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Q.1: What do you mean by Contract? Explain the essentials of a valid contract.

ESSENTIAL ELEMENTS OF A VALID CONTRACT
All agreements are not contracts. Only that agreement which is enforceable at law is a contract. An agreement which is enforceable at law cannot be contract. Thus, the term agreement is wider in scope than contract. **All Contracts are agreements but all agreements are not contracts.**
An agreement, to be enforceable by law, must possess the essential elements of a valid contract as contained in section 10 of the Indian Contract Act. According to Section 10, "All agreements are contract if they are made by the free consent of the parties, competent to contract, for a lawful consideration and with a lawful object and are not expressly declared to be void." As the details of these essentials form the subject-matter of our subsequent chapters, it is proposed to dismiss them in brief here.
The following are the essential elements of a valid contract:
1. Offer and Acceptance. In order to create a valid contract, there must be a 'lawful offer' by one party and 'lawful acceptance' of the same by the other party.
2. Intention to Create Legal Relationship. In case, there is no such intention on the part of parties, there is no contract. Agreements of social or domestic nature do not contemplate legal relations.
Case: - Balfour vs. Balfour (1919)
3. Lawful Consideration. Consideration has been defined in various ways. According to Blackstone, “Consideration is recompense given by the party contracting to another." In other words of Pollock, "Consideration is the price for which the promise of the is brought."
Consideration is known as quid pro-quo or something in return.
4. Capacity of parties. The parties to an agreement must be competent t contract. If either of the parties does not have the capacity to contract, the contract is not valid.
According the following persons is incompetent to contract.
(a) Minors,
(b) Persons of unsound mind, and
(c) Persons disqualified by law to which they are subject.

5. Free Consent. 'Consent' means the parties must have agreed upon the same thing in the same sense.

According to Section 14, Consent is said to be free when it is not caused by-

(1) Coercion, or (2) Undue influence, or (3) Fraud, or

(4) Mis-representation, or (5) Mistake.

An agreement should be made by the free consent of the parties.

6. Lawful Object. The object of an agreement must be valid. Object has nothing to do with consideration. It means the purpose or design of the contract. Thus, when one hires a house for use as a gambling house, the object of the contract is to run a gambling house.

The Object is said to be unlawful if-

(a) it is forbidden by law;

(b) it is of such nature that if permitted it would defeat the provision of any law;

(c) it is fraudulent;

(d) it involves an injury to the person or property of any other;

(e) the court regards it as immoral or opposed to public policy.

7. Certainty of Meaning. According to Section 29,"Agreement the meaning of which is not certain or capable of being made certain are void."

8. Possibility of Performance. If the act is impossible in itself, physically or legally, if cannot be enforced at law. For example, Mr. A agrees with B to discover treasure by magic. Such Agreements is not enforceable.

9. Not declared to be void or illegal. The agreement though satisfying all the conditions for a valid contract must not have been expressly declared void by any law in force in the country. Agreements mentioned in Section 24 to 30 of the Act have been expressly declared to be void for example agreements in restraint of trade, marriage, legal proceedings etc.

10. Legal Formalities. An oral Contract is a perfectly valid contract, expect in those cases where writing, registration etc. is required by some statute. In India writing is required in cases of sale, mortgage, lease and gift of immovable property, negotiable instruments; memorandum and articles of association of a company, etc. Registration is required in cases of documents coming within the scope of section 17 of the Registration Act.

All the elements mentioned above must be in order to make a valid contract. If any one of them is absent the agreement does not become a contract.

Q.2: 'All contracts are agreements, but all agreements are not contract.' Discuss the statement explaining the essential elements of a valid contract.

Ans. INTRODUCTION:

No doubt it is a valid and true statement. Before critically discussing the statement, we must know the exact and basic meanings of the two terms contract and agreement in the context of business law. For understanding the meaning, we have to go to the contract act 1872 that is applicable in subcontinent.

A contract is a legally binding agreement or relationship that exists between two or more parties to do or abstain from performing certain acts. There must be offer and acceptance for a contract to be formed. An offer must back by acceptance of which there must be consideration. Both parties involved must intend to create legal relation on a lawful matter which must be entered into freely and should be possible to perform.

Definition of contract

According to section 2(h) of the Contract Act 1872:

" An agreement enforceable by law is a contract."

A contract therefore, is an agreement the creates a legal obligation i.e., a duty enforceable by law.

From the above definition, we find that a contract essentially consists of two elements:
(1) An agreement and (2) Legal obligation i.e., a duty enforceable by law.
Example; A promises to sell a horse to B for Rs.100, 000, and B promises to buy horse at that price.
All contracts are agreements:
For a Contract to be there an agreement is essential; without an agreement, there can be no contract. As the saying goes, "where there is smoke, there is fire; for without fire, there can be no smoke". It could will be said, "Where there is contract, there is agreement without an agreement there can be no contract". Just as a fire gives birth to smoke, in the same way, an agreement gives birth to a contract.
What is agreement?
An agreement is a form of cross reference between different parties, which may be written, oral and lies upon the honour of the parties for its fulfilment rather than being in any way enforceable.
As per section 2 (e) of Contract At 1872:
" Every promise and every set of promises, forming the consideration for each other, is an agreement." Thus it is clear from this definition that a 'promise' is an agreement.
What is a Promise
The answer to this question is contained in section 2 (b) which defines the term." 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."
An agreement, therefore, comes into existence only when one party makes a proposal or offer to the other party and that other party signifies his assent thereto.
All agreements are not contracts
As stated above, an agreement to become a contract must give rise to a legal obligation. If an agreement is incapable of creating a duty enforceable by law. It is not a contract. Thus an agreement is a wider term than a contract.
Agreements of moral, religious or social nature e.g., a promise to lunch together at a friend's house or to take a walk together are not contracts because they are not likely to create a duty enforceable by law for the simple reason that the parties never intended that they should be attended by legal consequences
On the other hand, legal agreements are contracts because they create legal relations between the parties.
EXAMPLE: A invites B to dinner. B accepts this invitation but does not attend the dinner. A cannot sue B for damages. It is social agreement because it does not create legal obligation. So it is not a contract.
b- A promises to sell his car to B for one million. It is legal agreement because it creates legal obligations between the parties. So it is a contract
According to section 10 of the contract act 1872,
"All agreements are contracts if they are made by the free consent of the parties, competent to contract, for a lawful consideration and with a lawful object and not hereby declared to be void."
Thus an agreement becomes a contract when at least the following conditions are satisfied.
1-free consent
2-competency of the parties'

3-lawful consideration
4- lawful object.

Conclusion:

In a nut shell, an agreement is the basis of a contract and contract is the structure constructed on these bases. An agreement starts from an offer and ends on consideration while a contract has to achieve another milestone that is enforceability. Due to this, breach of an agreement does not give rise to any legal remedy to the aggrieved party while breach of contract provides legal remedy to the aggrieved party against the guilty party. Thus we can say that all contracts are agreements but all agreements are not contracts.

Q.3: Define the term 'offer'. Explain the legal rules regarding a valid offer.

Ans. "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 person to such act or abstinence, he is said to make a proposal."

The person making the proposal is called the 'offer ' or 'promise'. The person to whom the offer is made is called the 'offeree' or 'promisee'.

Offer and Acceptance

A offers to sell his scooter to B for Rs. 5,000. This is a proposal. A is the offeror or promisor and B is the offeree.

Legal Rules Regarding Offer:

An offer to be valid must comply with the following rules:

1. Offer may be express or implied:

An offer may be express or may be implied from the conduct of the parties or circumstances of the case.

Express Offer: An express offer is made by words spoken or written.
Examples:

(1) A says to B, "Will you purchase may car for Rs. 15,000? It is an oral offer.

(2) A, through a letter asks B to buy his car for Rs. 15,000. It is a written offer.

Implied Offer - An implied offer is not made by words spoken or written. It is implied from the conduct of the parties or from the circumstances.

Example:

(1) Public Transport, like, Railways. DTC in Delhi or MEST in Mumbai offer to carry passengers for a certain fare on a particular route.

(2) Public Telephones or Weighing Machines in public places like, Railway Stations or Cinema Houses offer their services for a certain amount, say one rupee.

2. Offer may be specific or general:

A specific offer is one which is made to a particular person. It can be accepted by the person to whom it has been made, no one else can accept such an offer.

Example:

A offers to sell his watch to B for Rs. 200. This is a specific offer made to B. It is B alone who can accept this offer and no one else can accept this offer, i.e., C or D cannot accept this offer. A general offer is made to the world at large. Therefore, it can be accepted by any person.

Example:1. A advertised in a Newspaper that he would give Rs. 100 to anyone who finds and returns his lost dog.

2. A company advertised that a reward of Rs. 100 would be given to any person who contracted influenza after using the medicine (Smoke balls) made by the company according to the printed directions. One lady, called Mrs. Carlill, purchased and used the medicine according to the printed directions of the company but suffered from influenza. She filed a suit to recover the reward of Rs. 100. The Court held that there was a contract as she had accepted a general offer by using the medicine in the prescribed manner and as such, she was entitled to recover the reward from the company.

