827] 4 BING 66

FACTS: Adamson was an auctioneer who was given cattle by Jarvis to be sold at an auction. Adamson followed the instructions and sold the cattle. But Jarvis was not the owner of the cattle. The real owner of the cattle sued Adams for conversion and was successful. Adamson had to pay damages and he then sued Jarvis to be indemnified for the loss that he suffered by way of damages to be paid to the real owner.

HELD: Adamson carried out Jarvis's instructions and was entitled to presume that if anything went wrong as per instructions, he would be indemnified. Jarvis was ordered to pay damages to Adams

GAJAN MORESHWAR V. MORESHWAR MADAN AIR 1942,

it was decided that law relating to indemnity is by no means exhaustive and thus, the court in India shall follow the English law. In the same case, English equity law was discussed, whether requiring an indemnity holder to actually pay and clear the damages before claiming them from the indemnifier places an undue burden on indemnity holder. Thus, if the liability of an indemnity holder becomes absolute, he was held entitled to get the indemnifier to pay off the claim or to pay the court sufficient amount of money for making a fund to pay the claim as and when it was made.

PROVISIONS & ENFORCEABILITY IN THE UNITED KINGDOM ON INDEMNITY

In order to define the contract of indemnity in U.K., the English Law uses a maxim "***you must be damnified before you can claim to be indemnified***"[51]. By this, we mean that until and unless promisee has not undergone any injury, he cannot claim indemnity.

The injury is one of the main essential of indemnity under English law.

The English rule of indemnity is that the indemnifier will compensate to indemnity holder only after the later has faced any loss or has worked as per the instructions of indemnifier or has incurred cost during suit proceedings or has paid any amount in compromise. In the absence of loss, contract of indemnity cannot be invoked by indemnity holder. Earlier the indemnity was enforceable once the losses were paid by the indemnity holder. After paying of losses he could seek relief of indemnity from indemnifier.

But such provisions were causing trouble to the indemnity holder where he cannot pay the claim from his pockets. The Court of Equity in order to sort relief removed the principle of being damnified in order to be indemnified. The indemnifier in such a situation is liable to indemnify for the promise made without the happening of actual loss.

Later the enforceability of indemnity shifted with the judgment of Buckley LJ in the case Richardson Re, ex parte The Governors of St. Thomas Hospital where he stated, “Indemnity is not necessarily given by repayment after payment. Indemnity requires that the party to be indemnified in the first occurrence shall never be called upon to pay”.

In another landmark judgement of Re Law Guarantee & Accidental case it was rightly observed by Kennedy LJ “that indemnity does not merely mean to reimburse in respect of the money paid, but to save from the loss in respect of the liability against which the indemnity has been given because otherwise, indemnity may be worth very little if the indemnity-holder is not able to pay in the first instance”.

The contract of indemnity in U.K. has a much wider scope than Indian Law since the loss may be due to the conduct of an individual or it can also arise from some event or accident, like in case of fire. But in India, only the former condition applies. In U.K., life insurance is not considered as the contract of indemnity. This is because the value of an individual’s life cannot be determined and where the loss is not a certain contract of indemnity does not arise. Moreover, U.K. accepts both implied and expressed contract of indemnity.

PROVISIONS & ENFORCEABILITY IN INDIA ON INDEMNITY

In India, Law of indemnity has a narrower scope in comparison to English Law. As per the definition of indemnity under section 124 of Indian Contract Act, 1872 indemnity has a limited scope since indemnity holder is only compensated in case loss occurred due to human agency. It does not include any other event or accident for the same.

Unlike U.K., India does not have a specific provision for enforceability of the contract of indemnity. There have been conflicting judgements regarding the same. But now the opinion of Equity Courts is been followed.

The first Indian case to provide indemnity before payment was ***Osman Jamal And Sons Ltd. v Gopal Purshottam***. In this case, the Plaintiff Company was a commission agent for the defendant firm for buying and selling of Hessian and Gunnies and the defendant will also indemnify in case of any loss. Plaintiff bought Hessian from one Maliram Ramjidas. Defendant failed to make payment or take delivery of the same and later Maliram Ramjidas sold the same to another at a lesser price. Maliram Ramjidas sued plaintiff for damages for the loss occurred. Plaintiff was winding up and asked the defendant to indemnify the same to which the defendant refused to state that the plaintiff at the foremost defaulted in making payment. But the court held that the defendant was liable to indemnify the plaintiff.

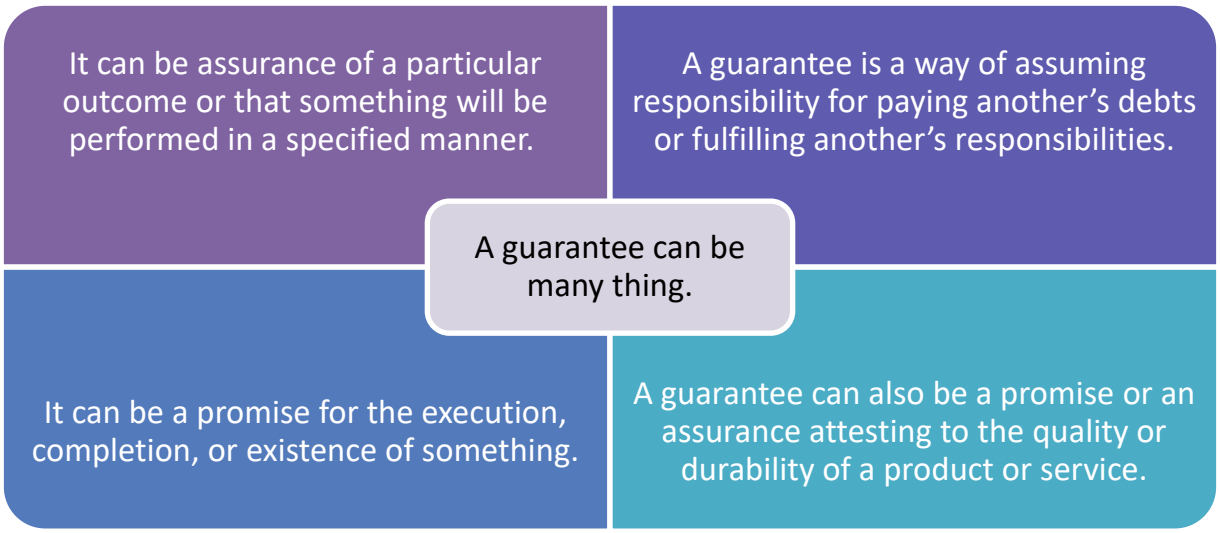
Also in the case of ***The New India Assurance Company Ltd. v The State Trading Corporation of India Ltd. and Anr***, The Gujarat High Court upheld the view of *Gajanan Moreshwar v Moreshwar Madan* by stating that indemnifier or the defendant is liable to pay in case of breach of promise irrespective of actual loss. Indemnity does not mean reimbursing the amount but it means to protect the indemnifier from the liability.

There is no specific mention of an implied contract of indemnity in Indian Contract Act, 1872. But the Privy Council has given recognition to an implied contract of indemnity as well. In the 13th report of Law Commission of India, 1958, it has recommended two amendments in Indian Contract Act, 1872 regarding loss to compensated from both caused by human conduct as well as any event or accident. Moreover, it has also demanded the inclusion of implied contracts of indemnity. Indian law only covers express contract of indemnity whereas implied contracts are left at the mercy of judicial decisions.

Contract of Guarantee

> Nobody can really guarantee the future. The best we can do is size up the chances, calculate the risks involvd, estimate our ability to deal with them and make our plans with confidence.
>
> -Henry Ford II

MEANING AND DEFINITION OF CONTRACT OF GUARANTEE



The English law defines a 'guarantee' as a 'promise to answer for the debt, default or miscarriage of another'.

***Section 126* of the Indian Contract Act, 1872**
says that a Contract of Guarantee is a contract to perform the promise or discharge the liability or a third person in case of his default.

► **Illustration:** If A gives an undertaking stating that if ` 200 are lent to C by B and C does not pay, A will pay back the money, it will be a contract of guarantee. Here, A is the surety, B is the principal debtor and C is the creditor.

PARTIES TO CONTRACT OF GUARANTEE

Surety is the person gives the guarantee,

- Contract Act uses the word 'surety' which is same as 'guarantor' Prima facie, the surety is not undertaking to perform should the principal debtor fail; the surety is undertaking to see that the principal debtor does perform his part of the bargain

Principal Debtor is one for whom the guarantee is given and

- A contract of guarantee pre-supposes a principal debt or an obligation that the principal debtor has to discharge in favour of the creditor.

creditor is the person to whom the guarantee is given.

In a contract of guarantee, there are two contracts;

- the Principal Contract between the principal debtor and the creditor,
- Secondary Contract between the creditor and the surety.

The contract of the surety is not contract collateral to the contract of the principal debtor but is an independent contract. Liability of surety is secondary and arises when principal debtor fails to fulfill his commitments. Even an acknowledgement of debt by the principal debtor will bind the surety.

► **Illustration:** 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 deemed sufficient consideration for C's promise.

► **Illustration:** 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.

► **Illustration:** A sells and delivers goods to B. C afterwards, without consideration, agrees to pay for them in default of B. The agreement is void.

