

Biyani's Think Tank

Concept based notes

Legal Aspects of Indian Business

(Business a regulatory Frame Work)

(BBA Part-I)

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Preface

I am glad to present this book, especially designed to serve the needs of the students. The book has been written keeping in mind the general weakness in understanding the fundamental concept of the topic. The book is self-explanatory and adopts the “Teach Yourself” style. It is based on question-answer pattern. The language of book is quite easy and understandable based on scientific approach.

It includes the key points to be covered in every topic and is valuable to the students from the point of view of examination.

Any further improvement in the contents of the book by making corrections, omission and inclusion is keen to be achieved based on suggestions from the reader for which the author shall be obliged.

I acknowledge special thanks to Mr. Rajeev Biyani, *Chairman* & Dr. Sanjay Biyani, *Director (Acad.)* Biyani Group of Colleges, who is the backbone and main concept provider and also have been constant source of motivation throughout this endeavour. We also extend our thanks to Biyani Shikshan Samiti Jaipur, who played an active role in co-ordinating the various stages of this endeavour and spearheaded the publishing work.

I look forward to receiving valuable suggestions from professors of various educational institutions, other faculty members and the students for improvement of the quality of the book. The reader may feel free to send in their comments and suggestions to the under mentioned address.

—Author

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CHAPTER-1

Some Important Short Questions

Q.1 Define Contract.

Ans.: "An agreement enforceable by Law is a Contract." (Section 2(h))

Q.2 What is implied contract?

Ans.: An agreement which is not made by written or spoken words of parties but it is evidenced from the acts or conduct of the parties or according to prevailing conditions.

Q.3 What is quasi contract?

Ans.: The contract which is not created by proposal and acceptance but imposed by law based on the principle of equity.

Q.4 Distinguish between void and voidable contract.

Ans.: A void contract is ab-initio void hence, cannot be enforced by law on the other hand enforceability of a voidable contract, depends upon the will of the aggrieved party.

Q.5 What is the difference between void Agreement and Void contract?

Ans.: Void agreement is void from beginning (ab-initio) whereas void contract becomes void when aggrieved party chooses to rescind it.

Q.6 What is general and standing offer?

Ans.: The offer made to the public in general and any one can receive, it is general offer, whereas standing offer is an offer made as tender to supply goods as and when required amounts to a standing offer.

Q.7 What is cross offer and counter offer?

Ans.: When two parties exchange identical offers in ignorance at the time of each other's offer, it is called cross offer, on the other hand when offeree offers variations in the original offer, it is called as counter offer.

Q.8 What is executed and executory contract?

Ans.: A contract in which all the parties to the contract have performed their respective obligation is known as executed contract, whereas Executory contracts is one in which all or something still remain to be fulfilled or performed by the parties.

Q.9 What is Bilateral and Unilateral contract?

Ans.: Bilateral contract is one in which both the parties exchange a promise to each other, which is to be performed in future, but still outstanding hence, it is called bilateral contract and similar to executory contract on the other hand, Unilateral contract is one in it a promisor promises to do something. In such a contract, promisor binds himself to perform his promise but the offerer does not do so. Therefore, it is called Unilateral Contract.

Q.10 Explain capacity to contract.

Ans.: The term capacity to contract means competence to legally enter into a contract that is legally binding to the parties.

Q.11 Who is a Minor?

Ans.: A minor is a person who has not completed eighteen years of age. Who has not completed the age of 21 years in case the court has appointed guardian or superintendence of court of wards of minor's property.

Q.12 What is Consent?

Ans.: According to Section 13 “Two or more persons are said to consent when they agree upon the same thing in the same sense.” It is Unison or meeting of mind or consensus ad idem.

Q.13 What is Coercion?

Ans.: According to Section 15 of Indian Contract Act, 1872, “Committing any act forbidden by Indian Penal Code or detaining or threatening to detain property of another for getting consent is coercion.”

Q.14 Explain undue influence.

Ans.: When a dominating party misuses his influence to dominate the will of the weaker party to get undue or unfair advantage in a contract, then it is called undue influence (Section 16).

Q.15 What do you mean by fraud?

Ans.: According to Section 17, “The term fraud is the intentional misrepresentation or concealment of material facts of an agreement by a party to or by his agent with an intention to deceive and induce the other party to enter into an agreement

Q.16 What do you mean by misrepresentation?

Ans.: It is defined under section 18. It means any innocent or without intentional false statement or positive assertion of fact made by one party to the other during the course of negotiation of a contract is known as misrepresentation.

Q.17 What is mistake?

Ans.: It is defined under Section 20 to 22, “It is an erroneous belief about something. When the consent of one or both the parties to a contract is caused by misconception or erroneous belief, the contract is said to be induced by mistake. It is mistake of law and mistake of fact. The mistake

of Indian Law is enforceable not void but mistake of foreign law is void. When mistake made by a person it unilateral mistake and mistake is made by both the parties. It is bilateral mistake.

Q.18 What is consideration.

Ans.: It is quid-pro-quo means something in return. Hence, consideration is the price paid by promisee for the obligation of the promise.

Q.19 What is doctrine of privity of contract?

Ans.: A person who is not a party to the contract cannot sue upon it. Only the party to the contract can enforce the same.

Q.20 What is Ex-Nudo-Pacto Nor-Oritur actio mean?

Ans.: It means from bare promise, no right of action can arise.

Q.21 What is maintenance?

Ans.: It is simply meaning the promotion of litigation in which one had no interest.

Q.22 What is Champerty?

Ans.: It is a bargain where by one party agrees to assist the other in recovering property.

Q.23 What is wagering Agreement?

Ans.: It is an agreement involving payment of a sum of money upon the determination of an uncertain event.

Q.24 What do you mean by Agreement against public policy?

Ans.: It simply mean whenever an agreement is harmful or injurious to public interest and welfare it is said to be against public policy. It is harmful to the social, political, economic and other interest and welfare of the public is called agreement opposed to public policy.

Q.25 What is Contingent contract?

Ans.: It is a contract in which the promisor undertakes to perform the contract upon the happening or non happening of a specified future uncertain event, which is collateral to the contract (Section 32).

Q.26 What is Appropriation of payments?

Ans.: In case of a debtor owes several distinct debts to the same creditor, he makes payment which is insufficient to satisfy all the debts. In such a situation a question arises as to which particular debt the payment is to be appropriated.

Q.27 What is Novation?

Ans.: Novation means substitution of a new contract in place of an existing one with the consent of all the parties to the contract.

Q.28 What is Rescission?

Ans.: It is cancellation of a contract by the consent of all the parties to it or by the aggrieved party to it.

Q.29 Explain Remission.

Ans.: According to Section 63, "Remission meant acceptance of a lesser performance in discharge of a whole obligation under a contract.

Q.30 What is Waiver?

Ans.: When a party entitled to claim performance releases the other party from his obligation it is known as waiver.

Q.31 What is supervening impossibility?

Ans.: If after making agreement it becomes impossible to fulfill the promise under contract, it is supervening impossibility. The contract becomes void.

Q.32 What is liquidated damages?

Ans.: When the sum payable in the event of breach is decided by parties in advance, it is called liquidated damages.

Q.33 What are exemplary damages? When they are awarded?

Ans.: The damages which are awarded with a view to punish the defendant. These are awards in two cases i) On breach of contract of marriage and 2) wrongful dishonour of customer's cheque by the bank.

Q.34 What is the contract of Indemnity?

Ans.: A contract of indemnity means a contract by which one person promises to save the other from the loss caused to him by conduct or incident.

Q.35 What is contract of guarantee?

Ans.: According to Section 126 of contract Act "A contract of guarantee as a contract to perform the promisor discharge the liability of a third person in case of his default.

Q.36 What is bailment?

Ans.: According to section 148 "bailment is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the direction of the person delivering them.

Q.37 What is Lien? What are its types?

Ans.: Lien is a right to retain that which is in possession of a person and belongs to another until his demands are satisfied. There are two types of lien 1)

The general lien which means to retain any property belonging to the other for any lawful payment and 2) It is relating to retain those goods, which are the subject matter of contract of particular lien.

Q.38 What is agency?

Ans.: The relationship between agent and principal created by an agreement whereby agent is authorized by his principal to represent him and establish contractual relations with third party.

Q.39 What is Agency by estoppel?

Ans.: If a person either by his conduct or words leads to another person to believe that a certain person is his agent, is called agency by estoppel.

Q.40 What is agency by ratification?

Ans.: If the principal ratifies the act of a person done without authority, it is known as 'agency by ratification'.

Q.41 What is sub-agent and substituted Agent?

Ans.: A sub agent is a person employed by and acting under the control of the original agent in the business of the agency (Section 191) on the other hand, a substituted agent is named by agent but appointed by the principal. He is liable to principal.

Q.42 What is contract of Sale. How it is different from Agreement to sell?

Ans.: A contract where seller transfers or agrees to transfer property, in goods to the buyer for a price on the other hand, a contract where seller agrees to transfer property in goods in future on fulfillment of certain conditions is called as agreement to sell.

Q.43 How sale is different from Bailment?

Ans.: The intention of parties in case of sale is to transfer property in goods immediately, but in case of bailment, the property in goods is not transferred.

Q.44 What is goods under sale of goods Act, 1930 and its types?

Ans.: According to Section 2(7) "Goods means every kind of movable property other than actionable claims and money and includes stock and shares, growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

According to Section 6 (1 and 2) of the act there are three types of goods as :

- (1) Existing goods viz – Specific, ascertained or unascertained goods
- (2) Future goods and
- (3) Contingent goods

Q.45 What is condition and warranty?

Ans.: According to Section 12(2), a condition is a stipulation essential to the main purpose of the contract, the breach of which gives rise to a right to treat the contract as repudiated, whereas warranty is a stipulation collateral to the main purpose of the contract, the breach of which gives right to claim for damages but not to a right to reject the goods and treat the contract as repudiated (Section 12(3)).

Q.46 What is doctrine of Caveat Emptor?

Ans.: The buyer must take care when buying goods; it is not seller's duty to point out the defects in goods.

Q.47 What is the meaning of Res Prit Domine?

Ans.: It simply means risks follows ownership. It is general rule that risk prima facie passes with ownership.

Q.48 What is the meaning of Nemo dot quod non habit.?

Ans.: It means nobody can give what he himself has not or no seller can transfer a better title than he himself has.

Q.49 What is unpaid seller?

Ans.: According to Section 45 (1) the seller of goods deemed to be unpaid seller when whole price has not been paid or negotiable instrument received as payment dishonoured.

Q.50 What are the rights of unpaid seller?

Ans.: He has two rights :

- (1) Right against the goods i.e. right of lien, right of stoppage of goods in transit and right of resale.
- (2) Rights against buyer personally i.e. a) suit for price, b) damages for non acceptance, repudiation of the contract before the due date and suit for interest.

Q.51 What is retracting the bid?

Ans.: The term retracting means withdraw or revoke. A bidder may retract his bid at any time before the completion of sale. Any condition in an auction sale which forbids the bidder to retract his bid is void.

Q.52 What is damping?

Ans.: Damping is an overt act of dissuade the prospective buyer from raising the price by pointing out defects in the goods, creating confusion in the mind of intending bidder and taking away him from the place of auction.

Q.53 When knock out agreement becomes illegal?

Ans.: In the intention of the partner to knock out is to defraud a third party; such agreement is illegal.

Q.54 Define Company under Company Law.

Ans.: In terms of Section 3(2)(i) of the Companies Act, 1956, a company means "A company formed and registered under company Act 1956 or an existing company. An existing company means a company formed and registered under any of the former companies Act."

Q.55 What is Body Corporate?

Ans.: According to Section 2(7), Body Corporate or Corporation includes a company incorporated outside of India but does not include as follows :

- (i) A corporate sole.
- (ii) A cooperative society registered under any law relating to co-operative societies.
- (iii) Any other body corporate declared by Central Govt. in its gazette.

Q.56 What do you mean by holding company?

Ans.: According to section 4(4) a company shall be deemed to be holding company of another if but only if that other is its subsidiary. Hence, a company has control over another company, the controlling company is known as holding company and the company is known as holding company and the other company is known subsidiary company.

Q.57 What is a Government Company?

Ans.: According to Section 617 "a Govt. company means any company in which not less than 51% of the paid up share capital is held by the following :

- (i) By the Central Govt;
- (ii) By any State Govt. or Governments; or
- (iii) Partly by Central Govt. And partly by one or more State Governments.

A subsidiary of a Government Company is an also Government Company.

Q.58 Foreign companies?

Ans.: According to Section 591(1) "A foreign company is the company which is or has been incorporated outside India but establish or has established a place of business within India."

Q.59 What is one man company?

Ans.: It is also known as family company. The one man holds entire share capital of the company. Other person holds only the minimum or negligible number of shares in the company.

Q.60 Who is a promoter?

Ans.: A promoter is a person or group of persons who conceives an idea regarding the formation of a company for the first time. He also takes necessary steps for formation of a company and takes other essential steps for its incorporation, raising of capital and making it a going concern.

Q.61 What is commencement of business certificate?

Ans.: A public company cannot start business without it. Hence, a public company before start of business must get a certificate that is called Commencement of Business Certificate. At the same time a public as well as private company must also commence its business within one year of its incorporation.

Q.62 What is Ultra Vires?

Ans.: It is composed of two Latin words i.e. Ultra and Vires. Ultra means beyond and vires means power. Hence ultra vires means beyond one's power. In the context of company law, ultra vires means the acts beyond the legal powers or objects of the company. If a company acts/contracts beyond the memorandum either expressly or impliedly, it is null and void.

Q.63 How doctrine of Constructive notice is opposed to the doctrine of indoor management?

Ans.: This is against the principle of constructive notice which protects the company against outsiders for notice given to all due to public documents on the other hand doctrine of indoor management believes that internal management of the company and rules are according to memorandum and Articles. In case of irregularity and mismanagement, then the company will be held liable.

Q.64 What is abridged prospectus?

Ans.: Abridged means which is in brief and it is a memorandum containing such salient features of a prospectus prescribed.

Q.65 What is Statement in lieu of prospectus? Explain the varying conditions of issue of it.

Ans.: If a company requires to get shares or debentures amount from the public. The private company is restricted but the public company is required to issue prospectus. But some time the company privately managed the funds in such a case statement in lieu of prospectus ;must be filed at least three days before the allotment of shares or debentures; so it is substitute to prospectus.

Q.66 Define a Director?

Ans.: The Supreme Court of India defines "A person who guides policy and superintends the working of a company, is a director". The name by which he is called is immaterial. The term includes a Managing Director

Q.67 How many directorships can be held by an individual?

Ans.: No person shall hold office at the same time as director in more than fifteen companies. If he does work more than this limit, he has to resign more than fifteen companies.

Q.68 Define Company Secretary?

Ans.: According to Section 2(45) of the Company Secretaries Act 1980 includes any individual possessing the prescribed qualifications and appointed to perform the duties which may be performed as Secretary under the act and any other ministerial or administrative duties.

According to Section 2(1)(C) of the Company Secretaries Act "Company Secretary means a person who is a member of the Institute of Company Secretaries of India."

Q.69 What is holder in Due Course?

Ans.: According to Section 9 of the act, a holder in due course means i) who is to be the holder of N.I. ii) who possessed for consideration iii) he got it before the date of maturity, iv) he must have obtained the instrument in good faith and v) it is complete in all respects.

Q.70 What is acceptor for honour?

Ans.: According to Section 108 of the act, "A person desiring to accept for honour must by writing on the bill under his hand, declares that he accepts under protest the protested bill for the honour of the drawer or of a particular endorser whom he names or generally for honour.

Q.71 What is obliterating a Crossing?

Ans.: According to Section 89 provides protection to a collecting banker of a cheque whose crossing is obliterated or erased by a dishonest person under the following condition of such cheque the paying bank shall be discharged from its liability if

A) The cheque is not crossed or obliteration of crossing is not apparent at the time of presentation for payment, and

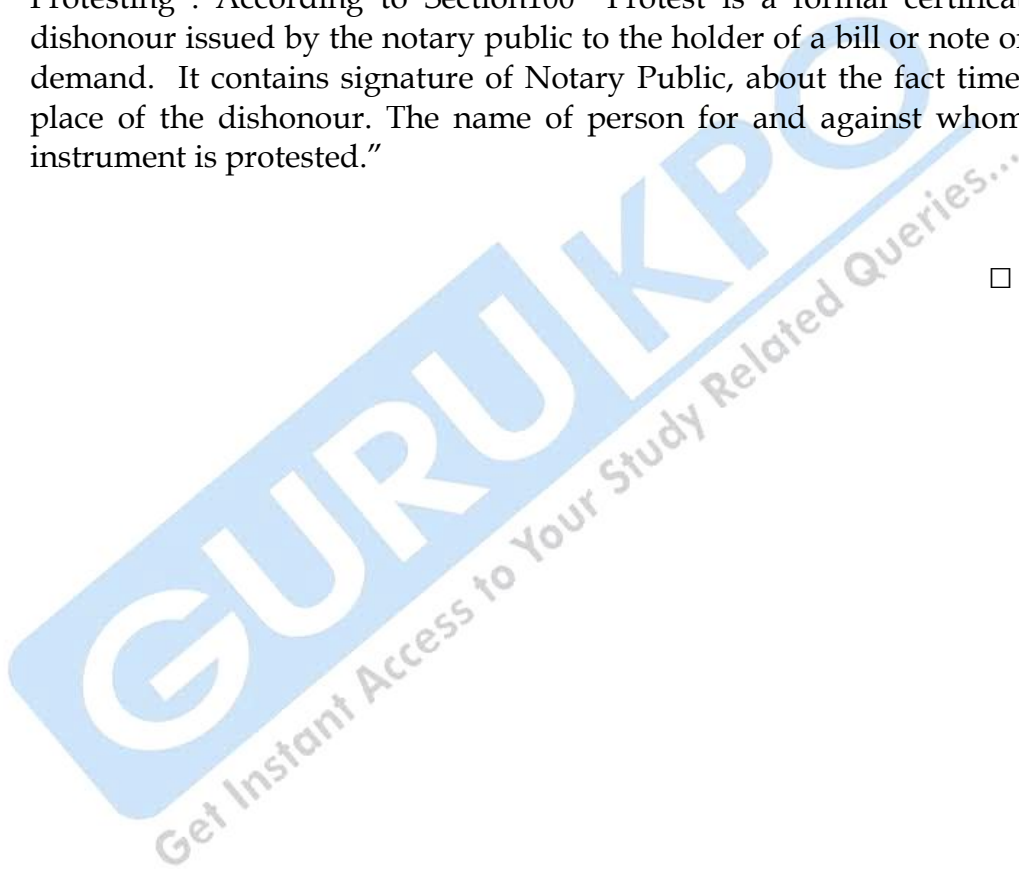
B) The payment has been made in due course as required under section 10.