3. Offer must give rise to legal obligation:

An offer to be valid must create legal relationship between the parties. The very purpose of entering into an agreement is to make it enforceable at a Court of law. If the offer has not been made with this intention it will not become a contract even if it is accepted by the party to whom it was made.

Example: A promised to pay Rs. 30 to his wife every month. Later, A failed to pay the amount. The wife filed a suit against the husband to recover the amount. The Court held that she could not recover as the promise was not made with an intention to create any legal relationship.

4. Terms of an offer must be definite and certain:

The terms of an offer should not be vague or indefinite.

Example: A has two cars - Ambassador and Fiat. He agrees to sell one of his cars to B for Rs. 20,000. It is not clear as to which of the cars A has agreed to sell. A might be thinking to sell the Ambassador car while B might be thinking to purchase the Fiat car. The offer is not definite.

5. Offer must be distinguished from an invitation to offer:

An offer must be distinguished from an invitation to offer. The shopkeepers generally display their goods in showcases with price tags. The shopkeeper in such cases is not making an offer so that you can accept it. He is, on the other hand, inviting you to make an offer which he may or may not accept. Thus you cannot compel a shopkeeper to sell the goods displayed in the showcase at the marked price. However, if there is specific law to sell goods at marked price then the seller will have to sell at marked price. For example, during National Emergency essential commodities like sugar etc. have to be sold at marked price.

6. Offer must be distinguished from a mere declaration of intention:

A declaration of intention to make an offer is not an offer. It is regarded as an invitation to offer. An advertisement for sale in a Newspaper or Magazine etc. is not an offer for sale.

Example: A advertised to sell certain furniture by auction, B reached A's house to purchase the furniture. However, A changed his mind not to sell the furniture. B cannot compel A to sell the furniture or even to recover his damages, i.e., conveyance charges and damages for inconvenience caused to him due to cancellation of the sale.

It should be noted that a general offer can be made through advertisement if the terms are certain and capable of being accepted.

Example: A lost his camera in a DTC bus. He announced a reward of Rs. 100 to the finder who may return it to him. B found the camera after reading the advertisement and returned it to him. B is entitled to the reward.

7. Offer must be communicated:

An offer must be communicated to the person to whom it is made. A person can accept the offer only when he knows about it. If he does not know it, he cannot accept it.

Example: G sent his servant L to trace his lost nephew. Later on G, announced a reward for tracing the boy. L without knowing about the advertisement of the reward traced the boy and restored him to G. When L came to know of the reward, he claimed it. G refused to give the reward. The Court held that L was not entitled to recover the reward as the offer was not communicated to L. He could not accept an offer which he did not know.

8. Communication of Special Terms:

Special terms of a contract must be communicated. Generally, such cases arise in respect of general offers, like tickets or receipts for depositing luggage at the Railway Station or receipts for clothes given for dry cleaning etc. The rule in these cases is that parties are not bound unless conditions printed are properly communicated.

Example: A passenger was travelling from Dublin to White haven with his luggage. On the back of the ticket, a special condition was printed according to which the Shipping Co. would not be liable for the loss of luggage. However, this condition was not communicated to the passenger in as much as no such words as RT.O. or See Back were printed on the face of the ticket to draw the attention of the passenger. The court held that the passenger was not bound by those conditions as those were not communicated to him. Hence the company was liable to pay for the loss of the luggage.

It should be noted that an acceptor is bound by the condition even if the conditions are printed in a foreign language. He should ask for its translation.

Again, an acceptor cannot even plead that he was illiterate or blind, provided the notice is reasonably sufficient for the class of persons to which he belongs.

Again, it should be noted that the special terms of the contract should be brought to the notice of the offeree at the time of offer was made. If the special terms are brought to the notice of the offeree after the contract was made, the offeree will not be bound by them.

Example: A and his wife took a room on hire in a hotel. After booking the room, they entered the room and saw a notice on the wall of the room. The proprietors not responsible for articles lost or stolen unless handed over to the manager for safe custody."

Due to the negligence of the hotel staff, their property was stolen. Held, the proprietor of the hotel was liable as the notice was not binding, because it came to the knowledge of the client only after the contract to take the hotel on hire had already been made.

9. Offer must be made with a view to obtaining the consent of the other party to do or to abstain from doing the act:

The offer must be made with an intention to get the consent of the other party to do or to abstain from doing the act and not simply with a view to making known the intention of making an offer.

Example: A tells B, "I may sell my Television if I can get Rs. 2,000 for it. It is not an offer as it has not been made with a view to get the consent of B. It is a mere declaration of intention. Therefore, B cannot accept it by saying. "I can pay you Rs. 2,000 for it." B is not accepting A's offer but is making his offer which A may or may not accept.

10. Offer should not impose an unnecessary obligation to communicate non-acceptance:

Thus an offeror cannot say that if acceptance is not communicated by Sunday next, the offer would be considered as accepted.

Example: A offers his car to B for Rs. 20,000 saying, "If you do not reply by Sunday next, I shall presume, you have accepted the offer."

In this case, no contract will be created even if the acceptor does not reply as the law does not permit a party to impose an unnecessary obligation of the acceptor if he does not want to accept the offer. Thus in the above example, if the acceptor does not accept the offer he will be put to an unnecessary burden of informing the offeror that he does not want to accept the offer.

Q.4: Define consideration. How far is it necessary for the validity of a contract? Critically discuss the essential elements of consideration.

Ans. Section 2 (d) of the Contract Act defines consideration as – 'When at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or abstain from doing, something, such act or abstinence or promise is called consideration for the promise.' In the words of Pollock, "an act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable."

In every contract, every party must stand to gain something in return of what it agrees to do or not to do. This something given or received is the consideration. Consideration is the essential element of contract. An agreement without consideration cannot be contract and hence is not enforceable by law. If the person who makes the promise gains nothing in return of the promise made, such promise cannot be enforced against him. Hence the principle – 'No consideration – No contract'.

Essential elements of Consideration

The analysis of the definition of consideration would show that following are the essential elements of valid consideration.

1. **Consideration must move at the desire of the promisor:** The definition of consideration starts with the assertion that consideration must move at the desire of the promisor. Hence, an act done at the desire of any third party is not consideration. Similarly, acts done voluntarily or services rendered without any request cannot form consideration.

2. Consideration may be furnished by anyone: Consideration need not be from the promisee alone, but may proceed from third person also. Thus as long as there is consideration, it does not matter from whom it is given. It may move from the promisee or any other person. It therefore follows that a person who is a stranger to the consideration can sue for the performance of the contract, because the consideration moves on his behalf from some other person.

3.Consideration may be past, present or future: The words used in the definition clearly indicate that the consideration (either in the form of some act or abstinence) may have been given in the past, or being given in the present, or promised now but to be given at some future time. Therefore, it is not only the act or abstinence of the past or present (something done or not done in the past and something being done or not done in the present), but also a promise to do or not to do certain act in the future which constitutes consideration.

4. Consideration must be 'something of value' in the eyes of law: The fourth essential element of consideration is that it must be something of value in the eyes of law. It should be noted that what is adequate consideration is to be decided by the parties and not by the law. The law insists on the presence of consideration and not on its adequacy.

When no consideration is necessary

Although as a general rule there cannot be any contract without consideration, there are some exceptions where an agreement is a valid contract even without consideration. These are the exceptions to the rule- No Consideration -No Contract.

1. Agreement made on account of natural love and affection: An agreement made without consideration is enforceable as valid contract, if it is,

a) Expressed in writing,

b) Registered under the law for the time being in force for the registration of documents,

c) Made on account of natural love and affection and is

d) Between the parties standing in a near relation to each other.

Under Section 25 (1), if the four conditions are satisfied, an agreement is a contract even without consideration.

2. Agreement to compensate for past voluntary services: If a promise is made to a person who has already voluntarily done something for the promisor in the past, such promise is a valid contract even though at the time of promise there is no consideration moving from that person to the promisor.

3. Agreement to pay a time-barred debt: The law of limitation lays down the period during which a suit can be filed to recover a debt. If that time expires, no recovery can be made through law. A time-barred debt is the debt which cannot be legally recovered, as the remedy to recover the same is lost under the law of limitation. Section 25 (3) of the Contract Act provides that where there is an agreement, made in writing and signed by the debtor or by his authorized agent, to pay wholly or in part, a debt barred by law of limitation, the agreement is a valid contract even though it is not supported by any consideration. What is necessary for the contract to fall under this exception is that 1) the contract must be in writing, 2) it must be signed by the debtor or by his authorized agent and 3) there has to be an express promise to pay.

4. Completed gift: An agreement whereby one person promises to give a gift to another is obviously not a contract, because there is no consideration. However, where the transaction of actually giving the gift is complete, it is a contract in the eyes of law. The gift so given cannot be demanded back on the ground that there was no contractual obligation to give the gift.