The most basic function of a contract of guarantee is to enable a person to get a job, a loan or some goods as the case may be. In case, a person is desirous of buying a car on a hire- purchase agreement by making monthly payments over a period of time but the car dealer asks for guarantee. Then someone would have to assure him that he will make the monthly payments in case of default by the person who is buying the care. Such an undertaking results in a contract of surety ship or guarantee. Guarantee is security in form of a right of action against a third party called the surety or the guarantor.

ESSENTIALS OF CONTRACT OF GUARANTEE

1) Essentials of a valid contract: Since Contract of Guarantee if a species of a contract, the general principles governing contracts are applicable here. There must be free consent, a legal objective to the contract, etc. Though all the parties must be capable of entering into a contract, the principal debtor may be a party incompetent to contract, ie., a minor. This scenario is discussed later in this chapter.

2) A principal debt must pre-exist: A contact of gurantee seeks to secure payment of a debt, thus it is necessary there is a recoverable debt. There can not be a contract to guarantee a time barred debt.

3) Consideration received by the principal debtor is sufficient for the surety. Anything done, or any promise made for the benefit of the principal debtor can be taken as sufficient consideration to the surety for giving guarantee.

NATURE OF CONTRACT OF GUARANTEE

- The contract of guarantee has to be clear: A letter clearly stating the intention to guarantee a transaction will go on smoothly or one will behave appropriately conduct himself at work place will suffice. But a promise to pay extra attention or to take care of it does not constitute a guarantee.
- In India, a contract of guarantee may be oral or written. It may even be inferred from the course of conduct of the parties concerned. Under English Law, a guarantee is defined as a promise made by one person to another to be collaterally answerable for the debt, default or miscarriage of the third persons and has to be in writing.
- It is not essential that the Principal Contract must be in place/existence at the time of the Contract of Guarantee being made. The original contract between the debtor and the creditor may be about to come into existence. Similarly, in certain situations, a surety may be called upon to pay though the principal debtor is not liable at all. For example, in cases where the principal debtor is a minor, the surety will be liable though the minor will not be personally liable.
- A contract of guarantee is to be enforced according to the terms of the contract.
- A guarantee is a contract of s*trictissima juris* that means liability of surety is limited by law; a surety is offered protection by law and is treated as a favored debtor in the eyes of the law. A contract of guarantee is not a contract 'uberrimae fidei' (requiring utmost good faith). Still the suretyship relationship is one of trust and confidence and the validity of the contract depends upon the good faith of the creditor. However, it is not a part of the creditor's duty to inform the surety about all his previous dealings with the principal debtor.
- In *WYTHES vs. LABON CHARE 1858*, Lord Chelmsford held that the creditor is not bound to inform the matters affecting the credit of the debtor or any circumstances unconnected with the transaction in which he is about to engage which will render his position more hazardous.
- Since it is based on good faith, a contract of guarantee becomes invalid if the guarantee is obtained from the surety by misrepresentation or concealment as given in *Sections 142 and 143* of the ICA, 1872.

► **Illustration:** If a clerk in an office occasionally fails to account for some of the receipts for money collected, he may be asked for surety. In case the person who steps up to be a surety for the clerk in the office is not informed of the occasional lapses on part of the clerk which lead to the requirement of a surety, any guarantee given by him is invalid as something of importance and directly affecting his decision to act as a surety was concealed from him.

► **Illustration:** A guarantees to C payment for iron to be supplied by him to B to the amount of 2,000 tons. B and C have privately agreed that B should pay ` five per ton beyond the market price, such excess to be applied in liquidation of an old debt. This agreement is concealed from A. A is not liable as a surety.

But where the surety ship is with regard to an advance to be made by a bank, the bank need not disclose past indebtedness to the surety unless it relates to the particular transaction.

Indian Partnership Act 1932

Indian Partnership Act 1932

The law of partnership is contained in the Indian Partnership Act, 1932, which came into force on 1st Oct.1932.This is based on the English Law on the subject as contained in the Partnership Act, 1890. The main principles are the same. The most important change is regarding provision for registration of firms.

Definitions and Nature of Partnership

Section 4 of the Partnership Act defines Partnership as "the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all".

The English Partnership Act defines Partnership as-
"The relation which subsist between the persons carrying on business in common with a view earning profit".

Essential Elements of Partnership
Partnership

If we elaborate we find this definition points out thefollowing essential elements of partnership:

1. There must be at least two persons.
2. That it is the result of an agreement.
3. That it is organized to carryon a business.
4. That the persons concerned agree to share the profits of the business.
5. That the business is to be carried on by all or anyone of them acting for all.

Test of Partnership

In a partnership, all the elements mentioned above must be present.
Thus, althoughsharing of profits is a strong evidence of the existence of partnership, yet the true test is the element of agency.
For this reason, creditor who advances money on the understanding that he would have a sharein the profits of business in lieu of interest is not a partner. Similarly, an employee getting a share ofprofits as a part of his remuneration, or the seller of goodwill of the business receiving a portion of the profits, is not a partner. In all these cases the third element of partnership, namely, agency is absent. A creditor or an employee or the seller of the goodwill cannot bind the firm by their actions, can be calledpartners.
Thus, in the absence of definite partnership agreement the Court, in order to determine the existence of partnership, must take into account all the relevant circumstances, such as, the conduct of parties; themode of doing business; who controls the property; the mode of keeping accounts; the manner of distribution of profits; evidence of employees and correspondence.
To sum up, for determining the existence of partnership, the following must be considered:
(1) There must be an agreement-oral or written;
(2) The agreement must be to share the profits
(3) Those profits must arise from a business; and
(4) That business must be carried on by all or anyone of them acting for all

Partnership and Co-ownership

Co-ownership means joint ownership. A and B jointly buy a horse for their riding. They are co-owners of the horse and not partners.

(1) Co-ownership is not always the result of agreement. It may arise by the operation of law or from status, e.g., co-heirs of a property, persons to whom property is jointly, given. Partnership, on the other hand, is necessarily theresult of agreement, express or implied.
(2) Partnership necessarily involves working for profit. Co-ownership does not.
(3) One co-owner can transfer his own rights without any intimation but partner have to take the consent of all other partner before transferring his rights.
(4) A partner is the agent of the partnership to bind the firm. A co-owner has no implied authority to bind the co-owner.
(5) Partnership always implies a business. Co-ownership can exist without any business, e.g., joint ownership of a residential house.
(6) A partner, being an agent of other partners has a lien on the partnership property. A co-owner has no such lien on the joint property.

Partnership and Company :

The points of distinction between the two may be summed up as follows :

1. A company comes into existence after registration under the Companies Act. In the case of partnership, registration is not compulsory.
2. The maximum number of persons required to form a company is seven in the case of public company and two in the case of a private company. A partnership can be formed with two persons.
3. A public company may have any number of members. A private company cannot have more than 50 members. Apartnership carrying on banking business cannot have more than 10 members and a partnership carrying on any otherbusiness cannot have more than 20 partners.

4. A company is regarded by law as a single person separate from the members, who constitute it. It has a legalpersonality. The partnership is a collection of partners. It is not a legal entity and has no rights and obligations separate from its partners.
5. The property of a partnership is the joint property of the partners. Each partner has authority to bindthe firm by his acts. The property of a company belongs to the company. A shareholder in his individual capacity cannot bind the company by his acts.
6. A company has perpetual succession. The death or insolvency of a member does not affect its ex istence.A partnership firm, in the absence of a contract to the contrary, comes to an end when a partner dies or becomes insolvent.
7. The liability of partners for the debts of the firm is always unlimited. The liability of the members of a company is usually limited.
8. The creditors of a partnership firm are creditors of the individual partners, and a decree obtained against afirm can be executed even against the individual partners. The creditors of a company are not creditors of individual shareholders. A decree obtained against a company can be executed only against the company, and not against the shareholders.
9. A partner of a firm cannot transfer his interest in the firm to an outsider and make the transferee apartner without the consent of all the others. A shareholder of a company can transfer his shares and the transferee can become a member of the company.

Partnership and Joint Hindu Family Firm

1. A partnership is created by agreement: A Joint Hindu family firm comes into existence by operation of law.Membership of joint family firm is the result of status, i.e. position of the person concerned as member of a joint family.
2. In a partnership, the death of a partner dissolves the firm, the death of a coparcener does not dissolve the joint family firm.
3. In a joint family firm only the manager or Karta has authority to bind the members by his acts, in a partnership each partner can do this.
4. In a partnership every partner is personally liable to an unlimited extent for the debts of the firm. In a joint Hindufamily firm, only the Karta has unlimited liability. The other members are liable only to the extent of their sharein the joint family business. Minor members are not liable.
5. Minor members of a joint family are members of the firm from the date of their birth.
6. In a partnership a minor cannot be a partner, as a partnership is the result of an agreement and a minor does not have capacity to enter into a contract.
7. The partners have a right to demand accounts of the partnership firm, a co-partner cannot ask for anaccount of past dealings; his only right is to ask for partition of the assets of the firm.
8. A partnership is governed by the Partnership Act; a joint Hindu family firm is governed by Hindu Law.

FORMATION OF PARTNERSHIP

In a contract of partnership all the elements of a valid contract must be present. There must be free consent,consideration, lawful object and the parties must have capacity to contract. Thus, an alien friend can enter intopartnership, an alien enemy cannot. A minor is not competent to be a partner. A minor can, however, be admitted tothe benefits of partnership, if all the partners agree to do so.

