P5 MODULE 3

COMMERCIAL LAWS

INDEX

1. INTRODUCTION TO LAW AND LEGAL SYSTEM IN INDIA

1.1. INTRODUCTION TO THE CONSTITUTION OF INDIA

Q NO 1. WRITE ABOUT INDIAN CONSTITUTION

ANSWER:

1. The constitution of India came into force on 26th January 1950.
2. The Indian Constitution is the lengthiest written Constitution which has a blend of rigidity and flexibility and has a federal system with unitary features.
3. The constitution has a preamble and 470 articles, which are grouped into 25 parts with 12 schedules and five appendices.
4. The constitution of India is supreme law of India. It mentions about the parliamentary form of Government and lays down that India shall have an independent judiciary.
5. The constitution further provides for emergency provision structure and has many features that help in governance of our country.

Q NO 2. PREAMBLE TO THE CONSTITUTION.

ANSWER:

The preamble to the constitution was adopted by constituent assembly and it reads as follows:

PREAMBLE WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into
SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC
And to secure to all its citizens:
JUSTICE, social, economic, and political;
LIBERTY of thought, expression, belief, faith, and worship;
EQUALITY of status and of opportunity; and to promote Among them all
FRATERNITY Assuring the dignity of the individual and the unity and integrity of the Nation;
IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION

Q NO 3. STATE THE PUPROSE OF PREAMBLE TO THE CONSTITUTION

ANSWER:

The preamble to the constitution is a key to open the minds of the makers and shows the general purpose for which they made the several provisions in the constitution.

Preamble serves the following purposes:

1. It discloses the source of the constitution.
2. It lays down the date of the commencement of the constitution.
3. It set out the rights and freedoms which the people of India wished to secure for themselves.
4. It declares the nature of the government

CASE LAW: In the case of **KESAVANANDA BHARTI VS. STATE OF KERALA**, the Supreme Court has held that preamble is part of the constitution. Preamble is of extreme importance and the constitution should be read and interpreted in the light of grand and noble vision expressed in the preamble. However, the preamble is neither a source of power to legislature nor creates a prohibition upon the powers of legislature. It is not enforceable in courts of law.

1.2. FUNDAMENTAL RIGHTS

1. Fundamental rights are the basic human rights enshrined in the constitution of India which are guaranteed to all citizens.

2. The six Fundamental Rights include

- **i)** Right to Equality (Article 14 – 18)
- **ii)** Right to Freedom (Article 19 - 22)
- **iii)** Right against Exploitation (Article 23, 24)
- **iv)** Right to Freedom of Religion (Article 25 – 28)
- **v)** Cultural and Educational Rights (Article 29, 30)
- **vi)** Right to Constitutional Remedies. (Article 32 – 35)

3. Fundamental right is called the Magna Carta of India.

Q NO 1. ARTICLE 14 – EQUALITY BEFORE LAW

ANSWER:

1. The state shall not deny any person equality before the law or the equal protection of laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.
2. **CASE LAW**: In **E. P. ROYAPPA V. STATE OF TAMIL NADU** the new concept of equality in the following words – "Equality is a dynamic concept with many aspects and dimensions and it cannot be described, Cabined and confined" within traditional limits from a positivistic point of view, equality is antithesis to arbitrariness.
3. In fact, equality and arbitrariness are sworn enemies, one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violated of Article14.
4. **EXCEPTIONS TO THE EQUALITY BEFORE LAW**- Article 361 of the Constitution permits the following exceptions to this rule –
   - **i)** The President or the Governor of a State shall not be answerable to any court.
   - **ii)** No criminal proceeding whatsoever shall be instituted or continued against the President or a Governor in any court during his term of office.
   - **iii)** No Civil Proceeding in which relief is claimed against the President or the Governor of a state shall be instituted during his term of office in any Court in respect of any act done or purporting to be done by him in his personal capacity.

Q NO 2. ARTICLE – 15 PROHIBITION ON DISCRIMINATION ON CERTAIN GROUNDS

ANSWER:

PROHIBITION ON DESCRIMINATION

1. The state shall not discriminate against any citizen on grounds only of: -
   - **i)** Religion
   - **ii)** Race
   - **iii)** Caste
   - **iv)** Sex
   - **v)** Place of birth or
   - **vi)** Any of them
2. No citizen shall be on above grounds, subject to any disability, liability, restriction or condition with regard to:
   - **i)** access to shops, public restaurants, hotels and places of public entertainment; or
   - **ii)** the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.
3. **EXCEPTIONS: -**
   - **i)** Nothing in this article shall prevent the State from making any special provision for women and children.
   - **ii)** Nothing in this article shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes in so far as such special provisions relate to their admission to educational institutions

Q NO 3. ARTICLE-16: EQUALITY OF OPPORTUNITY IN MATTERS OF PUBLIC EMPLOYMENT

ANSWER:

1. There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.
2. No citizen shall, on grounds only of: religion, race, caste, sex, descent, place of birth, residence, or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.
3. **EXCEPTIONS: -**
   - **i)** Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.
   - **ii)** Nothing in this article shall prevent the State from making any provision for the reservation of

appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

iii) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

iv) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

Q NO 4. ARTICLE – 17 ABOLITION OF UNTOUCHABILITY

ANSWER

1. "Untouchability" is abolished and its practice in any form is forbidden.

2. The enforcement of any disability arising out of "Untouchability" shall be an offence punishable in accordance with law.

3. The term "Untouchability" is not defined under the Constitution. However, it refers to the social disabilities imposed on certain class of person by reason of their birth in certain caste. However, it does not cover social boycott of a few individuals.

Q NO 5. ARTICLE – 18 ABOLITION OF TITLES

ANSWER:

1. No title, not being a military or academic distinction, shall be conferred by the State.
2. No citizen of India shall accept any title from any foreign State.
3. No person who is not a citizen of India shall, while he holds any office of profit or trust under the State, accept without the consent of the President any title from any foreign State.
4. No person holding any office of profit or trust under the State shall, without the consent of the President, accept any present, emolument, or office of any kind from or under any foreign State.

Q NO 6. ARTICLE 19 RIGHT TO FREEDOM

ANSWER:

1. Protection of six rights (Section 19(1))

- **a)** Freedom of speech and expression
- **b)** Freedom of Assembly
- **c)** Freedom to from Association
- **d)** Freedom of Movement
- **e)** Freedom to reside and to settle

f) Freedom of Profession, occupation, trade or business.

2. These six freedoms are however not absolute, and subject to reasonable restrictions which are as follows: -

i. Security of the State

ii. Friendly relations with foreign states

iii. Public order

iv. Decency and Morality

v. Contempt of Court

vi. Defamation

vii. Incitement to an offence

viii. Sovereignty and Integrity of India

3. CASE LAW:

i) In **PRABHU DUTT VS. UNION OF INDIA**: Supreme Court held that right to know news and information about the functioning of the Govt., is included in the freedom of Press.

ii) In **UNION OF INDIA VS. ASSOCIATION FOR DEMOCRATIC REFORMS**: Supreme Court held that people have right to know about the candidate before voting. Thus, the law preventing the Election Commission from asking for a candidate's wealth, Assets, liabilities education and other such information is invalid.

iii) In **TATA PRESS LTD. VS. M.T.N.L**. the Supreme Court held that commercial speech (Advertisement) is a part of freedom of speech and expression as per Article 19(1) (a).

iv) In **UNION OF INDIA VS. NAVEEN JINDAL**, the Court held that "Flying National Flag" is fundamental Right under Article 19(1) (a)

v) Freedom of Silence – Right not to speak

vi) In **BIJOY EMMANUEL VS. STATE OF KERALA**: Freedom not to sing the national anthem, but not to disrespect it. Students belonging to the Apostle's creed Christians did not sing the national anthem as their religion prohibits glorification of anything else other than their God.

Q NO 7. ARTICLE 20 PROTECTION IN RESPECT OF CONVICTION FOR OFFENCES:

ANSWER:

1. EX-POST FACTO LAW:

No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the Act charged as an offence, nor be subjected to a penalty greater 8 than that which might have been inflicted under the law in force at the time of the commission of the offence.

2. DOUBLE JEOPARDY:

No person shall be prosecuted and punished for the same offence more than once. The protection under this clause is available only in proceedings before a court of law or a judicial tribunal. In other words, it is not available in proceedings before departmental or administrative authorities.

3. SELF -INCRIMINATION:

No person accused of any offence shall be compelled to be a witness against himself. It extends to both oral and documentary evidence. Therefore, where a person is accused of an offence, if compelled to be a witness, then such compulsion should not result in his giving evidence against himself.

Q NO 8. ARTICLE 21 RIGHT TO LIFE & PERSONAL LIBERTY

ANSWER:

1. "No person shall be deprived of his life or personal liberty except according to Procedure established by law."
2. **CASE LAW**: In **MANEKA GANDHI V. UNION OF INDIA**. The Court has given the widest possible interpretation of personal liberty. Right to life includes within its ambit the right to live with human dignity. The Supreme Court held that the right to life defines not only physical existence but the "quality of life."
3. **INCLUDES**: This right is an inclusive right including the following:
   - **i)** Right to Travel abroad. (Satwant Singh v. Assistant Passport officer)
   - **ii)** Right to livelihood. (D.K.Yadav v. J.M.A Industries)
   - **iii)** Right to Shelter. (Chameli Singh v. State of U.P.)
   - **iv)** Right to Privacy. (R.Raja Gopal v. State of T.N.)

   CASE LAW: In **PUCL VS. UNION OF INDIA**, the S.C. held that telephone tapping is a serious invasion of an individual's right to Privacy which is part of the right to life and personal liberty.
   - **v)** Right to Health & Medical Assistance.
   - **vi)** Protection of Ecology and Environmental Pollution
   - **vii)** Right to education under Art. 21A
   - **viii)** Prisoner's Right: The Court held that if the Prisoner died due to beating by Police Officer, his family is entitled to compensation.
   - **ix)** Right to free Legal Aid
   - **x)** Right to speedy Trial
   - **xi)** Right Against Handcuffing
   - **xii)** Right against Delayed Execution
   - **xiii)** Right to food
   - **xiv)** Right to Marriage. (Lata Singh v. State of U.P.)
   - **xv)** Right to Reputation
   - **xvi) RIGHT TO EDUCATION- ARTICLE 21A** declares that state shall provide free and compulsory education to all children of the age of six to fourteen years in such a manner as the state may decide. Thus, this provision makes only elementary education a fundamental right and not higher or professional education.

Q NO 9. RIGHT AGAINST EXPLOITATION

ANSWER:

PROHIBITION OF TRAFFIC IN HUMAN BEINGS AND FORCED LABOUR: - ARTICLE 23 prohibits traffic in human beings and other similar forms of forced labour. This right is available to both citizens and non- citizens. It protects the individual not only against state but also against the private person. However, state may impose compulsory service for public purposes, which are: military service or social service.

PROHIBITION OF EMPLOYMENT OF CHILDREN IN FACTORIES ETC.: - ARTICLE 24 prohibits the employment of children below the age of 14 years in any factory, mine, or other hazardous activities. But it does not prohibit their employment in any harmless innocent work.

Q NO 10. RIGHT TO FREEDOM OF RELIGION

ANSWER:

ARTICLE 25 - All persons are equally entitled to freedom of conscience and the right to freely profess, practice and propagate religion.

The implications of these are as follows:

1. Freedom of conscience
2. Right to profess
3. Right to propagate
4. Right to practice

NOTE: Article 25 covers not only religious belief but also religious practices. This right is available to all person citizen as well as noncitizen.

ARTICLE 26- Every religious denomination or any of its section shall have the following right: -

1. To establish and maintain institutions for religious and charitable purposes;
2. To manage its own affairs in matters of religion.
3. To own and acquire movable and immovable property; and
4. To administer such property in accordance with law.

ARTICLE 27 - No person shall be compelled to pay any taxes for the promotion or maintenance of any particular religion or religious denomination. In other words, the state should not spend the public money collected by way of tax for the promotion or maintenance of any particular religion. This provision prohibits only levy of tax and not a fee.

ARTICLE 28 - No religious instruction shall be provided in any educational institution wholly maintained out of state funds. However, this provision shall not apply to an educational institution administered by the state but established under any endowment or trust requiring imparting of religious institution in such institution.

Q NO 11. EDUCATIONAL AND CULTURAL RIGHTS

ANSWER:

ARTICLE 29 - Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same. No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

ARTICLE 30 - THE RIGHT OF MINORITIES TO ESTABLISH AND ADMINISTER EDUCATIONAL INSTITUTIONS:

1. All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice

1A**.** In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.

2. The state shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language

Q NO 12. ARTICLE 32 THE RIGHT TO CONSTITUTIONAL REMEDIES

ANSWER:

1. The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed
2. The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part
3. Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2)
4. The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

1.3. SOURCES OF LAW

In some of the legal systems, court decisions are binding as law. On the basis of the above discussion, three major sources of law can be identified in any modern society are as follows:

1. Custom
2. Judicial precedent
3. Legislation

Q NO 1. CUSTOMS AS A SOURCE OF LAW

ANSWER:

1. A custom, to be valid, must be observed continuously for a very long time without any interruption.
2. Further, a practice must be supported not only for a very long time, but it must also be supported by the opinion of the general public and morality. However, every custom need not become law.
3. **EXAMPLE**- The Hindu Marriage Act, 1955 prohibits marriages which are within the prohibited degrees of relationship. However, the Act still permits marriages within the prohibited degree of relationship if there is a proven custom within a certain community.
4. Custom can simply be explained as those long-established practices or unwritten rules which have acquired binding or obligatory character.
5. In ancient societies, custom was considered as one of the most important sources of law; In fact, it was considered as the real source of law.
6. With the passage of time and the advent of modern civilization, the importance of custom as a source of law diminished and other sources such as judicial precedents and legislation gained importance.

Q NO 2. CLASSIFICATION OF LEGAL CUSTOMS

ANSWER:

Legal custom may be further classified into the following three types:

Kinds of Customs:

1. **GENERAL CUSTOMS:** These types of customs prevail throughout the territory of the State.
2. **LOCAL CUSTOMS:** Local customs are applicable to a part of the State, or a particular region of the country.
3. **CONVENTIONAL CUSTOMS:** Conventional customs are binding on the parties to an agreement. When two or more persons enter into an agreement related to a trade, it is presumed in law that they make the contract in accordance with established convention or usage of that trade.

All customs cannot be accepted as sources of law, nor can all customs be recognized and enforced by the courts. The jurists and courts have laid down some essential tests for customs to be recognized as valid sources of law.

These tests are summarized as follows:

1. **ANTIQUITY:** In order to be legally valid customs should have been in existence for a long time, even beyond human memory. However, in India there is no such time limit for deciding the antiquity of the customs. The only condition is that those should have been in practice since time immemorial.
2. **CONTINUOUS:** A custom to be valid should have been in continuous practice. It must have been enjoyed without any kind of interruption. Long intervals and disrupted practice of a custom raise doubts about the validity of the same. Exercised as a matter of right: Custom must be enjoyed openly and with the knowledge of the community. It should not have been practiced secretly. A custom must be proved to be a matter of right. A mere doubtful exercise of a right is not sufficient to a claim as a valid custom.
3. **REASONABLENESS:** A custom must conform to the norms of justice and public utility. A custom, to be valid, should be based on rationality and reason. If a custom is likely to cause more inconvenience and mischief than convenience, such a custom will not be valid.
4. **MORALITY:** A custom which is immoral or opposed to public policy cannot be a valid custom. Courts have declared many customs as invalid as they were practiced for immoral purpose.

Bombay High Court in the case of **MATHURA NAIKON VS. ESU NAEKIN, (1880) ILR 4 BOM 545)** held that, the custom of adopting a girl for immoral purposes is illegal. It is imperative that a custom must not be opposed or contrary to legislation. Many customs have been abrogated by laws enacted by the legislative bodies in India.

For instance, the customary practice of child marriage has been declared as an offence. Similarly, adoption laws have been changed by legislation in India. Custom was the most important source of law in ancient India. Even the British initially adopted the policy of non-intervention in personal matters of Hindus and Muslims.

At the same time, it is important to note that customs were not uniform or universal throughout the country. Some regions of the country had their own customs and usages. After independence, the importance of custom has definitely diminished as a source of law and judicial precedent, and legislation has gained a more significant place. A large part of Indian law, especially personal laws, however, are still governed by the customs.

Q NO 3. JUDICIAL PRECEDENT AS A SOURCE OF LAW

ANSWER:

1. In simple words, judicial precedent refers to previously decided judgments of the superior courts, such as the High Courts and the Supreme Court, which judges are bound to follow. This binding character of the previously decided cases is important, considering the hierarchy of the courts established by the legal systems of a particular country. In the case of India, this hierarchy has been established by the Constitution of India.

2. Judicial precedent is an important source of law, but it is neither as modern as legislation nor is it as old as custom. It is an important feature of the English legal system as well as of other common law countries which follow the English legal system. In most of the developed legal systems, judiciary is considered to be an important organ of the State. In modern societies, rights are generally conferred on the citizens by legislation and the main function of the judiciary is to adjudicate upon these rights. The judges decide those matters on the basis of the legislation and prevailing custom but while doing so, they also play a creative role by interpreting the law. By this exercise, they lay down new principles and rules which are generally binding on lower courts within a legal system.

SUPREME COURT (SC): became the supreme judicial authority and a streamlined system of courts was established. Supreme Court: Binding on all courts in India, not bound by its own decisions, or decisions of Privy Council or Federal Court - AIR 1991 SC 2176

HIGH COURTS: Binding on all courts within its own jurisdiction Only persuasive value for courts outside its own jurisdiction. In case of conflict with decision of same court and bench of equal strength, referred to a higher bench. Decisions of Privy Council and federal court are binding as long as they do not conflict with decisions of SC.

LOWER COURTS: Bound to follow decisions of higher courts in its own state, in preference to High Courts of other states.

JUDICIAL DECISIONS CAN BE DIVIDED INTO FOLLOWING TWO PARTS:

1. **Ratio decidendi:** 'Ratio decidendi' refers to the binding part of a judgment. 'Ratio decidendi' literally means reasons for the decision. It is considered as the general principle which is deduced by the courts from the facts of a particular case. It becomes generally binding on the lower courts in future cases involving similar questions of law.
2. **Obiter dicta:** An 'obiter dictum' refers to parts of judicial decisions which are general observations of the judge and do not have any binding authority. However, obiter of a higher judiciary is given due consideration by lower courts and has persuasive value. Having considered the various aspects of the precedent i.e., ratio and obiter, it is clear that the system of precedent is based on the hierarchy of courts.

Q NO 4. LEGISLATION AS A SOURCE OF LAW

ANSWER:

1. In modern times, legislation is considered as the most important source of law. The term 'legislation' is derived from the Latin word legis which means 'law' and latum which means "to make" or "set". Therefore, the word 'legislation' means the 'making of law'.
2. The importance of legislation as a source of law can be measured from the fact that it is backed by the authority of the sovereign, and it is directly enacted and recognized by the State.

3. The expression 'legislation' has been used in various senses. It includes every method of law-making. In the strict sense it means laws enacted by the sovereign or any other person or institution authorised by him.

TYPES OF LEGISLATION

i) **Primary Legislation:** When the laws are directly enacted by the sovereign, it is considered as supreme legislation. One of the features of Supreme legislation is that, no other authority except the sovereign itself can control or check it. The laws enacted by the British Parliament fall in this category, as the British Parliament is considered as sovereign. The law enacted by the Indian Parliament also falls in the same category. However, in India, powers of the Parliament are regulated and controlled by the Constitution, through the laws enacted by it are not under the control of any other legislative body.

ii) **Subordinate Legislation:** Subordinate legislation is a legislation which is made by any authority which is subordinate to the supreme or sovereign authority. It is enacted under the delegated authority of the sovereign. The origin, validity, existence and continuance of such legislation totally depends on the will of the sovereign authority.

Q NO 5. CLASSIFICATION OF SUBORDINATE LEGISLATION

ANSWER:

Subordinate legislation further can be classified into the following types: -

1. **LOCAL LAWS:** In some countries, local bodies are recognized and conferred with the law-making powers. They are entitled to make bye-laws in their respective jurisdictions. In India, local bodies like Panchayats and Municipal Corporations have been recognized by the Constitution through the 73rd and 74th Constitutional amendments. The rules and bye-laws enacted by them are examples of local laws.
2. **LAWS MADE BY THE EXECUTIVE:** Laws are supposed to be enacted by the sovereign and the sovereignty may be vested in one authority or it may be distributed among the various organs of the State. In most of the modern States, sovereignty is generally divided among the three organs of the State.

Q NO 6. DELEGATED LEGISLATION

ANSWER:

1. The three organs of the State namely legislature, executive and judiciary are vested with three different functions.
2. The prime responsibility of law-making vests with the legislature, while the executive is vested with the responsibility to implement the laws enacted by the legislature.
3. However, the legislature delegates some of its law-making powers to executive organs which are also termed delegated legislation. Delegated legislation is also a class of subordinate legislation.

4. In welfare and modern states, the amount of legislation has increased manifold and it is not possible for legislative bodies to go through all the details of law.
5. Therefore, it deals with only a fundamental part of the legislation and wide discretion has been given to the executive to fill the gaps. This increasing tendency of delegated legislation has been criticized.
6. However, delegated legislation is resorted to, on account of reasons like paucity of time, technicalities of law and emergencies. Therefore, delegated legislation is sometimes considered as a necessary evil.

1.4. PRIMARY AND SUBORDINATE LEGISLATIONS

Q NO 1. WRITE A NOTE ON PRIMARY AND SUBORDINATE LEGISLATIONS

ANSWER:

1. Primary legislation is an act that has been passed by the Parliament. Whereas, subordinate legislation is the legislation made by an authority subordinate to the legislature.
2. Subordinate legislation is that which is made under the authority other than the sovereign power and is, therefore, dependent for its continued existence and validity on some superior or supreme authority.
3. Most of the enactments provide for the powers for making rules, regulations, bye-laws or other statutory instruments which are exercised by the specified subordinate authorities. Such legislation is to be made within the framework of the powers so delegated by the legislature and is, therefore, known as delegated or subordinate legislation.
4. **CASE LAW**: The need and importance of subordinate legislation have been underlined by the Supreme Court in the **GWALIOR RAYON MILLS MFG. (WING.) CO. LTD. VS. ASSTT. COMMISSIONER OF SALES TAX AND OTHERS (ALL INDIA REPORTER 1974 SC 1660 (1667)** as:
5. Most of the modern socio-economic legislations passed by the legislature lay down the guiding principles and the legislative policy. The legislatures because of limitation imposed upon by the time factor hardly go into matters of detail.
6. Provision is, therefore, made for delegated legislation to obtain flexibility, elasticity, expedition and opportunity for experimentation. The practice of empowering the executive to make subordinate legislation within a prescribed sphere has evolved out of practical necessity and pragmatic needs of a modern welfare State.
7. The legislature lays down the policy and purpose of the legislation and leaves it to the executive, experts and technocrats to provide for working details within the framework of the enactment by way of rules, regulations, bye-laws or other statutory instruments.
8. That is why, delegated legislation is increasingly assuming an important role in the process of law-making, comprising an important component of legislation. Powers have also been conferred under various provisions of the Constitution of India on the different functionaries to frame rules, regulations or schemes dealing with various aspects.

DELEGATED LEGISLATION under such delegated powers is ancillary and cannot, by its very nature, replace or modify the parent law. Indian democracy is said to rest on the acclaimed four pillars and these are the legislature, the executive, the judiciary, and the press. These pillars are empowered by the constitution not to interfere in the matters of others. As per the Constitution, the legislative has legislative powers and the Executive has the power to execute the laws. Similarly, the Judiciary has the power to resolve dispute. There are multifarious functions that have to be performed by the

Legislature in welfare states and therefore there is a need to delegate rule- making power to other authorities. They have limited themselves to policy matters and have left a large volume of area to the Executive to make rules to carry out the purposes of the Legislature. In such types of situations, the system of delegated legislation comes to our mind. Therefore, the need for delegation is necessary and is sought to be justified on the ground of flexibility, adaptability and speed.

1.5. LEGISLATIVE PROCESSES IN INDIA

INTRODUCTION

1. Every country is governed by a set of rules and laws. The importance of laws and ancillary rules is to maintain a semblance of order in the society so as to regulate the behavior of various entities within it.
2. Every decision relating to citizenship to voting age, to how a country will be run in various aspects is all done through various laws, be it central or state laws.
3. Law serves many purposes, such as, maintaining order, resolving disputes, ensuring safety and guaranteeing enforcement of rights of citizens.
4. Laws are binding on all people residing in a country in addition to the organizations and Government alike.
5. The primary source of law is our constitution and every law either central act or state act or any other local act is made according to this important source of law.
6. No law in the country can be inconsistent with the Constitution of India. The constitution lays down the framework for procedures, powers, and duties of government institutions and sets out fundamental rights and duties of citizens along with directive principles of state policy.
7. The constitution mentions that India is a secular, sovereign, socialist and democratic republic and ensures its citizens justice, liberty, equality among other things.
8. The Constitution can never be overridden by any institution in India.
9. The Government of India has many ministries that cater to various sectors that are in charge of putting forth proposals involving major policies that is of national importance. These major policy proposals are usually in line with the goals of the Government that gets elected to power.
10. Therefore, before a bill is produced at the Parliament, detailed study and survey is undertaken by the relevant ministry and its ancillary departments. The study relates to social and financial cost, benefit and the key challenges that are required to be settled before and after the legislation comes into force.

Q NO 1. EXPLAIN THE STAGES THAT LAW GOES THROUGH BEFORE A BILL GETS PASSED

ANSWER:

1. In pre-drafting stages, first comes the formulation of legislative proposal. The concerned ministry makes the legislative proposal only after consulting with interested and effective stakeholders from financial and administrative point of view. Concerned ministry also mentions the necessity of the legislation in the proposal and all other incidental matters.
2. The pre-legislative consultation policy was adopted pursuant to the decision by a committee headed by the Cabinet Secretary on 10th January 2014. In this the concerned Ministry/department will have to publish the proposed legislation with explanatory note either on the internet or through other means. Such details will then be kept in the public domain for at least 30 days.

3. If a piece of legislation affects a particular group of people, it has to be published in a manner so it reaches the concerned affected people.
4. The feedback from the stakeholders shall then be taken into consideration while drafting the bill.
5. The concerned ministry then refers the matter to Ministry of Law and Justice for advice as to its practicability from legal and constitutional point of view. The Ministry of Law and Justice at this point only advice about the necessity and desirability of such legislation in the light of existing law and also constitutional validity of the proposal without going into the merits.
6. After the aforementioned consultation, the concerned ministry sends all relevant documents to Ministry of Law & Justice with office memorandum.
7. The Ministry of Law & Justice (Legislative Department) then prepares the draft bill on receipt of the proposal after getting clearance from the department of the legal affairs.
8. Once the draft is prepared by the Ministry of Law & Justice and is accepted after scrutiny done by the concerned ministry, a note to the cabinet secretary is sent for placing the draft bill before the cabinet for its consideration and subsequent approval.
9. After the approval of the draft, the concerned ministry examines the decision of the cabinet for any necessary changes suggested which would then be sent to the Ministry of Law and Justice with the comment of the cabinet for making the said changes. After the approval of the draft, if no suggestion is given by the cabinet, then the concerned ministry makes the statement of object and reason relating to the bill, to be signed by the Ministry of Law and Justice.
10. To enable the ministry of parliamentary affair to draw up the legislative programme of the session, complete details of the bill proposed to be introduced during a session will be sent at least one month before the commencement of the session.
11. Under Articles 109 read with 110 (1) & 117 (1) of the Indian Constitution, a money bill is to be introduced first in the House of People. In case of other type of bill, the house in which they have to be introduced will be decided by in consultation with ministry of parliamentary affairs.

Q NO 2. ARTICLE 107: PROVISIONS AS TO INTRODUCTION AND PASSING OF BILLS

ANSWER:

1. Subject to the provisions of articles 109 and 117 with respect to Money Bills and other financial Bills, a Bill may originate in either House of Parliament.
2. Subject to the provisions of articles 108 and 109, a Bill shall not be deemed to have been passed by the Houses of Parliament unless it has been agreed to by both Houses, either without amendment or with such amendments only as are agreed to by both Houses.
3. A Bill pending in Parliament shall not lapse by reason of the prorogation of the Houses.
4. A Bill pending in the Council of States which has not been passed by the House of the People shall not lapse on a dissolution of the House of the People.

5. A Bill which is pending in the House of the People, or which having been passed by the House of the People is pending in the Council of States, shall, subject to the provisions of article 108, lapse on a dissolution of the House of the People.

Q NO 3. ARTICLE 108: JOINT SITTING OF BOTH HOUSES IN CERTAIN CASES.

ANSWER:

1. If after a Bill has been passed by one House and transmitted to the other House-

i) the Bill is rejected by the other House; or

ii) the Houses have finally disagreed as to the amendments to be made in the Bill; or

iii) more than six months elapse from the date of the reception of the Bill by the other House without the Bill being passed by it, the President may, unless the Bill has elapsed by reason of a dissolution of the House of the People, notify to the Houses by message if they are sitting or by public notification if they are not sitting, his intention to summon them to meet in a joint sitting for the purpose of deliberating and voting on the Bill: Provided that nothing in this clause shall apply to a Money Bill.

2. In reckoning any such period of six months as is referred to in clause (1), no account shall be taken of any period during which the House referred to in sub-clause (c) of that clause is prorogued or adjourned for more than four consecutive days.

3. Where the President has under clause (1) notified his intention of summoning the Houses to meet in a joint sitting, neither House shall proceed further with the Bill, but the President may at any time after the date of his notification summon the Houses to meet in a joint sitting for the purpose specified in the notification and, if he does so, the Houses shall meet accordingly.

4. If at the joint sitting of the two Houses the Bill, with such amendments, if any, as are:

Provided that at a joint sitting-

i) if the Bill, having been passed by one House, has not been passed by the other House with amendments and returned to the House in which it originated, no amendment shall be proposed to the Bill other than such amendments (if any) as are made necessary by the delay in the passage of the Bill;

ii) if the Bill has been so passed and returned, only such amendments as aforesaid shall be proposed to the Bill and such other amendments as are relevant to the matters with respect to which the Houses have not agreed; and the decision of the person presiding as to the amendments which are admissible under this clause shall be final.

5. A joint sitting may be held under this article and a Bill passed thereat, notwithstanding that a dissolution of the House of the People has intervened since the President notified his intention to summon the Houses to meet therein.

Q NO 4. ARTICLE 109: SPECIAL PROCEDURE IN RESPECT OF MONEY BILLS

ANSWER:

1. A Money Bill shall not be introduced in the Council of States.
2. After a Money Bill has been passed by the House of the People it shall be transmitted to the Council of States for its recommendations and the Council of States shall within a period of fourteen days from the date of its receipt of the Bill return the Bill to the House of the People with its recommendations and the House of the People may thereupon either accept or reject all or any of the recommendations of the Council of States.
3. If the House of the People accepts any of the recommendations of the Council of States, the Money Bill shall be deemed to have been passed by both Houses with the amendments recommended by the Council of States and accepted by the House of the People.
4. If the House of the People does not accept any of the recommendations of the Council of States, the Money Bill shall be deemed to have been passed by both Houses in the form in which it was passed by the House of the People without any of the amendments recommended by the Council of States.
5. If a Money Bill passed by the House of the People and transmitted to the Council of States for its recommendations is not returned to the House of the People within the said period of fourteen days, it shall be deemed to have been passed by both Houses at the expiration of the said period in the form in which it was passed by the House of the People.

Q NO 5. ARTICLE 111: ASSENT TO BILLS

ANSWER:

When a Bill has been passed by the Houses of Parliament, it shall be presented to the President, and the President shall declare either that he assents to the Bill, or that he withholds assent therefrom:

Provided that the President may, as soon as possible after the presentation to him of a Bill for assent, return the Bill if it is not a Money Bill to the Houses with a message requesting that they will reconsider the Bill or any specified provisions thereof and, in particular, will consider the desirability of introducing any such amendments as he may recommend in his message, and when a Bill is so returned, the Houses shall reconsider the Bill accordingly, and if the Bill is passed again by the Houses with or without amendment and presented to the President for assent, the President shall not withhold assent therefrom.

After the assent of the President, the Ministry of Law & Justice publishes the Act in Gazette of India Extraordinary, forwards the copies to the all-state government for publication in their official gazette, get copies of the act in printed form for sale to the General Public.

1.6. LEGAL METHODS INCLUDING JUDICIAL ALTERNATIVE DISPUTE RESOLUTION (ADR) PROCESS IN INDIA

INTRODUCTION

1. There are many ways in which disputes can be resolved and grievances redressed. Whenever there is a lawful agreement between parties that bind both of them with certain duties and obligations, in cases of breach, a dispute resolution body, either a court or a tribunal can be approached.
2. However, the law has also provided for resolving disputes through mechanisms that do not involve courts or litigations. These methods may include arbitration, mediation, conciliation, negotiation and others. In older times nations used to resolve disputes through warfare, but as nations got more civilized and various conventions and treaties came into effect, different means of resolution of disputes came into emergence.
3. These aforementioned procedures of dispute resolution can be categorized into two broad heads, such as, adjudicative processes and consensual processes. In adjudicative processes, a judge or an arbitrator decides the case and determines the rights and obligations of the parties. Whereas in consensual processes, parties themselves attempt to reach an agreement with or without the help of a third-party mediator.
4. Provisions of dispute resolution clauses are imperative in trade and commerce, especially in treaties and contracts. Without these provisions protecting one's rights in property or contract becomes difficult.
5. **LITIGATION:** The most common form of judicial dispute resolution is litigation. Litigation is initiated when one party files suit against another. The proceedings are very formal and are governed by rules, such as rules of evidence and procedure, which are established by the legislature. Outcomes are decided by impartial judges, based on the factual questions of the case and the applicable law. The verdict of the court is binding; however, both parties have the right to appeal the judgment to a higher court.
6. Judicial dispute resolution is typically adversarial in nature, for example, involving opposing parties or opposing interests seeking an outcome most favorable to their position. Many parties opt for other means of dispute resolution which are more private and quicker, even though it may entail spending more money than what could have been required in cases of litigation.

Methods of dispute resolution that do not involve litigation through courts generally are classified under alternative dispute resolution (ADR) methods. ADR generally depends on agreement by the parties to use ADR processes, either before or after a dispute has arisen. ADR has experienced steadily increasing acceptance and utilization because of a perception of greater flexibility and speedy resolution of disputes, among other perceived advantages.

Q NO 1. WRITE A SHORT NOTE ON ALTERNATIVE DISPUTE RESOLUTION

ANSWER:

1. Alternative Dispute Resolution is a term used to describe several different modes of resolving legal disputes other than filing law suits and get timely justice.
2. The Courts are backlogged with dockets resulting in delay of a year or more for the parties to have their cases heard and decided. To solve this problem of delayed justice ADR Mechanism has been developed in response thereof. Its methods can help the parties to resolve their disputes at their own terms expeditiously.
3. Alternative dispute redressal techniques can be employed in several categories of disputes, especially civil, commercial, industrial, and family disputes. The term "Alternative Disputes Resolution" takes in its fold, various modes of settlement including, Lok Adalats, arbitration conciliation and Mediation
4. It was suggested by the Law Commission of India that the Court may require attendance of any party to the suit or proceedings to appear in person with a view to arriving at an amicable settlement of dispute between the parties and make attempts to settle the dispute between the parties amicably.

Q NO 2. STATE THE PROCEDURE LAID DOWN UNDER CIVIL PROCEDURE CODE IN PROVISION OF ADR'S

ANSWER:

SECTION 89 OF THE CIVIL PROCEDURE CODE LAYS DOWN:

1. **SETTLEMENT OF DISPUTES OUTSIDE THE COURT:** Where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the terms of a possible settlement and refer the same for:
   - **i)** arbitration;
   - **ii)** conciliation;
   - **iii)** judicial settlement including settlement through Lok Adalat; or
   - **iv)** mediation
2. **WHERE A DISPUTE HAS BEEN REFERRED:**
   - **i)** for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;
   - **ii)** to Lok Adalat, the Court shall refer the same to the Lok Adalat in accordance with the provisions of sub- section (1) of section 20 of the Legal Services Authority Act, 1987 (39 of

1987) and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;

iii) for judicial settlement, the Court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

iv) for mediation, the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed."

The **CODE OF CIVIL PROCEDURE (AMENDMENT) ACT, 1999** by which Section 89 was amended into the Code also amended a new Section 16 in the Court Fees Act, 1870 which states the following:

3. REFUND OF FEE: Where the court refers the parties to the suit to any one of the modes of settlement of dispute referred to in Section 89 of the Code of Civil Procedure, 1908 the plaintiff shall be entitled to a certificate from the court authorizing him to receive back from the Collector, the full amount of the fee paid in respect of such plaint.

Q NO 3. WHAT IS ARBITRATION AND STATE ITS ADVANTAGES

ANSWER:

ARBITRATION

Arbitration, a form of alternative dispute resolution (ADR), is a technique for the resolution of disputes outside the courts, where the parties to a dispute refer it to one or more arbitrators, by whose decision they agree to be bound. It is a resolution technique in which a third party reviews the evidence in the case and imposes a decision that is legally binding for both sides and enforceable. There are limited rights of review and appeal of arbitration awards. Arbitration is not the same as judicial proceedings or any other kind of alternate dispute resolution method. Arbitration can be either voluntary or mandatory. It can be referred to by the courts also.

THE ADVANTAGES OF ARBITRATION CAN BE SUMMARIZED AS FOLLOWS:

1. It is often faster than litigation in Court

2. Arbitral proceedings and an arbitral award are generally non-public, and can be made confidential

If the subject matter of the dispute is highly technical, arbitrators with an appropriate degree of expertise can be appointed as one cannot choose judge in litigation.

Q NO 4. STATE THE PROCEDURES OF ARBITRATION AND CONCILIATION

ANSWER:

The Arbitration and Conciliation Act, 1996 lays down provisions relating to arbitration and conciliation procedures.

Without an arbitration agreement, usually recourse to arbitration does not happen.

SECTION 7 ARBITRATION AGREEMENT:

1. In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
2. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
3. An arbitration agreement shall be in writing.
4. An arbitration agreement is in writing if it is contained in:
   - **i)** a document signed by the parties;
   - **ii)** an exchange of letters, telex, telegrams or other means of telecommunication [including communication through electronic means] which provide a record of the agreement; or
   - **iii)** an exchange of statements of claim and defense in which the existence of the agreement is alleged by one party and not denied by the other.
5. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

SECTION 8 POWER TO REFER PARTIES TO ARBITRATION WHERE THERE IS AN ARBITRATION AGREEMENT:

1. A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.
2. The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof:

   Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.
3. Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

The method of appointing arbitrators is also mentioned within the Act.

SECTION 10 NUMBER OF ARBITRATORS:

1. The parties are free to determine the number of arbitrators, provided that such number shall not be an even number.
2. Failing the determination referred to in sub-section (1), the arbitral tribunal shall consist of a sole arbitrator.

SECTION 11 APPOINTMENT OF ARBITRATORS:

1. A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

2. Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

3. Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.

4. If the appointment procedure in sub-section (3) applies and:

i) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

ii) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court;

5. Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court.

6. Where, under an appointment procedure agreed upon by the parties,

i) a party fails to act as required under that procedure; or

ii) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

iii) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request [the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court] to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment,

decree or order of any Court, confine to the examination of the existence of an arbitration agreement.

(6B) The designation of any person or institution by the Supreme Court or, as the case may be, the High Court, for the purposes of this section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court.

7. A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) to the Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court is final and no appeal including Letters Patent Appeal shall lie against such decision.

Q NO 5. WHAT IS CONCILIATION

ANSWER:

1. Conciliation is an alternative dispute resolution process whereby the parties to a dispute use a conciliator, who meets with the parties separately in order to resolve their differences. They do this by interpreting issues, providing technical assistance, exploring potential solutions and bringing about a negotiated settlement.

2. Conciliation is voluntary where the parties involved agree and choose to resolve their differences by conciliation. The process is flexible, allowing parties to define the time, structure and content of the conciliation proceedings. These proceedings are not public.

3. The conciliator when proposing a settlement, takes into account the legal, commercial and financial positions of the parties. The conciliator is usually a trained and qualified neutral person who facilitates negotiations between disputing parties.

4. Conciliation involves discussions among the parties and the conciliator with an aim to explore sustainable and equitable resolutions by targeting the existent issues involved in the dispute and creating options for a settlement that are acceptable to all parties. The process is risk free and not binding on the parties till they arrive at and sign the agreement.

5. According to procedure, usually one conciliator is appointed to resolve the dispute between the parties. The parties can appoint the sole conciliator by mutual consent. There is no bar to the appointment of two or more conciliators. In conciliation proceedings with three conciliators, each party appoints one conciliator. The third conciliator is appointed by the parties by mutual consent.

6. Unlike arbitration where the third arbitrator is called the Presiding Arbitrator, the third conciliator is not so.

7. The conciliator is supposed to be impartial and conduct the conciliation proceedings in an impartial manner. He is guided by the principles of objectivity, fairness and justice, and by the usage of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.

8. The conciliator is not bound by the rules of procedure and evidence. The conciliator does not give any award or order. If no consensus could be arrived at between the parties and the conciliation

Q NO 6. WRITE A SHORT NOTE ON MEDIATION

ANSWER:

1. Dispute settlement through mediation is a voluntary and relatively informal process of dispute resolution. It includes a party centric approach where a neutral third party assists the parties in amicably resolving their disputes by using specified communication and negotiation techniques. Involvement of parties in the control over the whole process is peculiar to this dispute resolution method.
2. The mediator only acts as a facilitator in helping the parties to reach a negotiated settlement of their dispute. The mediator makes no decisions or awards. In the mediation process, each side meets with an experienced neutral mediator. The session begins with each side describing the problem and the resolution they desire which is ameliorated by conducting separate and joint meetings culminating finally in an agreement of both parties.
3. The advantages of the mediation are that the agreement which is that of the parties themselves; the dispute is quickly resolved without great stress and expenditure; the relationship between the parties is preserved; and the confidentiality is maintained.

Q NO 13. WRITE A SHORT NOTE ON LOK ADALATS

ANSWER:

Lok Adalats or people's courts have been established by the government to settle disputes by way of compromise or conciliation. This is another way of alternate dispute resolution that has been provided for. It is a judicial institution and a dispute settlement agency developed by the people themselves for social justice based on settlement or compromise reached through systematic negotiations. Lok-Adalats accept even cases pending in the regular courts within their jurisdiction. Section 89 of the Civil Procedure Code also provides for referring disputes to Lok Adalat wherein provisions of the Legal Services Authorities Act, 1987 gets applied.

1.7. LEGAL TERMINOLOGY AND MAXIMS

A legal maxim is an established principle or proposition of law or a legal policy usually stated in Latin. These principles are used in Courts to denote the application of certain laws. Such principles do not have the authority of law but when Courts apply the maxims in deciding issues of law or the legislature incorporates such maxims while framing laws, they have the force of law.

1. Ab Initio – From the beginning.

2. Actionable per se – The very act is punishable, and no proof of damage is required.

3. Actio personalis moritur cum persona – A personal right of action dies with the person. In other sense, if he dies, the right to sue is gone.

4. Actori incumbit onus probandi – The burden of proof is on the plaintiff.

5. Actus me invito factus non est mens actus – An act done by me against my will is not my act. Read with section 94 of IPC.

6. Actus non facit reum nisi mens sit rea – An act does not make one guilty unless it is accompanied by a guilty mind.

7. Actus reus – Guilty act.

8. Actus Reus Non Facit Reum Nisi Mens Sit Rea – Conviction of a crime requires proof of a criminal act and intent. Or an act does not make a defendant guilty without a guilty mind. Or an act does not constitute guilt unless done with a guilty intention.

9. Ad hoc – For the particular end or case at hand.

10. Alibi – At another place, elsewhere.

11. Amicus Curiae – A friend of court or member of the Bar who is appointed to assist the court.

12. Ante Litem Motam – Before suit brought; before controversy instituted, or spoken before a lawsuit is brought.

13. Assentio mentium – The meeting of minds, i.e. mutual assents.

14. Audi alteram partem – No man shall be condemned unheard.

15. Bona fide – In good faith.

16. Bona vacantia – Goods without an owner.

17. Boni judicis est ampliare jurisdictionem – It is the part of a good judge to enlarge his jurisdiction, i.e. remedial authority.

18. Caveat – A caution registered with the public court to indicate to the officials that they are not to act in the matter mentioned in the caveat without first giving notice to the caveator.

19. Caveat actor – Let the doer beware.

20. Caveat emptor – Let the buyer beware.

21. Caveat venditor -Let the seller beware.

22. Certiorari – A writ by which orders passed by an inferior court is quashed.

23. Communis hostis omnium – They are common enemies of all. The common enemy of everyone.

24. Corpus – Body.

25. Corpus delicti – The facts and circumstances constituting a crime and Concrete evidence of a crime, such as a corpse (dead body).

26. Damnum sine injuria – Damages without injuries.

27. De facto – In fact.

28. De jure – By law.

29. De minimis – About minimal things.

30. De Minimis Non Curat Lex – The law does not govern trifles (unimportant things). Or law is not concerned with small or insignificant things/matters.

31. De novo – To make something anew.

32. Dictum – Statement of law made by the judge in the course of the decision but not necessary to the decision itself.

33. Doli capax – Capable of forming necessary intent to commit a crime.

34. Doli incapax – Incapable of crime. Or incapable of forming the intent to commit a crime.

35. Detinue – Tort of wrongfully holding goods that belong to someone else.

36. Donatio mortis causa – Gift because of death. Or a future gift given in expectation of the donor's imminent death and only delivered upon the donor's death.

37. Estoppel – Prevented from denying.

38. Ex gratia – As favour.

39. Ex officio – Because of an office held.

40. Ex parte – Proceedings in the absence of the other party.

41. Ex post facto – Out of the aftermath. Or after the fact.

42. Factum probans – Relevant fact.

43. Fraus est celare fraudem – It is a fraud to conceal a fraud.

44. Functus officio – No longer having power or jurisdiction.

45. Furiosi nulla voluntas est – Mentally impaired or mentally incapable persons cannot validly sign a will, contract, or form the frame of mind necessary to commit a crime. Or a person with mental illness has no free will.

46. Furiosis furore suo puiner – A madman is best punished by his own madness.

47. Furiosis nulla voluntas est – A madman has no will.

48. Habeas corpus – A writ to have the body of a person to be brought in before the judge.

49. Ignorantia facit doth excusat, Ignorance juris non-excusat – Ignorance of fact is an excuse, but ignorance of the law is no excuse.

50. Ignorentia juris non excusat – Ignorance of law is not an excuse..

51. Injuria sine damnum – Injury without damage.

52. Ipso facto – By the mere fact.

53. In promptu – In readiness.

54. In lieu of – Instead of.

55. In personam – A proceeding in which relief I sought against a specific person.

56. Innuendo – Spoken words that are defamatory because they have a double meaning.

57. In status quo – In the present state.

58. Inter alia – Among other things.

59. Inter vivos – Between living people

60. Jus cogens or ius cogens – Compelling law.

61. Jus in personam – Right against a specific person.

62. Jus in rem – Right against the world at large.

63. Jus naturale – Natural law. Or in other words, a system of law based on fundamental ideas of right and wrong that is natural law.

64. Jus Necessitatis – It means a person's right to do what is required for which no threat of legal punishment is a dissuasion.

65. Jus non scriptum – Customary law.

66. Jus scriptum – Written law.

67. Jus – Law or right.

68. Justitia nemini neganda est – Justice is to be denied to nobody.

69. Jus soli – Right of soil.

70. Jus sanguins – Right of blood or descent.

71. Lex non a rege est violanda – The law must not be violated even by the king.

72. Locus standi – Right of a party to an action to appear and be heard by the court.

73. Mala fide – In bad faith.

74. Mandamus – 'We command'. A writ of command issued by a higher court to government and public authority to compel the performance of public duty.

75. Mens rea – Guilty mind.

76. Misnomer – A wrong or inaccurate name or term.

77. Modus operandi – Way of working. Or mode of operation.

78. Modus Vivendi – Way of living.

79. Mutatis Mutandis – With the necessary changes having been made. Or with the respective differences having been considered.

80. Nemo bis punitur pro eodem delicto – Nobody can be twice punished for the same offence.

81. Nemo debet bis vexari pro una et eadem causa – It means no man shall be punished twice for the same offence.

82. Nemo debet esse judex in propria causa or Nemo judex in causa sua or Nemo judex in sua causa – Nobody can be the judge in his own case.

83. Nemo moriturus praesumitur mentire – A man will not meet his maker (God) with a lie in his mouth. Or, in other words, 'no man at the point of death is presumed to lie.' This maxim is related

to dying declaration.

84. Nemo Potest esse tenens et dominus – Nobody can be both a landlord and a tenant of the same property.

85. Nolle prosequi – A formal notice of abandonment by a plaintiff or prosecutor of all or part of a suit.

86. Novation – Transaction in which a new contract is agreed by all parties to replace an existing contract.

87. Nullum crimen sine lege, nulla poena sine lege – There must be no crime or punishment except in accordance with fixed, predetermined law.

88. Non Sequitur – A statement (such as a response) that does not follow logically from or is not clearly related to anything previously said.

89. Obiter dictum – Things said by the way. It is generally used in law to refer to a non-binding opinion made by a judge. It does not act as a precedent.

90. Onus probandi – Burden of proof.

91. Pacta Sunt Servanda – Agreements must be kept.

92. Pari passu – With an equal step. At par.

93. Per curiam (decision or opinion) – By the court. In other words, the decision is made by the court (or at least, a majority of the court) acting collectively.

94. Per se – By itself.

95. Persona non grata – A person who is unacceptable or unwelcome.

96. Prima facie – At first sight. Or on the face of it.

97. Alimony – A husband's (or wife's) provision for a spouse after separation or divorce; maintenance.

98. Per curiam – By a court.

99. Quantum meruit – What one has earned. Or the amount he deserves.

100. Qui facit per alium, facit per se – He who acts through another acts himself.

101. Quid pro quo – Something for something.

102. Qui sentit commodum, sentire debet et onus – It means he who receives advantage must also bear the burden.

103. Quo warranto – By what authority. A writ calling upon one to show under what authority he holds or claims a public office.

104. Quod necessitas non habet legem or Necessitas non habet legem – Necessity knows no law.

105. Ratio decidendi – Principle or reason underlying a court judgement. Or the rule of law on which a judicial decision is based.

106. Respondeat superior – Let the master answer. For example, there are circumstances when an employer is liable for acts of employees performed within the course of their employment.

107. Res ipsa loquitor – The thing speaks for itself.

108. Res Judicata – A matter already judged.

109. Res Judicata Pro Veritate Accipitur – It means that a judicial decision must be accepted as correct.

110. Rex non protest peccare – The king can do no wrong.

111. Salus populi est suprema lex – The welfare of the people is the supreme law.

112. Status quo – State of things as they are now.

113. Sine die – indefinitely

114. Sine qua non – "Without which nothing". An essential condition. A thing that is absolutely necessary. Basically, a component of an argument that, if debunked, causes the entire argument to crumble.

115. Suo Motu – On its own motion.

116. Uberrima fides (sometimes uberrimae fidei) – Utmost good faith.

117. Ubi jus ibi remedium – Where there is a right, there is a remedy.

118. Veto – Ban or order not to allow something to become law, even if it has been passed by a parliament.

119. Vice versa – Reverse position.

120. Vis major – Act of God.

121. Volenti non fit injuria – Damage suffered by consent gives no cause of action. Or harm caused with consent cannot be considered an injury.

122. Vox populi – Voice of the people. Or the opinion of the majority of the people.

123. Waiver – Voluntarily giving up or removing the conditions.

EXERCISE

☉ **Multiple Choice Question:**

1. Right to Property is a:

a) Fundamental Right
b) Fundamental Duty
c) Constitutional Right
d) None of the above

2. The Constitution of India describes India as:

a) A federation
b) Quasi-federal
c) A Union of states
d) None of the above

3. Constitution is the:

a) Law of the land
b) Administrative Law of the land
c) Constitutional Law of the land
d) None of the above

4. On which date was the Constitution of India adopted by Constituent Assembly?

a) August 15, 1947
b) January 26, 1950
c) November 26, 1949
d) January 30, 1948

5. What is the chief source of legal authority in India?

a) People
b) Constitution of India
c) Parliament
d) President of India

☉ **State TRUE or FALSE**

1. Fundamental rights are not enforceable in the court of law in India.
2. Freedom of speech is an unfettered right and cannot be curtailed under any circumstances.
3. Custom is a source of law.
4. India's Constitution is the longest Constitution in the world.
5. Right to Equality is a fundamental right.
6. Secularism is a feature enshrined in the Preamble.

☉ **Fill in the blanks**

1. The___is an exception to equality before law.
2. Indian Constitution permits discrimination on__
3. Fundamental Rights in Indian Constitution is based on_
4. Right to Property is a_right
5. ___, mediation, negotiation and conciliation are alternate dispute resolution methods.

☉ **Short Essay Type Questions**

1. Discuss the concept of primary and secondary legislation.
2. What are the objectives of the Preamble?
3. Write short notes on-
   (a) Conciliation & Mediation
   (b) Subordinate Legislation

☉ **Essay Type Questions**

1. Explain judicial precedents as a source of law.
2. Elaborate on the concept of alternate dispute resolution
3. Explain how fundamental rights guarantee equality?
4. Explain how customs are a source of law?

☉ **Unsolved Cases**

1. A has been accused of theft by his employer. He was tried in a court but got acquitted. However, the employer found new evidence about A being the thief and instituted another case in the Court. Can A be tried again according to the fundamental rights that the Indian Constitution guarantees him?

2. A works for a certain political party and is notorious for making hate speeches against a certain religious community which often leads to communal riots pursuant to his inciting speeches. A was asked not to speak at a congregation which was to be held publicly. Is A's freedom to speech impeded?