5. Contract of agency: Section 185 of the Contract Act provides that in the contract of agency, there is no need of consideration for creating agency.

6. Remission of promise: (waiver of rights) Remission of contractual rights takes place where the creditor agrees to accept less than what is outstanding. Thus, a banker, who fears that the total loan given to a borrower may turn out to be bad debt, may accept part of the loan amount in full settlement of the loan dues. No consideration is necessary for this contract. Similarly, under section 63, a contract whereby the time for performance of contract is extended, needs no consideration.

7. Contribution to charity: A promise to contribute to the charity, though gratuitous, would be enforceable, if on the faith of the promised contribution, the promisee materially alters his position and incurs a liability. For example, where A promises to pay a certain sum by way of contribution for the purpose of extension of a hospital building and if the hospital authorities, on the faith of the promised contribution, undertake the construction activity, the promise can be enforced against A, though it is without consideration.

Q.5: What do you understand by 'capacity to contract'? What is the effect of agreement made by persons of unsound mind?

Ans. Capacity to contract means the legal competence of a person to enter into a valid contract. Usually the capacity to contract refers to the capacity to enter into a legal agreement and the competence to perform some act. The basic element to enter into a valid contract is that she/he much have a sound mind.

Certain class of people are exempted from the category of people who are capable of entering into contract:

1. Infants/minors;
2. Insane;
3. People under the influence of drug;
4. Bankrupt; and
5. Enemy alien.

Capacity of Persons of Unsound Mind to enter into a Contract

As stated earlier, as per section 11 of the contract Act for a valid contract, it is necessary that each party to it must have a sound mind.

What is a 'sound mind'?

Section 12 of the contract act defines the term 'sound mind' as follows: "A person is said to be of sound mind for the purpose of making a contract, if at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effects upon his interests."

According to this section, therefore, the person entering into the contract must be a person who understands what he is doing and is able to form a rational judgment as to whether what he is about to so is to his interest or not.

The section further states that:
"A person, who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind." Thus a patient in a lunatic asylum, who is at intervals of sound mind, may contract during those intervals.

"A person, who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind." Thus, a sane man, who is delirious from fever, or who is so drunk that he cannot understand the terms of a contract, or from a rational judgment as to its effect on his interest, cannot contract whilst such delirium or drunkenness lasts.

In Halsbury's Lawa of England, it is stated: "The general theory of the law in regard to acts done, contracts made by parties affecting their rights and interests, is that in all cases there must be a free and full consent to bind the parties, consent is an act of reason accompanied by deliberate consent that the conveyance and contracts of unsound mind are generally deemed to be invalid; or in other works, (subject to exceptions), there cannot be a contract by a person of unsound mind.

Unsoundness of mind may arise from:

a. Idiocy – it is god given and permanent, with no intervals of saneness. The mental powers of an idiot are completely absent because of lack of development of the brain;
b. Lunacy or Insanity – it is a disease of the brain. A lunatic loses the use of his reason due to some metal strain or disease. Of course he may have lucid intervals of sanity;
c. Drunkenness – it produces temporary incapacity, till the drunkard is under the effect of intoxication, provided it is so excessive as to suspend the reason for a time and create impotence of mind;
d. Hypnotism – it also produces temporary incapacity, till the person is under the impact of artificially induced sleep;
e. Mental decay on account of old age, etc. In case where the contract is sought to be avoided on any of the above grounds, the burden of proof lies on the party who sets up such a disability; but if unsoundness of mind is once established, the burden of providing a lucid interval is on him, who sets it up (Mohanlal vs Vinayak).

Effects of agreements made by persons of unsound mind. An agreement entered into by a person of unsound mind is treated on the same footing as that of minor's, and therefore an agreement by a person of unsound mind is absolutely void and inoperative as against him but he can derive benefit under it (*Jugal Kishore vs Cheddu*). The property of a person of unsound mind is however, always liable for necessaries supplied to him or to any one whom he is legally bound to support under section 68 of the act.

Q.6: State briefly the various modes in which a contract may be discharged.
Ans. Discharge of a contract means termination of the contractual relations between the parties to a contract. A contract is said to be discharged when the rights and obligations of the parties under the contract come to an end. Modes of discharge of contract

Discharge by Performance
a contract can be discharged by performance in any of the following ways:

(a) By Actual Performance A contract is said to be discharged by actual per-formance when the parties to the contract perform their promises in accordance with the terms of the contract.

(b) By Attempted Performance or Tender A contract is said to be discharged by attempted performance when the promisor has made an offer of performance to the promisee but it has not been accepted by the promisee.

Discharge by Mutual Agreement
Since a contract is created by mutual agreement, it can also be discharged by mutual agreement.

A contract can be discharged by mutual agreement in any of the following ways:

a) Novation [Section 62] means the substitution of a new contract for the original contract. Such a new contract may be either between the same parties or between different parties. The consideration for the new contract is the discharge of the original contract.

(b) Rescission [Section 62] Rescission means cancellation of the contract by any party or all the parties to a contract.

(c) Alteration [Section 62] Alteration means a change in the terms of a contract with mutual consent of the parties. Alteration discharges the original contract and creates a new contract. However, parties to the new contract must not change.

(d) Remission [Section 63] Remission means acceptance by the promisee of a' lesser fulfilment of the promise made. According to Section 63, "Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit."

(e) Waiver means intentional relinquishment of a right under the con-tract. Thus, it amounts to releasing a person of certain legal obligation under a contract.

Discharge by Operation of Law
a contract may be discharged by operation of law in the following cases:

(a) By Death of the Promisor a contract involving the personal skill or ability of the promisor is discharged on the death of the promisor.

(b) By Insolvency when a person is declared insolvent, he is discharged from his liability up to the date of his insolvency.

(c) By Unauthorised Material Alteration If any party makes any material alteration in the terms of the contract without the approval of the other party, the contract comes to an end.

(d) By the Identity of Promisor and Promisee When the promisor becomes the promisee, the other parties are discharged.

Discharge by Impossibility of Performance
The effects of impossibility of the performance of a contract may be discussed under the following two heads:

(a) Effects of Initial Impossibility

(b) Effects of Supervening Impossibility

(c) Declaration of War The pending contracts at the time of declaration of war are either suspended or declared as void.

(d) Change of Law The contract is discharged if the performance of the contract becomes impossible or unlawful due to change in law after the formation of the contract.

Discharge by Lapse of Time
A contract is discharged if it is not performed or enforced within a specified period, called period of limitation. The Limitation Act, 1963 has prescribed the different periods for different contracts, e.g. period of limitation for exercising right to recover a debt is 3 years, and to recover an

immovable property is 12 years. The contractual parties cannot exercise their rights after the expiry of period of limitation.

Discharge by Breach of Contract
A contract is said to be discharged by breach of contract if any party to the contract refuses or fails to perform his part of the contract or by his act makes it impossible to perform his obligation under the contract. A breach of contract may occur in the following two ways:

(a) Anticipatory Breach of Contract Anticipatory breach of contract occurs when party declares his intention of not performing the contract before the performance is due.

(b) Actual Breach of Contract Actual breach of contract occurs in the follow-ing two ways:

(i) On Due Date of Performance: If any party to a contract refuses or fails to perform his part of the contract at the time fixed for performance, it is called an actual breach of contract on due date of performance.

Q.7: Discuss briefly the remedies for breach of contract.

Ans. Contracting party's actual failure or refusal to perform (or a clear indication of its intentions to not perform) its obligations under the contract. A breach could be affected by

(1) Repudiation of obligations before the beginning of the contract,

(2) Repudiation of obligations before its completion, or

(3) A conduct that prevents the contract's proper performance (such as interfering with the other party's performance). Breach of a major term (condition) of the contract (called 'fundamental breach') entitles the aggrieved party to (1) treat the contract as discharged, (2) consider itself free from its own obligations under the contract, and (3) sue the offending party for damages arising from the breach.

Breach of a minor term (warranty) allows for suing for damages arising from the breach, but does not allow any party to treat the contract as discharged except where terms of the contract override this implied legal-provision. In contrast to 'rescission of contract,' a breach of contract does not operate retrospectively.

REMEDIES FOR BREACH OF CONTRACT

What are the Remedies for Breach of Contract?

There are several remedies for breach of contract, such as award of damages, specific performance, rescission, and restitution. In courts of limited jurisdiction, the main remedy is an award of damages. Because specific performance and rescission are equitable remedies that do not fall within the jurisdiction of the magistrate courts, they are not covered in this tutorial.

What Damages Can Be Awarded?

There are two general categories of damages that may be awarded if a breach of contract claim is proved. They are:

1. Compensatory Damages. Compensatory damages (also called “actual damages”) cover the loss the no breaching party incurred as a result of the breach of contract. The amount awarded is intended to make good or replace the loss caused by the breach.