A partnership agreement may be oral or it may beimplied or inferred from the conduct of the parties. When it is reduced to writing it is incorporated in a documentknown as the Deed of Partnership or Articles of Partnership. The deed must be stamped according to the provisions ofthe Stamp Act. Thereafter, the firm may be registered with the Registrar of Firms, although registration is notcompulsory. Because of the disabilities suffered by an unregistered firm, it is advisable to register every firm.

REGISTRATION OF A FIRM

According to S.58 the registration should be made in the form of a Statement signed by all the partners and giving :

(1) The name of the firm;
(2) The principal place of business of the firm;
(3) Name of the other place (if any) where the firm carries on business;
(4) the date on which each partner joined the firm;
(5) the names in full and addresses of the partners;
(6) the duration of the firm. Furthermore, every change in the names and addresses of the partnersor place of business should be notified to the Registrar of Firms from time to time.

Effect of Non-registration of a Firm: Unlike English law registration is optional under Indian PartnershipAct, But it becomes indirectly necessary, so that if a firm is not registered, the following consequences will ensue :

1. A partner of an unregistered firm cannot file a suit against the firm or any partner to enforce a right arising from a contract or conferred by the Partnership Act [S.69(1)] Where A, B, C and Darepartners in an unregistered firm. D is wrongfully expelled from the firm by the rest of partners. D can not filea suit for his wrongful expulsion, the only remedy available to him is to file a suit for the dissolution of firm.
2. An unregistered firm cannot file a suit against any third party to enforce a right arising from acontract. [S. 69(2)]. This clause does not prohibit an unregistered firm to enter into contract with thirdparties, the bar is only against taking action against third parties. However, the third parties are free to takeaction against unregistered partnership.
3. An unregistered firm cannot claim a set off above Rs.100 in a suit [S.69(3)]. Non registration of the firm does not affect the following:
   (a) The right of a third party to sue the firm or any partner.
   (b) The right of a partner to sue for dissolution of the firm or for settlement of accounts if the firm isalready dissolved or for his share of the assets of the dissolved firm.
   (c) The right of an unregistered firm to sue to enforce a right arising otherwise than out of contract,e.g., for an injunction against a person wrongfully using the name of the firm; or for wrongfulinfringement of a trade mark. Registration is not necessary for a suit in respect of tort committed by a partner.
4. The power of an Official Assignee or Official Receiver to realise the property of an insolvent partner.
5. A suit or set-off not exceeding Rs. 100 in amount.
6. The rights of firms or partners of firms having no place of business in India.

Registration Time: An unregistered firm can get itself registered at any time before it is actuallydissolved. But in any case it should be registered before filling a suit in the court, otherwise the court willreject such suit. In order to institute a suit, not only the firm must be a registered one, but all the partners suing must also be shown as partners in the register of firms.
Example: A partnership firm consisting of A, Band C as partners was formed and it commenced itsbusiness before getting itself registered. The firm filled a suit against X for a claim of Rs.5000 for goodssupplied to him and immediately after filling the suit, the firm was registered. The court will dismiss the suitbecause the firm was unregistered at the time of filling the suit.But where a suit is dismissed because of the non-registration of a firm or it is with-drawn before it is dismissed by the court, the firm can subsequently get itselfregistered and file the suit again provided the suit has not become time barred.

Firm and Firm Name

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" (Sec. 4).A firm is not an artificial and legal person li ke a company. It is merely a collective name for thepartners. It is just a convenient way of describin g the partners. The rights and obligations of the partnership firmsare really the rights and obligation s of the partners constituting it.

Duration of Partnership

The parties may fix the duration of the partnership or say nothing about it. Where the partners decide to carry on the business for a certain period of time, it is called a "partnership for a fixed period". When the period is over, the partnership comes to an end. Where the partnership is formed for the purpose of carrying on particular venture, it is called a "particular partnership". It comes to an end on the completion of venture. It is also open to partners to say nothing about the duration orto agree that the business shall be carried on not for a fixed period, but so long as the partners are inclinedto carry it on. Such a partnership is called "Partnership at will". It is dissolved by notice by a partner to his co-partners.

Partnership Property: The property of the firm includes

(i) all property and rights and Interest in property brought into the stock of the firm or subsequently added thereto

(ii) The propertyacquired in the course of the business with money belonging to the firm

(iii) The goodwill of the business,the property of the firm is acquired to be used by the partners for the exclusive use of the firm.

Examples of Partnership Property

(a) A partnership is formed with A, Band C as partners. A contributes to the stock of the firm a plot of land. B amotor lorry and C the sum of Rs.10,000. Subsequently, the firm purchases, out of its earnings, a house. All theseproperties and the goodwill of the business are properties of the firm.

(b) A colliery owned by A was taken on lease by a firm consisting of A and B as partners and was worked. The profits were shared by the partners. The colliery was taken to be property of the firm for the timebeing. But if the colliery were only worked in partnership by A and B who shared profits of the venture, thecolliery remained the property of A, and did not become the property of the firm.

Partnership Deed

The agreement creating partnership may be express or implied and the latter may be concluded from the conduct or the course of dealing of the parties or from the circumstances of the case. But it is in the interest of the partners that agreement must be in writing. But it is in the of the partners that the agreement must be in writing. The document which contains this agreement is called Partnership deed. It contain provisions relating to the nature and principle place of business, name of the firm, the names and address of the partners, the duration of the firm, profit sharing ratio, interest on capital and drawings, valuation of goodwill on the death or retirement of a partner, management, accounts, arbitration etc. The Indian Stamp Act 1889 require that the deed must be stamped.

Who can become a Partner

Any person who is competent to contract can enter into partnership agreement. The position of foll owingpersons need special consideration :

1. **Minor:** A minor is not competent to contract, hence he can not enter into partnership contract. However he may be admitted to the benefits of partnership, if all the partners agree to do so.
2. **Alien:** An alien enemy can not be partner in an Indian firm.
3. **Person of unsound mind:** A person of unsound mind, not being competent to contract cannot enter into a partnership contract.
4. **Company:** A company, if authorised by its articles of association can enter into partnershipbecause it is a person competent to contract in the eyes of law.
5. **Firm:** A firm can not enter into partnership contract. If a firm, at all enters into partnership inthat case, the members become partners in the other firm in their individual capacity.

Position of a Minor admitted as a partner to the Benefits of Partnership

We have seen earlier that partnership results from a contract. Consequently, a minor cannot enter into acontract of partnership as an agreement by a minor is void. It follows that a minor cannot become a partner, nor can a partnership be created with a minor as a partner. But if all the partners agree a minor may beadmitted to the benefits of an already existing partnership firm. It should be remembered that even aftersuch admission the minor does not become one of the group of persons called the firm.

Section 30 of the Partnership Act lays down the rights and liabilities of a minor admitted to the benefits of a partnership as follows :

1. The minor has a right to such share of the property and of the profits of the firm as may be agreed upon by the partners.
2. The minor has access to and inspect and copy any of the accounts of the firm.
3. The minor is not personally liable for the debts and obligations of the firm although his share in the profits and of the assets of the firm will be liable for the same.
4. So long as the minor continues to be in the firm, he cannot file a suit against the other partners for an account or for the payment of his share of the property or profits of the firm. He can file such a suitonly when he wants to severe his connection with the firm.
5. At any time within six months of his attaining majority, or of his obtaining knowledge that he had been admitted tothe benefits of *partnership, whichever date is later, the minor has to elect either to become or not tobecome a partner in the firm.* Such election may be made by a public notice. If he gives no notice to this effect heshall become a partner in the firm on the expiry of the said six months.
6. A minor who thus becomes a partner will become personally liable for all debts and obligations of the firmincurred since the date of his admission to the benefits of partnership.

7. Where the minor elects not to become a partner the following rules will apply:
(a) His rights and liabilities continue to be those of a minor upto the date on which he gives public notice to not to become its partner.
(b) His share will not be liable for any act of the firm done after the date of the notice.
(c) He can sue the partners for his share of the property and profits of the firm.

Classes of Partners

A person who deals with a firm would like to know who are the partners, and to what extent they are liable to himfor his claim against the firm. The position of different classes of partners may be examined as follows :

Actual Partner

A person who has by agreement become a partner and who takes actual part in the conductof partnership business is an actual and working partner. He is the agent of other partners for the purposesof the business. All his acts in the ordinary course of the business bind him and the other partners to third parties.

Partner by Holding Out:

A person may, under certain circumstances, be liable for the debt of the firmalthough he is not a partner. If a person by words spoken or written, or by conduct represents himself orknowingly permits to be represented, to be a partner in a firm, he is liable as a partner in that firm toanyone who has, on the faith of such representation, given credit to the firm (Sec. 28), So, where a personconducts himself as to lend another to believe that he is a partner, although really he is not, and on thatbelief the other person gives credit to the firm, he is deemed to be a partner by holding out.
(a) A, B and C carry on a business for profit. C contributes neither labour nor money, and does not receive anyshare of the profits, but his name is used as a partner in the firm. He is liable to every outsider who givescredit relying on his being there as partner.
(b) Suresh carried on business in the name of the business as Ram Saran and Co., employed aperson named Ram Saran to act as manager of the business. Ram Saran was regarded as partner by holding out or estoppel.
The position of a partner by holding out is peculiar. He is liable to make good the loss which the person giving creditto the firm may suffer, but he has no claim upon the firm. A partner who has retired from the firm but allows the useof his name to continue with the firm may become liable to third parties by the principal of holding out.