Q.72 What is noting and protesting?

Ans.: According to Section 99, "Noting consists of recording and authenticating the fact and reasons of dishonour of a N.I. by the notary public at the request of the holder upon the same instrument or upon a paper attached thereto or party upon each. It contains date of dishonour, reasons for the dishonour, fees of Notary Public, his signature and reference to the notary public."

Protesting : According to Section 100 "Protest is a formal certificate of dishonour issued by the notary public to the holder of a bill or note on his demand. It contains signature of Notary Public, about the fact time and place of the dishonour. The name of person for and against whom the instrument is protested."

□ □ □



CHAPTER-2

Meaning and Essentials of Contract

Q.1. "An agreement enforceable by law is a contract" Comment and explain the essentials of a valid contract in brief.

Ans.: Generally contract means a promise or agreement made by two or more persons enforceable by law. According to Indian Contract Act 1872 Section 2(h) defined.

"An agreement enforceable by law is a contract." Hence, agreement and legal enforceability creates an agreement as contract. Section 10 defines "All Agreements are contracts if they are made by the free consent of parties, competent to contract for a lawful consideration and with a lawful object and are not hereby expressly declared void. The contract to be made in writing by law of land or in the presence of witnesses or be registered, if required"

On the basis of the above definitions and judgment given by judges, help us to mention the following essentials of a valid contract :

- (1) Atleast two parties are required to enter into a contract that is promisor and promisee.
- (2) **Agreement** : Proposal and acceptance must be absolute and unconditional. The two identical Cross-offers and successive counter offer are only offer and not agreement.
- (3) The intention should be to create legal relations not the social, domestic, political relations.
- (4) Contractual capacity among persons who is not minor, insane and disqualified by law of the land.
- (5) Consent or Consensus ad idem. The parties are said to consent when they agree upon the same thing in the same sense. (Section13).
- (6) **Free Consent** : According to Section14, the consent is said to be free when it is not caused by i) coercion, or ii) undue influence, or iii) fraud, or iv) misrepresentation or v) mistake.
- (7) **Consideration** : Except some exceptions, an agreement without consideration is void. It means quid pro-quo. It must be lawful and real and not illusory.

- (8) The lawful object and its consideration must be legal.
- (9) The agreement must have certain meaning.
- (10) An agreement to be valid must be possible to be performed.
- (11) The agreements must not be declared void by the law of the land.
- (12) Compliance of legal formalities is required.

Hence, every agreement to be enforceable by law must possess all these essential elements for a contract. If any of the element is missing in an agreement, such agreement is not enforceable by law.

□ □ □



CHAPTER-3

Proposal and Acceptance

Q.1. Define offer and acceptance. Explain rules regarding valid acceptance.

Ans.: The term offer is also called proposal. It is defined under Indian Contract Act, 1872 Section 2(a), "when one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal."

Acceptance is defined under section 2(b) of Contract Act, 1872 i.e. when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal when accepted becomes a promise.

Rules regarding Valid Acceptance : A few important rules of acceptance are as follows in brief :

- (1) Acceptance must be absolute and unqualified {Section 7(1)}.
- (2) It must be in prescribed manner/reasonable manner {Section 7(2)}.
- (3) Acceptance may be given by performance of condition or act required by an offeror {(Section8)}.
- (4) It may be given by acceptance of consideration (Section 8).
- (5) Acceptance may be express or implied.
- (6) It must be given within specified or reasonable period of time.

- (7) Acceptance must be given while the offer is in force.
- (8) It must be given only after the communication of offer is complete.
- (9) Acceptance must be given by the person to whom offer is made.
- (10) Acceptance must be communicated, only mental determination or intention to give acceptance is not sufficient.
- (11) It must be from competent person/authorized person otherwise it will not be binding. **Powell V. Lee (1908)**
- (12) It should be communicated to the offeror himself, other than him will not create legal obligation.
- (13) Acceptance subject to contract is no acceptance. It will not create legal binding.

Note :

- (i) A rejected offer cannot be accepted.
- (ii) Counter offer does not constitute acceptance.
- (iii) Cross offer cannot be assumed as acceptance.
- (iv) Silence does not generally amount to acceptance.
- (v) Acceptance to offer means acceptance of all terms of offer.
- (vi) Sometimes grumbling acceptance is a valid acceptance.
- (vii) Enquiring/seeking clarification of offer is not to be assumed as acceptance.
- (viii) Circumstances of the acceptance must show the ability and willingness to fulfill the terms of offer.

□ □ □

CHAPTER-4

Capacity to Contract

Q.1. Who can make a valid contract? Discuss the validity of agreements made by a minor.

Ans.: According to Section 11, "Every person is competent to contract who is of the age of majority according to law to which he is subject and who is of sound mind and is not disqualified from contracting by any law to which he is subject. Hence, the following persons can make valid contract :

- (i) Who is major
- (ii) Who is of sound mind or sane
- (iii) Who is not disqualified from contracting by any to which he is subject

Validity of Agreement made by a Minor :

- (i) Agreements with or by a minor is absolutely void. Ruling was given in Mohri Bibee vs. Dharmodas Ghose.
- (ii) No ratification of minor's contract.
- (iii) A minor can be a promisee or beneficiary.
- (iv) Restitution/compensation is possible in case of minor under (section 33, specific Relief Act, 1963).
- (v) The rule of estoppel does not apply for minor, he can plead his minority.

- (vi) No specific performance is possible in case of minor because contract made by him is void {(Mirsarwarjan vs. Fakhruddin 1912) 3 Col. 232)}
- (vii) Contract by parents/guardian/manager may be made on behalf of the minor, provided they had authority and benefit to minor
- (viii) Minor may be given share in existing partnership business by the consensus of the partners.
- (ix) Minor may be appointed as Agent but principal will be personally liable for his acts.
- (x) Acts done by minor parents will not be liable.
- (xi) Guarantee for and by the minor is valid.
- (xii) Insolvency Act does not apply on minor; hence, minor cannot be adjudicated insolvent.
- (xiii) Minor may be joint promisor under Law of contract.
- (xiv) Minor cannot apply for allotment of shares in company, but he can apply for fully paid up share on behalf of his guardian.
- (xv) Minor is allowed to make, draw and endorse negotiable instrument but he is not liable for dishonour.
- (xvi) Minor cannot enter into service agreement but he can be beneficiary if he has performed his promise.
- (xvii) Minor can enter into the contract of Apprenticeship at the age of 14 years if he is physically fit.
- (xviii) Minor can become trade union member if he has attained the age of 15 years.
- (xix) Marriage contract of minor on behalf of parents is allowed on the ground of the customs of the community.

- (xx) Minor is held responsible for torts or civil wrong committed by him
- (xxi) Liability of necessities of life supplied to him or his legal dependents. His property is liable; he is personally not liable.

□ □ □



CHAPTER-5

Free Consant

Q.1. Define Free consent? When does consent become free? Explain rules regarding free consent.

Ans.: According to section 10 of the Indian Contract Act, 1872, "All agreements are contract if they are made by the free consent of the parties competent to contract for a lawful consideration and lawful object and are not hereby expressly declared to be void". Therefore, free consent is the one of the essentials of valid contract. But free consent is composed of two words free + consent. The term free meant without any pressure. Consent means defined under Section 13. "Two or more persons are said to consent when they agree upon the same thing in the same sense."

Free consent is defined under section 14 i.e. consent is said to be free when issues not caused by :

- (1) Coercion, as defined in section 15, or
- (2) Undue influence, as defined in section 16, or
- (3) Fraud, as defined in section 17, or
- (4) Misrepresentation, as defined in section 18, or
- (5) Mistake subject to the provision of section 20, 21 and 22.

Therefore, consent is not free when it has been caused by coercion or undue influence or fraud or misrepresentation and mistake. But if the consent is caused by any one of the first four factors such as coercion, undue influence, fraud and misrepresentation. The agreement is a voidable at the option of the party whose consent was so caused. (Section 19 and 19A). Under such position, the aggrieved party has option to assume the agreement either valid or void. If the contract is caused by mistake of foreign law, the agreement is void under section 20 and 21.

Hence, there are two situations i.e. no free consent that is earlier and no consent is as error in consensus.

The rules regarding free consent are as follows one by one.

Coercion : Coercion means and includes the use or threatening to use the physical force against a person or property to compel him to enter him into a contract. According to section 15 of the Indian contract Act, 1872.

“Coercion is the committing or threatening to commit any act forbidden by the Indian Penal Code or the lawful detaining or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement. “It is immaterial whether IPC is or not enforced in the place where the coercion is employed (Section 15).

Legal Rules relating to Coercion :

- (1) Committing any act forbidden by the IPC i.e. killing or beating another person and interfering in the personal freedom of another person etc.
- (2) Threatening to commit any act forbidden by the IPC.
- (3) Threats to suicide amounts to coercion.
- (4) Unlawful detaining of any property.
- (5) Unlawful threatening to detain any property
- (6) The act of coercion must have been performed with the intention of causing any person to enter into an agreement.
- (7) Coercion may proceed either from the party or from a stranger.
- (8) Coercion may be directed against the party or any person.
- (9) It is not necessary that IPC should be in force at the place where the coercion is applied.

The effect of coercion is voidable at the desire of the aggrieved party.

Undue Influence : Instead of physical force ;when mental force is used for getting the consent of the another party, when a dominant party misuses his influence to dominate the will of the weaker party, to get unfair advantage, in a contract is said to be influenced by undue influence.

It is defined under Section 16.

The legal rules relating to undue influence :

- (1) The relations subsisting between the parties to a contract are such that one of them is in a position to dominate the will of the other due to
 - (i) Real or apparent authority.
 - (ii) In case of fiduciary relation.
 - (iii) In case of persons under mental or bodily stress.
- (2) The dominating party uses his position to obtain an unfair or undue advantage over the other party.

Legal effect : Due to undue influence, the agreement becomes voidable at the option of the party whose consent was so caused. The court may set aside any such act under undue influence. A pardanashin woman is also given protection from undue influence.

Fraud : Fraud is intentional misrepresentation or concealment of material facts of an agreement by any party to or by his agent with an intention to deceive and induce the other party to enter into an agreement.

According to Section 17, "fraud means and includes any of the following acts committed to a contract or with his connivance, or by his agent, with an intention to deceive another party thereto or his agent, or to induce him to enter into contract."

- (i) The suggestion as a fact of that which is not true by one who does not believe it to be true.
- (ii) The active concealment of a fact by one having knowledge or belief of the fact.
- (iii) A promise made without any intention of performing it,
- (iv) Any other act fitted to deceive, and
- (v) Any such act or omission as the law specially declares to be fraudulent.

Essential Elements of Fraud :

- (1) There must be a false representation either by words or by spoken words, induce the other party to enter into contract by active concealment of material fact.
- (2) It must be done by the party or his agent.
- (3) The representation must relate to a fact, the other party has been attracted to act upon the representation leading to fraud.
- (4) The representation intentionally done to commit a fraud must have been done before the conclusion of the contract.
- (5) The other party must have been deceived by fraud.

Legal Effects :

- (1) Contract becomes voidable at the option of the party defrauded,
- (2) The defrauded party can sue for damages suffered or ask for restitution, and
- (3) The party can insist for the performance of the contract.

Misrepresentation : It is innocent and unintentional false statement of fact told by one party to the other during the course of negotiation is called misrepresentation. According to section 18 misrepresentation means and includes :

- (i) The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it is not true.
- (ii) Any breach of duty which, without an intention to deceive, gains an advantage to the person committing it or any one claiming under him, by misleading another to his prejudice or to the prejudice any one claiming under him.
- (iii) Causing, however, innocently, a party to an agreement to make a mistake as to the substance of the thing which is subject of the agreement.

Essential Elements of Misrepresentation :

- (i) It must be a misrepresentation of some material fact;
- (ii) It must be made before the concerned party enters into a contract.

- (iii) It must be innocent or unintentional statement.
- (iv) Misrepresentation may be committed by any of the following ways :
 - (a) By positive statement.
 - (b) By breach of duty.
 - (c) By causing a mistake by innocent misrepresentation.

Legal Effect of Misrepresentation : An aggrieved party suffering any loss as a result of misrepresentation can either rescind or avoid the contract altogether or can accept the contract but insist that he will be placed in such position in which he should have been, if the misrepresentation made had been true (section 19).

Mistake : Mistake is one of the causes because of which the consent is said not to be free. It is a misconception or misimpression or misunderstanding or erroneous belief about something. According to Section 20, "Where both the parties to an agreement are under a mistake as to a matter of fact essential to an agreement, the agreement is void."

Mistake may be of two types viz -

- (i) Mistake of Law, and
- (ii) Mistake of Fact

Mistake of law may be two types :

- (i) Mistake of law of the land will be enforceable but mistake of foreign law is void.
- (ii) Mistake of fact: is as to material fact of the contract.

Mistake of fact may be of two types :

- (1) Bilateral Mistake, and
- (2) Unilateral Mistake
- (1) **Bilateral Mistake :** Bilateral mistake is mutual mistake by both the parties to agreement and relating to
 - (i) Mistake as to subject matter, and
 - (ii) Mistake as to possibility of performance of the contract.

(i) Mistake as the subject matter may be as to identity of subject matter, as to existence of subject matter, quality of the subject matter, quantity of product, as to price, mistake as to title, mistake as to existence of State of affairs and (ii) mistake is to possibility of performance. It may be of two types viz Physical and Legal impossibility.

(2) **Unilateral Mistake** : The unilateral mistake means where one of the parties to a contract is under a mistake. As to the matter of fact, it is unilateral mistake. Such contract is not voidable. But under such following conditions, contract of unilateral mistake also becomes void :

- (i) Mistake as to the identity of the party contracted with,
- (ii) Mistake as to identity of attributes of contracting party, and
- (iii) Mistake as to the nature of the contract.

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CHAPTER-6

Consideration

Q.1. What is consideration? A contract without consideration is void. Explain.

Ans.: Consideration means giving something in return. Quid pro quo, i.e. something to recompense. Blackstone defined "Consideration is recompense given by the party contracting to the other."

According to Indian Contract Act, 1872, section 2(d) defined, "when at the desire of the promiser, the promisee or any other person has done or abstained from doing or does or abstains from doing, or promises to do or to abstain from doing some thing, such act or abstinence or promise is called a consideration for the promise."

Therefore, consideration is the promise or performance that parties exchange with each other. It is the price that one party to a contract pays for the promise or performance of the other party. It must be at the desire of the promisor or any other person, it may be relating to doing or abstinence. May be present, past and future.

Contract without consideration is void. People believe that if no consideration no contract, because without it is nudum Pactum. It is simply a bare promise, hence, not enforceable by law. It is said that Ex Nudo Pacto Non Oritur Actio - means, out of bare promise, no action arises. It is also stated in section 25 that some exception are there, without consideration the agreement will be valid and enforceable by law. They are as follows :

- (1) **Agreement on Account of Natural Love and Affection :** If the agreement is made on account of natural love and affection between the parties (promisor and promisee) agreement is valid even without consideration. If the following conditions are satisfied/fulfilled :
 - (i) The agreement is in written form,
 - (ii) It is registered under the law,
 - (iii) It is made only out of natural love and affection between the parties, and
 - (iv) There is close relation between the parties.
- (2) **Promise to Compensate Voluntary Service :** If a person performs an obligation for the other person wholly or in part, is valid even without consideration under following conditions :
 - (i) If the person willingly done something voluntarily for the promisor.
 - (ii) If the person has done something which the promisor was legally compelled to do so under section 25(2).
- (3) **Promise to Pay a Time Barred Debt :** If a debtor promises to pay his time barred debt in writing and under his signature or if the promise is given by his duly authorized agent to pay the time barred debt, no fresh consideration is required.
- (4) **Contract of Agency :** According to section 185 of Indian contract Act, 1872, no consideration is necessary for creating agency.
- (5) **Gift Actually Made :** Without consideration will not affect its validity of contract between the doner and donee. Gifts once given cannot be recovered on the ground of absence of consideration.

- (6) **Promise of Charities** : Only promise of charity is made without consideration, is not enforceable law. But if promiser promised to pay charity and promisee started some construction and promisor did not pay, it may be recovered to the extent of the liability incurred by the promisee.
- (7) **Contract of Gratuitous Bailment** : In the context of gratuitous bailment, the bailor has not given consideration, inspite of it the bailor had every right to enforce the contract of bailment.
- (8) **Remission** : If the promisee agrees to accept the lesser sum due or whole promise, no consideration is necessary for such act of remission. It is valid agreement.