There are two kinds of compensatory damages that the no breaching party may be entitled to recover:

A. General Damages. General damages cover the loss directly and necessarily incurred by the breach of contract. General damages are the most common type of damages awarded for breaches of contract.

Example: Company A delivered the wrong kind of furniture to Company B. After discovering the mistake later in the day, Company B insisted that Company A pick up the wrong furniture and deliver the right furniture. Company A refused to pick up the furniture and said that it could not supply the right furniture because it was not in stock. Company B successfully sued for breach of contract. The general damages for this breach could include:

- Refund of any amount Company B had prepaid for the furniture; plus
- Reimbursement of any expense Company B incurred in sending the furniture back to Company A; plus
- Payment for any increase in the cost Company B incurred in buying the right furniture, or its nearest equivalent, from another seller.

B. Special Damages. Special damages (also called "consequential damages") cover any loss incurred by the breach of contract because of special circumstances or conditions that are not ordinarily predictable. These are actual losses caused by the breach, but not in a direct and immediate way. To obtain damages for this type of loss, the no breaching party must prove that the breaching party knew of the special circumstances or requirements at the time the contract was made.

Example: In the scenario above, if Company A knew that Company B needed the new furniture on a particular day because its old furniture was going to be carted away the night before, the damages for breach of contract could include all of the damages awarded in the scenario above, plus: payment for Company B's expense in renting furniture until the right furniture arrived.

2. Punitive Damages. Punitive damages (also called "exemplary damages") are awarded to punish or make an example of a wrongdoer who has acted wilfully, maliciously or fraudulently. Unlike compensatory damages that are intended to cover actual loss, punitive damages are intended to punish the wrongdoer for egregious behaviour and to deter others from acting in a similar manner. Punitive damages are awarded in addition to compensatory damages.

Punitive damages are rarely awarded for breach of contract. They arise more often in tort cases, to punish deliberate or reckless misconduct that results in personal harm.

How is Compensatory Damages Calculated?

The calculation of compensatory damages depends on the type of contract that was breached and the type of loss that was incurred. Some general guidelines are:

Standard Measure. The standard measure of damages is an amount that would allow the no breaching party to buy a substitute for the benefit that would have been received if the contract had been performed. In cases where the cost of the substitute is speculative, the no breaching party may recover damages in the amount of the cost incurred in performing that party's obligations under the contract.

Contracts for the Sale of Goods. The damages are measured by the difference between the contract price and the market price when the seller provides the goods, or when the buyer learns of the breach.

Are There Any Limitations on the Award of Compensatory Damages?

An important limitation on the award of damages is the duty to mitigate. The no breaching party is obligated to mitigate, or minimize, the amount of damages to the extent reasonable. Damages cannot be recovered for losses that could have been reasonably avoided or substantially ameliorated after the breach occurred. The no breaching party's failure to use reasonable diligence in mitigating the damages means that any award of damages will be reduced by the amount that could have been reasonably avoided.

Q.8: What is a contract of sale of goods? Discuss the essential characteristics of a contract of sale of goods.

Ans. The law relating to sale of goods is contained in the Sale of Goods Act, 1930. It has to be read as part of the Indian Contract Act, 1872 [Sections 2(5) and (3)].

Contract of Sale of Goods

According to Section 4, a contract of sale of goods is a contract whereby the seller:
(i) Transfers or agrees to transfer the property in goods
(ii) To the buyer,
(iii) For a money consideration called the price.

It shows that the expression "contract of sale" includes both a sale where the seller transfers the ownership of the goods to the buyer, and an agreement to sell where the ownership of goods is to be transferred at a future time or subject to some conditions to be fulfilled later on.

The following are thus the essentials of a contract of sale of goods:

i. *Bilateral contract:* It is a bilateral contract because the property in goods has to pass from one party to another. A person cannot buy the goods himself.

ii. *Transfer of property:* The object of a contract of sale must be the transfer of property (meaning ownership) in goods from one person to another.

iii. *Goods:* The subject matter must be some goods.

iv. *Price or money consideration:* The goods must be sold for some price, where the goods are exchanged for goods it is barter, not sale.

v. All essential elements of a valid contract must be present in a contract of sale.

Essential Characteristics of Sale of Goods

Essential Characteristics of Sale of Goods are as follows:

1. Two parties: There should be two parties namely the buyer and seller. Incase the students of a Hostel take meals in a mess run by them , there is no contract of sale because the student are undivided joined owners, who are running the mess on cooperative basis. Undivided join owners must be distinguished from a ‘part-owner’ who is a join owner with divisible share.

2. Transfer of Property: ‘Property’ here means ‘ownership’. Transfer of property in the goods is another essential of a contract of sales of goods. A mere transfer of possession of the goods cannot be termed as sale. To constitute a contract of sale the seller must either transfer or agree to transfer the property in the goods to the buyer. Further, the term ‘property,’ as used in the Sale of Goods Act, means ‘general property’ in goods as distinguished from ‘special property’

3. Goods: The subject-matter of the contract of sale must be ‘goods’ 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, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.” Goodwill, trademarks, copyrights, patents right, water, gas, electricity,, decree of a court of law, are all regarded as goods. In the case of land the grass which forms part of land have to be separated from the land. Thus where trees sold so that they could be cut out and separated from the land and then taken away by the buyer, it was held that there was a contract for sale of movable property or goods

(Kursell vs Timber Operators & Contractors Ltd.). But contracts for sale of things 'forming part of the land itself' are not contracts for sale of goods.

4. Price: The consideration for a contract of sale must be money consideration called the 'price.' If goods are sold or exchanged for other goods, the transaction is barter, governed by the Transfer of Property Act and not a sale of goods under this Act. But if goods are sold partly for goods and partly for money, the contract is one of sale (Aldridge vs Johnson).

5. Includes both a 'sale' and 'an agreement to sell.' The term 'contract of sale' is a generic term and includes both a 'sale' and an 'agreement to sell' [as is clear from the definition of the term as per Section 4(1) given carlier].

6. Sale: Where under a contract of sale the property in the goods is immediately transferred at the time of making the contract from the seller to the buyer, the contract is called a 'sale' [Sec. 4(3)]. It refers to an 'absolute sale', e.g. an outright sale on a counter in a shop. There is immediate conveyance of the ownership and mostly of the subject matter of the sale as well (delivery may also be given in future), it is an executed contract.

Q.9: Define the term 'sale' and agreement to sell' and distinguish between the two.

Ans. Distinction between Sale and Agreement to Sell:

A contract of sale is a generic term and includes both an actual sale and an agreement to sell. Section 4 provides that if the property in goods is transferred from the seller to the buyer under a contract, the contract is called a sale. Where the transfer of the property in the goods will take place at a future time or is subject to some condition which has to be fulfilled, the contract is called an agreement to sell. Such an agreement to sell becomes a sale when the prescribed time lapses or the conditions are fulfilled.

Basis of Distinction	Sale	Agreement to Sell
Contract	It is an executed contract.	It is an executory contract.
Transfer of property	The property in the goods sold passes to the buyer at the time of contract. It passes immediately.	The property passes when it becomes sale on the expiry of prescribed time or the fulfilment of certain conditions. It takes place at a future time or subject to fulfilment of conditions.
Conveyance of property	It creates a right in rem – a right to enjoy the goods against the whole world including the seller.	It creates a right in personam– right against the seller.
Transfer of risk	The transfer of risk takes place immediately. It is related to ownership and when ownership is transferred, the risk also passes to the person. If there is loss of goods, it will fall on the buyer	There is no transfer of risk of loss of goods as ownership is not transferred. The loss will be borne by the seller even though the goods are in possession of the buyer.

	even though the goods maybe in the possession of the seller.	
Right of seller in case of breach	Since the property has passed to the buyer, the seller can sue the buyer for price of the goods.	The seller can only sue for damages, unless the price was payable at a particular date.
Right of buyer in case of breach	He can sue the seller for damages. He can also sue the third party who bought those goods for the goods.	He can sue the seller for damages only.
Insolvency of seller in possession of goods	He can claim the goods from the Official assignee or Receiver.	He cannot claim the goods but only a rateable dividend for the money paid.
Insolvency of buyer before paying the price	The seller has to deliver the goods to the Official assignee except where he has a lien over the property.	The seller can refuse to deliver the goods to the Official Assignee or Receiver.

The question of paying sales tax arises only in case of a completed sale and not where there is only agreement to sell.

Q.10: Define and distinguish between a condition and a warranty. Under what circumstances a breach of condition is to be treated as a breach of warranty?

Ans. Conditions and Warranties (Sections 10-17)

The parties are at liberty to enter into a contract with any terms they please. As a rule, before a contract of sale is concluded, certain statements are made by the parties to each other. The statement may amount to a stipulation, forming part of the contract or a mere expression of opinion which is not part of the contract. If it is a statement by the seller on the reliance of which the buyer makes the contract, it will amount to a stipulation. If it is a mere commendation by the seller of his goods it does not amount to a stipulation and does not give the right of action. .