Example:

Pretired from a firm consisting of PX and R as its partners. He failed to give notice of his retirement. Afterhis retirement S joined the firm and the firm continued its business under the old name. One creditor fileda suit for the recovery of his debt after the retirement of P. It was held the creditor could make P and hisco-partners and R liable for his debt on the principle of estoppel. But he can not file a suit against P, X, Rand S, all of them together.

Dormant or Sleeping Partner:

A person who is in reality a partner but whose name does not appear in any way as partner, nor does he take part in the management of the business, and is not, therefore known to outsiders as partner in the firm, is called a dormant or sleeping Partner Such a partner is liable to third parties who gave credit to the firm even without knowing of his being partner but subsequently discovering the fact. A sleeping partner's liability rests on his being in the position of anundisclosed principal.One important distinction exist s between a sleeping and active partner with regard to liability towards third parties.

A sleeping partner is responsible for the debts of the firm takenduring the tenure of hispartnership li ke an active partner. But his liability ceases immediately on retirement and he is not supposed to give a notice on his retirement like other active partners.

Partners in Profits only: A partner may stipulate with his co-partners that he will be entitled to a certainshare of the profits without being liable for losses. But he will be liable to outsiders for all debts and obligations of the firm.

Sub-partner : Where a member of a firm agrees to share the profit derived by him from the firm with astranger, there arises a sub-partnership between him and the stranger. Such stranger is said to be a sub-partner, although he is in no way a partner in the original firm, has no rights against it, nor he is liable for its debts.

Incoming Partner: A person who is admitted as a partner into an already existing firm with the consent ofall the partners is called an incoming or new partner. The incoming partner does not become liable for anyact of the firm done before he becomes partner, unless he agrees to be so liable. His liability commences from the date of admission as a partner.

Retired or Outgoing Partner: A partner who goes out of a firm in which the remaining partners continueto carry on the business is called retired or outgoing partner; A retired partner continues to be liable forall debts and obligations of the firm incurred before his retirement.A, B and C are partners and D is thecreditor of the firm. A retires from the firm. A remains liable to D. Two years after A's retirement the firm becomesinsolvent. A wil1 be liable for the debts existing at the time of his retirement.A retired partner will be liable for all debts incurred after his retirement if he fails to give proper notice of his retirement. In that case he is deemed to be a partner by holding out. A retiring partner will also be liable to third parties for all transactions of the firm beganbut unfinished at the time of his retirement, even though notice of his retirement is given to third party.A retiringpartner may, however, be discharged from the liability by the consent of the creditors. The remaining partners will beliable in such a case. This rule is the application of the general rule of the law of contract known as "Novation".

Right after retirement to share profits or interest -(Sec. 37)

Where a member of a firm ceases to be the partner of the firm and the continuing partner carry on the business withthe property of the firm without any final settlement of accounts, i.e., without the share of the assets of theoutgoing partner being paid over, or without his interest being purchased by the remaining partners, the estate of thepartner is entitled to share in the profit earned with the aid of the assets of such outgoing partner, or interest at 6%per annum at the option of the out going partner. The option to claim a share of the profits or interest can beexercised only when the accounts of the subsequent business are made. But a claim both for share of the subsequentprofits as well as interest will not be allowed. Also, once the outgoing partner has decided, then he will not beallowed to go back on it, nor he be permitted to claim profits for part of the period and interest for remainingperiod.

Nominal Partner: If a person's name is used as a member of the firm, although he is not a real memberand not entitled to the share of profits of the firm, is known a nominal partner. Such a person is anecessary party only in cases of negotiable instruments.

Rights of the Partner

1. Subject to any contract to the contrary, every partner has a right to take part in the management of the business.
2. Every partner has a right to be consulted and heard in all matters affecting the business of the firm. In all mattersof importance and those affecting the policy and nature of the business or any change in the constitution of thefirm, all the partners must agree, mere majority will not be sufficient. But in ordinary routine matters the majorityrule may apply.

3. Every partner, active or dormant, has a right of free access to all records, books and accounts of the business and also to examine and copy them.
4. Every partner is entitled to equal share in the profits, unless different proportions are stipulated
5. A partner who has contributed more than his share of the capital for the purposes of the business is entitled tointerest at a rate agreed upon and where no rate is agreed upon, at6 per cent per annum. But a partner is notentitled to any interest on the capital subscribed by him unless there is an agreement or a trade custom to thateffect exists.
6. Subject to a contract to the contrary, a partner is entitled to be indemnified by the firm for all acts done by him inthe course of the partnership business, for all payments made by him to discharge the debts and liabilities of the firmand for expenses made by him in an emergency.
7. Every partner is joint owner of the partnership property and is entitled to have the property used exclusively for the purposes of the partnership.
8. A partner has power to act in emergency for protecting the firm form loss.
9. Every partner is entitled to prevent the introduction of a new partner into the firm without his consent.
10. An incoming partner is not liable for any debts and obligations of the firm incurred before he joined it, excepting by his own consent.
11. Every partner has a right to retire from the firm.
12. Every partner has a right to continue in the partnership and not to be expelled from it unless power of expulsionis provided in the partnership agreement.
13. Every outgoing partner has a right to carry on competing business, but without using the firm's name and withoutsoliciting the customers. He may, however, agree not to do so for a specified period and within specified local limits.
14. Where a partner dies or otherwise ceases to be a partner because of his retirement, expulsion, insolvency,insanity, and the other partners carry on the business with the property of the firm without any final settlement ofaccounts, the estate of the deceased partner, or the partner himself, as the case may be, is entitled to share in theprofit earned with the aid of the assets of the outgoing partner, or interest at 6 per cent per annum, if so desired bythe legal representatives of the deceased partner, or by the partner himself.

Duties of Partners

The relation of partners is based on mutual confidence and the law required that a partner must act towards the otherpartners with the utmost good faith. In particular, the Partnership Act provides for the following duties :
1. Every partner must carry on the business of the firm to the greatest common advantage.
2. Every partner must be just and faithful to the other partners.
3. A partner is bound to keep and render true, proper and correct account of the partnership. He mus t permitthe other partners to inspect such accounts and take copies of them. All money of the firm that may come tohis hand must be handed over to the firm.
4. Every partner is an agent of the other partners and as such is bound to communicate full information relatingto the business of the firm to the other partners.
5. Every partner is bound to indemnify the firm for any loss caused by his fraud in conduct of business. Also, if apartner commits a fraud on his co-partner, he must indemnify him for any loss caused to him.
6. Every partner who is guilty of wilful neglect in the conduct of the business and the firm suffers loss inconsequence, is bound to make compensation to the firm and other partners.
7. Subject to a contract to the contrary, every partner is bound to share losses equally with the others.

8. Every partner is bound to attend diligently to the business of the firm and in the absence of an agreement tothe contrary, he is not entitled for any remuneration; whether in the form of salary, commission, or otherwise, onaccount of his own trouble in conducting the business of the firm.
9. In the absence of an agreement to the contrary, every partner is bound to hold and use the partnership property for the firm.
10. A partner cannot make private gain by reason of his membership with the firm. Thus, where a partner inthe course of the business has received an information and uses it for his personal gain as against theinterest of the firm, he must pay over any benefits he may have obtained by the use of this information. Hecannot bargain for a private gain from the customers of the firm.
11. No partner can carry on any business which is likely to compete with the business of the partnershipexcept with the consent of the other partners. If he does so, he shall have to account for the profits ofsuch business to the firm, and also to compensate the firm for any loss sustained by his carrying on such competing business.
12. Every partner is bound to act within the scope of the actual authority conferred upon him. If he exceeds hisauthority, he shall have to compensate the other partners for any ensuing loss, unless they ratify his act.
13. No partner can assign or transfer his partnership interest to any other person so as to make him a partner in thebusiness. But a partner may assign his share in the profits and assets of the firm. The assignee or transferee will have noright to ask for the accounts or to interfere in the management of the business. He can only share the actual profits.On dissolution he can ask for the share of the assets and also the accounts since the date of dissolution.

Implied Authority of a Partner of the firm

If the act is "outside the usual course of the business of the firm" it will not bind the firm even if it is prudent or has benefited the firm unless it is ratified and approved by all the partners. Power to do the usual does not include power to do the unusual.
A partner has implied authority to bind the firm by all acts done by him in all matters connected with the partnership business and which are done in the usual way and are not in their nature beyond the scope of partnership.
If there is no usage or custom of trade to the contrary, the implied authority of the partner does not empower him to:
(a) Submit a dispute to the business of the firm to arbitration as it is not the ordinary business of partnership firm to enter into a submission for arbitration:
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(b) Open a bank account on behalf of the firm in his own name;
(c) Compromise or relinquish any claim or portion of a claim by the firm against a third party (i.e. an outsider).
(d) Withdraw a suit or proceedings filed on behalf of the firm;
(e) Admit any liability in a suit or proceedings against the firm;
(f) Acquire immovable property on behalf of the firm;
(g) Transfer immovable property on belonging to the firm; and
(h) Enter into partnership on behalf of the firm.

Rights of Transferee of a Partner's Share (Sec. 29)

A share in a partnership is transferable like any other property but as the partnership relationship is based on mutual confidence, the assignee of a partner's interest by sale, mortgage or otherwise cannot enjoy the same rights and privileges as the original partner. The supreme court has held the assignee will enjoy only the rights to receive the share of the profits of the assignor and the account of profits agreed to by other partners.