ANSWER:

Multiple Choice Question

1. c; 2. c; 3. a; 4. c; 5. b.

State TRUE or FALSE

1. False; 2. False; 3. True; 4. True; 5. True; 6. True.

Fill in the blanks

1. President; 2. Nothing/no ground; 3. USA constitution; 4. Constitutional; 5. Arbitration

2. INDIAN CONTRACTS ACT, 1872

2.1. ESSENTIAL ELEMENTS OF A CONTRACT, OFFER AND ACCEPTANCE

Q NO 1. INTRODUCTION TO CONTRACTS AND THEIR SIGNIFICANCE

ANSWER:

1. Contracts are crucial for carrying on our daily lives. In absence of contracts and its corresponding regulations, there could be anarchy. Opposed to popular belief, contracts are not only used in business deals, but also while carrying out our daily activities like taking the public transport, buying groceries or a cinema ticket or buying anything online, among others.
2. Contracts are those relationships that lay down rights and obligations of the parties to it which are more often than not negotiated and agreed to by themselves.
3. Contracts exist in every sphere of our lives. These negotiated terms and conditions provide a lucid record of such a transaction which needs to be carried out in good faith. If such obligations are breached, the contracts even mention a way of dispute resolution.
4. A perfect contract is one where all terms and conditions along with all details have been clearly defined leaving nothing to ambiguity or arbitrary construction. Contracts and its corresponding regulations have been a boon to the society for many reasons, economic development being one of the most important out of all.
5. **COMMENCEMENT**: The Indian Contract Act was enacted in 1872 which enlists provisions that could help the adjudicating authority in deciding the rights and liabilities of the parties.
6. All essentials of a valid contract, indemnities as applicable, limit of liabilities and grounds for termination are the clauses that the Act essentially deals with among other provisions.
7. Contracts minimize the risk of commercial transactions by a great deal. They bind the parties to their obligations and reduces the likelihood of breach. Conflict resolution can also be done in a relatively hassle-free way under contract laws.

The laws relating to contract enforce clarity between parties and helps in increasing productivity. From buying shares in a company to working for a company, in whatever capacity, all relationships are governed through contracts. Contracts generally enhance transparency and a well-defined law that governs these relationships help in observance of such contracts in good faith.

Q NO 2. DEFINITIONS

ANSWER:

1. **CONTRACT SECTION 2(h):** An agreement enforceable by law

   Example: A offered to sell his book to B for Rs.100. B paid A Rs.100 and bought the book. A is the offeror, B is the offeree/acceptor, Rs.100 is the consideration. Similarly, A's offer to sell the book

is his promise, and B's acceptance to pay the money is his promise. When this aforementioned agreement fulfils Section 10 of the Indian Contract Act, 1872, it becomes a contract.

2. **AGREEMENT SECTION 2(e):** Every promise, and every set of promises, forming the consideration for each other.
3. **RECIPROCAL PROMISE SECTION 2(f):** Promises that form the consideration or part of the consideration for each other are called reciprocal promises.
4. **OFFER SECTION 2(a)**: When one person signifies to another his willingness to do or abstain from doing anything with a view to obtaining the assent of that other to such act or abstinence
5. **CONSIDERATION SECTION 2(d)**: "Consideration refers to Something in Return (Latin Maxim – "Quid Pro Quo").
6. **VOIDABLE CONTRACT SECTION 2(i):** An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others.

Q NO 3. WHAT ARE THE ESSENTIAL ELEMENTS OF A VALID CONTRACT

ANSWER:

SECTION 10 provides that all agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not otherwise expressly declared to be void

ESSENTIAL ELEMENTS OF A CONTRACT, OFFER AND ACCEPTANCE

1. To constitute an agreement, it is essential that there exists an **OFFER**.
2. Such offer when accepted, gives rise to an **AGREEMENT**.
3. However, to conclude a contract the fulfilment of other pre-requisites of consideration, legality of object, competence of parties and so on, is required.
4. **FREE CONSENT**: There must be free consent of the parties to the contract. According to Section 14, "Consent is said to be free when it is not caused by
   - **i)** Coercion
   - **ii)** undue influence
   - **iii)** fraud
   - **iv)** misrepresentation, or
   - **v)** mistake".

   If the consent of the parties is not free, then no valid contract comes into existence.

   Eg: X threatens to kill Y if he does not sell his house to X. Y agrees to sell his house to X. In this case, Y's consent has been obtained by coercion and therefore, it cannot be regarded as free.
5. **CAPACITY OF PARTIES**: The parties to an agreement must be competent to contract. According to Section 11 of Indian Contract Act, 1872, "every person is competent to contract who is of the age of majority, sound mind and not disqualified by any law. If the parties to agreement are not

competent to contract, then no valid contract comes into existence

6. **LAWFUL CONSIDERATION**: An agreement must be supported by lawful consideration. Consideration means something in return. According to Section 23 of the Indian Contract Act, 1872, "the consideration or Object is considered lawful unless it is forbidden by law or is fraudulent or involves or implies injury to the person or property of another or is immoral or is opposed to public policy."

   Eg: X agrees to sell his car to Y for Rs.1,00,000. Here, Y's promise to pay Rs.1,00,000 is the consideration for X's promise to sell the car and X's promise to sell the car is the consideration for Y is promise to pay Rs.1,00,000.

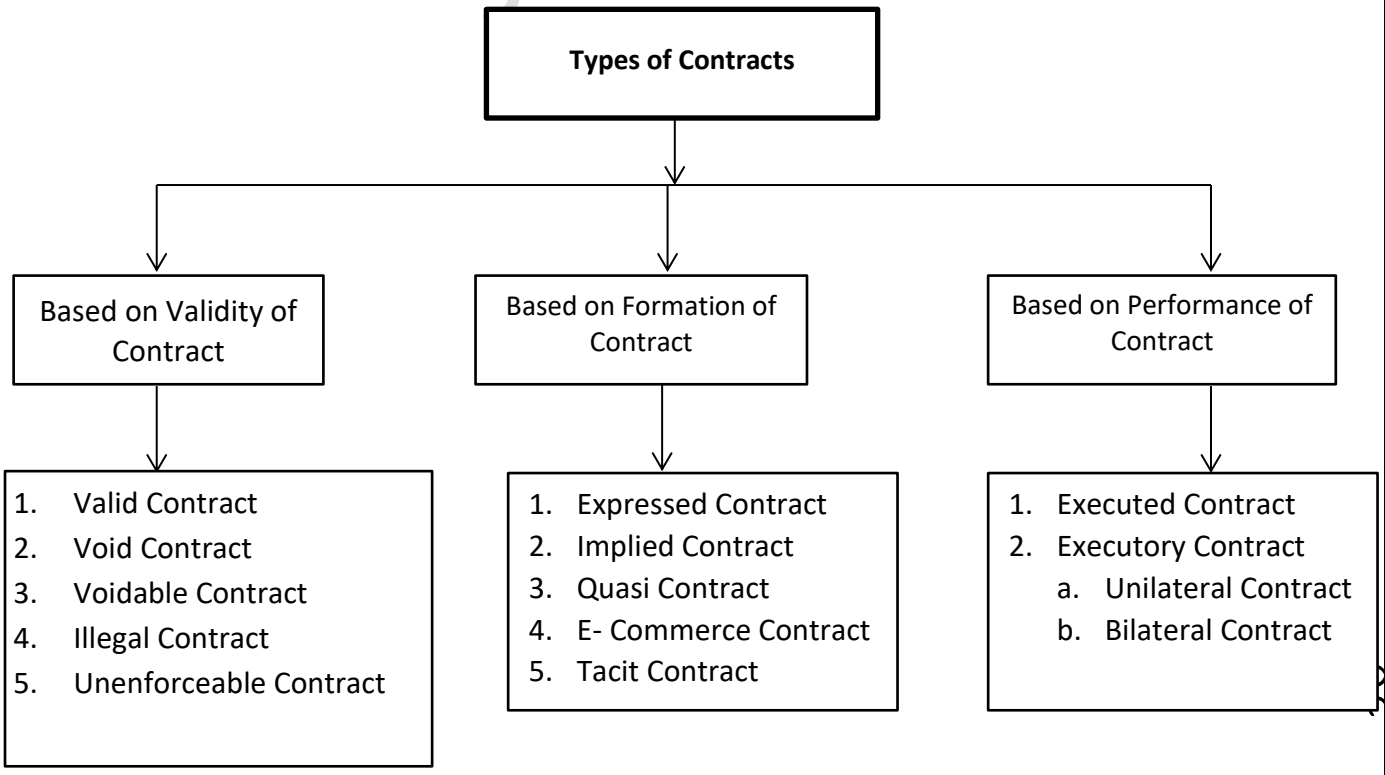
7. **LAWFUL OBJECT**: The parties to contract must enter into an agreement for a lawful Object. Object means the purpose/design

8. **AGREEMENT NOT EXPRESSLY DECLARED VOID**: The agreement must not have been expressly declared void under the provisions of Sections, 24 to 30 of the Indian Contract Act, 1872. Under these provisions, agreement in restraint of marriage, agreement in restraint of legal proceedings, agreement in restraint of trade and agreement by way of wager have been expressly declared void.

9. Contracts are legally enforceable. However, every agreement may not be enforceable under law. i.e All contracts and agreements but all agreements are not contracts.

Q NO 4. EXPLAIN TYPES OF CONTRACTS

ANSWER:



CONTRACTS ON THE BASIS OF VALIDITY OR ENFORCEABILITY

1. **VALID CONTRACT:** A contract which contains all the essentials specified as per Section 10 of the Indian Contract Act, 1872 is called a valid contract. Valid contracts are enforceable in the court of law.
2. **VOID CONTRACT:** According to Section 2(i) of the Indian Contract Act, 1872, A contract which ceases to be enforceable by law due to missing of any of the essentials, becomes void contract" In other words, a void contract is a contract which was valid initially when entered into but which subsequently became void due to missing of essentials.

   EXAMPLE: X offers to marry Y. Y accepts X's offer. Later on, Y dies. This contract was valid at the time of its formation but became void on the death of Y.
3. **VOIDABLE CONTRACT:** According to Section 2(i) of the Indian Contract Act, 1872, "an agreement which is enforceable by law at the option of one or more of the parties thereon but not at the option of the other or others: is a voidable contract.

   EXAMPLE: X, Y sells his house to X and receives payment. Here, Y's consent has been obtained by coercion and hence this contract is voidable at the option of Y, the aggrieved party. If Y decides to avoid the contract, he will have to return Rs.1,00,000 which he had received from X. if Y does not exercise his option to repudiate the contract within a reasonable time and in the meantime, Z purchases that house from x for Rs.1,00,000 in good faith. Y cannot repudiate the contract.
4. **ILLEGAL CONTRACT:** It is a contract which is forbidden by law, unlawful and opposed to public policy. Such an agreement cannot be enforced by law. Thus, illegal agreements are always void ab-initio (i.e., void from the very beginning).

   EXAMPLE: X agrees to pay Y Rs.1,00,000 if Y kills Z. Y kills Z and claims Rs.1,00,000. Y cannot recover from X because the agreement between X and Y is illegal as its object is unlawful.

   EFFECT ON COLLATERAL AGREEMENTS. In case of illegal agreements, even the collateral agreements become void.
5. **UNENFORCEABLE CONTRACT:** It is a contract which is actually valid but cannot be enforced because of some technical defects (such as not in writing, lack of stamping). Such contracts can be enforced if the technical defects are removed.

   EXAMPLE: An oral agreement for arbitration is unenforceable because the law requires that an arbitration agreement must be in writing. If the oral agreement for arbitration is made to writing, it will become enforceable.

CONTRACTS ON THE BASIS OF CREATION OR FORMATION

1. **EXPRESS CONTRACT:** Express contract is one which is made by words spoken or written

   EXAMPLE: X says to Y "Will you buy my car for Rs.1,00,000?" Y says to X "I am ready to buy your car for Rs.1,00,000." It is an express contract made orally.
2. **IMPLIED CONTRACT:** An implied contract is one which is made otherwise than by words spoken or written. It is inferred from the conduct or action of a person based on circumstances

EXAMPLE: A transport company runs buses on different routes to carry passengers. This is an implied offer by transport company. X boards a bus. This is an implied acceptance by X. Now, there is an implied contract and X is bound to pay the prescribed fare

3. **TACIT CONTRACT:** A tacit contract is one which is inferred from the conduct of parties involving machines

   EXAMPLE: Withdrawing cash through ATM & Sale by fall of hammer at an auction sale

4. **QUASI CONTRACT:** Contracts, which are created neither by word spoken, nor written, nor by the conducts of t he parties, but the obligations are created by the law

   EXAMPLE: Responsibility of finder of lost goods is to trace the legal owner and restore the same even though there is no express or implied contract between Legal owner and Finder of lost goods.

5. **E-CONTRACT:** An e-contract is one, which is entered into between two parties via internet. It is one of the most common ways of contracting in the current scenario. the offer and acceptance of the parties do not happen in person but over the information highway (internet)

   EXAMPLE: Online purchase of cloths and groceries

CONTRACTS ON THE BASIS OF EXECUTION OR PERFORMANCE

1. **EXECUTED CONTRACT:** It is a contract in which Consideration is given for the act done or forbearance.

   EXAMPLE: X offers to sell his car to Y for Rs.1,00,000. Y accepts X's offer. X delivers the car to Y and Y pays Rs.1,00,000 to X. It is an executed contract

2. **EXECUTORY CONTRACT:** It is a contract in which Consideration is to be given in future.

   EXAMPLE: X offers to sell his car to Y for Rs.1,00,000. Y accepts X's offer. If the car has not yet been delivered by X and the price has not yet been paid by Y, it is an executory contract

   Executory contracts further divided into two types as follows

   I. **UNILATERAL CONTRACT:** A Unilateral contract is one in which only one party has to perform his promise or obligation

   II. **BILATERAL CONTRACT:** A bilateral contract is one in which both the parties have to perform their respective promises or obligations

Q NO 5. DEFINE OFFER AND ITS ESSENTIAL ELEMENTS

ANSWER:

OFFER SECTION 2(a)

1. The term 'proposal' is otherwise called as 'offer'. An offer is a proposal by one person, whereby he expresses his willingness to enter into a contractual obligation in return for promise, act or forbearance.
2. Section 2(a) of the Act defines 'proposal' or offer as when one person signifies to another his willingness to do or abstain from doing anything with a view to obtaining the assent of that other

to such act or abstinence.

3. The person making the proposal is called as 'offeror' or proposer' and the person the proposal is made is called as 'offeree'.
4. Therefore, to constitute a valid offer, such an offer:
   - **i)** Must be in clear, definite, complete and final in terms and not be vague in terms;
   - **ii)** Must be communicated to the offeree.
   - **iii)** Is communicated either in writing or is oral;
   - **iv)** May be in expressed terms or in implied terms.
5. **EXAMPLE:** Ram tells Ghanshyam that he wants to sell his house to him just before he dies. Ram mortgages the house in favour of the State Bank of India for loans. Ghanshyam sues Ram for doing so as there was a contract between Ghanshyam and Ram for the sale of the same house. In this situation, Ram has not told at what price does he want to sell the house to Ghanshyam or the exact time of sale. Hence this cannot be a contract as the offer was unclear, not definite, incomplete and vague.
6. The offer may be general or specific. If an offer is made to a specific person, it is called specific offer. Such offer can be accepted by such specific person; if an offer is made to the world at large, it is a general offer. It can be accepted by any member of the general public by fulfilling the condition laid down in the offer.

Q NO 6. DEFINE ACCEPTANCE AND ITS LEGAL RULES

ANSWER:

1. Acceptance means giving consent to the offer. It is an expression by the offeree of his willingness to be bound by the terms of the offer.
2. According to Section 2(b) of the Indian Contract Act, 1872, "A person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted.
3. **CASE LAW: THAWARDAR PHERUMAL VS. UNION OF INDIA (AIR 1955 SC 468)** the Supreme Court held that before an offer can become a binding promise and result in an agreement it must be accepted, either by words or acts.
4. A proposal when accepted becomes a promise." In other words, an acceptance is the consent given to offer.

Example X offers to sell his car to Y for Rs.1,00,000. Y agrees to buy the car for Rs.1,00,000. Y's act is an acceptance of X's offer.

5. **LEGAL RULES OF A VALID ACCEPTANCE:**
   - **i)** Acceptance may be oral or in writing;
   - **ii)** It may be expressed or implied;
   - **iii)** If a particular method of acceptance is prescribed, the offer must be accepted in the prescribed manner;

iv) It must be unqualified and absolute and must correspond with all terms of the offer;

v) The conditional acceptance will amount to rejection of offer;

vi) A counter offer for acceptance will also amount to reject of offer but the counter offer may be accepted or rejected by the other party;

vii) It must be communicated to the offeror, since acceptance is completed the moment, it is communicated;

viii) Mere silence does not amount to acceptance;

ix) The acceptance should be given if there is a time limit is fixed or otherwise at a reasonable time and before he offers lapses or is revoked.

Q NO 7. EXPLAIN THE PROVISIONS RELATED TO COMMUNICATION OF OFFER AND ACCEPTANCE

ANSWER:

COMMUNICATION OF OFFER (SECTION 4):

1. Communication of offer is complete when it comes to the knowledge of the person to whom it is made.

2. communication of acceptance is completed at different times for the proposer and acceptor. The rules regarding the communication of acceptance are as under

i) AS AGAINST THE PROPOSER: When it is put in a course of transmission to him, so as to be out of the power of the acceptor. In case of acceptance made by post, the proposer becomes bound by the acceptance as soon as the properly addressed and stamped letter of acceptance is duly posted even if such letter of acceptance is lost or delayed in post.

ii) AS AGAINST ACCEPTOR: When it comes to the knowledge of the proposer. In case of acceptance made by post, the acceptor becomes bound by the acceptance only when the letter of acceptance is actually received by proposer.

EXAMPLE: A proposes, by letter, to sell a house to B at a certain price. B accepts A's proposal by a letter sent by post. The communication of the acceptance is complete, as against A when the letter is posted and as against B, when the letter is received by A.

3. It states an offer which has been communicated properly continues as such until it lapses or revoked by the offer or rejected or accepted by the offeree. An ideal offer should have all the essentials of a valid contract as once it is accepted by the offeree, it becomes a contract. However, an offer can also be revoked.

Q NO 8. STATE THE PROVISIONS RELATED TO REVOCATION OF ACCEPTANCE

ANSWER:

REVOCATION OF ACCEPTANCE

AS PER SECTION 4

1. AS AGAINST THE PERSON WHO MAKES IT: when it is put into the course of transmission

2. **AS AGAINST PERSON TO WHOM IT IS MADE:** when it comes to the knowledge of the person to whom it is made

Example: B revokes his acceptance by telegram. B's revocation is complete as against B when the telegram is dispatched and as against A when it reaches him.

AS PER SECTION 5

1. **PROPOSAL CAN BE REVOKED:** Before communication of acceptance is completed against offeror
2. **ACCEPTANCE CAN BE REVOKED:** Before communication of acceptance is completed against offeree.

EXAMPLE: A proposes, by a letter sent by post, to sell his house to B; B accepts the proposal by a letter sent by post; B may revoke his acceptance at any time before or at the moment when the letter communicates it reaches A, but not afterwards.

Q NO 9. WHAT ARE THE MODES OF REVOCATION OF OFFER

ANSWER:

LAPSE OF OFFER – SEC 6

An offer must be accepted before it lapses (i.e., comes to an end). An offer may come to end in any of the following ways:

1. **BY REVOCATION**: An offer lapses if the offeror revokes the offer before its acceptance by the offeree. Example: At an auction sale, the highest bidder can revoke his offer to buy before the fall of the hammer.
2. **BY LAPSE OF TIME**: An offer lapses if it is not accepted within the fixed time (if any prescribed in the offer) or within reasonable time (if no time is prescribed in the offer).
3. **BY DEATH OR INSANITY OF THE OFFEROR OR OFFEREE**: An offer lapse if –
   - **i)** The fact of death or insanity of offeror comes to the knowledge of the acceptor before he makes his acceptance.
   - **ii)** The offeree dies or becomes insane before accepting the offer because an offer can be accepted only by the offeree and not by any other person.
4. **BY FAILURE TO ACCEPT CONDITION PRECEDENT**: An offer lapses if it is accepted without fulfilling the conditions of the offer.
5. **BY COUNTER OFFER**: An offer lapses if the counter offer is made i.e. changing the terms of offer while accepting the offer.

   Example: X offered to sell his car to Y for Rs.1,00,000. Y said that he would buy it for Rs.90,000. X refused to sell for Rs.90,000. Subsequently, Y offered to buy the car for Rs.1,00,000. Here, Y's offer to buy for Rs.90,000 is a counter offer which terminates the original offer. Y's second offer to buy for Rs.1,00,000 is a fresh offer and not an acceptance of the original offer. [Hyde v. Wrench].
6. **BY NOT ACCEPTING IN THE PRESCRIBED MODE OR USUAL MODE**: An offer if it is not accepted in

the specific manner (if any, prescribed in the offer) or in some usual and reasonable manner (if no manner has been prescribed in the offer).

7. **BY REJECTION OF OFFER BY OFFEREE**: An offer lapses if it is rejected by the offeree. It may be noted that once an offer is rejected, it cannot be revived subsequently.
8. **BY SUBSEQUENT ILLEGALITY OR DESTRUCTION OF SUBJECT MATTER OF THE OFFER**: An offer lapses if it becomes illegal or the subject matter is destroyed before its acceptance by offeree. Example: X of Delhi offered supply of 100 bottles of wine. Before this offer is accepted by Y, the Central Government issued an order prohibiting supply of wine Here, X's offer has come to an end

2.2. LEGALITY OF OBJECT AND CONSIDERATION

Q NO 1. WHEN DOES CONSIDERATION OR OBJECT OF AN AGREEMENT TREATED AS UNLAWFUL

ANSWER:

The object and the consideration of an agreement must be lawful, otherwise, the agreement is void**.** According to Section 23 of The Indian Contract Act, 1872, the consideration or the object of an agreement is unlawful in the following cases:

1. **IF IT IS FORBIDDEN BY LAW:** If the object or the consideration of an agreement is the doing of an act which is forbidden (i.e., prohibited) by law, the agreement is void. An act is said to be forbidden by law when it is punishable either by the criminal law of the country or by special legislation.

   Example: X, a Hindu already married and his wife alive, entered into a marriage agreement with Y an unmarried girl. This agreement is void because the second marriage is forbidden by Hindu Law.
2. **IF IT DEFEATS THE PROVISIONS OF ANY LAW:** If the object or the consideration of an agreement is of such nature that, if permitted, it would defeat the provisions of any law, the agreement is void.

   Example: Increasing or decreasing the period of recovery from 3 years is against Limitation Act, 1961.

   Increasing or decreasing the age of majority from 18 years is against Indian Majority Act, 1875.
3. **IF IT IS FRAUDULENT:** If the object of an agreement is to defraud other, the agreement is void.

   Example: A, B and C enter into an agreement for the division among them of gains acquired, or to be acquired, by them by fraud. The agreement is void, as its object is unlawful.
4. **IF IT INVOLVES INJURY TO A PERSON OR PROPERTY OF ANOTHER:** If the object of an agreement is to injure a person or the property of another, the agreement is void.

   Example: X promised to pay Rs.10,000 to Y when he agreed to publish a libel (i.e., defamatory article against someone). It was held that Y could not recover the amount because the agreement was void as it involved injury to someone.
5. **IF THE COURT REGARDS IT AS IMMORAL OR OPPOSED TO PUBLIC POLICY:** If the object or consideration is immoral or is opposed to the public policy, the agreement is void. Morals and opposed to public policy have no rigid meaning and will change from time to time.

   Example: A agrees to let her daughter to hire to B for concubinage. The agreement is void because it is immoral, though the letting may not be punishable under the Indian Penal Code

   CASE LAW: BAIVIJI VS HAMDA NAGAR: X agave Rs.1,00,000 to Y a married woman to obtain divorce from her husband. X agreed to marry her as soon as she obtained a divorce. It was held that X could not recover back the amount because the agreement was void as the object was immoral.

Q NO 2. STATE WHAT AGREEMENTS ARE OPPOSED TO PUBLIC POLICY

ANSWER:

AGREEMENTS OPPOSED TO PUBLIC POLICY

An agreement which conflicts with morals of the time and contravenes any established interest of society or public interest or welfare may be said to be opposed to public policy. In India, it has been left to Court to hold any contract as unlawful on the ground of being opposed to public policy.

The following agreements have been held to be opposed to public policy:

1. **AGREEMENTS OF TRADING WITH ENEMY:** All agreements made with an alien enemy are illegal on the ground of public policy.
2. **AGREEMENT FOR STIFLING PROSECUTION**: An agreement for stifling prosecution is illegal on the ground of public policy.

   Example**:** X, who knows that Y has committed a murder, receives Rs.7,00,000 from Y in consideration of not exposing Y. This agreement is illegal.
3. **CHAMPERTY AND MAINTENANCE:** Maintenance is an agreement whereby one party having no interest in suit, agrees to assist another to maintain suit. For example, X promises to pay Y Rs.5,000 if Y files a suit against Z. This is a maintenance agreement.

   Champerty is an agreement whereby one party agrees to assist another in recovering property and in turn is to share in the proceeds of the action.

   CASE: NUTHAHI VENKATASWAMI VS KATTA NAGI: X, agreed to pay Rs.10,000 to Y to enable him to file a suit for the recovery of his property and Y promised to give him $3/4^{th}$ share in the property, if recovered. The agreement was held to be champertous.

   Position in England: Both agreements are declared illegal and void.

   Position in India: All these agreements of maintenance and champerty are not opposed to public policy. The Court may refuse to enforce such agreements if its object is not confided or the terms of reward are unreasonable or made with malafide intention. If made in good faith are valid.
4. **AGREEMENT FOR THE SALE/TRANSFER OF PUBLIC OFFICES AND TITLES:** The agreements for the sale or transfer of public offices or to obtain public titles like Padma Shree, are unlawful on the ground of public policy.

   Example: X promises to pay Rs.50,000 if Y secures him an employment in Govt. service. This agreement is opposed to public policy.
5. **AGREEMENTS IN RESTRAINT OF PARENTAL RIGHTS:** An agreement which prevents a parent to exercise his right of guardian - ship is void on the ground of public policy. Legal adoption is valid but the original parents cannot be stopped from parental rights.

   Example: G, a father having two sons, agreed to transfer guardianship in favor of A and also agreed not to revoke the transfer during his life. Subsequently, he filed a suit for the recovery of boys. It was held that he had a right to revoke his authority and get back his children.

6. **AGREEMENTS IN RESTRAINT OF PERSONAL LIBERTY:** An agreement which unduly restricts the personal liberty of any person is void on the ground of public policy.

   Example: X borrowed Rs.1,00,000 from Y on the promise that he would not, without the Y's written permission leave his job, borrow money, dispose of his property or change his residence. It was held that the agreement was illegal on the ground of public policy

7. **AGREEMENT FOR CREATION OF MONOPOLY:** An agreement which tends to create monopoly is void on the ground of public policy. Such agreements are also restricted by Monopolies Restrictive Trade Practices Act, 1969
8. **AGREEMENTS INTERFERING WITH COURSE OF JUSTICE:** An agreement which interferes with course of justice is void on the ground of being opposed to public policy. Example: Giving bribe to a judicial officer of a state to act partially is void on the grounds of public policy
9. **MARRIAGE BROKERAGE CONTRACTS:** A marriage brokerage contract is one whereby one or more persons receives money or money's worth in consideration of marriage hence it is void. Example: Prostitution
10. **AGREEMENT IN RESTRAINT OF MARRIAGE - Sec 26:** Every agreement in restraint of marriage of any person other than a minor is void.
11. **AGREEMENT IN RESTRAINT OF TRADE - Sec 27:** Every agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.

EXCEPTIONS

i) An agreement to restrain a partner from carrying on any business other than that of the firm is totally valid – Sec 11 of The Indian Partnership Act, 1932

ii) An agreement restraining the outgoing partner from carrying on a similar business with that of the firm within a specified area is totally valid – Sec 36 of The Indian Partnership Act, 1932

iii) An agreement between Seller and buyer of goodwill as to not to use the goodwill till a specified period of time is totally valid – Sec 55(1) of The Indian Partnership Act, 1932

12. **AGREEMENT IN RESTRAINT OF LEGAL PROCEEDING - Sec 28:** An agreement which restricts a party absolutely from enforcing his legal rights arising under a contract or an agreement which curtails the period of limitation within which the legal rights may be enforced is void.

EXCEPTIONS:

i) A contract by which the parties agree that any dispute between them in respect of any subject shall be referred to arbitration and that only the amount awarded in such arbitration shall be recoverable is a valid contract.

ii) Similarly, a contract by which the parties agree to refer to arbitration any question between them which has already arisen or which may arise in future, is valid; but such a contract must be in writing.

Q NO 3. WHAT ARE AGREEMENTS EXPRESSLY DECLARED TO BE VOID

ANSWER:

1. **UNCERTAIN AGREEMENTS – SEC 29:**

   An uncertain agreement means an agreement the meaning of which is not certain or capable of being made certain. Such agreements are void.

   Example: A agrees to sell to B "a hundred ton of oil." There is nothing whatever to show what kind of oil was intended. The agreement is void for uncertainty.

2. **CONSIDERATION UNLAWFUL IN PART: SECTION 24**

   If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void."

   This section is an obvious consequence of the general principle of Section 23. The general rule is that where the legal part of a contract can be severed from the illegal part, the bad part may be rejected and the good one can be retained. But where the illegal part cannot be severed, the contract is altogether void.

   Example: A promises to superintend, on behalf of Y, a legal manufacturer of indigo and an illegal traffic in other articles. B promises to pay A a salary of 2,000 rupees per month. The agreement is void, the object of A's promise and the consideration for B's promise being in part unlawful.

3. **WAGERING AGREEMENT SECTION 30:**

   An agreement to pay money or money's worth dependent on an uncertain future event is known as Wagering Agreements. In Wagering Agreements promises are made by both the parties and neither party has control over the Uncertain Event.

   Example: A agrees to pay ' 500 to B if it rains, and B promises to pay a like amount to A if it does not rain, the agreement will be by way of wager. But if one of the parties has control over the event, agreement is not a wager

   Wagering agreements are Illegal in the States of Gujarat and Maharashtra and Void in rest of India.

   In wagering agreements, winner cannot recover the stake money if it's not paid by looser, however the principal can recover the stake money from his agent who was engaged to receive money on behalf of his principal.

   In prize competitions if prize money does not exceed Rs 1,000 they are not treated as wagers.

   Example: Lottery, Gambling, Betting, Horse Races

4. **SPECULATIVE TRANSACTIONS**: A speculative transaction essentially, must have two elements, namely,

   i) Mutual intention of the contracting parties to acquire or deliver, as the case may be, the commodities; and

   ii) The undertaking or risk arising from movement

   Even though speculative transactions are in the form of wager, they are still valid unlike the wagering agreements but many at times it is difficult to distinguish a transaction as Wagering and Speculative Transactions.

2.3. CONSIDERATION

Q NO 1. DEFINE CONSIDERATION AND ITS ESSENTIAL ELEMENTS.

ANSWER:

DEFINITION: SECTION 2(d) of the Indian Contract act, 1872 defines consideration as: "Where, at the desire of the promisor, the promise or any other person has done or abstained, does or abstains, promises to do or abstains from doing something, such an act or abstinence is called a consideration for the promise."

Consideration is one of the essential elements of a valid contract.

The term 'consideration' means something in return, i.e. *quid-pro-quo* in the Latin words

"A valuable consideration in the sense of the law, may consist either in some right, interest, profit or benefit accruing to the one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other."

Thus, consideration must result in a benefit to the promisor, and a detriment or loss to the promisee or a detriment to both.

ESSENTIAL ELEMENTS:

1. **IT MUST MOVE AT THE DESIRE OF THE PROMISOR:** An act constituting consideration must have been done at the desire or request of the promisor. Thus, an act done at the desire of a third party or without the desire of the promisor cannot constitute a valid consideration.
2. **IT MAY MOVE FROM ANY PERSON:** An act constituting consideration may be done by the promisee himself or any other person (i.e., there can be stranger to consideration). Thus, it is immaterial who furnishes the consideration i.e., privity of consideration is not required.
   Note: There cannot be a stranger to consideration as per English Law
3. **IT MAY BE POSITIVE OR NEGATIVE**: An act of doing resembles a positive act and the act of abstaining resembles a negative act. Hence the consideration may be Positive or Negative.
4. **IT MAY BE PAST OR PRESENT OR FUTURE:** The consideration may be past, present or future.
5. **IT NEED NOT BE ADEQUATE:** The consideration need not be adequate to the promise but it must be of some value in the eye of the law. According to explanation 2 of section 25, an agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate i.e., it is valid.
6. **IT MUST BE REAL AND NOT ILLUSORY:** The consideration must be real and not illusory.
   Example: X promises to put life into Y's dead wife and Y promises to pay Rs.1,00,000. This agreement is void because consideration is physically impossible to perform.
7. **IT MUST BE LAWFUL:** Sec 10 requires the parties to have lawful consideration without which an agreement cannot be enforceable in the eyes of law **(Refer sec 23).**
8. **IT MUST NOT BE SOMETHING WHICH THE PROMISOR IS ALREADY BOUND TO PERFORM:** The act constituting consideration must be something which the promisor is not already bound to do

because a promise to do what a promisor is already bound to do adds nothing to the existing obligation.

CASE LAW: RAMCHANDRA CHINTAMANA VS KALU RAJU: X promises Y, his advocate, to pay an additional sum if the suit was successful. The suit was declared in favour of X but X refused to pay additional sum. It was held that Y could not recover additional sum because the promise to pay additional sum was void for want of consideration as Y was already bound to render his best services under the original agreement.

9. It must not be illegal, immoral or Opposed to Public Policy.

Q NO 2. STATE EXCEPTIONS TO THE DOCTRINE OF PRIVITY OF CONTRACT

ANSWER:

DOCTRINE OF PRIVITY OF CONTRACT: As per Privity of contract a stranger to a contract cannot sue because of the absence of privity of contract i.e., Offeror can sue offeree or vice a versa but cannot be sued by the third parties There can be a stranger to consideration i.e., it can be furnished or supplied by any person whether he is the promisee or not.

CASE LAW: DUNLOP P TYRE VS SELFRIDGE & CO LTD: X bought tyres from Dunlop Rubber Co. and sold them to Y, a sub-dealer who agreed with X not to sell below Dunlop's list price and to pay to Dunlop Co. Rs.150 as damages on every tyre he undersold. Y sold two tyres at less than the list price and thereupon. Dunlop Co. sued him for the breach. It was held that the Dunlop Co. could not maintain the suit because it was a stranger to the contract.

EXCEPTIONS TO "DOCTRINE OF PRIVITY OF CONTRACT"

The rule that a stranger to a contract cannot sue, is subject to the following exceptions;

1. **IN CASE OF TRUSTS:** The beneficiary i.e., the person for whose benefit the trust has been created may enforce the contract.

   CASE LAW: KWAJA MOHD VS HUSSAIN BEGUM: X transferred certain properties to be held by Y for the benefit of Z. Z can enforce the agreement even though he is not a party to the agreement
2. **IN CASE OF FAMILY SETTLEMENT:** The person for whose benefit the provision is made under family arrangements may enforce the contract.

   CASE LAW: **RAKHMANBAL VS GOVIND:** A provision of marriage expenses of a female member was made in a Joint Hindu Family. On partition, the female member sued for such expanses. It was held that she was entitled to sue.
3. **ACKNOWLEDGEMENT OF LIABILITY BY ESTOPPEL:** The person who becomes an agent of third party by acknowledgement or otherwise, can be sued by such third party.

   CASE LAW: SURAJ VS NANAT: X receives Rs.1,000 from Y for paying the same to Z. X acknowledges this receipt to Z. Z can recover the amount from X because X will be regarded as Z's agent.

4. **ASSIGNMENT OF A CONTRACT:** Where a benefit under a contract has been assigned, the assignee can enforce the contract subject to all equities between the original parties to the contract
5. **AGENCY:** A principal may enforce the contracts entered into by his duly authorized agent.
6. **COVENANT RUNNING ALONG WITH THE PROPERTY:** New owner or tenant is bound by all the rules and regulations running along with the property entered by the previous owner even though he is not a party in the contract.

Q NO 3. NO CONSIDERATION, NO CONTRACT. COMMENT

ANSWER:

AGREEMENTS WITHOUT CONSIDERATION – Sec 25

GENERAL RULE 'No Consideration, No Contract**:** According to Section 25, an agreement made without consideration is void and not enforceable. Such agreements are called "Nudum Pactum" (Promise without consideration)

CASE LAW: ABDUL AZIZ VS MAZUM ALI: A promise to donate Rs.500 towards construction of a mosque was held unenforceable as it was a gratuitous promise lacking consideration.

EXCEPTIONS TO THE GENERAL RULE 'NO CONSIDERATION, NO CONTRACT"

1. **AGREEMENTS MADE ON ACCOUNT OF NATURAL LOVE AND AFFECTION - SEC 25(1):** Such agreement made without consideration is valid if:
   - **i)** It is expressed in writing
   - **ii)** It is registered under the law
   - **iii)** It is made on account of love and affection, and
   - **iv)** It is between parties standing in a near relation to each other

NOTE: Mere Nearness of relation by itself does not necessarily imply natural love and affection.

Example: A Hindu husband by a registered document promised to pay his wife Rs.1,000 per month as her pin-pocket money. This agreement is valid.

2. **PROMISE TO COMPENSATE FOR PAST VOLUNTARY SERVICES - SEC 25(2):** Such promise made without consideration is valid if:
   - **i)** It is a promise to compensate (wholly or in part); and
   - **ii)** Promise is made by the person who received the benefit.
   - **iii)** The person who is to be compensated has already done something voluntarily or has done something which the promisor was legally bound to do.

   Example: X writes to Y, "at the risk of your own life, you saved me from a serious motor accident. I promise to pay you Rs.1 lakh. "X does not pay. Advise Y. This is a valid contract since a promise to compensate for voluntary acts done in the past is valid even though it is without consideration. Y is advised to file a suit to recover Rs. 1 lakh.

3. **PROMISE TO PAY TIME BARRED DEBT - SEC 25(3):** Such promise without consideration is valid if:
   i) It is made in writing,
   ii) It is signed by the debtor or his agent, and
   iii) It relates to a debt which could not be enforced by creditor as per Law of Limitation Act.

NOTE: According to The Indian Limitation Act, a debt which remains unpaid or unclaimed for a period of 3 years becomes a time barred debt which is legally not recoverable. But a promissory note issued in personal capacity by the wife of a debtor to pay his time barred debt of her husband is not enforceable

4. **COMPLETED GIFTS - SEC 25(4):** The gifts actually made by a donor and accepted by the donee are valid even without consideration. Thus, a completed gift needs no consideration.
   Example: X transferred some property to Y by a duly written and registered deed as a gift. This is a valid contract even though no consideration moved.
5. **AGENCY - SEC 185:** No consideration is necessary to create an agency.
6. **CHARITY:** In case of charity, even though there is no consideration to Donor, Promise of Donor is valid and enforceable if on this faith donee incurs any liability. The liability of donor is restricted to promised amount or liability incurred by donee.
7. **GRATUITOUS BAILMENT – SEC 148**: No Consideration is necessary for gratuitous bailment and it is valid

Q NO 4. WHAT IS E- CONTRACTS AND STATE ITS ESSENTIAL ELEMENTS

ANSWER:

Electronic contracts are paperless contracts and are in electronic form. It is the change of technology and legal requirements lead the contract to be in electronic form. E-contract is a contract modelled, specified, executed and deployed by a software system. They are conceptually very similar to traditional commercial contracts. E-contract also requires the basic elements of a contract.

The following are ingredients of the E-contracts-

1. An offer is to be made;
2. Offer is to be accepted;
3. There shall be a lawful consideration;
4. There shall be an intention to create legal relations;
5. The parties must be competent to contract;
6. There must be free and genuine consent;
7. The object of the contract must be lawful;
8. There must be certainty and possibility of performance.

The main feature of this type of contract is speed, accuracy and reliability. The parties to the contract have to obtain digital signature from the competent authority and they have to affix the digital signature instead of manual signing. The Information Technology Act, 2000 regulates such e-contracts.

In this type of contract, the web site of the offeror acts as a display to the world at large. E-mails are used to negotiate and agree on contract terms and to send and agree to the final contract. An email contract is enforceable if the requirements of the contract are fulfilled. Electronically signed contracts cannot be denied because they are in electronic form and delivered electronically.

Example: Anil buys Microsoft Office, online, for his Macbook. Microsoft lays down terms and conditions that will now bind both Anil and Microsoft with respect to the sale of Microsoft Office. When Anil clicks on "I agree to the terms and Conditions" and makes the payment, he is now bound by the e-contract.

2.4. CONSTRAINTS TO ENFORCE CONTRACTUAL OBLIGATIONS

Q NO 1. STATE THE PERSONS WHO ARE COMPETENT TO ENTER INTO A CONTRACT

ANSWER:

As per **SECTION 11** every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.

From the above provisions of the section, it means the following types of persons are not competent to contract:

1. A person who has not attained the age of majority, i.e., minor.
2. A person of unsound mind
3. A person who is disqualified from contracting by some law.

1. MINOR:

As per section 3 of the Indian Majority Act of 1875, every person in India is a minor if he has not attained the age of 18 years of age. However, in case of a minor of whose person or property or both a guardian has been appointed under the Guardian and Wards Act, 1890 or whose property is under the superintendence of any court of wards before he attains 18 years of age is 21 years.

THE POSITION OF MINOR'S AGREEMENT AND EFFECT THEREOF IS AS UNDER:

i) An agreement with a minor is void ab-initio.

ii) The law of estoppel does not apply against a minor. It means a minor can always plead his minority despite earlier misrepresenting to be a major. In other words, he cannot be held liable on an agreement on the ground that since earlier he had asserted that he had attained majority.

iii) Doctrine of Restitution does not apply against a minor. In India, the rules of restitution by minor are similar to those found in English laws. The scope of restitution of contract by minor was examined by the Privy Council in Mohiri Bibi case when it has held that the restitution of money under section 64 of the Indian Contract Act cannot be granted under section 65 because a minor's agreement is not voidable but absolutely void ab-initio. Similarly no relief can be granted under section 65 as this section is applicable where the agreement is discovered to be void or the contract becomes void.

iv) No Ratification on Attaining Majority - Ratification means approval or confirmation. A minor cannot confirm an agreement made by him during minority on attaining majority. If he wants to ratify the agreement, a fresh agreement and fresh consideration for the new agreement is required.

v) Contract beneficial to Minor - A minor is entitled to enforce a contract which is of some benefit to him.

vi) Minority is a personal privilege and a minor can take advantage of it and bind other parties.

vii) Minor as an agent - A minor can be appointed an agent, but he is not personally liable for any of his acts.

viii) Minor's liability for necessities - If somebody has supplied a minor or his dependents with necessities, minor's property is liable but a minor cannot be held personally liable

ix) A minor cannot be adjudged insolvent as he is incapable of entering into a contract.

x) Where a minor and an adult jointly enter into an agreement with another person, the minor is not liable and the contract can be enforced against the major person.

2. PERSON OF SOUND MIND:

A person is said to be of sound mind for the purposes of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests. A person, who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind. A person, who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.

EXAMPLE:

A patient in a lunatic asylum, who is at intervals of sound mind, may contract during those intervals. and A sane man, who is delirious from fever or who is so drunk that he cannot understand the terms of a contract or form a rational judgment as to its effect on his interests, cannot contract whilst such delirium or drunkenness lasts.

In both the cases, it is clear that a person is of sound mind if he fulfils the two conditions at the time when he makes it namely:

i) He/she is capable of understanding the contract.

ii) He/she is capable of forming a rational judgment about the effects of such contract on his interest.

In both the cases person not satisfying any of these two conditions is not treated as a person of sound mind.

3. OTHER DISQUALIFIED PERSONS:

The persons who are disqualified from entering into contract due to certain other reasons may be from legal status, political status or corporate status. Some of such categories of persons are given below:

i) ALIEN ENEMY: An agreement with an Alien Enemy is void. But agreement with an alien friend is perfectly valid and enforceable. When the Government of an Alien is at war with the Government of India, the alien is called Alien enemy, who cannot enter into any contract with any Indian citizen without the permission of Government of India as the same is against the public policy. Contract entered into with an alien before war is put into suspension during the duration of war.

ii) **FOREIGN SOVEREIGN AND AMBASSADORS:** Foreign sovereigns and their representatives enjoy certain privileges and immunities in every country. They cannot enter into contract except through their agents residing in India. They can sue the Indian citizen but an Indian citizen cannot sue them.

iii) **CONVICTS:** A convict cannot enter into a contract while he is undergoing imprisonment.

iv) **INSOLVENTS:** An insolvent person is one who is unable to discharge his liabilities and therefore has applied for being adjudged insolvent or such proceedings have been initiated by any of his creditors. An insolvent person cannot enter into any contract relating to his property.

v) **COMPANY OR STATUTORY BODIES:** A contract entered into by a corporate body or statutory body will be valid only to the extent it is within its Memorandum of Association.

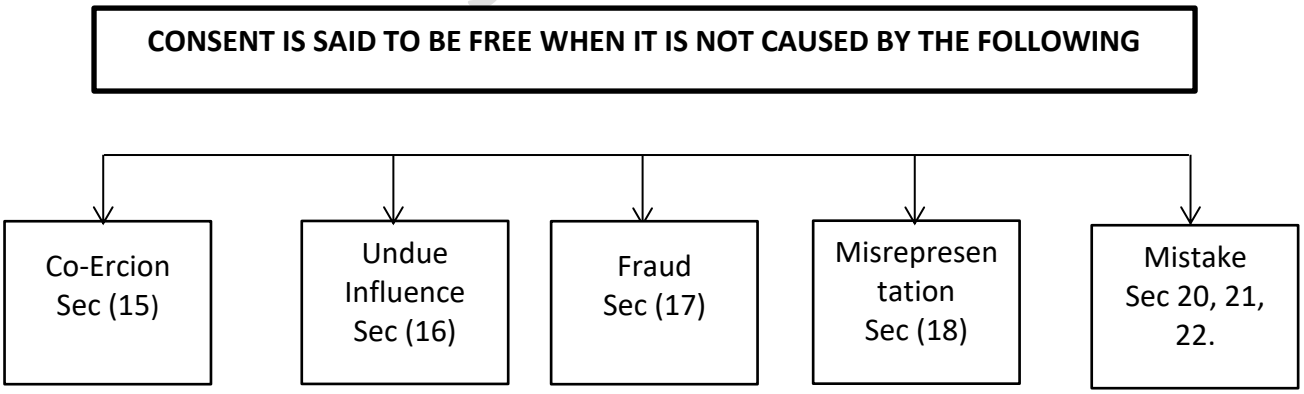
2.5. FREE CONSENT

Q NO 1. WHAT IS FREE CONSENT AND STATE THE CASES WHERE CONSENT IS NOT FREE.

ANSWER:

1. **CONSENT**: 'Two or more persons are said to consent when they agree upon the same thing in the same sense.'- [Sec 13]
2. Section 13: "Two or more persons are said to consent when they agree upon the same thing in the same sense". Thus, consent involves identity/Meeting/Uniformity of minds in respect of the subject matter of the contract. In English Law, this is called **'**consensus-ad-idem'. If the parties have not agreed upon the same thing in the same sense, there is no real consent and hence no contract is formed.

   Example: X has one Maruti car and one Fiat car. He wants to sell Fiat car. Yd does not know that X has two cars. Y offers to buy X's Maruti car for Rs.50,000. X accepts the offer thinking it to be an offer for his Fiat car. Here, there is no identity of mind in respect of the subject matter. Hence, there is no consent at all and the agreement is void ab-initio.
3. As per section 14 of the Indian Contract Act, 1872 consent is said to be free when it is not caused by:
   - **i)** Coercion (Sec 15), or
   - **ii)** Undue influence (Sec 16), or
   - **iii)** Fraud (Sec 17), or
   - **iv)** Misrepresentation (Sec 18), or
   - **v)** Mistake, subject to the provisions of Sec 20, 21 and 22.



4. Consent must be obtained at the discretion of the offeree.
5. Free consent is one of the essential elements of a valid contract as it is evidenced by Section 10 which provides that all agreements are contracts if they are made by the free consent of the parties.
6. When there is consent but it is not free (i.e when it is caused by coercion or undue influence or fraud or misrepresentation), the contract is usually voidable at the option of the party whose consent was so caused. This is described by Mr Salmond as "**ERROR IN CAUSA**"

Example X threatens to kill Y if he does not sell his house to X. Y agreed to sell his house to X. In this case, Y's consent has been obtained by coercion and therefore, it cannot be regarded as free.

Q NO 2. WHAT IS COERCION AND STATE ITS CONSEQUENCES

ANSWER:

COERCION: [SEC. 15]

The term "Coercion" has been defined in Section 15 of the Act as the committing or threatening to commit, any act forbidden by the Indian Penal Code, or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

Explanation**:** It is immaterial whether the Indian Penal Code is or is not in force in the place where the coercion is employed.

From the above definition of coercion given in section 15, consent is said to be caused by coercion, when it is obtained by any one of the following;

1. Committing or threatening to commit any act forbidden by Indian Penal Code;
2. Unlawful detaining or threatening to detain the property of another person.
3. Coercion may come from a person party to the contract or even third person not connected with the contract directly.
4. Unlawful detaining also amounts to coercion: If a person unlawfully detains or gives a threat to detain any property to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement amounts to coercion.

EFFECT OF COERCION

According to section 19 when the consent is caused by coercion, fraud or misrepresentation, the agreement is avoidable at the option of the party whose consent was so caused. The aggrieved party may opt to rescind the contract. If the aggrieved party seeks to rescind the contract, he must restore the benefit so obtained under the contract from other party.

It should be noted that threat to committing suicide also amounts to coercion.

Some special cases which are prone to be construed cases of coercion are discussed as under;

1. **PROSECUTION:** A mere threat to prosecute a man or file suit against him does not constitute coercion. In the case of Andhra Sugar Lts V State of AP AIR 1968 SC 599, it was held that compulsion of law is not a coercion, fraud, misrepresentation, mistake or even undue-influence.
2. **HIGH PRICES AND HIGH INTEREST RATES:** Charging high interest rate, high price etc is not coercion as the same is not prohibited under the Indian Penal code.
3. **A THREAT TO COMMIT SUICIDE:** Consent to an agreement may at times be obtained by threatening to commit suicide. The Madras High court has held that threat to commit suicide amounts to coercion.

CASE LAW: In **AMRAJU V SESHAMMA 1917 41 MAD 33** it was argued by Oldfield J, one of the judge of the Bench which decided this case, that section 15 of the Indian Contract Act, must be construed strictly and that an act which is not punishable under the Indian Penal Code cannot be said to be forbidden by it. Suicide is not punishable by the Indian Penal Code, only the attempt to suicide is punishable.

Q NO 3. WHAT IS UNDUE INFLUENCE

ANSWER:

UNDUE INFLUENCE [SECTION 16]

Section 16 of the Indian Contract Act defines undue influence as under:

1. A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.
2. In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another—
   - **i)** Where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or
   - **ii)** Where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.
3. Where a person, who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

Nothing in this sub-section shall affect the provisions of section 111 of the Indian Evidence Act, 1872 (1 of 1872).

THERE IS PRESUMPTION OF UNDUE INFLUENCE IN THE FOLLOWING RELATIONSHIPS:

i. Parent and child

ii. Guardian and ward

iii. Doctor and patient

iv. Solicitor and client

v. Trustee and beneficiary

vi. Religious advisor and disciple

vii. Fiancé and fiancée

There is however no presumption of undue influence in case of relationship of —

-['['Landlord and tenant

i. Debtor and creditor

ii. Husband and wife. The wife has to be *pardanashin* for such presumption. In these relationships undue influence has to be proved.

ELEMENTS FOUND IN THE DEFINITION

Going through the definition of undue influence in section 16 we find that two elements are found in undue influence:

i. The relationship subsisting between the parties is such that one party is in a position to dominate the will of other and

ii. He uses that position to obtain an unfair advantage over the other. The person intending to avoid the contract on the ground of undue influence must prove both the above two elements

EXAMPLES:

i. A having advanced money to his son, B, during his minority, upon B's coming of age obtains, by misuse of parental influence, a bond from B for a greater amount than the sum due in respect of the advance. A employs undue influence.

ii. A, a man enfeebled by disease or age, is induced, by B's influence over him as his medical attendant, to agree to pay B an unreasonable sum for his professional services, B employs undue influence.

iii. A, being in debt to B, the money-lender of his village, contracts a fresh loan on terms which appear to be unconscionable. It lies on B to prove that the contract was not induced by undue influence.

iv. A applies to a banker for a loan at a time when there is stringency in the money market. The banker declines to make the loan except at an unusually high rate of interest. A accepts the loan on these terms. This is a transaction in the ordinary course of business, and the contract is not induced by undue influence.

Q NO 4. STATE THE CONSEQUENCES OF UNDUE INFLUENCE

ANSWER:

EFFECT OF UNDUE INFLUENCE: Section 19A provides that when the consent is caused by undue influence, the agreement is voidable at the option of the party whose consent was so caused. The aggrieved party may opt to rescind the contract. If the aggrieved party seeks to rescind the contract, he must restore the benefit so obtained under the contract from other party, upon such terms and conditions as to the court may seem just. The following illustrations are appended to the section.

i. A's son has forged B's name to a promissory note. B, under threat of prosecuting A's son, obtains a bond from A for the forged note. If B sues on this bond, the Court may set the bond aside.

ii. A, a moneylender, advances Rs.100 to B, an agriculturist, and, by undue influence, induces B to execute a bond for Rs.200 with interest at 6 per cent per month. The Court may set the bond aside; ordering B to repay Rs.100 with such interest as may seem just.