The stipulation may either be a condition or a warranty. Section 12 draws a clear distinction between a condition and a warranty. Whether a stipulation is a condition or only a warranty is a matter of substance rather than the form of the words used. A stipulation may be a condition though called a warranty and *vice versa.*

Conditions

If the stipulation forms the very basis of the contract or is essential to the main purpose of the contract. it is a condition. The breach of the condition gives the aggrieved party a right to treat the contract as repudiated. Thus, if the seller fails to fulfill a condition, the buyer may treat the contract as repudiated, refuse the goods and. if he has already paid for them, and recover the price. He can also claim damages for the breach of contract.

Warranties

If the stipulation is collateral to the main purpose of the contract, i.e.. is a subsidiary promise, it is a warranty. The effect of a breach of a warranty is that the aggrieved party cannot repudiate the contract but can only claim damages. Thus, if the seller does not fulfill a warranty. The buyer must accept the goods and claim damages for breach of warranty.

Section 11 states that the stipulation as to time of payment are not to be deemed conditions (and hence not to be of the essence of a contract of sale) unless such an intention appears from the contract. Whether any other stipulation as to time (e.g., time of delivery) is the essence of the contract or not depends on the terms of the contract.

When condition sinks to the level of warranty

In some cases a condition sinks or descends. To the level of a warranty. The first two cases depend upon the will of the buyer. But the third is compulsory and acts as estoppel against him.

(a) A condition will become a warranty where the buyer waives the condition, or

(b) A condition will sink to the level of a warranty where the buyer treats the breach of condition as a breach of warranty; or

(c) Where the contract is indivisible and the buyer has accepted the goods or part thereof. The breach of condition can only be treated as breach of warranty: The buyer can only claim damages and cannot reject the goods or treat the contract as repudiated.

Sometimes the seller may be excused by law from fulfilling any condition or warranty and the buyer will not then have a remedy in damages.

BASIS FOR COMPARISON	CONDITION	WARRANTY
Meaning	A requirement or event that should be performed before the completion of another action, is known as Condition.	A warranty is an assurance given by the seller to the buyer about the state of the product, that the prescribed facts are genuine.
Defined in	Section 12 (2) of Indian Sale of Goods Act, 1930.	Section 12 (3) of Indian Sale of Goods Act, 1930.
What is it?	It is directly associated with the objective of the contract.	It is a subsidiary provision related to the object of the contract.
Result of breach	Termination of contract.	Claim damages for the breach.

BASIS FOR COMPARISON	CONDITION	WARRANTY
Violation	Violation of condition can be regarded as a violation of the warranty.	Violation of warranty does not affect the condition.
Remedy available to the aggrieved party on breach	Repudiate the contract as well as claim damages.	Claim damages only.

Q.11: Define partnership. What are the essential elements of a partnership?

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

A type of business organization in which two or more individual's pool money, skills, and other resources, and share profit and loss in accordance with terms of the partnership agreement. In absence of such agreement, a partnership is assumed to exit where the participants in an enterprise agree to share the associated risks and rewards proportionately.

The essential characteristics of partnership are as follows:

1. Two or more persons:

There must be at least two persons to form a partnership. A person cannot enter into partnership with himself. The maximum number of persons in a partnership should not exceed 10 in case of banking business and 20 in other types of business.

If the number of partners exceeds the prescribed maximum, it would become an illegal association of persons. A firm cannot become a partner of another firm though its partners can join any other firm as partners.

2. Agreement:

Partnership is the outcome of an agreement between persons. The relation of partnership arises from the formation of a contract and not from status or birth.

If a proprietor gives a share in profits to his employee it will not be called a partnership unless there is an agreement of partnership between the two. The agreement may be oral or in writing but it must satisfy all the essentials of a valid contract.

3. Lawful business:

A partnership can be formed only for the purpose of carrying on a business. An association of persons who jointly own a house without carrying on a business is not partnership.

Moreover, the business carried on by the partners must be lawful. Illegal acts such as theft, dacoity, smuggling, etc., cannot be called partnership.

4. Sharing of profits:

The agreement between the partners must be to share the profits of business. There can be no partnership without the intention of mutual gain. The profits must be distributed among the partners in an agreed ratio.

Similarly, losses should be shared among the partners. However, sharing of profits is not a conclusive proof of partnership. For example, a manager may be given a share in profits of the firm.

5. Mutual agency:

Partnership business can be carried on by all the partners or by any of them acting on behalf of the others. In other words, every partner is an implied agent of the other partners and of the firm. Each partner is liable for acts performed by other partners on behalf of the firm.

The above mentioned features are the real tests of partnership. In addition, partnership has the following characteristics:

6. Utmost good faith:

The relations between partners are based upon mutual trust and confidence. Every partner is expected to act in the best interests of other partners and of the firm as a whole.

He must observe utmost good faith in all the dealings with his co-partners. He must render true accounts and make no secret profits from the business.

7. Unlimited liability:

Every partner is jointly and severally liable to an unlimited extent for the debts of the partnership firm. In case the assets of the firm are insufficient to pay the debts in full, the personal property of each partner can be attached to pay the creditors of the firm.

8. Restriction on transfer of interest:

No partner can transfer his share in the partnership without the prior consent of all other partners.

Q.12: What is a partnership deed? State its main contents.

Ans. Partnership firm can be established with an agreement between the partners. This agreement may be written or oral. An oral agreement may be the cause of dispute in future. So, it is better to have a written agreement in order to avoid future conflicts. The written agreement duly signed by the partners is known as partnership deed or agreement or Articles of Partnership. It is the written contract between partners. It contains the term and conditions of the partnership.

Partnership deed forms the basis of partnership. Partnership deed is a document containing all the matters according to which mutual rights, duties and liabilities of the partners in the conduct and management of the affairs of the firm are determined. Hence, it contains the terms and conditions of the partnership. It is helpful in preventing and resolving disputes among the partners. A partnership deed can be altered at any time with the consent of all the partners.

The past experiences of partnership firms show that there are disputes among partners over many things and these results in the closure of the firm. If the areas of dispute or conflict are spotted earlier and a clear understanding is reached, then the business can run smoothly. So, partnership deed or agreement is a document which is prepared to explain important points so that the chances of conflict are minimized. Even if there is a dispute it helps in easier settlement. So, written deed should be preferred.

Main Content of Partnership Deed

Some of the important clauses to be included in a partnership deed are as follows:

(1) Name of the firm and Its Address : The deed should contain of the firm and place of its business.

(2) Name and Address of Partners: The deed should also contains the names and address of all partners.

(3) Nature of Firm's Business: The nature of business proposed to be carried and its limitation should be included in it.

(4) Duration of Partnership: It the partnership is established for a fixed duration or for a fixed work, it should be stated in it.

(5) Partners' Capitals: The deed should contain the total amount of capital and contributions by each partner.

(6) Interest on Capital: If the partners decide to change interest on their capitals, the rate should be mentioned in the deed.

(7) Drawing and Interest on Them: The deed should contain the limit of drawings by every partner and the rate of interest to be charged.

(8) Division of Profit: Profit and loss sharing ratio should be stated in the deed. If it is not mentioned partners are authorized to share equally according to Partnership Act.

(9) Partners' Salary and Commission: If the partners decide to pay salary and commission to the partners, the deed should contain the amount of salary or commission payable to any partner for the services rendered to the business.

(10) Rights and Duties of Partners: If any partner has some special rights and duties regarding to conducts of business or if the liability of any partner is limited to the capital invested by him, these facts should also be mentioned in it.

(11) Admission and Retirement of Partners; after the establishment of partnership some new

partners may be admitted and some may retire from the business. If any definite procedure is to be adopted at the time of admission or retirement of partner, it should be stated in it.

(12) Death of a Partner: The procedure of calculating the amount due to a deceased partner and the method of its payment to his successors should also be decided and stated in the deed.

(13) Valuation of Goodwill; The method of valuation of goodwill at the time of admission, retirement or death of a partner should be also be clearly stated in it.

(14) Revaluation of Assets and Liabilities; The method of revaluation of assets and liabilities on admission, retirement or death of a partner should also be clearly stated in it.

(15) Accounts and Audit: The procedure of keeping accounts and their audit should also be stated in it.

(16) Dissolution of Partnership; the deed should contain the firm and the method of the final settlement of accounts.

(17) Arbitration Clause; In case of disputes the method of appointing arbitrators and their rights should be clearly mentioned.

Q.13: Discuss the various kinds of partners in a partnership firm.
Ans. Following are the important kinds or types of partners:

1. Active Partner:-
A person who provides his share in capital and also takes active part in the management. The development of business depends upon the active partners. He carries on business on behalf of the other partners. If he wants to retire, he has to give a public notice of his retirement; otherwise he will continue to be liable for the acts of the firm.