The rights of such a transferee are as follows:
(1) During the continuance of partnership, such transferee is not entitled **(a)** to interfere with the conduct of the business, **(b)** to require accounts, or **(c)** to inspect books of the firm. He is only entitled to receive the share of the share profits of the transferring partner and he is bound to accept the profits as agreed to by the partners, i.e., he cannot challenge the accounts.
Mercantile Law: The Indian
(2) On the dissolution of the firm or on the retirement of the transferring partner, the transferee will be entitled, against the remaining partners: **(a)** to receive the share of the assets of the firm to which the transferring partner was entitled, and **(b)** for the purpose of ascertaining the share, he is entitled to an account as from the date of the dissolution.
By virtue of **Section 31**, which we will discuss hereinafter, no person can be introduced as a partner in a firm without the consent of all the partners. A partner cannot by transferring his own interest, make anybody else a partner in his stead, unless the other partners agree to accept that person as a partner. At the same time, a partner is not debarred from transferring his interest. A partner's interest in the partnership can be regarded as an existing interest and tangible property which can be assigned.
Legal Consequences of Partner Coming in and going out (Section 31-38)
Introduction of new partner (Section 31): As we have studied earlier, subject to a contract between partners and to the provisions regarding minors in a firm, no new partners can be introduced into a firm without the consent of all the existing partners.
Introduction of the new partner
The liabilities of the new partner ordinarily commence from the date when he is admitted as a partner, unless he agrees to be liable for obligations incurred by the firm prior to the date. The new firm, including the new partner who joins it, may agree to assume liability for the existing debts of the old firm, and creditors may agree to accept the new firm as their debtor and discharge the old partners.
Retirement of a partner: A partner may retire:
(i) with the consent of all the other partners;
(ii) by virtue of an express agreement between the partners; or
(iii) in the case of a partnership at will, by giving notice in writing to all other partners of his intention to retire.
Such a partner, however, continues to be liable to the third party for acts of the firm after his retirement until public notice of his retirement has been given either by himself or by other partners. But the retired partner will not be liable to any third party of the latter deals with the firm without knowing that the former was partner [**Sub-Section (3) and (4)**].
Right of outgoing partners
(i) However, the partner may agree with his partners that on his ceasing to be partner, he will not carry on a business similar to that of the firm within a specified period or within specified local limits. Such an agreement will not be in restraint of trade if the restraint is reasonable [**Section 36(2)**]. A similar rule applies to such an agreement of sale of the firm's goodwill [**Section 53(3)**].
(ii) (a) On the retirement of a partner, he has the right to receive his share of the property of the firm including goodwill.
(b) An outgoing partner, where the continuing partners carry on business of the firm with the property of the firm without any final settlement of accounts with him, is entitled to claim from the firm such share of the profits made by the firm, since he ceased to a partner, as attributable to the use of his share of the property of the firm. In the alternative, he can claim interest at the rate of 6% per annum on the amount of his share in firm's property (**Section 37**).
(c) However, if by a contract between the partners, an option has been given to the surviving or continuing partners to purchase the interest of the outgoing partner and the option if duly exercised, the outgoing partner or his estate will not be entitled to any further share of the profits.

Liabilities of an outgoing partner

The retired partner will not be liable to any third party of the latter deals with the firm without knowing that the former was partner [**Section 32 (3)&(4)**]. Expulsion of a partner (**Section 33**): It is, thus, essential that: **(i)** the power of expulsion must have existed in a contract between the partners; **(ii)** the power has been exercised by a majority of the partners; and **(iii)** it has been exercised in good faith.

If all these conditions are not present, the expulsion is not deemed to be in bonafide interest of the business of the firm.The test of goods faith as required under **Section 33(1)** includes three things:

(a) That the expulsion must be in the interest of the partnership.

(b) That the partner to be expelled is served with a notice.

(c) That he is given an opportunity of being heard.

Insolvency of a partner (Section 34)

When a partner in a firm is adjudicated an insolvent, he ceases to be a partner on the date of the order of adjudication whether or not the firm is thereby dissolved. His estate (which thereupon vests in the official assignee) ceases to be liable for any act of the firm done after the date of the order, and the firm also is not liable for any act of such a partner after such date (whether or not under a contract between the partners the firm is dissolved by such adjudication).

Death of a partner (Section 35)

Where under the contract a firm is not dissolved by the death of partner, the estate of the deceased partner is not liable for act of the firm after his death. Ordinarily, the effect of the death of a partner is the dissolution of the partnership, but the rule in regard to the dissolution of the partnership, by death of partner is subject to a contract between the parties and the partners competent to agree that the death of one will not have the effect of dissolving the partnership as regards the surviving partner sunless the firm consists of only two partners. In order that the estate of the deceased partner may be absolved from liability for the future obligations of the firm, it is not necessary to give any notice either to the public or the persons having dealings with the firm.

In relation to **Section 35**, let us consider a concrete case. X was a partner in a firm. The firm ordered goods in X's lifetime; but the delivery of the goods was made after X's death. In such a case, X's estate would not be liable for the debt; a creditor can have only a personal decree against the surviving partners and a decree against the partnership assets in the hands of those partners.

A suit for goods sold and delivered would not lie against the representatives of the deceased partner. This because there was no debt due in respect of the goods in X's lifetime.

Revocation of continuing guarantee by change in the firm (Section 38)

It provides that a continuing guarantee given to a firm or to third party in respect of the transaction of a firm is, in the absence of an agreement to the contrary, revoked as to future transaction from the date of any change in the constitution of the firm.

RETIREMENT OF A PARTNER (Section 32).

(1) A partner may retire - (a) with the consent of all the other partners

(b) in accordance with an express agreement by the partners, or

(c) where the partnership is at will, by giving notice in writing to all the other partners of his intention to retire.

(2) A retiring partner may be discharged from any liability to any third party for acts of the firm done before his retirement by an agreement made by him with such third party and the partners of the reconstituted firm, and such agreement may be implied by a course of dealing between such third party and the reconstituted firm after he had knowledge of the retirement.

(3) Notwithstanding the retirement of a partner from a firm, he and the partners continue to be liable as partners to third parties for any act done by any of them which would have been an act of the firm if done before the retirement, until public notice is given of the retirement Provided that a retired partner is not liable to any third party who deals with the firm without knowing that he was a party.

(4) Notices under sub-section (3) may be given by the retired partner or by any partner of the reconstituted firm.

EXPULSION OF A PARTNER (Section33)

(1) A partner may not be expelled from a firm by any majority of the partners, save in the exercise in good faith or powers conferred by contract between the partners.

(2) The provisions of sub-sections (2), (3) and (4) of section 32 shall apply to an expelled partner as if he were a retired partner.

INSOLVENCY OF A PARTNER (Section34)

(1) Where a partner in a firm is adjudicated an insolvent, he ceases to be a partner on the date on which the order of adjudication is made, whether or not the firm is thereby dissolved.

(2) Where under a contract between the partners the firm is not dissolved by the adjudication of a partner as an insolvent, the estate of a partner so adjudicated is not liable for any act of the firm and the firm is not liable for any act of the insolvent, done after the date on which the order of adjudication is made.

Sales of Goods Act

COMMENCEMENT AND APPLICABLE

APPLICABILITY OF THE ACT

⇒ This act extends to whole of India, ***except the State of Jammu and Kashmir***.

⇒ This act came into force w.e.f. 1 July 1930.

⇒ The 'contract of sale' includes both a sale as sell as an agreement to sell.

⇒ The word Indian was omitted the title of the Act in 1963 (22 sept.)

⇒ This Act does not deal with the sale of immovable property.

⇒ The transaction relating to immovable properties, e.g., the sale, lease, gifts, etc., are governed by a separate Act known as 'Transfer of Property Act, 1882'. This Act is beyond the scope of this book.

DEFINITIONS (Sec. 2)

Buyer – Sec 2 (1)
⇒ A person, who buys or agrees to buy the goods.

Delivery Sec (2)
⇒ It means voluntary transfer of possession from one person to another.

Delivery State Sec 2(3)

- Goods are said to be in delivered state, when they are in such state that the **Buyer would be bound** to take the delivery of them in accordance with the contract.

Documents of title to Goods 2(4)

- A document of the title to goods may be described as any document used as proof of the possession or control of goods, authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.

Section 2(4) of the Sale of Goods Act, 1930 recognizes the following as documents of title to goods:

(i) Bill of lading,
(ii) Dock warrant,
(iii) Warehousekeeper's certificate,
(iv) Wharfinger's certificate,
(v) Railway receipt,
(vi) Multi – modal transport document,
(vii) Warrant or order for the delivery of goods, and
(viii) Any other document used in the ordinary course of business as document of title (as described in the preceding paragraph).

Document of Title v. Document showing the title :
A document of title enables a person named therein to transfer the property by mere endorsement and delivery, whereas a document showing title does not confer any right to transfer by way of endorsement and delivery.

For example, **a share certificate** shows that the person named therein is entitled to the shares represented by it, but does not allow transfer of the shares by mere endorsement and delivery of the certificate.

Goods – Sec 2 (7)
⇒ Goods mean every kind of **movable property.**

⇒ Other than actionable claims and money, and it includes.

⇒ stock and shares, growing crops, grass and things attached to or forming part of land which are agreed to be severed before sale or under the contract of sale.