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CHAPTER-7

Void Agreement

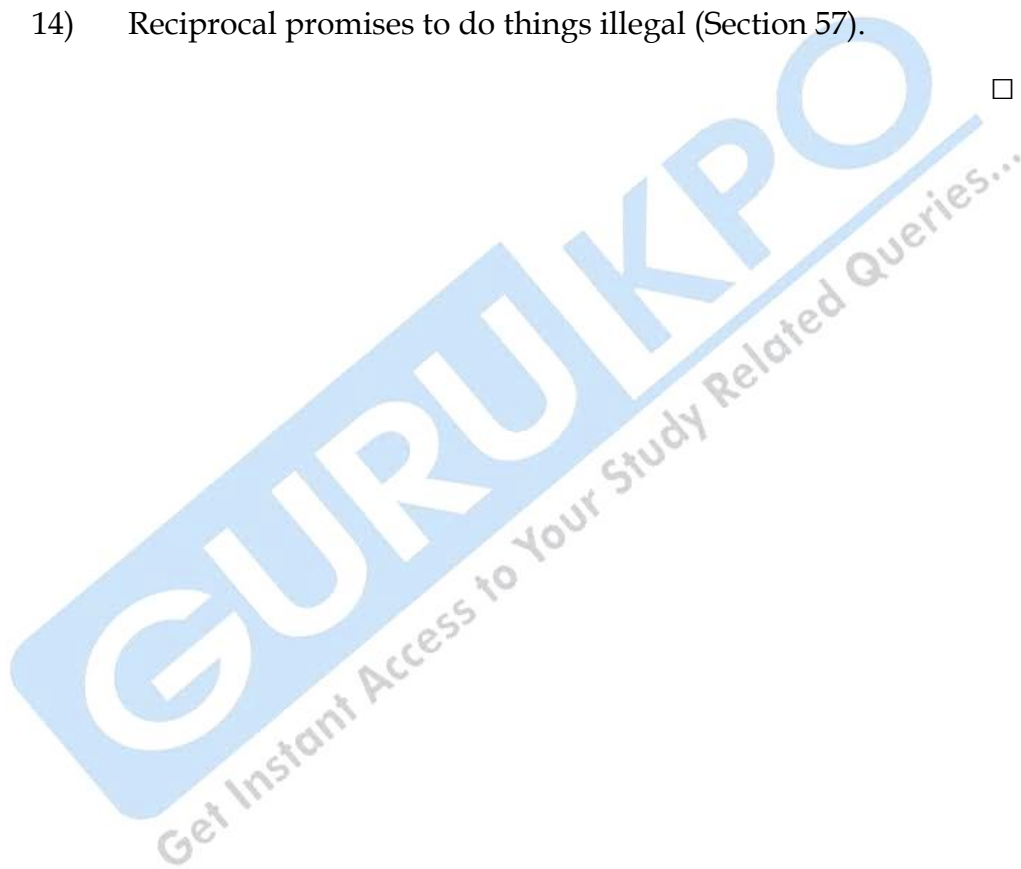
Q.1. What is void Agreement? Briefly state the various agreements that are expressly declared to be void under Indian Contract Act, 1872.

Ans.: According to Indian Contract Act, 1872 (Section 2(G) defined, "An agreement not enforceable by law is said to be void.") Such agreements are ab-initio void, null in the eye of law. Such agreements are expressly declared void. These agreements are void agreements. They are as under :

- (1) Agreements by incompetent parties e.g. minors, persons of unsound mind and persons disqualified by law of the country.
- (2) Agreements made under mutual mistake of material facts specially the bilateral mistake (Section 20).
- (3) Agreements of which the consideration or object is unlawful [section 23] e.g.
 - (i) If it is forbidden by law.
 - (ii) If permitted, it would defeat the provisions of any law.
 - (iii) If it is fraudulent.
 - (iv) If it involves or implies injury to the person or property of another.
 - (v) If the court regards it as immoral.
 - (vi) If the court regards it as opposed to public policy.
- (4) Agreements of which the consideration or object is unlawful in part and cannot be separated from the lawful part (Section 24).
- (5) Agreements made without any consideration (Section 25) with certain exceptions.
- (6) Agreements made in restraint of marriage (Section 26).

- 7) Agreements in restraint of trades (Section 27).
- 8) Agreements in restraint of legal proceedings (Section 28).
- 9) Agreements the meaning of which is uncertain (Section 29).
- 10) Agreements contingent on impossible acts (Section 36).
- 11) Wagering agreements (Section 30).
- 12) Agreements contingent on impossible acts (Section 56).
- 13) Agreements to do impossible acts (Section 56).
- 14) Reciprocal promises to do things illegal (Section 57).

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CHAPTER-8

Remedies for Breach of Contract

Q.1. Discuss the remedies available to an aggrieved party in the case of breach of contract.

Ans.: When the promiser fails to perform his obligations towards promisee, the promisee (the injured party) gets some remedy against the promiser any one or more following remedies.

- | | |
|---|-------------------------|
| (1) Suit for Rescission of the Contract | (2) Suit for Damages |
| (3) Suit for Quantum Meruit | (4) Suit for Injunction |

(1) **Rescission of the Contract :** Rescission means revocation or setting aside of a contract or cancellation or putting an end to a contract. When one of the parties to a contract breaks the contract, the other party may sue and refuse further performance. The aggrieved party is also entitled to claim compensation of damages caused to him due to non fulfillment of the contract. A promise to sell a horse to B for Rs.50,000/- on 1st July. But B fails to pay the amount. Now he is a entitled to rescind the contract.

(2) **Suit for Damages :** The another remedy for breach of contract is suit for damages. Damages means monetary compensation payable by defaulting party to the aggrieved party for the loss suffered by the aggrieved party as a result of breach of contract. The aggrieved party may claim for damages. The main object is to compensate the injured party for the monetary loss naturally suffered by him to the break of contract.

The important type of damages are :

- (i) **Ordinary Damages :** These are also called natural damages, which arise in ordinary course of events from break of contract. It requires aggrieved party must have suffered

damages by breach of contract and damages must be the proximate or direct consequence of the breach of contract. (Hadley v. Baxendale (1894) IEX.341)

- (ii) **Special Damages** : Special damages are those damages if the parties had knowledge about such damages when they made the contract, to be likely to result from the breach of contract (Section 73 Para 1) (Simpson v. London North Western Railway Com (1876)]
 - (iii) **Nominal Damages** : Where the injured or aggrieved party suffered no loss or very negligible loss, the court may still award him/her nominal damages merely acknowledge that the aggrieved or injured party has proved his case and won it.
 - (iv) **Vindictive/Exemplary Damages** : Heavy damages are imposed by the court to discourage the faulty party under the two following cases :
 - (a) Breach of a contract to marry.
 - (b) wrongful dishonour of a cheque by a banker.
 - (v) **Liquidated Damages** : According to Section -74 of Indian Contract Act when the parties decide a fair and genuine pre estimated amount of damages likely to result due to breach of contract, parties are bound to pay in the event of breach of contract. Such certain amount is called liquidated damages. The aggrieved party will get such liquidated damages. The aggrieved party will get such liquidated amount.
- (3) **Suit for Quantum Meruit** : The literal meaning of quantum meruit means 'as much as' merited or as much as earned. According to this doctrine, a party is entitled to claim payment as much as a amount he had earned. This right is available only under the following circumstances.
- (i) When a contract is discharged by breach during the course of performance
 - (ii) When the party does something for another not intending to do gratuitously and the other enjoy the benefit of the act.

- (4) **Suit for Specific Performance** : Sometimes award of damages are not considered to be an adequate remedy in certain cases and therefore the court of law can direct the party in case of breach of contract according to terms and conditions of the contract
- (i) When there exists no standard for measuring the actual damage caused by the non performance of the act agreed to be done.
 - (ii) When the act agreed to be done is such that monetary compensation for non performance would not afford adequate relief.

The specific performance is not granted in the following cases :

- (i) Where damages are an adequate remedy for breach.
 - (ii) Where the contract is in its nature revocable.
 - (iii) Where the contract is uncertain.
 - (iv) Where the contract is entered into by trustees in breach of their trust.
 - (v) Where the contract is inequitable to either party.
 - (vi) Where it is not possible for the court to supervise the contract.
 - (vii) When a company makes any contract the powers not conferred on it by its Memorandum of Association.
 - (viii) Where contract is not certain.
 - (ix) Where one of the parties is a minor.
- (5) **Suit for Injunction** : It is an order of a court prohibiting a party to a contract from doing a particular thing or from doing something against the terms and conditions of the contract. If the party breaches the contract, the aggrieved party can go to court for injunction. The court has discretionary powers to grant injunction order in case of clear negative stipulation and in case of inferred negative stipulation.

CHAPTER-9

Indemnity and Guarantee

Q.1. Distinguish between Indemnity and Guarantee. In what circumstances a surety is discharged from his liability.

Ans.: The contract of Indemnity and Guarantee are governed under section 124 to 147. To distinguish between these two, their concept is to be cleared.

Meaning of Indemnity in the contract of indemnity, there are two parties i.e. indemnifier and Indemnity holder. The indemnifier promises to protect the indemnified from loss caused to him by the conduct of the promiser or by the conduct of other party.

According to Section 124, "A contract of indemnity is a contract by which one party promises to save the other from loss caused to him by the conduct of the promiser himself or by the conduct of any other person." On the other hand, contract of Guarantee defined under section 126, "A contract of guarantee is a contract to perform the promise or discharge the liability of a third person in case of his default." Now both can be distinguished as follows :

Distinguish between Indemnity & Guarantee Contract

S. No.	Basis of comparison	Indemnity	Guarantee
1-	Definition	One party promises to pay loss caused by the faulty of himself or by the conduct of the other party. The promisor will	It is a contract to perform the promise or discharge his liability of a third person in case of his default

		save him is called the contract of Indemnity (Section124)	(Section126).
2-	Object	It's main object is to save the promisee from loss.	It is meant to provide the assurance as to performance of promise or discharge of liability.
3-	No. of Parties	There are only two parties indemnifier and indemnity holder.	The Principal debtor/creditor and surety are three parties.-+
4-	No. of Contracts	Only one contract between the two parties.	There are three contracts between three parties such as i) Principal debtor and creditor; ii) Creditor and surety; iii) the principal debtor and surety.
5-	Request of the Debtor	It is not necessary for the indemnifier to act on the request of the debtor.	The surety may give guarantee at the request of the debtor.
6-	Right of the Parties	An indemnifier cannot sue a third party in his own name unless there is no privity of contract. He can do so only if there is an assignment in his favour.	The guarantor, on discharging the debt due by the principal debtor can proceed against the principal debtor in his own right.

7-	Existence of Debt or Duty	The risk of any loss happening is the only contingency against which the indemnifier undertakes to indemnify.	The existing debt or duty which is guaranteed by the surety.
8-	Consideration	The consideration in an indemnity contract is direct.	But there is indirect consideration for the surety. The principal debtor's original debt is his consideration
9-	Suit against Third Party	The indemnifier cannot claim against the third party who caused the loss to the subject matter, unless this right of the indemnified has been transferred to him.	The surety can sue the principal debtor after making payment of debt to the creditor.
10-	Presence of any loan or credit	In case of indemnity contract presence of any loan or credit is not found. The consideration in an indemnity contract is direct.	It is basis of any guarantee contract.

11-	Right of Restitution	The indemnifier has no right to get back the amount once paid.	Contrary to it the surety has the right to get back the amount that was paid by him to the creditor from the principal debtor.
12-	Cessation of Liability	Under indemnity contract the liability ends when contract comes to the end.	In contract of guarantee, it is ended if any change is made in the conditions of the contract without the consent of the surety.
13-	Financial Interest	In addition to indemnity, the person who has given, has some financial interest in the transaction.	Here in the guarantor is entirely unconnected with the contract except by means of his promise to pay on debtor's default because he has no financial interest in the contract.
14-	Origin of Liability	The liability is originated only when a loss is happened. There is no liability when there is no loss.	The secondary liability of surety will become primary when the principal debtor commits a default.
15-	Capacity to Contract	Both the parties of indemnity contract must have the capacity to contract.	In a guarantee contract, it is not necessary for the principal debt or to be capable for entering into a valid contract, but surety's contractual capacity is a must.

Q.2. In what circumstances a surety is discharged from his liability?

Ans.: Under the following ways in varying circumstances a surety is discharged from his liability :

(1) **By Revocation**

- (i) By notice of revocation by surety (Section 130)
- (ii) Death of surety (Section 131)
- (iii) Novation (Section 62)

(2) **By Conduct of the Creditor** - under these conditions

- (i) Variation of terms without consent of surety (Section 133)
- (ii) Release or discharge of Principal debt or without the consent of surety (Section 134)
- (iii) Compounding by creditor with principal debtor without the consent of surety (Section 135)
- (iv) Creditor's act or omission impiring surety's eventual remedy (Section 139)
- (v) Loss of security (section 141)

(3) **By Invalidation** - under following circumstances :

- (i) Guarantee obtained by fraud or misrepresentation (Section 142)
- (ii) Guarantee obtained by silence (Section 143)
- (iii) Failure of consideration
- (iv) Failure of co-surety to join the suretyship (Section 144)

Q.3. What is doctrine of Ratification? Explain the conditions and rules of Ratification.

Ans.: The doctrine of Ratification applies where one person does something for another without the knowledge and authority. The person on behalf of the act is done should opt either to reject it or adopt it. In case decides to adopt it, the agency relationship is created but not other wise.

According to Section 196 of the Act, "where acts are done by one person on behalf of another but without his knowledge or authority, he may elect to ratify or to disown such act. If he ratifies them, the same effects will follow as if they had been performed by his previous authority."

Example : A without authority lends B's money to C from whom B accepts the interest on the money to C. From B's conduct implies a ratification of the loan.

Conditions and Rules of Ratification are as follows :

- (i) The act must have been done for or on account of the Principal.
- (ii) The existence of Principal is a must at the time when the agent acted.
- (iii) The principal must have contractual capacity at the time of contract of agency and at the time of ratification.
- (iv) The acts to be rectified must be lawful and not void or ultra vires.
- (v) Ratification must be expressed or implied.
- (vi) It must be made with full knowledge of all the material facts.
- (vii) The ratification must be related to the whole act and not to a part of it.
- (viii) Ratification cannot be to give damages to a third party or terminating any right of third party.
- (ix) Ratification must be made with in the time fixed for otherwise it will not be valid.
- (x) Ratification must be within reasonable time if fixed time is not decided.
- (xi) Ratification must be communicated to the agent by principal within proper time.
- (xii) Ratification can be of acts which principal had the power to do.
- (xiii) Ratification may be applied retrospectively.
- (xiv) Ratification does not mean for such past ratified act for future also.

- (xv) If ratification is made by agent for past acts, he will become able to receive remuneration from the principal.

Q.4. "No one can give a better title to the goods than what he himself has" Comment on this statement and also discuss the exceptions to this rule as per Sales of Goods Act.

Ans.: According to Sale of Goods Act, 1930, Section 27 states that when a seller who is not the owner of the goods but sells the same without the consent of the true owner the goods or without proper authority, the buyer also cannot acquire better title to the goods than what the seller had, unless the owner is precluded by his conduct from denying the seller's authority to sell. Hence, a person who is not the owner of the goods cannot make a third person owner of the goods. He can make the third person owner of the goods only if he sells them under authority of the owner or with the consent of the owner. Similarly, if a person purchases stolen property, the true owner can recover from him. For example - A finds a necklace of B and sells it to a third party (say C) who purchases it for the value and in good faith. The true owner i.e. B can recover the necklace from C, since A had no title to the necklace (*Faruquharson v. King*) 1902 A.C. 325.

Exceptions to the Principle : In the interest of trade, commerce and industry, some exceptions to the rule of *Nemo dat quod Non habit* which means no one can give something which he does possess have been recognized. Contrasted with the above maxim is the principle that a person who buys in good faith for value and without notice should get a title the law relating to transfer of title seeks to balance these two conflicting principle of title to meet the interest of Business in modern times. They are as follows :

- (i) **Title by Estoppel :** According to Section 27, where the true owner by his words or conduct causes the buyer to believe ;that the seller was the owner of the goods or had the owner's authority to sell the goods, and induces him to buy goods, he shall be estopped from denying the fact and in such case, the buyer gets a better title that of the seller.
- (ii) **Sale by a Mercantile Agent :** Suppose A buys goods and get good title from a mercantile agent who has no authority to sell if :

- (a) The mercantile agent possesses the goods or documents of title to goods with the consent of the owner.
 - (b) The agent sells the goods while acting as an agent.
 - (c) Buyer acts in good faith; and
 - (d) The buyer had no knowledge of the defect title of the seller of the goods at the time when he entered into the contract.
- (iii) **Sale by Co-owner** : According to (Section 28) if any buyer in goods faith, for valuable consideration and assuming the seller as the real owner, buys goods ;from one of the joint owners, he gets good title to goods he bought.
- (iv) **Sale by a Person in Possession under Voidable Contract (Section 29)** : If the seller sells the goods acquired under voidable contract but the contract of sale has not been rescinded at the time of sale and the buyer purchases them in good faith without the notice of seller's defective title, such buyer acquires a goods title to the goods.
- (v) **Sale by Seller in Possession of Goods after Sale** : According to Section 30(i) of the act provides that where a seller, after having sold the goods, is in possession of goods sold or the documents ;of title to the goods, and again sells them or pledges the same either by himself or through a mercantile agent to a new buyer, who acts in good faith and without the notice of prior sale, he will get a good title to the goods, but the possession of seller must be as seller and not as hirer or bailee. The hirer or the bailee cannot sell the goods so as to give a good title to the transferee.
- (vi) **Sale by Buyer in Possession of Goods** : According to Section 30(2) when a buyer, having bought or agreed to buy goods, obtains with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent for him, of goods or documents of title under any sale, pledge or other disposition thereof to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of title goods, shall have effect as if such lien or right did not exist.