2. Sleeping or Dormant Partners:-
These partners only provide capital and also share the profit and loss of the business. A sleeping partner does not take part in the management of a firm. These are not known to public as a partner. A sleeping partner is a partner who 'sleeps', that is, he does not take active part in the management of the business. Such a partner only contributes to the share capital of the firm, is bound by the activities of other partners, and shares the profits and losses of the business. A sleeping partner, unlike an active partner, is not required to give a public notice of his retirement. As such, he will not be liable to third parties for the acts done after his retirement.

3. Silent Partner:-
A silent partner is known to the public as a partner. He does not participate in the affairs of the management. But be is liable to pay debts of the firm.

4. Secret Partner:-
He takes active part in the business but public does not know him as a partner of the firm. He is liable to pay all the debts of the firm.

5. Nominal Partner:-
These partners do not share the profit and loss the firm. These do not participate in the management of a firm. A firm only uses the name and goods reputation of the partners. So these are called nominal partners. A nominal partner is one who does not have any real interest in the business but lends his name to the firm, without any capital contributions, and doesn't share the profits of the business. He also does not usually have a voice in the management of the business of the firm, but he is liable to outsiders as an actual partner.

6. Minor Partner:-
A minor may become partner with the consent all the partners. A minor is only admitted in the profits of the business only. He has no liability of loss. A partnership is created by an agreement. And if a partner is incapable of entering into a contract, he cannot become a partner. Thus, at the time of creation of a firm a minor (i.e., a person who has not attained the age of 18 years) cannot be one of the parties to the contract. But under section 30 of the Indian Partnership Act, 1932, a minor 'can be admitted to the benefits of partnership', with the consent of all partners. A minor partner is entitled to his share of profits and to have access to the accounts of the firm for purposes of inspection and copy.
He, however, cannot file a suit against the partners of the firm for his share of profit and property as long as he remains with the firm. His liability in the firm will be limited to the extent of his share in the firm, and his private property cannot be attached by creditors.

On his attaining majority, he has to decide within six months whether he will become regular partner of withdraw from partnership. The choice in either case is to be intimated through a public notice, failing which he will be treated to have decided to continue as partner, and he becomes personally liable like other partners for all the debts and obligations of the firm from the date of his admission to its benefits (and not from the date of his attaining the age of majority). He also becomes entitled to file a suit against other partners for his share of profit and property.

7. Senior Partner:-
A person who is playing important role in the management according to his ability, experience and capital, is called senior partner.

8. Junior Partner:-
A person who has small investment in the firm and has a limited experience of business is called junior partner.

9. Limited Partner:-

A partner whose loss responsibility is restricted to his share only is called limited partner. He cannot take post in the management of a firm.

10. Unlimited Partner:-

When the liability of the partner is unlimited he is called unlimited partner. The debts of firm can be paid even by the personal property of the partner.

Q.14: What are the different modes in which a firm may be dissolved?

Ans. The dissolution of partnership among all the partners of a firm is called the Dissolution of the Firm (Sec. 39 of the Partnership Act, 1932). Dissolution of Partnership involves a change in the relation of partnership business, if the remaining partners resolve to continue the concern. In such cases there will be a new partnership but the firm will continue in a reconstituted form.

Dissolution:

Dissolution of firm means complete breakdown of the relation of partnership among all the partners. When all the partners resolve to dissolve the partnership, the dissolution of firm occurs, i.e. the firm is wound up.

If the business comes to an end, it is said that the firm has been dissolved. Dissolution of firm means the closing down of the business. Firm's dissolution implies partnership dissolution but not vice versa.

That is dissolution of partnership does not mean dissolution of firm, but the dissolution of firm will be dissolved on any one of the following ways:

(A) Dissolution by Agreement (Sec. 40):

A firm may be dissolved at any time with the consent of all partners. For instance, when a firm does not expect good prospects in the future, a firm can be dissolved by mutual consent of all partners.

(B) Compulsory Dissolution (Sec. 41):

A firm is compulsorily dissolved by operation of law when all the partners except one become insolvent or when all the partners become insolvent or when business becomes illegal or when the number of partners exceeds twenty in case of ordinary business or ten in case of banking.

(C) Dissolution on the Happening of Certain Contingencies (Sec. 42):

A firm is dissolved, in the absence of contrary, in the event of any of the following circumstances:

(i) The expiry of the term for which it was formed.

(ii) The completion of the venture for which the partnership was constituted.

(iii) The death of a partner.

(iv) The adjudication of a partner as an insolvent.

(D) Dissolution by Notice of Partnership at Will (Sec. 43):

Where a partnership is at will, the firm may be dissolved by any partner giving notice in writing to all the other partners of his intention to dissolve the firm.

(E) Dissolution by the Court (Sec. 44):

The court is empowered to order the dissolution of a firm consequent on a suit by a partner in the following cases:

(i) When a partner becomes insane or unsound of mind.

(ii) When a partner becomes permanently incapable of performing his duties, be it mental or physical.

(iii) When a partner is proved guilty of misconduct which is likely to affect adversely the business of the firm.

(iv) When a partner conduct himself in such a way that it is not possible for the other partners to carry on partnership with him.

(v) When a partner transfers his interest or share to third party.

(vi) When the business cannot be carried out except at a loss. (It must be remembered that the object of partnership is to earn profits and if that object is not fulfilled, the firm can be dissolved).

(vii) When it appears to be just and equitable. For instance, continued quarrelling, deadlock in the management, refusal to attend matters of business, absence of cooperation etc. among the partners. (The court has wide discretionary powers).

Q.15: Define the term 'Negotiable Instrument'. What are its essential characteristics?
Ans. MEANING OF NEGOTIABLE INSTRUMENTS

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

In the words of Justice, Willis, "A negotiable instrument is one, the property in which is acquired by anyone who takes it bonafide and for value notwithstanding any defects of the title in the person from whom he took it".

Thus, the term, negotiable instrument means a written document which creates a right in favour of some person and which is freely transferable. Although the Act mentions only these three instruments (such as a promissory note, a bill of exchange and cheque), it does not exclude the possibility of adding any other instrument which satisfies the following two conditions of negotiability: 1. the instrument should be freely transferable (by delivery or by endorsement. and delivery) by the custom of the trade; and 2. The person who obtains it in good faith and for value should get it free from all defects, and be entitled to recover the money of the instrument in his own name. As such, documents like share warrants payable to bearer, debentures payable to bearer and dividend warrants are negotiable instruments. But the money orders and postal orders, deposit receipts, share certificates, bill of lading, dock warrant, etc. are not negotiable instruments. Although they are transferable by delivery and endorsements, yet they are not able to give better title to the bonafide transferee for value than what the transferor has.

CHARACTERISTICS OF A NEGOTIABLE INSTRUMENT

A negotiable instrument has the following characteristics:

1. Property: The possessor of the negotiable instrument is presumed to be the owner of the property contained therein. A negotiable instrument does not merely give possession of the instrument but right to property also. The property in a negotiable instrument can be transferred without any formality. In the case of bearer instrument, the property passes by mere delivery to the transferee. In the case of an order instrument, endorsement and delivery are required for the transfer of property.

2. Title: The transferee of a negotiable instrument is known as 'holder in due course.' A bona fide transferee for value is not affected by any defect of title on the part of the transferor or of any of the previous holders of the instrument.

3. Rights: The transferee of the negotiable instrument can sue in his own name, in case of dishonour. A negotiable instrument can be transferred any number of times till it is at maturity.

The holder of the instrument need not give notice of transfer to the party liable on the instrument to pay.

4.Presumptions: Certain presumptions apply to all negotiable instruments e.g., a presumption that consideration has been paid under it. It is not necessary to write in a promissory note the words 'for value received' or similar expressions because the payment of consideration is presumed. The words are usually included to create additional evidence of consideration.

5. Prompt payment: A negotiable instrument enables the holder to expect prompt payment because dishonour means the ruin of the credit of all persons who are parties to the instrument.

Q.16: Define a promissory note. What are its essential elements?

Ans. TYPES OF NEGOTIABLE INSTRUMENT

Section 13 of the Negotiable Instruments Act states that a negotiable instrument is a promissory note, bill of exchange or a cheque payable either to order or to bearer. Negotiable instruments recognised by statute are: i. Promissory notes, ii. Bills of exchange iii. Cheques. Negotiable instruments recognised by usage or custom are: (i) Hundis (ii) Share warrants (iii) Dividend warrants (iv) Bankers draft (v) Circular notes (vi) Bearer debentures (vii) Debentures of Bombay Port Trust (viii) Railway receipts (ix) Delivery orders.

PROMISSORY NOTES

Section 4 of the Act defines, "A promissory note is an instrument in writing (note being a bank-note or a currency note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money to or to the order of a certain person, or to the bearer of the instruments."

Parties to a Promissory Note

1. **Maker.** He is the person who promises to pay the amount stated in the note. He is the debtor.
2. **Payee.** He is the person to whom the amount is payable i.e. the creditor.
3. **Holder.** He is the payee or the person to whom the note might have been indorsed.
4. The endorser and endorsee (the same as in the case of a bill).