The court has discretion to direct the aggrieved party for giving back the benefit whether in whole or in part or set aside the contract without any direction for refund of benefit.

In a case for avoiding a contract on the ground of undue influence, the plaintiff has to prove that:

i. the other party was in a position to dominate the will; and

ii. he actually used his influence to obtain the plaintiff's consent to the contract; it will be then for the defendant to show that the plaintiff freely consented.

THE PRESUMPTION IS RAISED AT LEAST IN THE FOLLOWING CASES:

i. Unconscionable bargains

ii. Contracts with pardanashin women

Q NO 5. WHAT IS FRAUD

ANSWER:

FRAUD [SECTION 17]

As per section 17 of the Indian Contract Act:

"Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:

1. The suggestion, as a fact, of that which is not true by one who does not believe it to be true;

2. The active concealment of a fact by one having knowledge or belief of the fact;

3. A promise made without any intention of performing it;

4. Any other act fitted to deceive;

5. Any such act or omission as the law specially declares to be fraudulent.

EFFECT OF FRAUD:

i) According to section 19 when consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

ii) A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been, if the representations made had been true.

iii) However, there is one exception to the rule of voidability of contract at the option of aggrieved party. If such consent was caused by misrepresentation, or by silence, fraudulent within the meaning of section 17, the contact, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence

Q NO 6. DOES SILENCE AMOUNTS TO FRAUD. EXPLAIN

ANSWER:

At times one of the parties to a contract be silent to some of the facts relating to the subject matter of contract. The matter on which silence is maintained by party may be material fact. Does this amount to passive fraud under the Indian Contract Act or not depends upon various factors?

Explanation to Section 17 of the Indian Contract Act provides that mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud unless the circumstances of case are such that having regard to them, it is the duty of the person keeping silence to speak or unless silence itself is equivalent to speech.

EXCEPTIONS:

1. When there is a duty to speak.
2. Where silence is equivalent to speech.

However, in the following two types of cases, silence amounts to fraud, as held by the courts in various cases:

i) **WHERE THERE IS CHANGE IN CIRCUMSTANCES-** A representation may be true when made but with the passage of time or changed circumstances it may become false. Accordingly, this must be communicated to other party otherwise it amounts to fraud.

ii) **WHEN THERE IS HALF-TRUTH-** Even when a person is not bound to disclose a fact, he may be held guilty of fraud if he volunteers to disclose a state of fact partly. This is so when the undisclosed part renders the disclosed part false.

EXAMPLES:

i. A sell, by auction, to B, a horse which A knows to be unsound. A says nothing to B about the horse's unsoundness. This is not fraud in A.

ii. B is A's daughter and has just come of age. Here, the relation between the parties would make it A's duty to tell B if the horse is unsound.

iii. B says to A— "If you do not deny it, I shall assume that the horse is sound." A says nothing. Here, A's silence is equivalent to speech.

iv. A and B, being traders, enter upon a contract. A has private information of a change in prices which would affect B's willingness to proceed with the contract. A is not bound to inform B.

Q NO 7. WHAT IS MIS REPRESENTATION AND STATE ITS EFFECTS.

ANSWER:

MISREPRESENTATION [SECTION 18]

A representation when wrongly made either innocently or unintentionally is a misrepresentation. When it is made innocently or unintentionally, it is misrepresentation and when made intentionally or willfully it is fraud.

Misrepresentation has been defined in Section 18 of the Act as under:

"MISREPRESENTATION" MEANS AND INCLUDES—

1. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
2. Any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice or to the prejudice of anyone claiming under him;
3. Causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

From the above definition of the term Misrepresentation, the following two types of misrepresentations are noticed:

i) **UNWARRANTED STATEMENTS:** When a person positively asserts or makes an absolute and explicit statement of facts, that fact is true, though he has no reliable source to form this opinion, he believes it to be true. This is one type of misrepresentation.

ii) **BREACH OF DUTY:** Any breach of duty which brings advantages to the person committing it by misleading the other to his prejudice is a misrepresentation.

EFFECT OF MISREPRESENTATION

As per section 19 when consent to an agreement is caused by misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused. A party to a contract, whose consent was caused by misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been, if the representations made had been true.

EXCEPTION: If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

EXAMPLES:

i) A, intending to deceive B, falsely represents that five hundred maunds of indigo are made annually at A's factory, and thereby induces B to buy the factory. The contract is voidable at the option of B.

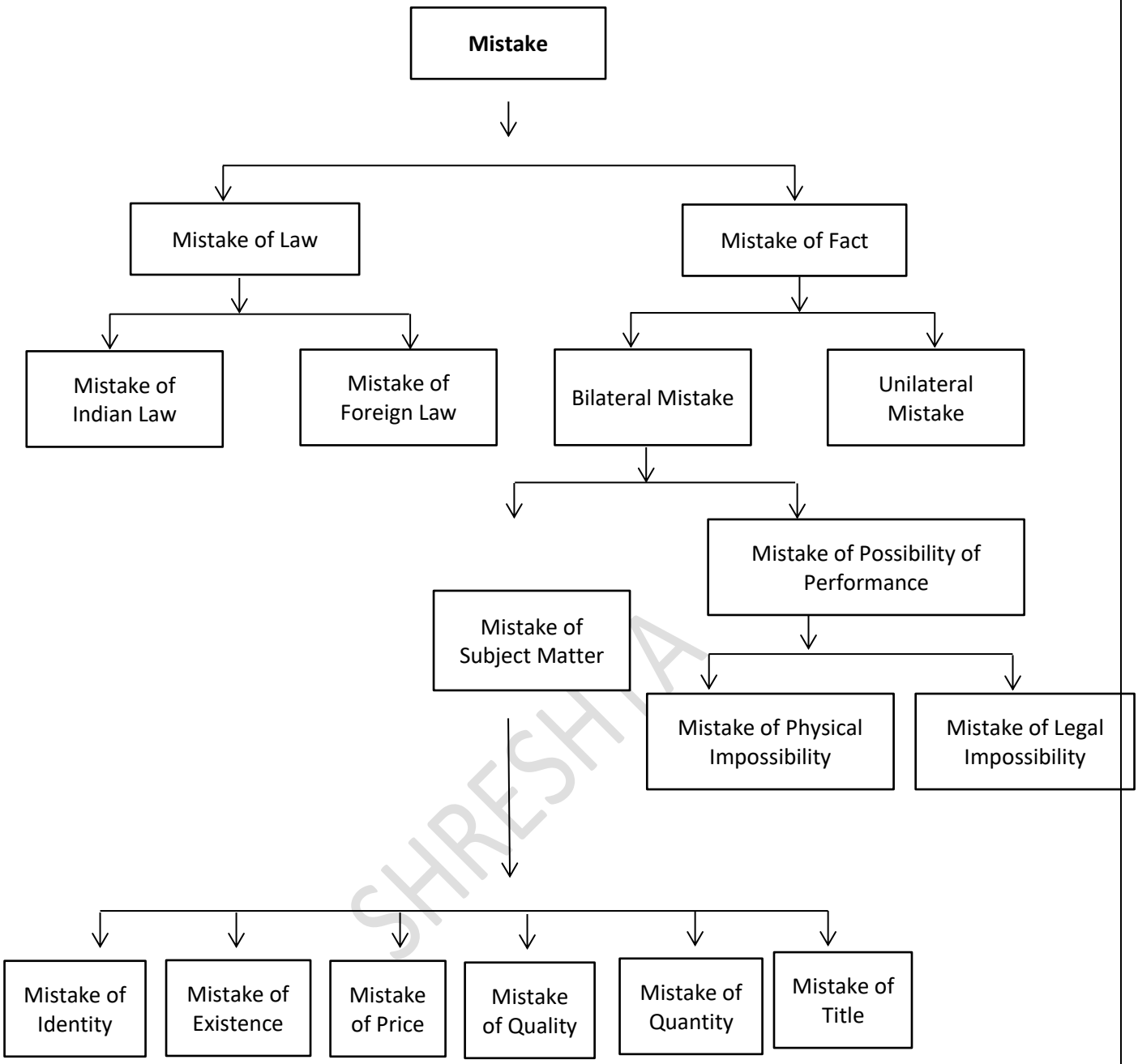
ii) A, by a misrepresentation, leads B erroneously to believe that, five hundred maunds of indigo are made annually at A's factory. B examines the accounts of the factory, which show that only four hundred maunds of indigo have been made. After this B buys the factory. The contract is not voidable on account of A's misrepresentation.

Q NO 8. WHAT IS MISTAKE AND HOW IT EFFECTS THE STATUS OF THE CONTRACT

ANSWER:

MISTAKE [SECTIONS 20, 21 AND 22]

Mistake means an erroneous belief about something. It has not been defined in the Indian Contract Act.



Mistake can be –

1. Mistake of law, or (Section 21)
2. Mistake of fact (Section 20)

1. MISTAKE OF LAW MAY BE:

i) MISTAKE OF LAW OF THE COUNTRY: When a party enters into a contract, without the knowledge of law in the country, the contract is affected by such mistake but it is not void. A contract is not voidable because it was caused by a mistake as to any law in force in India. The reason here is that ignorance of law is not an excuse at all. However, if a party is *induced* to enter into a contract by the mistake of law, then such a contract may be avoided.

ii) **MISTAKE OF LAW OF A FOREIGN COUNTRY**: Such a mistake is treated as mistake of fact and agreement is such case is void.

2. MISTAKE OF FACT MAY BE:

i. **BILATERAL MISTAKE:** Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void
The various types of mistakes falling under bilateral mistakes are as under:

ii. **MISTAKE AS TO EXISTENCE OF SUBJECT MATTER:** If both the parties are at mutual mistake as to existence of the subject matter, the agreement is void.

iii. **MISTAKE AS TO IDENTITY OF SUBJECT MATTER:** It usually happens when both the parties have different subject matter of contract in their mind. The agreement is void due to mistake of identify of subject matter.

iv. **MISTAKE AS TO THE QUALITY OF THE SUBJECT MATTER:** If the subject matter is something essentially different from what the parties thought to be, the agreement is void.

v. **MISTAKE AS TO QUANTITY OF SUBJECT MATTER:** Bilateral mistake as to quantity of subject matter would render the agreement void.

vi. **MISTAKE AS TO TITLE OF SUBJECT MATTER:** The agreement is void due to bilateral mistake as to title of the subject matter

vii. **MISTAKE AS TO PRICE OF THE SUBJECT MATTER:** Mutual mistake as to price of the subject matter would render the agreement void.

viii. **PHYSICAL IMPOSSIBILITY:** An agreement is void, if it is identified to be non-feasible due to physical factors, like time, distance, height, etc

ix. **LEGAL IMPOSSIBILITY:** An agreement is void, if it provides that something shall be done which as a matter of law cannot be done.

EXAMPLES:

i. A agrees to sell to B a specific cargo of goods supposed to be on its way from England to Bombay. It turns out that, before the day of the bargain, the ship conveying the cargo had been cast away and the goods lost. Neither party was aware of the these facts. The agreement is void.

ii. A agrees to buy from B a certain horse. It turns out that the horse was dead at the time of bargain, though neither party was aware of the fact. The agreement is void.

iii. A, being entitled to an estate for the life of B, agrees to sell it to C. B was dead at the time of the agreement, but both parties were ignorant of the fact. The agreement is void.

I. **UNILATERAL MISTAKE AS TO FACT**

As per section 22, a contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact. A unilateral mistake is not allowed as a defense in avoiding a contract unless brought about by another party's fraud or misrepresentation.

2.6. PERFORMANCE OF CONTRACT

Q NO 1. WHAT IS PERFORMANCE OF CONTRACT AND STATE ITS TYPES.

ANSWER:

MEANING OF PERFORMANCE of CONTRACT

1. Performance of promise is the next step of making the promise which is enforceable by law
2. Performance of the contract means fulfilling the promises made by the parties to each other one of the various modes of discharge of the contract.
3. A contract is said to have been performed when the parties to a contract either perform or offer to perform their respective promises or obligations
4. According to section, 37, "The parties to a contract must either perform or offer to perform their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law."

TYPES OF PERFORMANCE OF THE CONTRACT:

There may be two types of performance as follows:

ACTUAL PERFORMANCE: Where a promisor has made an offer of performance to the promisee and such performance has been accepted by the promisee, it is called an actual performance. (Actually, performing the obligation)

Example: X contracted to deliver to Y at his warehouse on 1st October, 100 bales of cotton of a particular quality. X brought the cotton of requisite quality to the appointed place on the appointed day during the business hours, and Y took the delivery of goods. This is an actual performance.

Due to Actual performance, both the parties will be discharged from the obligations and contract will be discharged i.e., comes to an end

ATTEMPTED PERFORMANCE (OR TENDER OR OFFER TO PERFORM): Where a promisor has made an offer of performance to the promisee, and the promisee refused to accept, it is called an attempted performance (Section 38).

Example**:** If in the aforesaid example, Y refused to take the delivery of goods, it is a case of attempted performance because X has done what he was required to do under the contract.

EFFECTS OF TENDER

1. The promisor is not responsible for non-performance and he is alone discharged from obligation
2. The promisor does not lose his rights under the contract

TYPES OF TENDER AS FOLLOWS:

TYPES OF TENDERS	MEANING	EFFECTS
TENDER OF GOODS OR SERVICES	Where the promisor offers to deliver the goods or services	**(a)** Goods or services need not be offered again

	but the promisee refuses to accept the delivery	**(b)** Promisor may sue the promise for non-performance **(c)** Promisor is discharged from his liability
TENDER OF MONEY	Where the promisor offers to pay the amount but the promise refuses to accept the same.	(a) Promisor is not discharged from his liability to pay the amount (b) Promisor will not be liable for interest from the date of a valid tender.

Q NO 2. WHO CAN PERFORM THE CONTRACT

ANSWER:

PERSONS ELIGIBLE TO PERFORM THE CONTRACT

PROMISOR ONLY	**i.** Contracts involving personal skills or consideration **ii.** Such contract comes to an end at death of promisor
PROMISORS' AGENT	**i.** Contracts not involving personal skills or consideration **ii.** Only during lifetime of promisor (After death – Legal Representative)
LEGAL REPRESENTATIVE	**i.** Contracts not involving personal skills or consideration **ii.** Only if promisor dies before performance of contract
THIRD PERSON	Only if promisee accepts (It cannot be demanded from promisor)
JOINT PROMISORS	• Two or more persons making the promise collectively is called Joint Promise**.** In case of several promisors, unless a contrary intention appears, the following persons must perform the promise.

Case	Who must perform the promise
In case all the promisors are alive	The promisors jointly
In case of death of any of joint promisors	Representatives of the deceased promisor jointly with the surviving promisor(s)
In case of death of all joint promisors	Representatives of all of them jointly.

Q NO 3. WHAT IS ASSIGNMENT OF PERFORMANCE

ANSWER:

1. Assignment means transfer of contractual rights or liability by a party to a contract to another person who is a stranger to the said contract. Assignments are used to make transactions simpler

and expedited. Assignments can take place in various kinds of transactions like in marketplace, in commercial transactions, with respect to intellectual property and so on.

2. Assignment has also been widely used in the context of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, whereby loans have been secured by banks by way of assignment of their contractual rights, as a creditor even with respect to mortgage and so on, to an asset reconstruction company who then undertakes to recover the loan amount from the debtor. When a contract is assignable and there is an assignment of the same in favour of the plaintiff, the plaintiff can sue upon it, and the plea that there is no privity of contract with plaintiff can be of no avail.

   Example: if A owes B Rs.500 and B owes C a like amount, B has the right to receive from A and is under liability to pay C. B can ask A to pay directly to C and if A accepts, that will be an assignment of B's right to C.

3. **SECTION 37** of the Indian Contract Act, 1872 enables parties to dispense with performance by way of assignment. It lays down obligation of parties to contracts. It states that the parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law. Promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract.

   Example: Amit, a well-known artist, promises to paint a picture for Sumit by a certain day, at a certain price. Amit dies before the day. The contract cannot be enforced either by Amit's representatives or by Sumit.

4. **SECTION 38** of The Indian Contract Act, 1872, discusses the effect of refusal to accept offer of performance. It states that where a promisor has made an offer of performance to the promisee, and the offer has not been accepted, the promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract.

5. Every such offer must fulfil the following conditions

   i. it must be unconditional;

   ii. it must be made at a proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do;

   iii. if the offer is an offer to deliver anything to the promisee, the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver. An offer to one of several joint promisees has the same legal consequences as an offer to all of them.

2.7. DISCHARGE OF CONTRACT

Q NO 1. WHAT DO YOU MEAN BY DISCHARGE OF CONTRACT? WHAT ARE THE WAYS OF DISCHARGE OF CONTRACT?

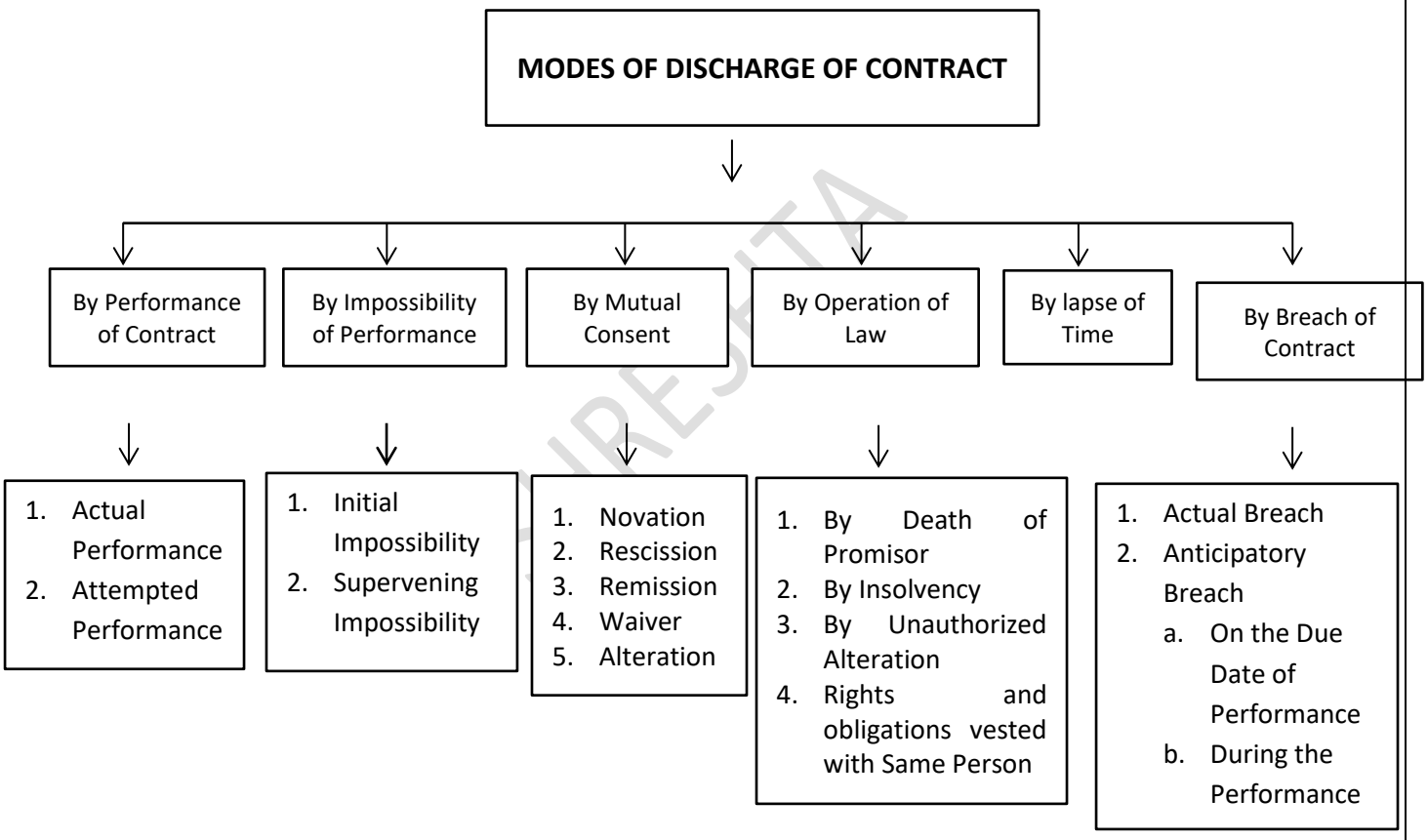
ANSWER:

DISCHARGE OF A CONTRACT

Discharge of a contract means termination or end of the contractual relations between the parties to a contract. Once a contract is discharged the rights and obligations of the parties under the contract will come to an end.

MODES OF DISCHARGE OF CONTRACT:

A contract may be discharged in various modes as under



1. **DISCHARGE OF CONTRACT BY PERFORMANCE:** Where the parties fulfill their respective promises then the contract is said to be discharged by way of performance
2. **DISCHARGE BY MUTUAL CONSENT:** Since a contract is created by mutual agreement, it can also be discharged by mutual agreement. A contract can be discharged by mutual agreement i.e. (by consent of both parties) in the following ways
   - **I) NOVATION [SECTION 62]:** Novation means the substitution of a new contract for the original contract i.e., replacing old with new. Novation may involve new contract between the same parties or same contract between different parties. The terms of contracts may or may not be

changed. The consideration for the new contract is the discharge of the original contract. In case of novation, the original contract need not be performed.

Example: A owes money to B under a contract. It is agreed between A, B and C that B shall henceforth accept C as his debtor, instead of A. The old debt of A to B no longer exists and a new debt from C to B has been contracted.

ii) **RESCISSION [SECTION 62]:** Rescission means cancellation of the contract mutually by all the parties to a contract. Contract is discharged without any performances.

Example: X promises Y to sell and deliver 100 Bales of cotton on 1st October at his godown and Y promises to pay for goods on 1st Nov. X does not supply the goods. Y may rescind the contract.

iii) **ALTERATION [SECTION 62]:** Alteration means a change in the terms of a contract with mutual consent of the parties without changing the parties. Alteration discharges the original contract and creates a new contract. However, parties to the new contract must not change.

Example: X promises to sell and deliver 100 bales of cotton on 1st October and Y promises to pay for goodson1st November Afterwards, X and Y mutually decide that the goods shall be delivered in five equal installments at Z's god own. Here, original contract has been discharged and a new contract has come into effect.

iv) **REMISSION [SECTION 63]:** Remission means acceptance of lesser performance in consideration of full promise made. According to section 63, "Every promisee-

- **i.** May dispense with or remit, wholly or in part, the performance of the promise made to him, or
- **ii.** May extend the time for such performance, or
- **iii.** May accept any other consideration than agreed to in the contract instead of it any satisfaction which he thinks fit of less value.
- **iv.** No consideration is necessary for remission.

Example: A owes B Rs.5,000. A pay to B, and B accepts, in satisfaction of the whole debt, Rs.2,000 paid at the time and place at which Rs.5,000 were payable. The whole debt is discharged.

v) **WAIVER:** Waiver means intentional relinquishment (complete sacrifice) of a right under the contract. Thus, it amounts to releasing a person of certain legal obligation under a contract without any performance.

Example: X promises to supply goods to Y. Subsequently, Y exempts X from carrying out the promise. This amounts to waiving the right of performance on the part of Y.

DISTINCTION BETWEEN NOVATION AND ALTERATION

BASIS OF DISTINCTION	NOVATION	ALTERATION
Parties	The parties of contract may or may not be changed	The parties to contract must not change

Terms	The terms of contract may or may not be changed.	The terms of contact are changed.

3. DISCHARGE BY OPERATION OF LAW:

A contract may be discharged by operation of law as follows

i) BY DEATH OF THE PROMISOR: A contract involving the personal skill or ability of the promisor is discharged automatically on the death of the promisor as it cannot be performed by others.

ii) BY INSOLVENCY: When a person is declared as insolvent by the court, he is discharged from his liability up to the date of his insolvency. And further he cannot enter into contracts up to discharge of insolvency.

iii) BY UNAUTHORIZED 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.

iv) RIGHTS AND OBLIGATIONS VESTING ON THE SAME PERSON OR BY THE IDENTITY OF PROMISOR AND PROMISEE: When the promisor becomes the promisee, the other parties are discharged i.e. Rights and Obligations vesting on the same person.

Example: X draws a bill receivable on Y who accepts the same. X endorses the bill in favour of Z who in turn endorses in favour of Y. Here, Y is both promisor & promisee and hence the contract is discharged.

4. DISCHARGE BY IMPOSSIBILITY OF PERFORMANCE

The impossibility of the performance of a contact may be discussed under the following **two** heads

i) Initial impossibility

ii) Supervening impossibility

EFFECTS OF INITIAL IMPOSSIBILITY

Initial impossibility means the impossibility existing at the time of making the contract and it is a void agreement. The effects of initial impossibility are as follows:

Case	Effect
Where both the promisor and promisee **know** about the initial impossibility	Such agreement is void ab-initio.
Where both the promisor and promisee do **not know** about the initial impossibility	Such agreement is void on the ground of **mutual mistake**.
Where the promisor **alone** knows about the initial impossibility	Contract is void as one of the essentials is missing and Such promisor must compensate for any loss which promisee sustains through the non-performance of the promise.

EFFECTS OF SUPERVENING IMPOSSIBILITY

Supervening impossibility means impossibility which does not exist at the time of making the contract but which arises subsequently after the formation of the contract and which makes the performance of the contract impossible or illegal.

It is also known as **Doctrine of frustration under English Law**.

The effects of supervising impossibility are as under:

CASE	EFFECT
Where an act becomes impossible after the contract is made	The contract to do such an act becomes void when the act becomes impossible.
Where an act becomes unlawful by reason of some event beyond the control of promisor	The contract to do such an act becomes void when the act becomes unlawful
Where the promisor alone knows about the impossibility	Such promisor must compensate the promisee for any loss which such promisee might have suffered on account of non-performance of the promise.
Where an agreement is discovered to be void or where a contract becomes void.	Any person who has received any benefit under such agreement or contract is bound to restore it or to make compensation for it, to the person from whom he received it.

5. 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.

Example: On 1st July 2014 X sold goods to Y for Rs.1,00,000 and Y has made no payment till August 2017. State the legal position as on 1st August 2017 if no credit period was allowed (b) if 2 months credit period was allowed.

Case (a) The contract is discharged by lapse of time (i.e. 3 years) from 1s July 2014 because the debt has become time barred and hence X cannot exercise his right to recover this debt.

Case (b) The contract is not discharged by lapse of time because the period of limitation is yet to expire on 31st August 2017 (i.e. 3 years from the expiry of the credit period),

6. 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. There are two types of breach.

I. Actual Breach

II. Anticipatory Breach

2.8. BREACH OF CONTRACT

Q NO 1. WHAT IS BREACH. EXPLAIN THE TYPES OF BREACH OF CONTRACT

ANSWER:

A breach of contract occurs if any party refuses or fails to perform his part (obligation) of the contract or by his act makes it impossible to perform his obligation under the contract.

1. In case of breach, the aggrieved party (i.e. the party not an fault) is relieved from performing his obligation and gets a right to proceed against the party at fault.
2. A breach of contract may arise in two ways,
   - **I.** Anticipatory breach and
   - **II.** Actual breach.

ACTUAL BREACH OF CONTRACT

Actual breach of contract may take place in any of the following two ways.

I. ON DUE DATE OF PERFORMANCE: If any party to contract refuses or fails to perform his part of the contract at the time fixed for performance (due date), it is called an actual breach of contract on due date of performance.

Example X agreed to sell to Y 10 tons of wheat @ Rs.8,000 per ton to be delivered in two equal installments on 20th October and on 21st October. On 20th October, X refused to deliver the goods. It is an actual breach of contract on due date of performance.

II. DURING THE COURSE OF PERFORMANCE: If any party has performed a part of the contact and then refuses or fails to perform the remaining part of the contract, it is called an actual breach of contact during the course of performance.

Example X agreed to sell to Y 10 tons of wheat @ Rs.8,000 per ton to be delivered in two equal installments on 20th October and 21st October. On 20th October, X delivered 5 tons and refused to deliver remaining 5 tons. It is an actual breach of contract during the course of performance.

ANTICIPATORY BREACH OF CONTRACT

Anticipatory beach occurs when the party declares his intention of not performing the contract before the performance is due. Thus, when a party refuses to perform a contract even before it is due for performance, it is called anticipatory breach.

A party may declare his intention of not performing the contract in the following two ways:

i. WHEN A PARTY TO A CONTRACT HAS REFUSED TO PERFORM HIS PROMISE

Example: X, a farmer agrees to sell to Y his entire crop of 10 tons of wheat @ 8,000 per ton to be delivered on 20th October. On 1st October, X informs Y that he is not going to supply the goods. X has committed anticipatory breach of contract by express repudiation.

ii. WHEN A PARTY TO A CONTRACT HAS DISABLED HIMSELF FROM PERFORMING HIS PROMISE IN ITS ENTIRETY

Example: X, a farmer agrees to sell to Y his entire crop of 10 tons of wheat @ 8,000 per ton to be delivered on 20th October. On 1st October, X sold his entire crop to Z @ Rs.10,000 per ton. X has committed anticipatory breach of contract by implied repudiation

Q NO 2. WHAT ARE THE CONSEQUENCES OF ACTUAL BREACH OF CONTRACT

ANSWER:

SITUATIONS	TIME IS ESSENCE	TIME IS NOT ESSENCE
Contract becomes voidable at the option of the promisee	Yes	No
Whether the promisee is entitled to claim the compensation for any loss occasioned to him by the nonperformance of the promise at the stipulated time.		
a. performance beyond the stipulated time is not accepted	Yes	Yes
b. performance beyond the stipulated time is accepted	No, unless the promsiee gives notice to the promisor of his intention to do so.	No, unless the promsiee gives notice to the promisor of his intention to do so.

Example X, a singer, enters into a contract with Y, the manager of a theatre, to sing at his theater two nights in every week for the next two months. Y agrees to pay her Rs.100 for each performance. On the sixth night, X willfully absents herself from the theatre.

In this case, Y has the following two options:

i) Y may rescind the contract and claim compensation for the loss occasioned to him by X's failure to sing on the sixth night.

ii) Y may permit X to sing on the seventh night and claim compensation for loss from X by giving a notice to X of his intention to do so.

Q NO 3. WHAT ARE THE CONSEQUENCES OF ANTICIPATORY BREACH OF CONTRACT

ANSWER:

TWO OPTIONS AVAILABLE TO AGGRIEVED PARTY

In case of anticipatory breach, the aggrieved party has the following two options:

OPTION I. He can rescind the contract and claim damages for breach of contract without waiting until the due date for performance, or

OPTION II. He may treat the contract as operative and wait till the due date for performance and claim damages if the promise still remains unperformed.

CONSEQUENCES OF TREATING CONTRACT AS OPERATIVE

In case of anticipatory breach, if the aggrieved party treats the contract as operative and waits till the due date for performance, the consequences will be as follows:

i) The promisor may perform his promise on or before the due date of performance and the promise will be bound to accept the performance.

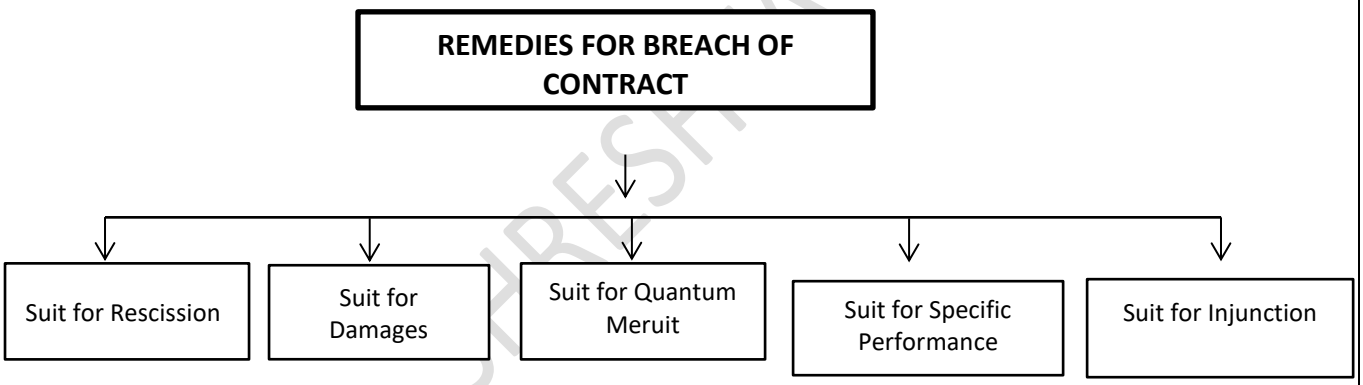
ii) The promisor may take advantage of the discharge by supervening impossibility arising between the date of breach and the due date of the performance and in such a case, the promisee shall lose his right to sue for damages.

Example X, a farmer agreed to sell to Y his entire crop of wheat @ Rs.8,000 per ton to be delivered on 20th October. On 1st October, X informed Y that he was not going to supply the goods. Y decided not to rescind the contract on 1st October and to wait till 20th October. On 19th October, the entire crop was destroyed by fire without the fault of either party. Since the contract had become void on the ground of impossibility of performance. Y had lost his right to sue X for damages.

Q NO 4. WHAT ARE THE REMEDIES AVAILABLE TO THE AGGRIEVED PARTY FOR BREACH OF CONTRACT

ANSWER:

OTHER REMEDIES FOR BREACH OF CONTRACT



1. **SUIT FOR RESCISSION OF CONTRACT [SECTION 39]:** Rescission means a right not to perform obligation.

   In case of breach of a contract, the promisee may put an end to the contract. In such a case, the aggrieved party is discharged from all the obligations i.e. no need to perform his part under the contract and is entitled to claim compensation for the damage which he has sustained because of the non-performance.

   Example: X agrees to supply 10 tons of wheat to Y on 20th October. Y promises to pay for the goods on its receipt. X does not supply the goods on the due date. Here, Y is discharged from the liability of paying the price. Y is entitled to rescind the contact and to claim compensation for the damage which he has sustained because of non-supply of goods on the due date.

2. **SUIT FOR DAMAGES:** The word 'damages' means monetary compensation for the loss suffered. Whenever a breach of contract takes place, the remedy for 'damages' is the one that is applied by the aggrieved party as a consequence of breach of contract.

3. **SUIT FOR SPECIFIC PERFORMANCE:** Suit for specific performance means demanding the court's direction to the defaulting party to perform the promise according to the terms of the contract.

CASES WHERE SUIT FOR SPECIFIC PERFORMANCE IS MAINTAINABLE

I. Where Actual damages arising from breach are not measurable

II. Where Monetary compensation is not an adequate remedy

Example X agreed to sell an old painting to Y for Rs.50,000. Subsequently, X refused to sell the painting. Here, Y may file a suit against X for the specific performance of the contact.

CASES WHERE SUIT FOR SPECIFIC PERFORMANCE IS NOT MAINTAINABLE

I. Where the damages are considered as an adequate remedy

II. Where the contract is of personal nature, e.g. contract to marry.

III. Where the contract is made by a company beyond its powers as laid down in its Memorandum of association.

IV. Where one of the parties is a minor

V. Where the contract became impossible to perform due to supervening impossibility

4. **SUIT FOR INJUNCTION:**

Suit for injunction means demanding court's stay order. Injunction means an order of the court which prohibits a person to do a particular act what he promised not to do.

Example W agreed to sing at L's theatre only during the contract period. During the contract period, W made contract with Z to sing at another theatre and refused to perform the contract with L. It was held that W could be restrained by injunction from singing for Z [Lumely v. Wagner]

5. **SUIT UPON QUANTUM MERUIT**

The term 'quantum meruit' means as much as merited or 'as much as earned.' In other words, it means payment in proportion to the amount of work done.

I. Generally, one cannot claim performance from another unless one has performed his obligation in full but in certain cases, a person who has performed some work under a contract can claim remuneration for the work which he has already done.

II. The right to claim on 'quantum meruit' does not arise out of a contract as the right to damages does. It is a claim on the quasi-contractual obligations which is implied by the circumstances. The claim for quantum meruit arises only when the original contract is discharged.

2.9. CONTINGENT AND QUASI CONTRACTS

Q NO 1. DEFINE CONTINGENT CONTRACT AND ITS ESSENTIAL ELEMENTS

ANSWER:

DEFINITION OF CONTINGENT CONTRACT – SEC 31

Contingent contract" in simple words may be defined as a "Conditional Contract

A contingent contract is a contract which is dependent on the happening (or) non-happening of some future uncertain event and it is valid.

Example: A contracted to pay Rs.10,000 to B if B's house burnt. As its performance is dependent upon uncertain event (i.e. burning of B's house) it is a contingent contract.

ESSENTIAL ELEMENTS OF CONTINGENT CONTRACT:

1. There must be a valid contract (i.e., agreement should contain all the essential element of Section 10).
2. The performance of the contract must be conditional (or) contingent.
   Example: A promised to pay Rs.500 to B if it rains on the first of the next month.
3. The future event, upon which the performance of a contract depends, must be an uncertain event. If it is certain then it is not a contingent contract.
4. The event must be collateral to the contract.
   Example: A agreed to purchase B's horse for Rs,2000 if the horse proved lucky. It is not a contingent contract as the event is directly connected with the contract and hence it is void on grounds of uncertainty.

Q NO 2. STATE THE RULES FOR THE ENFORCEMENT OF CONTINGENT CONTRACT

ANSWER:

RULES REGARDING ENFORCEMENT OF CONTINGENT CONTRACT – SEC 32- 36

1. **DEPENDENT ON THE "HAPPENING" OF FUTURE UNCERTAIN EVENTS-SECTION 32**: A contingent contract dependent on the happening of a future uncertain event can be enforced only when that uncertain event has happened.
   Example: A offered to sell his horse to B for Rs.4000. Subsequently, A, entered into a contract with C to sell the same horse to him for Rs.3500 if B refused to buy it. The contract between A and C is contingent and can be enforced by law only when B refuses to buy the horse.
   If the event becomes impossible then such contract becomes void.
2. **DEPENDENT ON THE "NON-HAPPENING" OF FUTURE UNCERTAIN EVENT-SECTION 33**: A contingent contract dependent on the non-happening of future uncertain event can be enforced only when the event does not happen (or) becomes impossible.

Example: A agrees to pay B Rs.500 if a certain ship did not return. Subsequently, the ship sunk into the sea. It is a contingent and can be enforced by law when ship sinks into the sea.

If the event happens (or) does not becomes impossible, then such contract becomes void.

3. **DEPENDENT ON THE "HAPPENING" OF SPECIFIED UNCERTAIN EVENT WITH IN "FIXED TIME"-SECTION 35:** A contingent contract dependent on the happening of a specified uncertain event within fixed time can be enforced if that event happens with in the fixed time.

   Example: A agreed to pay Rs.1000 to B if a certain ship returned within a year. It is contingent contract and can be enforced by law if the ship returns within a year**.**

   If the event does not happen within the fixed time (or) if it becomes impossible before the expiry of fixed time, then such contract becomes void.

4. **DEPENDENT ON THE "NON-HAPPENING" OF SPECIFIED UNCERTAIN EVENT WITHIN "FIXED TIMES"-SECTION 35 SECOND PARA:** A contingent contract dependent on the non-happening of specified uncertain event within fixed time can be enforced if that event does not happen within fixed time (or) if it becomes certain that such event will not happen.

   Example: A agreed to pay Rs.2000 to B if a ship does not return within a year. It is a contingent contract and can enforce if it does not return within a year. (Or) burnt (or) sank within a year**.**

5. **CONTINGENT CONTRACT DEPENDENT ON IMPOSSIBLE EVENT-SECTION 36:** All such contract is void and cannot be enforced by law as the impossible event will never happen.

   Example: A agreed to pay Rs.500 to B if he proved that two straight lines can enclose a space.

Q NO 3. WHAT ARE QUASI CONTRACTS, ITS FEATURES, CIRCUMSTANCES WHERE QUASI CONTRACT ARISES

ANSWER:

MEANING OF QUASI-CONTRACTS:

A Quasi-contact is not a contract in the strict meaning of contract as one or the other essentials for the formation of a contract are absent.

1. It is an obligation imposed by law upon a person for the benefit of another even in the absence of a contract.
2. It is based on the principle of equity, which means no person shall be allowed to unjustly enrich himself at the expense of another.
3. Such obligations are called quasi-contracts or implied contracts because the outcome of such obligations resemble those create d by a contract even though there are no express words

FEATURES OF A QUASI-CONTRACT

The salient features of a quasi-contract are as under:

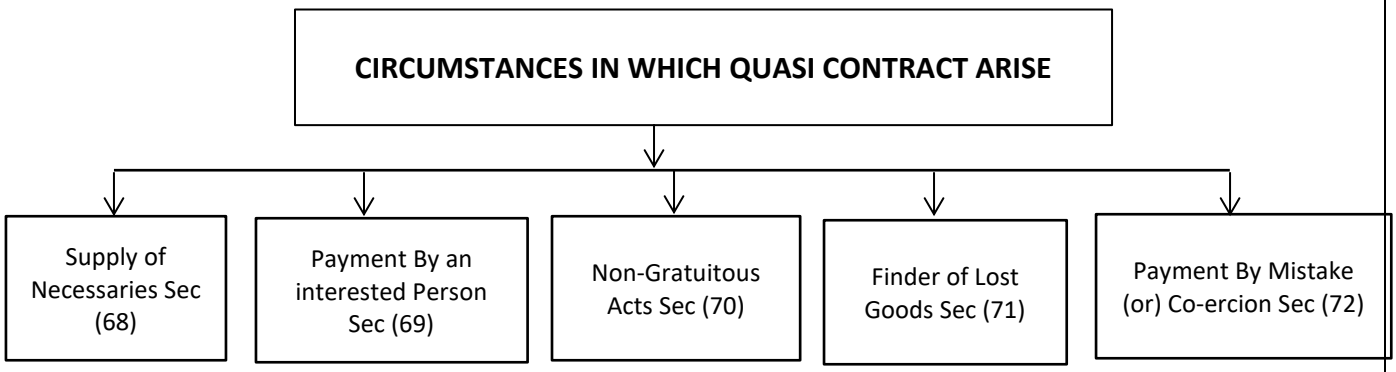
I. It is imposed bylaw and does not arise from any agreement.
II. The duty of a party and not the promise of any party is the basis of such contract.

III. The right under it is always a right to money and generally, though not always, to a liquidated sum of money.

IV. The right under it is available against specific person(s) and not against the world.

V. A suit for its breach may be filed in the same way as in case of a complete contract.

CIRCUMSTANCES IN WHICH QUASI CONTRACTS ARISE – SEC 68-72



1. SUPPLY OF NECESSARIES [SECTION 68]

The person who has supplied the necessaries to a person who is incompetent to contract or anyone who is dependent on such incompetent person, is entitled to claim their price (cost) from the property y of such incapable person.

Example: A supplies B, a lunatic, with necessaries suitable to his condition to life. A is entitled to be reimbursed from B's property

A supply to wife and children of B, a lunatic, with necessaries suitable to their condition in life. A is entitled to be reimbursed from B's property.

2. RIGHT TO RECOVER MONEY PAID FOR ANOTHER PERSON [SECTION 69]

A person who is interested in the payment of money for which another person is legally bound to pay, and who therefore pays it, is entitled to recover the payment made from the person who was legally bound to pay.

Example: B holds land in Bengal, on a lease granted by A, a Zamindar. The revenue payable by A to the Government being in arrears, his land is advertised for sale by the Government. Under the revenue law, the consequence of such sale will be the annulment of B's lease. B, to prevent the sale and the consequent annulment of his own lease, pays the Government the sum due from A. A is bound to make good to B the amount so paid.

3. RIGHT TO RECOVER FOR NON-GRATUITOUS ACT [SECTION 70]

Such right to recover arises if the following three conditions are satisfied:

I. The thing must have been done or delivered lawfully.

II. The person who has done or delivered the thing, must not have intended to do so gratuitously;

III. The person for whom the act is done/to whom thing is delivered must have enjoyed the benefit of the act done/thing delivered.

Example: A, a tradesman, leaves goods at B's house by mistake. B teats the goods as his own. He is bound to pay A for them.

4. RESPONSIBILITY OF FINDER OF GOODS [SECTION 71]

A person who finds goods belonging to another, and takes them into his custody, is subject to the same responsibility as a bailee, Not use it for personal purposes and has the obligation to trace the legal owner and restore the same.

I. However, in certain circumstances, the finder of lost goods can use (or) sell the goods but in this case also he is bound to repay the reasonable price when he is using the goods (or) repay the proceed of sold goods when he is selling the goods if the goods are perishable in nature.

II. The finder of goods is entitled to recover the expenses incurred to trace while restoring the goods to the owner, can exercise **right of lien** for non-payment and can sue if goods are delivered.

III. If the finder incurs expense of more than $2/3^{rd}$ value in tracing, further the need not trace

IV. The finder of lost goods can pass the valid title to the bonafide purchaser

Example: X a guest found a diamond ring at a birthday party of Y. X told Y and other guests about it. He has performed his duty to find the owner. If he is not able to find the owner, he can retain the ring as bailee.

5. RIGHT TO RECOVER FROM A PERSON TO WHOM MONEY IS PAID OR THING IS DELIVERED, BY MISTAKE OR UNDER COERCION [SECTION 72]

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

Example: A and B jointly owe Rs.100 to C. A alone pays the amount to C, and B, not knowing this fact, pays Rs.100 over against to C. C is bound to repay the amount to B.

2.10. IMPOSSIBILITY AND FORCE MAJEURE

Q NO 1. IMPOSSIBILITY OF THE PERFORMANCE OF THE CONTRACT

ANSWER:

1. **SECTION 32** of the Indian Contract Act, 1872 lays down provisions relating to enforcement of contracts contingent on an event happening. It states that contingent contracts to do or not to do anything based on an uncertain future event happening, cannot be enforced by law unless and until that event has happened. If the event becomes impossible, such contracts become void.

Examples:

I. A makes a contract with B to buy B's horse if C dies before A. This contract cannot be enforced by law unless and until C dies during A's lifetime.

II. Ms. X contracts to pay Mr. Y a sum of money if Mr. Y married Ms. X. Unfortunately, Ms. X dies without being married to Mr. Y. The contract becomes void.

Section 36 of the Indian Contract Act, 1872 states that an agreement contingent on impossible events is void. Contingent agreements to do or not to do anything, if an impossible event happens, are void, whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made.

2. **SECTION 56** of The Indian Contract Act, 1872 states that an agreement to do an act impossible in itself is void.
3. **CONTRACT TO DO AN ACT AFTERWARDS BECOMING IMPOSSIBLE OR UNLAWFUL**: A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.
4. **COMPENSATION FOR LOSS THROUGH NON-PERFORMANCE OF ACT KNOWN TO BE IMPOSSIBLE OR UNLAWFUL**: Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.

Examples:

I. A agrees to marry B if B gets A the moon in the sky. The agreement is void.

II. A agrees with B to discover treasure by magic. The agreement is void:

III. A and B contract to marry each other. Before the time fixed for the marriage. A goes mad. The contract becomes void.

IV. Indian company has a contract for supply of sugar to Pakistan with the Government of Pakistan. However, war is declared between the two nations. The contract becomes void as it is with an enemy country, pursuant to the declaration of war.

ILLUSTRATION:

Anil and Sunil entered into the contract where Anil promised to deliver 100 labourers for building his house. At the time of making the contract they included the clause “Force Majeure”. But Anil could not deliver the labourers to Sunil due to Covid-19 lockdown. Under this situation Anil is under no obligation to perform the contract - Justify.

SOLUTION

1. Force Majeure clause is a ground for avoiding obligations emanating out of a contract due to circumstances that are out of control of either of the parties.
2. The pandemic was one such instance when most contracts could not be completed due to the sudden lockdown leading to the invoking of the force majeure clause. The lockdown was pursuant to the directions by the Government. However, many events take place that cannot be controlled that in turn may lead to the impossibility of performance of a contract.
3. Thus, under Section 56 of the Indian Contract Act, 1872, it becomes now impossible for either party to perform its obligations thereby making it void.
4. A force majeure clause is decided beforehand by parties before the execution of the contract, whereby the parties identify the events, which would attract the applicability of the Force majeure clause. However, the term ‘Force majeure’ is not defined anywhere in The Indian Contract Act, 1872.

2.11. TENDER PROCEDURE OF GOVERNMENT CONTRACT

Q NO 1. WHAT IS TENDER

ANSWER:

1. Essentially a tender is construed as an invitation to an offer which invites bids from various contenders. These bids are then construed as offer which when accepted becomes a contract which is binding on both the parties equally. These contracts are usually for the purposes of executing specific work or supply commodities within specified time schedules.
2. A tender document may also be called as Request for Tender (RFT). This document usually contains the specifications of the work to be carried out or goods to be supplied, time limit for fulfilment of the work and conditions of contract. These tenders may be floated by companies, organizations or by the Government or its agencies. Interested parties then submit a proposal against the tender which is then evaluated and shortlisted for the contract by those who floated the tender.

   Example: The local Government school required installation of fans and light bulbs in its classrooms for which they published a request for tender in the national daily. Many electrical companies submitted their bids according to the specifications mentioned in the tender. Honeywell company was selected out of the bidders who quoted the least price for the installation of the fans and light bulbs.
3. The General Financial Rules (GFR), 2017, by the Department of Expenditure Ministry of Finance, are a compilation of rules and orders of Government of India to be followed by all while dealing with matters involving public finances. These rules and orders are treated as executive instructions to be observed by all Departments and Organizations under the Government and specified Bodies except otherwise provided for in these Rules. The GFR outlines the procurement procedure, contract management, and financial management principles. Under Chapter 6 of GFR 2017 procurement of goods and services has been discussed. Additionally, Delegation of Financial Powers Rules (DFPR) along with the GFR, 2017 deals with governmental procurement and government procurement contracts. Apart from the GFR, 2017, there is no central legislation that governs governmental procurement and contract of tender in India. Every state has its own rules and guidelines with respect to government procurement contracts, based on broader principles of GFR, 2017.
4. Rule 144 of General Financial Rules (GFRs), 2017, by the Department of Expenditure Ministry of Finance, Government of India, lays down the fundamental principles of public buying (for all procurements including procurement of works).

   It states: Every authority delegated with the financial powers of procuring goods in public interest

shall have the responsibility and accountability to bring efficiency, economy, and transparency in matters relating to public procurement and for fair and equitable treatment of suppliers and promotion of competition in public procurement. The procedure to be followed in making public procurement must conform to the following yardsticks: -

i) The description of the subject matter of procurement to the extent practicable should –

i. be objective, functional, generic and measurable and specify technical, qualitative and performance characteristics.

ii. not indicate a requirement for a particular trade mark, trade name or brand.

ii) The specifications in terms of quality, type etc., as also quantity of goods to be procured, should be clearly spelt out keeping in view the specific needs of the procuring organizations. The specifications so worked out should meet the basic needs of the organization without including superfluous and non- essential features, which may result in unwarranted expenditure.

iii) Where applicable, the technical specifications shall, to the extent practicable, be based on the national technical regulations or recognized national standards or building codes, wherever such standards exist, and in their absence, be based on the relevant international standards. In case of Government of India funded projects abroad, the technical specifications may be framed based on requirements and standards of the host beneficiary Government, where such standards exist. Provided that a procuring entity may, for reasons to be recorded in writing, adopt any other technical specification.

iv) Care should also be taken to avoid purchasing quantities in excess of requirement to avoid inventory carrying costs.

v) Offers should be invited following a fair, transparent and reasonable procedure.

vi) The procuring authority should be satisfied that the selected offer adequately meets the requirement in all respects.

vii) The procuring authority should satisfy itself that the price of the selected offer is reasonable and consistent with the quality required.

viii) At each stage of procurement, the concerned procuring authority must place on record, in precise terms, the considerations which weighed with it while taking the procurement decision.

ix) A complete schedule of procurement cycle from date of issuing the tender to date of issuing the contract should be published when the tender is issued.

x) All Ministries/Departments shall prepare Annual Procurement Plan before the commencement of the year and the same should also be placed on their website.

Also, Rule 145 lays down provision relating to authorities competent to purchase goods:

An authority which is competent to incur expenditure may sanction the purchase of goods required for use in public service in accordance with provisions in the Delegation of Financial Powers Rules, following the general procedure contained in the following rules.

2.12. SPECIAL CONTRACT - INDEMNITY AND GUARANTEE; BAILMENT AND PLEDGE; LAWS OF AGENCY

INDEMNITY AND GUARANTEE

Chapter VIII of the Act deals with the contract of indemnity and guarantee. Sections 124 and 125 deal with the contract of indemnity. The other provisions deal with the contract of guarantee

Q NO 1. WRITE ABOUT CONTRACT OF INDEMNITY.

ANSWER:

CONTRACT OF INDEMNITY

1. Section 124 of the Act defines the expression 'contract of indemnity' as a contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person.

   Example: A contracts to indemnify B against the consequences of the proceedings which C may take against B in respect of a certain sum of Rs.2 lakhs. This is a contract of indemnity.
2. This contract includes indemnifier and indemnity holder. A person who promises to indemnify from losses is called as indemnifier and the person whose loss is made good is called as indemnity holder. To indemnify does not merely means to reimburse in respect of moneys paid, but to save from loss in respect of the liability for which the indemnity has been given.
3. A contract of indemnity may be either expressed or implied.
4. **CASE LAW:** In '**KUPPAN CHETTIAR V. RAMASWAMI CHETTIAR' – ILR (1947) MAD.58** it was held that there is implied by law a contract by the person making the request to keep indemnified the person having the duty against any liability which may result from such exercise of the supposed duty.