- (vii) **Sale by Unpaid Seller [(Section 54(3))]** : When an unpaid seller who has used his right of lien or stoppage of goods in transit, resale the goods, the buyer acquires a good title to the goods as against the original buyer.
- (viii) **Exceptions in Other Acts** : In all the cases described below, if the seller sells the goods, even though he is not the owner of the goods, the buyer gets a good title to the goods.
- (a) **Sale by an official assignee** or liquidator of a company.
 - (b) **Sale by a person** who finds the lost goods under certain circumstances (Section 169 of the contract Act 1972)
 - (c) **Sale by pawnee** of pledge under certain conditions (Section 176 of contract Act).
 - (d) **Sale in a Market Overt** : It is under British or English law where buyer acquires a good title to the goods in good faith and the goods have been sold according to the custom of the market. The buyer buys goods in good faith for valuable consideration and without knowing the defective title of the seller.

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CHAPTER-10

Nature of Negotiable Instruments

Q.1. Define Negotiable Instruments and explain its main characteristics and presumptions.

Ans. Introduction : In India Negotiable Instruments Act, 1881 enacted. Earlier it was based on British Common Law. This act came into force on March, 1882. The latest amendment of this act was made in 2002. This act contains 147 sections.

Meaning of Negotiable Instruments : The term Negotiable Instrument is composed of two words Negotiable + Instruments. Negotiable means transferable by delivery and instrument means a written document creating a right of a person to claim certain sum of money.

According to Section 13 of the Act, "Negotiable Instrument ;means a promissory note, bill of Exchange or cheque payable either to order or bear, whether the word, order or bearer appear on the instrument or not."

Definition : According to Justice Willis, "A negotiable instrument is one the property in which is acquired by any one who takes it bonafide and for value notwithstanding any defects of the title in the person from whom he took it" In brief, "a negotiable instrument is a written and signed document entitling a person to a sum of money specified in it and which is transferable from one person to another either by delivery or by endorsement and delivery.

Characteristics of Negotiable Instrument : The essential characteristics of negotiable instrument are :

- (1) It must be in writing may be typed or printed.
- (2) It must be signed by the maker or drawer, at the foot or any part of the instrument. It may be in ink or pencil.

- (3) There must be unconditional promise or order to pay a certain sum of the money only and nothing else.
- (4) It must be payable at a time which is certain to arrive.
- (5) It is freely transferable, or negotiable from one person to another – in case of bearer and by endorsement in case of payable to order.
- (6) It is negotiable for unlimited number of endorsement. This process may continue till the maturity of the instrument
- (7) No notice of endorsement of an instrument required to be given to any party liable to it.
- (8) In case of cheque or bill of exchange, the drawee must be named or described with reasonable certainty.
- (9) The holder in due course is entitled to see on the instrument in his own name.
- (10) The holder in course is entitled to sue on the instrument in his own name.
- (11) Negotiable Instruments have certain statutory presumptions as follows :
 - (i) That negotiable instrument was drawn, accepted and endorsed made or transferred for consideration.
 - (ii) It is accepted within reasonable period of time after being made as well as before the date of maturity.
 - (iii) The date it bears is the date on which it was made.
 - (iv) The endorsements were made in the same order in which they appear.
 - (v) All and every transactions were made before the date of maturity.
 - (vi) The lost instrument was duly signed and stamped.
 - (vii) Every holder of the negotiable instrument is a holder in due course if the holder

- (viii) In case if suit upon a dishonoured instrument, the court shall, non proof of the protest, presume that it was dishonoured until this fact is proved.

Q.2 Explain the types of Negotiable Instruments.

Ans.: Broadly speaking, there are two types of Negotiable Instruments :

- (1) Negotiable Instruments, recognized by Statute, according to Section 13, these are promissory note, bill of exchange & cheque
- (2) Negotiable Instruments recognized by usage or Customs of Trade are :
 - (i) Hundies
 - (ii) Government Promissory Notes or /Treasury Bills
 - (iii) Banker's drafts and pay order
 - (iv) Share warrant etc.

In India, these instruments are not recognized as N.I.

- | | | |
|-----------------------------|-------------------------------|-------------------------|
| (i) R.R. (Railway Receipts) | (ii) Delivery Order for Goods | (iii) Bill of Lading |
| (iv) Dock Warrant | (v) Money Order | (vi) Postal Order |
| (vii) Share Certificate | (viii) Deposit Receipt | (ix) Letter of Credit |
| (x) Mate's Receipt | (xi) Payment Warrants | (xii) LIC Policies etc. |

These are though transferable but does not provide better title.

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CHAPTER-11

Kinds of Negotiable Instruments

Q.1. What is Promissory Note? Define & Explain its elements. How does it differ from Bill of Exchange?

Ans.: Meaning of Promissory Note : A promissory note is an instrument in writing and signed by the maker containing an unconditional promise to pay certain sum of money only to or to the order of certain person definition. According to section 4 of the Act defines, "A Promissory note is an instrument in writing (not being a bank note or currency note) containing an unconditional undertaking, signed by the maker to pay a certain sum of money only to, or to the order of a 'certain person or to the bearer of the instruments."

For Example : A signs instrument as, ... I promise to pay D or order the sum of Rs.50,000/-.

Essential Characteristics of Promissory Note :

- (1) It is a written negotiable instrument.
- (2) The promise must be to pay only money of definite amount
- (3) The promise is to make an unconditional payment.
- (4) It must be signed by the maker, payee as well as maker must be certain and real man.
- (5) The amount in it should be certain.
- (6) It should be properly stamped as per law.
- (7) It may be promise to pay a certain person, a certain sum of money and to pay the bearer of the instrument.

Distinguish between Promissory Note and Bill of Exchange :

S.No.	Basis of Distinction	Promissory Note	Bill of Exchange
1-	Position	It is written in a position of debtor.	The Bill of exchange is written in a position of creditor.
2-	Parties	It requires two parties. The maker and the payee.	It involves three parties - i) The Drawer, ii) The Drawee, and iii) Payee.
3-	Promise and Order	Promissory note maker makes unconditional promise to pay a specified sum.	But is unconditional order made by the maker.
4-	Acceptance	Due to acceptance is given by the maker, no acceptance is required.	Here acceptance by the debtor is essential before it is presented for payment.
5-	Same Party	Maker and payee cannot be same.	But in this case of B/E, the drawer and payee may be same person.
6-	Conditional Instrument	A promissory note cannot be made conditionally.	Though B/E cannot be drawn conditionally but acceptance of bill may be conditionally.
7-	Nature of Liability	The liability of pronote maker is basic and absolute.	The liability of maker of B/E is secondary and

			conditional if the acceptor fails to make payment.
8-	Payable to Bearer	Except RBI and Central Government, no person can make a promissory note payable to bearer or payable on demand.	A bill can be drawn payable to bearer after date. It cannot be payable on demand.
9-	Position of the Maker	It is in immediate relation with the payee.	The drawer of an accepted bill stands in close relation with the acceptor and not the payee.
10-	Notice of Dishonour	The maker is not required to be given a notice of dishonour.	It is compulsory to give notice of dishonour all the parties including the drawer and all prior endorsees.
11-	Protest for Dishonour	The promoter is not required to be protested for dishonour	According to Sec.104, a foreign bill must be protested according to their law.

S.No.	Basis of Distinction	Promissory Note	Bill of Exchange
12-	Application of Certain Provisions	The provisions of B/E is also applied to Promissory note.	The provisions relating to acceptance for honour and bills in sets are also applicable to B/E.

Q.2. What is bill of Exchange? Explain its features and types.

Ans.: Section 5 of Negotiable Instruments defines, "A bill of exchange is an instrument in writing containing an unconditional order signed by the maker directing a certain person to pay a certain sum of money only to the order of a certain person or to the bearer of the instrument."

Therefore, B/E is a written acknowledgement of the Debt written by the creditor and accepted by the debtor.

Characteristics of B/E :

- (i) It must be written.
- (ii) No particular Performa is prescribed.
- (iii) It must be signed by drawer.
- (iv) The drawer, drawee and payee must be certain.
- (v) The sum also payable must be certain.
- (vi) It should be properly stamped.
- (vii) It must contain an express order to pay money and money alone.
- (viii) The order must be unconditional.
- (ix) There must be three parties to a bill of exchange i.e.
 - (a) Drawer,
 - (b) Drawee, and

- (c) Payee
- (x) The payee must be certain.
- (xi) B/E may be bearer or order.
- (xii) It is completed where it is presented to the payee.
- (xiii) The formalities of date, place and consideration is necessary.

Types of Bill of Exchange : The Bill of Exchange can be classified as :

- (1) Inland and Foreign Bills
- (2) Time and Demand Bills
- (3) Trade and Accommodation Bills

(1) **Inland Bill :** Is a bill if

- (i) It is drawn in India on a person residing in India on a person residing outside India; or
- (ii) It is drawn in India on a person residing outside India payable in India.

Foreign Bill : Means A bill which is not an inland bill is a foreign. It includes :

- (i) It is drawn in India on a person residing in India, whether payable in or outside India or
- (ii) It is drawn in India on a person residing outside India but payable in India.

(2) **Time and Demand Bill :** The term time bill is payable after a fixed time, is called time bill or a bill payable "after date" is a time bill or a bill payable "after date" is a time bill.

Demand Bill : Means a bill payable at sight or on demand is termed as a demand bill.

- (3) **Trade and Accommodation Bill** : Trade bill refers to a bill which is drawn and accepted generally for genuine trade transaction is called a "trade bill".

Accommodation Bill : Means a bill drawn and accepted not for genuine trade transaction but only to provide financial help to some party is called an "accommodation bill."

Q.3. What is a cheque? Explain its essential elements and types.

Ans.: Meaning of a Cheque : A cheque is a written instrument signed by the drawer containing an unconditional order to a specified bank to pay on demand to a particular person a certain sum of money only to or order of a particular person or to the bearer of the instrument.

Definition : Sec 6 of the Act defines, "A cheque is a bill of exchange drawn on a specified banker, and not expressed to be payable otherwise than on demand and it includes the electronic image of a truncated cheque and a cheque in the electronic form (Section 6 as amended in 2002)."

Essential Elements of a Cheque :

- (i) A cheque must be an instrument in writing in a specific form provided by the banker
- (ii) It is always payable on demand.
- (iii) It is always drawn on a specific Bank.
- (iv) It should be an unconditional order which is meant to pay a certain amount to payee.
- (v) The amount is to be mentioned in figure and words. If it differs, then the amount stated in words shall be the amount ordered to be paid.

- (vi) The signature of maker or drawer must sign and signatures must tally with the specimen signature submitted to the bank.
- (vii) The name of payee to whom or to whose order the money to be paid should be certain.
- (viii) The cheque must be delivered to the bearer. Its delivery is essential.
- (ix) It must be in money only not in kinds or goods.

Types of Cheques :

- (1) **Bearer Cheque :** A bearer cheque is that cheque the payment of which is made to the holder of a cheque or bearer of the cheque.
- (2) **Order Cheque :** An order cheque is that cheque , the payment of which is given to the person in whose name the cheque is issued. Bank has to identify if wrong or different person has taken payment, the bank will be held liable.
- (3) **Anti-dated Cheque :** A cheque which bears a date before the date of issue is anti-dated.
- (4) **Post dated Cheque :** A cheque which bears a date later than the date of issue is post dated. If it is presented on or after the date given, Bank cannot refuse to pay.
- (5) **Stale Cheque :** When a cheque is not presented within six months, then the bank may dishonour it. It is also called Stale/outdated cheque. The stale cheque loses its negotiability.

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CHAPTER-12

Crossing Dishonour of Cheques and Banks

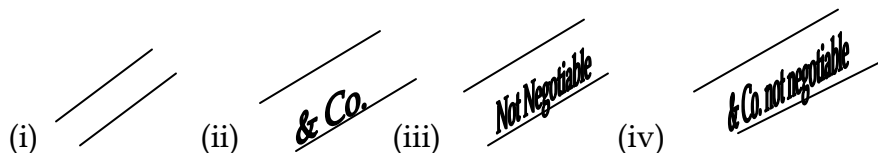
Q.1. What is crossing of a cheque? Explain the types of crossing.

Ans.: **Meaning of Crossing of a Cheque :** In order to avoid great risks if cheque is stolen and encashed, the system of crossing is introduced. A crossing is a direction to the paying banker not to pay the holder money at the counter. There are four types of crossings.

- (1) General Crossing
- (2) Special Crossing
- (3) Double Crossing
- (4) Restrictive Crossing.

(1) **General Crossing :** It is that crossing where a cheque bears across its face an addition of :

- a) The words "and company" or any abbreviation between two parallel transverse lines; or
- b) Two parallel transverse lines simply, either with or without the words "Not negotiable". The following are the examples of general crossing.



(v) Below Rs.50,000/- only

Such addition is called general crossing of a cheque
(Section 123)

- (2) **Special Crossing :** According to (Section 124) – A special crossing is that where a cheque bears across its face an addition of the name of a banker either with or without the words “not negotiable.”. It is a special crossing. For example :

State Bank of India

Bank of Baroda
not negotiable

- (3) **Double Crossing :** According Section 127, if a paying banker receive a cheque crossed specially to two bankers, he must not pay it. If one of the bankers name is mentioned for agent for collection. It is called double crossing. For Example :

State Bank of India
to
Bank of Baroda
as Collection Agent

- (4) **Restrictive Crossing :** A restrictive crossing have been adopted by the Bank for the protection of risk of a thief obtaining payment. So “Account payee only” is written within the transverse line e.g.

A/c Payee only
Bank of Baroda

Account Payee only

A/c Payee only
Not Negotiable

Q.2. What is Hundi? Explain its types.

Ans.: The term HUNDI is a negotiable instrument recognized as per local usage or custom of the trade, although negotiable Instrument does not apply on it.

The term Hundi is originated from the Sanskrit word 'Hund' which means 'to collect'. It is quite popular among Indian merchant and prevalent from very old days. They all used to finance trade and commerce and provide a facile and strong medium of currency and credit. It may be transferred from one person to another. Its owner may sue in his own name for recovery of amount of Hundi. It may have varied forms. They may be orally accepted.

Types of Hundies :

- (1) **Darshani Hundies :** A Hundi which is payable at sight is called Darshani Hundi. It is payable on demand; hence Darhani hundi.
- (2) **Muddati or Miadi Hundi :** The term Miad means a specific time period. It is payable after a specified period of time.
- (3) **Shah Jog Hundi :** The term Shah means a person of worth and substance of high repute. Hence, it means one which is payable to or through a Shah who is famous in the market. A Shah jog Hundi passes from hand to hand by mere delivery till it reaches the hands of shah who presents for acceptance and for payment.
- (4) **Nam Jog Hundi :** It is a Hundi payable to the party named in the hundi or according to his order is called a Nam Jog Hundi. It can be negotiated in favour of any other person just like a bill of exchange.
- (5) **Dhani Jog Hundi :** It is also called Dekhandora Hundi. The term Dhani means the owner or holder who purchases a hundi. Hence a hundi which is payable to its owner or to the person who becomes holder or bearer by purchasing it.
- (6) **Jawabi Hundi :** It is used for remittance of money from one person to another. The person receiving the money has to send a jawab or answer showing that he has received the money to the remitter.
- (7) **Johkahmi Hundi :** It is a conditional hundi which is payable by the drawee means buyer or consignee of the goods on safer arrival of the goods against which the Hundi is drawn. It is the nature of

policy of Insurance with this difference that money is paid before hundi is to be recovered if the ship arrives safely to the destination.

- (8) **Farman Jog Hundi** : A hundi payable to firman or order. It can be negotiated by endorsement and delivery is called firman jog Hundi.
- (9) **Insan Jog Hundi** : It is a hundi which is paid only to the person who presents it, is called Insan jog Hundi.

Q.3. What is endorsement? Explain the kinds of Endorsement.

Ans.: Meaning of Endorsement : The term endorsement means writing of a person's name on the back of the instrument for the purpose of negotiation is called endorsement of a negotiable instrument.

Definition : According to section 15 of the Act "when the maker or holder of negotiable instrument signs the same otherwise than as such maker for the purpose of negotiation on the back or face thereof or on a slip of a paper annexed thereto or so signs for the same purpose a stamped paper intended to be completed as negotiable instrument, he is said to endorse the same and is also called the 'endorser' (Section-15).

A bearer instrument can be transferred merely by delivery, on the contrary to transfer an instrument payable to order endorsement alongwith delivery is essential.

Kinds of Endorsement :

- (1) **General & Blank Endorsement** : According to Se.16 if the endorser signs his name only on the instrument for the purpose of negotiation it is called blank or general endorsement. For example :

Backside of N.I.

R. L. Sharma 07.07.2008

- (2) **Full or Special Endorsement :** Under this type if the person/holder of N.I. adds a direction to pay the amount or to the order of a particular person, the endorsement is said to be in full and the person so specified is called the endorsee of the instrument. For example :

Backside of N.I.