Essential elements

An instrument to be a promissory note must possess the following elements:

1. It must be in writing: A mere verbal promise to pay is not a promissory note. The method of writing (either in ink or pencil or printing, etc.) is unimportant, but it must be in any form that cannot be altered easily.

2. It must certainly an express promise or clear understanding to pay: There must be an express undertaking to pay. A mere acknowledgment is not enough. The following are not promissory notes as there is no promise to pay.

If A writes:

(a) "Mr. B, I.O.U. (I owe you) Rs. 500"

(b) "I am liable to pay you Rs. 500".

(c) "I have taken from you Rs. 100, whenever you ask for it has to pay".

The following will be taken as promissory notes because there is an express promise to pay:

If A writes:

(a) "I promise to pay B or order Rs. 500"

(b) "I acknowledge myself to be indebted to B in Rs. 1000 to be paid on demand, for the value received".

(3) Promise to pay must be unconditional: A conditional undertaking destroys the negotiable character of an otherwise negotiable instrument. Therefore, the promise to pay must not depend upon the happening of some outside contingency or event. It must be payable absolutely.

(4) It should be signed by the maker: The person who promises to pay must sign the instrument even though it might have been written by the promisor himself. There are no restrictions regarding the form or place of signatures in the instrument. It may be in any part of the instrument. It may be in pencil or ink, a thumb mark or initials. The pronote can be signed by the authorised agent of the maker, but the agent must expressly state as to on whose behalf he is signing, otherwise he himself may be held liable as a maker. The only legal requirement is that it should indicate with certainty the identity of the person and his intention to be bound by the terms of the agreement.

(5) The maker must be certain: The note self must show clearly who is the person agreeing to undertake the liability to pay the amount. In case a person signs in an assumed name, he is liable as a maker because a maker is taken as certain if from his description sufficient indication follows about his identity. In case two or more persons promise to pay, they may bind themselves jointly or jointly and severally, but their liability cannot be in the alternative.

(6) The payee must be certain: The instrument must point out with certainty the person to whom the promise has been made. The payee may be ascertained by name or by designation. A note payable to the maker himself is not pronate unless it is indorsed by him. In case, there is a mistake in the name of the payee or his designation; the note is valid, if the payee can be ascertained by evidence. Even where the name of a dead person is entered as payee in ignorance of his death, his legal representative can enforce payment.

(7) The promise should be to pay money and money only: Money means legal tender money and not old and rare coins. A promise to deliver paddy either in the alternative or in addition to money does not constitute a promissory note.

(8) The amount should be certain: One of the important characteristics of a promissory note is certainty—not only regarding the person to whom or by whom payment is to be made but also regarding the amount. However, paragraph 3 of Section 5 provides that the sum does not become indefinite merely because (a) there is a promise to pay amount with interest at a specified rate. (b) the amount is to be paid at an indicated rate of exchange. (c) the amount is payable by instalments with a condition that the whole balance shall fall due for payment on a default being committed in the payment of anyone instalment.

(9) Other formalities: The other formalities regarding number, place, date, consideration etc. though usually found given in the promissory notes but are not essential in law. The date of instrument is not material unless the amount is made payable at a certain time after date. Even in such a case, omission of date does not invalidate the instrument and the date of execution can be independently ascertained and proved. On demand (or six month after date) I promise to pay Peter or order the sum of rupees one thousand with interest at 8 per cent per annum until payment.

Q.17: Define a Cheque. How does it differ from a bill of exchange?

Ans. CHEQUES

Section 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". A cheque is bill of exchange with two more qualifications, namely, (i) it is always drawn on a specified banker, and (ii) it is always payable on demand. Consequently, all cheque are bill of exchange, but all bills are not cheque. A cheque must satisfy all the requirements of a bill of exchange; that is, it must be signed by the drawer, and must contain an unconditional order on a specified banker to pay a certain sum of money to or to the order of a certain person or to the bearer of the cheque. It does not require acceptance.

Parties to a Cheque

1. **Drawer.** He is the person who draws the cheque, i.e., the depositor of money in the bank.
2. **Drawee**. It is the drawer's banker on whom the cheque has been drawn.
3. **Payee.** He is the person who is entitled to receive the payment of the cheque.
4. The holder, indorser and indorsee (the same as in the case of a bill or note).

Distinction between Bills of Exchange and Cheque

1. A bill of exchange is usually drawn on some person or firm, while a cheque is always drawn on a bank.
2. It is essential that a bill of exchange must be accepted before its payment can be claimed A cheque does not require any such acceptance.
3. A cheque can only be drawn payable on demand, a bill may be also drawn payable on demand, or on the expiry of a certain period after date or sight.
4. A grace of three days is allowed in the case of time bills while no grace is given in the case of a cheque.
5. The drawer of the bill is discharged from his liability, if it is not presented for payment, but the drawer of a cheque is discharged only if he suffers any damage by delay in presenting the cheque for payment.

6. Notice of dishonour of a bill is necessary, but no such notice is necessary in the case of cheque.
7. A cheque may be crossed, but not needed in the case of bill.
8. A bill of exchange must be properly stamped, while a cheque does not require any stamp.
9. A cheque drawn to bearer payable on demand shall be valid but a bill payable on demand can never be drawn to bearer.
10. Unlike cheques, the payment of a bill cannot be countermanded by the drawer.

Q.18: In what different ways may a negotiable instrument be dishonoured? What are the duties of a holder of a dishonoured bill?

Ans. DISHONOUR OF A NEGOTIABLE INSTRUMENT

When a negotiable instrument is dishonoured, the holder must give a notice of dishonour to all the previous parties in order to make them liable. A negotiable instrument can be dishonoured either by non acceptance or by non-payment. A cheque and a promissory note can only be dishonoured by non-payment but a bill of exchange can be dishonoured either by non-acceptance or by non-payment.

Dishonour by non-acceptance (Section 91)

A bill of exchange can be dishonoured by non-acceptance in the following ways:

1. If a bill is presented to the drawee for acceptance and he does not accept it within 48 hours from the time of presentment for acceptance. When there are several drawees even if one of them makes a default in acceptance, the bill is deemed to be dishonoured unless these several drawees are partners. Ordinarily when there are a number of drawees all of them must accept the same, but when the drawees are partners acceptance by one of them means acceptance by all.
2. When the drawee is a fictitious person or if he cannot be traced after reasonable search.
3. When the drawee is incompetent to contract, the bill is treated as dishonoured.
4. When a bill is accepted with a qualified acceptance, the holder may treat the bill of exchange having been dishonoured.
5. When the drawee has either become insolvent or is dead.
6. When presentment for acceptance is excused and the bill is not accepted. Where a drawee in case of need is named in a bill or in any endorsement thereon, the bill is not dishonoured until it has been dishonoured by such drawee.

Dishonour by non-payment (Section 92)

A bill after being accepted has got to be presented for payment on the date of its maturity. If the acceptor fails to make payment when it is due, the bill is dishonoured by non-payment. In the case of a promissory note if the maker fails to make payment on the due date the note is dishonoured by non-payment. A cheque is dishonoured by non-payment as soon as a banker refuses to pay.

An instrument is also dishonoured by non-payment when presentment for payment is excused and the instrument when overdue remains unpaid (Sec 76).

Effect of dishonour: When a negotiable instrument is dishonoured either by non acceptance or by non-payment, the other parties thereto can be charged with liability. For example if the acceptor of a bill dishonours the bill, the holder may bring an action against the drawer and the endorsers. There is a duty cast upon the holder towards those whom he wants to make liable to give notice of dishonour to them.

Notice of dishonour: Notice of dishonour means the actual notification of the dishonour of the instrument by non-acceptance or by non-payment. When a negotiable instrument is refused acceptance or payment notice of such refusal must immediately be given to parties to whom the holder wishes to make liable. Failure to give notice of the dishonour by the holder would discharge all parties other than the maker or the acceptor (Sec. 93).

Notice by whom: Where a negotiable instrument is dishonoured either by non- acceptance or by non-payment, the holder of the instrument or some party to it who is liable thereon must give a notice of dishonour to all the prior parties whom he wants to make liable on the instrument (Section 93). The agent of any such party may also be given notice of dishonour. A notice given by a stranger is not valid. Each party receiving notice of dishonour must, in order to render any prior party liable give notice of dishonour to such party within a reasonable time after he has received it. (Sec. 95)

When an instrument is deposited with an agent for presentment and is dishonoured, he may either himself give notice to the parties liable on the instrument or he may give notice to his principal. If he gives notice to his principal, he must do so within the same time as if he were the holder. The principal, too, in his turn has the same time for giving notice as if the agent is an independent holder. (Sec. 96)

Notice to whom?: Notice of dishonour must be given to all parties to whom the holder seeks to make liable. No notice need be given to a maker, acceptor or drawee, who is the principal debtors (Section 93).