⇒ You may notice that 'money' and 'actionable claims' have been expressly excluded from the term 'goods'**. 'Money' means the legal tender**. **'Money' does not include old coins and foreign currency.** They can, therefore, be sold or bought as goods. Sale and purchase of foreign currency is, however, also regulated by the foreign Exchange Management Act,

⇒ 'Actionable claims', like debts, are things which a person cannot make use of, but which can be claimed by him by means of a legal action. Actionable claims cannot be sold or purchased like goods, they can only be assigned, as per the provisions of Transfer of property Act.

⇒ Grass, growing crops, trees to be cut and their log wood to be delivered, material of a building to be demolished, etc. are goods. Similarly, things like goodwill, copyright, trade mark, patents, water, gas electricity are all goods and may be the subject matter of a contract of sale.

Seller – Sec 2 (13)
⇒ A person, who sells or agrees to sell the goods.

Agreement to sell
⇒ Where transfer of property in goods takes place at future date.

Sale
⇒ Where transfer of property in goods takes place at the time of contract

The following are the essentials of valid contract of sale:

⇒ **There must be two parties, one seller and other buyer.**
• Seller and buyer must be different.
• Part owner can sell goods to another part owner.
• Partners are not regarded as separate persons for the purpose of sale of the partnership property. They are the joint owners of the goods and as such they cannot be both sellers and buyers [State of Gujarat v. Ramanlal S & W. (1965)]. But, a partner may buy goods from the firm or sell goods to the firm.

⇒ **There must be movable goods as subject matter of contract.**

⇒ **There must be a transfer of property in goods. It means general property. (i.e. ownership)**

⇒ **There must be price involved. Price means money consideration for sale of goods.**

• Exchange of goods for goods is barter.
• If Exchange is for partly goods and partly for money it is sale.

⇒ **All essential elements of valid contract must be observed.**

⇒ **The contract of sale can be entered into, expressly or impliedly.**

Formation. The contract of sale may provide for any of the following methods.
• Immediate delivery of goods.
• Immediate payment of price but delivery at some future date.
• Immediate payment of price and immediate delivery of goods.
• Delivery or payment or both made in installments.
• Delivery or payment or both will be made at future date.

TRANSFER OF "PROPERTY IN GOODS"

⇒ Property means general property in goods and not merely special property in goods. It means ownership of goods. **Special property in goods means possession of goods.**
⇒ Cases where property in goods is not transferred:
• Bailment
• Creating charge or pledge

Difference Between Sale and Agreement to Sell

SALE

- Immediate transfer of ownership to buyer
- It is executed contract
- It creates right in rem for buyer
- Seller can use for price – if not buyer
- Risk passes to buyer
- Buyer can get goods even if seller has becomes insolvent
- Delivery to receiver if buyer becomes insolvent before the payment of price

AGREEMENT TO SELL

- Ownership remains with the seller
- It is an executory contract
- It provides right in personam for buyer and seller
- Seller can sue for damages
- Risk doesn't passes to buyer
- Buyer can get proportionate share in money but can't get goods
- Delivery can be refused by seller if buyer

becomes insolvent.

CONTRACT FOR WORK AND SKILL

⇒ Some contract involves use of both service and goods. This type of contract is considered as contract for work and skill.

⇒ This kind of contract involves exercise of skill and labor by one party on some goods or materials supplied by other party or supplied by party who exercise skill and labor for price. It is immaterial who supply material. Alternatively, it can be said that in this kind of contract, main purpose is to exercise work and skill. Supply of own goods is only subsidiary. Intension of parties is to transfer goods only after exercise of some skill and labor.

⇒ As it is not falling within categories of contract for Sale no sales tax is payable.

Example:

(1) A dentist agreed to supply a set of artificial teeth to a patient. The material was wholly found by the dentist. Held, it was a contract for the sale of goods.

(2) An artist was asked to paint a portrait. The material was supplied by the party and not by the painter. It was held to be a contract for work and labour and not of sale.

CLASSIFICATION OF GOODS

Types of Goods

The goods may be classified into following categories:

Existing goods
• Existing goods are the goods, which are owned and possessed by the seller at the time of sale. Existing goods may be of three types;

(a) Specific Goods:
• The goods, which are identified and agreed upon by the parties at the time of contract of sale.
• It should be noted that the goods must be both identified and agreed upon.

(b) Unascertained Goods:
• These are the goods, are not identified and agreed upon at the time of the contract of sale.
• These goods are merely described by the parties at the time of contract of sale.

(c) Ascertained Goods:
• There are the goods, which are identified after the formation of contract of sale. When the un-ascertained goods are identified and agreed upon by the parties, the goods are known as ascertained goods.

Future Goods
⇒ Future goods are those goods, which do not exist at the time of the contract of sale.
⇒ These goods are to be manufactured or acquired by the seller after the making of the contract of sale.
⇒ Future goods cannot be sold, but there can only be an agreement to sell.
Example:
A, a manufacturer agrees to sell 5 tables and 50 chairs to B at Rs.10,000. B agrees to purchase it. However, tables and chairs are yet to manufactured by A.

Contingent goods
⇒ It is a kind of future goods.
⇒ It is goods, the acquisition of which is contingent upon the happening or non –happening of an uncertain event.
Example:
A agrees to sell the goods loaded on the ship "Titanic", which is coming from London to Bombay. The ship may or may not arrive. So, these goods will be called as contingent goods.

Price of Goods – Sec 9 – 10

Price means the money consideration for a sale of a Goods 2(10)

The following are the modes of determining price: [Sec. 9]
⇒ Price is specified under the contract. It is the most common method of determining the price. Here, parties decide the price in advance.
⇒ Price may be determined as per the method specified in contract.
Example :
Delivery of rice on 1st December 2008 at the rate prevailing on that day.
⇒ Price may be determined in accordance to custom and usage of trade. This method is applicable if parties regularly trade.
⇒ Where the price is not fixed as above, the buyer shall pay the seller a **reasonable price.**

'What is a reasonable price is a question of fact and circumstances.
Fixation of price by third party. (Sec. 10)
If it is so, contract shall specify name of third party.
If third party fails to specify, contract is void but if goods are delivered to buyer and used by him, he is required to pay reasonable price.
If the third party is prevented from fixing price, defaulting party is liable for the damages.

Consequences of Destruction of Specific Goods – Sec 7 – 8
The consequences of destruction of specific goods can be discussed under the following three heads:
⇒ **If goods perish before making the contract**
• Contract is void – ab – initio, due to mistake as to existence of subject matter.
• It is to be noted that if the seller has knowledge about the destruction of goods, even then the enters into the contract of sale with buyer, then seller is bound to compensate to the buyer.

⇒ **Where a part of the goods is perished before making contract**
• If the goods was divisible, then the contract can be enforced party and if the goods was indivisible, then the contract becomes void – ab-inito.
Example:
A contracted to sell one wagon containing 700 bags of groundnut to B. Unknown to A, 109 bags had been stolen at the time of sale, Therefore, A made a delivery of 591 bags. Held, the sale was void.

If goods perish after the "Agreement to sell; but before' Sale [Sec. 8]
The contract is void if subsequently the goods have perished, and there is no fault on the part of the buyer or seller in perishing the goods.
Example:
A horse was delivered upon trial for 8 days. However, the horse died within 8 days, without the fault of buyer or seller. Held, the seller must bear the loss, as the contract was void.
However, parties to the contract may provide otherwise also.

Section 7 and 8 are applicable only in case of specific goods.
Therefore, if unascertained goods are destroyed either before or after making the agreement, the contract shall not become void. Thus, in an agreement to sell unascertained goods, even if the entire stock of goods is destroyed, the contract that not become void and the seller will have to perform his promise.

Example
'A' agreed to sell to 'B' 100 bags of wheat from his stock of 1,000 bags in his go down. The entire stock was destroyed by fire. 'A' is bound to deliver 100 bags of wheat or else he will be liable for damages.

If the contract does not otherwise provide, then –
⇒ Stipulation as to time of payment is not deemed to be essence of contract.
⇒ Stipulation as to time of delivery is deemed to be essence of contract.

CONDITIONS AND WARRANTIES
⇒ Generally, at the time of sale, the seller makes some representation, statements of stipulations for the praise of his goods. Some of representations are in nature of opinion others are in nature of facts. Representation as to fact which becomes a part of contract of sale is called as stipulation.

⇒ Stipulation may be condition or warranty depends upon its importance in relation to contract.

⇒ Stipulation which is **essential to the main purpose of contract is known as condition.** Breach of condition gives the aggrieved party right to terminate the contract.

⇒ Stipulation which is **collateral to the main purpose of the contract is warranty.** Breach of warranty gives rise to the aggrieved party right to claim damages but contract cannot be terminated.

⇒ The conditions and warranties **may be express or implied.**

⇒ Express conditions and warranties are those, which the parties agree expressly, i.e. orally or in writing.

⇒ Implied conditions are those, which are implied by the law in the absence of any agreement to the contrary.

IMPLIED CONDITIONS

The following are the implied conditions which are contained in the Sales of Goods Act:
Conditions as to title – SEC 14(a)

⇒ There is an implied condition on the part of the seller that
• In the case of sale, the seller has a right to sell the goods, and
• In the agreement to sell, the seller will have a right to sell the goods at the time of passing of ownership in goods.
⇒ If the title of seller out to be defective, the buyer must return the goods to the true owner and recover the price from the seller.

Conditions as to description – Sec 15

⇒ Where the goods are sold by description, there is an implied condition that the goods shall correspond to the description.

Example;

A machine was sold. The buyer has not been the machine, but the seller described it as a new one. However, it was found to be a very old one. Held, the machine was not according to the description.