Q NO 2. WHAT ARE THE RIGHTS OF INDEMNITY HOLDER

ANSWER:

RIGHTS OF INDEMNITY HOLDER WHEN SUED

Section 125 provides the rights of indemnity holder when sued. This section provides that the promise, in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor-

1. **DAMAGES FOR SUIT**: All damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies;
2. **COST OF SUIT**: All costs which he may be compelled to pay in any such suit if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorized him to bring or defend the suit;

3. **SUM PAID FOR COMPRAMISING SUIT**: All the sums which he may have paid under the terms of any compromise of any such provided that:
    I. He acted under the authority of the indemnifier
    II. He did not contravene the orders of the indemnifier
    III. He acted in such a way as a prudent man would act in his own case.
4. **SUE FOR SPECIFIC PERFORMANCE:** If the indemnity holder had incurred an absolute liability, he becomes entitled to ask the indemnifier to indemnify him.

Q NO 3. WHAT IS MEANT BY CONTRACT OF GUARANTEE AND STATE ITS ESSENTIAL FEATURES

ANSWER:

CONTRACT OF GUARANTEE SECTION 126

A contract to perform the promise, or discharge the liability of a third person in case of his default. The parties of this contract consist of:

SURETY – the person who gives the guarantee is called as the 'surety';

PRINCIPAL DEBTOR – the person in respect of whose default the guarantee is given is called the principal debtor;

CREDITOR – the person to whom the guarantee is given is called the 'creditor'.

ESSENTIALS OF VALID GUARANTEE:

1. A contract of guarantee is a triplicate agreement between the Principal, Debtor and Surety
2. A contract of Guarantee requires the concurrence (consent) of all three parties to it i.e principal debtor, creditor and surety
3. Essentials of valid contract:
    i) The principal debtor need not to be competent to contract. Even if principal debtor is incompetent to contract, the guarantee is valid. But if surety is incompetent, the guarantee is void
    ii) Surety need not be benefited. Consideration received by principal debtor is a sufficient consideration to the surety for giving the guarantee.
4. There should be an existing liability. Such liability or promise must be enforceable by law.
5. Guarantee should not be obtained by misrepresentation or concealment of material fact
6. A guarantee may be either oral or written.
7. Consideration for Guarantee: Anything done, or any promise made, for the benefit of the principal debtor, may be a sufficient consideration to the surety for giving guarantee. This section takes into its fold past consideration also. Like any other contract, a contract of guarantee must be supported by consideration. It is not necessary that the consideration should be received by the surety. Consideration between the principal debtor and the creditor is good consideration for the guarantee given by the surety

EXAMPLES:

i) B requests A to sell and deliver to him goods on credit. A agrees to do so, provided C will guarantee the payment of the price of the goods. C promises to guarantee the payment in consideration of A's promise to deliver the goods. This is sufficient consideration for C's promise

ii) A sells and delivers goods to B. C afterwards requests A to forbear to sue B for the debt for a year, and promises that, if he does so, C will pay for them in default of payment by B. A agrees to forbear as requested. This is a sufficient consideration for C's promise

iii) A sells and delivers goods to B. C afterwards, without consideration, agrees to pay for them in default of B.

The agreement is void.

8. **CASE LAW: IN 'RAJENDRA V. MAHILA CHANDRABAI' – 2012 (1) MPLJ 164** the case is within the purview of example (c). Merely because the appellant made promise to the plaintiff that in this case first and second defendants who were required to pay the sale price to her, fail to pay the same, he would pay the sale price, that promise was without consideration and therefore the said agreement between the plaintiff and third defendant was void. Needless to say, that a void agreement cannot be enforced by law and therefore, since the status of the appellant (third defendant) is that of a guarantor, his case is covered under the ambit of example 3 to Section 127 of the Act and he is not liable to pay the sale consideration or any other amount to the plaintiff on account of the failure in making the payment by first and second defendants.

Q NO 4. STATE THE DIFFERENCES BETWEEN CONTRACT OF INDEMNITY AND GUARANTEE

ANSWER:

DISTINCTION BETWEEN INDEMNITY AND GUARANTEE

The contract of indemnity differs from the contract of guarantee in the aspects shown in the following table:

Sl. No.	CONTRACT OF INDEMNITY	CONTRACT OF GUARANTEE
1	In this contract there are two parties – the indemnifies and the indemnified	In this contract three parties are involved – principal debtors, surety and creditor
2	The primary liability is on the indemnifier	The principal liability is on the principal debtors. Secondary liability is on the surety.
3	The indemnifier is not acting at the request of the debtor.	The surety gives contract at the request of the principal debtor.
4	The possibility of any loss happening is the only contingency against which the indemnifier undertakes to indemnify.	There is an existing debt for which the surety gives guarantee to the creditor on behalf of the principal debtor.

5	The indemnifier cannot sue the third party in his own, unless there is an assignment.	The surety is entitled to proceed against the principal debtor when he is obliged to perform the guarantee
6	The contract is between the indemnifier and indemnified.	The contract is between the principal debtor - creditor; surety - creditor; principal debtor - surety.
7	Defined u/s 124	Defined u/s 126

Q NO 5. STATE THE EXTENT OF LIABILITY OF SURETY

ANSWER:

LIABILITY OF SURETY SECTION 128

1. The liability of surety arises only when the principal debtor fails to pay the debt to the creditor. It provides that the liability of the surety is co- extensive with that of the principal debtor, unless it is otherwise provided by the contract.
2. The liability of surety arises only on default of Principal Debtor
3. Where the debtor cannot held liable on account of any defect in the document, the liability of the surety also comes to an end
4. Surety's liability continues even if the principal debtor has not been sued or omitted from being sued because the liability of surety is separate in the contract of guarantee.
5. If the principal debt is illegal or unenforceable, the principal debtor as well as surety shall not be liable.
6. If the principal debtor is discharged from the liability the surety shall also be discharged.

Example: A guarantees to B the payment of a bill of exchange by C, the acceptor. The bill is dishonored by C. A is liable, not only for the amount of the bill, but also for any charges which may have become due on it.

CASE LAW: 'GOURI PRASAD V. 5RABO INDIA FINANCE LIMITED' – 2013 (2) MH.L., J. 195.

The liability of the surety is co-extensive with that of the principal debtor and the surety is liable to pay the entire amount his liability being immediate as held in

'SWAMINATHA PILLAI VS. LAKSHMAN AYYA' – AIR 1935 MAD 748 it was held that there is no authority for the general proposition that a creditor cannot proceed against the surety unless he has first exhausted all his remedies against the principal debtor.

S.N. PRASAD V. MONNET FINANCE LIMITED' – (2011) SCC 320 Where the letter of guarantee issued by a guarantor, guarantees repayment of only the principal sum and does not guarantee the payment of any interest, he could not be made liable for the payment of interest as held in.

Q NO 6. WRITE ABOUT CONTINUING GUARANTEE

ANSWER:

CONTINUING GUARANTEE SECTION 129

1. A guarantee which extends to a series of transactions is called continuing guarantee.
2. In continuing guarantee, the liability of surety extends till the-
   - **I.** Performance or discharge of all the transactions entered into or
   - **II.** Revocation of guarantee.

Examples:

I. A, in consideration that B will employ C in collecting the rents of B's zamindari, promises B to be responsible, to the amount of Rs.5,000 for the due collection and payment by C of those rents. This is a continuing guarantee.

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

III. A guarantees payment to B of the price of five sacks of flour to be delivered to B to C and to be paid for in a month. B delivers five sacks to C. C pays for them. Afterwards B delivers four sacks to C, which C does not pay for. The guarantee given by A was not a continuing guarantee and accordingly he is not liable for the price of four sacks.

Q NO 7. WRITE DOWN THE CIRCUMSTANCES IN WHICH SURETY IS DISCHARGED FROM LIABILITY BY REVOCATION OF CONTINUOUS GUARANTEE.

ANSWER:

A continuing guarantee can be revoked by two ways

1. **REVOCATION BY SURETY**: The continuing guarantee may be revoked at any time by the surety, as to future transactions by serving notice to the creditors.

   But however, revocation is not possible:

   - **I.** Where a continuing relationship is established
   - **II.** For the past transactions which have already taken place.

2. **REVOCATION ON THE DEATH OF SURETY SECTION 131:** Revocation of continuing guarantee by surety the death of the surety operates, in the absence of any contract to the contrary, as a revocation of continuing guarantee, so far as regards future transactions.

EXAMPLE:

I. A, in consideration of B's discounting at A's request, bills of exchange for C, guarantees to B, for 12 months, the due payment of all such bills to the extent of Rs.5,000. B discounts bill for C to the extent of Rs.2,000. Afterwards, at the end of three months, A revokes guarantee. The revocation discharges A from all liability to B for any subsequent discount. But A is liable to B for Rs.2,000 on

default of C.

II. A guarantee to B, to the extent of Rs.10,000/- that C shall pay all the bills that B shall draw upon C. C accepts the bill. A gives notice of revocation. C dishonors the bill at maturity. A is liable upon his guarantee.

Q NO 8. WHEN SURETY IS DISCHARGED

ANSWER:

DISCHARGE OF SURETY

The liability of the surety is discharged under the following circumstances-

1. By giving notice to the creditor – Section 130;
2. By the death of the surety – Section 131;
3. By variance in terms of contract – Section 133;
4. By release or discharge of principal debtor – Section 134;
5. When creditor compounds with the principal debtor by giving time to, or agrees not to sue principal debtor – Section 135;
6. By creditor' act or omission impairing surety's eventual remedy – Section 139;

HOWEVER, IN THE FOLLOWING CIRCUMSTANCES THE LIABILITY OF THE SURETY IS NOT CONSIDERED TO BE DISCHARGED-

1. Section 136 – Where a contract to give time to the principal debtor is made by the creditor with a third person, and not with the principal debtor, the surety is not discharged;

2. Section 137 – Mere forbearance on the part of the creditor to sue the principal debtor or to enforce the other remedy against him, does not, in the absence of any provision in the guarantee to the contrary, discharge the surety;

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

Q NO 9. STATE THE RIGHTS OF SURETY

ANSWER:

RIGHTS OF SURETY

The rights of a surety may be classified as under:

1. Right against principal debtor

2. Right against creditor

3. Right against co-sureties

RIGHT AGAINST PRINCIPAL DEBTOR:

I) RIGHT AGAINST SUBROGATION SECTION 140:

i. On payment of the guaranteed debt or performance of the guaranteed duty, the surety acquires all the rights with which creditor had against the principal debtor

ii. This right is known as right of subrogation. The surety steps into the shoes of the creditor.

II) RIGHT TO BE INDEMNIFIED SECTION 145

i. In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety.

ii. The surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully.

RIGHT AGAINST CREDITOR

I. SURETY'S RIGHT TO BENEFIT OF CREDITOR'S SECURITIES SECTION 141

i. A surety is entitled to the benefit of every security which the creditor had against the principal debtor at the time when the contract of surety ship is entered into, whether the surety knows of the existence of such security or not; and,

ii. if the creditor loses or, without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security.

II. RIGHT TO CLAIM SET OFF

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

Examples:

i. C advances to B, his tenant Rs.20,000 on the guarantee of A. C has also a further security for Rs.20,000 by a mortgage of B's vehicle. C cancels the mortgage. B becomes insolvent, and C sues A on his guarantee. A is discharged from liability to the amount of the value of the furniture;

ii. C, a creditor whose advance to B is secured by a decree, receives also a guarantee for that advance from C afterwards takes B's goods in execution under the decree, and then, without the knowledge of A, withdraws the execution. A is discharged;

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

Q NO 10. STATE THE CIRCUMSTANCES IN WHICH CONTRACT OF GUARANTEE CAN BE TREATED AS INVALID

ANSWER:

INVALID GUARANTEE

The following are considered as invalid guarantee-

1. **GUARANTEE OBTAINED BY MISREPRESENTATION – SECTION 142** provides that any guarantee which has been obtained by means of misrepresentation made by the creditor or with his knowledge and assent, concerning a material part of the transaction is invalid;
2. **GUARANTEE OBTAINED BY CONCEALMENT – SECTION 143** provides that any guarantee within the creditor has obtained by means of keeping silence as to material circumstances is invalid.

3. **FAILURE OF COSURETY TO JOIN A SURETY CONTRACT – SECTION 144:** When contract of guarantee provides that a creditor shall not act on it until another person has joined in it as co surety. the guarantee is not valid if that person does not join

Examples:

i) A engages B as clerk to collect money for him. B fails to account for some of his receipts and A in consequence calls upon him to furnish security for his duly accounting. C gives his guarantee for B's duly accounting. A does not acquaint C with B's previous conduct. B afterwards makes default. The guarantee is invalid**;**

ii) A guarantee to C payment for iron to be supplied by him to B to the amount of Rs.2000 per tons. B and C have privately agreed that B should pay Rs.5 per ton beyond the market price, such excess to be applied in liquidation of an old debt. This agreement is concealed from A. A is not liable as surety.

Q NO 11. STATE THE RIGHT OF SURETY AGAINST THE CO-SURETIES

ANSWER:

CO-SURETY

SECTION 144 provides that where a person gives a guarantee upon a contract that the creditor shall not act upon it until another person has joined in it as co-surety, the guarantee is not valid if that other person does not join.

RIGHTS OF SURETY

1. **CO-SURETIES LIABLE TO CONTRIBUTE EQUALLY SECTION 146**
   - **i)** In the absence of the any contract to the contrary, co-sureties are liable to contribute equally.
   - **ii)** This section provides that where two or more persons are co-sureties for the same debt or duty, either jointly or severally, and whether under the same or different contracts, and whether with or without the knowledge of each other, the co-sureties, in the absence of any contract to the contrary, are liable, as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains unpaid by the principal debtor.
2. **LIABILITY OF CO-SURETIES BOUND IN DIFFERENT SUMS SECTION 147**: Co-sureties who are bound in different sums are liable to pay equally as far as the limits of their respective obligations permit.

Examples:

i) A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of each Rs.10,000, B in that of Rs.20,000, C in that of Rs.40,000, conditioned for D's duly accounting to E. D makes default to the extent of Rs.30,000. A, B and C are each liable to pay Rs.10,000.

ii) A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of Rs.10,000, B in that of Rs.20,000, C in that of Rs.40,000, conditioned for D's duly accounting to E. D makes default to the extent of Rs.40,000. A is liable to pay Rs.10,000, and B and C Rs.15,000 each.

iii) A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of Rs.10,000, B in that of Rs.20,000, C in that of Rs.40,000, conditioned for D's duly accounting to E. D makes default to the extent of Rs.70,000. A, B and C have to pay each the full penalty of his bond.

BAILMENT AND PLEDGE

Chapter IX of the Indian Contract Act, 1872 deals with bailment and pledge.

Q NO 12. DEFINE THE CONTRACT OF BAILMENT

ANSWER:

MEANING OF CONTRACT OF BAILMENT

1. As per Section 148 'bailment' is defined as the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them.
2. **PARTIES TO THE BAILMENT**:
   - **i)** Bailor – the person delivering the goods is called the 'bailor'; and
   - **ii)** Bailee – the person to whom the goods are delivered is called the 'bailee'.

If a person, already in possession of the goods of other contracts to hold them as a bailee, he thereby becomes the bailee and the owner becomes the bailor of such goods, although they may not have been delivered by way of bailment.

EXAMPLES OF BAILMENT TRANSACTIONS:

i) Providing goods on rent

ii) Delivering goods for repair

iii) Goods given to friend for the use

Q NO 13. STATE THE ESSENTIAL CHARACTERISTICS BAILMENT

ANSWER:

ESSENTIAL CHARACTERISTICS OF BAILMENT:

1. In bailment, the delivery of goods is based upon contract may be expressed or implied
2. There must be a delivery of specific goods by one person to another;
3. The delivery must be for some specific purpose;
4. The delivery must be upon a contract that the goods shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the bailor.

Bailments may be classified into voluntary and involuntary. Voluntary bailments are the outcome of an express contract between the parties. Instances of involuntary bailments are found in cases of finders of good or of goods sent to a wrong place, or in excess of the quantity ordered, or in cases where the bailee dies and the subject of bailment comes into the hands of the bailee's heirs. Where

there is no obligation to return the identical article, either in its original or in an altered form, there is no contract of bailment.

Q NO 14. DIFFERENT MODES OF DELIVERY

ANSWER:

DELIVERY TO BAILEE

Section 149 provides that the delivery to the bailee may be made by doing anything which has the effect of putting the goods in the possession of the intended bailee or any persons authorized to hold them on his behalf.

Different modes of delivery:

1. Physical delivery
2. Symbolic delivery
3. Constructive delivery

Q NO 15. DISCUSS DUTIES OF BAILOR

ANSWER:

BAILOR'S DUTY

1. **BAILORS DUTY TO DISCLOSE FAULTS IN GOODS BAILED SECTION 150**
   - **i)** It is the duty of the bailor to disclose to the bailee faults in the goods bailed, of which the bailor is aware, and which materially interferes with the use of them, or expose the bailee to extraordinary risks;
   - **ii)** If the bailor does not make such disclosure and some loss or damage results, he is responsible for so much of it as arises to the bailee directly from such faults;
   - **iii)** If the goods are bailed for hire, the bailor is responsible for damage arising to the bailee directly from such faults, whether he was or was not aware of the existence of such faults in the goods bailed.

Examples:

- **i.** A lends a horse, which he knows to be vicious, to B. He does not disclose the fact that the horse is vicious. The horse runs away. B is thrown and injured. A is responsible to B for damages sustained.
- **ii.** A hire a carriage of B. The carriage is unsafe, though B is not aware of it, and A is injured. B is responsible to A for the injury.

3. **BAILOR SHALL PAY NECESSARY EXPENSES SECTION 158**
   - **i.** In case of gratuitous bailment bailor shall pay to bailee all necessary expenses incurred by him'
   - **ii.** In case of non-gratuitous bailment, it is sufficient for the bailor to repay extraordinary expenses incurred by bailee**.**
4. **REIMBURMENT OF EXPENSES**
   - **i.** Bailor may incur some expenses in process of returning which shall be reimbursed by the

bailor.

5. **INDEMNIFY THE LOSS FOR PREMATURE TERMINATION SECTION 159**
   - **i.** In case of gratuitous bailment bailor may prematurely terminate the bailment.
   - **ii.** Due to premature termination if bailee incurred loss more than the benefits then bailor shall indemnify bailee.
6. **RECEIVE BACK THE GOODS SECTION 164**
   - **i.** Duty of bailor to receive back the goods when bailee returned them
   - **ii.** If bailor wrongfully refuses to receive back the goods, he shall be liable to pay ordinary expenses incurred by the bailee for keeping goods safe.
7. **BAILOR SHALL INDEMNIFY THE LOSS CAUSED TO BAILEE DUE TO DEFECTIVE TITLE OF GOODS BAILED SECTION 164**

Q NO 16. STATE RIGHTS OF THE BAILOR

ANSWER:

1. Right to claim compensation in case of unauthorized use of goods (Section 154)
2. Right to terminate the contract in case of unauthorized use of goods bailed (Section 153)
3. Right to claim damages arising out of mixing the goods of bailor with his own goods
   - **i.** Goods are mixed at bailor's consent: bailor and bailee has proportionate interest in such mixture (Section 155)
   - **ii.** Goods are mixed without bailors' consent but goods are separable: bailor has right to claim goods, bailee shall pay expenses for separation, bailee shall pay damages if any to the bailor (Section 156)
   - **iii.** Goods are mixed without bailors' consent and goods are not separable: bailor has right to claim compensation from bailee for loss of goods (Section 157)
4. Right to demand return of goods (Section 160)
5. Right to demand accretion of goods (Section 163): In absence of contract to contrary, bailor has right to claim the profit which may have accrued from goods bailed.

RIGHTS OF BAILOR ARE CONSIDERED AS DUTIES OF BAILEE

Q NO 17. STATE DUTIES OF BAILEE

ANSWER:

DUTIES OF BAILEE:

1. Care to be taken by Bailee

   Section151 provides that in all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed.
2. No unauthorized use of goods

3. No right to mix the goods bailed
4. Return of goods bailed after time expired or the purpose is accomplished, Section 165 provides that if several joint owners of goods bail them, the bailee may deliver them back to, or according to the directions of, one joint owner without the consent of all, in the absence of any agreement to the contrary
5. Return accretions to the goods
6. Not to set up an adverse title

Q NO 18. WHEN BAILMENT GETS TERMINATED

ANSWER:

1. Expiry of specific period
2. Achievement of object
3. Inconsistent use of goods
4. Destruction of subject matter
5. Death of bailor or bailee
6. Termination by bailor

Q NO 19. STATE THE RIGHTS AND DUTIES OF FINDER OF LOST GOODS

ANSWER:

RIGHT OF FINDER OF GOODS

1. **RIGHT OF LIEN SECTION 168:** The finder of goods has no right to sue the owner for compensation for trouble and expense voluntarily incurred by him to preserve the goods and to find out the owner; but he may retain the goods against the owner until he receives such compensation; and, where the owner has offered a specific reward for the return of goods lost, the finder may sue for such reward, and may retain the goods until he receives it.
2. **RIGHT TO SUE FOR REWARD:** where the real owner has announced any reward the finder is entitled to receive it
3. **RIGHT OF RESALE SECTION 169:** when a thing which is commonly the subject of sale is lost, if the owner cannot, with reasonable diligence, be found or if he refuses, upon demand, to pay the lawful charges of the finder, the finder may sell it-
   i. when the thing is in danger of perishing by or of losing the greater part of its value; or
   ii. when the lawful charges of the finder, in respect of the thing found, amount to two thirds of its value.
4. **CASE LAW: IN 'MJR STEELS (P) LIMITED VS. CHRISOMAR CORPORATION' –AIR 2007 (NOC) 234 (CAL.)** it was held that it is not always necessary that sale should be by owner himself; sale by agent or anyone with the consent of owner is valid. Finder of asset can also sale and give good title. There can also sale by estoppels.

Q NO 20. BAILORS LIEN

ANSWER:

BAILEE'S LIEN SECTION 170

When the bailee has in accordance with the purpose of the bailment, rendered any service involving the exercise of labor or skill in respect of the goods bailed, he has, in the absence of a contract to the contrary, a right to retain such goods until he receives due remuneration for the service, he has rendered in respect of them.

Examples:

a) A delivers a rough diamond to B, a jeweller, to be cut and polished, which is accordingly done. B is entitled to retain the stone till he is paid for the services he has rendered.

b) A gives, cloth to B, a tailor, to make into a coat. B promises A to deliver the coat as soon as it is finished, and to give a three months' credit for the price. B is not entitled to retain the coat until he is paid.

Q NO 21. WHAT IS MEANT BY PLEDGE OR PAWN? STATE ITS ESSENTIAL FEATURES

ANSWER:

PLEDGE

1. Section 172 of the Act provides that the bailment of goods as security for payment of a debt or performance of a promise is called 'pledge'.
2. **PARTIES**: The pledge constitutes-
   - **i.** 'Pawnor' – The bailor in this case is called as pawnor;
   - **ii.** Pawnee – the bailee in this case is called as pawnee.
3. A pledge is a bailment of moveable property by way of security.
4. The concept of pledge under this Act is dealt with under Sections 172 to 179.
5. **CASE LAW**: In **'MAHARASTRA STATE CO-OPERATIVE BANK LIMITED VS. ASSISTANT PROVIDENT FUND COMMISSIONER' – (2009) 10 SCC 123** it was held that in a pledge the pledge is in possession of and has a special property in the goods which he is entitled to detain to secure repayment. Unlike a mortgage, a pledge does not have the effect of transferring any interest in the property in favour of the pledge. Delivery of goods is necessary to complete a pledge.

Q NO 22. STATE THE RIGHTS OF PAWNOR OR PAWNEE

ANSWER:

RIGHTS OF PAWNOR:

1. Redeem pledged goods
2. Right to receive increase or profits from the goods
3. Right to receive notice of sale

RIGHTS OF PAWNEE

1. The pawnee may retain the goods pledged, not only for the payment of the debt or the performance of the promise, but for the interest of the debt and all necessary expenses incurred by him in respect of the possession or for the preservation of the goods pledged.
2. The pawnee is entitled to receive from the pawnor extraordinary expenses incurred by him for the preservation of the goods pledged.
3. The pawnor makes default in payment of the debt, or performance at the stipulated time of the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawner upon the debt or promise and retain the goods pledged as a collateral security, or he may sell the things pledged, on giving the pawner a reasonable notice of the sale. If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawner is still liable to pay the balance. If the proceeds of the sale are greater than the amounts so due, the pawnee shall pay over the surplus to the pawner.
4. Pledge by person in possession under voidable contract: The pawnee acquires the goods title of goods when it satisfies the following conditions: when pawnee acts in goods faith and he had no notice of pawnors defect in title.

Q NO 23. STATE THE PROVISIONS RELATED TO PLEDGE BY NON-OWNERS

ANSWER:

1. PLEDGE BY MERCANTILE AGENT SECTION 178

Where a mercantile agent is, with the consent of the owner, in possession or goods or the documents of the title of goods, any pledge made by him, when acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were expressly authorized by the owner of the goods to make the same, provided the pawnee acts in good faith and has not at the time of the pledge notice that the pawner has no authority to pledge.

The term 'mercantile agent' is defined under Section 2(2) of Sale of Goods Act as an agent having in the course of ordinary business having authority, either to sell goods or to consign goods for the purposes of sale or to buy goods or to raise money on the security of the money.

2. PLEDGE WHERE PAWNOR HAS LIMITED INTEREST SECTION 179

where a person pledges goods in which he has only a limited interest, the pledge is valid to the extent of that interest.

Q NO 24. MISSLENOEUS PROVISIONS

ANSWER:

1. SUIT AGAINST WRONG DOERS

Section 180 provides that if a third person wrongfully deprives the bailee of the use of possession of the goods bailed, or does them any injury, the bailee is entitled to use such remedies as the owner

might have used in the like case if no bailment had been made; and either the bailer or the bailee may bring a suit against a third person for such deprivation or injury.

2. APPORTIONMENT OF RELIEF

Section 181 provides that whatever is obtained by way of relief or compensation in any such suit shall, as between the bailor and bailee, be dealt with according to their respective interests.

AGENCY

Chapter-X of the Act deals with Agency.

Q NO 25. DEFINE THE TERM AGENCY AND STATE ITS ESSENTIAL ELEMENTS

ANSWER:

AGENT

Section 182 provides that an 'agent' is a person employed to do any act for another or to represent another in dealing with the third person.

PRINCIPAL

The person for whom such act is done, or who is so represented is called the 'principal'.

Provisions regarding to Agent

ESSSENTIAL FEATURES OF AGENCY:

1. In creation of agency consideration is not necessary
2. **CAPACITY TO EMPLOY AN AGENT**

   A person may become an agent-

   - **i.** if he is of the age of majority according to the law to which he is subject;
   - **ii.** he is of sound mind;
   - **iii.** no consideration is necessary for the appointment of agent;
   - **iv.** the authority of an agent may be expressed or implied;
3. **CAPACITY TO ACT AS AN AGENT**
   - **i)** As between principal and third parties any person can become an agent
   - **ii)** Even a person who –
     - **i.** has not attained majority
     - **ii.** is of unsound mind

can become agent of one another. But such persons are not responsible to their principal.

Q NO 26. WHAT ARE THE DIFFERENT MODES OF CREATION OF AGENCY

ANSWER:

1. **AGENCY BY EXPRESS AGREEMENT (SECTION 186):** It may be express or implied. An authority is said to be express, when it is given by words spoken or written.

2. **AGENCY BY IMPLIED AGREEMENT (SECTION 187):** An authority is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written, or the ordinary course of dealing, may be accounted circumstances of the case.

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

Q NO 27. AGENTS' AUTHORITY IN EMERGENCY

ANSWER:

AGENT'S AUTHORITY IN AN EMERGENCY SECTION 189

According to this section, an agent has authority, in an emergency, to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence, in his own case, under similar circumstances.

Examples:

a) An agent for sale may have goods repaired if it be necessary;

b) A consigns provisions to B at Calcutta, with direction to send them immediately to C at Cuttack. B may sell the provisions at Calcutta, if they will not bear the journey to Cuttack without spoiling.

Section 190 provides that when agent cannot delegate his authority. An agent cannot lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform personally, unless by the ordinary custom of a trade a sub-agent may, or from the nature of the agency, a sub-agent must, be employed.

Q NO 28. WHO IS SUBAGENT? IS APPOINTMENT OF SUBAGENT IS VALID? DISCUSS

ANSWER:

SUB AGENT

1. 'Sub-agent' is defined as a person employed by, and acting under the control of, the original agent in the business of the agency.
2. where a sub agent is properly appointed, the principal is, so far as regard third persons, represented by the sub agent, and is bound by and responsible for his acts, as if he were an agent originally appointed by the principal.
3. The agent is responsible to the principal for the acts of the sub agent. The sub agent is responsible for his acts to the agent, but not to the principal except in cases of fraud or willful wrong.
4. The responsibility of the agent for sub agent appointed without authority. Where an agent, without having authority to do so, has appointed a person to act as a sub-agent, the agent stands towards such person in the relation of a principal to an agent, and is responsible for his acts both to the principal and to third persons; the principal is not represented by, or responsible for, the acts of the person so employed, nor is that person responsible to the principal.

5. Where an agent, holding an express or implied authority to name another person to act for the principal in the business of the agency, has named another person accordingly, such person is not a sub-agent but an agent of the principal for such part of the business of the agency as is entrusted to him.

Examples:

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

ii) A authorizes B, a merchant in Calcutta, to recover the money due to A from C & Co., B instructs D, a solicitor, to take legal proceedings against C & Co for the recovery of the money. D is not a sub-agent, but is a solicitor for A.

Q NO 29. AGENTS DUTY

ANSWER:

AGENT'S DUTY

Section 195 provides that in selecting such agent for his principal, an agent is bound to exercise the same amount of discretion as a man of ordinary prudence would exercise in his own case; and if he does this, he is not responsible to the principal for the acts or negligence of the agent so selected.

Example:

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

b) A consigns goods to B, a merchant, for sale. B, in due course, employs an auctioneer in good credit to sell the goods of A and allows the auctioneer to receive the proceeds of the sale. The auctioneer afterwards becomes insolvent without having accounted for the proceeds. B is not responsible to A for the proceeds.

Q NO 30. WHAT IS MEANT BY AGENCY BY RATIFICATION

ANSWER:

RATIFICATION SECTION 196: Ratification means confirming the acts already done

1. The right of person as to acts done for him without his authority. Where acts are done by one person on behalf of another, but without his knowledge or authority, he may elect to ratify or to disown such acts. If he ratifies them, the same effects will follow as if they had been performed by this authority.
2. The ratification may be expressed or implied in the conduct of the person on whose behalf the acts are done.

Examples:

i) A, without the authority, buys goods for B. Afterwards B sells them to C on his own account; B's conduct implies a ratification on the purchase made for him by A; A, without B's authority, lends B's money to C. Afterwards B accepts interest on the money from C.

ii) B's conduct implies a ratification of the loan.

3. No valid ratification can be made by a person whose knowledge of the facts of the case is materially defective.

4. The effect of ratifying any unauthorized act forming part of a transaction. A person ratifying any unauthorized act done on his behalf ratifies the whole of the transaction of which such act formed a part.

5. Ratification of unauthorized act cannot injure third person. An act done by one person on behalf of another, without such other person's authority, would have the effect of subjecting a third person to damages, or of terminating any right or interest which, if done with authority, of a third person, cannot, by ratification, be made to have such effect.

Examples:

i) A, not being authorized thereto by B, demands on behalf of B, the delivery of a chattel, the property of B, from C, who is in possession of it. This demand cannot be ratified by B, so as to make C liable for damages for his refusal to deliver;

ii) A holds a lease from B, terminable on three months' notice. C, an unauthorized person, gives notice of termination to A. The notice cannot be ratified by B, so as to be binding on A.

Q NO 31. TERMINATION OR REVOCATION OF AGENCY

ANSWER:

1. WHEN REVOCATION SHALL BE MADE? SECTION 203

The principal may revoke the authority given to his agent at any time before the authority has been exercised so as to bind the principal

2. COMPENSATION FOR REVOCATION SECTION 205:

The provision of compensation for revocation by principal or renunciation by agent. When there is an express or implied contract that the agency should be continued for any period of time, the principal must make compensation to the agent, or the agent to the principal, as the case may be, for any previous revocation or renunciation of the agency without sufficient cause.

3. NOTICE OF REVOCATION SECTION 206

The principal shall give reasonable notice before revocation or renunciation of the agency. Otherwise, the damage thereby resulting to the principal or the agent, as the case may be must be made good to the one by the other.

4. EXPRESS OR IMPLIED SECTION 207

The revocation and renunciation may be expressed or implied in the conduct of the principal or agent respectively.

Example: A empowers B to let A's house. Afterwards A lets it himself. This is an implied revocation of B's authority.

5. AGENT'S DUTY ON TERMINATION OF AGENCY SCETION 209

When an agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take, on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of interests entrusted to him.

6. TERMINATION OF SUB-AGENT'S AUTHORITY SECTION 210

The termination of the authority of an agent causes the termination of the authority of all sub agents appointed by him.

TERMINATION OF AGENCY SECTION 201

An agency is terminated by the principal-

1. revoking his authority; or
2. by the agent renouncing the business of the agency; or'
3. by the business of the agency being completed; or
4. by either the principal or agent dying or becoming of unsound mind; or
5. by the principal being adjudicated an insolvent under the provisions of any Act for the time being in force for the relief of insolvent debtors.

SECTION 202 provides that where the agent has himself an interest in the property which forms the subject matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest.

Examples:

i) A gives authority to B to sell A's land and to pay himself, out of the proceeds, the debts due to him. A cannot revoke his authority, nor can it be terminated by his insanity or death;

ii) A consigns 1000 bales of cotton to B, who has made advances to him on such cotton, and desires B to sell the cotton and to repay himself out the price, the amount of his own advances. A cannot revoke the authority nor is it terminated by his insanity or death.

SECTION 208 provides as to the time at which the agent's authority is terminated as to agent and as to third persons. The termination of the authority of an agent does not, so for as regards the agent, take effect before it becomes known to him, or, so far as regards third persons, before it becomes known to them.

Example:

i) A directs B to sell goods for him and agrees to give B 5% commission on the price fetched by the goods. A afterwards, by letter, revokes B's authority. B, after the letter is sent, but before he receives it, sells the goods for Rs.100. The sale is binding on A and is entitled to Rs.5 as his commission;

ii) A, at Madras, by letter directs B to sell for him some cotton lying in a warehouse in Bombay and afterwards, by letter, revokes his authority to sell, and directs B to send the cotton to Madras. B,

after receiving the second letter, enters into a contract with C, who knows the first letter, but not of the second, for the sale to him of the cotton. C pays B the money, with which B absconds. C's payment is good as against A.

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

Q NO 32. STATE THE DUTIES AND OBLIGATIONS OF AN AGENT

ANSWER:

DUTIES OF AN AGENT

1. DUTY TO ACT ACCORDING TO DIRECTIONS OR CUSTOMS OF TRADE SECTION 211

An agent is bound to conduct the business of his principal according to the directions given by the principal, or in the absence of any such directions, according to the custom which prevails in doing business of the same kind at the place where the agent conducts such business. When the agent acts otherwise, if any loss be sustained, he must make it good to his principal and if any profit accrues, he must account for it.

Examples:

i) A, an agent engaged in carrying on for B a business, in which it is the customs to invest from time to time, at interest, the moneys which may be in hand, omits to make such investment. A must make good to B the interest usually obtained by such investments;

ii) B, a broker in whose business it is not the custom to sell on credit, sell goods of A on credit to C, whose credit at the time was very high. C, before payment, becomes insolvent. B must make good the loss to A.

2. REQUIREMENTS AS TO SKILL AND DELIGENCE SECTION 212

An agent is bound to conduct the business of the agency with as much skill as is generally possessed by persons engaged in similar business unless the principal has notice of his want of skill. The agent is always bound to act with reasonable diligence, and to use such skill as he possesses; and to make compensation to his principal in respect of the direct consequences of his own neglect, want of skill, or misconduct, but not in respect of loss or damage which are indirectly or remotely caused by such neglect, want of skill or misconduct.

Examples:

i) A, a merchant in Calcutta, has an agent. B in London, to whom a sum of money is paid on A's account, with orders to remit. B retains the money for a consideration time. A, in consequence of not receiving the money, becomes insolvent, B is liable for the money and interest, from the day on which it ought to have been paid, according to the usual rate, and any further direct loss – as e.g., by variation of rate of exchange – but not further;

ii) A, an agent for the sale of goods, having authority to sell on credit, sells to B on credit, without

making the proper and usual enquiries as to the solvency of B. B at the time of such sale is insolvent. A must make compensation to his principal in respect of any loss thereby sustained;

iii) A, an insurance broker employed by B to effect an insurance on a ship, omits to see that the usual clauses are inserted in the policy. The ship is afterwards lost. In consequence of the omission of the clauses nothing can be recovered from the underwriters. A is bound to make good the loss to B.

iv) A, a merchant in England, directs B, his agent at Bombay, who accepts the agency, to send him 100 bales of cotton by a certain ship. B, having it in his power to send the cotton, omits to do so. The ship arrives safely in England. Soon after her arrival the price of cotton rises. B is bound to make good to A the profit which he might have made by the 100 bales of cotton at the time the ship arrived, but not any profit he might have made by the subsequent rise.

3. DUTY TO RENDER ACCOUNTS SECTION 213

An agent is bound to render proper accounts to his principal on demand.

4. DUTY TO COMMUNICATE WITH PRINCIPAL SECTION 214

It is the duty of an agent, in cases of difficulty, to use all reasonable diligence in communicating with his principal and in seeking to obtain his instructions;

5. NOT TO DEAL ON HIS OWN ACCOUNT SECTION 215 & 216

If an agent deals on his own account in the business of the agency, without first obtaining the consent of the principal and acquainting him with all material circumstances which have come to his own knowledge on the subject, the principal may repudiate the transaction, if the case shows, either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him.

Examples:

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

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

Section 216 provides that if an agent, without the knowledge of his principal, deals in the business of the agency on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction.

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

6. **AGENTS DUTY TO PAY SUMS RECEIVED FOR PRINCIPAL (SECTION 218)**
7. **PROTECT INTERESTS OF THE PRINCIPAL (SECTION 209)**

Q NO 33. STATE THE RIGHTS OF AN AGENT AGAINST PRINCIPAL

ANSWER:

AGENT'S RIGHT

1. **RIGHT OF RETENTION SECTION 217**

An agent may, retain, out of any sums received on account of the principal in the business of the agency, all moneys due to himself in respect of advances made or expenses properly incurred by him in conducting such business and also such remuneration as may be payable to him for acting as agent.

2. **RIGHT TO REMUNERATION SECTION 219**

In the absence of any special contract, payment for the performance of any act is not due to the agent until the completion of such act, but an agent may detain moneys received by him on account of goods sold, although the whole of the goods consigned to him for sale may not have been sold, or although the sale may not be actually complete.

3. **RIGHT OF LIEN SECTION 221**

In the absence of any contract to the contrary, an agent is entitled to retain goods, papers and other property, whether movable or immovable, of the principal received by him, until the amount due to himself for commission, disbursements and services in respect of the same has been paid or account for to him.

4. **RIGHT OF INDEMNIFICATION FOR LAWFUL ACTS SECTION 222**

The employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agents in exercise of the authority conferred upon him.

Examples:

i) B, at Singapore, under instructions from A of Calcutta, contracts with C to deliver certain goods to him. A does not send the goods to B, and C sues B for breach of contract. B informs A of the suit and A authorizes him to defend the suit. B defends the suit and is compelled to pay damages and costs and incur expenses. A is liable to B for such damages, costs and expenses.

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

5. **RIGHT OF INDEMNIFICATION AGAINST THE ACTS DONE IN GOOD FAITH SECTION 223**

Where one person employs another to do an act, and the agent does the act in good faith, the employer is liable to indemnify the agent against the consequences of that act, though it causes an injury to the rights of third persons.

Examples:

a) A, a decree-holder and entitled to execution of B's goods, requires the officer of the Court to seize certain goods, representing them to be the goods of B. The Officer seizes the goods, and is sued by C, the true owner of the goods. A is liable to indemnify the officer for the sum which he is compelled to pay to C, in consequence of obeying A's directions;

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

6. RIGHT OF COMPENSATION SECTION 225

The principal must make compensation to his agent in respect of injury caused to such agent by the principal's neglect or want of skill.

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

Q NO 34. MISCELLANEOUS PROVISIONS

ANSWER:

MISCONDUCT OF AGENT

Section 220 provides that an agent, who is guilty of misconduct in the business of the agency, is not entitled to any remuneration in respect of that part of the business which he has been misconducted.

Examples:

i) A employs B to recover Rs.1 lakh from C, and to lay it out on good security. B recovers Rs.1 lakh and lays out Rs.90,000 on good security, but lays out Rs.10,000 on security which he ought to have known to be bad, whereby A loses Rs.2,000. B is entitled to remuneration for recovering Rs.1,00,000 and for investing Rs.90,000. He is not entitled to any remuneration for investing Rs.10,000 and he must make good the Rs.2,000 to A;

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

NON-LIABILITY OF PRINCIPAL TO AGENT

Section 224 provides that where one person employs another to do an act which is criminal, the employer is not liable to the agent, either upon an express or implied promise to indemnify him against the consequences of that act.

Example:

i) A employs B to beat C, and agrees to indemnify him against all consequences of the Act. B thereupon beats C, and has to pay damages to C for so doing. A is not liable to indemnify B for those losses.

ii) B, the proprietor of a newspaper, publishes, at A's request, a libel upon C in the paper, and A

agrees to indemnify B against the consequences of the publication, and all costs and damages of any action in respect thereof. B is sued by C and has to pay damages, and also incurs expenses. A is not liable to B upon the indemnity.

AGENCY WITH THIRD PERSONS

Section 226 provides for the enforcement and consequences of agent's contracts. Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner and will have the same legal consequences, as if the contracts had been entered into, and the acts done by the principal in person.

Examples:

i) A, buys goods from B, knowing that he is an agent for their sale, but not knowing who is the principal. B's principal is the person entitled to claim from A the price of the goods, and A cannot, in a suit by the principal, set off against that claim a debt due to himself from B;

ii) A, being B's agent, with authority to receive money on his behalf, receives from C a sum of money due to B. C is discharged of his obligation to pay the sum in question to B.

Section 227 provides that when an agent does more than he is authorized to do, and when the part of what he does, which is within his authority, can be separated from the part which is beyond his authority, so much only of what he does as is within his authority, is binding as between him and his principal.

Example: A being owner of a ship and cargo, authorizes B to procure an insurance for Rs.4,000 on the ship. B procures a policy for Rs.4,000 on the ship, and another for the like sum on the cargo. A is bound to pay the premium for the policy on the ship, but not the premium for the policy on the cargo.

Section 228 provides that principal is not bound when excess of agent's authority is not separable. Where an agent does more than he is authorized to do, and what he does beyond the scope of his authority cannot be separated from what is within it, the principal is not bound to recognize the transaction.

Example: A authorizes B to buy 500 sheep for him. B buys 500 sheep and 200 lambs for one sum of Rs.6,000.

A may repudiate the whole transaction.

NOTICE TO AGENT

Section 229 provides that any notice given to or information obtained by the agent, provided it be given or obtained in the course of the business transacted by him for the principal, shall, as between the principal and third parties, have the same legal consequences as if it had been given to or obtained by the principal.

Examples:

i) A is employed by B to buy from C certain goods, of which C is the apparent owner, and buys them accordingly. In the course of the treaty for the sale, A learns that the goods really belonged to D, but B is ignorant of that fact. B is not entitled to set off a debt owing to him from C, against the

price of the goods;

ii) A is employed by B to buy from C goods of which C is the apparent owner. A was, before he was so employed, a servant of C, and then learnt that the goods really belonged to D, but B is ignorant of that fact. In spite of the knowledge of his agent, B may set off against the price of the goods a debt owing to him from C.

ENFORCEMENT OF CONTRACT BY AGENT ON BEHALF OF PRINCIPAL

Section 230 provides that in the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal nor is he personally bound by him. Such a contract shall be presumed to exist in the following cases-

1. where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad;
2. where the agent does not disclose the name of his principal;
3. where the principal, though disclosed, cannot be sued.

RIGHT OF PARTIES TO A CONTRACT MADE BY AGENT

Section 231 provides the right of parties to a contract made by agent not disclosed. If an agent makes a contract with person who neither knows, nor has reason to suspect, that he is an agent, his principal may require the performance of the contract; but the other contracting party has, as against the principal the same rights as he would have had as against the agent if the agent had been principal.

If the principal discloses himself before the contract is completed, the other contracting party may refuse to fulfil the contract, if he can show that, if he had known who was the principal in the contract, or if he had known that the agent was not a principal, he would not have entered into the contract.

Section 232 provides that where one man makes a contract with another, neither he knowing, nor having reasonable ground to suspect that the other is an agent, the principal, if he requires the performance of the contract, can only obtain such performance subject to the rights and obligations subsisting between the agent and the other party to the contract.

Example: A, who owes Rs.500 to B, sells Rs.1,000 worth of rice to B. A is acting as agent for C in the transaction, but B has neither knowledge, nor reasonable ground of suspicion that such is the case. C cannot compel B to take the rice without allowing him to set-off A's debt.

Section 233 provides that in cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them liable.

Example: A enters into a contract with B to sell him 100 bales of cotton and afterwards discovers that B was acting as agent for C. A may sue either B or C, or both, for the price of the cotton.

Section 234 provides that when a person who has made a contract with an gent induces the agent to act upon the belief that the principal only will be held liable, or induces the principal to act upon the belief that the agent only will be held liable, he cannot afterward hold liable the agent or principal respectively.

LIABILITY OF A PRETENDED AGENT

Section 235 provides that a person untruly representing himself to be the authorized agent of another, and thereby inducing a third person to deal with him as such agent, is liable, if his alleged employer does not ratify his acts, to make compensation to the other in respect of any loss or damage which he has incurred by so dealing.

Section 236 provides that a person, with whom a contract has been entered into in the character of agent, is not entitled to require the performance of it, if he was in reality acting, not as agent, but on his account.

Section 237 provides that when an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts of obligations, if he has by his words or conduct induced such third persons to believe that such acts and obligations were within the scope of the agent's authority.

Example:

i) A consigns goods for B for sale and gives him instructions not to sell under a fixed price. C, being ignorant of B's instructions, enters into a contract with B to buy the goods at a price lower than the reserved price. A is bound by the contract.

ii) A entrusts B with negotiable instruments in blank. B sells them to C in violation of private orders from A.

The sale is good.

EFFECT OF MISREPRESENTATION OR FRAUD BY AGENT

Section 238 provides that misrepresentation made or frauds committed, by agents acting in the course of their business for their principals, have the same effect on agreements made by such agents as if sum misrepresentations or frauds had been made or committed by the principals; but misrepresentations made, or frauds committed, by agents in matters which do not fall within their authority, do not affect their principles.

Examples:

i) A, being B's agent to the sale of goods, induces C to buy them by a misrepresentation, which he was not authorized by B to make. The contract is voidable, as between B and C, at the option of C.

ii) A, the captain of B's ship, signs bills-of-lading without having received on board the goods mentioned therein. The bills-of-lading are void as between B and pretended consignor.

EXERCISE

⊙ **Multiple Choice Question:**

1. Acceptance to be a valid must

a) Be absolute
b) Be unqualified
c) Both be absolute & unqualified
d) Be conditional

2. A proposal can be accepted

a) By notice of acceptance
b) b) By performance of condition of proposal
c) By acceptance of consideration for a reciprocal promise
d) All of the above

3. Competency to contract relates to

a) Age of parties
b) Soundness of mind of the parties
c) Both age and soundness of mind
d) Intelligence of the parties

4. If only a part of the consideration or object is unlawful, the contract under Section 24 shall be:

a) Valid
b) Voidable
c) Void
d) Illegal

5. When the consent is caused by undue influence, the contract under Section 19A is:

a) Valid
b) Void
c) Voidable
d) Illegal

⊙ **State TRUE or FALSE**

1. A guarantee obtained by misrepresentation or concealment is voidable

2. The surety stands discharged by death

3. Under a contract of guarantee is principal debtor is not liable, guarantor is not liable

4. Silence on the part of the offeree amounts to acceptance

5. An agreement to which the consent of the promise is freely given is not void

6. Creditor is a person to whom the guarantee is given

7. Liability of a surety is conditional on default

⊙ **Fill in the blanks**

1. Agreements enforceable by law are called_____

2. Agreements without consideration are_____

3. Agreements in restraint of marriage is_____.

4. Section 2 (d) defines_____.

5. Section 5 provides that a proposal may be revoked at any time_____the communication of acceptance.

6. Agreements of wagers are_____.

7. When the person to whom the_____is made signifies his assent thereto, proposal is said to have been accepted.

8. Proposal is other called as_____

9. The person delivering the goods for bailment is called the_____

10. No consideration is necessary to create_____.

☉ **Short Essay Type Questions**

1. What are the requirements for a valid contract?

2. When an offer may be lapsed?

3. Write short notes on-

(a) e-contracts;

(b) Quasi Contracts;

(c) Contingent contracts.

☉ **Essay Type Questions**

1. Discuss the consequences of the absence of consent and free consent.

2. Explain the conditions of enforceability of the standard form of contracts.

3. What is the difference between an agent and an employee?

4. What are the essential elements of a contract?

5. Distinguish between illegal and void contracts.

6. Minor's agreement is void. Explain with exceptions.

7. Discuss the concept of impossibility of performance of contracts.

8. Can a contract be made without consideration? Discuss.

☉ **Unsolved Cases**

1. A intending to deceive B falsely represents that 500 maunds of indigo were made annually at A's factory and thereby induces B buy the factory. Is the contract valid?

2. On B's request A lent gratuitously his scooter to B for his use for one week. After two days A urgently needs his scooter and requires its return from B. B refuses to return the goods unless he is indemnified for his damages, which he would suffer owing to the premature delivery. Is A liable?

ANSWER:

Multiple Choice Question:

1. c; 2. d; 3. c; 4. c; 5. c.

State whether TRUE or FALSE

1. False; 2. False; 3. True; 4. False; 5. True; 6. True; 7. True.

Fill in the blanks

1. Contracts; 2. Void; 3. Void; 4. Consideration; 5. Before; 6. Void; 7. Offer/proposal; 8. Offer; 9. Bailor; 10. Agency.

3. SALE OF GOODS ACT, 1930

3.1. ESSENTIAL CONDITIONS OF A CONTRACT OF SALE

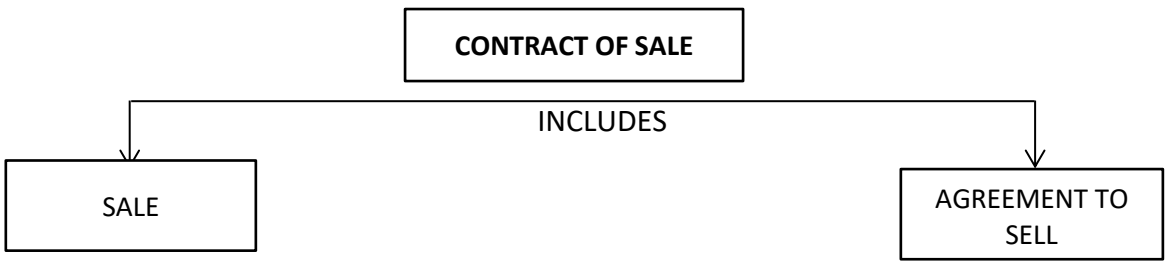
Q NO 1. INTRODUCTION TO THE SALE OF GOODS ACT 1930

ANSWER:

1. The Sale of Goods Act was separated and came into force on 1st July 1930.
2. Previously Indian Contract Act, 1872 was applicable for Sale of Goods.
3. With effect from 22nd September, 1963, the word 'Indian' was omitted with the assent of The Parliament and now the present Act is called 'The Sale of Goods Act, 1930'.
4. The Sale of Goods Act is only applicable to Sale of Movable goods.
5. Sale of Immovable Goods is covered under Transfer of Property Act.
6. According to section 3. "The provisions of the Indian Contract Act, 1872 still continue to apply to contacts for the sale of goods except where 'The sale of Goods Act, 1930' provides for the contrary".
7. **SCOPE OF THE ACT**
   - **i)** The Sale of Goods Act deals with 'sale' but not with 'mortgage' (which is dealt with under the Transfer of Property Act, 1882) or 'pledge' (which is dealt with under Indian Contract Act, 1872).
   - **ii)** This Act deals with 'Sale of movable goods' but not with other movable property, e.g. actionable claims & money
   - **iii)** This Act creates a right called "Jus in Rem" which means 'Right against the Goods'.

Q NO 2. WHAT IS THE MEANING OF CONTRACT OF SALE. STATE DIFFERENCES BETWEEN SALE AND AGREEMENT TO SELL

ANSWER:



1. According to section 4(1) of the Sale of Goods Act, 1930, "contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price."

2. 'Contract of Sale' is a generic term which includes both a 'Sale' as well as an 'Agreement to Sell'.

   i) SALE: According to Section 4(3) of the Sale of Goods Act, "Where under a contract of sale, the property in the goods is transferred from the seller to the buyer; the contract is called a sale. "In this case, the ownership of the goods is immediately transferred from a seller to a buyer and the buyer becomes the owner of the goods.

   ii) AGREEMENT TO SELL: An 'agreement to sell' is defined in Section 4(3) of the Sale of Goods Act as "Where under a contact of sale, the transfer of property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell." In this case, the ownership of goods is not immediately transferred from a seller to a buyer but it is agreed upon to transfer it on a future date.