Pay to Mohan, Sohan Lal Sharma 06.06.2008

- (3) **Partial Endorsement :** According to Section 56, negotiable instrument cannot be partially endorsed. The partial endorsement is invalid. But as an exception if an instrument has been paid in part, the fact of the part payment may be endorsed on the instrument and may then be negotiated for the residue. For example :

Pay to Ram or order Rs.1000/- being the unpaid residue of the Bill Mukesh Sharma 20.06.2008
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- (4) **Restrictive Endorsement :** Means which prohibits or restricts the endorsee from further negotiating the instrument as per directions given by the endorser. For example :

Pay Mohan only or Pay Ram or order for A/c of Shyam Pankaj 06.06.2008

- (5) **Conditional Endorsement** : It is also called as qualified endorsement. It means when an endorser inserts a condition in the endorsement, it is called as conditional Instrument. Though, negotiable instrument cannot be conditional but it may be under different ways :
- (i) **Sans Recourse Endorsement** : When the person making the instrument clear about no liability or limits the liability, then he adds the words sans recourse. It is called sane recourse.
 - (ii) **Facultative Endorsement** : Under this method, endorser waives some of his rights for Example : Pay to Amar (Notice of dishonour waived) Mohan 6/4/2008
 - (iii) **"Sans Frais"** : Where a maker/endorser does not want the endorser or subsequent holder of the instrument, to bear any expense on his account on the instrument, this is called Sans Frais.
 - (iv) **Liability Dependent upon a Contingency** : Some times the endorser may make the endorsement in such a way that his liability will depend upon the occurrence of a particular event which may never ;happen. Therefore, there will be no liability if it becomes impossible.

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Meaning and Nature of A Company

Q.1. "A company is an artificial person created by law, having a separate entity with a perpetual succession and common seal". Explain the above statement and briefly describe the characteristics of a company.

Ans.: **Meaning of Company :** The term company is a voluntary association of persons formed and registered for certain common purposes under the present provisions of company law. It exists in the contemplation (eye) of law. It is an artificial person having separate entity from its members with perpetual succession and common seal. The liability of the members is limited. The capital of the company is divided into transferable shares and shareholders are called members.

Definition of the Company : Company may be defined under three main heads :

- A) Definition given under law
 - B) Definition given by professors/prolific writers
 - C) Definition given by judges
- (A) **Definition according to Law :** According to the companies Act 1956, a company means "A company formed and registered under the companies Act 1956 or an existing company.: [Section 3(1)(i)]. An existing company means a company formed and registered under any of the former Companies Acts."

This definition is not clear about the elements of a company. Hence definitions given by Professors can be explained.

- (B) **Definitions by Famous Writers :** Professor Haney defined" A company is an artificial person created by law", having separate entity, with a perpetual succession and common seal."

- (C) **Definition :** Definition given by Judges. According to Justice (C.J) Marshall "A company is an artificial person created by law, having separate entity, with a perpetual succession and common seal."

To conclude, a company may be defined as an incorporated association of persons, which is an artificial legal person in the eye of law, having an independent legal entity, with a perpetual succession, a common seal, a common capital comprising transferable shares and carrying limited liability. Sometimes it is also called Corporation.

Characteristics of a Company :

- (1) **Voluntary Incorporated Association :** For the formation of a company ;registration is compulsory under the Company Act otherwise it will become illegal association of persons. It is voluntary and statutory association; hence it is also called body corporate. It is formed by consensus.
- (2) **Number of Members/Subscribers :** For incorporation/registration of a company, minimum seven persons in case of public company and two in case of private are required. The maximum number of members in case of private company may be 50 but for a public company, no limit of members.
- (3) **Artificial Personality :** A company is an artificial, invisible and intangible person, it exists in the eye of law. It is not natural person because it has no physical body, no soul and no conscience.
- (4) **Separate Legal Entity :** A decision is given in case of Soloman v. Soloman & Co.(1877) that a company has distinct legal entity from its members. It has its own legal existence independent of its members. It has its own name, can sue and be sued by its members and even by outsiders. A member can enter into contract with his company in the same manner as other individuals.
- (5) **Perpetual Succession :** Company is created and wind up by law alone. It's existence is ;not affected by the lanacy, retirement, death or lunacy of its members. Man may come, man may go but

company goes on for ever like water of river may change but the river like the Ganga is still existing.

- (6) **Common Seal** : Company is an artificial person, hence cannot sign like a natural person, thus the common seal which is engraved should be affixed on any documents for authentication and legally binding on the company.
- (7) **Limited Liability** : The Principle of limited liability for business debts is one of the principal advantages of doing business under the corporate form of business organization. In case of a company limited by shares, the liability of a member is limited to the nominal value of the shares held by him. In case of company limited by guarantee will be liable to pay the amount at the time of winding up of the company.
- (8) **Share Capital** : Every company have to require share capital according to law Section 3(1) of Indian Company - a public company is ;required to have a minimum paid up capital of Rs.5 lakh and a private company must have Rs. One lakh. But, in case of companies engaged in promotion of commerce, art, science, religion, etc. need not require to have minimum paid up capital.
- (9) **Transferability of Shares** : Section 82 of the companies Act, 1956, provides that "the shares ;or other interest of any member shall be movable property, transferable in a manner provided for in the articles of the company. Therefore, a member may - (A) sell his shares in the open market, or (B) transfer his shares to anybody he likes in a public Limited company as per conditions laid down in the articles of the company. However, there are certain restrictions on the transfer of shares in respect of private limited companies as the very nature of the company indicates, namely private
- (10) **Separation of Ownership and Management** : A company has a right to own and transfer property since it is a legal entity. A shareholder has no proprietary right in the property of the company but merely to their shares. Therefore, the claims of the company's creditors will be against the company's property and not that of the shareholders. A Company can sue and is being sued for enforcement breach of legal rights as the case may be. The

decision was given in the case of Gramophone & Typewriter Co Ltd., vs. Stanley (1908),

- (11) **A Company is not a Citizen :** A company on incorporation assumes a legal personality distinct from its members, but it cannot claim to be a citizen of a country under the constitution of India or the citizenship Act, 1955. Hence, the company cannot claim the fundamental rights guaranteed under the constitution. However, it has certain rights protected under our constitution as a legal entity which is guaranteed to all persons whether holding the citizenship or not. The company is mere abstraction or creation of law on the other hand, the company is deprived of citizenship, has a nationality, domicile and residence. Its domicile is the place of its registration and it is attached to it as long as it is in existence. This establishes the residence of a company at that place where central control and Management of its business is located or exercised. This residence business is located or exercised. This residence of the company gives jurisdiction to the taxation.
- (12) **Separate Property :** The property of the company is not the property of share holders. It can acquire and keep it in its own name. No member has either individually or jointly a right to the assets of a company during its life or on its winding up. If all the shares be taken by one man, the man cannot insure the property of a company because he does not have insurable interest.
- (13) **Act within Intra Vires :** A company cannot work beyond the scope of memorandum of association. Acts made beyond the scope of memorandum result into ultra vires.
- (14) **Democratic Management :** It is managed by the board of directors, elected by the members of the company. Day to day decisions is taken by the concerned Managers. The shareholders cannot take part in the decision process directly.
- (15) **Governance by Majority :** Company is managed by rule of majority decision is taken by simple or special majority.
- (16) **Statutory Obligations :** A company is required to comply with various statutory obligations regarding management. For instance, filling balance sheets, maintaining proper accounts books, registers

and filing annual return and P & LA/CS duly audited are statutory obligations of a company.

- (17) **Separate Name** : Every company must have specific name which must be registered. Once company's name is registered. It must be painted or affixed on the outside of every officer or place of business.
- (18) **Raising of Capital on a Large Scale** : A company can raise the capital on the large scale by selling its shares to the public at large.
- (19) **Shareholders are not the Agents of Company** : Shareholders have only invested capital in the company but their entity is different from that for their company. The company is not bound by its shareholders.
- (20) **May Assume Enemy Character** : Company exists in the eye of law as legal person hence it cannot become a friend nor an enemy. A company may be regarded as enemy company if the persons in control of its affairs are residents in the enemy country or are acting in accordance with directions or instructions of the enemy.

Q.2. What is lifting of corporate veil? Explain the circumstances under which the corporate veil of a company may be lifted.

Ans.: "Corporate veil" here refers to the 'partition' or 'curtain' between the company and its members. A company being given a legal status, all dealings with the company will be in the name of the company and men behind the company are disregarded. Lifting of corporate veil is a fiction of law, which means disregarding the separate legal entity of a company and identifying the realities which lay behind the legal façade. In applying this doctrine, the court ignores the company and concern itself directly with the members or directors.

This doctrine of lifting the corporate veil is understood as identification of a company with its members when individual member may be held liable for its acts or titles to property. The corporate veil may be lifted when the directors or members use the legal entity of the company for any fraudulent or dishonest purpose or to defeat provisions of the law, public interest or to defeat crime.

The corporate entity is disregarded in exceptional cases which are categorized into :

- (1) Excess or Violation of Statutory Provisions
- (2) Judicial Interpretation
- (1) **Excess Statutory Provisions :**
 - (i) **Reduction of Membership below Statutory Minimum :** Under section 45 of companies Act, 1956, a company is privileged to carry on its business with a limited liability for six months when the member is reduced below seven in case of a public company and below two in case of a private company. Beyond this period of six months, the members will be held individually liable for debts contracted by the company.
 - (ii) **Prevention of Fraud or Improper Conduct :** The legal personality of a company is disregarded when registration is used for fraudulent purposes like defrauding creditors, defeating or circumventing law. In such cases, the court may declare those who are responsible for such conduct, personally liable for all the debts of the company without any limitation of liability (See 542). In such a situation the court is empowered to fine. The corporate veil and identify the persons who defrauded to the creditors or any other persons.
 - (iii) **Misstatement in Prospectus :** Every person who is responsible to issue the prospectus will be held liable in case of misstatement in prospectus. He will be held liable to pay compensation to every person who bought the shares on the honesty and faith of the prospectus. For any loss or damages, the aggrieved party can claim from such person who believed on the prospectus (See 62(ii)).
 - (iv) **Mis-description of a Company :** Each company is required that its name must be fully and properly mentioned on the documents, contract or negotiable instruments like cheque, Bill of exchange and promissory note. This is mentioned

under section 147, failing which the person who has committed the act or made a contract is held personally liable for it. Hence, the court lifts the 'veil' where a company is merely a cloak, or a sham

- (v) **Holding and Subsidiary Companies :** Both these are having separate legal existence. But for establishing a proper relationship of a holding and subsidiary company, the court may lift the corporate veil and probe behind it to fix up the persons who control the companies. This is necessary to determine how far a subsidiary company is independent. It is quite possible that subsidiary company may be only a branch of the holding company depending upon how the board of directors is constituted and how the profits, the control and conduct of the subsidiary is conducted.
- (vi) **Investigation of the Affairs of the Company :** Section 239 empowers ;the appointment of an inspector to investigate into the affairs of a company. He will also investigate the affairs of anybody corporate in the same management or group of contral. The object is to investigate the affairs of some companies which are so related that it is necessary or if it is felt necessary to bring the affairs of these companies under investigation.
- (vii) **Investigation of Ownership of a Company :** A company may be investigated by the central government if it is satisfied that it has sufficient ground to investigate. It may appoint the inspectors to investigate and report on the membership or any company or any matters related to the company for the purpose of deciding the true persons who are financially entrusted in the company and who control and materially influence the policy of the company under section 247 by lifting the corporate veil.
- (viii) **Failure to Refund Application more or Excess Money :** Under the following cases, the directors of the company are jointly ;and severally liable to refund the application money or excess of application money :

- (a) Under Section 69(5) in case no shares are allotted to the applicants.
 - (b) Under Section 73(2) the stock exchange did not allow to issue and allot shares.
 - (c) In case of excess money received from applicants for issue of shares that have been allotted.
- (ix) **Directors with Unlimited Liability** : According to Section 322, if the liability of Directors of public limited is unlimited, in such a case liability of director will be unlimited and he will be personally held liable.
- (x) **Non Payment of Income Tax** : In case of Section 197 of Income Tax Act, company is liable to pay Income Tax. If not paid then the court will lift the corporate veil and the Director of the Company will be held responsible for the default.
- (2) **Judicial Interpretation** :
- (i) **Determination of Character of the Company** : A company may assume an enemy character when person in de facto control of its affairs are residents in an enemy country. Hence, when a company is suspected of being owned or controlled by enemies, the court may lift the corporate veil and examine the persons constituting it. This is necessary during the time when two countries are at war. This was decided in the famous case of Daimler Company Ltd. vs. M/s Continental Tyre and Rubber Co. As said, Daimler Company, registered in Great Britain was controlled by German residents. Thus, it is against public policy to allow alien enemies to trade under company organization. But a company registered here can carry on business in an enemy country and it is not treated as an alien enemy.
 - (ii) **For Benefits of Revenue** : In the interest of securing the revenue from those who are attempting to conceal it through corporate veil, the court will not hesitate to pierce this veil,

particularly when the individual shareholders are avoiding to pay income tax. This action becomes essential. This can be explained with help of the case Sir Dinshaw Maneckjee (AIR-1977), where the assessee was enjoying the dividend and income from investment held by him. The investment was in four companies floated him only. The dividend and investment was again drawn by him as a sole trustee. Thus he was avoiding the tax revenue. In this case the company and assessee were held to be one and same. This was revealed only when the veil was pierced.

- (iii) **In case of Fraud and Misconduct :** The court will also lift the corporate veil where the company is formed to defraud creditors or to defeat the provisions of law or to avoid any legal obligations. This is fully shown in the case of Gilford Motor Co vs. Horne (1933) 1 Ch.935. In the present case Mr. Horne was appointed Managing Director of Gilford Motor Co on the condition that he would not solicit or entice away the customers of the company. In the mean while, Mr. Horne formed another company to carry on his own business and this company enticed the customers of Gilford Motor Co. It was hence, held that "the company was a mere cloak or sham for the purpose of enabling the defendant to commit a breach of his covenant against solicitation." Hence, it was held that it was a fraud committed by Horne for his own benefit by forming a company.
- (iv) **Company Acting as an Agent or Trustee of the Shareholders :** According to agency contract acts done by agent on behalf of Principal. The principal will be held liable. Where a company is formed for acting as an agent for its shareholders, the shareholders will be liable for the acts of the company. This is illustrated in the case of F.G.Films Ltd; Re(1953) 1. WLR.483. The English company acted as merely the nominee of an agent for American Company.
- (v) **Fixing Liability for Economic Offences :** If there are economic offences, the court may draw aside the veil of corporate entity. For example, offences done under FEMA,

the Excise Act, Salestax Act etc. The person who have the ultimate control over the affairs of the Company may be held liable. The decision was given in the case of Santanu Ray vs. Union of India (1989)65 Comp. cases 196 Delhi.

- (vi) **Fixing Liability under Welfare Legislations :** In India, there are various legislation for welfare of the employees. Such as PF, Gratuity, Bonus are provided. If there is any default or offences under these above acts, the courts are empowered to lift the corporate entity and determine the persons responsible for committing offences or defaults. Sometimes a subsidiary company is formed to reduce tax liability under the welfare legislations. The courts are empowered to lift the corporate veil find the reality. In this context case may be illustrated workmen of associated rubber industry Ltd vs. Associated Rubber Industry Ltd (1956) 59 Comp cases 134).
- (vii) **Where the Company is used for Illegal Purposes :** In such a situation the courts are empowered to lift the corporate veil to detect the real culprit. [(PNB Finance Ltd vs. S.P.Jain (1983) 54 camp cases, Delhi]
- (viii) **To Punish for Contempt of Court :** Where Corporate/Company entity is used for contempt of court, in such a situation the court may lift the corporate veil and punish the person who is responsible for contempt of court.
Case law - Jyoti Ltd vs. Kanwaljit Singh Kaur Bhasin (1987) 62 Camp.cases 626, Delhi.
- (ix) **Determination of Qualifications or Competence :** The court may also set aside the separate legal entity and lift the corporate veil in case of determination of qualifications or technical competence. Case Law - New Harisons Ltd vs. Union of India (1997) 89 camp cases 849 SC)
- (x) **When Company is Sham or Cloak :** If the company is incorporated to mere sham or cloak, in such a situation corporate veil may be lifted for knowing the reality.

Case Law - Delhi Development Authority vs. Skipper Construction Company P.Ltd [(1997) 89 camp. Cases 362 SC]

- (xi) **In case of Fraudulent Scheme of Management or Compromise :** If under section 349 of Company law 1956, company makes any fraudulent scheme of arrangement or compromise, then the corporate veil may be lifted. Case law - Bedrock Ltd [R.(1998) IT SCL 385 Bombay]

Q.3 What is a Private Company? Distinguish between Private and Public Company.

Ans. The term Private Company means a company which has a minimum paid up capital of Rs.one lakh or more as may be prescribed by the articles :

- (i) Restricts the transfer of its shares from one share holder to another.
- (ii) Limits the number of its members to 50, excluding its present or past employees.
- (iii) Prohibits an invitation to the public to subscribe to its shares and debentures and
- (iv) Prohibits any invitation or acceptance of deposits from persons other than its members, directors or their relatives. Section 3(i)(III) amended Act 2000

To distinguish well it is necessary to know what is a public company? A public company is a company which (i) is not a private company (ii) has a minimum paid up capital of rupees five lakh or such higher paid up capital as may be prescribed. (iii) The subsidiary of a public company is also a public company [Section3(1) as per amendment Act, 2000]

Distinction between Private Company and Public Company :

S.No.	Basis of Distinction	Private company	Public company
1-	Minimum Capital	It requires atleast 1 lac or more as paid up capital.	Min. paid up capital of Rs.5 lacs or more as prescribed.