Notice of dishonour may be given to an endorser. Notice of dishonour may be given to a duly authorised agent of the person to whom it is required to be given. In case of the death of such a person, it may be given to his legal representative. Where he has been declared insolvent the notice may be given to him or to his official assignee (Section 94). Where a party entitled to a notice of dishonour is dead, and notice is given to him in ignorance of his death, it is sufficient (Section 97).

Mode of notice: The notice of dishonour may be oral or written or partly oral and partly written. It may be sent by post. It may be in any form but it must inform the party to whom it is given either in express terms or by reasonable intendment that the instrument has been dishonoured and in what way it has been dishonoured and that the person served with the notice will be held liable thereon.

What is reasonable time? It is not possible to lay down any hard and fast rule for determining what reasonable time is. In determining what reasonable time is, regard shall be had to the nature of the instrument, the usual course the dealings with respect to similar instrument, the distance between the parties and the nature of communication between them. In calculating reasonable time, public holidays shall be excluded (Section 105).

Section 106 lays down two different rules for determining reasonable time in connection with the notice of dishonour (a) when the holder and the party to whom notice is due carry on business or live in different places, (b) when the parties live or carry on business in the same place.

In the first case the notice of dishonour must be dispatched by the next post or on the day next after the day of dishonour. In the second case the notice of dishonour should reach its destination on the day next after dishonour.

Place of notice: The place of business or (in case such party has no place of business) at the residence of the party for whom it is intended, is the place where the notice is to given. If the person who is to give the notice does not know the address of the person to whom the notice is to be given, he must make reasonable efforts to find the latter's address. But if the party entitled to the notice cannot after due search be found, notice of dishonour is dispensed with.

Duties of the holder upon dishonour

(1) Notice of dishonour. When a promissory note, bill of exchange or cheque is dishonoured by non-acceptance or non-payment the holder must give notice of dishonour to all the parties to the instrument whom he seeks to make liable thereon. (Sec. 93)

(2) Noting and protesting. When a promissory note or bill of exchange has been dishonoured by non-acceptance or non-payment, the holder may cause such dishonour to be noted by a notary public upon the instrument or upon a paper attached thereto or partly upon each (Sec. 99). The holder may also within a reasonable time of the dishonour of the note or bill, get the instrument protested by notary public (Sec.100).

(3) Suit for money. After the formality of noting and protesting is gone through, the holder may bring a suit against the parties liable for the recovery of the amount due on the instrument.

Instrument acquired after dishonour: The holder for value of a negotiable instrument as a rule, is not affected by the defect of title in his transferor. But this rule is subject to two important exceptions (i) when the holder acquires it after maturity and (ii) when he acquires it with notice of dishonour.

The holder of a negotiable instrument who acquired it after dishonour, whether by non acceptance or non-payment, with notice thereof, or after maturity, has only, as against the other parties, the rights thereon of his transfer. (Sec.59)

NOTING AND PROTESTING

When a negotiable instrument is dishonoured the holder may sue his prior parties' i.e the drawer and the endorsers after he has given a notice of dishonour to them. The holder may need authentic evidence of the fact that a negotiable instrument has been dishonoured. When a cheque is dishonoured genera1ly the bank who refuses payment returns back the cheque giving reasons in writing for the dishonour of the cheque. Sections 99 and l00 provide convenient methods of authenticating the fact of dishonour of a bill of exchange and a promissory note by means of 'noting' and 'protest'.

Noting

As soon as a bill of exchange or a promissory note is dishonoured, the holder can after giving the parties due notice of dishonour, sue the parties liable thereon. Section 99 provides a mode of authenticating the fact of the bill having been dishonoured. Such mode is by noting the instrument. Noting is a minute recorded by a notary public on the dishonoured instrument or on a paper attached to such instrument. When a bill is to be noted, the bill is taken to a notary public who represents it for acceptance or payment as the case may be and if the drawee or acceptor still refuses to accept or pay the bill, the bill is noted as stated above. Noting should specify in the instrument, (a) the fact of dishonour, (b) the date of dishonour, (c) the reason for such dishonour, if any (d) the notary's charges, (e) a reference to the notary's register and (f) the notary's initials.

Noting should be made by the notary within a reasonable time after dishonour. Noting and protesting is not compulsory but foreign bills must be protested for dishonour when such protest is required by the law of the place where they are drawn. Cheques do not require noting and protesting. Noting by itself has no legal effect. Still it has some advantages. If noting is done within a reasonable time protest may be drawn later on. Noting without protest is sufficient to allow a bill to be accepted for honour.

Protest

Protest is a formal certificate of the notary public attesting the dishonour of the bill by non-acceptance or by non-payment. After noting, the next step for notary is to draw a certificate of protest, which is a formal declaration on the bill or a copy thereof. The chief advantage of Protest is that the court on proof of the protest shall presume the fact of dishonour.

Besides the protest for non-acceptance and for non-payment the holder may protest the bill for better security. When the acceptor of a bill becomes insolvent or suspends payment before the date of maturity, or when he absconds the holder may protest it in order to obtain better security for the amount due. For this purpose the holder may employ a notary public to make the demand on the acceptor and if refused, protest may be made. Notice of protest may be given to prior parties. When promissory notes and bills of exchange are required to be protested, notice of protest must be given instead of notice of dishonour. (Sec. 102)

Inland bills may or may not be protested. But foreign bills must be protested for dishonour when such protest is required by the law of the place where they are drawn (Sec. 104).

Where a bill is required to be protested under the Act within a specified time, it is sufficient if it is 'noted for protest' within such time. The formal protest may be given at any time after the noting (Sec. 104A)

Contents of protest

Section 101 of the Act lays down the contents of a regular and perfect protest which are as follows:

1. The instrument itself or a literal transcript of the instrument; and of everything written or printed thereupon.
2. The name of the person for whom and against whom the instrument has been protested.
3. The fact of and reasons for dishonour i.e. a statement that payment or acceptance or better security, as the case may be, has been demanded of such person by the notary public from the person concerned and he refused to give it or did not answer or that he could not be found.
4. The time and place of demand and dishonour.
5. The signature of the notary public. 6. In the case of acceptance for honour or payment for honour the person by whom or for whom such acceptance or payment was offered and affected.

Q.19: Discuss the liability of various parties to negotiable instruments.

Ans. Liabilities of the parties to an instrument:

We shall discuss the liabilities of the following parties in the light of relevant legal provisions:
Liability of **Drawer**
Liability of **Drawee** of a cheque
Liability of **maker** of note and **acceptor** of bill
Liability of **Endorser**

Liability of Drawer:
It has been defined in section 30 which is given below:
The drawer of a bill or cheque is bound to compensate the holder in case dishonoured by the drawee or acceptor provided due notice of dishonour has been given or received by the drawer.
Before acceptance of a bill, drawer's liability is primary and after acceptance his liability becomes secondary to acceptor's liability.

Liability of drawee of cheque:
It has been defined in section 31 which is given below:
The drawee of a cheque having sufficient funds of the drawer in his hands properly applicable to the payment of such cheque must pay the cheque when duly required so to do, and, in default of such payment, must compensate the drawer for any loss or damage caused by such default

Liability of maker of note and acceptor of bill:
It has been defined in section 32 which is given below:
In the absence of a contract to the contrary, the maker of a promissory note, by making it, the acceptor before maturity of a bill of exchange by accepting it, engages that he will pay it according to the tenor of the note or his acceptance respectively, and in default of such payment, such maker or acceptor is bound to compensate any party to the note or bill for any loss or damage sustained by him and caused by such default. .

The acceptor of a bill of exchange at or after maturity, by accepting it, **engages to pay** the amount thereof to the **holder on demand.**

Liability of endorser:
It has been defined in section 35 which is given below:
In the absence of a contract to the contrary, the .endorser of a negotiable instrument, by indorsing it, engages that on due presentment it shall be accepted and paid according to its tenor and that if it be dishonoured he will compensate the holder or subsequent endorser who is compelled to pay it for any loss or damage caused to him by such dishonour.

Extent of Liability-- Rules as to compensation:
It has been defined in section 117 which is given below:
The compensation payable in case of dishonour of a promissory, bill of exchange or cheque, by any party liable to the holder or any endorsee, shall be determined by the following rules:,-

The holder is entitled to the amount due upon the instrument; together with the expenses properly incurred in presenting, noting and protesting it;

When the person charged resides at a place different from that at which the instrument was payable, the holder is entitled to receive such sum at the current rate of exchange between the two

places;
An endorser who, being liable, has paid the amount due on the same is entitled to the amount so paid with interest at six per centum per annum from the date of payment until, tender or realization thereof, together with all expenses caused by the dishonour

When the person charged and such endorser reside at different places the endorser is entitled to receive such sum at the current rate of exchange between the two places;

The party entitled to compensation may draw a bill upon the party liable to compensate him, payable at sight or on demand, for the amount due to him, together with all expenses properly incurred by him. Such bill must be accompanied by the instrument dishonoured and the protest thereof (if any). If such bill is dishonoured, the party dishonouring the same is liable to make compensation thereof in the same manner as in the case of the original bill.

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