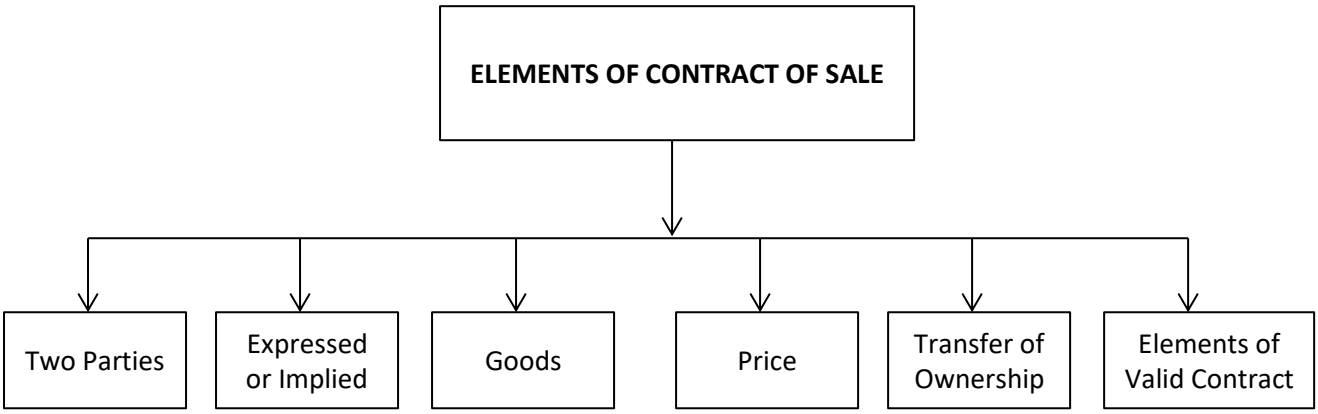
DIFFERENCE BETWEEN CONTACT OF SALE AND AGREEMENT TO SELL

BASIS	CONTRACT OF SALE	AGREEMENT TO SELL
Transfer of property	The property of the goods passes from the buyer to the seller.	The transfer of property takes place at a future time or subject to certain conditions to be fulfilled.
Type of contract	It is an executed contract.	It is an executory contract.
Type of goods	Sales takes place only for existing and specific goods.	Future and contingent goods.
Risk of loss	If the goods are destroyed, the loss falls on the buyer despite the goods are in the possession of the seller.	If the goods are destroyed, the loss falls on the seller despite the goods are in the possession of the buyer.
Breach of contract	The seller can sue the buyer for price and for damages in case of breach by the buyer.	The seller can sue for damages only in case of breach by the buyer.
General and particular property	It gives buyer to enjoy the goods as against the world at large including the seller.	It gives a right to the buyer against the seller to sue for damages.
Insolvency of the buyer	In the absence of lien over the goods the seller is to return the goods to the Official receiver or assignee. He is entitled to get the dividend declared by the Official receiver which will be at the reduced rate.	The seller is not bound to part with the goods until the price is paid to him.
Insolvency of the seller	The buyer, becoming the owner, is entitled to recover the same from the Official receiver or assignee.	The buyer cannot claim the goods but the dividend declared by the Official receiver or assignee.

Example: Mr. A entered into a contract to sell his car to Mr. B. The contract was set for discharge on a specific date and for a certain specified amount. However, if the certain amount was not given on the specified date, the sale would not take place

Q NO 3. WHAT ARE THE ESSENTIAL ELEMENTS OF CONTRACT OF SALE

ANSWER:



The aforesaid definition clearly indicates the following essential elements.

1. There must be at least two parties i.e. Seller and Buyer
2. There must be an agreement which may be express or implied.
3. The subject matter must be goods.
4. The above goods must be transferred for a price.
5. The agreement must be for transfer of property.
6. The parties of the contract of sale have to satisfy even the section 10 essential elements of valid contract

Q NO 4. IMPORTANT DEFINITIONS

ANSWER:

1. **TWO PARTIES:** There must be at least two parties i.e., seller and the buyer
   - **i) SELLER:** Seller' means a person who sells or agrees to sell goods **[Section 2(13)]**
   - **ii) BUYER:** 'Buyer' means a person who buys or agrees to buy goods **[Section 2(1)]**

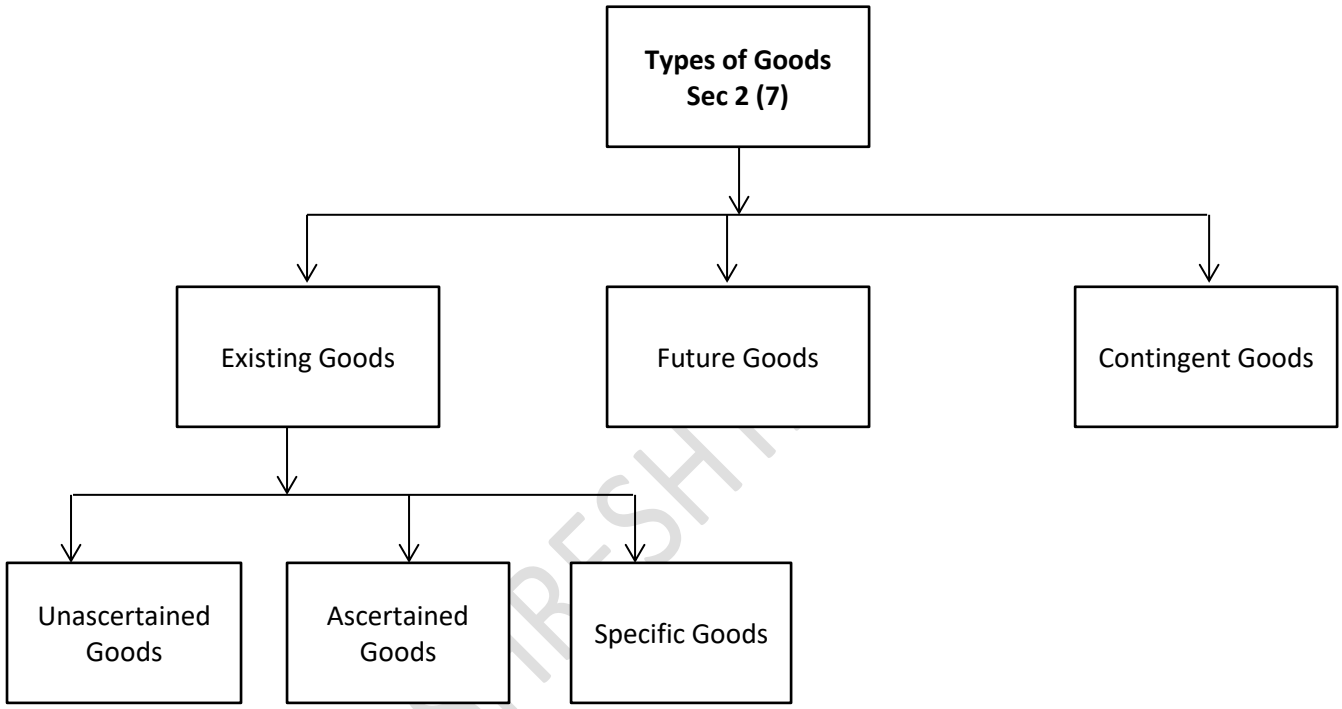
   A person cannot be a seller as well as a buyer as a person cannot buy his own goods. That is why distribution of goods among partners on account of dissolution of a film does not amount to a sale of goods because the partners are joint owner and they cannot be both sellers and buyers
2. **GOODS:** There must be some goods. 'Goods' means every kind of movable property other than actionable claims and money and includes stock, 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

i) It may be noted that the contract relating to actionable claims, immovable property and services are not covered by this Act.

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

iii) 'money' here means the legal tender money (i.e. currency of the country) and not old coins or the foreign currency which is not in circulation in India.

3. TYPES OF GOODS:



The goods which form the subject of a contract of sale may be classified into following categories

I. **EXISTING GOODS:** Existing Goods mean the goods which are either owned or possessed by the seller at the time of contract of sale. The existing goods may be specified or ascertained or unascertained as follows:

- **i. SPECIFIC GOODS [SECTION 2(14)]:** These are the goods which are identified and agreed upon at the time when a contract of sale is made – For example, a specified TV, VCR, Car, Ring etc.
- **ii. ASCERTAINED GOODS:** Goods are said to be ascertained when out of a mass of unascertained goods, the quantity extracted for is identified and set aside for a given contract. Thus, when part of the goods lying in bulk are identified and earmarked for sale, such goods are termed as ascertained goods.
- **iii. UNASCERTAINED GOODS:** These are the goods which are not identified and agreed upon at the time when a contract of sale is made. Or whole quantity of goods without any specification. Example: Goods in stock or lying in lots or bulk quantity.

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

Example: X agrees to sell to Y all the crops to be grown at his farm in Haryana during the year 2021 seasons for a sum of Rs. 1, 00,000. This is an agreement to sell of future goods and not sale.

III. **CONTINGENT GOODS [SECTION 6(2)]:** These are the goods the acquisition of which by the seller depends upon a contingency which may or may not happen.

Example: X agrees to sell to Y 100 bottle of wine which are importing from Australia if a certain ship comes to the port. It is a contingent goods as the existing of goods depends on arrival of ship. There can be agreement to sell only**.**

4. **PRICE:** There must be a price. Price here means the monetary consideration for a sale of goods
   I. When the consideration is only goods, it amounts to a 'barter' and not sale. When there is no consideration, it amounts to 'gift' and not sale.
   II. However, the consideration may be party in money and party in goods because the law does not prohibit as such.

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

6. **ELEMENTS OF VALID CONTRACT:** It is the responsibility of the parties to satisfy even the essential elements of valid Contract along with the above Elements.

7. **MERCANTILE AGENT**: An agent appointed by Seller or Buyer to either sell or buy the goods on their behalf is a Mercantile Agent of Seller or Buyer respectively.

Ex: Broker, Factor, Auctioneer etc.

8. **DOCUMENT OF TITLE**: It is a document which gives the right to transfer the ownership to the third party.

Example:

i) Bill of Lading,

ii) Railway Receipt,

iii) Airway Bill,

iv) Dock Warrant,

v) Multimodal Transport Document,

vi) Wharfinger's Certificate

vii) Warehouse Keeper's Certificate etc.

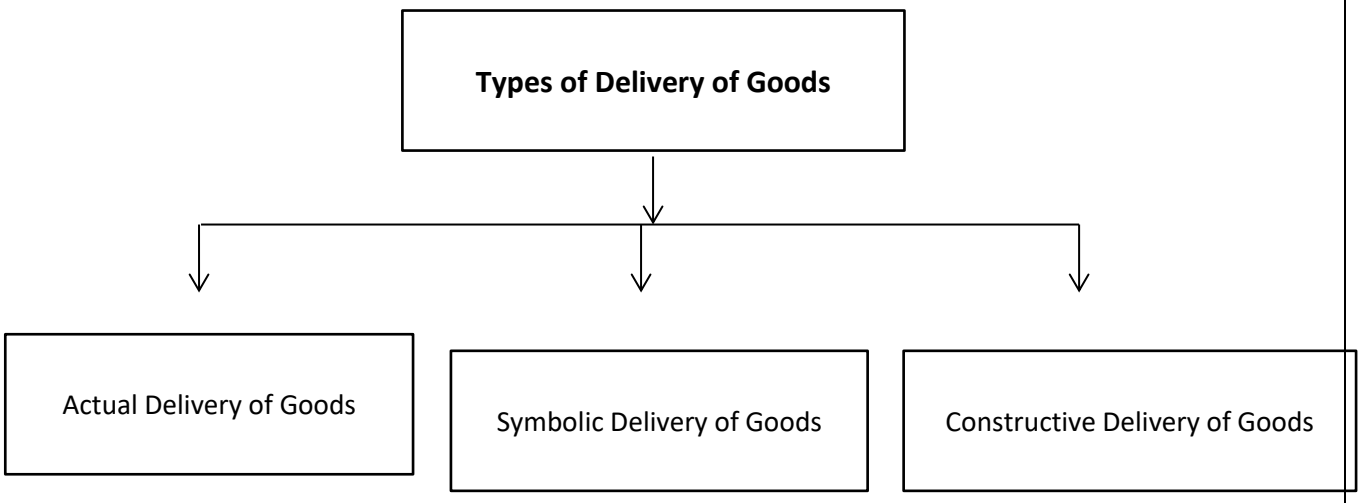
9. **DOCUMENT SHOWING TITLE**: It is a document which does not give the right to transfer the ownership but it depicts the information as to who is the owner of the goods mentioned in the document. Example: Share Certificate.

10. **SUBJECT MATTER OF CONTRACT OF SALE – [SECTION 6]:**

The subject matter of contract of sale is Goods. Such goods may be either existing goods or future goods. In case of existing goods, the contract of sale will be treated as sale where as in case of future goods the contract of sale will be treated as an agreement to sell.

11. **DELIVERY [SECTION 2(2):** Delivery means the voluntary transfer of possession from one person to another.

THREE TYPES OF DELIVERY: The delivery of goods may be of the following three types:



i) **ACTUAL DELIVERY:** Delivery is said to be actual where the goods are physically handed over to the buyer or his authorized agent. Example: X sells to Y 100 bags of wheat lying in Z's warehouse. X ordered Z to deliver the wheat to Y. Z delivers to Y. In this case there is Actual delivery of goods.

ii) **SYMBOLIC DELIVERY:** Delivery is said to be symbolic where some symbol or means of taking delivery of goods is handed over to buyer. Example: X sells to Y 100 bags of wheat lying in Z's warehouse and hands over the key of Z's warehouse to Y. In this case, there is symbolic delivery of goods.

iii) **CONSTRUCTIVE DELIVERY:** Delivery is said to be constructive where a person who is in possession of goods, acknowledges to hold goods on behalf of the buyer, it is also known as 'Delivery by Attornment'. **Example:** X sells to Y 100 bags of wheat lying in Z's warehouse. X ordered Z to deliver the wheat to Y. Z agrees to hold the 100 bags of wheat on behalf of Y and makes the necessary entry in his books. In this case, there is constructive delivery of goods.

Q NO 5. WHAT ARE THE FORMALITIES OF A CONTRACT OF SALE [SECTION 5]

ANSWER:

A Contract of sale may be made by Offer to buy or sell by one person and acceptance of sale by another person.

1. There is no any particular form to create Contract of Sale.
2. The contract of sale may be in form of;
   - **i)** In writing,
   - **ii)** By words of mouth,
   - **iii)** Partly in writing and partly by words of mouth,
   - **iv)** May be implied by the conduct of parties.
3. However, if any particular form of contract is prescribed in any other Law, then contract must be entered in that particular form.
4. The contract may be done in any of the following Modes:
   - **i)** Immediate delivery and immediate payment of price
   - **ii)** Immediate delivery and payment in future
   - **iii)** Immediate payment of price and delivery in future
   - **iv)** Delivery at future and payment also at future
   - **v)** Delivery in instalment and payment also in instalment

Q NO 6. WHAT IS THE EFFECT OF DESTRUCTION OF THE SPECIFIC GOODS

ANSWER:

EFFECT OF DESTRUCTION OF GOODS:

1. **IN CASE OF CONTRACT OF SALE [SECTION 7]:** Goods not existing (already destroyed) at the time of contract. Contract of sale becomes void (Impossibility of performance + Bilateral mistake)

2. **IN CASE OF AN 'AGREEMENT TO SELL' [SECTION 8]:** Goods perishable after agreement to sell but before sale is completed. Contract of sale becomes void
3. **NOTE:**
   - **i)** If goods are destroyed due to fault of one party, then other party can claim damages.
   - **ii)** Section 7 & 8 apply to only specific goods
   - **iii)** For unascertained goods- contract is not void even if entire stock is destroyed.

Q NO 7. ASCERTAINMENT OF PRICE

ANSWER:

PRICE – SECTION 2(10): Price means the money consideration for a sale of goods.

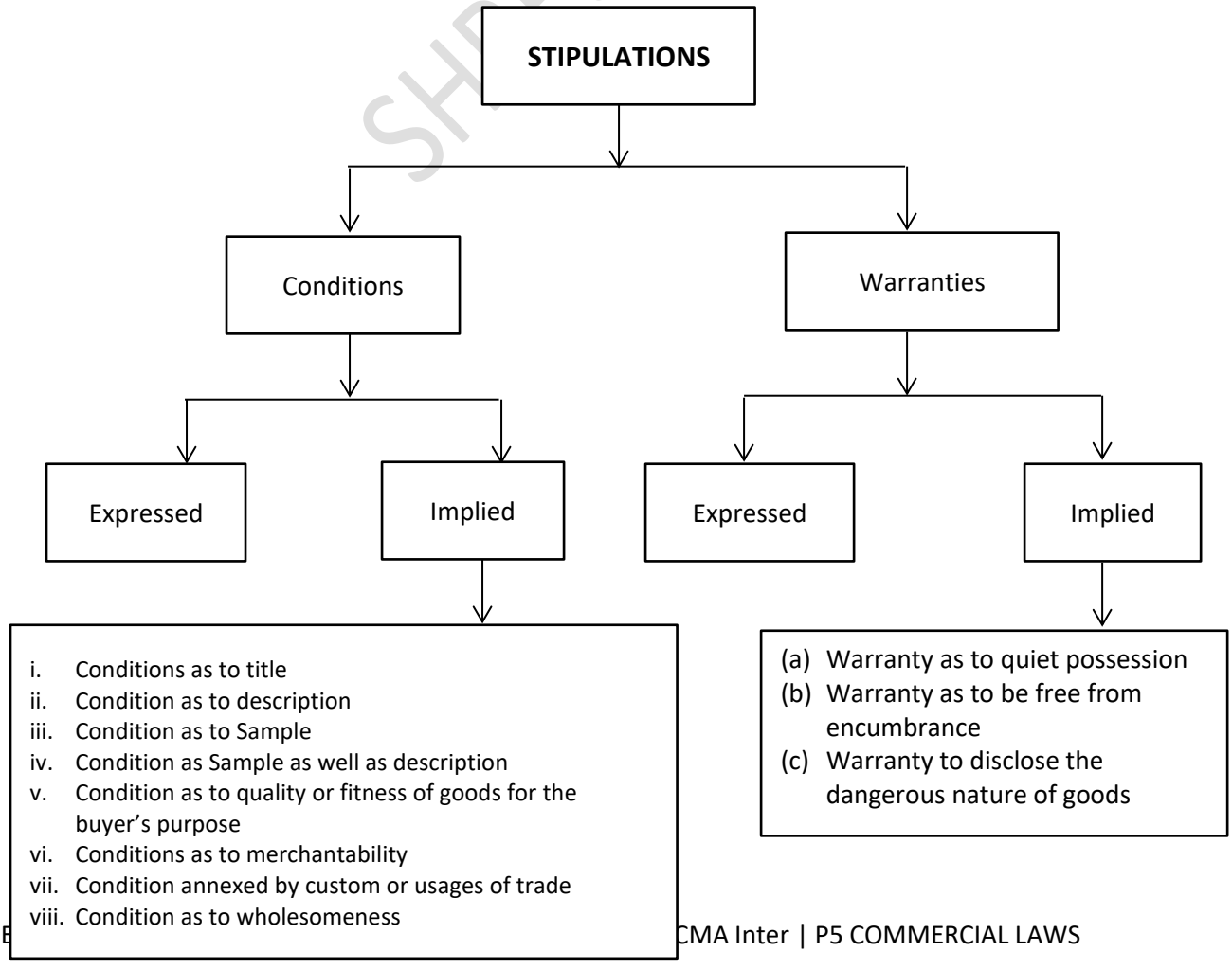
The three modes of ascertaining the price are as under – Sec 9 & 10:

1. By parties
2. By manner provided in the contract
3. As per customs & usages of trade

NOTE: If parties couldn't apply the manner provided in the contract i.e by valuation then reasonable price shall be paid (if none of the above principles are applicable)

If third party fails to fix the price – contract becomes void

STIPULATION, CONDITION AND WARRANTY:



Q NO 8. WHAT IS STIPULATION IN CONTRACT OF SALE.

ANSWER:

It is usual for both seller and buyer to make representations to each other at the time of entering into a contract of sale. Some of these representations are mere opinions which do not form a part of contract of sale. Whereas some of them may become a part of contract of sale.

i) **STIPULATION:** Representations or terms which become a part of contract of sale are termed as stipulations which may either a condition or a warranty.

ii) **CONDITION – SECTION 12(2):** A condition is a stipulation –
   - **i.** Which is essential or primary to the main purpose of the contract, and
   - **ii.** The breach of which gives the aggrieved party a right to terminate the contract and claim damages

iii) **WARRANTY – SECTION 12(3):** A warranty is a stipulation –
   - **i.** Which is collateral, secondary or not essential to the main purpose of the contract, and
   - **ii.** the breach of which gives the aggrieved party a right to claim damages only but not a right to reject goods and to terminate the contract.

Q NO 9. WHEN CONDITION TO BE TREATED AS WARRANTY [SECTION 13]

ANSWER:

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

i) Voluntary waiver of condition by buyer.

ii) Where the buyer elects to treat breach of the condition as a breach of warranty;

iii) Where the contract is not severable and the buyer has accepted the goods or part thereof

iv) If there exist any impossibility of performance, seller is excused by law.

Q NO 10. IMPLIED CONDITIONS

ANSWER:

1. **CONDITION AS TO TITLE [SECTION 14(A)]:** If sellers title is defective, buyer must return goods to the true owner and recover price paid to the seller
2. **SALE BY DESCRIPTION [SECTION 15]:** Where there is a contract of sale of goods by description, there is an implied condition that the goods shall correspond with description.
3. **SALE BY SAMPLE [SECTION 17]:** A contract of sale is a contract for sale by sample when there is a term in the contract, express or implied, to that effect. The 'Sale by Sample' is subject to the following conditions:
   - **i)** The goods must correspond with the sample in quality.
   - **ii)** The buyer must have a reasonable opportunity of comparing the bulk with the sample.

i. The goods must be free from any defect which renders them un-merchantable and which would not be apparent on reasonable examination of the sample.

ii. Such defects are called 'Latent Defects' and are discovered when the goods are put to use. It may be noted that the seller cannot be held liable for apparent or visible defects which could be easily discovered by an ordinary prudent person.

4. **CONDITION AS SAMPLE AS WELL AS BY DESCRIPTION [SECTION 15]:** If the same is by sample as well as by description, the goods must correspond with the sample as well as the description.
5. **CONDITION AS TO QUALITY OR FITNESS [SECTION 16(1)]:** There is no implied condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale. Condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

EXCEPTION TO THIS RULE:

There is an implied condition that the goods shall be reasonably fit for a particular purpose described If the following three conditions are satisfied:

i) The particular purpose for which goods are required must have been disclosed (expressly or impliedly) by the buyer to the seller.

ii) **Note**: This condition need not be fulfilled if the goods can be used only for particular purpose.

iii) The buyer must have relied upon the skill and judgment of the seller.

iv) The seller's business must be to sell such goods (regular seller not a casual seller.)

6. **CONDITION AS TO MERCHANTABLE QUALITY [SECTION 16(2):** The expression 'merchantable quality' means that the quality and condition of the goods must be such that a man of ordinary prudence would

I. Accepts them as the goods of that description. Goods must be free from any latent or hidden defects.

II. Capable of using them or for resale with the same description.

Example: X bought cement from a dealer. During transit due to rain cement became stone and lost merchantable quality.

7. **CONDITION AS TO WHOLESOMENESS:** In case of eatables or provisions or foodstuffs, there is an implied condition as to wholesomeness. Condition as to wholesomeness means that the goods shall be fit for human consumption.

Q NO 11. IMPLIED WARRANTIES

ANSWER:

1. **WARRANTY AS TO QUIET POSSESSION [SECTION 14(B)]:** There is an implied warranty that the buyer shall have and enjoy quiet possession of the goods. The breach of this warranty gives buyer a right to claim damages from the seller.

Example: X sold a second-hand Radio to Y who spent Rs.100 on the repairs of this radio. This radio was seized by the police as it was a stolen one. Y filed a suit against X for the recovered damages for

breach of warranty of quite possession including the cost of repairs. It was held that Y was entitled to recover the same.

2. **WARRANTY OF FREEDOM FROM ENCUMBRANCES [SECTION 14(C)]:** There is an implied warranty that the goods are free from any charge or encumbrance in favour of any third person if the buyer is not aware of such charge or encumbrance. The breach of this warranty gives buyer a right to claim damages from the seller.

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

3. **WARRANTY AS TO QUALITY OR FITNESS FOR A PARTICULAR PURPOSE:** Condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.
4. **WARRANTY TO DISCLOSE DANGEROUS NATURE OF GOODS:** In case of goods of dangerous nature, the seller must disclose or warn the buyer of the probable danger. If the seller fails to do so, the buyer may make him liable for breach of implied warranty:

Q NO 12. DOCTRINE OF CAVEAT EMPTOR:

ANSWER:

MEANING:

The expression 'Caveat Emptor' means **'**Let the Buyer Beware'. The doctrine of caveat emptor has been given in the first para of Section 16 which reads as under: "Subject to the provisions of this Act and any other law for the time being in force, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale".

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

EXCEPTIONS:

1. **IN CASE OF MISREPRESENTATION BY THE SELLER:** Where the seller makes a misrepresentation and the buyer relies on that representation.
2. **IN CASE OF CONCEALMENT OF LATENT DEFECT:** Where the seller knowingly conceals a defect, which would not be discovered on a reasonable examination.
3. **IN CASE OF SALE BY DESCRIPTION [SECTION 15]:** Where the goods are sold by description and the goods supplied by the seller do not correspond to the description.
4. **IN CASE OF SALE BY SAMPLE [SECTION 17]:** Where the goods are sold by sample and the goods supplied by the seller do not correspond with the sample.
5. **IN CASE OF SALE BY SAMPLE AS WELL AS DESCRIPTION [SECTION 15]:** Where the goods are sold by sample as well as description and the goods supplied by the seller do not correspond with sample as well as description.

dealer of the type of goods sold by him and the buyer has disclosed the purpose for which goods are required and relied upon the seller's skill and judgment.

7. **MERCHANTABLE QUALITY [SECTION 16(2):** Where the goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or producer or not), there is an implied condition that goods shall be of merchantable quality.

3.2. TRANSFER OF OWNERSHIP

The Sections 18 to 26 of the Sale of Goods Act, determine when the property passes from the seller to the buyer and other provisions relating to transfer of ownership.

Q NO 1. STATE THE RULES FOR TRANSFER OF PROPERTY

ANSWER:

RULES FOR ASCERTAINING PASSING OF PROPERTY

1. **GOODS MUST BE ASCERTAINED [SECTION 18]:** As per section 18 in a contract for sale of unascertained goods, the property in the goods does not pass to the buyer unless and until the goods are ascertained.

2. **INTENTION OF THE PARTIES FOR SUCH TRANSFER [SECTION 19]:** As per section 19(1), in a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. Section 19(2) provides that the intention of the parties is ascertained from the terms of the contract, the conduct of the parties and the circumstances of the case.

When intention of the parties cannot be ascertained, rules contained in Sections 20 to 24 are required to be applied for ascertaining the time of transfer of property and the same are discussed hereunder:

I.SPECIFIC GOODS [SECTIONS 20 TO 22]

I. SPECIFIC GOODS IN A DELIVERABLE STATE [SECTION 20]

In an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment of the price or the time of delivery of the goods, or both, is postponed. Goods are said to be in deliverable state when they are in such a state that the buyer would under the contract is bound to take delivery thereof.

II. SPECIFIC GOODS TO BE PUT INTO A DELIVERABLE STATE [SECTION 21]

Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing is done and the buyer has notice thereof.

III. SPECIFIC GOODS IN A DELIVERABLE STATE, WHEN THE SELLER HAS TO DO ANYTHING THERETO IN ORDER TO ASCERTAIN PRICE [SECTION 22]

If there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing is done and the buyer has notice thereof.

II. UNASCERTAINED GOODS [SECTION 23]

i. Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.

ii. **DELIVERY TO CARRIER:** Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods for the purpose of the contract.

III. GOODS ON APPROVAL OR 'ON SALE OR RETURN' [SECTION 24]

In order to push up the sales generally there is a practice of sending goods to the customer with the clear-cut understanding that he has option to approve or return the goods within a given period. This type of sales is known as "approval or sale or return". In such cases, the transaction does not culminate into sale until the goods are approved by the customer and the property in goods still remains with the seller.

When goods are delivered to the buyer on approval or on sale or return or other similar terms, the property therein passes to the buyer:

i. When he signifies his approval or acceptance to the seller

ii. When he does any other act adopting the transaction.

iii. If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time.

IV. RESERVATION OF RIGHT OF DISPOSAL [SECTION 25]

Section 25(1) – Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to a buyer, or to a carrier or other bailee for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

Section 25(2) – Where goods are shipped or delivered to a railway administration for carriage by railway and by the bill of landing or railway receipt, as the case may be, the goods are deliverable to the order of the seller or his agent, the seller is prima facie deemed to reserve the right of disposal.

Section 25(3) – Where the seller of goods draws on the buyer for the price and transmits to the buyer the bill of exchange together with the bill of lading or, as the case may be, the railway receipt, to secure acceptance to payment of the bill of exchange, the buyer is bound to return the bill of lading or the railway receipt if he does not honour the bill of exchange, and, if he wrongfully retains the bill of lading or the railway receipt, the property in the goods does not pass to him.

Example: Magic Co. Ltd., based in England, shipped 50 tons of wool to Mr. Norton, based in Spain. Mr. Norton was supposed to claim the shipment through the bill of lading he received from Magic Co. Ltd. However, when the shipment arrived, Mr. Norton was not present in person at the dock. The wharfinger therefore took the shipment to his cloak room for safekeeping. Thereupon upon producing the bill of lading, the wharfinger will then deliver the same goods to the buyer.

Q NO 2. RISK PASSES WITH PROPERTY. COMMENT

ANSWER:

RISK PRIMA FACIE PASSES WITH PROPERTY: EXCEPTIONS

The rule regarding risk passes with the property enshrined in section 26 is subject to the following exceptions:

1. It is permissible for the parties to provide in the agreement that although the property does not pass, the risk passes and they may fix the point of time when it is to pass.
2. Where delivery has been delayed through the fault of either party the buyer or the seller, the goods are at the risk of the party at fault as regards any loss which might not have been occurred but for such fault. The goods are at the risk of the party who is at fault in delay of delivery.
3. If there is a custom in that particular trade that the risk does not pass with property, in such a case the risk will pass as per the custom.
4. Risk and property may be separated by agreement between the parties. Section 40 of the Act also provides that where the seller agrees to deliver the goods at his own risk at a distant place from where they are, the buyer shall unless otherwise agreed, not take any risk of deterioration in the goods incidental to the transit. This will be discussed subsequently in the paragraph dealing with delivery of goods.

Q NO 3. NEMO DAT QUOD NON HABET. COMMENT OR SALE BY NON-OWNERS

ANSWER:

TRANSFER OF TITLE BY NON-OWNERS OF GOODS

As per section 27 of the Sale of Goods Act, where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by conduct precluded from denying the seller's authority to sell.

A buyer cannot get good title to the goods unless he purchased the goods from a person who is the owner thereof and sell them under the authority or with the consent of real owner.

"Nemo dat quod non habet" means that no one can give what he himself does not have. It means a non-owner cannot make valid transfer of property in goods. If the title of the seller is defective, the buyer's title will also be subject to same defect. If the seller has no title, the buyer does not acquire any title although he might have acted honestly and might have acquired the goods after due

payment. This rule is to protect the real owner of the goods. Though this doctrine seeks to protect the interest of real owners, but in the interest of the trade and commerce, there must be some safeguard available to a person who acquired such goods in good faith for value.

Accordingly, the Act provides the following exceptions to this doctrine which seek to protect the interest of bona fide buyers:

1. **SALE BY A MERCANTILE AGENT:** If a mercantile agent is authorized by the owner of the goods to sell on his behalf, then such sale shall be valid. In such cases, the buyer can acquire a good title of the goods. This exception will be implemented subject to fulfilment of the following conditions: -
   - **i)** The person must be in possession of goods or documents of title to the goods in his capacity as a mercantile agent and with the consent of his owner
   - **ii)** The person must sell the goods while acting in the ordinary course of business.
   - **iii)** The buyer must act in good faith without having any notice, at the time of contract that the mercantile agent has no authority to sell the goods.
2. **TRANSFER OF TITLE BY ESTOPPELS:** This exception is based on the principle of personal estoppels. Sometime, the real owner may lead the buyers by virtue of his conduct or words or by act to believe that the seller is the owner of the goods or has the authority to sell them. In such case, he may not thereafter deny the seller's authority to sell.
3. **SALE BY A JOINT OWNER:** As per Section 28, it there are several joint owners of goods, one of them if has sole possession of the goods by permission of the co-owners, then the property in goods is transferred to any person who buys them from such joint owner. In order to apply this exception, following conditions must be fulfilled:
   - **i)** One of the several owners must be in sole possession of the goods.
   - **ii)** The joint owner must have permission of co-owners.
   - **iii)** The buyer must purchase goods in good faith.
   - **iv)** The buyer should not have notice regarding the matter that the seller has no authority to sell.
4. **SALE BY PERSON IN POSSESSION UNDER VOIDABLE CONTRACT:** According to the Section 29 a person in possession of goods under a voidable contract which is not rescinded, can transfer a good title to the buyer. The buyer should purchase the goods in good faith and without notice of the seller's defective title.
5. **SALE BY SELLER IN POSSESSION AFTER SALE:** Under Section 30(1) it is laid down that where a person has sold goods but he continues in possession of goods or of the documents of title to the goods, he may sell them to a third person and if such person obtains delivery thereof in good faith and without notice of the previous sale, the person can get a good title to them. In order to apply this exception, the seller must be in possession after sale of goods and there must be delivery or transfer of the goods or documents of title by the seller.
6. **SALE BY BUYER IN POSSESSION AFTER SALE:** Under Section 30(2), it is laid down that where a buyer having bought or having agreed to buy goods, obtain with the consent of the seller the

transfer. If at the time of this sale, buyer was not in possession, then this exception will not apply.

7. **SALE BY AN UNPAID SELLER:** If the unpaid seller has exercised right of lien or stoppage in transit, resells the goods, then the buyer acquires a good title as against the original buyer, even though the resale is not justified in the circumstances
8. **EXCEPTION UNDER OTHER ACTS:** According to some Acts, a person although he is not the owner of the goods may sell the goods and pass a better title than he himself has. As for example-
   - **i)** Under Section 169 of the Indian Contract Act, a finder of the goods has the right to sell.
   - **ii)** Under Section 176 of the Indian Contract Act, a pawnee of goods has the right to sell the goods pawned subject to satisfying some conditions.
   - **iii)** In certain cases, a special right of sale is given to officers of court, liquidators of the companies, receivers of insolvents estate, custom officers for dues and duties remaining unpaid etc.
   - **iv)** A person who takes a negotiable instrument in good faith and for value becomes the true owner even if he takes it from a thief or finder.

3.3. PERFORMANCE OF CONTRACT OF SALE

Q NO 1. STATE THE RULES RELATED TO THE DELIVERY OF THE GOODS

ANSWER:

Chapter IV of the Act describes the procedure for performance of the contract of sales. Section 31 provides that it is the duty of the seller to deliver the goods and the buyer to accept and pay for them, in accordance with the terms of the contract.

RULES REGARDING DELIVERY OF THE GOODS:

1. **DELIVERY OF THE GOODS AND PAYMENT OF THE PRICE ARE CONCURRENT CONDITIONS UNLESS OTHERWISE AGREED SECTION 32**: The seller shall be ready and willing to give the possession of the goods to the buyer in exchange for the price. The buyer shall be ready and willing to pay the price in exchange for the possession of the goods.
2. **MODE OF DELIVERY SECTION 33:** The delivery of goods sold may be made-
   I. by doing anything which the parties agree; or
   II. which has the effect of putting the goods in the possession of the buyer or of any person authorized to hold them on his behalf;
3. **EFFECT OF PART DELIVERY SECTION 34:** A delivery of part of goods, in progress of the delivery of the whole, has the same effect as a delivery of the whole for the purpose of passing the property in such goods. If a delivery of part of the goods is done with an intention of severing it from the whole, then it does not operate as a delivery of the reminder.
4. **BUYER TO APPLY FOR DELIVERY SECTION 35:** The seller is not bound to deliver them until the buyer applies for the delivery apart from any express contract.
5. **TIME AND PLACE OF DELIVERY SECTION 36:** Rules for the delivery as detailed below:
   I. Apart from any contract, goods sold are to be delivered at the place at which they are at the time of the sale; and
   II. Goods agreed to be sold are to be delivered at the place at which they are at the time of the agreement to sell; or
   III. if not then in existence, at the place at which they are manufactured or produced;
   IV. Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time;
   V. Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless until such third person acknowledges to the buyer that he holds the goods on his behalf;
   VI. This shall not affect the operation of the issue or transfer of any document of title to the goods;
   VII. Demand or tender of delivery may be treated as ineffectual unless made at reasonable hour;
   VIII. Unless otherwise agreed, the expenses of and incidental to putting the goods into a

deliverable state shall be borne by the seller.

6. **DELIVERY OF WRONG QUANTITY SECTION 37:** The transfer of goods, in a sale, is expected to be delivered as agreed to in the contract. If there is a variation in the quantity of goods delivered, the following action may be taken by the buyer:
   I. **SHORT DELIVERY SECTION 37(1)**: Where the sellers delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them. If the buyer accepts the goods so delivered, he shall pay for them at the contract rate
   II. **EXCESS DELIVERY SECTION 37(2):** Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and the reject the rest, Or he may reject the whole, If the buyer accepts the whole of the goods so delivered, he shall pay for them at the contract rate;
   III. **MIXED DELIVERY SECTION 37(3):** Where the seller delivers to the buyer the goods, he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject or may reject the whole;
7. **INSTALMENT DELIVERIES SECTION 38:**
   I. Buyer of the goods is not bound to accept the delivery of goods by instalments unless otherwise agreed to between both the parties.
   II. Where there is a contract for the sale of goods to be delivered by stated instalments which are to be separately paid for and:
   III. The seller makes no delivery or defective delivery in respect of one or more instalments; or,
   IV. The buyer neglects or refuses to take delivery of or pay for one or more instalments

   However, it is a question in each case, depending on the terms of the contract and circumstances of the case as to whether the breach of contract is:
   i. a repudiation of the whole contract; or
   ii. whether it is severable breach giving rise to a claim for compensation but not to treat the whole contract as repudiated.
8. **DELIVERY TO CARRIER OR WHARFINGER SECTION 39(1):** Delivery of goods to a carrier for transmission to buyer is primafacie deemed to be delivery to the buyer
9. **DELIVERY OF GOODS AT A DISTANT PLACE/ DETERIORATION DURING TRANSIT SECTION 40:** Where the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold, the buyer shall, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit.
10. **BUYER'S RIGHT OF EXAMINING THE GOODS SECTION 41:** The buyer is having right to examine the goods, which have not been examined by him previously before acceptance. The examination of the goods by the buyer is for the purpose of ascertaining whether they are in conformity with the contract. The seller is also bound to afford an opportunity to the buyer for examining the goods

for the purpose of ascertaining whether they are in conformity with the contract.

11. ACCEPTANCE SECTION 42: The buyer is deemed to have accepted the goods-

I. when he intimates to the seller that he has accepted them; or

II. when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller; or

III. when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

3.4. RIGHTS OF UNPAID SELLER

Q NO 1. WHO IS UNPAID SELLER AND STATE HIS RIGHTS AGAINST GOODS AND BUYER

ANSWER:

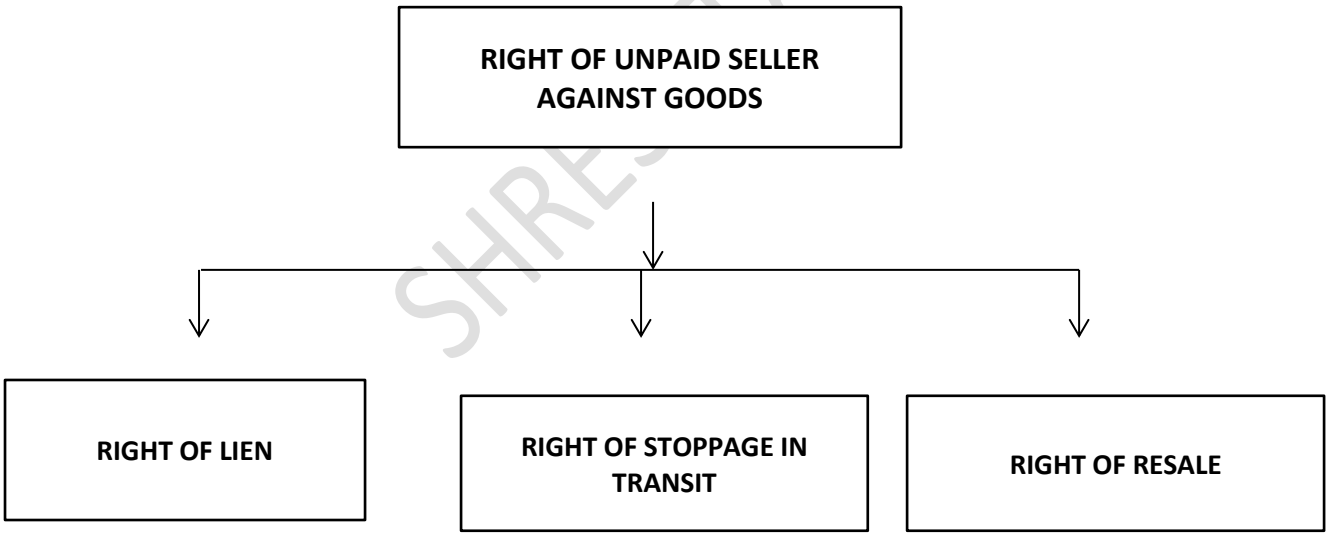
According to Section 45(1), the seller of the goods is deemed to be 'unpaid seller' within the meaning of this Act-

1. when the whole of the price has not been paid or tendered;
2. when a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise;

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

RIGHTS OF AN UNPAID SELLER AGAINST THE GOODS

According to Section 46, an unpaid seller's right against the goods is:



RIGHT OF LIEN [SECTIONS 47-49 AND 54]: An unpaid seller who is in possession of goods sold, may exercise his lien on the goods, i.e., keep the goods in his possession and refuse to deliver them to the buyer until the payment or tender of the price in cases where:

I. the goods have been sold without any stipulation as to credit; or
II. the goods have been sold on credit, but the term of credit has expired; or
III. the buyer becomes insolvent.

The lien depends on physical possession. The seller's lien is possessory lien, so that it can be exercised only so long as the seller is in possession of the goods. It can only be exercised for the non-payment of the price and not for any other charges.

Examples:

I. Rajnish sold his car to Manish under a contract. However, Manish gave Rajnish a cheque for the amount due. However, Manish became insolvent and filed for bankruptcy. Since the cheques would not get encashed anymore, Rajnish withheld the car by exercising his right of lien until the payment under the contract of sale was made for the same.

TERMINATION OF LIEN

I. When the seller delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer, without reserving the right of disposal of the goods;

II. When the buyer or his agent lawfully obtains possession of the goods;

III. By waiver of his lien by the unpaid seller

STOPPAGE IN TRANSIT [SECTIONS 50-52]: The right of stoppage in transit is a right of stopping the goods while they are in transit, resuming possession of them and regaining possession until payment or tender of the price.

The right to stop goods is available to an unpaid seller:

I. when the buyer becomes insolvent; and

II. the goods are in transit.

The buyer is insolvent if he has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due. It is not necessary that he has actually been declared insolvent by the court.

The goods are in transit from the time they are delivered to a carrier or other bailee like a wharfinger or warehouse keeper for the purpose of transmission to the buyer and until the buyer takes delivery of them.

TERMINATION OF TRANSIT:

i. If the buyer obtains delivery before the arrival of the goods at their destination;

ii. If, after the arrival of the goods at their destination, the carrier acknowledges to the buyer that he holds the goods on his behalf, even if further destination of the goods is indicated by the buyer;

iii. If the carrier wrongfully refuses to deliver the goods to the buyer.

If the goods are rejected by the buyer and the carrier or other bailee holds them, the transit will be deemed to continue even if the seller has refused to receive them back.

The right to stop in transit may be exercised by the unpaid seller either by taking actual possession of the goods or by giving notice of the seller's claim to the carrier or other person having control of the goods. On notice being given to the carrier, he must redeliver the goods to the seller who must pay the expenses of the re-delivery.

The seller's right of lien or stoppage in transit is not affected by any sale on the part of the buyer unless the seller has assented to it. A transfer, however, of the bill of lading or other document of seller to a bona fide purchaser for value is valid against the seller's right.

RIGHT OF RE-SALE [SECTION 54]:

The unpaid seller may re-sell:

i. where the goods are perishable;
ii. where the right is expressly reserved in the contract;
iii. where in exercise of right of lien or stoppage in transit, the seller gives notice to the buyer of his intention to re-sell, and the buyer, does not pay or tender the price within a reasonable time.

If on a re-sale, there is a deficiency between the price due and amount realised, he is entitled to recover it from the buyer. If there is a surplus, he can keep it. He will not have these rights if he has not given any notice and he will have to pay the buyer profit, if any, on the resale.

Example: Ram contracted with Shyam to buy 50 litres of Milk from Shyam on 16th March, 2020 for Rs.100 per litre. However, Ram failed to claim the consignment on the said date. Shyam runs the risk of getting the milk spoiled. Ram failed to claim the consignment until 20th March, 2020 and Shyam had to sell the same to Dham. Shyam is justified in doing so even though he had a valid contract with Ram with respect to the same milk.

RIGHTS TO WITHHOLD DELIVERY

If the property in the goods has passed, the unpaid seller has right as described above. If, however, the property has not passed, the unpaid seller has a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transit.

RIGHTS OF AN UNPAID SELLER AGAINST THE BUYER

An unpaid seller in addition to his rights against the goods has the following rights against the buyer personally.

1. SUIT FOR PRICE [SECTION 55]: Where the property in goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay the price, the seller can sue the buyer for price.

2. SUIT FOR DAMAGES FOR NON-ACCEPTANCE [SECTION 56]: Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller can sue him for damages for non-acceptance of the goods.

3. SUIT FOR REPUDIATION: Where the buyer repudiates the contract before the date of delivery, the seller may wait till the date of delivery or may treat the contract as cancelled and sue for damages for breach.

4. SUIT FOR INTEREST [SECTION 61]: Where there is specific agreement between the seller and the buyer regarding interest on the price of goods, the seller may claim it from the date when payment becomes due. If there is no specific agreement, the interest is payable from the date notified by the seller to the buyer.

Q NO 2. STATE THE REMEDIES AVAILABLE TO THE BUYER IN ACSE OF BREACH OF CONTRACT OF SALE

ANSWER:

BUYER'S REMEDIES AGAINST SELLER FOR BREACH OF CONTRACT

A buyer also has certain remedies against the seller who commits a breach. These are:

1. SUIT FOR DAMAGES FOR NON-DELIVERY [SECTION 57]: When the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may sue the seller for damages for non-delivery. This is in addition to the buyer's right to recover the price, if already paid, in case of non-delivery.

2. SUIT FOR PRICE: Where the buyer has paid the price and the goods are not delivered to him, he can recover the amount paid.

3. SUIT FOR SPECIFIC PERFORMANCE [SECTION 58]: When the goods are specific or ascertained, a buyer may sue the seller for specific performance of the contract and compel him to deliver the same goods. The court orders for specific performance only when the goods are specific or ascertained and an order for damages would not be an adequate remedy. Specific performance is generally allowed where the goods are of special significance or value example: A rare paining, a unique piece of jewellery, etc.

4. SUIT FOR BREACH OF WARRANTY [SECTION 59]: Where there is a breach of warranty by the seller, or where the buyer elects or is compelled to treat the breach of condition as breach of warranty; the buyer cannot reject the goods. The buyer may:

I. set up the breach of warranty in extinction or diminution of the price payable by him, or
II. sue the seller for damages for breach of warranty.

5. REPUDIATION OF CONTRACT BEFORE THE DUE DATE [SECTION 60]: Section 60 provides that where either party to a contract of sale repudiates the contract before the date of delivery, the other may either treat the contract as subsisting or wait till the date of delivery, or he may treat the contract as rescinded and sue for damages for the breach.

6. SUIT FOR INTEREST: The buyer may recover such interest or special damages, as may be recoverable by law. He may also recover the money paid where the consideration for the payment of it has failed. In the absence of a contract to the contrary, the court may award interest, to the buyer, in a suit by him for the refund of the price in a case of a breach on the part of the seller, at such rate as it thinks fit on the amount of the price from the date on which the payment was made.

3.5. AUCTION SALES

Q NO 1. STATE THE PROVISIONS RELATED TO AUCTION SALE

ANSWER:

Section 64 provides that in the case of a sale by auction-

1. Where goods are put up for sale in lots, each lot is prima facie deemed to be the subject of a separate contract of sale;
2. The sale is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner; and until such announcement is made, any bidder may retract his bid;
3. A right to bid may be reserved expressly by or on behalf of the seller and, where such right is expressly so reserved, but not otherwise, the seller or any one person on his behalf may, subject to the provisions hereinafter contained, bit at the auction;
4. Where the sale is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person; and any sale contravening this rule may be treated as fraudulent by the buyer;
5. The sale may be notified to be subject to a reserved or set up price;
6. If the seller makes use of pretended bidding to raise the price, the sale is voidable at the option of the buyer.

Section 64 does not deal with the question of passing of the property at auction sale but merely deals with completion of the contract of sale which takes place at the fall of the hammer or at the announcement of the close of the sale in other customary manner by the auctioneer. In other words, all that happens at the fall of the hammer or at the announcement of the closure of the sale in other customary manner is that a contract of sale comes into existence and parties get into the relationship of a promisor and a promisee in an executory contract.

EFFECT OF TAX [SECTION 64A]

In the event of any tax being imposed, increased, decreased or remitted in respect of any goods after the making of any contract for the sale or purchase of such goods without stipulations as to the payment of tax where tax was not chargeable at the time of the making of the contract, or for the sale or purchase of such good tax- paid where tax was chargeable at that time.

I. if such imposition or increase so takes effect that the tax or increased tax, as the case may be, or any part of such tax is paid or is payable, the seller may add so much to the contract price as will be equivalent to the amount paid or payable in respect of such tax or increase of tax, and he shall be entitled to be paid and to sue for and recover such addition, and

II. if such decrease or remission so takes effect that the decreased tax only, or no tax, as the case may be, is paid or is payable, the buyer made deduct so much from the contract price as will be equivalent to the decrease of tax or remitted tax, and he shall not be liable to pay, or be sued for, or in respect of, such deduction.

EXERCISE

⊙ Multiple Choice Question:

1. A sale is complete when the following is transferred from one.

a) Money b) Ownership

c) Usage d) None of the above

2. The Consideration in contract of sale must be:

a) Immovable b) Movable

c) Price d) None of the above

3. The subject matter of the contract must be:

a) Sale b) Product

c) Service d) None of the above

4. On which date was the Sale of Goods enforced?

a) 1948 b) 1930

c) 1932 d) 1951

5. As per Sale of Goods Act, this is not included:

a) Growing crop b) Money

c) Table d) Goodwill

⊙ State TRUE or FALSE

1. Condition is a stipulation which is essential to the main purpose of the contract.

2. The sale of goods Act only deals only with goods that are immovable in nature.

3. Warranty is a stipulation which is collateral to the purpose of the contract.

4. Caveat Emptor is the concept of "let the buyer beware".

5. The subject matter of the contract under Sale of Goods Act must be goods.

6. Sale under Sale of Goods Act is an executory contract.

⊙ Fill in the blanks

1. The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or_____ good

2. The_____ in a contract of sale may be fixed by the contract or may be left to be fixed in manner thereby agreed or may be determined by the course of dealing between the parties.

3. A contract of sale is made by an offer to buy or sell goods for a price and the_____of such offer.

4. A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a_____

5. A contract of sale may be _____or conditional

⊙ Short Essay Type Questions

1. What are the rights of unpaid seller against goods?

2. Discuss the provisions on the re-selling of goods.

3. Write short notes on-

(a) Auction Sale

(b) Doctrine of Caveat Emptor

(c) Agreement to Sell

☉ **Essay Type Questions**

1. Discuss the difference between condition and warranty.

2. Explain the concept of Caveat Emptor

3. What are the rights and duties of a seller?

4. What are the rights and duties of a buyer?

5. What are the implied conditions in a contract of sale by sample?

6. What is a contract of sale?

7. What is an agreement to sell?

8. Distinguish between a sale and an agreement to sell?

☉ **Unsolved Cases**

1. Ram agreed to send a consignment to Shyam via a ship. This was done on the basis of an agreement where Shyam would have to pay Rs.1,000 for the consignment upon delivery. However, Shyam became insolvent and Ram got to know about it before he despatched the goods for delivery to Shyam. Can Ram exercise his right of lien over goods as an unpaid seller against goods?

2. Sita asked for 100 Litres of mustard oil from Gita. However when Gita delivered the same through her agent to Sita, Sita refused saying that it was palm oil and was not what she had contracted for. Gita's mustard oil therefore was not sold and she suffered damages. What can Gita do in this case where there is no default on her part and Sita wrongfully refused to take delivery of the goods within reasonable time?

ANSWER:

Multiple Choice Question:

1. b; 2. c; 3. a; 4. b; 5. b.

State TRUE or FALSE

1. True; 2. False; 3. True; 4. True; 5. True; 6. False.

Fill in the blanks

1. Future; 2. Price; 3. Acceptance; 4. Price; 5. Absolute.

4. NEGOTIABLE INSTRUMENTS ACT, 1881

4.1. DEFINITION AND FEATURES OF NEGOTIABLE INSTRUMENT

INTRODUCTION

1. Negotiability = Transferability (Mere Delivery/Sign and Delivery)

2. Instrument = A Document created for a right of a person and can be transferred from one to another person.

3. The law relating to negotiable instruments is the law of the commercial world which was enacted to facilitate the activities in trade and commerce making provision of giving sanctity to the instruments of credit which could be deemed to be convertible into money and easily passable from one person to another.