2-	Membership	In case of private company, minimum atleast two and maximum 50 members are required.	Min.7 and no limit of maximum of persons.
3-	Transfer of Shares	Transfer of shares is restricted by its articles and its shares cannot be transferred.	The shares of public company are freely transferable from one person to another and they can be quoted on the stock exchanges. A public company must file a prospectus with the registrar before allotting shares.
4-	Prospectus	It is not needed to file a prospectus or statement in lieu of the prospectus.	A public limited company must file a prospectus with the registrar before allotting shares.
5-	Statement in Lieu of Prospectus	It need not be issued before allotment of shares.	In case of public company, if it issues shares to its existing members or directors or to their relatives or friends it must file a statement in lieu of prospectus to the registrar earlier to allotment of shares.
6-	No. of Directors	Atleast two directors are required in case of private company.	3 Directors are required in case of Public Company.

7-	Commencement of Business	A private company can commence its business after obtaining certificate of incorporation.	Contrary to it, a public company can start its own business merely after obtaining certificates of commencement of business.
8-	Right Shares	In case of private company, the existing share holders have no right to get allotment in further issue of shares.	A public company can commence its business only after getting Certificate of commencement of Business.
9-	Statutory Meeting and Report	A private company need not hold any statutory meeting to file to the registrar.	A public limited company is required to hold a Statutory meeting and file a statutory report with in the specified time to the registrar.
10-	Directors' Consent	The Directors of private company are not required to file with written consent to work as directors to the registrar of the company.	But in case of public company, it is required to do so.

11-	Appointment of Directors	All the directors may be appointed by the single resolution.	But contrary to it, in public company, a separate resolution is required for appointment of each director atleast two third directors of public company must retire by rotation at every general meeting.
12-	Retirement of Directors	Here directors are not required to be retired by rotation.	Atleast two third directors of public company must retire by rotation at every general meeting.
13-	Maximum No. of Directors	More than 12 directors may be appointed without the approval of Central Govt.	Beyond 12 directors cannot be appointed without the consent of central govt.
14-	Quorum	If two members personally present in the meeting, can form quorum of the meeting.	For legality atleast five members must be present personally to form quorum of the meeting.
15-	Managerial Remuneration	There is no fixed limit of remuneration in case of a private company.	It cannot exceed the limit of 11 per cent of the net profit.

S.No.	Basis of Distinction	Private company	Public company
16-	Share Warrant	Cannot be issued in case of a private company.	With the consent of central government, it can be issued.
17-	Loan to Directors	With the consent of central Govt. it can grant loans to its Directors.	Without the approval of the Central Govt. public company cannot grant loan to its Directors.
18-	Provisions as to General Meetings	It can prescribe its own regulations regarding the general meetings.	It follows all the provisions of company law in this context.
19-	Index of Members	It is not required in case of private company.	But it is a must in case of index of members if its membership is beyond 50.
20-	End Words of the Name	A Private Company have the words "Private Limited" in its name.	But the Public Company must have only the word "Limited" in its name.
21-	Preparation of Articles	A private company has to prepare articles of Association.	In case of public company, need not to prepare article of Association, it can use table 'A'.

Q.4. Discuss the legal formalities that are required to be complied with under the Indian Companies Act, regarding the formation of a company.

Ans.: Without incorporation a company cannot be formed. It comes into existence only after registration and issue of certificate of incorporation. A promoter for registration takes the following steps.

- (1) Preliminary Steps
 - (2) Delivery of Documents to the Registrar
 - (3) Scrutiny of Documents by the Registrar
 - (4) Obtaining Certificate of Incorporation
- (1) **Preliminary Steps** : Following preliminary steps are taken by promoter for registration :
- (i) **A Promoter decides the type of Company** : either private or a public company he wants to be registered. It will be either limited by shares or guarantee or with or without share capital. The company may be registered with unlimited liability
 - (ii) The promoter also decides the place of registered office of the company. If the proper place is not decided then the name of state is at least decided by him.
 - (iii) **Selecting the Name of the Company** : The promoter also suggest four names of a proposed company as alternatives in form 1-A with a fee of Rs.500 to the registrar of the company to decide about the availability and desirability of the name out of four names. This name will be decided by the registrar within seven days it will be reserved for six months.
 - (iv) **Drafting Memorandum** : The promoter may draft the memorandum with help of his solicitor, company secretary and etc.
 - (v) Drafting of Articles of Association for private company is essential but for a public company it is optional in place of it, it can use Table-A.

- (vi) **Vetting of the Drafts** : The registrar may help in avoiding mistake and unnecessary delay in avoiding mistake and unnecessary delay in registration of the company.
 - (vii) **Printing of Memorandums** : Such as Memorandum and Articles of Association are required to be printed by the promoter.
 - (viii) Stamping on both the documents is a must according to laws applicable to them.
 - (ix) **Signature by the Subscribers** : Atleast 7 and 2 in case of public and private company respectively, signed by the subscribers on these public documents. In case of illiterate subscriber, he may give his thumb impression or mark.
 - (x) **Dating** : The subscribers must mention the dates on both the documents but not before the date of stamping.
 - (xi) **Statutory Declaration** : The legal compliance is completed nothing remain to be declared in connection to registration of the company. It is duly signed by the competent person prescribed in the act.
 - (xii) Getting consent of directors that they will act as directors of the company by the promoter.
 - (xiii) Getting undertaking to take atleast one share which is called qualification shares by the director this consent is also taken by the promoter.
 - (xiv) Other contracts such as preliminary are to be drafted by the promoter.
- (2) **Delivery of the Documents to the Registrar** : The promoter delivers the following documents to the registrar.
- (i) Triplicate copies duly signed on printed copies of Memorandum of Association, which should be divided into different paragraphs each copy should be signed by the witnesses also.
 - (ii) **Articles of Association** : Three copies duly printed, signed ;and evidenced by one witnesses should be submitted to the

registrar. It is compulsory in case of private company but a public company may be exempted due to use of Table-A in place of Article of Association. It should also be dated and stamped.

- (iii) The promoter also attach agreement copy with the whole time Managing Director or Manager.
 - (iv) Statutory Declaration by the advocate of Supreme Court or of High Court or An Attorney or a pleader who is entitled to appear before the High Court or a C.S/C.A.
 - (v) **List of Directors** : A list of persons who have agreed to act as Directors of the proposed company shall also be filed with other documents by the promoter.
 - (vi) A written and signed consent of directors shall also be submitted to the Registrar in prescribed form.
 - (vii) A written undertaking to take atleast one share known as qualification share shall also be filed with the Registrar.
 - (viii) **Information of Registered Office** : The promoter is also required to intimate about the registered office address or if not possible of location, then name of state so that the full address of the location may be submitted within 30 days of the registration of the company.
 - (ix) Copy of the letter confirming availability of the name of the company must be submitted by the company.
 - (x) **Power of Attorney by any Subscriber** : The corporate subscriber must be given power of attorney to any specific person who can sign on memorandum. They should also be given the power of attorney to make corrections also.
 - (xi) Document in support of payment of fees. The fees receipt is also to be attached in the file.
- (3) **Scrutiny of Documents** : When the promoter duly file all the documents relating for incorporation to the registrar, the registrar then will scrutinize these documents from legal point of view. If all the documents found correct, he may issue a certificate of

incorporation, but if finds any minor defect in the documents, then he may require for rectification. But if there is no defect, then he may be compelled to register if he denies.

- (4) **Certificate of Incorporation** : When the registrar ;after scrutiny of document feels satisfaction regarding formation formalities, he may retain all the relevant documents with him and he shall issue a Certificate of Incorporation to the company.

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Memorandum of Association and Articles of Association

Q.1. What are memorandum of Association and Articles of Association. Make out clearly Relationship and the difference between the two?

Ans.: Memorandum of Association is the charter of the company. It is generally called the constitution of the company which contains all those fundamental conditions upon which alone a company is incorporated. It is the foundation on which the complete structure of the company is to be built up. It includes six clauses namely, name, registered office, object, capital, liability and subscription clauses. It explains the scope and limitations of the company and it establishes the relationship between the company and the outside world.

Article of Association : It is another document which is very important for the company. It includes all the rules, by laws and procedures for management, administration and control of a company. It directs and supervises the employees, officers, and management of the company regarding the conduct of Business. It establishes the relationship between the company and its employees.

The Relationship between the Two : Both the documents are very important for the company. They may be regarded as two blades of the scissor, or two wheels of a vehicle or two legs of an handicapped. Memorandum states the limitations within which a company has to work. While articles of association drafts the guidelines for management and administration of the company. Memorandum decides what is to be done, while Articles of Association decides how can it be done. These two are supplementary to each other.

The relationship between the two can be explained as follows :

- (1) Articles of Association are subsidiary to the Memorandum of Association. Articles of Association can be made only within the limits as decided by the Memorandum of Association. Articles cannot go beyond the Memorandum of Association.
- (2) **Supplementary to Each Other** : These two documents are not competitors to each other but they are supplementary to each other. Memorandum directs for the limit and power of the company whereas Articles of Association guides for the internal Management of the company.
- (3) Articles of Association cannot amend a memorandum of Association, because articles of Association are subsidiary of the Memorandum. They cannot control/amend the memorandum.
- (4) Memorandum states objects while articles provide the manner in which objects may be attained.
- (5) Memorandum can be explained as constitution or foundation stone where as articles are relating to internal regulations.

Distinction between Memorandum and Articles of Association :

S.No.	Basis of Comparison	Memorandum of Association	Articles of Association
1-	Meaning	It is the charter of a company which defines the fundamental conditions upon which the company is incorporated.	It is a document which contains the rules and regulations for the internal affairs of a company.
2-	Definition	It is defined under section 2(28) of company law, 1950.	But is defined under Section 2(2).
3-	Importance	It is a fundamental document which is required to be framed	It is a supplementary document and not required to be

		by every company.	prepared by the public company limited by shares.
4-	Contents	It contains the objects of a company, name, place, capital, liability and Association clause.	It contains management of internal affairs of the company.
5-	Purpose	Its main purpose is to state the objectives for which the company has been established.	Its main objective is to carry out the company's objectives.
6-	Dominant and Subordinates	It is the main & dominant document which is beyond the control of Articles.	It is regulated and controlled through memorandum
7-	Necessity	It is originally framed by every company.	It is not required by public company limited by shares because Table A applies there.
8-	Alteration	Memorandum rarely altered by ;the permission of Central Law Board/Company Law Board.	Articles can be converted by the special resolution passed in the meeting of the company.
9-	Compliance of Provisions	Memorandum is made according to provisions of Company law.	Articles of Association is framed with help of Memorandum & Company law.
S.No.	Basis of Comparison	Memorandum of Association	Articles of Association
10-	Ultra Vires	Any act done ultra vires are absolutely	Any act which is intra vires of memorandum and company law but

		void.	ultra vires Articles of Association may be legal.
11-	Ratification	If any act is ultra vires of memorandum, then it will be null and void. Such act cannot be ratified.	If any act is ultra vires of Articles of Association, may be made intra vires by the special resolution passed.
12-	Basis of Relations	It is concerned with relations between company and outsiders.	Articles, defines relations between company and its members.
13-	Remedy with Outsiders	Where the acts are beyond the memorandum, there is no remedy for outsiders against the company.	If acts are done without following of the Article, the outsiders can enforce rights against the company.
14-	Explanation	Memorandum does not explain Articles.	But articles can be used to describe as supplement of the memorandum but in no case it can be extended the scope of memorandum.

CHAPTER-15

Prospectus

Q.1. Discuss the consequences of omission, misrepresentation and fraud in connection with prospectus of a company. Explain the circumstances under which a director may be relieved from the liability.

Ans.: Meaning of Misstatement or Untrue Statement : It is a false statement. It means any statement which may confuse or which may have a wrong impression in the minds of the public about facts of the issue. A general recommendation even if it is true highly coloured, cannot be a false statement. A statement that something is expected or it has been done, when it is not so in real, will be a mis-statement of the fact. If there is omission of a material fact from a prospectus, it may also be deemed to be untrue. Hence, a prospectus should honestly be framed and should not contain any incomplete statement or any ambiguous statement. Hence, a prospectus containing false, misleading, ambiguous or fraudulent statement of material facts may be termed as a misleading prospectus e.g. the case of *Rex vs. Kysant* : A prospectus was issued in 1928 with a statement that the company has regularly been paying dividend ranging from 5% to 8%. The truth was that the company had been incurring substantial trading losses during the seven years preceding the date of prospectus. The court held that the prospectus was false, not because of what is stated but because of what was not contained in it.

It must be observed that there must be misrepresentation of facts and not of law, to be called a misleading prospectus, e.g. if the prospectus of the company states that the shares of company will be issued at half of their normal rates but it is not the real statement, the prospectus may not be held misleading because it is only a misrepresentation of law because section 79 does not allow a company to issue its shares at a discount exceeding 10%.

According to Section 65, a prospectus shall also be deemed to have untrue statement if omission of any matter from it is calculated to mislead to those who act on the faith of the prospectus. Therefore, if the statement in prospectus is untrue and mislead those who act on the faith of the prospectus, is misstatement and untrue.

Remedies or Consequences of Misleading Statement of a Prospectus :

Following are the remedies to a person against the company for the misrepresentation or misstatement in the prospectus.

- (1) Remedies against the Company
 - (2) Remedies against the Directors, Promoters etc.
 - (3) Remedies against the Experts
- (1) **Remedies against the Company :** The company is held liable for every misstatement in its prospectus to any person who on the faith of it subscribes for shares in the company. The aggrieved parties have following remedies against the company.
- (A) Rescission of the Contract
 - (B) Damages for Deceit
- (A) **Rescission of the Contract for Misrepresentation/Untrue Statement :** Rescission means avoiding the contract and entitles the allottee to immediate removal of his name from the register of members and repayment of the amount paid on the shares with interest. But the contract can be rescinded subject to satisfaction of the following conditions :
- (i) The prospectus must contain a false statement or misrepresentation, whether fraudulent or innocent. Untrue statement is defined in section 65 of the company law if it is in misleading form and context as well as if it is misleading due to omission and untrue statement.
 - (ii) The statement which induced the allottee to subscribe for the shares must relate to fact and not law, an expression of opinion or expectations.

- (iii) The false statement must be material to the contract to take shares (Peek v. Gurney (1873))
 - (iv) The shareholder must have relied on the statement in the prospectus.
 - (v) The omission of material fact must be misleading before the rescission is granted.
 - (vi) The proceedings for the rescission must be started by the allottee within a reasonable period of time and before the company goes on liquidation.
- (B) **Loss of Right of Rescission :** The subscriber loses his right to rescind the contract in the following circumstances :
- (i) If he does not start the proceedings within a reasonable time after knowing the misrepresentation.
 - (ii) If he confirms his contract, either expressly or impliedly after becoming aware of the false statement. If a subscriber attends any of the meetings of the company, accepts any payment of dividend by the company, pays any call money on his shares or tries to sell his shares, it will be taken as his affirmation of the contract by his acts and in all such cases he will not be allowed to rescind the contract.
 - (iii) If a company goes on liquidation before he starts the proceedings to rescind the contract.
 - (iv) If the company proves that he is a man of such caliber and such experience that he is not likely to be misled by the misstatement in the prospectus.
- (C) **Right to claim damages for fraud :** If a person has purchased any shares or debentures of a company induced by a misstatement, in the prospectus of the company, he does not enjoy only the right of rescission of contract but also to recover the damages for such statement.

But to avail this remedy the subscriber must prove the following:

- (i) That the statements made fraudulently and not innocently, if a fraudulently statement was made innocently, only the right of rescission of contract is available for the subscriber.
- (ii) That he has actually been deceived by the misstatement. It is to remember that the right to claim any damages can be exercised only after the recession of contract has been allowed by the court. It makes it clear that if the right to rescind a contract is lost, right to claim the damages will be lost automatically.

It is to be remembered in this context that the right to claim damages for fraud is an elective right. First the allottee must rescind the contract and secondly then he can claim for damages.

- (2) **Remedies against the Directors, Promoters etc. :** Every Director, promoter and every other person who authorized the issue of prospectus, which contains untrue or misleading statement is liable to compensate to every such persons who subscribed the securities of the company on the faith of such prospectus.

The liability of such persons may be classified into two groups :

(A) Civil Liability

(B) Criminal Liability

(A) **Civil Liability :** Every director and promoter and others who authorized to issue prospectus, the allottee has the right to get remedies because there is misleading and untrue statement in the prospectus. They have the following remedies.

- (i) **Damages for Misstatement :** According to Section 62(1) every aggrieved party being a subscriber may sue director, promoter etc for the payment of loss or damages caused by him due to misstatement in the prospectus. He can claim for damages within three years from the date of the allotment of shares.

Defenses available to Directors etc : If the director, promoter and others may be exempted to pay damages or compensation if he proves any of the following :

- (a) That he had withdrawn the consent to become director or before the issue of prospectus or the prospectus was issued without his consent.
 - (b) The prospectus was issued without his knowledge or consent and on becoming aware, he forthwith gave public notice to that effect.
 - (c) Unaware about the misstatement made in prospectus, when came to know he withdrew his consent by a public notice before allotment of shares or debentures.
 - (d) Reasonable ground for belief : If the director understands that ;he had reasonable ground to believe and did upto the time of allotment that the statement was true, I have no doubt at that time.
 - (e) Statement by expert : The director will not be held liable if he says that the misstatement is correct to the best of my knowledge ;because it is based on reasonable ground and expert was competent to make it and he had given his consent and had not withdrawn that consent before registration of prospectus.
 - (f) A copy or extract of official document : According to section 62(2) if the director proves that the statement given in the prospectus is a copy of or extract from an official document or is based on the statement made by an official person.
- (ii) **Damages for Omission :** Every ;matter of the prospectus must be according to specified schedule II,

even though if certain things are omitted, then the subscriber gets the right of an action for damages to subscriber for shares, who actually suffered the loss thereby.