Sale by sample – Sec 17

⇒ Where the goods are sold by sample, the following are implied conditions.

• The bulk shall correspond to sample in quality.

• The buyer shall be given a reasonable opportunity to compare the goods with the sample.

• The goods shall be free from any defect, rendering them un – merchantable. It is to be noted that this implied condition applies only in the case of latent defects, i.e. those defects which cannot be discovered by ordinary inspection. In fact, such defects are discovered when the goods are put to use or by examination in laboratories. The seller is not liable for apparent or visible defects which can be discovered by examination.

Sale by description as well as sample – Sec 15

⇒ If the sale is by sample as well as description, both conditions shall be satisfied. Goods must correspond with sample as well as description.

Example :

A agreed to sell to C some oil described as "Foreign refined oil" and warranted only equal to sample. The goods supplied were equal to sample, but contained a mixture to hemp oil. Held, C could reject the goods.

Conditions as to quality and fitness for buyer's purpose – Sec 16

⇒ Where the buyer, expressly or impliedly, tells the seller the particular purpose for which he needs the goods and relies on the skill or judgment of the seller, there is an implied condition that the goods shall be reasonably fit for such purpose.

⇒ When the article can be used only for one particular purpose, the buyer need not inform the seller the purpose for which the goods are required.

Example:

A purchased a hot water bottle from a chemist. While the bottle was being used by A's wife, it burst and injured A's wife. Held, the seller was liable for damages as the bottle was not fit for the purpose for which it was meant – Priest vs Last.

Exceptions to the implied condition as to quality or fitness

⇒ The condition as to quality or fitness' well not apply, if the buyer is suffering from an abnormality, which renders the goods unsuitable for a particular purpose and the buyer does not inform the seller about that abnormally.

Example
A purchased a coat. He had abnormally sensitive skin, By wearing the coat, he got skin complaint. Held, there was no breach of condition, as he had not disclosed the abnormally of his skin.
⇒ Where the goods can be used for a number of purposes, the buyer should inform the particular purpose for which such goods were required. If the does not disclose, there is no such conditions of quality or fitness.

Conditions as to merchantability
⇒ Where goods are **bought by description** from a seller, who deals in goods of that description, there is an implied conditions that the goods shall be of merchantable quality.
⇒ 'Merchantability' means that there is no defect in the goods, which renders them unfit for sale. Thus, a watch that will not keep time and a pen that will not write cannot be regarded as merchantable.

Example:
A radio set was sold to a layman. The set was defective. It did not work in spite of repairs, Held, the buyer could return the set and claim refund.

Condition as to wholesomeness
⇒ In the case of **eatable and food** – **stuff,** there is an implied condition that the goods shall be wholesomeness, i.e., free from any defect which renders them **unfit for human consumption.**

Example:
A Purchased milk from B, a milk dealer. The milk contained typhoid germs. A's wife on taking the milk got infected and died. Held, A was entitled to get damages – Frost vs Aylesbury Dairy Co. Ltd.

IMPLIED WARRANTIES

The following are the implied warranties which are contained in the Sales of Goods Act:
⇒ In the absence to any contract showing contrary intention, there is an implied warranty that the **buyer shall have and enjoy quiet possession of the goods**. If the buyer is disturbed in the enjoyment of the goods, he can claim damages from the seller.

Warranty as to quiet possession – Sec 14

Warranty against encumbrances – Sec 14
⇒ Unless the circumstances of the case are such as to show a contrary intension, there is an implied warranty that the **goods shall be free from any charge or encumbrance** in favor of any party not declared to the buyer before or at the time contract is made. However, there will not be any such warranty if charge is declared to buyer at the time of sale.

⇒ An implied warranty as to quality or fitness for a particular purpose may be annexed by the usage of trade.

⇒ In case of sale of dangerous goods, the **seller is under an obligations to warn the buyer about the probable danger.** Failure to do so will make the seller liable to pay damages.

Example :
A sold a tin of disinfectant to B, knowing that it was likely to be dangerous to the tin, whereupon disinfectant powder went into her eyes, causing her injury. Held, A was liable in damages to B, as he failed to warn B of the probable danger.

Difference between Condition and Warranty

Definition of Condition

Certain terms, obligations, and provisions are imposed by the buyer and seller while entering into a contract of sale, which needs to be satisfied, which are commonly known as Conditions. The conditions are indispensable to the objective of the contract. There are two types of conditions, in a contract of sale which are:

- Expressed Condition: The conditions which are clearly defined and agreed upon by the parties while entering into the contract.
- Implied Condition: The conditions which are not expressly provided, but as per law, some conditions are supposed to be present at the time making the contract. However, these conditions can be waived off through express agreement. Some examples of implied conditions are:
    - The condition relating to the title of goods.
    - Condition concerning the quality and fitness of the goods.
    - Condition as to wholesomeness.
    - Sale by sample
    - Sale by description.

Definition of Warranty

A warranty is a guarantee given by the seller to the buyer about the quality, fitness and performance of the product. It is an assurance provided by the manufacturer to the customer that the said facts about the goods are true and at its best. Many times, if the warranty was given, proves false, and the product does not function as described by the seller then remedies as a return or exchange are also available to the buyer i.e. as stated in the contract.
A warranty can be for the lifetime or a limited period. It may be either expressed, i.e., which is specifically defined or implied, which is not explicitly provided but arises according to the nature of sale like:

- Warranty related to undisturbed possession of the buyer.
- The warranty that the goods are free of any charge.
- Disclosure of harmful nature of goods.
- Warranty as to quality and fitness

Key Differences Between Condition and Warranty

The following are the major differences between condition and warranty in business law:

1. A condition is an obligation which requires being fulfilled before another proposition takes place. A warranty is a surety given by the seller regarding the state of the product.
2. The term condition is defined in section 12 (2) of the Indian Sale of Goods, Act 1930 whereas warranty is defined in section 12 (3).
3. The condition is vital to the theme of the contract while Warranty is ancillary.
4. Breach of any condition may result in the termination of the contract while the breach of warranty may not lead to the cancellation of the contract.
5. Violating a condition means violating a warranty too, but this is not the case with warranty.
6. In the case of breach of condition, the innocent party has the right to rescind the contract as well as a claim for damages. On the other hand, in breach of warranty, the aggrieved party can only sue the other party for damages.

Warranty as to quality and fitness by usage of Trade – Sec 16

DOCTRINE OF CAVEAT EMPTOR

⇒ The doctrine of **'Caveat Emptor' means "let the buyer beware".**
⇒ **It means that the buyer while purchasing goods must act with a "third eye and ear",**
i.e.,
• He should be careful to see that the goods purchased will serve his purpose well.
• If the buyer is not careful and he finds later on that the goods do not serve his purpose, he cannot hold the seller liable for it.
• The seller is under no obligation to tell the defects of his articles.

"Caveat Emptor" is a Latin phrase that translates to "let the buyer beware". What exactly does this mean? Does the seller have no responsibilities? The answers lie in the Doctrine of Caveat Emptor. Let us learn more about it along with its exceptions.

Doctrine of Caveat Emptor

The doctrine of Caveat Emptor is an integral part of the Sale of Goods Act. It translates to "let the buyer beware". This means it lays the responsibility of their choice on the buyer themselves. It is specifically defined in Section 16 of the act "*there is no implied warranty or condition as to the quality or the fitness for any particular purpose of goods supplied under such a contract of sale"*
A seller makes his goods available in the open market. The buyer previews all his options and then accordingly makes his choice. Now let's assume that the product turns out to be defective or of inferior quality. This doctrine says that the seller will not be responsible for this. The buyer himself is responsible for the choice he made.
So the doctrine attempts to make the buyer more conscious of his choices. It is the duty of the buyer to check the quality and the usefulness of the product he is purchasing. If the product turns out to be defective or does not live up to its potential the seller will not be responsible for this.
Let us see an example. A bought a horse from B. A wanted to enter the horse in a race. Turns out the horse was not capable of running a race on account of being lame. But A did not inform B of his intentions. So B will not be responsible for the defects of the horse. The Doctrine of Caveat Emptor will apply.

However, the buyer can shift the responsibility to the seller if the three following conditions are fulfilled.

- if the buyer shares with the seller his purpose for the purchase
- the buyer relies on the knowledge and/or technical expertise of the seller
- and the seller sells such goods

However, in the following exceptions Doctrine of caveat emptor is not applicable:

⇒

purpose and relied on skill of seller, the doctrine of caveat emptor is not applicable.
of merchantable quality. In such
case, doctrine of caveat emptor is not applicable.
re not fit for human consumption then buyer is not liable but seller
will be liable.
• Usage or custom of trade.
r is obtained by fraud, the provision of doctrine of caveat
emptor is not applicable.
• Implied conditions as to quality or fitness. It means when buyer has specified his
• When goods are sold by description, it should be
• In case of edible items, implied condition of wholesomeness is applicable and
goods should a
• When the consent of buyer is obtained by fraud, the provision of doctrine of caveat
emptor is not applicable.

Rights of Unpaid Seller Against Buyer

In a contract, there is always a reciprocal promise. Even in a contract of sale, both the buyer and the seller must perform their duties. And if the buyer does not pay the seller his due, the seller becomes an unpaid seller. This means such unpaid seller has some rights against the buyer. Let us see.

When the buyer of goods does not pay his dues to the seller, the seller becomes an unpaid seller. And now the seller has certain rights against the buyer. Such rights are the seller remedies against the breach of contract by the buyer. Such rights of the unpaid seller are additional to the rights against the goods he sold.