4. The source of Indian law relating to such instruments is admittedly the English Common Law.

5. In the absence of such instruments, the trade and commerce activities were likely to be adversely affected as it was not practicable for the trading community to carry on with it the bulk of the currency in force.

6. The **main objective** of the Act is to legalize the system by which instruments contemplated by it could pass from hand to hand by negotiation like any other goods.

7. The Act applies to the whole of India, but nothing herein contained affects the Reserve Bank of India Act, 1934, (section 21 which provides the Bank to have the right to transact Government business in India), or affects any local usage relating to any instrument in an oriental language.

8. It shall come into force on the first day of March, 1882.

9. The provisions of this Act are also applicable to Hundis, unless there is a local usage to the contrary. Other native instruments like Treasury Bills, Bearer Debentures etc. are also considered as negotiable instruments either by mercantile custom or under other enactments.

10. Hence , newly The Negotiable Instruments (Amendment) Act, 2018 received the assent of the President and was notified in the Official Gazette on 2nd August, 2018 and came into effect from September 1,2018. The Amendment Act 2018 contains two significant changes – the introduction of Section 143A and Section 148. These sections provide for interim compensation during the pendency of the criminal complaint and the criminal appeal.

Some Basic Concepts to be discussed in the class

Q NO.1 WHAT IS NEGOTIABLE INSTRUMENTS?

ANSWER

The Act does not define the term 'Negotiable Instruments' , but

SECTION 13 :

Negotiable instrument means an instrument

1. the property in which is acquired by anyone who takes it bona-fide; and
2. for value;
3. notwithstanding any defect in the person from whom he took it .

Negotiable instrument refers to Bills of Exchange ⎫ Promissory Notes ⎫ Cheques > Payable either to order or to bearer.

EFFECT OF NEGOTIABILITY:

The Principle of law relating of transfer of property is that no one can pass a better title than he himself has (nemo dat quad non habet). The Exception to this general rule is being used in the NI act . This Maxim is not applicable in NI Act.

Q NO.2 CHARACTERISTICS OF NEGOTIABLE INSTRUMENTS ARE _____?

ANSWER:

1. Written Instrument with Signature
2. Freely transferable indefinitely
3. HDC (Holder in Due course) gets a good title to negotiable instrument even though the title of transferor is defective.
4. A negotiable instrument may have more than one payee jointly or alternatively.
5. Made or drawn for consideration.
6. Every negotiable instrument must contain an unconditional promise or order to pay money. The promise or order to pay must consist of money only.
7. The sum payable, the time of payment, the payee, must be certain.
8. The instrument should be delivered. Mere drawing of instrument does not create liability.

Q NO.3 PRESUMPTIONS AS TO NEGOTIABLE INSTRUMENTS _____?

ANSWER:

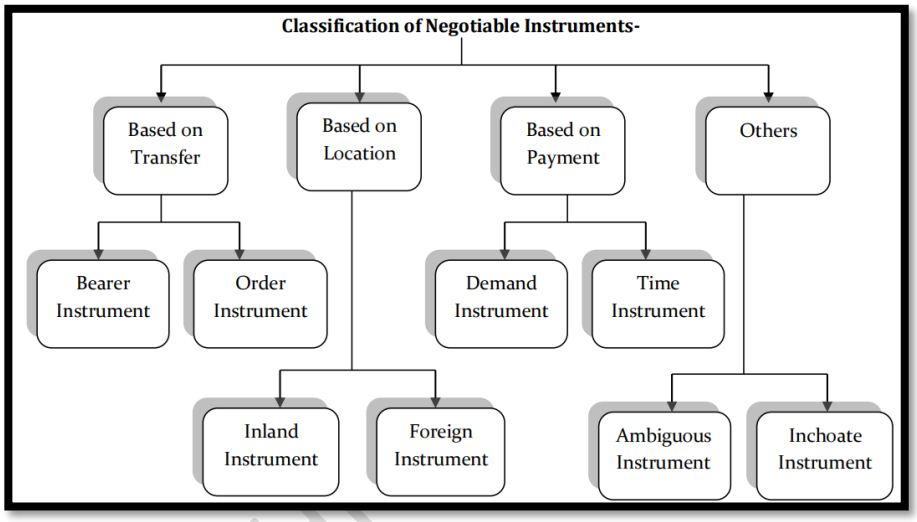
Unless the contrary is proved, the following presumptions shall be made –

1. As to consideration - That every negotiable instrument was made or drawn for consideration and that every such instrument when it has been accepted, endorsed or negotiated has been for consideration.
2. As to date - That every negotiable instrument bearing a date was made or drawn on such date.
3. As to time of acceptance - That every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity.

4. As to time of transfer -That every transfer of a negotiable instrument was made before its maturity.
5. As to order of endorsements -That the endorsements appearing upon a negotiable instrument were made in the order in which they appear thereon
6. As to stamp -That a lost promissory note or bill of exchange was duly stamped.
7. That holder is a holder-That the holder of a negotiable instrument is a holder in due course.
8. As to dishonour -If a suit is filed upon an instrument which has been dishonoured, the court shall, on proof of the protest, presume the fact of dishonour.

Q NO.4 CLASSIFICATION OF NEGOTIABLE INSTRUMENTS?

ANSWER:



1. ORDER INSTRUMENT

An instrument

I. Payable to a particular person or expressed to be payable to a particular person, and

II. Does not contain words prohibiting transfer or indicating an intention that it shall not be transferable.

2. BEARER INSTRUMENT

An instrument is payable to bearer of

I. It is expressed to be so payable, or

II. on which the only or last endorsement is an endorsement in blank.

Promissory note – cannot be made payable to bearer

Bill of exchange cannot be made payable to bearer on demand.

3. DEMAND INSTRUMENT SECTION 19

An instrument which satisfies the following conditions

I. Time for payment is not specified.

II. Expressed to be payable on demand.

III. Can be presented for payment at any time.

4. TIME INSTRUMENT SECTION 22

An instrument in which time for payments is specified and may be payable

I. After a specified period, or

II. On a specified day, or

III. Certain period after, sight, or

IV. On the happening of a certain event.

5. INLAND INSTRUMENT [SEC.11]

A P/Note, B/Exchange or cheque is said to be an inland instrument, if any one of the following conditions is satisfied –

I. Drawn or made in India and made payable in India, or

II. Drawn or made in India and drawn upon a person resident in India.

Note: Even if an Inland Bill is endorsed to a foreign country, it continues to be an Inland Instrument.

Example 1. A promissory note made in Kolkata and payable in Mumbai.

Example 2. A bill drawn in Varanasi on a person resident in Jodhpur (although it is stated to be payable in Singapore)

6. FOREIGN INSTRUMENT [SEC.12]

An instrument which is not an Inland Instrument, is deemed to be a Foreign Instrument.

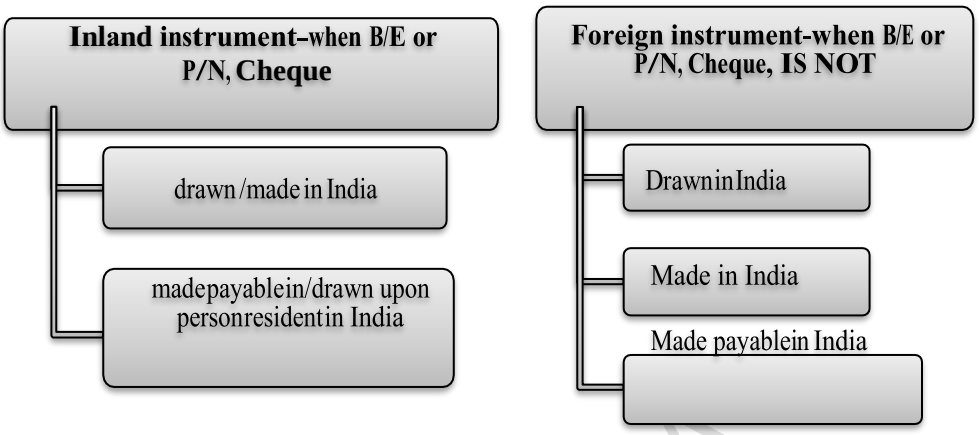
Place where bill is drawn	Residence of Person on whom drawn and place where made payable	Nature of Instrument
Bills drawn outside India	on a person resident in or outside India + made payable in India	are foreign bills.
	on a person residing outside India + payable in India or outside India.	
	on a person residing in or outside India + payable outside India	

LIABILITY OF MAKER/ DRAWER OF FOREIGN BILL

In the absence of a contract to the contry, the liability of the maker or drawer of a foreign promissory note or bill of exchange or cheque is regulated in all essential matters by the law

of the place where he made the instrument, and the respective liabilities of the acceptor and indorser by the law of the place where the instrument is made payable (Section 134).

Example : A bill of exchange is drawn by A in Berkley where the rate of interest is 15% and accepted by B payable in Washington where the rate of interest is 6%. The bill is indorsed in India and is dishonoured. An action on the bill is brought against B in India. He is liable to pay interest at the rate of 6% only. But if A is charged as drawer, he is liable to pay interest at 15%.



7. AMBIGUOUS INSTRUMENTS [SEC.17]

Where an instrument may be constructed either as a P/Note, B/Exchange, the holder may at his option treat it as either, and the instrument shall henceforth be treated accordingly,

e.g. a B/E drawn in favour of a fictitious person.

An Ambiguous Instrument treated as a P/Note, B/Exchange cannot be treated differently afterwards.

Where amount is stated differently in figures and words [Section 18]

If the amount undertaken or ordered to be paid is stated differently in figures and in words, the amount stated in words shall be the amount undertaken or ordered to be paid.

8. INCHOATE INSTRUMENT

An inchoate Instrument means an instrument that is incomplete in certain respects.

I. Legal effect

The holder gets a prima facie authority to make or complete the negotiable instrument.

II. Liability on an inchoate instrument

Rights of a person to whom an inchoate instrument is delivered :- He can recover only such amount as he was authorized to fill.

Rights of HDC(Holder in Due course) : - He can recover the whole amount stated in the instrument, but not exceeding the amount covered by the stamps.

Conditions for an inchoate instrument

i. A person signs a negotiable instrument.

ii. The negotiable instrument is stamped.

iii. The negotiable instrument is either wholly blank or is partially blank.

iv. The person signing such negotiable instrument delivers it to another person.

EXAMPLE: A person signed a blank acceptance on a bill of exchange and kept it in his drawer. The bill was stolen by X and he filled it up for Rs.20,000 and negotiated it to an innocent person for value. It was held that the signer to the blank acceptance was not liable to the holder in due course because he never delivered the instrument intending it to be used as a negotiable instrument. Further, as a condition of liability, the signer as a maker, drawer, indorser or acceptor must deliver the instrument to another. In the absence of delivery, the signer is not liable. Furthermore, the paper so signed and delivered must be stamped in accordance with the law prevalent at the time of signing and on delivering otherwise the signer is not estopped from showing that the instrument was filled without his authority.

Q NO.5 "AT SIGHT", "ON PRESENTMENT", "AFTER SIGHT" [SECTION 21]-

ANSWER:

In a promissory note or bill of exchange the expressions "at sight" and "on presentment" means on demand.

The expression "after sight" means, in a promissory note, after presentment for sight, and, in a bill of exchange after acceptance, or noting for non-acceptance, or protest for non-acceptance.

Q NO.6 WHAT IS THE CAPACITY TO INCUR LIABILITY UNDER INSTRUMENT?

ANSWER:

1. **PERSON MUST BE CAPABLE OF CONTRACTING**

   A person shall be liable on a negotiable instrument (by reason of making, drawing, accepting endorsing, delivering or negotiating a negotiable instrument) only if he is capable of contracting according to the law to which he is subject.

2. **LIABILITY IN CASE OF A MINOR**

   A minor may draw, endorse, deliver and negotiate any negotiable instrument. All the parties shall be bound on such negotiable instrument. However, the minor shall not be bound on such negotiable instrument.

Q NO.7 MATURITY OF THE NEGOTIABLE INSTRUMENT?

ANSWER:

It means the date on which the negotiable instrument falls due for payment.

A negotiable instrument which is payable otherwise than on demand is entitled to 3 days of grace.

CALCULATION OF DAYS OF MATURITY	DATE OF MATURITY
Negotiable instrument payable on a specified day	Specified day + 3rd day.
Negotiable instrument payable on a stated number of days after date	Date on which negotiable instrument is drawn + stated number of days + 3rd day.
Negotiable instrument payable on stated number of days after sight	Date on which negotiable instrument is presented for sight + stated number of days + 3rd day.
Negotiable instrument payable on stated number of days after happening of a certain event	Date on which such event happens + stated number of day + 3rd day.
Negotiable instrument payable on stated number of months after date	Corresponding day of the relevant month (i.e., date on which negotiable instrument is drawn + stated number of months) + 3rd day.
Negotiable instrument payable on stated number of months after sight	Corresponding day of the relevant month* (i.e., Date on which negotiable instrument is presented for sight + stated number of months) + 3rd day
Negotiable instrument payable on stated number of months	Corresponding day of the relevant month* (i.e., Date on which such event happens + stated number of months) + 3rd day

Example:

1. A negotiable instrument dated 29th January, 2019, is made payable at one month after date. The instrument is at maturity on the third day after the 28th February, 2019, i,e, on 3rd March 2019.
2. A negotiable instrument, dated 30th August, 2019, is made payable three months after date. The instrument is at maturity on the 3rd December, 2019.
3. A promissory note or bill of exchange, dated 31st August, 2019, is made payable three months after date. The instrument is at maturity on the 3rd December, 2019.

CALCULATING MATURITY OF BILL OR NOTE PAYABLE SO MANY DAYS AFTER DATE OR SIGHT [SECTION 24]

In calculating the date at which a promissory note or bill of exchange made payable at certain number of days after date or after sight or after a certain event is at maturity, the day of the date, or of or sight, or of protest for non-acceptance, or on which the event happens, shall be excluded.

Example: Bharat executed a promissory note in favour of Bhushan for Rs.5 crores. The said amount was payable three days after sight. Bhushan, on maturity, presented the promissory note on 1st January, 2019 to Bharat. Bharat made the payments on 4th January, 2019. Bhushan wants to recover interest for one day from Bharat. As per Section 24 of the Negotiable Instruments Act, 1881 states that where a bill or note is payable after date or after sight or after happening of a specified event, the time of payment is determined by excluding the day from which the time begins to run. Therefore, in the given case, Bharat will succeed in objecting to Bhushan's claim. Bharat paid rightly "three days after sight". Since the bill was presented on 1st January, Bharat was required to pay only on the 4th and not on 3rd January, as contended by Bhushan.

WHEN THE DAY OF MATURITY IS A HOLIDAY [SECTION 25]

When the day on which a promissory note or bill of exchange is at maturity is a public holiday, the instrument shall be deemed to be due on the next preceding business day.

Explanation: The expression "Public Holiday" includes Sundays and any other day declared by the Central Government, by notification in the Official Gazette, to be a public holiday.

RELEVANT QUESTIONS

1. State briefly the rules laid down under the Negotiable Instruments Act for determining the date of maturity of a bill of exchange. Ascertain the date of maturity of a bill payable hundred days after sight and which is presented for sight on 4th May, 2020. **A.** In this case the day of presentment for sight is to be excluded i.e. 4th May, 2020. The period of 100 days ends on 12th August, 2020 (May 27 days + June 30 days + July 31 days + August 12 days). Three days of grace are to be added. It falls due on 15th August, 2020 which happens to be a public holiday. As such it will fall due on 14th August, 2020 i.e. the next preceding business day.	**Study-Mat**

4.2. HOLDER AND HOLDER IN DUE COURSE

Q NO.8 HOLDER FOR CONSIDERATION (MEANING OF HOLDER WITH EXAMPLE)?

ANSWER:

MEANING OF 'HOLDER'(SECTION 8):

1. He must be entitled to the possession of negotiable instrument in his own name.
2. He must be entitled to receive or recover the amount due on negotiable instrument from the parties liable on negotiable instrument.

HOLDER FOR VALUE:

1. 'Holder for value' means, as regards all parties prior to himself, holder of an instrument for which value has, at any time, been given.
2. A negotiable instrument made, drawn, accepted, endorsed, or transferred without consideration, or for a consideration which fails, creates no obligation of payment between the parties to the transaction. But if any such party has transferred the instrument with or without endorsement to a holder for a consideration, such holder, and every subsequent holder deriving title from him, may recover the amount due on such instrument from the transferor for consideration or any prior party thereto.
3. When the consideration for which a person signed a promissory note, bill of exchange or cheque consisted of money and was originally absent in part, or has subsequently failed in part, the sum which a holder standing in immediate relation with such signer is entitled to receive from him is proportionally reduced.

Example:

1. A draws a bill on B for Rs. 500 payables to the order of A. B accepts the bill, but subsequently dishonours it by non-payment. A sues B on the bill. B proves that it was accepted for value as to Rs. 400, and as an accommodation to the plaintiff as to the residue. A can only recover Rs. 400.
2. A person who finds or steals a bearer instrument or takes an instrument under forged indorsement is not a holder. The reason is that the holder of a negotiable instrument must have right to receive or recover the money thereon from the parties thereto.
3. An agent holding an instrument for his principal is not a holder. The reason being that, although agent can receive payment of the instrument, he has no right to sue on the instrument in his own name.

Q NO.9 HOLDER IN DUE COURSE[HDC] (SECTION 9)?

ANSWER:

1. He must be a holder (Refer Section 8).

2. He must have become the holder for consideration.
3. He must have obtained the possession of negotiable instrument before maturity
4. He must have obtained the negotiable instrument in good faith, i.e. without sufficient cause to believe that any defect existed in the title of the person from whom he derived his title.
5. The instrument should be complete and regular on the face of it.

ESSENTIALS TO BECOME HOLDER IN DUE COURSE (HDC):

I. The holder must have paid valuable consideration:

i. To become a holder in due course, a person must obtain a negotiable instrument by paying valuable and lawful consideration for it.

ii. When given as a gift or has been inherited, the transferee cannot be a holder in due course.

II. A holder must acquire the instrument before its maturity in order to attain the status of holder in due course.

III. The holder must have obtained the instrument in good faith.

IV. The instrument must be complete and regular on the face of it.

V. He must have received the instrument as a holder- i.e. A HDC may be either payee, or the possessor (if the instrument is payable to bearer), or the indorsee (if the instrument is payable to order).

Example

Sl.no	Situation	Holder	Holder for Value	Holder in due Course
1.	X steals a cheque	Yes	No	No
2.	X gets a cheque for consideration but after Maturity	Yes	Yes	No
3.	X gets a cheque for consideration before Maturity	Yes	Yes	Yes

PRIVILEGES OF HOLDER IN DUE COURSE(HDC):

i. In case of Inchoate Instrument:

A person signing and delivering to another a stamped but otherwise inchoate instrument (When you execute an unfilled up but duly signed negotiable instrument such as a cheque or a promissory note, it is an inchoate negotiable instrument) is debarred from asserting, as against a holder in due course, that the instrument has not been filled in accordance with the authority given by him, the stamp being sufficient to cover the amount (Section 20).

Example: A signs his name on a blank but stamped instrument which he gives to B with an authority to fill up as a note for a sum of ` 3 000 only. But B fills it for ` 5,000. B then transfers it to C for a consideration of 5000 who takes it in good faith. Here in the case, C is entitled to recover the full amount of the instrument because he is a holder in due course whereas B, being a holder cannot recover the amount because he filled in the amount in excess of his authority.

ii. In case of fictitious bill:

In case a bill of exchange is drawn payable to the drawer's order in a fictitious name and is indorsed by the same hand as the drawer's signature, it is not permissible for acceptor to allege as against the holder in due course that such name is fictitious (Section 42).

iii. In case of conditional instrument or 'escrow':

In case a bill or note is negotiated to a holder in due course, the other parties to the bill or note cannot avoid liability on the ground that the delivery of the instrument was conditional or for a special purpose only.

iv. In case of instrument obtained by unlawful means or for unlawful consideration:

The person liable in a negotiable instrument cannot set up against the holder in due course the defences that the instrument had been lost or obtained from the former by means of an offence or fraud or for an unlawful consideration (Section 58). Thus, a holder in due course acquires a title free from all defects.

v. In case original validity of the instrument is denied:

No maker of a promissory note, and no drawer of a bill or cheque and no acceptor of a bill for the honour of the drawer shall, in a suit thereon by a holder in due course be permitted to deny the validity of the instrument as originally made or drawn (Section 120). In short, a holder in due course gets a good title to the bill.

vi. In case Payee's capacity to indorse is denied:

No maker of a promissory note and no acceptor of a bill payable to order shall, in a suit thereon by a holder in due course, be permitted to deny the payee's capacity, at the date of the note or bill, to indorse the same (Section 121). In short, a holder in due course gets a good title to the bill.

IN SHORT:

1. Every prior party to a negotiable instrument is liable to HDC
2. Once a negotiable instrument passes through hands of a HDC, it gets cleansed of all its defects provided the holder himself is not a party to fraud which affected negotiable instrument in some stage.
3. No prior party can set up a defence that Instrument was made, endorsed without consideration
4. No prior party can set up a defence that Instrument was lost and obtained from him under fraud or for unlawful consideration.
5. No prior party can say that it was delivered conditionally for some purpose only.

6. HDC can claim full amount but not exceeding amount covered by stamp even though such amount was in excess of the amount authorized by the person delivering an inchoate instrument.

"PAYMENT IN DUE COURSE" [SECTION 10]—"

Payment in due course" means payment in accordance with the apparent tenor of the instrument in good faith and without negligence to any person in possession thereof under circumstances which do not afford a reasonable ground for believing that he is not entitled to receive payment of the amount therein mentioned.

RELEVANT QUESTIONS

1. Y draws a bill of exchange on Z for Rs. 5000 payable to his order. Z accepts the bill but subsequently dishonours it by non-payment. Y sues Z on the bill. Z proves that bill was accepted for value of Rs. 3000 and an accommodation to the balance of Rs. 2000. How much amount Y can recover from Z? **A.** Refer to Q.no 13	**Study-Mat**
2. A draws a bill of exchange payable to himself on X, who accepts the bill without consideration just to accommodate A. A transfers the bill to P for good consideration. State the rights of A and P. would your answer be different if A transferred the bill to P after maturity? **A.** Refer to Q.no 13	**Study-Mat**
3. Discuss with reasons, in the following given conditions, whether M can be called as a Holder under the Negotiable Instruments Act, 1881: a) M, the payee of the cheque who is prohibited by a court order from receiving the amount of the cheque b) M, the agent of Q is entrusted with an instrument without endorsement by Q who is the payee. **A.** Refer to Q.no. 14	**Study - Mat**
4. Mr. V draws a cheque of Rs.11,000 and gives to Mr. B by way of gift. State with reason whether - (1)Mr. B is a holder in due course as per the Negotiable Instrument Act, 1881? (2)Mr. B is entitled to receive the amount of Rs.11,000 from the bank? **A.** In the instant case, Mr. V draws a cheque of Rs. 11,000 and gives to Mr. B by way of gift. 1. Mr. B is holder but not a holder in due course since he did not get the cheque for value and consideration. 2. Mr. B's title is good and bonafide. As a holder he is entitled to receive Rs.11,000 from the bank on whom the cheque is drawn.	**Study-Mat**

5. Mr S Venkatesh drew a cheque in favour of M who was sixteen years old. M settled his rental due by endorsing the cheque in favour of Mrs. A the owner of the house in which he stayed. The cheque was dishonoured when Mrs A presented it for payment on grounds of inadequacy of funds. Advice How Mrs A can proceed to collect her dues. **A.** Refer to Q.no. 14	**Study-Mat**
6. F by inducing G obtains a Bill of Exchange from him fraudulently in his favour. Later, he enters into a commercial deal with h and endorses the bill to him towards consideration for the deal. H takes the bill as a Holder in due course. H subsequently endorses the bill to F for value as consideration to F for some other deal. On maturity the bill is dishonoured, F sues G for the recovery of the money. Explain whether F will succeed in this case. **A.** Refer to Q.no. 14	**Study-Mat**
7. Discuss with reasons, whether the following persons can be called as a 'holder' under the Negotiable Instruments Act, 1881: (i) X who obtains a cheque drawn by Y by way of gift. (ii) A, the payee of the cheque, who is prohibited by a court order from receiving the amount of the cheque. (iii) M, who finds a cheque payable to bearer, on the road and retains it. (iv) B, the agent of C, is entrusted with an instrument without indorsement by C, who is the payee. (v) B, who steals a blank cheque of A and forges A's signature. **A.** Refer to Section 8 for Holder definition. (i) Yes, X can be termed as a holder because he has a right to possession and to receive the amount due in his own name. (ii) No, he is not a 'holder' because to be called as a 'holder' he must be entitled not only to the possession of the instrument but also to receive the amount mentioned therein. (iii) No, M is not a holder of the Instrument though he is in possession of the cheque, so is not entitled to the possession of it in his own name. (iv) No, B is not a holder. While the agent may receive payment of the amount mentioned in the cheque, yet he cannot be called the holder thereof because he has no right to sue on the instrument in his own name. (v) No, B is not a holder because he is in wrongful possession of the instrument.	**Study-Mat**

4.3. KINDS / TYPES OF NEGOTIABLE INSTRUMENTS

Q NO 10. WHAT IS A PROMISSORY NOTE?

ANSWER:

Specimen of Promissory Note

Rs..... Place.....
Date.....

.....month/days after date. I promise to pay .....or Bearer/Order the sum of Rs.....for value received with interest @.....p.a. with .....rests

To-
Address

(Maker)
Stamp

According to **section 4** of the Act,

A 'Promissory note' is an instrument in writing (not being a bank note or a currency note) containing an unconditional undertaking Signed by the maker to pay a certain sum of money only to –

1. a certain person; or
2. the order of a certain person or to the bearer of instrument.

The words " or to the bearer of the instrument" is inoperative in view of section 31 of the Reserve Bank of India Act, 1934, which provides that no person in India other than Reserve Bank of India or Central Government can make or issue promissory note payable to bearer of the instrument.

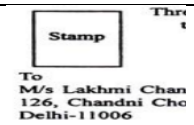
PARTIES TO PROMISSORY NOTE

Maker: The person who makes the promissory note is called as maker. His liability is primary and unconditional.

Payee: he person to whom money is to be paid named in the promissory note

ESSENTIALS OF A PROMISSORY NOTE:

1. In writing	An oral promise to pay is not sufficient. Eg. A promises to pay Rs.1,000 to 'B', over telephone., "Mr. B I.O.U ` 1,000." – Invalid promissory note as there is no promise to pay. It is just an acknowledgement of debt.	
2. Express Promise to pay	There must be an express promise to pay. Mere acknowledgement of indebtedness is not sufficient.	
3. Definite and unconditional promise	If a promise to pay is dependent upon an event which is certain to happen, although the time of its happening is uncertain, the promise to pay is unconditional. Eg. I promise to pay B Rs.500 seven days after my marriage with C. (the promissory note is invalid as	

	marriage with C may or may not happen.), I promise to pay B ` 500 on D's death, provided D leaves me enough to pay that sum. Invalid promissory note as promise is dependent on D leaving behind money which is not certain.	
4. Signed by maker	A promissory note must be signed by the maker. The signatures may be made on any part of the instrument.	
5. Promise to pay a certain sum	"I promise to pay B Rs.500 and all other sums which shall be due to him." Since the amount payable is not certain, it is not a valid promissory note.	
6. Promise to pay money only	"I promise to pay B Rs. 500 and to deliver to him my black horse on 1st January next." It is not a valid promissory note since the promisor is required to deliver his black horse also, which is not 'money'.	
7. Payee must be certain	The name of payee must be specified in the promissory note, otherwise it will be invalid.	
. Stamped	A promissory note must be stamped.	

EXAMPLES- WHETHER PROMISSORY NOTE/NOT?

I. I promise to pay B or order Rs. 500 on 1st Jan 2020 - Yes
II. I acknowledge myself to be indebted to B in Rs. 1000 to be paid on demand for value received. - No
III. Mr B.I.O.U. Rs 1000 - No
IV. I promise to pay Rs. 500 and all other sums which shall be due to him - No
V. I promise to pay Rs. 500 first deducting there out any money which he may owe me.- No
VI. I promise to pay B Rs. 500 seven days after my marriage with C -No
VII. I promise to pay Rs. 500 on B's death, provided he leaves me enough to pay that sum- No

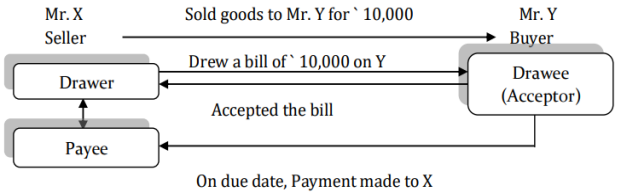
RELEVANT QUESTIONS

1. Rama executes a promissory note in the following form, 'I promise to pay a sum of Rs.10,000 after three months'. Decide whether the promissory note	**Study-Mat**

is a valid promissory note. **A.** Refer to the Q.no. 4 . In the above question the amount is certain but the date and name of payee is missing, thus making it a bearer instrument.	

Q NO.10 BILL OF EXCHANGE [SECTION 5] STATES?

ANSWER:



A 'bill of exchange' is an instrument in writing

1. Containing an unconditional order
2. Signed by the maker
3. Directing a certain person
4. To pay a certain sum of money only to –

I. a certain person ; or
II. the order of a certain person; or
III. the bearer of the instrument.

PARTIES TO BILL OF EXCHANGE

1. Drawer: The person who draws the bill (i.e. the person who makes the bill) is called as drawer. His liability is secondary and conditional.
2. Drawee: The person on whom the bill is drawn is called as drawee.

   On acceptance of the bill,

   I. he is called as acceptor;
   II. he becomes liable for the payment of the bill;
   III. his liability is primary and unconditional.
3. Payee: The person to whom money is to be paid is named in the bill. He is called as payee.

ESSENTIALS OF BILLS OF EXCHANGE:

1. In writing	The bill of exchange must be in writing and be Drawn in any form complying with the Requirements of section 5.	
2. Express Promise to pay	It is the essence of the bill that its drawer orders the drawee to pay money to the payee. Order in this section does not mean a command, but a direction for payment.	

3. Definite and unconditional promise	This order must be unconditional, as the bill is payable at all events. The order must not make the payment of the bill dependent on a contingent event. A conditional bill of exchange is invalid.	 Unconditional Order
4. Signed by maker	The drawer must sign instrument. The instrument without the proper signature will be inchoate and hence ineffective.	 Signature
5. Sum in the order must be certain	A bill must contain an order to pay in terms of money & should be definite amount of money.	
6. Order to pay money only	The medium of payment must be money and money only. The distinctive order to pay anything in kind will vitiate the bill.	
7. Drawer, Drawee & Payee must be certain	The drawer, the drawee (acceptor) and the payee are the necessary parties to a bill and are to be specified in the instrument with reasonable certainty.	
. Stamped	A bill of exchange must be stamped.	

Q NO.11 DIFFERENTIATE BETWEEN PROMISORY NOTE AND BILLS OF EXCHANGE?

ANSWER

SL.no	Basis	Promissory Note	Bill of Exchange
1.	**Definition**	"A Promissory Note" is an instrument in writing (not being a banknote or a currency-note) containing an unconditional undertaking signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument.	"A bill of exchange" is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of a certain person or to the bearer of the instrument.
2.	**Nature of Instrument**	In a promissory note, there is a promise to pay money.	In a bill of exchange, there is an order for making payment.

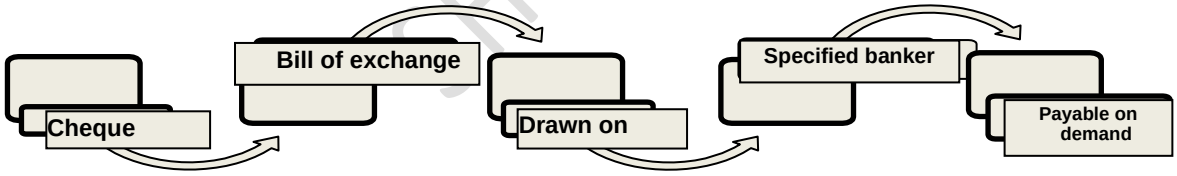
3.	**Parties**	In a promissory note, there are only 2 parties namely: 1. The maker and 2. The payee	In a bill of exchange, there are 3 parties which are as under: 1. The drawer 2. The drawee 3. The payee
4.	**Acceptance**	A promissory note does not require any acceptance, as it is signed by the person who is liable to pay.	A bills of exchange needs acceptance from the drawee.
5.	**Payable to bearer**	A promissory note cannot be made payable to bearer.	On the other hand, a bill of exchange can be drawn payable to bearer. However, it cannot be payable to bearer on demand

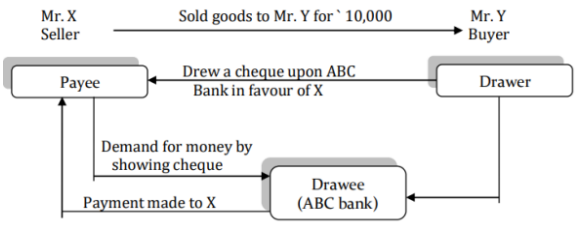
Q NO.12 CHEQUE MEANS _____?

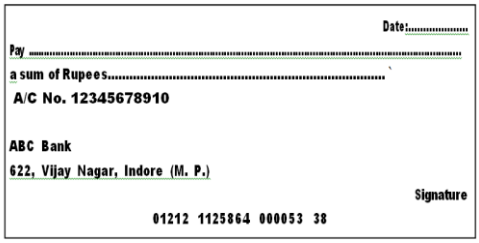
ANSWER:

Section 6: A "cheque" is a bill of exchange drawn on a specified banker and not expressed to be payable

otherwise, than on demand and it includes the electronic image of a truncated cheque and a cheque in the electronic form.






Date:.....
Pay .....
a sum of Rupees.....
A/C No. 12345678910
ABC Bank
622, Vijay Nagar, Indore (M. P.)
Signature
01212 1125864 000053 38

Parties to a Cheque

Drawer: The person who draws the cheque, i.e., the person who makes the cheque is called as drawer. His liability is primary and conditional.

Drawee : The bank on whom the cheque is drawn is called as drawee. He makes the payment of the cheque.

Payee : The person to whom money is to be paid (i.e., the person in whose favour cheque is issued) is named in the cheque. He is called as payee. The payee may be the drawer himself or a third party.

Types of Cheques:

Electronic Cheque

"A cheque in the electronic form" means a cheque which contains the exact mirror image of a paper cheque, and is generated, written and signed in a secure system ensuring the minimum safety standards with the use of digital signature (with or without biometrics signature) and asymmetric crypto system;

Truncated Cheque

"A truncated cheque" means a cheque which is truncated during the course of a clearing cycle, either by the clearing house or by the bank whether paying or receiving payment, immediately on generation of an electronic image for transmission, substituting the further physical movement of the cheque in writing.

Essentials of Cheque:

1. In writing	A cheque must be in writing	
2. Express Promise to pay	It must contain an express order to pay.	
3. Definite and unconditional promise	This order to pay must be definite & unconditional.	
4. Signed by maker	The drawer must sign the cheque	
5. Sum in the order must be certain	A cheque should be an order with definite amount of money.	
6. Order to pay money only	The medium of payment must be money and money only.	

7. Drawer, Drawee & Payee must be certain	The drawer, the drawee (acceptor) and the payee are the necessary parties and must be certain.	
8. Payable on demand	It is always payable on demand.	
9. Drawn upon a specified banker	It is always drawn upon a specified banker.	

Q NO.13 DIFFERENCE BETWEEN CHEQUE AND BILL OF EXCHANGE?

ANSWER :

BASIS	BILL OF EXCHANGE	CHEQUE
Drawee	Any person (including a banker) can be a drawee in case of a bill.	A cheque can be drawn only upon a banker, i.e., only a banker can be a drawee in case of a cheque.
Liability of drawer	The liability of drawer is secondary and conditional. However, until a bill is accepted, the liability of drawer is primary.	The liability of a drawer is always primary. The drawer bank is simply a custodian of moneys of the customer (i.e., drawer.)
Payable to bearer on demand	A bill cannot be made payable to bearer on demand	A cheque can be made payable to bearer on demand
Maturity date	A bill may be payable on demand or otherwise than on demand.	A cheque is always payable on demand.
Stamping	A bill must be stamped	A cheque does not require stamping
Acceptance	A bill requires acceptance if it is payable certain period after sight, or it contains an express term requiring acceptance.	In no case, acceptance of cheque is required
Days of grace	Three days of grace are allowed in case of every bill payable otherwise than on demand.	Since a cheque is always payable on demand, no days of grace are allowed in case of a cheque. A cheque is to be paid immediately on presentment of payment
Crossing	A bill cannot be crossed	A cheque can be crossed
Noting or protest	If a bill is dishonoured, it may be noted or protest.	A cheque cannot be noted or protested in case of dishonour.

Q NO.14 NOTING & PROTESTING?

ANSWER:

Noting & Protesting:

Recording the fact of dishonour of a negotiable instrument on the negotiable instrument. It is a convenient mode of authenticating the fact that bill or note has been dishonoured.

When a note or a bill has been dishonoured by non-acceptance or non-payment, the holder causes such dishonour to be noted by a Notary Public.

Noting Section 99 provides convenient method of authenticating the fact of dishounor by means of "Noting"

Protest [Section 100]: When a promissory note or bill of exchange has been dishonoured by non-acceptance or non-payment, the holder may, within a reasonable time, cause such dishonour to be noted and certified by a notary public. Such certificate is called a protest.

When an instrument, say a bill of exchange, is to be noted for dishonour, is taken to Notary Public who presents it once again for acceptance or payment, as the case may be; and if the drawee or acceptor still refuses to accept or pay the bill, it is noted, i.e., a minute is prepared containing the date of dishonour, reason for such dishonour, etc. which is attached to the instrument; and the facts are noted on the instrument.

Procedure and contents of noting

1. The dishonoured bill is handed over to a Notary Public.
2. Notary Public presents it again for acceptance/payment.
3. If drawee/acceptor refuses to accept or pay the bill, the Notary Public records the fact of dishonour on the bill.

'Noting' must contain the following particulars (Sec. 90):

i) The fact of dishonour

ii) The date of dishonour,

iii) The reasons, if any, assigned for such dishonour,

iv) If the instrument has not been expressly dishonoured, the reason why the holder treats it as dishonoured; and

v) The notary's charges

CONTENTS OF PROTEST

Protest is based upon noting. A protest, in order to be valid, must contain all the particulars of Noting.

NOTING	PROTEST
P/N, BoE, Cheque has been dishonoured by nonacceptance or non-payment— the holder may cause such dishonour to be noted by a	P/N or BoE has been dishonoured by non-acceptance or non-payment— the holder may, cause such dishonour to be noted,

notary public upon- the instrument, or upon a paper attached thereto, or partly upon each	and certified by a notary public

Notice of protest: When a promissory note or bill of exchange is required by law to be protested, notice of such protest must be given instead of notice of dishonour, in the same manner and subject to the same conditions; but the notice may be given by the notary public who makes the protest (Sec. 102).

4.4. CROSSING OF CHEQUES

Q NO.15 CROSSING OF CHEQUES STATES?

ANSWER:

1. Meaning of crossing: Crossing of a cheque means an instruction to the drawee i.e., the paying bank that the payment is not to be made at the counter but through a bank.
2. A Cheque is either open or cross .
3. Crossing means a direction given by the drawer of the cheque to the drawee bank, not to pay the cheque at the counter of the bank, but to pay it to a person who presents it through a banker. Crossing makes it possible to trace the person to whom the payment has been made. Thus, it makes the cheque safe.
4. An open Cheque can be presented by the payee to the paying banker and is paid over the counter.
5. To restrain negotiability , addition of words "Not Negotiable" or Account Payee only" is necessary.
6. **Objects of Crossing**: A crossing is a warning to the bank not to make payment of the crossed cheque over the counter. Crossing operates as a caution to the paying banker.
   I. Crossing affects the mode of payment of cheque- An open or uncrossed cheque is payable to the payee or holder at the counter of the bank. In such a case, if a wrong person takes away the payment of cheque, it is difficult to trace him.
      The payment of a cross cheque can be obtained only through a banker. Thus, crossing is a mode of assuring that only the rightful holder (i.e., the person entitled to receive money) gets payment.
   II. Crossing does not affect the transferability or negotiability of cheque- a crossed cheque can be negotiated just the same way as an open cheque. A person acquiring a crossed cheque in good faith becomes its holder in due course just as in case of open cheque.
   III. Crossing is a material alteration but crossing of cheque by the holder does not in any way affect his rights in respect of cheques (section 125).

Who may cross? [Section 125]

A cheque may be crossed by the following parties:

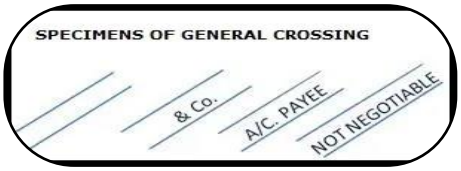
i. By Drawer: A drawer may cross it generally or specially.
ii. By Holder: A holder may cross an uncrossed cheque generally or specially. If the cheque is crossed generally, the holder may cross specially. If cheque crossed generally or specially, he may add words "not negotiable".
iii. By Banker: A banker may cross an uncrossed cheque, or if a cheque is crossed generally he may cross it specially to himself. Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker, his agent, for collection.

Q NO.16 TYPES OF CROSSING:

ANSWER

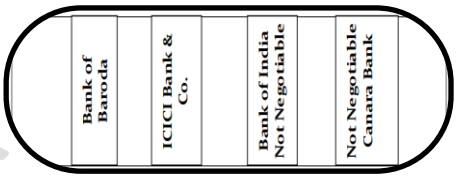
GENERAL	SPECIAL	RESTRICTIVE	NON NEGOTIABLE

1. General Crossing:



Where a cheque bears across its face an addition of – The words 'and company' or any abbreviations thereof between two parallel transverse lines, or Two parallel transverse lines simply either with or without the words 'not negotiable', the addition shall be deemed a crossing, and the cheque shall be deemed to be crossed generally. Where a cheque is crossed generally, the banker on whom it is drawn shall not pay it otherwise than to a banker.

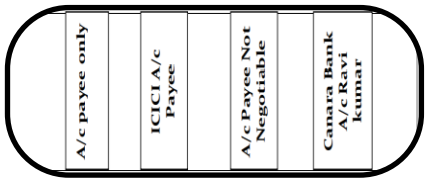
2. Special Crossing:



According to section 124, where a cheque bears across its face an entry of the name of a banker either with or without the words "not negotiable", the cheque is considered to have been crossed specially to that banker.

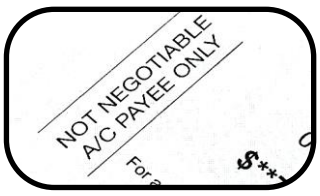
In the case of special crossing the addition of two parallel transverse lines is not essential though generally the name of the bank to which the cheque is crossed specially is written between two parallel transverse lines.

3. **Restrictive/A/C payee**:



Crossing The purpose of this crossing bearing the words "A/c Payee" is to obviate the risk of a wrong person obtaining payment on a cheque. It is a direction to banker to credit the proceeds only to the account of the payee.

4. Not negotiable crossing:



According to section 130, a person taking a cheque crossed generally or specially bearing in either case the words 'not negotiable' shall not have or shall not be able to give a better title to the cheque than that title the person from whom he took had. In consequence if the title to the transferor is defective, the title of the transferee would be vitiated by the defect. But, in the case of a bill negotiated in the ordinary way, the title of the holder in due course would not be affected by the defect in the title of the transferor. Cheque crossed 'Not negotiable' does not affect the transferability of the negotiable instrument in anyway.

. **"Payment in due course" [Section 10]** Concept before covered.

Q NO.17 PROTECTION OF LIABILITY TO PAYING BANKER AND COLLECTING BANKER?

ANSWER:

PROTECTION TO PAYING BANKER :

The banker who makes the payment of a crossed cheque is called the paying banker.

i) **Cheque payable to order [Section 85(1)]:** Where a cheque payable to order purports to be indorsed by or on behalf of the payee, the banker is discharged by payment in due course. The banker, in other words, can debit his customers account even though the indorsement by the payee might turn out to be forgery or the indorsement might have been placed by the payee's agent without his authority.

ii) **Cheque payable to bearer [Section 85(2)]:** As regards bearer cheque, the rule is "once a bearer always a bearer". A banker gets a good discharge by payment in due course of the amount on a bearer cheque to the holder of the cheque. It does not matter whether the apparent holder is the owner of the cheque or not.

iii) **Payment of cheque crossed generally:** Where a cheque is crossed generally, the banker on whom it is drawn shall not pay it otherwise than to a banker.

iv) **Payment of cheque crossed specially**: Where a cheque is crossed specially, the banker on whom it is drawn shall not pay it otherwise than to the banker to whom it is crossed, or his agent for collection.

The above are important situations where it is said that protection to paying banker Some others ,----

v) **Payment in due course of crossed cheque [Section 128]:** Where the banker on whom a crossed cheque is drawn has paid the same in due course, the banker paying the cheque, and (in case such cheque has come to the hands of the payee) the drawer thereof, shall respectively be entitled to the same rights, and be placed in the same position in all respects, as they would respectively be entitled to and placed in if the amount of the cheque had been paid to and received by the true owner thereof.

vi) **Payment of crossed cheque out of due course [Section 129]:** Any banker paying a cheque crossed generally otherwise than to a banker, or a cheque crossed specially otherwise than to the banker to whom the same is crossed, or his agent for collection, being a banker, shall be liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid.

EXCEPTION: Payment of a cheque on which drawer signatures were forged: If any drawee banks made the payment on a cheque on which drawer signatures were forged then such bank shall be liable to the true owner. Thus, the paying banker shall be liable if it makes the payment of the cheque on which drawers' signature was forged.

Summary:

1. When a banker pays a cheque (drawn by his customer), if crossed generally then to any banker, and if crossed specially then to banker, to whom it is crossed or his agent for collection (also being

a banker), he can debit the drawer's account so paid, even though the amount of the cheque does not reach true owner.

2. According to the apparent tenor of the instrument, in good faith and without negligence, to any person in possession thereof in the circumstances which do not excite any suspicion that he is not entitled to receive payment of the cheque.
3. Even though the banker is protected for having made payment of the cheque to a wrong person, the true owner of the cheque is entitled to recover the amount of the cheque from the person who had no title to the cheque.
4. Bank will not be protected under the Act where it makes a payment for a cheque in which Drawer's signature is forged. The banker is required to verify his own customer's sign every time a payment is made.
5. A bank cannot be held liable if endorsee's sign was forged and bank made payment in good faith.

PROTECTION TO COLLECTING BANKER

The bank which receives the payment of a crossed cheque on behalf of its customer is known as the collecting banker.

Section 131- Non liability of banker receiving payment of cheque: A banker who has in good faith and without negligence received payment for a customer of a cheque crossed generally or specially to himself shall not, in case the title of the cheque proves defective, incur any liability to the true owner of the cheque by reason only of having received such payment.

In order to **avail such a protection**, the banker needs to prove the following:

i) That the banker had received the payment of crossed cheque

ii) That the collection was made by the bank on behalf of the customer

iii) That the collecting bank must have acted in good faith and without negligence.

RELEVANT QUESTIONS

1. Mr. Muralidharan drew a cheque payable to Mr. Vyas on order. Mr. Vyas lost the cheque and was not aware of the loss of the cheque. The person who found the cheque forged the signature of Mr. Vyas and endorsed it to Mr. Parshwanath as the consideration for goods bought by him from Mr. Parshwanath. Mr. Parshwanath encashed the cheque on the very same day from the drawee bank. Mr Vyas intimated the drawee bank about the theft of the cheque after three days. Examine the liability of the drawee bank. **A.** Refer to Q. no.25 Section 85 - Cheque payable to order As per the given facts, cheque is drawn payable to "Mr. Vyas or order". It was lost and Mr. Vyas was not aware of the same. The person found the cheque and forged and indorsed it to Mr. Parshwanath, who encashed the cheque from the drawee bank. After few days, Mr. Vyas intimated about the theft of the cheque, to the	**Study-Mat**

drawee bank, by which time, the drawee bank had already made the payment. According to above stated section 85, the drawee banker is discharged when it has made a payment against the cheque payable to order when it is purported to be indorsed by or on behalf of the payee. Even though the signature of Mr. Vyas is forged, the banker is protected and is discharged. The true owner, Mr. Vyas, cannot recover the money from the drawee bank in this situation	

4.5. ACCEPTOR AND ACCEPTOR FOR HONOUR

Q NO.18 ACCEPTANCE RELATES TO?

ANSWER:

"Acceptor" [Section 7] - After the drawee of a bill has signed his assent upon the bill, or, if there are more parts thereof than one, upon one of such parts, and delivered the same, or given notice of such signing to the holder or to some person on his behalf, he is called the "acceptor". Thus, an acceptor is the drawee who has signed his assent upon the bill and delivered it to the holder.

Meaning of acceptance

1. The drawee signs the bill; and
2. The drawee delivers it to the holder of the bill; or
3. Writing (whether on the face or back of the bill)
4. Signed (Signature without the word 'accepted' is also valid)
5. Signing on the bill
6. Delivery or intimation to the holder that the bill has been accepted.

Types of Acceptance

i) General – Acceptance of bill without any qualification.

ii) Qualified – Acceptance of bill subject to some qualification .

(e.g. accepting the bill subject to the condition that the payment of bill shall be made only on happening of an event specified therein).

Effect of qualified acceptance

i) The holder may object to the qualified acceptance. In such a case, it shall be treated that the bill is dishonoured due to non – acceptance.

ii) He may give his consent to the qualified acceptance. In such a case, all the previous parties, not consenting to it, are discharged.

Acceptance of Bill in fictitious name Section 42

An acceptor of a bill of exchange drawn in a fictitious name and payable to the drawer's order is not, by reason that such name is fictitious, relieved from liability to any holder in due course claiming under an endorsement by the same hand as the drawer's signature, and purporting to be made by the drawer.

Illustration X draws a bill on Y but signs it in the fictitious name of Z. The bill is payable to the order of Z. The bill is duly accepted by Y. M obtains the bill from X thus becoming its holder in due course. Can Y avoid payment of the bill? Decide in the light of the provisions of the Negotiable Instruments Act, 1881. Solution Bill drawn in fictitious name: The problem is based on the provision of Section 42 of the Negotiable Instruments Act, 1881. In case a bill of exchange is drawn payable to the drawer's order in a fictitious name and is endorsed by the same hand as the drawer's signature, it is not

permissible for the acceptor to allege as against the holder in due course that such name is fictitious. Accordingly, in the instant case, Y cannot avoid payment by raising the plea that the drawer (Z) is fictitious. The only condition is that the signature of Z as drawer and as endorser must be in the same handwriting.

ACCEPTANCE FOR HONOUR

When a bill of exchange has been dishonoured by non- acceptance and any person accepts it for honour of the drawer or of any indorsers, such person is called "an Acceptor for honour".

The payment which he makes is known as "payment for honour. In other words, it is an undertaking by a third party to accept and pay a bill of exchange that was dishonoured, either by non-acceptance (see dishonour by non-acceptance) or by non-payment (see dishonour by non-payment) by the party on whom it was drawn. It is also called acceptance supra protest.

How acceptance for honour must be made: A person desiring to accept for honour must, [by writing on the bill under his hand], declare that he accepts under protest the protested bill for the honour of the drawer or of a particular endorser whom he names, or generally for honour.

Example: The acceptor for honour may write across the bill of exchange "Accepted Supra Protest" or "Accepted for AB (the name of drawee)".

Essentials of valid acceptance for honour

1. The holder must consent to acceptance for honour. The holder cannot be compelled to assent to acceptance for honour.
2. The bill must have been noted or protested for the non-acceptance or for better security.
3. Acceptance for honour can be made by a person who is not already liable on the bill. Drawee of the bill when he refuses to accept the bill becomes a stranger. He may, therefore, accept the bill for honour of any party thereto.
4. It must be made by writing on the bill.
5. It must be for the whole amount due on the bill
6. Acceptance must be for the honour of any party already liable on the bill.
7. Acceptance for honour must be made before bill is overdue.

Liability of acceptor for honour

I. He is liable to pay the amount of the bill, if the drawee does not pay on maturity.

II. He is liable only to the parties subsequent to the party for whose honour the bill is accepted

The bill of exchange should be presented at its maturity to the drawee for payment and it must be dishonoured by the drawee and noted or protested for non-payment to charge an acceptor for honour (Section 112). The bill must be presented or forwarded for presentment to the drawee not later than the day next after the day of its maturity.

Rights of acceptor for honour

I. Acceptor for honour binds himself to all the subsequent parties to pay the amount of the bill if the drawee does not pay.

II. The party for whose honour he accepts to pay the amount and all prior parties are liable to compensate the acceptor for honour for all loss or damage sustained by him in consequence of such acceptance. The liability of an acceptor for honour is conditional and he is liable only if the drawee fails to pay the bill.

He is entitled to recover the amount paid by him from the party for whose honour the bill was accepted, and from all the parties prior to such party.

PRESENTMENT FOR ACCEPTANCE:

According to section 61 of the Negotiable Instruments Act, 1881, a bill of exchange payable after sight must, if no time or place is specified therein for presentment, be presented to the drawee thereof for acceptance, if he can, after reasonable search, be found, by a person entitled to demand acceptance, within a reasonable time after it is drawn, and in business hours on a business day. In default of such presentment, no party thereto is liable thereon to the person making such default. If the drawee cannot, after reasonable search, be found, the bill is dishonoured. If the bill is directed to drawee at a particular place, it must be presented at that place, and if at the due date for presentment he cannot, after reasonable search, be found thereon, the bill is dishonoured. When authorized by agreement or usage, a presentment through the post office by means of a registered letter is sufficient.