Under the following cases a subscriber will not be liable for omission of any matter from the prospectus :

- (a) If he proves that he had no knowledge of the matter not disclosed.
- (b) If he proves that non-disclosure arose from an honest mistake of fact on his part,
- (c) If the non-compliance was immaterial in the opinion of the court.
- (d) If in the eye of the court, the person sued ought to be executed for non compliance under section 56 (4).

- (iii) **Damages under General Law** : If a subscriber is defrauded by inducement by the prospectus of the company. The subscriber took the shares and was defrauded by it and substantial loss due to fraud, the subscriber can claim for damages.

The remedy can be given under the following conditions :

- (a) Where the aggrieved subscriber has lost the right of rescission of contract as against the company due to laches or negligence.
 - (b) The company became liquidated, the directors will not be held liable for loss if it is proved that they honestly believed the statement to be true [Derry v. Peek, 1889)
- (B) **Criminal Liability** : The criminal liability of the Directors will be as follows (according to Section63(1) as amended in 2000)]

- (i) **Criminal Liability for Misstatement in Prospectus :** If a prospectus contains any untrue statement every person authorizing the issue of prospectus shall be punishable with an imprisonment for a term which may be upto 2 years or with fine may be upto Rs.50,000 or with both.

But a Director may be free from liability under the following terms :

- (a) The statement was immaterial.
- (b) He had reasonable ground to believe and did upto the time of issue of the prospectus he believed that the statement was true.

- (ii) **Criminal Liability for Inducing Persons to Invest Money :** According to Section 68(Amended Act 2000), sometimes a person fraudulently either by knowingly or recklessly making any statement, promise or forecast which is false deceptive and misleading or dishonestly concealed material facts and propelled or induced or attempts to induce another person to enter into or to offer to enter into the contract as follows :

- (a) An agreement for acquiring, disposing of subscribing for, or underwriting shares/debentures.
- (b) An agreement to secure a profit to any of the parties from the benefit of shares/debentures or by references to fluctuations in the value of shares/debentures.

If the above position is found by any such agreement, he shall be punishable with imprisonment for a term, may be upto 5 years or with fine which may be extended to Rs. one lakh or with both.

- (3) **Remedies against Experts :** According to Section 58 if an expert gives his consent to issue prospectus containing untrue statement made by him, shall be made liable to all the subscriber because he bought the shares due to induced by the false statement in the

prospectus. They believed and after deceived. The subscriber is entitled to claim the following from the expert :

- (i) Damages under the General Law
- (ii) Damages under Section 62

But the expert has no criminal liability for his untrue statement because he is not deemed to be a person who has authorized to issue of a prospectus [See 63(2)].

Defenses available to an Expert : He may be escaped from his liability if he proves :

- (i) That having given his consent, he withdrew it in writing before delivery of a copy of the prospectus for registration.
- (ii) That after delivery of prospectus for registration but before allotment of shares, he became aware of the untrue statement and withdrew his consent in writing and gave a reasonable public notice of the withdrawal of his consent and reasons thereof.
- (iii) That he was competent to make the statement in question and believed it on reasonable ground that it was true.

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CHAPTER-16

Directors : Position, Appointment and Removal

Q.1. How the Directors of a company appointed? What restrictions have been imposed by the Company Act in respect of appointment of Directors?

Ans.: Section 253 of the Indian Companies Act, 1956 states that only an individual can be appointed as a Director in a company. It follows that a partnership firm or an incorporated body cannot work as a Director. The Indian Companies Act provided the following provisions regarding the appointment of Directors :

The modes/methods of appointment of directors: The directors may be appointed by the following ways.

- (1) Appointment of First Directors
 - (2) Appointment by the Member/Company
 - (3) Appointment by Board of Directors
 - (4) Appointment by the Third Parties
 - (5) Appointment by Proportional Representation
 - (6) Appointment by the Central Government
- (1) **Appointment of First Directors :** The first directors are appointed by the promoters of the company. They are appointed by the subscribers of the memorandum. If the articles do not provide for the appointment of first directors and table A is excluded, the signatories of the memorandum must be deemed to be first directors of the company's articles. According to section 254, such

directors shall act as director till the directors are duly appointed at the first general meeting after incorporation of the company

- (2) **Appointment at the General Meeting of the Members of the Company :** According to Section 255, at least two third of the total number of directors of a public company or of a private company must be appointed by the company in general meeting. So far as public company or private company, which is a subsided of a public company, at least two thirds of the total number are called Rotational Directors and shall be appointed ;by the shareholders in general meeting. Only 1/3 directors out of the total number of directors hold permanent directorship.
- (3) **Appointment of the Directors by the Board of Directors :** Board of director of a company may appoint directors of the following nature :
 - (i) **Additional Director :** According to Section 262, if the articles so permit, Board of directors may appoint additional directors subject to maximum number of fixed in the articles of the company who shall hold office only upto the date of next Annual General Meeting.
 - (ii) **Casual Vacancies :** Section 262(i) empowers Board of ;directors that a casual vacancy occurring amongst the directors may be filled up by the Board of directors itself unless the articles provide a different procedure but the persons so appointed shall hold office only upto the time his predecessors would ;have continued.
 - (iii) **Alternative Directors :** According to Section 313, if it is permitted ;by the articles of the company or by the company's resolution at the general meeting may appoint an alternative director. Such an alternative director has to act for the original director during his absence for a period of more than three months from the State in which the meetings of the company are held. The alternative director can continue as director only for the period for which the original Director was eligible Further, on the return of the

original director, the alternative director may vacate the office of the directorship.

- (4) **Appointment of the Directors by the Third Party:** Sometimes the articles give a right to financial corporation, debenture holders and banking companies which have lent money to the company to nominate directors on the board of the company with a view to ensuring that the funds advanced by them are used by the company for the purpose for which they were borrowed. The number of directors so nominated should not exceed one third of the total strength of the board and they are not to retire by rotation.
- (5) **Appointment by Proportional Representation:** Normally directors are appointed on a straight vote of the members of the company. But section 265 of the act allows a public company or a private company which is subsidiary of a public company to provide in its articles for the appointment of not less than 2/3 majority of the total number of directors by the Principle of proportional representation either by a single transferable vote or according to the principle of cumulative voting or otherwise. If the company decides to appoint directors, under this method, the director may be appointed for a period of three years at a time.
- (6) **Appointment made by the Central Government :** According to Section 408, the Central Government may appoint such number of directors when the company law board decides that it is necessary to safeguard the interests of the company or its shareholders or the public if :
 - (i) Not less than 100 members of the company apply to company law board to make such an appointment.
 - (ii) Member holding not less than one tenth of the total voting power to make an application to the company law board for making such an appointment.
 - (iii) On its initiative.
 - (iv) The directors appointed by the government may or may not be the shareholders of the company. They are appointed to prevent the oppression of the minority of the shareholders

or to prevent mismanagement of the company or in the public interest. They are appointed for a maximum period of three years. They are not required to hold qualification shares and are not liable to retire by rotation but they may be removed by the central government at any time and other persons may be appointed by it in their place. Considered for the purpose of reckoning 2/3rd or any other proposition of the total number of directors of company [Section 408(3)].

Restrictions on Appointment of Directors: According to section 253 of the companies Act lays down that a person cannot be appointed a Director by the articles or named as director in the prospectus or statement in lieu of prospectus unless before registration of articles, publication of the prospectus or filing of the statement in lieu of prospectus, he has :

- (a) Given his consent in writing to act as director and his consent has been duly filed with the registrar.
- (b)
 - (i) Signed the memorandum for his qualification shares.
 - (ii) Taken his qualification shares and paid or agreed to pay for them.
 - (iii) Signed and filed with the registrar an undertaking to take and pay qualification shares.
 - (iv) Made and filed with the registrar an affidavit stating that his qualification shares are registered in his name.

The above restrictions do not apply to :

- (i) A company without share capital.
- (ii) A private company.
- (iii) A private company now converted into a public company.
- (iv) A company which has issued prospectus after the expiry of one year from the date on which it was entitled to commence business.

Q.2. Describe the statutory provisions relating to a Manager and clearly distinguish between a Managing Director and a Manager.

Ans.: The Statutory provisions relating to Manager are as follows:

- (i) Every public company having a paid up share capital of rupees five crore or more shall have a Managing Director or a whole time Director or Manager (Section 269(2)).
- (ii) According to Section 269 (2), if the conditions specified in schedule XIII are fulfilled, the Managing or Whole time director or Manager in a public company can be appointed/reappointed without the approval of Central Government. A return in the prescribed form No. 25C is however required to be filed within 90 days of appointment.
- (iii) If the conditions specified in schedule XIII are not complied with an application seeking approval to the appointment must be made to the Central Government/reappointment [(Section 269 (2)(3)].
- (iv) The Central Govt. may grant approval for a period lesser than the period for which the proposal has been made.
- (v) If the appointment or reappointment is not sanctioned or approved by the central government, the appointee shall vacate office immediately on communication of the decision by the Central Government otherwise he shall be punishable with fine upto Rs.5000 for every day during which he fails to vacate such office.
- (vi) In addition to the above where the central Government on information received is prima facie of the opinion that any appointment made without its approval has been made in contravention of the requirements of schedule XIII, the Central govt. may refer the matter to the company Law Board for decision. The company Law Board after giving reasonable opportunity of hearing to the company and the appointee may make an order declaring whether contravention of the requirements of schedule XIII has or has not taken place. If the company Law Board comes to the conclusion that such contravention has occurred, the appointment shall be deemed to have come to an end on the date of such declaration and the person so appointed shall be addition to being liable to pay a fine of one lakh rupees refund to the company the entire amount of salaries and perquisites etc received by him. However, all the acts of Managerial/personnel whose appointment

is invalidated will be deemed to be valid. It is stated (Section 269(7)(8)(9)(10) and 12]

- (vii) No change can be made in the context of appointment/reappointment of Managing Director or a whole time director without the approval of the central government or schedule XIII of company's act.
- (viii) The remuneration payable to M.D. or whole time director cannot be more than 5% of the net profits of that financial year. If there is more than one M.D or whole time Director in a company, the maximum limit fixed at 10 per cent of the annual net profit explained in Section 309 (3) These limits are, however, subject to the overall ceiling of total management remuneration of 11 per cent of annual net profits of the company.
- (ix) At a time the maximum term of appointment can be five years. Reappointment is possible but it may be made within the last two years of his present terms only mentioned in Section 317.
- (x) No person can act as a M.D of more than two companies at a time including both public and private. Out of these two at least one is a public company.
- (xi) No person can be appointed a Managing Director or whole time Director who :
 - (a) Is an undischarged insolvent.
 - (b) Suspends or has at any time suspended payment to his creditors or makes or has made a composition with them.
 - (c) Is/has been convicted by the court of an offence involving moral turpitude.

Distinguish between Manager and Managing Director: They are distinguished as follows:

- (i) **Compulsion of being Director and Managing Director:** A Manager may be a director or may not be a director of the company but a Managing Director must be a director of the company.

- (ii) **Rights or Scope of Authority** : M.D is entrusted with substantial powers of Management whereas a Manager has the Management of whole or substantially a whole of the affairs of a company.
- (iii) **Number** : There may be more than one Managing Directors in a company but in case of a company only one manager is required.
- (iv) **Appointment** : MD may be appointed either by agreement with the company or by a resolution of the Board or general meeting or under memorandum or Articles of the company. Manager is usually appointed under a contract of service by the Board of Directors.
- (v) **Cessation of Office** : A person as M.D when ceases to be a director is automatically ceases to be the M.D contrary to it a manager remain manager after ceasing to be director.
- (vi) **Employee** : M.D. may be an employee or not, it depends on the terms of employment On the other hand, Manager is an employee of the company.
- (vii) **Disqualification** : Some disqualifications of M.D. are for whole life whereas the disqualification of Manager are only of five years and even the central government may waive these disqualifications.
- (viii) **Membership of the Board** : MD is the member of the Board of Directors whereas manager is not the member of Board of Directors.
- (ix) **Relationship** : MD is a co-director of the other directors of the company. Managers in relation of employee with directors.
- (x) **Practice** : Usually MD is appointed in a company whereas Manager is rarely appointed in a company.
- (xi) **Qualification Shares** : According to the Articles of Association, an M.D. must have qualification shares. But a manager on the other hand need not require qualification shares because he is not a director.
- (xii) **Remuneration** : The maximum remuneration payable to a person holding the office of a Manager cannot exceed 5% of the annual net profits of the company . Contrary to it if the company has more

than one M.D, the total remuneration payable to all of them should not exceed 10% of the total net profits of the company.

- (xiii) **Control** : A manager functions under the control and direction of the board while a Managing Director functions under the control and supervision of the board.

□ □ □



CHAPTER-17

Company Secretary

Q.1. Explain the legal position of the Secretary of a Company. OR While the directors are the brains of the company, the secretary is its ears, eyes and hands. He is responsible in plenty, but he is only an agent and cannot act for the company without authority from the directors. Discuss this point.

Ans.: It is the period of globalization, liberalization, privatization, technological and informational changes every where, though new organisations are emerging in the form of multi national corporations. Though company is an artificial, invisible, intangible and exists only in the contemplation of law. It is managed by very professional and competent Manager, because company is owned by shareholders and Management and company is separate. Therefore, it is very necessary that company should run according to company law and other laws applicable accordingly. The person who is responsible to see all this is called the Company Secretary.

According to Oxford Dictionary, "A Secretary is one whose office is to write for another, especially one who is liable to conduct correspondence to keep records and to transact various other businesses for another person or for a society, corporation or a public body.". Section 2(45) of Indian Companies (amendment) Act 1974 "Secretary means any individual possessing the qualifications appointed to perform the duties which may be performed by a Secretary under this act and any other ministerial or Administration duties". According to Section 2(1)© of the Company Secretaries Act, company Secretary means a person who is a member of the Institute of Company Secretaries of India In brief "a company Secretary is an individual who is a member of Institute of company secretaries of India. Besides, any individual who is possessing the other prescribed qualifications and appointed to perform the duties

which may be performed by a Secretary under the companies act and any other ministerial or administrative duties.

Legal Position of a Company Secretary : What is the status of a Company Secretary, is very difficult and complicated because the company is silent about the legal position of Secretary. If we look at the rights and duties of C.S, we can state that a Secretary is a representative officer, agent, advisor of the company, as well as the servant of the company. Secretary is in constant relationship between directors and shareholders. The legal position of C.S. is as follows :

- (1) **Secretary as an Agent :** The Secretary is an agent of the company. As an agent, he must conduct the businesses with reasonable amount of care and intelligence. As a principal, the company is liable for all the works done by its Secretaries, provided such works are within the limit of his authority and are done in a bonafide manner in the interests of the company. If the Secretary has made any secret profit, he shall be made liable to account for any such profits. But Secretary is ;an agent in the company in the capacity of a servant. He can do anything whatever is told to him. Hence, he may enter into contract with the consent or authority of the directors. He may exercise such powers as the board of directors delegate him. He has only ostensible authority. It is stated by various authorities to do so on behalf of the directors and company. He is certainly authorized to sign contracts connected with administrative side of the company's affairs such as employing staff, ordering vehicles and so forth. All such acts are within ostensible authority of Secretary as an agent.
- (2) **Secretary as an Officer :** According to Section2(30) of the Indian Company Act, Company Secretary is an officer of the company. He is not managerial person. Lord Denning held that he has extensive duties and responsibilities. Justice solmon says Secretary is the Chief Administrative Officer of the company. He is also held liable when he is on default in following cases.
 - (i) He is liable to sign and file various forms and returns and maintaining statutory books. If he fails to do so, he is liable to penalties.

- (ii) He is liable for liaisoning work, link between company and third parties. He is liable to supervise all ministerial and Administrative work in the capacity as an executive officer. He also advises the board in relation to the statutory provision.
 - (iii) He may be subjected to misfeasance proceedings at all time of winding up if he has misutilised or retained any money or property of the company or has been guilty of breach of trust.
 - (iv) C.S. is liable to be punished if he falsifies the books of the company, misstatement in balance sheet or any reports or returns or certificates filed to the registrar.
 - (v) C.S is liable for statutory obligations under the provisions of various acts such as MRTP Act, FERA Act, Income Tax Act, Salestax and Indian stamps duty act and other labour laws.
- (3) As a Professional person or as representative of the Company: A C.S. is recognized as professional person by I.C.S.I (Institute of Company Secretaries of India). He is entitled to represent the company in case of the tribunal, Income Tax and Central Excise authorities have recognized as a practicing Secretary for attestation of documents.
- 4) **As a Managerial Person :** A company Secretary is not a managerial person. He is subordinate of a Manager actually. He is subordinate officer. His remuneration is not taken into account for as managerial personnel under Section198. The act does not prevent his managerial power if provided he will become more powerful. If there are more than two or three directors, then one of them may be appointed as company secretary if he is possessing required qualification of C.S.
- (5) **As a Person in Fiduciary Position :** The Company Secretary stands in fiduciary position towards a company. He is liable to company if earns secret profits. Company and Secretary stand in trust and fiduciary position.