1] Suit for Price

Under the contract of sale if the property of the goods is already passed but he refuses to pay for the goods the seller becomes an unpaid seller. In such a case. the seller can sue the buyer for wrongfully refusing to pay him his due.
But say the sales contract says that the price will be paid at a later date irrespective of the delivery of goods,. And on such a day the if the buyer refuses to pay, the unpaid seller may sue for the price of these goods. The actual delivery of the goods is not of importance according to the law.

2] Suit for Damages for Non-Acceptance

If the buyer wrongfully refuses or neglects to accept and pay the unpaid seller, the seller can sue the buyer for damages caused due to his non-acceptance of goods. Since the buyer refused to buy the goods without any just cause, the seller may face certain damages.
The measure of such damages is decided by the Section 73 of the Indian Contract Act 1872, which deals with damages and penalties. Take for example the case of seller A. He agrees to sell to B 100 liters of milk for a decided price. On the day, B refuses to accept the goods for no justifiable reason. A is not able to find another buyer and the milk goes bad. In such a case, A can sue B for damages.

3] Repudiation of Contract before Due Date

If the buyer repudiates the contract before the delivery date of the goods the seller can still sue for damages. Such a contract is considered as a rescinded contract, and so the seller can sue for breach of contract. This is covered in the Indian Contract Act and is known as Anticipatory Breach of Contract

4] Suit for Interest

If there is a specific agreement between the parties the seller can sue for the interest amount due to him from the buyer. This is when both parties have specifically agreed on the interest rate to be paid to seller from the date on which the payment becomes due.
But if the parties do not have such specific terms, still the court may award the seller with the interest amount due to him at a rate which it sees fit.

Remedies of Buyer Against the Seller

When the seller breaches the contract the buyer also has certain remedies against the seller. Let us take a look at some remedies that the Sales Act prescribes for the buyer.
1] Damages of Non-Delivery
If the seller wrongfully or neglectfully refuses to deliver the goods to the buyer, then the buyer can sue for non-delivery of the goods. According to Section 57 of the Sale of Goods Act, if the buyer faces losses due to the wrongful actions of the seller (non-delivery) he can sue for damages caused due to this.
Let's take for example A whose agrees to sell to B 10 pair of shoes for 1000/- each. B was going to sell the same shoes to C for 1100/- a pair. A neglects to deliver the goods to B. Now, B can sue A for non-delivery. He can sue for the amount of 100/- per pair, i.e. 1000/- (the difference between B's cost price and sale price)
2] Suit for Specific Performance

If the seller commits a breach of contract, the buyer can approach the court to ask the seller for specific performance. The court after deliberation can command the seller for specific performance. One important point to keep in mind is that this remedy is only available if the goods are ascertained or specific.

Example: There was a contract between A and B, that A will sell to B a very expensive painting on a specific date. On the said day A refuses to sell. B can approach the court, who orders A to sell the painting to B at the ascertained price.

3] Suit for Breach of Warranty

When the seller breaches the warranty of the goods, the buyer cannot simply reject the goods on such basis. The buyer has two options in such a case,

- set up against the buyer the said breach of warranty in the extinction of the price
- or sue the seller for breach of warranty

4] Repudiation of Contract

If the seller repudiates the contract, the buyer does not have to wait until the date of the contract. He can treat the contract as rescinded and sue for damages immediately. This will be an anticipatory breach of contract.

5] Sue for Interest

The Act specifically states that nothing in the act will affect the right of the seller or the buyer to recover interest or special damages due to him by the contract. And if there is no specific clause in the contract, the court can come to the rescue of the affected party.

Passing of Risk (Section 26)

When goods are sold, they remain at the seller's risk until the property in the goods is transferred to the buyer. Once the property is passed, the goods are at the buyer's risk even if the delivery has not been made.
There are some points that you need to remember about the passing of risk:

1. It holds true unless the buyer and seller have agreed to some other terms
2. In cases where the delivery has not been made, if the delay in delivery is due to the fault of the seller, then the risk lies with the seller. If the delay is due to a fault of the buyer, then the goods are at the buyer's risk.
3. Regardless of the buyer or the seller bearing the risk, the duties and responsibilities of both of them as a bailee of goods for the other party, remain unaffected.

Rules related to Delivery of Goods

Law on Sales

1] The Duty of the Buyer and Seller (Section 31)

It is the duty of the seller to deliver the goods and the buyer to pay for them and accept them, as per the terms of the contract and the law on sales.

2] Concurrency of Payment and Delivery (Section 32)

The delivery of goods and payment of the price are concurrent conditions as per the law on sales unless the parties agree otherwise. So, the seller has to be willing to give possession of the goods to the buyer in exchange for the price. On the other hand, the buyer has to be ready to pay the price in exchange for possession of the goods.

The Sale of Goods Act, 1930 prescribes the following rules regarding delivery of goods:

a. Delivery (Section 33)
The delivery of goods can be made either by putting the goods in the possession of the buyer or any person authorized by him to hold them on his behalf or by doing anything else that the parties agree to.

b. Effect of part-delivery (Section 34)

If a part-delivery of the goods is made in progress of the delivery of the whole, then it has the same effect for the purpose of passing the property in such goods as the delivery of the whole. However, a part-delivery with an intention of severing it from the whole does not operate as a delivery of the remainder.

c. Buyer to apply for delivery (Section 35)

A seller is not bound to deliver the goods until the buyer applies for delivery unless the parties have agreed to other terms in the contract.

d. Place of delivery [Section 36 (1)]

When a sale contract is made, the parties might agree to certain terms for delivery, express or implied. Depending on the agreement, the buyer might take possession of the goods from the seller or the seller might send them to the buyer.
If no such terms are specified in the contract, then as per law on sales

- The goods sold are delivered at the place at which they are at the time of the sale
- The goods to be sold are delivered at the place at which they are at the time of the agreement to sell. However, if the goods are not in existence at such time, then they are delivered to the place where they are manufactured or produced.

e. Time of Delivery [Section 36 (2)]

Consider a contract of sale where the seller agrees to send the goods to the buyer, but not time of delivery is specified. In such cases, the seller is expected to deliver the goods within a reasonable time.

f. Goods in possession of a third party [Section 36 (3)]

If at the time of sale, the goods are in possession of a third party. Then there is no delivery unless the third party acknowledges to the buyer that the goods are being held on his behalf. It is important to note that nothing in this section shall affect the operation of the issue or transfer of any document of title to the goods.

g. Time for tender of delivery [Section 36 (4)]

It is important that the demand or tender of delivery is made at a reasonable hour. If not, then it is rendered ineffectual. The reasonable hour will depend on the case.

h. Expenses for delivery [Section 36 (5)]

The seller will bear all expenses pertaining to putting the goods in a deliverable state unless the parties agree to some other terms in the contract.

i. Delivery of wrong quantity (Section 37)

- Sub-section 1 – If the seller delivers a lesser quantity of goods as compared to the contracted quantity, then the buyer may reject the delivery. If he accepts it, then he shall pay for them at the contracted rate.
- Sub-section 2 – If the seller delivers a larger quantity of goods as compared to the contracted quantity, then the buyer may accept the quantity included in the contract and reject the rest. The buyer can also reject the entire delivery. If he wants to accept the increased quantity, then he needs to pay at the contract rate.
- Sub-section 3 – If the seller delivers a mix of goods where some part of the goods are mentioned in the contract and some are not, then the buyer may accept the goods which are in accordance with the contract and reject the rest. He may also reject the entire delivery.
- Sub-section 4 – The provisions of this section are subject to any usage of trade, special agreement or course of dealing between the parties.

j. Installment deliveries (Section 38)

The buyer does not have to accept delivery in installments unless he has agreed to do so in the contract. If such an agreement exists, then the parties are required to determine the rights and liabilities and payments themselves.

k. Delivery to carrier [Section 36 (1)]

The delivery of goods to the carrier for transmission to the buyer is prima facie deemed to be 'delivery to the buyer' unless contrary terms exist in the contract.

l. Deterioration during transit (Section 40)

If the goods are to be delivered at a distant place, then the liability of deterioration incidental to the course of the transit lies with the buyer even though the seller agrees to deliver at his own risk.

m. Buyers right to examine the goods (Section 41)

If the buyer did not get a chance to examine the goods, then he is entitled to a reasonable opportunity of examining them. The buyer has the right to ascertain that the goods delivered to him are in conformity with the contract. The seller is bound to honor the buyer's request for a reasonable opportunity of examining the goods unless the contrary is specified in the contract.

Acceptance of Delivery of Goods (Section 42)

A buyer is deemed to have accepted the delivery of goods when:

- He informs the seller that he has accepted the goods; or
- Does something to the goods which is inconsistent with the ownership of the seller; or
- Retains the goods beyond a reasonable time, without informing the seller that he has rejected them.

Return of Rejected Goods (Section 43)

If a buyer, within his right, refuses to accept the delivery of goods, then he is not bound to return the rejected goods to the seller. He needs to inform the seller of his refusal though. This is true unless the parties agree to other terms in the contract.

Refusing Delivery of Goods (Section 44)

If the seller is willing to deliver the goods and requests the buyer to take delivery, but the buyer fails to do so within a reasonable time after receiving the request, then he is liable to the seller for any loss occasioned by his refusal to take delivery. He is also liable to pay a reasonable charge for the care and custody of goods.