RELEVANT QUESTIONS

1. Examine whether acceptance of a bill of exchange in the following situations shall be treated as 'qualified' acceptance where the acceptor a) Undertakes to pay only Rs. 2000 for a bill drawn for Rs. 5000 b) Declares the payment to be independent of any other event c) Writes Accepted, payable at ABC Bank' A. Refer to Q.no. 26	**Study- mat**

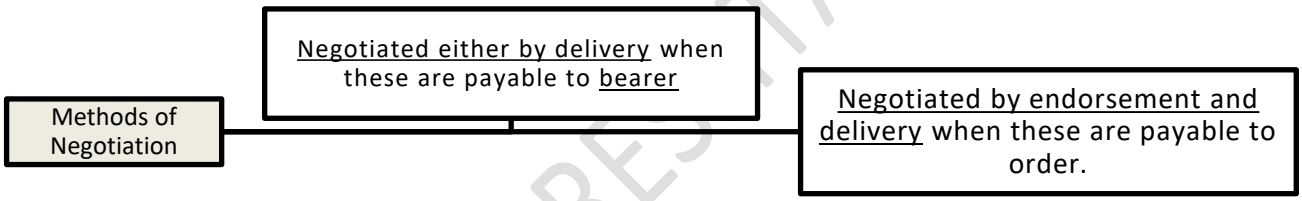
4.6. NEGOTIATION (TRANSFER) OF NEGOTIABLE INSTRUMENTS

Q NO.19 NEGOTIATION SECTION 14 REFERS TO ____?

ANSWER:

1. **Negotiation** means transfer of a negotiable instrument to any other person so as to constitute that person the holder of such negotiable instrument.
2. The rights in a negotiable instrument can be transferred from one person to another by negotiation.
3. According to Section 14 of the N.I. Act, when a negotiable instrument is transferred to any person with a view to constitute the person holder thereof, the instrument is deemed to have been negotiated. Thus, there is a transfer of ownership of the instrument.
4. Negotiable instruments may be negotiated either by delivery when these are payable to bearer or by endorsement and delivery when these are payable to order.

Methods/Modes of Negotiation:



i. A promissory note, bill of exchange or cheque payable to bearer is negotiable by the delivery thereof.

ii. A promissory note, bill of exchange or cheque payable to order is negotiable by the holder by endorsement and delivery thereof.

Q NO.20 NEGOTIATION BY DELIVERY [SECTION 47] REFERS TO _____?

ANSWER:

Subject to the provisions of section 58, a promissory note, bill of exchange or cheque payable to bearer is negotiable by delivery thereof.

Exception: A promissory note, bill of exchange or cheque delivered on condition that it is not to take effect except in a certain event is not negotiable (except in the hands of a holder for value without notice of the condition) unless such event happens.

Example:

I. A, the holder of a negotiable instrument payable to bearer, delivers it to B's agent to keep for B. The instrument has been negotiated

II. A, the holder of a negotiable instrument payable to bearer, which is in the hands of A's banker, who is at the time the banker of B, directs the banker to transfer the instrument to B's credit in the banker's account with B. The banker does so, and accordingly now possesses the instrument as B's agent. The instrument has been negotiated, and B has become the holder of it.

Importance of Delivery in Negotiation [Section 46]

1. Delivery of an instrument is essential whether the instrument is payable to bearer or order for effecting the negotiation.
2. The delivery must be voluntary, and the object of delivery should be to pass the property in the instrument to the person to whom it is delivered.
3. The delivery can be, actual or constructive or some times conditional.
4. Section 46 also lays down that when an instrument is conditionally or for a special purpose only, the property in it does not pass to the transferee, even though it is indorsed to him, unless the instrument is negotiated to a holder in due course.
5. The contract on a negotiable instrument until delivery remains incomplete and revocable. The delivery is essential not only at the time of negotiation but also at the time of making or drawing of negotiable instrument. The rights in the instrument are not transferred to the Endorsee unless after the indorsement the same has been delivered.
6. If a person makes the endorsement of instrument but before the same could be delivered to the Endorsee the Endorser dies, the legal representatives of the deceased person cannot negotiate the same by mere delivery thereof. (Section 57).

Types of Delivery

I. Actual delivery takes place when the instrument changes hand physically.

II. Constructive Delivery- The Instrument is delivered to an agent/servant of the endorsee on his behalf • The endorser holds on behalf of endorsee .

III. Conditional Delivery-The Instrument is delivered upon a condition or for a special purpose. The instrument cannot be negotiated until the condition is satisfied.

RELEVANT QUESTION

Q. M owes money to N. Therefore, he makes a promissory note for the amount in favour of N, for safety of transmission he cuts the note in half and posts one half to N. He then changes his mind and calls upon N to return the half of the note which he had sent. N requires M to send the other half of the promissory note. Decide how rights of the parties are to be adjusted. **A.** The question arising in this problem is whether the making of promissory note is complete when one half of the note was delivered to N.	**Study – Mat**

Under Section 46 of the N.I. Act, 1881, the making of a Promissory Note (P/N) is completed by delivery, actual or constructive. Delivery refers to the whole of the instrument and not merely a part of it. Delivery of half instrument cannot be treated as constructive delivery of the whole. So, the claim of N to have the other half of the P/N sent to him is not maintainable. M is justified in demanding the return of the first half sent by him. He can change his mind and refuse to send the other half of the P/N.	

Q NO.21 WHEN IS DELIVERY EFFECTIVE BETWEEN THE PARTIES?

ANSWER

Negotiation of instruments between the parties	How delivery is to be made
As between parties standing in immediate relation	Delivery to be effectual must be made by the party making, accepting, or endorsing the instrument, or by a person authorized by him in that behalf.
As between such parties and any holder of the instrument other than a holder in due course	It may be shown that the instrument was delivered conditionally or for a special purpose only, and not for the purpose of transferring absolutely the property therein.

Q NO.22 NEGOTIATION BY ENDORSEMENT AND DELIVERY [SECTION 48] RELATES TO ___?

ANSWER:

Before understanding this, read the Endorsement term .

Subject to the provisions of section 58, a or promissory note, bill of exchange cheque payable to order, is negotiable by the holder by endorsement and delivery thereof.

Q NO.23 ENDORSEMENT / INDORSEMENT OF INSTRUMENT > [SECTION 15- 16]

ANSWER:

Endorsement:

(Endorsement and indorsement are both nouns.)

1. Signing on the face or back of negotiable instrument or on a slip of paper annexed known as allonge . or so , signs for the purpose , as tamped paper intended to be called as the negotiable instrument , he is said to endorse the same(Section 15) , the person to whom the instrument is endorsed is called the Endorsee.
2. The signature may also be on the face of the instrument. No particular form of words is necessary for an endorsement.

3. A legal representative is not an agent of the deceased. Therefore, a legal representative cannot complete the instrument if the instrument was executed by the deceased but could not be delivered because of his death.
4. Endorsement means and involves the writing of something on the back of an instrument for the purpose of transferring the right , title and interest therein to some other person.

ENDORSEMENT: When the maker or holder of a negotiable instrument ,signs the same (otherwise than as such maker)—

I. for the purpose of negotiation
II. on the back or face thereof or on a slip of paper annexed thereto, or so signs for the same purpose a stamped paper intended to be completed as a negotiable instrument,
III. he (maker/holder) is said to indorse the same, and is called the "endorser".

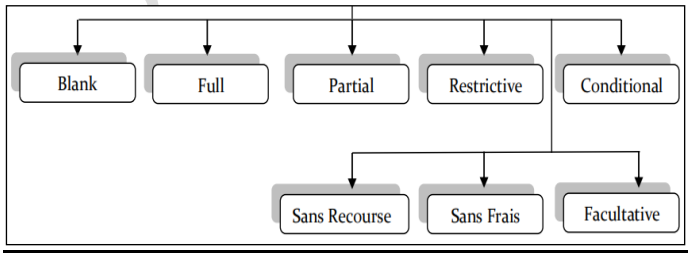
Example: X, who is the holder of a negotiable instrument, writes on the back thereof: "pay to Y or order" and signs the instrument. In such a case, X is deemed to have indorsed the instrument to Y. If X delivers the instrument to Y, X ceases to be the holder and Y becomes the holder.

ESSENTIAL REQUIREMENTS OF A VALID ENDORSEMENT

I. Writing: The endorsement must be in writing
II. Signed: The endorsement shall not be valid unless it is signed.
III. By holder: The endorsement shall be valid only if the negotiable instrument is signed by the holder.

Q NO.24 DIFFERENT CLASSES OF ENDORSEMENT/(INDORSEMENT)?

ANSWER:



Various Kinds of Indorsement

1. **General endorsement i.e. endorsement in blank**

   General endorsement means, an endorsement made by the endorser without writing the name of the endorsee. Order instrument is converted into bearer instrument. Where the endorser just puts his signature without specifying the endorsee, the Endorsement is said to be in blank (Section 16).

2. **Special endorsement i.e., endorsement in full(name and signature)**

   Special endorsement means an endorsement made by a holder by – signing his name, and adding a direction to pay the amount to a specified person . Thus, where the instrument states, 'Pay X or

order' and is signed by A, the payee, it constitutes 'indorsement in full'.(Section 16)

3. **Restrictive endorsement**

An endorsement which restricts the right of further negotiation is called as restrictive endorsement. An Endorsement is "restrictive" when it prohibits or restricts the further negotiability of the instrument. It merely entitles the holder of the instrument to receive the amount on the instrument for a specific purpose.

Example: D signs the following endorsements on different negotiable instruments payable to bearer:

(a) Pay the contents to G only

(b) Pay G for my use

(c) Pay G or order for the account of H

These endorsements exclude the right of further negotiation by G.

4. **Partial endorsement**

An endorsement which purports to transfer only a part of the amount of the instrument is called as partial endorsement. Partial endorsement is not valid at law as per Section 56. Exception to the Second part of section 56 states that if a bill has been paid in part, the fact of the part payment may be indorsed on the instrument and it may then be negotiated for the residue.

Examples

1. A bill may be indorsed: Pay A or order Rs.5000 being the unpaid residue of the bill. It is a valid indorsement.

2. A is a holder of a bill for Rs.10000. A indorses it thus: "Pay B or order Rs.5000". This is partial indorsement and invalid for the purpose of negotiation.

5. **Conditional endorsement - Section 52**

Power to an endorser to insert in the indorsement by express words, a stipulation negating (excluding) or limiting his own liability to the holder by making such liability or the right of the endorsee to receive the amount due thereon upon the happening of a specified event although such event may never happen.

1. Sans Recourse: By adding these words after the endorsement, the endorser declines to accept any liability on the instrument of any subsequent party .Sometimes, where an endorser who so excludes his liability as an endorser afterwards becomes the holder of the same instrument. In such a case, all intermediate endorsers are liable to him.

Example: M, the holder of a bill, endorses it "without recourse" to N. N endorses it to P, P to Q, Q to R and R endorses it again to M. M can recover the amount of the bill from N,P,Q and R, or any of them. Thus, M is not only reinstated in his former rights, but has the right of an endorse against N,P,Q and R.

2. Sans Frais: These words when added at the end of the endorsement indicate that no expenses should be incurred on account of the bill.

3.Facultative: when it is desired to waive certain right, the appropriate words are added to indicate the fact, e.g., "notice of dishonour dispensed with".

4. Conditional: Endorsement by which the endorser makes his liability dependent upon happening of some event.

Q NO.25 CONVERSION OF INDORSEMENT IN BLANK INTO INDORSEMENT IN FULL [SECTION 49]

ANSWER:

The holder of a negotiable instrument indorsed in blank may—without signing his own name, by writing above the endorser's signature a direction to pay to any other person as endorsee, convert the indorsement in blank into an indorsement in full; and the holder does not thereby incur the responsibility of an endorser.

According to Section 55, if a negotiable instrument, after having been indorsed in bank, is indorsed in full, the amount of it cannot be claimed from the endorser in full, except by the person to whom it has been indorsed in full, or by one who derives title through such person.

Example: A is the payee holder of a bill. A indorses it in blank and delivers it toB. B indorses it in full to c or order. C without indorsement transfers the bill to D. D as the bearer is entitled to receive payment or to sue drawer, acceptor, or A who indorsed the bill in blank, but he cannot sue B or C. C can sue B as he received the bill form by indorsement in full. If, however, C instead of passing the bill to D without indorsement passes it by a regular indorsement, D can claim against all prior parties.

Thus, if an indorsement in blank is followed by an indorsement in full, the instrument still remains payable to bearer and negotiable by delivery against all parties prior to the endorser in full, though the endorser in full is only liable to a holder who made title directly through his indorsement, and person deriving title through such holder.

Essentials of a valid indorsement

i) Signature of indorser: The indorsement must be signed. The indorsement may be made by the indorser either by merely signing his name on the instrument or by specifying in addition to his signature, the person to whom or to whose order the instrument is payable. When, in a bill payable to order, the indorsee's name is wrongly spelled, he should when he indorses it, sign the name as spelled in the instrument and write the correct spelling within brackets after his indorsement.

ii) Who may indorse or negotiate- Every sole maker, drawer, payee or indorsee, or all of several joint makers, drawers, payees or indorsee's of a negotiable instrument may indorse and negotiate the same unless negotiability of such instrument has been restricted or excluded as mentioned in Section 50.

Explanation: It is however, necessary that such maker or drawer who wants to indorse is in lawful possession of the instrument. (Section 51)

Example: A bill is drawn payable to A or order. A indorses it to B, the indorsement not containing the words "or order" or any equivalent words. B may negotiate the instrument.

I. Effect of indorsement: The indorsement of a negotiable instrument followed by delivery transfers to the indorsee the property therein with the right of further negotiation, but the indorsement may by express words, restrict or exclude such right, or may merely constitute the indorsee an agent to indorse the instrument, or to receive its contents for the indorser, or for some other specified person.

Example :

B signs the following indorsements on different negotiable instruments payable to bearer,—

(a) "pay the contents to C only".

(b) "pay C for my use".

(c) "pay C on order for the account to B".

(d) "the within must be credited to C".

The above indorsements exclude the right of further negotiation by C.

The below indorsements do not exclude the right of further negotiation by C:

(a) "pay C".

(b) "pay C value in account with the Oriental Bank".

(c) "pay the contents to C, bring part of the consideration in a certain deed of assignment executed by C to indorser and others".

Endorser who excludes his own liability or makes it conditional [Section 52]

The endorser of a negotiable instrument may,

1. by express words in the indorsement, exclude his own liability thereon, or

2. make such liability or the right of the endorsee to receive the amount due thereon depend upon the happening of a specified event, although such event may never happen.

Where an endorser so excludes his liability and afterwards becomes the holder of the instrument all intermediates' endorsers are liable to him.

Example:

(1) The endorser of a negotiable instrument signs his name, adding the words "without recourse". Upon this indorsement he incurs no liability.

(2) A is the payee and holder of a negotiable instrument. Excluding personal liability by an indorsement, "without recourse", he transfers the instrument to B, and B indorses it to C, who indorses it to A. A is not only reinstated in his former rights, but has the rights of an indorsee against B and C.

INSTRUMENT OBTAINED BY UNLAWFUL MEANS OR FOR UNLAWFUL CONSIDERATION [SECTION 58]:

1. When a negotiable instrument has been lost, or
2. has been obtained from any maker, acceptor or holder thereof by means of an offence or
3. fraud, or
4. for an unlawful consideration,

no possessor or indorsee who claims through the person who found or so obtained the instrument is entitled to receive the amount due thereon from such maker, acceptor or holder, or from any party prior to such holder, unless such possessor or indorsee is, or some person through whom he claims was, a holder thereof in due course.

INSTRUMENT ACQUIRED AFTER DISHONOUR OR WHEN OVERDUE [SECTION 59]

The holder of a negotiable instrument, who has acquired it after dishonour, whether by—

1. non-acceptance
2. or non-payment,
3. with notice thereof, or
4. after maturity,

has only, as against the other parties, the rights thereon of his transferor.

Accommodation note or bill:

Provided that any person who, in good faith and for consideration, becomes the holder, after maturity, of a promissory note or bill of exchange made, drawn or accepted without consideration, for the purpose of enabling some party thereto to raise money thereon, may recover the amount of the note or bill from any prior party.

Example : The acceptor of a bill of exchange, when he accepted it, deposited with the drawer certain goods as a collateral security for the payment of the bill, with power to the drawer to sell the goods and apply the proceeds in discharge of the bill if it were not paid at maturity. The bill not having been paid at maturity, the drawer sold the goods and retained the proceeds, but indorsed the bill to A. A's title is subject to the same objection as the drawer's title.

INSTRUMENT NEGOTIABLE TILL PAYMENT OR SATISFACTION [SECTION 60]:

A negotiable instrument may be negotiated (except by the maker, drawee or acceptor after maturity) until payment or satisfaction thereof by the maker, drawee or acceptor at or after maturity, but not after such payment or satisfaction.

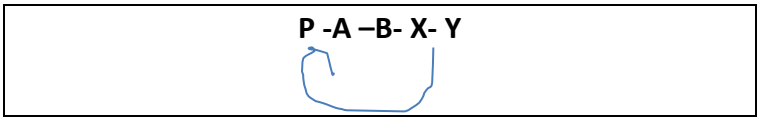
Q NO.26 NEGOTIATION BACK _____?

ANSWER:

An instrument is said to have been negotiated back to him and he is said to have taken up or taken back the negotiable instrument when a person who has been a party to the negotiable instrument takes it again.

Taking up of a bill is its other name .

Example, suppose that the endorsements on a negotiable instrument are as under:



I. Here A is person who is a prior party to the instrument.

II. He negotiated it to B, B to X, X to Y and Y again to A

III. A, in the above-case cannot sue Y, X or B. But A can sue P since the latter is prior to A's original endorsement.

IV. If however A, in original endorsement, had signed "sans recourse" there could be no circuitry of action and A could sue Y, X or B.

Q NO.27 DISTINCTION BETWEEN NEGOTIATION AND ASSIGNMENT?

ANSWER:

BASIS	Negotiation	ASSIGNMENT
1. Applicable Act	If a negotiable instrument is transferred by way of negotiation, Negotiable Instrument Act, 1881, applies.	Where any right is transferred by way of assignment, the Transfer of Property Act applies.
2. Meaning	Negotiation means transfer of a negotiable instrument to any other person so as to constitute that person the holder of such negotiable instrument.	Transfer of a right to receive the payment of a debt by one person (viz assignor) to another document is called as assignment
3. Scope	Negotiation can be made for transferring negotiable instruments only.	Assignment can be made of any right.
4. Method or manner	A bearer instrument can be negotiated merely by delivery, and an order instrument can be negotiated by endorsement and delivery.	Assignment is valid only if it is made in writing and is signed by the assignor.
5. Notice	Notice of negotiation is not required to be given to any party.	Notice of assignment must be given by the assignee to the debtor.
6. Consideration	It is presumed that every negotiable instrument was negotiated for consideration.	There is no such presumption in case of assignment

7. Burden of proof	The other party has to prove that negotiation was without any consideration	The assignee has to prove that there was some consideration.
8. Better title	The transferee of a negotiable instrument acquires a title better than that of the transfer, i.e., he becomes a holder in due course	The assignee does not acquire a title better than that of the assignor.

RELEVANT QUESTIONS

1. M drew a cheque amounting to Rs. 2 lakh payable to N and subsequently delivered to him. After receipt of cheque N indorsed the same to C but kept it in his safe locker. After sometime, N died, and P found the cheque in N's safe locker. Does this amount to Indorsement under the Negotiable Instruments Act, 1881? **A.** No, P does not become the holder of the cheque as the negotiation was not completed by delivery of the cheque to him. (As per Section 48, the Negotiable Instruments Act, 1881)	**Study-Mat**

4.7. HUNDIES

Meaning: ▪ Hundis are negotiable instrument drawn in an oriental or vernacular language.

▪ The Negotiable Instrument Act, 1881 is ordinarily not applicable to Hundies but the parties to the Hundies may agree to be governed by the Negotiable Instrument Act.

▪ A Hundi may be accepted orally as per local usage.

▪ A Hundi is assignable without any regular form of endorsement**.**

Types of Hundies:

Shah Jog Hundi	It is a hundi payable to Shah (i.e. a financier of repute) Shah. 'Shah' means a respectable and responsible person or a man of worth in the bazar/market.
Nam Jog Hundi	It is a hundi payable to the party named in the Hundi or his order. It is transferable by endorsement and delivery.
Dhani Jog Hundi	It is a hundi payable to the Dhani or owner a holder or bearer owner. It is transferable by mere delivery.
Jokhmi Hundi	It is a hundi drawn on or against goods shipped on the vessel mentioned in the hundi and is payable only when the goods reach their destination safely. It is combination of a bill of exchange and insurance policy. It is the money paid before hand and is to be recovered if the ship arrives safely.
Jawabee Hundi	It is a hundi which is in the nature of a letter or recommendation to a banker for payment of particular amount to a particular person. Its used for remitting money from one place to another.
Khoka	Hundi which has already been discharged.

1.2. DISCHARGE

Q NO.28 DISCHARGE OF AN INSTRUMENT?

ANSWER:

MEANING: An instrument is said to be discharged only when the party who is ultimately liable therein is discharged from liability.

Different modes of discharge of Instrument are :

1. Payment in due course: A negotiable instrument is discharged if the party primarily liable on the negotiable makes the payment in due course. When the payment is made, the negotiable

instrument must be cancelled or the fact of payment must be recorded on negotiable instrument.

2. Cancellation: Where the holder cancels the name of the party primarily liable on the negotiable instrument, with intent to discharge him, the negotiable instrument is discharged.
3. Release: Where the holder releases or renounces his rights against the party primarily liable on the negotiable instrument, the negotiable instrument is discharged.
4. Party Primarily Liable becoming Holder: If the acceptor of a bill of exchange becomes its holder at or after maturity in his own right, the instrument is discharged.

Q NO.29 DISCHARGE OF A PARTY [Section 82 to 90]?

ANSWER:

When a party, who is liable on a negotiable instrument, ceases to be liable he is said to be discharged from liability. Discharge from liability of a party to an instrument is different from the discharge of negotiable instrument itself.

When only some of the parties to an instrument are discharged from liability but others continue to be liable thereon, it is only discharge of some of the parties from liability.

When the rights against all the parties on an instrument come to an end, the instrument is discharged. After the instrument is discharged no person, even a holder in due course, can claim the amount of the instrument from any party thereto.

Thus, when the maker of a promissory note or the acceptor of a bill is discharged, all the other parties liable on the instrument are automatically discharged and in that case the instrument itself is deemed to be discharged. So long as the instrument is discharged it can continue to be negotiated.

Modes of discharge from liability on Instruments

According to section 82 of the Negotiable Instruments Act, 1881, the maker, acceptor or endorser respectively of a negotiable instrument is discharged from liability thereon-

I. By cancellation-to a holder thereof who cancels such acceptor's or endorser's name with intent to discharge him, and to all parties claiming under such holder,
II. By release- to a holder thereof who otherwise discharges such maker, acceptor or endorser, and to all parties deriving title under such holder after notice of such discharge;
III. By payment-to all parties thereto, if the instrument is payable to bearer, or has been endorsed in blank, and such maker, acceptor or endorser makes payment in due course of the amount due thereon.

Further, as per section 83 of the Negotiable Instruments Act, 1881, if the holder of a bill of exchange allows the drawee more than 48 hours, exclusive of public holidays, to consider whether he will accept the same, all previous parties not consenting to such allowance are thereby discharged from liability to such holder.

The Negotiable Instrument is deemed to be discharged in the following cases –

1. **Payment [Sec.78]**

   Where payment is made by any party liable on the negotiable instrument (other than the party primarily liable on the negotiable instrument), such a party and all parties subsequent to him are discharged.

2. **Cancellation of N/I [Sec.82]**

   Where the holder cancels the name of any party liable on the negotiable instrument (other than the party primarily liable on the negotiable instrument), such a party and all parties subsequent to him are discharged.

3. **Release**

   Where the holder releases any party liable on the negotiable instrument (other than the party primarily liable on the negotiable instrument), such a party and all parties subsequent to him are discharged.

4. **Negotiation back**

   Where a party already liable on the negotiable instrument (other than the party primarily liable on the negotiable instrument) becomes the holder of the negotiable instrument, such a party and all intermediate parties are discharged.

   If the acceptor of a bill of exchange becomes its holder at or after maturity in his own right, the instrument is discharged.

5. **By Allowing drawee more than 48 hours to Accept [Section 83]**

   If the holder allows more than 48 hours, exclusive of public holidays, to the drawee to accept the bill, all the prior parties not consenting to the same are discharged from liability to such holder.

6. **Qualified acceptance**

   Where the holder consents to qualified acceptance, all the prior parties not consenting to the same are discharged.

   If the holder of a bill agrees to a qualified acceptance all prior parties whose consent is not obtained to such an acceptance are discharged from liability. Acceptance of a bill is deemed to be qualified, for example, when the acceptance is conditional, declaring the payment to be dependent on the happening of an event therein stated, or wherein alters the payment of the sum ordered to be paid, or when the acceptor accepts to pay at a specified place only and not elsewhere.

7. OPERATION UNDER LAW :

i) Lapse of time

An instrument becomes discharged by lapse of time making the debt time barred under the limitation Act. On the expiry of the period prescribed for the recovery of the amount due.

ii) Insolvency of party primarily liable

When the party primarily liable becomes insolvent, the instrument is discharged and the holder cannot make any other prior party liable thereon. On declaration of a party as an insolvent by an order of the court

8. MATERIAL ALTERATION TO INSTRUMENT (IMPT)

An alteration can be called a material alteration if it

- Alters or attempts to alter the character of the instrument and
- Affects or is likely to affect the contract which the instrument contains or is evidence of.

Effect of Material Alteration: An instrument which is materially altered becomes void against all persons who were parties to it at the time of alteration and did not consent to it.

Examples of Material Alteration:

1. Alteration of date of instrument (e.g. if a bill dated 1st May 1998 is changed to a bill dated 1st June 1998)
2. Alteration of time of payment (e.g., if a bill payable three months after date is changed to a bill payable four months after date)
3. Alteration of place of payment (e.g., if a bill payable at Delhi is changed to bill payable at Mumbai).
4. Alteration of amount payable (e.g., if bill for `1,000 is changed to a bill for Rs.2,000)
5. Addition of a new party to an instrument.

Non-material alteration cases (the instrument is not void):

1 Conversion of instrument payable to order into one payable to bearer.
2 Elimination of the words or order from an endorsement.
3 Addition of the words on demand' to a note in which no time or payment is expressed.
4 Alteration of one of the clauses of the instrument containing a penal action.

Some Material Alterations Authorized by the Act [Sections 20, 49, 125] :

1. Filling blanks of inchoate instruments [Section 20]
2. Conversion of a blank endorsement into an endorsement in full [Section 49]
3. Crossing of cheques [Section 125].

4. Apparent alteration – The alteration should be apparent on the face of the instrument otherwise it remains a valid security in the hands of a holder in due course. Section 89 provides that where an instrument has been materially altered but does not appear to have been so altered, the party paying it will be discharged by payment in due course.
But in such case, the acceptor is liable only for the original tenor of the instrument and not for its altered tenor.

Example : A promissory note was made without mentioning any time for payment. The holder added the words "on demand" on the face of the instrument. As per the above provision of the Negotiable Instruments Act, 1881 this is not a material alteration as a promissory note where no date of payment is specified will be treated as payable on demand. Hence adding the words "on demand" does not alter the business effect of the instrument.

9. <u>Negotiation To Acceptor [Sec. 90]</u>

When a B/E which has been negotiated is, at or after maturity, held by the Acceptor in his own right, all rights of action thereon are extinguished, i.e. the B/E is discharged.

4.8. DISHONOUR OF NEGOTIABLE INSTRUMENTS (SECTION 91 – SECTION 98)

Q NO.30 DISHONOUR ___?

ANSWER:

It means to fail or refuse to pay.

Dishonour means not honouring the obligation. A negotiable instrument may be dishonoured by- A bill of Exchange is dishonoured either by non-acceptance or by non-payment but a cheque and promissory notes can be dishonoured by non-payment.

A bill may be dishonoured by the below two ways

(a) Non-acceptance, or

(b) Non- payment.

Q NO.31 DISHONOUR BY NON-ACCEPTANCE [Section 91]?

ANSWER:

1. Meaning: A BE is said to be dishonored by non-acceptance, when the drawee makes default in acceptance upon being duly required to accept the bill Where the drawee is incompetent to contract or the acceptance is qualified the bill may be treated as dishonored.

2. A bill of exchange is said to be dishonoured by non-acceptance in following circumstances

   i) If the drawee does not accept it within 48 hours from the time of Presentment.

   ii) Where presentment is excused, and the bill is not accepted

   iii) When the drawee is incompetent to contract.

   iv) When the drawee cannot be found after reasonable search.

   v) When the drawee is a fictitious person or after reasonable search cannot be found.

   vi) When a drawee gives a qualified acceptance, the holder may treat the instrument dishonoured.

3. Consequences of Dishonour by Non-acceptance :

   i) Holder can sue all prior parties instantly

   ii) No need for waiting till the maturity and prior parties can be sued immediately.

Q NO.32 DISHONOUR BY NON-PAYMENT [Section 92]?

ANSWER:

A negotiable instrument shall be dishonoured by non-payment if default in payment is made by the following parties.

1. Promissory Note - Maker

2. Bill of Exchange - Acceptor (Drawee, in case the bill does not require acceptance)
3. Cheque - Drawee

When >>

1. When the party is primarily liable (i.e., the maker of the note or acceptor of the bill or drawee of the cheque) makes default in payment upon being duly required to, pay the same.

2. When the presentment for payment is excused and the instrument when overdue remains unpaid. [Section 76]

Note: Where a promissory note was sent by registered post and the party liable refused to receive the post, the bill was held to be dishonoured.

Q NO.33 NOTICE OF DISHONOUR

ANSWER:

The object of notice of dishonour is to inform (or warn) the party or the person who is liable on instrument about the dishonour of the instrument

Also, in the case of drawer to enable him to protect himself as against the drawee or acceptor who has dishonoured his bill. The notice is necessary whatever the nature of the instrument i.e. whether it is payable at sight or on demand or whether it is an accommodation bill.

In order to make the drawer liable, on the dishonour by the drawee or the acceptor, it is necessary that a 'notice of dishonour' must have been given to him.

The omission on the part of holder to give due notice of dishonour would discharge the drawer not only from his liability upon the cheque, but also upon the original debtor consideration. The doctrine of notice of dishonour is based upon the principle of just and equity.

Some important points:

1. Notice by whom: It must be given by the holder or by a party liable on the instrument.
2. Notice to whom: To all parties (other than the maker of a note or drawee of a bill or cheque) whom the holder seeks to make severally or jointly liable.
3. Contents of Notice: No specific format thereof is available, only requirement is that it must inform the party to whom it is given that the instrument has been dishonoured and in what way and that he will be held liable thereon.
4. Time limit of giving Notice: Notice must be given within a reasonable time after dishonour.
5. Consequences of omission to give notice of Dishonour: If notice is not given to any party to whom it is required to be given, within reasonable time, such party is discharged from liability on the instrument.

Modes of giving notice

Notice of dishonour may be given

1. to a duly authorized agent of the person to whom it is required to be given, or, where he has died, to his legal
2. representative or, where he has been declared insolvent, to his assignee;
3. may be oral or written; may,
4. if written, be sent by post within reasonable time after dishonour, at 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.

If the notice is duly directed and sent by post and miscarries, such miscarriage does not render the notice invalid (Sec. 94).

Q NO.34 WHEN IT IS NOT REQUIRED OF NOTICE OF DISHONOUR [Section 98]

ANSWER:

No notice of Dishonour is required when the following situations arise :

1. Waiver by the party:

   A party to a bill or note may give up his right of getting notice of dishonour in favour of the holder, by writing the words 'Notice of dishonour is waived' at the time of making endorsement.
2. Payment stopped :

   When the drawer of a cheque after having drawn the cheque, but before it is presented for payment countermanded payment.
3. Party not found:

   When the party to whom a notice of dishonour is required to be given could not be found after making a reasonable search.
4. Unavoidable circumstances:

   Omission to give notice of dishonour is excused if the holder had been in unavoidable situations may be death, illness, accident or under other natural calamities.

Party receiving must transmit notice of dishonour :

Any party receiving notice of dishonour must, in order to render any prior party liable to himself, give notice of dishonour to such party within reasonable time, unless such party otherwise receives due notice as provided by Sec. 93 (Sec. 95).

Thus, a person receiving notice must transmit it to prior parties whom he wishes to make liable to himself because the holder may have omitted to give notice to some of the prior parties.

Agent of presentment :

When instrument is deposited with an agent for presentment, the agent is entitled to the same time to give notice to his principal as if he were the holder giving notice of dishonour, and the principal is

entitled to a further like period to give notice of dishonour (Sec. 96). When party to whom notice given is dead When the party to whom notice of dishonour is dispatched is dead, but the party dispatching the notice is ignorant of his death, the notice is sufficient (Sec. 97).

Effect of Default:

A party to whom notice of dishonour is not given is discharged from liability on the negotiable instrument. However, it is not necessary to give notice of default to maker of dishonoured promissory note or acceptor of a dishonoured bill/cheque and these parties are not discharged from their liability on the negotiable instrument.

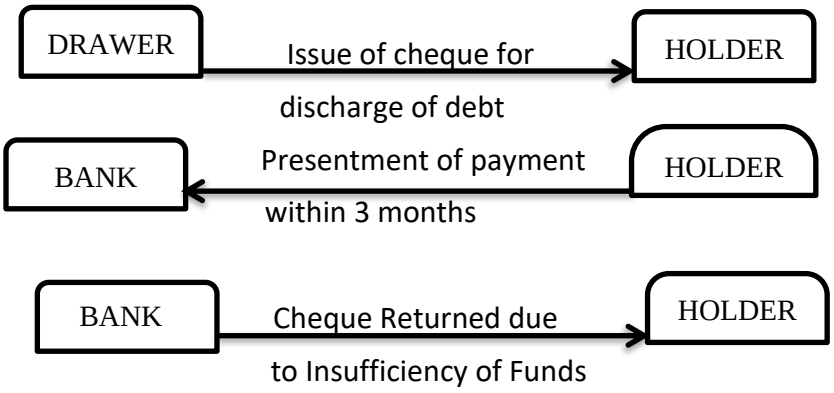
RELEVANT QUESTIONS

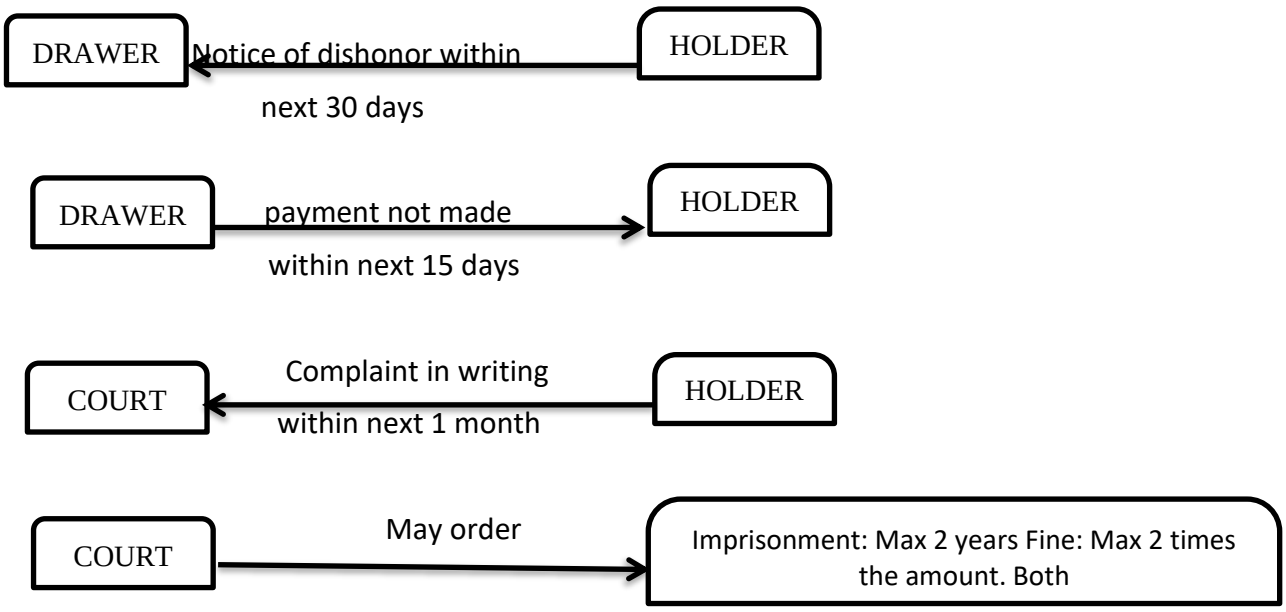
1. Is notice of dishonour necessary in the following cases: i) X having a balance of INR 1,000 with his bankers and having no authority to over draw, drew a cheque for INR 5,000/-. The cheque was dishonoured when duly presented for repayment. ii) X, drawer of a Bill informs Y, the holder of the bill that the bill would be dishonoured on the presentment for payment. **A.** Notice of dishonour is not necessary in both the cases. [Section 98 of the Negotiable Instruments Act, 1881].	Study mat example
2. What are the circumstances under which a bill of exchange can be dishonored by non-acceptance? Also, explain the consequences if a cheque gets dishonored for insufficiency of funds in the account. **A.Refer to Section 91 , Q.no. 32**	

Q NO.35 BOUNCING OR DISHONOUR OF CHEQUE [SECTION 138] ?

ANSWER:

The process how it goes and attracts 138 Section:





- The cheque in question should be issued in discharge of a liability and therefore a cheque given as gift will not fall in this category.
- The cheque should be presented within three months.

DISHONOUR OF CHEQUE FOR INSUFFICIENCY, ETC., OF FUNDS IN THE ACCOUNTS

[SECTION 138] says :

Where any cheque drawn by a person on an account maintained by him with a banker—

1. for payment of any amount of money
2. to another person from that account
3. for the discharge, in whole or in part, of any debt or other liability, [A cheque given as gift or donation, or as a security or in discharge of a mere moral obligation, or for an illegal consideration, would be outside the purview of this section]
4. is returned by the bank unpaid,
5. either because of the—
   - I. amount of money standing to the credit of that account is insufficient to honour the cheque, or
   - II. that it exceeds the amount arranged to be paid from that account by an agreement made with that bank,

   if the **above conditions** are there then the------

   PENALTY: If a cheque issued by the drawer is dishonoured due to insufficiency of funds, the drawer is punishable with
   1. Imprisonment upto 2 years (Maximum); or
   2. Fine upto 2 times the amount of cheque (Maximum); or
   3. Both

Provided that this section SHALL NOT APPLY, unless—

1. Cheque presented within validity period: The cheque has been presented to the bank within a period of three months from the date on which it is drawn or within the period of its validity, whichever is earlier.

2. Demand for the payment through the notice: the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, within 30 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid, and

3. Failure of drawer to make payment: the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

   Explanation: For the purpose of this section, "debt or other liability" means a legally enforceable debt or other liability.

Example: X issued a post-dated cheque to Y on the account of discharge of its liability. Further, X instructed to the bank to stop the payment due to unavailability of the adequate amount in the account. Here, in this instance section 138 of the Act is attracted as when a cheque is dishonoured on account of stop payment instructions sent by the drawer to his banker in respect of a post- dated cheque irrespective of insufficiency of funds in the account. A post-dated cheque is deemed to have been drawn on the date it bears and the three months period for the purposes of section 138 is to be counted from that date. So, X will be liable for dishonour of cheque. Once a cheque is issued by the drawer, a presumption under section 139 must follow.

RELEVANT QUESTIONS

1. Bholenath drew a cheque in favour of Surendar. After having issued the cheque; Bholenath requested Surendar not to present the cheque for payment and gave a stop payment request to the bank in respect of the cheque issued to Surendar. Decide, under the provisions of the Negotiable Instruments Act, 1881 whether the said acts of Bholenath constitute an offence?	**Study- Mat**

A. As per the facts stated in the question, Bholenath (drawer) after having issued the cheque, informs Surendar (drawee) not to present the cheque for payment and as well gave a stop payment request to the bank in respect of the cheque issued to Surendar**.** Refer to Section 138-139-140. Accordingly, the act of Bholenath, i.e., his request of stop payment constitutes an offence under the provisions of the Negotiable Instruments Act, 1881.	

PENALTY AND OFFENCES

PRESUMPTION IN FAVOR OF HOLDER [SECTION 139]

4. When a cheque is dishonoured, it shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, or any debt or other liability.

5. Presumption prescribed here is a "rebuttable presumption" as the provisions clearly provides that the person issuing the cheque is at liberty to prove to the contrary. The effect of this presumption is to place the evidential burden on the accused.

DEFENCE WHICH MAY NOT BE ALLOWED IN ANY PROSECUTION UNDER SECTION 138 [SECTION 140]

6. It shall not be a defence in a prosecution of an offence under section 138 that the drawer had no reason to believe when he issued the cheque that the cheque may be dishonoured on presentment for the reasons stated in that section.

OFFENCES BY COMPANIES [SECTION 141]

If the person committing an offence u/s 138 is a company,

1. every person who, at the time the offence was committed was
2. in charge of, and was responsible for the conduct of the business of the company,
3. shall be deemed to be guilty of the offence and
4. shall be liable to be proceeded against and punished accordingly.

Where a person is nominated as a director of a company/partner in a Firm by virtue of his holding any office or employment in the CG or SG or a financial corporation owned or controlled by the CG or SG, as the case may be, he shall not be liable for prosecution under the chapter.

Further, a person shall not be liable for punishment if he proves that offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence.

Example: A promoter who has borrowed a loan on behalf of company, who is neither a director nor a person-in-charge, sent a cheque from the companies account to discharge its legal liability. Subsequently, the cheque was dishonoured and the complaint was lodged against him. Is he liable for an offence under section 138?

ANSWER: According to Section 138 of the Negotiable Instruments Act, 1881 where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from/out of that account for discharging any debt or liability, and if it is dishonoured by banker on sufficient grounds, such person shall be deemed to have committed an offence and shall be liable.

However, in this case, the promoter is neither a director nor a person-in-charge of the company and is not connected with the day-to-day affairs of the company and had neither opened nor is operating the bank account of the company. Further, the cheque, which was dishonoured, was also not drawn on an account maintained by him but was drawn on an account maintained by the company. Therefore, he has not committed an offence under section 138.

COGNIZANCE OF OFFENCES - THE PAYEE/HOLDER MUST MAKE A COMPLAINT WITH THE COURT [SEC 142]

Following points are worth noting in this regard:

1. The complaint must be in writing.
2. The complaint must be made within 1 month from the date when cause of action arose, i.e., within 1 month from the last day on which drawer was liable to pay the money to the payee/holder.
3. The complaint shall be made with a Court not inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class.

JURISDICTION OF COURTS FOR THE TRIAL OF OFFENCE [SECTION 142 (2)]:

The complaint is to be filed with the Court within whose jurisdiction

a) in case the cheque is delivered for collection through an account - the branch of the bank where the payee or HDC, as the case may be, maintains the account, is situated;

b) in case the cheque is presented for payment by the payee or HDC, otherwise through an account - the branch of the drawee bank where the drawer maintains the account is situated.

Explanation— For the purposes of clause (a), where a cheque is delivered for collection at any branch of the bank of the payee or holder in due course, then, the cheque shall be deemed to have been delivered to the branch of the bank in which the payee or holder in due course, as the case may be, maintains the account."

Example: Mr. A holds an account in Navrangpura Branch, Ahmedabad of "XYZ" Bank, issues a cheque payable in favour of B. B, who holds an account with the M.S University Road Branch, Vadodara of the "PQR" bank, deposits the said cheque at Surat Branch of 'PQR bank' and the

cheque is dishonoured. The complaint will have to be filed before the court having jurisdiction where the M.S University road branch is situated.

VALIDATION FOR TRANSFER OF PENDING CASES (SEC. 142A)

1. If more than one case by the same payee / HDC against the same drawer is pending in different courts, then, all such cases shall be transferred to the court having jurisdiction u/s 142(2).

   Notwithstanding anything contained in any order of any court, all cases transferred to the court having jurisdiction u/s 142(2) shall be deemed to have been validly transferred.
2. If any complaint is pending in the court having jurisdiction u/s 142(2), all subsequent complaints arising out of section 138 against the same drawer shall be filed before same court. This provision shall apply notwithstanding anything contained in Sec. 142(2).

   4. Notwithstanding anything contained in the Code of Criminal Procedure, 1973 or any judgment, decree, order or direction of any court, all cases transferred to the court having jurisdiction under sub-section (2) of section 142, as amended by the Negotiable Instruments (Amendment) Ordinance, 2015, shall be deemed to have been transferred under this Act, as if that sub-section had been in force at all material times.
3. (2) Notwithstanding anything contained in sub-section (2) of section 142 or sub-section (1), where the payee or the holder in due course, as the case may be, has filed a complaint against the drawer of a cheque in the court having jurisdiction under sub-section (2) of section 142 or the case has been transferred to that court under sub-section (1) and such complaint is pending in that court, all subsequent complaints arising out of section 138 against the same drawer shall be filed before the same court irrespective of whether those cheques were delivered for collection or presented for payment within the territorial jurisdiction of that court.

   The above sub-section deals with respect to filing of subsequent complaints. The payee has filed a complaint against the drawer in a court with the appropriate jurisdiction, all subsequent complaints against that person regarding cheque bouncing will be filed in the same court. This will be irrespective of the mode of presentation of cheque.
4. (3) If, on the date of the commencement of the Negotiable Instruments (Amendment) Act, 2015, more than one prosecution filed by the same payee or holder in due course, as the case may be, against the same drawer of cheques is pending before different courts, upon the said fact having been brought to the notice of the court, such court shall transfer the case to the court having jurisdiction under sub-section (2) of section 142, as amended by the Negotiable Instruments (Amendment) Ordinance, 2015, before which the first case was filed and is pending, as if that sub-section had been in force at all material times.

   This sub-section deals with where more than one case filed by the same payee against the same drawer before different courts. If more than one case is filed by the same payee against the same drawer before different courts, the case will be transferred to the court with the appropriate jurisdiction before which the first case was filed..

POWER OF COURT TO TRY CASES SUMMARILY [SECTION 143]

1. **Trial of Offence**: Notwithstanding anything contained in the Code of Criminal Procedure, 1973, all offences under this Chapter shall be tried by a Judicial Magistrate of the first class or by a Metropolitan Magistrate and the provisions of sections 262 to 265 (both inclusive) of the said Code shall, as far as may be, apply to such trials.

   In case of summary trial: Provided that in the case of any conviction in a summary trial under this section, it shall be lawful for the Magistrate to pass a sentence of imprisonment for a term not exceeding 1 year and an amount of fine exceeding Rs. 5000.

   In case where no summary trial can be made: Provided further that when at the commencement of, or in the course of, a summary trial under this section, it appears to the Magistrate that the nature of the case is such that a sentence of imprisonment for a term exceeding one year may have to be passed or that it is, for any other reason, undesirable to try the case summarily, the Magistrate shall after hearing the parties, record an order to that effect and thereafter recall any witness who may have been examined and proceed to hear or rehear the case in the manner provided by the said Code.

2. **Speedy Trial**: The trial of a case under this section shall, so far as practicable, consistently with the interests of justice, be continued from day to day until its conclusion, unless the Court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded in writing.

3. **Speedy and efficient Disposal**: Every trial under this section shall be conducted as expeditiously as possible and an endeavour shall be made to conclude the trial within 6 months from the date of filing of the complaint.

POWER TO DIRECT INTERIM COMPENSATION [SECTION 143A]

The Court trying an offence under section 138

1. may order the drawer of the cheque to
2. pay interim compensation to the complainant which shall
3. not exceed 20% of the amount of the cheque.

   The interim compensation shall be paid within 60 days from the date of the order or within such further period not exceeding 30 days as may be directed by the Court on sufficient cause being shown by the drawer of the cheque.

   If the drawer of the cheque is acquitted,

   i) the Court shall direct the complainant

   ii) to repay to the drawer the amount of interim compensation,

   iii) with interest at the bank rate as published by the RBI, prevalent at the beginning of the relevant financial year,

iv) within 60 days from the date of the order, or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the complainant.

The interim compensation payable under this section may be recovered as if it were a fine under section 421 of the Code of Criminal Procedure, 1973.

The amount of fine imposed u/s 138 or the amount of compensation awarded u/s 357 of the Code of Criminal Procedure, 1973, shall be reduced by the amount paid or recovered as interim compensation under this section.

OFFENCES TO BE COMPOUNDABLE [SECTION 147]:

Notwithstanding anything contained in the CoCP (Code of Criminal Procedure) , 1973, every offence punishable under this Act shall be compoundable.

POWER OF APPELLATE COURT TO ORDER PAYMENT PENDING APPEAL AGAINST CONVICTION [SECTION 148]

In an appeal by the drawer against conviction under section 138,

1. the Appellate Court may order the appellant to deposit such sum which shall be a
2. minimum of twenty percent of the fine or compensation awarded by the Trial Court
3. within sixty days from the date of the order, or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the appellant.

Note: This amount shall be in addition to any interim compensation paid by the appellant under section 143A.

Note: The Appellate Court may direct the release of the amount deposited by the appellant to the complainant at any time during the pendency of the appeal.

If the appellant is acquitted, the Court shall ::

4. direct the complainant to repay to the appellant the amount so released,
5. with interest at the bank rate as published by the Reserve Bank of India, prevalent at the beginning of the relevant financial year,

within sixty days from the date of the order, or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the complainant.''

EXERCISE

⊙ **Multiple Choice Question:**

1. The Negotiable Instruments Act, 1881 is an Act to define and amend the law relating to:

a) cheques b) bills of exchange

c) promissory notes, d) All of the above

2. "banker" includes:

a) Any person acting as an employee of any bank and any post office saving bank.

b) b) Any person acting as a banker and any post office saving bank

c) Any person acting as an agent of any bank and any post office saving bank.

d) Any person acting as a Managing Director of any bank and any post office saving bank

3. Which is NOT an example of "Promissory Note":

a) "I acknowledge myself to be indebted to B in Rs.1,000, to be paid on demand, for value received.

b) Mr B, I.O.U Rs.1,000."

"c) "I promise to pay B or order Rs.500" d) None of the above

4. In a Promissory Note, how many parties are involved:

a) One b) Two

c) Three d) Four

5. Which is NOT correct about the "Promissory Note":

a) It contains a conditional undertaking.

b) It contains the amount mentioned on it.

c) It is an instrument in writing.

d) It is signed by the maker

6. The Negotiable Instruments Act, 1881 extends to:

a) Only to Capital cities of the States.

b) The whole of India.

c) The whole of India except the State of Jammu and Kashmir. Territories.

d) The whole of India except the Union

⊙ **State TRUE or FALSE**

1. "I acknowledge myself to be indebted to B in Rs.1,000, to be paid on demand, for value received." is a promissory note.

2. Section 5 of the NI Act deals with Holders in due course.

3. A 'Cheque' is a Bills of exchange and has been defined under Banking Regulation Act.

4. All offences under Chapter XVII shall be tried by either a Metropolitan Magistrate or a Judicial Magistrate of the first class.

5. Courts that can entertain any offence punishable under section 138 are, Court not inferior to that of a Judicial Magistrate of the first class or Court not inferior to that of a Metropolitan Magistrate.

Fill in the blanks

1. The transaction of negotiable instrument requires at least_persons.

2. The person named in the instrument, to who or to whose order the money is by the instrument directed to be paid is, called the_.

3. Negotiation is of two types, namely,_,___.

4. A cheque is a bill of exchange drawn on a specified_on demand.

5. Clearing house is managed by___.

6. Draft cannot be drawn on.

7. Indorsement is of two types, namely,___,___.

8. A negotiable instrument indorsed in blank is payable to the___.

9. If the amount is paid after due date, the interest is payable at_when no interest rate has been specified in the instrument.

10. The dishonor of the instrument may be due to_and___.

☉ **Short Essay Type Questions**

1. Discuss about the various types of Instruments.

2. who are the parties to an instrument?

3. Write short notes on-

(a) Bill of Exchange

(b) Types of Acceptance

(c) Holder in due course

☉ **Essay Type Questions**

1. Discuss briefly the historical background of law of Negotiable Instruments in India.

2. What is the object, scope and applicability of Negotiable Instruments Act? Is it exhaustive on matters relating to Negotiable Instruments?

3. What do you understand by term "Negotiable Instruments"? What are its special characteristics?

4. Define and explain Rs.Promissory Note'. What are its essential features?

5. Define and explain "Bill of Exchange". What are the essential requisites of Bill of Exchange. What is the distinction between Promissory Note and Bill of Exchange ?

☉ **Unsolved Cases**

1. A' signs, as maker, a blank stamped paper and gives it to 'B', and authorises him to fill it as a note for Rs.500, to secure an advance which 'C' is to make to 'B'. 'B' fraudulently fills it up as a note for Rs.2,000, payable to 'C', who has in good faith advanced Rs.2,000. Decide, with reasons, whether 'C' is entitled to recover the amount, and if so, up to what extent?

2. A signs, as the maker, a blank stamped paper and gives it to B and authorises him to fill it as a note for Rs.2,000, it being the amount of advances made by B to A. B fraudulently fills it up as a note for Rs.3,000 and then, for consideration, endorses it to C. Can C enforce the instrument?

ANSWER:

Multiple Choice Question

1. d; 2. b; 3. b; 4. b; 5. a; 6.b.

State TRUE or FALSE

1. True; 2. False; 3. False; 4. True; 5. True.

Fill in the blanks

1. 2;	2. Payee;	3. Negotiation by delivery, negotiation by indorsement;	4. Banker;	5. Reserve Bank of India;
6. Private individual;	7. Indorsement in blank, indorsement in full;	8. Bearer;	9. 18%;	10. Non acceptance, nonpayment.