- (6) **Secretary as a Departmental Officer :** He is the officer of Ministerial staff. He manages the meetings of share holders and directors. He directs and controls the Accounts Department, distribution, Sales and correspondence department. However, it should be noted that he only supervises these departments. He cannot participate directly.
- (7) **Secretary as the Servant of the Company :** A Secretary is basically a servant of a company. He is to perform his duties in accordance with instructions given to him by the directors of the company. According to justice Isher, "A secretary is a mere servant, his position is that he is to do what he is told and no person can assume that he has authority to represent anything at all. It reminds that a secretary is a servant of his company because he simply follows the orders given to him by his directors. He cannot do any thing on his own. He cannot register a transfer of shares.
- (8) **A Secretary as an Advisor :** A secretary is also the advisor of the company because if the directors are the brains of the company, the secretary is its ear, eyes and hands. Therefore, it is concluded that Secretary of a company is the very important person. He serves the company as any officer, as a servant, as an agent and as an advisor

Q.2. Explain the role or importance of Company Secretary.

Ans.: The role of Company Secretary is increasing day by day due to globalization, legal and government intervention in the affairs of business. He is in key position in the company organization, having a link among Board of Directors, Managers, Shareholders, outsiders and registrar of the company. Hence, Bucknell truly stated "the position of company secretary is like that a hub in the cycle wheel."

The role and importance may be explained from the following statement :

- (i) "While directors are brain of a company, Secretary is the company's ears, eyes and hands.
- (ii) Secretary as a servant as well as a guide to Directors.
- (iii) Secretary, "the mouth-piece of Directors."

The importance and role of Company Secretary can be explained in the following manner :

- (1) **Directors are the brains, Secretary is ears, eyes and hands :** Company is an artificial, intangible and invisible having no soul or brain. It works through board of directors and they get work done through various officers, Secretary is among them. His role is pivotal. Head Fausset, and Wilson explained " While the directors are the brain of the company, the Secretary is its ears, eyes and hands." This statement can be explained as follows :
 - (i) **Directors are the brain of the Company :** Due to artificial, intangible and legal creature, it has no body, no soul, no brain and no conscious. But the company acts through directors. They are the brains of the company. They formulate its plans, policies, procedures and strategies, the work in a judicious way for profits and well being of the company. Directors work like brain which is very sensitive and responsive for the success and growth.
 - (ii) **Secretary, the ears of the Company :** The ears helps in listening proper information, instructions and guidance and transmit these to the brain and then decision is taken. In the same manner, Secretary analyses the internal and external environment. He hears views, complaints, suggestions and criticism from the office staff and employers and external parties. He then tells to the management. That is why Secretary performs the functions of ears.
 - (iii) **Secretary, the eyes of the Company :** Like eyes sees and find out the merits and demerits of a particular person and things. In the same manner, Company Secretary observes, sees working system of the company and find out any drawback. After watching and observing, the brain has no doubt about the working system. Hence, a Secretary perfectly fits in the role of the company
 - (iv) **Secretary, the hands of the Company :** Hands help in performing work. In the same way whatever plans policies,

procedures and programmes are instructed by the directors (like a brain), the Secretary implements these accordingly to requirement of the time. He prepares the reports, returns, statements et. In compliance with ;the legal requirements. He maintains books, statutory books, registers and documents. He also ensures properly compliance of other legal documents such as income tax, excise, labour stamp duty, MRTP laws. He also writes to the government on behalf of the company and directors in doing every important activity of the company.

- (2) **Secretary, as servant as well as guide to Directors :** It is stated by Lord Esher that a Secretary is mere servant. He is to do what he is told. He is like an employee of the company. His remuneration is not like a manager's remuneration. But his position has become more dignified. He guides directors on important and typical matters of law and practice. He also helps in formulation of plans and policies. He also guides relating to issue, allotment, transfer and transmission of shares, issue of right or bonus shares, declaration of dividend etc. Hence, he is not only a servant but also provides worthy guidance.
- (3) **Secretary is also the mouth piece of Directors :** He usually represents the company. He issues explanation to the press in general and shareholders in particular. He also makes press release regarding the achievements, progress and working of the company. He is also concerned with the image of the company. He nurtures or exploits every opportunity to directors to the shareholders as well as to the public at large. Hence, we conclude that the Company Secretary is like a mouth piece of the company. Whatever he tells it is assumed told by the management of the company.

LEGAL ASPECT OF INDIAN BUSINESS

Unsolved Paper – 2011

Time Allowed : 3 Hours

Max .Marks : 100

*Attempt five questions in all.
Question Nos. 1 and 2 are compulsory.*

Part-I

Q.1 Answer all the ten questions. All questions carry 2 marks each. (Answer limit up to 50 words each). $2 \times 10 = 20$

- (i) What is an agreement ?
- (ii) What is contract ?
- (iii) What is void agreement ?
- (iv) What is a specific offer ?
- (v) Define a company.
- (vi) What is a Memorandum of Association.
- (vii) What is Agency ?
- (viii) What is existing goods?
- (ix) What do you mean by negotiable instrument ?
- (x) What do you mean by an unpaid seller ?

Q.2 Answer all five questions. Each question carries 4 marks. (Answer limit up to 100 words each). $5 \times 4 = 20$

- (i) Distinguish between void and voidable contract.
- (ii) What do you understand by capacity to contract ?
- (iii) What is Fraud ?
- (iv) What do you mean by sub-agent ?
- (v) Define Public Company.

Part-II

Attempt any three questions. Each question carries 20 marks.

- Q.3 “All contacts are agreements but all agreements are not contacts.” Comment with suitable arguments.
- Q.4 Who can make a valid contract? Discuss the validity of agreements made by a minor.
- Q.5 What is contract of indemnity? Discuss the rights of indemnity holder and indemnifier
- Q.6 What is meant by unpaid seller? Explain the rights of an unpaid seller.
- Q.7 Describe the essential characteristics of a Negotiable Instrument.

Unsolved Paper – 2010

Time Allowed : 3 Hours

Max .Marks : 100

*Attempt five questions in all.
Question Nos. 1 and 2 are compulsory.*

Part-I

Q.1 Answer all the ten questions. All questions carry 2 marks each. (Answer limit up to 50 words each). 2 x 10 = 20

- (i) Give any five elements of a valid contract.
- (ii) Who are the persons considered as incompetent to enter into a contract?
- (iii) Who may perform the contract?
- (iv) What is a continuing guarantee?
- (v) Mr. "P" appoints Mr. 'A' A minor, to sell his bicycle for cash for a price not below Rs.700 Mr. A sells it to Mr. M for Rs.500. Explain the position of Mr. 'A' and Mr. 'M'.
- (vi) Briefly state the right of an "unpaid seller".
- (vii) Define a 'Bill of exchange'
- (viii) What do you mean by 'Holder in due course'?
- (ix) What are the main features of a private company?
- (x) What is 'Doctrine of Indoor' management?

Q.2 Answer all five questions. Each question carries 4 marks. (Answer limit up to 100 words each). 5 x 4 = 20

- (i) When is consideration deemed to be unlawful?
- (ii) What are the right of an 'Indemnity Holder'?
- (iii) Briefly state the classification of goods.
- (iv) Discuss the modes of negotiation of a negotiable instrument.
- (v) In what circumstances, the service of a company secretary can be dismissed?

Part-II

Attempt any three questions. Each question carries 20 marks.

- Q.3 Define and distinguish between 'coercion' and 'undue' influence' what is their effect on the validity of a contract?
- Q.4 Distinguish between a contract of indemnity and "Guarantee' in what circumstances a surety is discharged from his liability?
- Q.5 Define a contract of sale of goods. Distinguish between a sale and an "Agreement of sell"
- Q.6 What do you mean by crossing of a cheque? Discuss different kinds of crossing with suitable examples.
- Q.7 (i) Describe the case law "Saloman Vs Saloman & Co. Ltd., (1897)
(ii) Define 'Memorandum of association' and state its contents.

Unsolved Paper – 2009

Time Allowed : 3 Hours

Max .Marks : 100

*Attempt five questions in all.
Question Nos. 1 and 2 are compulsory.*

Part-I

Q.1 Answer all the ten questions. All questions carry 2 marks each. (Answer limit up to 50 words each). 2 x 10 = 20

- (i) Define the 'offer' and the 'acceptance'.
- (ii) What is meant by consent? When is a consent said to be free?
- (iii) "No consideration, no contract". Explain discuss the exception to this rule.
- (iv) State the agreements declared expressly as void by Indian contract act.
- (v) What is meant by contract of indemnity and contract of guarantee?
- (vi) Define condition and warranty.
- (vii) Enumerate the characteristics of company.
- (viii) What do you mean by negotiable instrument?
- (ix) What do you mean, by endorsement of negotiable instrument?
- (x) Define contractual capacity. Name of person incompetent to contracting.

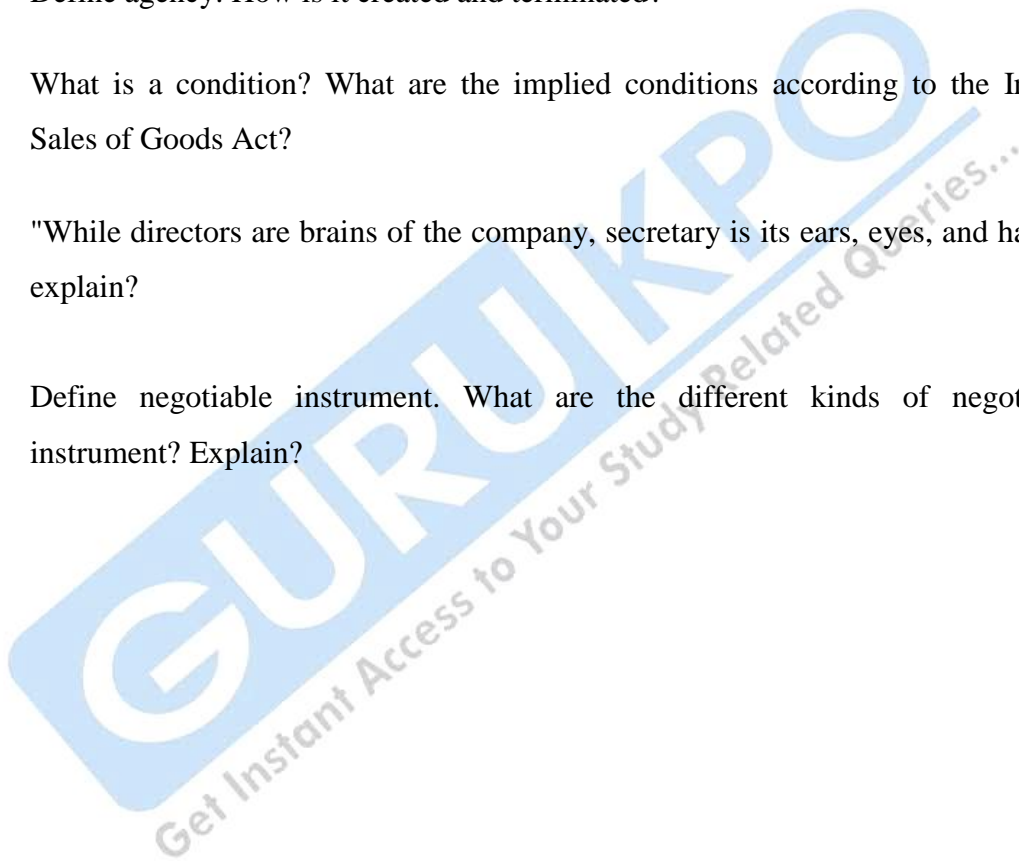
Q.2 Answer all five questions. Each question carries 4 marks. (Answer limit up to 100 words each). 5 x 4 = 20

- (i) Describe the cash law "Mohri Bibi vs. Dharmodas Ghosh".
- (ii) Discuss the agreements against the public policy.
- (iii) Explain the doctrine of "Caveat emptor" with its exceptions.
- (iv) Discuss "Doctrine of ultra virus" doctrine of indoor management" and "Doctrine of constructive notice".
- (v) What do you mean by a holder in due course of a negotiable instrument?

Part-II

Attempt any three questions. Each question carries 20 marks.

- Q.3 "All contracts are agreement but all agreement are not contracts. Explain?
- Q.4 Define agency. How is it created and terminated?
- Q.5 What is a condition? What are the implied conditions according to the Indian Sales of Goods Act?
- Q.6 "While directors are brains of the company, secretary is its ears, eyes, and hands" explain?
- Q.7 Define negotiable instrument. What are the different kinds of negotiable instrument? Explain?



Unsolved Paper – 2008

Time Allowed : 3 Hours

Max .Marks : 100

*Attempt five questions in all.
Question Nos. 1 and 2 are compulsory.*

Part-I

Q.1 Answer all the ten questions. All questions carry 2 marks each. (Answer limit up to 50 words each). 2 x 10 = 20

- (i) Distinguish between general offer and a specific offer.
- (ii) "An agreement entered into by minor cannot be enforced by law" comment.
- (iii) Write a short note on discharge of contract by operation of law.
- (iv) Write a short note on appropriation of payments.
- (v) Write a short note on irrevocable agency.
- (vi) Distinguish between sub agent and substituted agent.
- (vii) State the implied warranties in a contract of sale.
- (viii) Distinguish between general and special crossing.
- (ix) Enumerate the documents that are required to be filed with register for incorporation of a company.
- (x) When in public company not required to issue a prospectus?

Q.2 Answer all five questions. Each question carries 4 marks. (Answer limit up to 100 words each). 5 x 4 = 20

- (i) Enumerate the essential elements of a valid contract.
- (ii) Distinguish between coercion and undue influence.
- (iii) When can an unpaid seller resale goods?
- (iv) Distinguish between cheque and a bill of exchange.
- (v) Under what cases the post of Directors becomes vacant?

Part-II

Attempt any three questions. Each question carries 20 marks.

- Q.3 "A contract without consideration is void". Comment on the statement and give its exceptions.
- Q.4 Distinguish between a contract of indemnity and guarantee. In what circumstances a surety is discharged from his liability?
- Q.5 "No one can give a better title to the goods than what he himself has" Comment on this statement and also discuss the exceptions to this rule as per the sale of goods act.
- Q.6 Define a negotiable instrument and state those basic characteristics which distinguish a negotiable instrument from ordinary goods.
- Q.7 What is memorandum of association (MOA)? What are the clauses of the memorandum of association of company limited by shares? Discuss the importance of the objective clause and show how it can altered?

Unsolved Paper – 2007

Time Allowed : 3 Hours

Max .Marks : 100

*Attempt five questions in all.
Question Nos. 1 and 2 are compulsory.*

Part-I

Q.1 Answer all the ten questions. All questions carry 2 marks each. (Answer limit up to 50 words each). 2 x 10 = 20

- (i) Write a short note on acceptance by conduct?
- (ii) What is a void agreement?
- (iii) When is it duty of a person to speak while making a contract?
- (iv) Is a contract of insurance a wager?
- (v) What do you mean by anticipatory Breach of contract?
- (vi) Write a short note on undisclosed Principal?
- (vii) Write a note on continuing guarantee?
- (viii) Write a note on symbolic delivery?
- (ix) Define a private company.
- (x) What is doctrine of ultra virus?

Q.2 Answer all five questions. Each question carries 4 marks. (Answer limit up to 100 words each). 5 x 4 = 20

- (i) Distinguish between offers an intention to put an offer.
- (ii) Discuss the case of Mohari Bibee Vs Dharmodas Ghose.
- (iii) How can a deemed public company again become a private company?
- (iv) What preliminary steps are taken for incorporation of a company?
- (v) When is a company required to file a statement in lieu of prospectus?

Part-II

Attempt any three questions. Each question carries 20 marks.

- Q.3 Who can make a valid contract? Discuss the validity of agreement made by a minor.
- Q.4 Define agency. How is it created and terminated?
- Q.5 What is meant by unpaid seller? Explain the rights of an unpaid seller?
- Q.6 "Company is a legal person just as much as an individual but with no physical existence" Discuss the above statement and explain the characteristics of the company?
- Q.7 Describe the statutory provisions relating to a managing Director and clearly distinguish between a managing director and a manager.

Unsolved Paper – 2006

Time Allowed : 3 Hours

Max .Marks : 100

*Attempt five questions in all.
Question Nos. 1 and 2 are compulsory.*

Part-I

Q.1 Answer all the ten questions. All questions carry 2 marks each. (Answer limit up to 50 words each). $2 \times 10 = 20$

- (i) Write a short note on free consent.
- (ii) "An agreement without consideration is void." Comment.
- (iii) Write a short note on discharge of contract by operation of law.
- (iv) Distinguish between subagent and substituted agent.
- (v) Write a short note on kind of delivery of goods.
- (vi) When can an unpaid seller resale the goods?
- (vii) Mention any four legal presumptions made in respect of negotiable instrument.
- (viii) Distinguish between promissory note and a bill of exchange.
- (ix) What is doctrine of constructive notice?
- (x) Is it compulsory to appoint company secretary in every company? What are the consequences if a company does not appoint a company secretary?

Q.2 Answer all five questions. Each question carries 4 marks. (Answer limit up to 100 words each). $5 \times 4 = 20$

- (i) Distinguish between void and voidable contract.
- (ii) When is an agent personally liable for the acts done by him for his principle?
- (iii) When can a breach of condition be treated as a breach of warranty?
- (iv) Distinguish between general and special crossing.
- (v) The certificate of incorporation is the conclusive evidence of registration of company. Explain?

Part-II

Attempt any three questions. Each question carries 20 marks.

- Q.3 What is void agreement? Briefly state the various agreements that are expressly declared to be void under the act.
- Q.4 Distinguish between a contract of guarantee and indemnity in what circumstances a surety is discharged from his liability?
- Q.5 "No one can give a better title to the goods than what himself has". Comment on it also discuss the exceptions to this rule as per the sale of goods act.
- Q.6 Distinguish between holders of a holder in due course. Explain the special privileges of holder in due course under the Negotiable Instrument Act.
- Q.7 What is memorandum of association? What are the clauses of memorandum of association of a company limited by shares? Describe process of alteration of the object clause.