5. INDIAN PARTNERSHIP ACT, 1932

5.1. NATURE OF PARTNERSHIP

INTRODUCTION

1. The Act came into force on 1st day of October, 1932
2. Earlier the provisions relating to partnership are contained in Indian Contract Act, 1872 but later in 1930 these provisions were repealed from India Contract Act and a new Act formed Indian Partnership Act, 1932
3. A partnership is a business form wherein two or more persons agree to come together for carrying out a business for economic gains.
4. However, presence of profits is not always a determinative criterion to ascertain if a business form is a partnership.
5. Prior to partnerships being established and legalized by legislation, sole proprietorship used to be carried out by individuals.
6. Even though such business forms still exist, the challenges faced by such business forms led to the emergence of other business forms that could be used to conduct business more efficiently.
7. In sole proprietorship the business is carried out by an individual with limited capital and skills. Due to this paucity of resources, larger businesses could seldom be conceived by such individuals.
8. Therefore, with the emergence of partnerships, a number of partners could now join their resources and skills to carry out bigger businesses.

Q NO 1. DEFINE PARTNERSHIP AND STATE ITS ESSENTIAL ELEMENTS

ANSWER:

DEFINITION

Section 4 defines the term 'partnership' as the relationship between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. The term 'partners' is defined as persons, who have entered into partnership with one another are called individually partners. A 'firm' is the collective of the partners. The 'firm name' is the name under which the business is carried on.

The following are the essential ingredients for the constitution of a partnership-

1. There should be an agreement between the parties;
2. The agreement must be to share the profits of the business; and
3. The business must be carried on by all or any of them acting for all;
4. The existence of an agency between the concerned persons inter-se
5. The agreement need not be in writing. It may be oral. It may be express of implied.

Q NO 2. STATE DIFFERENT TYPES OF PARTNERSHIP

ANSWER:

DIFFERENT TYPES OF PARTNERSHIP

There are four types of partnership which are as detailed below-

General Partnership;

Limited Partnership;

Partnership at will;

Particular Partnership

1. GENERAL PARTNERSHIP:

I. The liability of each partner is unlimited. It means that the firm's creditors can realize their dues in full, from any of the partners by attaching their personal property if the firm's assets are found to be inadequate to pay off its debts.

II. An exception is made in the case of a minor partner whose liability is limited to the amount of his share in the capital and profits of the firm. In India all partnership firms are general partnerships. Each partner of a general partnership is entitled to take active part in the management of the firm, unless otherwise decided by the other partners.

2. LIMITED PARTNERSHIP:

I. It is a partnership consisting of some partners whose liability is limited to the amount of capital contributed by each.

II. The personal property of a limited partner is not liable for the firm's debts.

III. He cannot take part in the management of the firm.

IV. His retirement, insolvency, lunacy or death does not cause dissolution of the firm. There is at least one partner having unlimited liability.

V. A limited partnership must be registered. Limited partnership is now allowed in India under the Limited Liability Partnership Act.

VI. In England limited partnership can be formed under the Limited Partnership Act, 1907 and in the USA under the Partnership Act, 1890.

3. PARTNERSHIP AT WILL:

I. It is a partnership formed for an indefinite period.

II. The time period or the purpose of the firm is not mentioned at the time of its formation.

III. It can continue for any length of time depending upon the will of the partners.

IV. It can be dissolved by any partner by giving a notice to the other partners of his desire to quit the firm.

4. PARTICULAR PARTNERSHIP

I. It is a partnership formed for a specific time period or to achieve a specified objective.

II. It is automatically dissolved on the expiry of the specified period or on the completion of the specific purpose for which it was formed.

Q NO 3. STATE DIFFERENT TYPES OF PARTNERS

ANSWER:

DIFFERENT TYPES OF PARTNERS

The following are the various types of partners-

1. **WORKING PARTNER OR ACTIVE PARTNER**: Active partner contributes capital and also takes active part in the management of the firm. He bears an unlimited liability for the firm's debts. He is known to outsiders. He shares profits of the firm. He is a full-fledged partner.
2. **SLEEPING OR DORMANT PARTNER**: A sleeping or inactive partner simply contributes capital. He does not take active part in the management of the firm. He shares in the profits or losses of the firm. His liability for the firm's debts is unlimited. He is not known to the outside world.
3. **SECRET PARTNER**: Secret partner contributes capital and takes active part in the management of the firm's business. He shares in the profits and losses of firm and his liability is unlimited. However, his connection with the firm is not known to the outside world.
4. **LIMITED PARTNER**: The liability of such a partner is limited to the extent of his share in the capital and profits of the firm. He is not entitled to take active part in the management of the firm's business. The firm is not dissolved in the event of his death, lunacy or bankruptcy.
5. **PARTNER IN PROFITS ONLY**: Partners in profit only share in the profits of the firm but not in the losses. But his liability for the firm's debts is unlimited. He is not allowed to take part in the management of the firm. Such a partner is associated for his money and goodwill.
6. **NOMINAL OR OSTENSIBLE OR QUASI PARTNER**: Nominal Partner neither contributes capital nor takes part in the management of business. He does not share in the profits or losses of the firm. He only lends his name and reputation for the benefit of the firm. He represents himself or knowingly allows himself to be represented as a partner. He becomes liable to outsiders for the debts of the firm.
7. **MINOR AS A PARTNER.**
8. **PARTNER BY ESTOPPELS AND PARTNER BY HOLDING OUT:** A person who by his words (spoken or written) or conduct represents himself as a partner becomes liable to those who advance money to the firm on the basis of such representation. He cannot avoid the consequences of his previous act.

   Example: Suppose a rich man, Jalal, is not a partner but he tells Ramu that he is a partner in a firm called Alpha Enterprises. On this impression, Ramu sells good worth Rs.20,000 to the firm. Later on the firm is unable to pay the amount. Ramu can recover the amount from Jalal. Here, Jalal is a partner by estoppels. When a person is declared as a partner and he does not deny this even after becoming aware of it, he becomes liable to third parties who lent money or credit to the firm on the basis of such a declaration. Suppose, Alpha tells Ramu in the presence of Jalal that Jalal is a partner in the firm of Alpha Enterprises. Jalal does not deny it. Later on Ramu gives a loan of Rs.20,000 to Alpha Enterprises on the basis of the impression that Jalal is a partner in the firm.

The firm fails to repay the loan to Ramu. Jalal is s liable to pay Rs.20,000 to Ramu. Here, Jalal is a partner by holding out.

Q NO 4. PARTNERSHIP IS A CREATION OF CONTRACT

ANSWER:

Section 5 provides that the relation of partnership arises from contract and not from status. The members of a Hindu Undivided Family carrying on a family business as such, or a Burmese Buddhist husband and wife, carrying on business as such, are not partners in such business.

This section lays down that partnership is not a status, but a creation of contract. The partnership is entirely different from a company, Limited Liability partnership, Hindu Undivided Family.

Q NO 5. STATE DIFFERENCES

ANSWER:

DIFFERENCE BETWEEN A PARTNERSHIP AND A COMPANY

BASIS	PARTNERSHIP	COMPANY
Legal entity	It is not a separate legal entity.	A company is a separate legal entity.
Liability	The liability of the partners is unlimited.	The liability of the members of the company is limited.
Number of members	Minimum required is two. Maximum number can be 100 subject to some exceptions present Rules provide 50.	Minimum number of members for a private company is 2 and maximum 200. Minimum number of members for a public limited company is 7 and there is no limited for maximum.
Transfer of shares	A partner cannot transfer his share without the consent of other members	Transfer of shares in a public limited company is not a restricted one.
Management	The firm can be run by all or any of the partners.	The Board of Directors has responsibility to run the management
Relationship	The relationship with partners is of that of agency.	No such relationship in the company.
Profit distribution	Profit is distributed according to the agreement entered between partners; if no agreement equal distribution.	No requirement of profit distribution to members. It is at the discretion of the management to declare dividend that too only out of profits.
Remedy to creditors	The creditors of a firm can proceed against the partners jointly and severally.	The creditors can proceed only against the company and not against shareholders.

Audit	Audit is not compulsory for the partnership firm.	Various types of audit are compulsory for the company
Dissolution	Firm can be dissolved on the eve of death of partner, retirement of partner etc., unless other- wise than agreed to in the agreement.	A company can be dissolved only by the winding up process as ordered by the Court.

In 'Gurugubilli Chendran Naidu V. Achanti Pydisetti' – AIR 1985 NOC 135 (AP) it was held that right to share the profits of the partnership in equal shares can arise only when there is no contract between the partners regarding it. But there is no specific provision in the Indian Partnership Act, 1932 to share capital equally.

DIFFERENCE BETWEEN PARTNERSHIP AND LIMITED LIABILITY PARTNERSHIP

BASIS	PARTNERSHIP	LIMITED LIABILITY PARTNERSHIP
Legal entity	It is not a separate legal entity	It is a separate legal entity
Liability	The liability of the partners is unlimited.	The liability of the members of the LLP is limited.
Number of members	Minimum required is two. Maximum number is 50 subject to some exceptions	Minimum number of members for a LLP is 2 and no limit for maximum numbers.
Entering into contracts	Partnership is not a separate person and enter into contract on behalf of its partners	LLP is capable of entering into contracts and holding property in its own name
Compliance of law	Lesser compliance	More compliance under LLP Act.
Dissolution	Firm can be dissolved on the eve of death of partner, retirement of partner etc., unless otherwise than agreed to in the agreement.	LLP can be dissolved by complying with the provisions of LLP (Winding up and Dissolution) Rules, 2012.

DIFFERENCES BETWEEN THE PARTNERSHIP AND HINDU UNDIVIDED FAMILY

BASIS	PARTNERSHIP	HINDU UNDIVIDED FAMILY
Relationship	Relation subsists between the partners.	It is a single person and it cannot have a partnership by itself.
Management	All of the partners may involve in the management	Karta of HUF is managing the business

Share of profit	Partners can share profit as per the agreement	No such sharing of profits in HUF
Property	The properties even though in the name of partnership firm belongs to all partners	This business is a species of ancestral joint property in which every member of a family acquires
Authority	Each partner is the agent of others	It has implied authority to contract debts and pledge the properties and credit of the family for the ordinary purposes of the family business
Dissolution	Firm can be dissolved on the eve of death of partner, retirement of partner etc., unless otherwise than agreed to in the agreement.	The death of Karta will not lead to the dissolution of the HUF business.

5.2. RIGHTS AND LIABILITIES OF PARTNERS

Q NO 1. STATE THE DUTIES OF PARTNERS WHICH CANNOT BE ALTERED BY AN AGREEMENT IN BETWEEN THEM

ANSWER:

GENERAL DUTIES OF PARTNERS SECTION 9

Partners are bound-

1. To carry on the business of the firm to the greatest common advantage;
2. To be just and faithful to each other; and
3. To render true accounts and full information of all things affecting the firm, to any partner or his legal representative.
4. Every partner shall indemnify the firm for any loss caused to it by his fraud in the conduct of the business of the firm.

DUTY TO INDEMNIFY THE LOSS CAUSED BY FRAUD SECTION 10

If partner commits any fraud in conduct of the business of the firm and the firm suffers with loss thereof, then such partner must indemnify such loss sustained by the firm due to his misconduct

Q NO 2. HOW RIGHTS AND DUTIES OF PARTNERS ARE DETERMINED BY A CONTRACT BETWEEN THEM

ANSWER:

RIGHTS AND DUTIES OF PARTNERS SECTION 11(1)

1. The mutual rights and duties of the partners of a firm may be determined by contract entered between the partners.
2. Such contract may be expressed or may be implied by a course of dealing.
3. Such contract may be varied by consent of all partners. Such consent may be expressed or may be implied by a course of dealing.

AGREEMENTS IN RESTRAINT OF TRADE

1. **SECTION 11(2)**: The contracts entered between partners may provide that a partner shall not carry on any business other than that of the firm while he is a partner.
2. **SECTION 36 (2):** A partner may make an agreement with his partners on ceasing to be a partner, he will not carry on any business similar to that of the firm within a specified period or within specified local limits. Such agreement shall be valid if the restrictions imposed are reasonable.
3. **SECTION 54**: The partners may, upon or anticipation of the dissolution of the firm, make an agreement that some of them will not carry on a business similar to that of a firm within a specified period or within specified local limits.
4. **SECTION 55(3)**: Any partner may, upon the sale of the goodwill of a firm, make an agreement with the buyer that such partner will not carry on any business similar to that of the firm within a specified period or within specified local limits.

Q NO 3. STATE THE RIGHTS AND DUTIES OF PERTNERS IN CONDUCT OF BUSSINESS

ANSWER:

Subject to the contract between the partners-

1. **RIGHT TO TAKE PART IN THE CONDUCT OF THE BUSINESS SECTION 12(a)**: Every partner has a right to take part in the conduct of the business;
2. **DUTY TO ACT DUE DELIGENTLY SECTION 12(b)**: Every partner is bound to attend diligently to his duties in the conduct of the business;
3. **RIGHT TO BE CONSULTED SECTION 12(c):** Any difference, arising as to ordinary matters connected with the business, may be decided by a majority of the partners, and every partner shall have the right to express his opinion before the matter is decided, but no change may be made in the nature of the business without the consent of all the partners;
4. **RIGHT TO ACCESS TO BOOKS SECTION 12(d)**: Every partner has a right to have access to, and to inspect and copy, any of the books of the firm; and
5. **RIGHT OF LEGAL HEIRS OR REPRESENTATIVES/ THEIR DULY AUTHORIZED AGENTS SECTION 12(e)**: In the event of the death of a partner, his heirs or legal representatives or their duly authorised agents shall have a right of access to and to inspect and copy any of the books of the firm.

CASE LAW: IN 'RAJNIKANTH HASMUKHLAL GOLWALA V. NATARAJ THEATRE, NAVSARI' – AIR 2000 GUJ 80 (88) it was held that Section 12 of the Act gives right to every partner to take part in the conduct of the business. Of course, the right which is enshrined in the Act takes effect subject to any express or implied contract amongst the partners. This right cannot be fettered by any court unless there is a contract to the contrary arrived at amongst the partners themselves. Further their transferees have no right to do the business sin view of the Section 29 of the Act.

'SASTHI KENKER V. GOBINDA' – AIR 1919 PAT 419 IC 2 it was held that a partner is not liable for negligence if he can show that used such skill and intelligence as he possessed in the conduct of the business.

Q NO 4. STATE MUTUAL RIGHTS AND LIABILITIES OF PARTNERS

ANSWER:

MUTUAL RIGHTS AND LIABILITIES SECTION 13

1. **RIGHT TO CLAIM REMUNERATION SECTION 13(a)**: A partner is not entitled to receive remuneration for taking part in the conduct of the business; But however, he is entitled to receive when there is an express agreement or continuous usage of the firm.
2. **RIGHT TO SHARE PROFITS SECTION 13(b)**: The partners are entitled to share equally in the profits earned and shall contribute equally to the losses sustained by the firm;

3. **RIGHT TO CLAIM INTEREST ON CAPITAL SECTION 13(c**): Where a partner is entitled to interest on the capital subscribed by him, such interest shall be payable only out of profits;
4. **RIGHT TO CLAIM INTEREST ON ADVANCES SECTION 13(d):** A partner, making, for the purposes of the business, any payment or advance beyond the amount of capital he has agreed to subscribe, is entitled to interest thereon at 6% per annum;
5. **RIGHT TO BE INDEMNIFIED SECTION 13(e):** The firm shall indemnify a partner in respect of payments made, and liabilities incurred, by him-in the ordinary and proper conduct of the business, and
   I. in doing such act, in an emergency, for the purpose of protecting the firm from loss, as would be done by a person of ordinary prudence,
   II. in his own case, under similar circumstances; and
6. **DUTY TO INDEMNIFY THE FIRM SECTION 13(f):** A partner shall indemnify the firm or any loss caused to it by his willful neglect in the conduct of the business of the firm.

Q NO 5. STATE THE PROVISIONS RELATED TO THE PERSONAL PROFITS EARNED BY A PARTNER

ANSWER:

PERSONAL PROFITS EARNED BY A PARTNER SECTION 16

Subject to contract between partners

If a partner

1. from any transaction of the firm; or
2. from the use of the property; or
3. business connection of the firm; or
4. the firm name

he shall account for that profit and pay it to the firm.

If a partner carries on any business of the same nature as, and competing with, that of the firm, he shall account for and pay, to the firm, all profits made by him in that business.

Q NO 6. STATE THE RIGHTS AND DUTIES OF THE PARTNERS AFTER THE CHANGE IN THE FIRM

ANSWER:

RIGHTS AND DUTIES OF PARTNERS SECTION 17

Subject to the contract between the partners-

1. **AFTER THE CHANGE IN CONSTITUTION OF THE FIRM**: where a change occurs in the constitution of a firm, the mutual rights and duties of the partners in the reconstituted firm remain the same as they were immediately before the change, as far as may be;
2. **AFTER THE EXPIRY OF THE TERM OF THE FIRM:** where a firm constituted for a fixed term continues to carry on business after the expiry of that term, the mutual rights and duties of the

partners remain the same as they were before the expiry, so far as they may be consistent with the incidents of partnership-at-will; and

3. **AFTER CARRYING OUT ADDITIONAL UNDERTAKINGS OF THE FIRM:** where a firm constituted to carry out one or more adventures or undertakings carry out other adventures or undertaking, the mutual rights and duties of the partners in respect of the other adventures or undertakings are the same as those in respect of the original adventures or undertakings.

Q NO 7. DEFINE IMPLIED AUTHORITY. IN THE ABSENCE OF ANY USAGE OR CUSTOM OF TRADE TO THE CONTRARY, IMPLIED AUTHORITY OF THE PARTNER DOES NOT EMPOWER HIM TO DO CERTAIN ACTS. WHICH IS BEYOND IMPLIED AUTHORITY OF A PARTNER. COMMENT

ANSWER:

IMPLIED AUTHORITY OF A PARTNER AS AGENT OF THE FIRM

1. As per provisions of section 22 provides that the act of a partner, which is done to carry on, in the usual way, business of the kind carried on by firm, binds the firm.
2. The authority conferred on the partner by provision of Section 19(1) is called his 'implied authority'
3. In the absence of any usage or custom of trade to the contrary, the implied authority of a partner does not empower him to- **SECTION 19(2)**
   - **i)** Submit a dispute relating to the business of the firm to arbitration;
   - **ii)** Open a banking account on behalf of the firm in his own name;
   - **iii)** Compromise or relinquish any claim or portion of a claim by the firm;
   - **iv)** Withdraw a suit or proceeding filed on behalf of the firm;
   - **v)** Admit any liability in a suit or proceeding against the firm;
   - **vi)** Acquire immovable property on behalf of the firm;
   - **vii)** Transfer immovable property belonging to the firm; or
   - **viii)** Enter into partnership on behalf of the firm.

Q NO 8. WRITE THE PROVISIONS RELATING TO

1. **EXTENSION AND RESTRICTION OF IMPLIED AUTHORITY**
2. **PARTNERS AUTHORITY IN EMERGENCY**

ANSWER:

EXTENSION AND RESTRICTION OF IMPLIED AUTHORITY SECTION 20

The partners may extend or restrict the implied authority of any partner by contract between the partners. Despite such restrictions, any act done by a partner on behalf of the firm, which falls within his implied authority, binds the firm unless the person, with whom he is dealing, knows of the restriction or does not know or believe that partner to be a partner.

AUTHORITY IN EMERGENCY SECTION 21

In case of emergency a partner has authority to do all such acts for the purpose of protecting the firm from loss as would be done by a person of ordinary prudence, in his own case acting under similar circumstances, and such acts bind the firm.

Effect of admission

Q NO 9. DISCUSS THE LIABILITY OF A PARTNER FOR THE ACT OF THE FIRM AND LIABILITY OF THE FIRM FOR ACT OF THE PARTNER

ANSWER:

1. **LIABILITY OF A PARTNER SECTION 25:** Every partner is liable, jointly with all other partners and also severally, for all acts of the firm done while he is a partner.
2. **LIABILITY OF THE FIRM FOR WRONGFUL ACTS OF THE PARTNERS SECTION 26:** Where, by the wrongful act or omission of a partner, acting in the ordinary course of the business of a firm, or with the authority of his partners, loss or injury is caused to any third party, or any penalty is incurred, the firm is liable therefore to the same extent as the partner.
3. **LIABILITY OF THE FIRM FOR MISAPPLICATION OF THE PARTNERS SECTION 27 :** The firm is liable for misapplication by partners. If -

I. a partner, acting within his apparent authority, receives money or property from a third party and misapplies it; or

II. a firm, in the course of its business, receives money or property from a third party and the money or property is misapplied by any of the partners while it is in the custody of the firm, the firm is liable to make good the loss.

Q NO 10. WHO ARE DEEMED PARTNERS

ANSWER:

HOLDING OUT/DEEMED PARTNERS SCETION 28

Any person, who -

1. by words spoken or written; or
2. by conduct, represents himself; or
3. knowingly permits himself

To be represented to be a partner in a firm, is liable as a partner in that firm to anyone who has, on the faith of any such representation, given credit to the firm, whether the person, representing himself or represented to be a partner does or does not know that the representation has reached the person so giving credit. Two or more persons doing some activity with common understanding and for gain shall be deemed as partners even when they themselves deny to be partners when they are liable to third parties.

If the business is continued, after the death of a partner, in the old firm name, the continued use of that name, or of the deceased partner's name, as a part thereof, shall not, of itself, make his legal representative, or his estate, liability for any act of the firm done after his death.

Q NO 11. STATE THE RIGHTS OF TRANSFEREE OF A PARTNERS INTEREST

ANSWER:

RIGHTS OF TRANSFEREE OF A PARTNER'S INTEREST SECTION 29

This section allows a partner to transfer his interest in the firm, either absolutely or by mortgage or by the creation of a charge on such interest during the continuance of the firm. The transferee who receives such interest in the firm, does not entitled to-

1. Interfere in the conduct of the business; or
2. To require accounts; or
3. To inspect the books of the firm

He is entitled to receive the share of profits of the transferring partners and the transferee is to accept the account of profits agreed to by the partners.

If the firm is dissolved or the transferring partner ceases to be a partner, the transferee is entitled to receive the share of the assets of the firm to which the transferring partner is entitled and for the purpose of ascertaining that share, to an account as from the date of dissolution.

Q NO 12. STATE THE PROVISIONS RELATED TO MINOR AS A PARTNER

ANSWER:

MINORS AS PARTNERS SECTION 30

Though a minor cannot be a partner of a firm, but, with the consent of all the partners for the time being, he may be admitted to the benefits of the partnership by an agreement executed through his guardian with the other partners.

RIGHTS AND LIABILITY OF MINOR

1. A minor in a partnership has a right to such share of the property and of the profits of the firm as may be agreed upon. He is having power to have access to and inspect and to get copy, any of the accounts of the firm.
2. The share of a minor in a partnership firm is liable for the acts of the firm. But he is not personally liable for any such act. When a minor severs his connection with the firm he may not sue the partners for an account or payment of his share of the property or profits of the firm. The account of his share shall be determined by a valuation made, as far as possible.
3. All the partners of a firm together or any partner entitled to dissolve the firm, upon notice to other partners, may elect to dissolve the firm. The Court shall proceed with the suit as one for dissolution and for settling accounts between the partners, and the amount of the share of the minor shall be determined along with the shares of the partners.

ELECTION ON MAJORITY

On attaining majority, or of his obtaining knowledge that he had been admitted to the benefits of partnership whichever date is later, a minor may within six months from such date give public notice that he has elected to become or that he has elected not to become a partner in the firm. Such notice shall determine his position as regards to the firm. If a minor fail to give such notice, he shall become a partner in the firm on the expiry of the said six months.

If a minor elect to become a partner-

i. his rights and liabilities as a minor continue up to the date on which he becomes a partner, but he also becomes personally liable to third parties for all acts of the firm done since he was admitted to the benefits of the partnership; and

ii. his share in the property and profits of the firm shall be the share to which he was entitled as a minor. If a minor does not elect to become a partner-

iii. his rights and liabilities shall continue to be those of a minor up to the date on which he gives public notice;

iv. his share shall not be liable for any acts of the firm done after the date of the notice; and

v. he shall be entitled to sure the partners for his share of the property. Holding out is not applicable in these cases.

Where any person has been admitted as a minor to the benefits of partnership in a firm, the burden of proving the fact that such person had no knowledge of such admission until a particular date after the expiry of six months of his attaining majority shall lie on the person, asserting the fact.

Q NO 13. STATE THE RIGHTS OF THE OUTGOING PARTNERS TO BEGIN A COMPETITIVE BUSINESS AND RELATING TO THEIR SHARE OF PROPERTY WHICH IS NOT SETTLED.

ANSWER:

RIGHTS OF OUTGOING PARTNERS SECTION 36

An outgoing partner may carry on a business competing with that of the firm. He may advertise such business, but, subject to contract to the contrary, he may not-

1. use the firm name;
2. represent himself as carrying on the business of the firm; or
3. solicit the custom of persons who were dealing with the firm before he ceased to be a partner.

RIGHT TO SHARE IN SUBSEQUENT PROFITS SECTION 37

In case where a partner has died or ceased to be a partner, the surviving and continuing partners may carry on the business of the firm with the property of the firm without any final settlement of accounts as between them and the outgoing partner or the estate of deceased partner. In the absence of a contract to the contrary, the outgoing partner of the representative of the deceased partner is entitled at the option-

1. to such share of the profits made since he ceased to be a partner as may be attributable to the use of his share of the property of the firm; or
2. to interest at 6% per annum on the amount his share in the property of the firm.

Where an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner and the same is duly exercised, the estate of the deceased partner or the outgoing partner is not entitled to any further or other share of profits. But if any partner, assuming to act in exercise of the option, does not, in all material respects comply with the terms, he is liable to account under the provisions of this section.

5.3. FORMATION, RECONSTITUTION AND DISSOLUTION OF FIRMS

Q NO 1. EXPLAIN THE MODE OF DETERMINING THE EXISTENCE OF PARTNERSHIP

ANSWER:

1. **DETERMINING EXISTENCE OF PARTNERSHIP SECTION 6**

   In order to determine-

   i) Whether a group of persons is or is not a firm; or

   ii) Whether a person is or is not a partner in a form

   regard shall be had to the real intention between the parties, taking into the facts together.

2. The sharing of profits or of gross returns arising from property by persons holding a joint or common interest in that property does not make such persons as partners.

3. **THE RECEIPT-**

   i) of a share of the profits of a business; or

   ii) of a payment contingent upon the earning of profits; or

   iii) varying with the profits earned by a business,

   by a person does not of itself, make him a partner with the persons carrying on the business.

4. **THE RECEIPT OF SUCH SHARE OR PAYMENT-**

   i) by a lender of money to persons engaged or about to engage in any business;

   ii) by a servant or agent as remuneration;

   iii) by the widow or child of a deceased partner, as annuity, or

   iv) by a previous owner or part owner of the business as consideration for the sale of the goodwill or share thereof does not make the receiver a partner with the persons carrying on the business.

5. **CASE LAW**: In '**S.K. PARTHASARATHY NAIDU V. K. RAMA NAIDU' – AIR 2001 MAD 399 (405)** it was held that the legal existence of a partnership is proved by facts to support such a claim. There need not be any particular form of document and in fact, the partnership can even be oral, but, whether a relationship of partners exists or does not exist depends on what was intended by parties.

'**SHIV NARAIN & SONS V. COMMISSIONER OF INCOME TAX' – AIR 1935 LAH 896** it was held that a partnership firm is not a 'person', but merely a collective name for the individuals who are members of the partnership, and as such it cannot be a partner in another partnership firm. A partnership is a relationship which subsists between persons. A partnership firm is not a legal entity, is incompetent to enter into a partnership with another partnership firm.

Q NO 2. WHAT DO YOU UNDERSATND BY THE TERM PARTNERSHIP PROPERTY AND STATE THE RULES REGARDING ITS APPLICATION

ANSWER:

PROPERTY OF THE FIRM SECTION 14

Subject to contract between the partners

1. The property of the firm includes all property and rights and interests in property, originally brought into the stock of the firm, or acquired, by purchase or otherwise, by or for the firm, or for the purposes and in the course of the business of the firm and includes also the goodwill of the business.
2. The property and rights and interests in property acquired with money belonging to the firm are deemed to have been acquired for the firm unless the contrary intention appears.
3. **CASE LAW: IN 'ARJUN KANAJI TANKAR V. SHANTARAM' (1969) 3 SCC 555** a contention was raised that in any event, by virtue of Section 14 of the Partnership Act, all the assets with the aid of which the business was carried on by the plaintiff must be deemed in law to have become the partnership assets under the deed of partnership. It was held that under Section14, the property belonging to a person, in the absence of any agreement to the contrary, does not, on a person entering into a partnership with others, become the property of the partnership merely because it is used for the business of the partnership. It will become the property of the partnership only if there is an agreement, express or implied, that the property was, under the agreement of partnership, to be treated as the property of the partnership.
4. **APPLICATION OF PARTNERSHIP PROPERTY SECTION 15:** The property of the firm shall be held and used by partners exclusively for the purposes of the business.
5. **CASE LAW:** In '**REDDI VERRAJU V. CHITTORI LAKSHMINARASAMMA' AIR 1971 AP 266** it was held that no partner can claim an exclusive right in any article of the partnership property. But upon on a dissolution, any part of the partnership property may, by contract of the partners, be converted into the separate individual property of either. It, therefore, follows, so long as there is a partnership in existence, no partner has any right to take any portion of the partnership property or to say that it belongs to him exclusively so as to assign or transfer the partnership property. The right, that he possesses in the partnership property, is as a member of the partnership, and not a right which can claim in his individual capacity.

Q NO 3. STATE THE DETAILED PROCEDURE TO FORM A PARTNERSHIP FIRM

ANSWER:

PROCEDURE TO FORM A PARTNERSHIP

1. First decide to who are the partners of the firm, considering the limit envisaged in the Act;
2. The name of the partnership firm is selected subject to the provisions of the partnership Act;
3. Select the business to be done by the partnership and object of the business;

4. Decide the capital to be brought by each and every partner;
5. Prepare the agreement deed of the firm – the deed is the vital and most significant document. The deed shall contain all aspects of the partnership firm. This document prescribes the 'a to z' of the partnership firm to be formed;
6. The agreement should invariably in writing and signed by all partners;
7. The provisions contained in the agreement are binding all partners;
8. The partnership firm is to be registered. According to the Act the partnership firm may be registered or may not be registered. Unregistered firms have no legal protection and therefore registration of partnership firm is to be preferred.
9. Open bank account in the name of the partnership firm;
10. In the present scenario obtaining PAN is necessary and get the PAN from the Income Tax Authority;
11. Acquire all mandatory licenses from the respective authorities for the conduct of the business;
12. Registration with required tax authorities i.e., direct tax as well as indirect tax such as central excise, service tax, VAT etc.,
13. The Registration certificate is the conclusive evidence of the formation of the partnership firm.

Q NO 4. WHAT DO YOU MEAN BY RECONSTITUTION OF THE FIRM

ANSWER:

RECONSTITUTION OF FIRM

Partnership is an agreement between the members of a firm for sharing the profits of the business carried on by all or any of them acting for all. Any change in this relationship amounts to reconstitution of the partnership firm. Any change in the existing agreement of partnership amounts to reconstitution of a firm. A change in the partnership agreement brings to an end the existing agreement and a new agreement comes into being. This new agreement changes the relationship among the members of the partnership firm. Hence, whenever there is a change in the partnership agreement, the firm continues but it amounts to the reconstitution of the partnership firm.

THE RECONSTITUTION OF A PARTNERSHIP FIRM MAY TAKE PLACE IN THE FOLLOWING OCCASIONS-

1. Change in profit sharing ratio of the existing partners;
2. Admission of a new partner;
3. Retirement of existing partner;
4. Death of a partner;
5. Amalgamation of two partnership firm.

CHANGE IN PROFIT SHARING RATIO

When all the partners of a firm agree to change their profit-sharing ratio, the ratio may be changed. For example, Ram, Mohan and Sohan are partners in the firm sharing profits in the ratio of 3:2:1. With effect from April 1, 2022, they decided to share profits equally. Here, change in the existing profit-sharing ratio results into reconstitution of the firm.

In this case one profit is purchasing a share of partner from another one. In other words, share of one partner may increase and share of another partner may decrease. In case of change in profit sharing ratio, the gaining partner must compensate the sacrificing partner by paying the proportionate amount of goodwill. At the time of change in profit sharing ratio, if there are some reserves or accumulated profits/losses existing in the books of the firm, these should be distributed to partners in their old profit-sharing ratio.

Partners may decide that reserves and accumulated profits/losses will not be affected and remains in the books with same figure. In this case, the gaining partner must compensate the sacrificing partner by the share gained by him.

At the time of change in profit sharing ratio of existing partners' assets and liabilities of a firm must be revalued because actual realizable value of assets and liabilities may be different from their book values. Change in the assets and liabilities to the period prior to change in profit sharing ratio and therefore it must be share in old profit-sharing ratio.

ADMISSION OF A NEW PARTNER

Admission of a partner is one of the modes of reconstitution of a partnership firm. A new partner may be admitted in a partnership firm either for the increase of capital of the firm or to strengthen the management of the firm. A new partner may be admitted with the consent of all existing partners as per the provisions of the agreement of the firm. For example, Hari and Haqque are partners sharing profit in the ratio of 3:2. On April 1, 2022 they admitted John as a new partner with 1/6th share in the profits of the firm. In this case, with the admission of John the firm is reconstituted.

The new partner is entitled the following rights-

1. The right to share in the assets of the partnership firm; and
2. The right to share the profits in the business.

The following are to be taken care of while admitting a new partner-

1. Computation of new profit-sharing ratio and sacrifice ratio;
2. Accounting treatment of goodwill;
3. Revaluation of assets and liabilities;
4. Treatment of undisbursed profits and accumulated losses;
5. Adjustment of capital accounts.

RETIREMENT OF AN EXISTING PARTNER

Retiring of a partner from the firm amounts to reconstitution of the firm. On the retirement of a partner, the existing partnership deed comes to an end. In its place the new partnership deed needs to be framed, i.e. the firm requires reconstitution. The remaining partners shall continue to do their business but on the different terms and conditions. For example, Roy, Ravi and Rao are partners in the firm sharing profit in the ratio of 2:2:1. Ravi retires from the firm on March 31, 2022. Retirement of Ravi from the firm of Roy, Ravi and Rao results into reconstitution of firm.

A partner can retire from the firm in three ways-

1. Retirement through mutual consent – A partnership firm may take its shape through mutual consent of partners in the same way. A partner may retire if all the partners agree on the decision of his retirement;
2. When there is a provision in the partnership deed for retirement of a partner, in that case the partner may retire from the firm by expressing his intention of leaving the firm through a notice to the other partners of the firm.
3. When partnership is at will, a partner may retire by giving notice in writing to all other partners informing them about his intention to retire.

The outgoing partner's account is settled as per the terms of partnership deed i.e., in lump sum immediately or in various installments with or without interest as agreed or partly in cash immediately and partly in installment at the agreed intervals. In the absence of any agreement, Section 37 of the Indian Partnership Act, 1932 is applicable, which states that the outgoing partner has an option to receive either interest @ 6% p.a. till the date of payment or such share of profits which has been earned with his/her money (i.e., based on capital ratio). Hence, the total amount due to the retiring partner which is ascertained after all adjustments have been made is to be paid immediately to the retiring partner. In case the firm is not in a position to make the payment immediately, the amount due is transferred to the retiring Partner's Loan Account, and as and when the amount is paid it is debited to his account.

LIABILITY OF A RETIRING PARTNER

A retiring partner may be discharged from any liability to any third party for acts of the firm done before his retirement by an agreement made by him with such third party and the partners of the reconstituted firm. Such agreement may be implied by a course of dealing between such third party and the reconstituted firm after he had knowledge of the retirement.

Despite the retirement of a partner of a firm, he and the partners continue to be liable as partners to third parties for any act done by any of them which would have been an act of the firm if done before the retirement, until public notice is given of the retirement. He is not liable to any third party who deals with the firm without knowing that he was a partner. The notice may be given by the retired partner or any partner of the reconstituted firm.

DEATH OF A PARTNER

The death of a partner in partnership firm amounts to reconstitution of the firm since the vacant of one partner arises. For example, X, Y and Z are partners in a firm sharing profits in the ratio 3:2:1. X dies on March 31, 2022. Y and Z decide to carry on the business sharing future profits equally. In this case, continuity of business by Y and Z sharing future profits equally amounts to reconstitution of the firm.

The accounting treatment for disposal of amount due to retiring partner and deceased partner is similar with a difference that in case of death of a partner, the amount credited to him/her is transferred to his Executors' Account and the payment has to be made to him/her. However, there is

one major difference that, while the retirement normally takes place at the end of an accounting period, the death of a partner may occur any time. Hence, in case of a partner, his claim shall also include his share of profit or loss, interest on capital, interest on drawings (if any) from the date of the last Balance Sheet to the date of his death of these, the main problem relates to the calculation of profit for the intervening period (i.e., the period from date of the last balance sheet and the date of the partner's death. Since, it is considered cumbersome to close the books and prepare final account, for the period, the deceased partner's share of profit may be calculated on the basis of last year's profit (or average of past few years) or on the basis of sales.

LIABILITY OF ESTATE OF DECEASED PARTNER

Section 35 provides that where, under a contract between the partners, the firm is not dissolved by the death of a partner, the estate of a deceased partner is not liable for any act of the firm done after his death.

EXPULSION OF A PARTNER

Section 33 provides that a partner may not be expelled from a firm by any majority of the partners, save in the exercise, in good faith, of powers conferred by contract between the partners. The provisions of retired partners will be applicable to such expelled partner.

INSOLVENCY OF A PARTNER

Section 34 provides that where a partner in a firm is adjudicated an insolvent, he ceases to be a partner on the date on which the order of adjudication is made, whether or not the firm is thereby dissolved.

Where the firm is not dissolved by the adjudication of a partner as an insolvent, the estate of a partner so adjudicated is not liable for any act of the firm and the firm is not liable for any act of the insolvent, done after the date on which the order of adjudication is made.

REVOCATION OF CONTINUING GUARANTEE

Section 38 provides that a continuing guarantee given to a firm or to a third party in respect of the transactions of a firm, is revoked as to future transactions from the date of any change in the constitution of the firm, in the absence of agreement to the contrary.

AMALGAMATION OF TWO PARTNERSHIP FIRMS

When two or more firms merge into one firm and makes a new firm, then this is called amalgamation of firms.

Example: Rai and Sanjeev are partners in the firm sharing profits in the ratio of 4:1. To avoid competition and bring down administrative expenses their firm was amalgamated with the firm of Sohan and Ashok who are sharing profits in the ratio of 1:2. It was decided that the new profit sharing ratio of Rai, Sanjeev, Sohan and Ashok will be 4:1:1:2. In this case, two firms have amalgamated into one which amounts to reconstitution of the firm of Raj and Sanjeev on the one hand and the firm of Sohan and Ashok on the other hand to form a new reconstituted firm.

When two firm amalgamate with each other, at this time we treat following accounting in the books

of old firms so that all doubt solves-

1. Revaluation of Assets and Liabilities - All entries same as at the time of admission and retirement;
2. Transferring reserve to old partners' capital account into their old ratio;
3. Treatment of Good will - the goodwill is evaluated according to the condition of agreement and then goodwill will open with agreed value in the books;
4. Treatment of Assets and liabilities not taken by new firm - If assets and liabilities are not taken by new firm, then these items will transfer to the capital accounts of partners of old firm and close these accounts.

Q NO 5. STATE THE PROCEDURE FOR REGISTRATION OF THE FIRMS

ANSWER:

REGISTRARS OF FIRMS SCETION 57

The State Government may appoint Registrars of Firms for the purposes of this Act and may define the areas within which they shall exercise their powers and perform their duties.

APPLICATION FOR REGISTRATION SECTION 58

For the purpose of registration, a statement in the prescribed form stating-

1. The name of the firm;
2. The place, or principal place, of business of the firm;
3. The names of any other places where the firm carries on business;
4. The date when each partner joined the firm;
5. The names, in full, and permanent address of the partners; and
6. The duration of the firm.

shall be prepared and duly signed by all partners, or by their agents specifically authorized in this behalf. The prescribed fee is also paid for registration. Each person, signing the statement, shall also verify it in the manner prescribed.

NAME OF THE FIRM

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

PROCEDURE

The registration of a firm may be affected at any time by sending by post or delivering to the Registrar of the area in which any place of business of the firm is situated or proposed to be situated.

Section 59 provides that when the Registrar is satisfied that the provisions of Section 58 have been duly complied with, he shall record an entry of the Statement in a register call the Register of Firms and shall file the statement.

Q NO 6. MISCELLANEOUS

ANSWER:

ALTERATION IN FIRM NAME OR PLACE OF BUSINESS SECTION 60

When there is an alteration in firm name or the principal place of business name, a statement may be sent to the Registrar accompanied by the prescribed fee, specifying the alteration and signed and verified in the prescribed manner. When the Registrar is satisfied that the provisions of Section 60 have been duly complied with, he shall amend the entry relating to the firm in the Register of Firms in accordance with the Statement and shall file it along with the statement relating to the firm.

CLOSING AND OPENING OF BRANCHES SECTION 61

When a registered firm discontinues its business at any place or begins to carry on business at any place, such place not being its principal place of business, any partner or agent of the firm may send intimation to the Registrar. The Registrar shall make a note of such intimation in the entry relating to the firm and file the intimation.

CHANGES IN NAMES AND ADDRESSES OF PARTNERS SECTION 62

When any partner of a firm alters his name or permanent address an intimation of the alteration may be sent by any partner or agent of the firm to the Registrar, who shall take note of the same in the entry relating to the firm and file the intimation.

RECODING DISSOLUTION OF A FIRM SECTION 63

When a change occurs in the constitution of a firm, any incoming, continuing or outgoing partner and when a registered firm is dissolved, any person who was a partner immediately before the dissolution may give notice to the Registrar of such change or dissolution, specifying the date of charge or dissolution. The Registrar shall make a record of the notice in the entry relating to the firm in the Register of Firms and shall file the notice along with the statement.

WITHDRAWAL OF A MINOR

When a minor who has been admitted to the benefits of the partnership in a firm, attains majority and elects to become or not to become a partner then he may give notice to the Registrar that he has or has not become a partner. The Registrar shall make a record of the notice in the entry relating to the firm in the Register of Firms and shall file the notice along with the Statement.

RECTIFICATION OF MISTAKES SECTION 64

The Registrar shall have the power to rectify any mistake at all times to bring the entry in the Register of Firms relating to any firm into conformity with the documents relating to that firm. On application made by all the parties, who have signed any document, the Registrar may rectify any mistake in such document or in the record or note made in the Register of firms.

AMENDMENT BY ORDER OF COURT SECTION 65

A Court, deciding any manner, relating to a registered firm, may direct that the Registrar shall make any amendment, in the entry in the Register of Firms, relating to such firm, which is consequential upon its decision and the Registrar shall amend the entry accordingly.

INSPECTION SECTION 66

The Register of Firms shall be open to inspection by any person on payment of such fee as may be prescribed. All statements, notices and intimations, filed shall be open to inspection subject to such conditions and on payment of such fee, as may be prescribed.

Section 67 provides that the Registrar shall, on application, furnish to any person, on payment of such fee, as may be prescribed, a copy, a certified under his hand, of any entry or portion thereof in the Register of Firms.

RULES OF EVIDENCE SECTION 68

Any statement, intimation or notice, recorded or noted in the Register of Firms, shall, as against any person, by whom or on whose behalf such statement, intimation or notice was signed, be conclusive proof of any fact therein stated.

Q NO 7. WHAT ARE THE CONSEQUENCES OF NON-REGISTRATION OF THE FIRM

ANSWER:

EFFECT OF NON-REGISTRATION SECTION 69

The provisions of the Act place an unregistered firm under some disadvantages as a result of which firms go for compulsory registration. The consequences of non-registration of a firm are as under;

1. No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any Court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm.

2. No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.

3. The provisions of sub-sections (1) and (2) shall apply also to claim of set- off or other proceeding to enforce a right arising from contract, but shall not affect-

I. the enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm, or any right or power to realise the property of a dissolved firm, or

II. the powers of an official assignee, receiver or Court under the Presidency- towns Insolvency Act, 1909 or the Provincial Insolvency Act, 1920. to realise the property of an insolvent partner.

PENALTY SCETION 70

Any person who signs any statement, amending statement, notice or intimation, containing any particular, which he knows to be false or does not believe to be true, or containing particulars which he knows to be incomplete or does not believe to be complete, shall be punishable with imprisonment which may extend to 3 months or with fine or with both.

Q NO 8. WHAT IS THE MODE OF GIVING PUBLIC NOTICE

ANSWER:

MODE OF GIVING PUBLIC NOTICE SECTION 72

A public notice is given-

1. If it relates to the retirement or expulsion of a partner from a registered firm, or to the dissolution of a registered firm, or to the election to become or not to become a partner in a registered firm by a person attaining majority who was admitted as a minor to the benefits of partners, by notice to the Registrar of Firms and by publication in the Official Gazette and in at least one vernacular newspaper circulating in the district where the firm, to which it relates, has its place or principal place of business; and
2. In any other case, by publication in the Official Gazette and in at least one vernacular newspaper circulating in the district where the firm, to which it relates, has its place of principal place of business.

DISSOLUTION OF A FIRM (SECTION 39-47)

Section 39 provides that the dissolution of partnership between all the partners of a firm is called the 'dissolution of the firm'.

Q NO 9. STATE THE MODES OF DISSOLUTION OF THE FIRM WITHOUT ORDER OF THE COURT

ANSWER:

MODES OF DISSOLUTION OF A FIRM

DISSOLUTION WITHOUT THE ORDER OF THE COURT OR VOLUNTARY DISSOLUTION

I) DISSOLUTION BY AGREEMENT [SECTION 40]

A firm may be dissolved with the consent of all partners or in accordance with a contract between the parties.

II) COMPULSORY DISSOLUTION [SECTION 41]

Firm is dissolved-

i) By the adjudication of all the partners or of all the partners but one as insolvent; or

ii) By the happening of any event which makes it unlawful for the business of the firm to be carried on or for the partners to carry it on in partnership.

Where more than one separate adventure or undertaking is carried on by the firm, the illegality of one or more shall not cause the dissolution of the firm in respect of its lawful adventures and undertakings.

III. DISSOLUTION ON THE HAPPENINGS OF CERTAIN CONTINGENCIES [SECTION 42]

Subject to the contract between the partners, a firm is dissolved-

i. if constituted for a fixed term, by the expiry of that term;

ii. if constituted to carry out one or more adventures or undertakings, by the completion thereof;

iii. by the death of a partner; and

iv. by the adjudication of a partner as an insolvent.

IV.DISSOLUTION BY NOTICE OF PARTNERSHIP AT WILL [SECTION 43]

Where the 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. The firm is dissolved as from the date mentioned in the notice as the date of dissolution or, if no date is mentioned, as from the date of the communication of then notice.

Q NO 10. WHAT ARE THE VARIOUS GROUNDS ON WHICH FIRM MAY BE DISSOLVED WITH ORDER BY COURT

ANSWER:

DISSOLUTION BY THE COURT [SECTION 44]

The grounds on which the Court may direct dissolution of a firm in a suit as discussed below:

1. if a partner has become of unsound mind;
2. if a partner has become permanently incapable of performing his duties as partner;
3. if a partner is guilty of conduct which is likely to affect prejudicially the carrying on of business, regarding being had to the nature of business;
4. if a partner willfully or persistently commits breach of agreements relating to-
5. the management of the affairs of the firm or the conduct of its business; or the conduct of its business; or otherwise so conducts himself in matters relating to the business that it is not reasonably practicable for the other partners to carry on the business in partnership with him;
6. If a partner has in any way-
   - **i)** transferred the whole of his interest in the firm to a third party; or
   - **ii)** has allowed his share to be charged; or
   - **iii)** has allowed it to be sold in the recovery of the arrears of land revenue; or
   - **iv)** of any dues recoverable as arrears of land revenue due by the partner;
   - **v)** the business of the firm cannot be carried on save at a loss; or
   - **vi)** on any other ground which renders it just and equitable that the firm should be dissolved.

Q NO 11. WHAT ARE THE CONSEQUENCES OF THE DISSOLUTION OF THE FIRM

ANSWER:

LIABILITY OF PARTNERS AFTER DISSOLUTION SECTION 45

The liability of the partners will continue for the acts done before the dissolution, even after the dissolution, until public notice is given of the dissolution. The following partner is not liable for the acts after the date on which he ceases to be a partner-

1. a deceased partner;
2. a partner who is adjudicated as an insolvent;
3. a partner, who not having been known to the person, dealing with the firm, to be a person, retires from the firm

RIGHT OF PARTNERS AFTER DISSOLUTION SECTION 46

On the dissolution of a firm, every partner or his representative is entitled as against all the other partners or their representatives, to have the property of the firm applied in payment of the debts and liabilities of the firm and to have the surplus distributed among the partners or their representatives according to their rights.

CONTINUING AUTHORITY OF PARTNERS SECTION 47

After the dissolution of a firm, the authority of each partner to bind the firm and the other mutual rights and obligations of the partners continue, notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the firm and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise.

The firm is, in no case, bound by the acts of a partner who has been adjudicated insolvent. This will not affect the liability of any person who has, after the adjudication, represented himself, or knowingly permitted to be represented as partner of the insolvent.

MODE OF SETTLEMENT SECTION 48

The mode of settlement of accounts between the partners after the dissolution. In this regard, the following shall be observed, subject to the agreements by the partners-

1. losses, including deficiencies of capital, shall be paid first out of profits, next out of capital and lastly, if necessary, by the partners individually in the proportions in which they were entitled to share profits;

2. the assets of the firm, including any sums contributed by the partners to make up deficiencies of

3. capital shall be applied in the following manner and order-

i) in paying the debts of the firm to the third parties;

ii) in paying to each partner ratably what is due to him from the firm for advances as distinguished

iii) from capital;

iv) in paying to each partner ratably what is due to him on account of capital; and

v) the residue, if any, shall be divided among the partners in the proportions in which they were entitled to share profits.

PAYMENT OF FIRM DEBTS SECTION 49

Where there are joint debts due from the firm and also separate debts due from any partner, the property of the firm shall be applied in the first instance in payment of the dues of the firm. If there is any surplus then the share of each partner shall be applied in payment of his separate debts or paid to him. The separate property of any partner shall be applied first in the payment of his separate debts and the surplus, if any, in the payment of the debts of the firm.

PERSONAL PROFITS AFTER DISSOLUTION SECTION 50

The personal profits earned by any surviving partner or by the representatives of a deceased partner, undertaken after the firm is dissolved on account of the death of a partner and before the affairs have been completely wound up, then such personal profits shall be accounted to the firm. Where any partner or his representative has bought the goodwill of the firm, he shall have right to use the firm name.

RETURN OF PREMIUM SECTION 51

Section 51 provides that where a partner has paid a premium on entering into partnership for a fixed term and the firm is dissolved before the expiration of that term otherwise than by the death of the partner, such partner is entitled to repayment of the premium or of such part there of as may be reasonable, regard being had to the terms upon which he became a partner and to the length of time during which he is a partner, unless-

1. the dissolution is mainly due to his own misconduct; or
2. the dissolution is in pursuance of an agreement containing no provision for the return of the premium or any part of it.

RESCINDING OF CONTRACT SECTION 52

Where a contract creating partnership is rescinded on the ground of the fraud or misrepresentation of any of the parties, the party entitled to rescind is, without prejudice to any other right, entitled-

1. to a lien, or a right of retention of, the surplus of the assets of the firm remaining after the debts of the firm have been paid, for any sum paid by him for the purchase of a share in the firm and for any capital contributed by him;

2. to rank as a creditor of the firm in respect of any payment made by him towards the debts of the firm; and

3. to be indemnified by the partner or partners guilty of the fraud or misrepresentation against all the debts of the firm.

RESTRAIN TO USE FIRM NAME SECTION 53

After a firm is dissolved, every partner or his representative may, in the absence of a contract between the partners to the contrary, restrain any other partner from carrying on a similar business in the firm name, or from using any of the property of the firm for his own benefit, until the affairs of the firm have been completely wound up. Where any partner or his representative has brought the goodwill of the firm he has the right to use the firm name.

In 'Ramesh Kumar V. Smt. Lata Devi' AIR 2007 MP 153 it was held that in order to exercise an option under Section 53, it is necessary to establish that firm has been dissolved and after dissolution of the firm contract has to be seen. In the absence of contract to the contrary there is option available to restrain any other partner or his representative from carrying on the business in the firm name or using any of the property of the firm. The object underlying this section is to restrain a partner from doing anything, while the liquidation proceedings are pending which may prejudice the saleable value or otherwise affect the property of the firm until its use.

EXERCISE

⊙ **Multiple Choice Question:**

1. An act of a firm means:

a) Any partner or agent of the firm which gives rise to a right enforceable by or against the firm

b) Any act by all the partners

c) Any omission by all the partners

d) All of the above

2. Partnership is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. Does it mean that losses are not shared?

a) A minor may be admitted in partnership, only for the profits, but he cannot share in losses.

b) It also depends on the partnership agreement. A person may share the profits but may not share in losses.

c) Sharing of profits also include losses (negative profits)

d) All of the above.

3. Where no provision is made by contract between the partners for the duration of their partnership, or for the determination of their partnership, the partnership is called as:

a) Particular partnership

b) Partnership for a fixed term

c) partnership at will

d) None of the above

4. What information shall be given to the Registrar of Firms by a registered partnership firm:

a) New opening/closing of the existing branch, if any.

b) Change in the name of and address of the partner (s)/change in the constitution of the firm.

c) What there is change in the name of the firm or in location of the principal place of business.

d) All of the above.

5. Who can inspect the Register and filed documents at the office of the Registrar:

a) Any Government servant

b) The Partners of the firm

c) The partners of the other firms

d) Any person

6. What are the right of partners after dissolution:

a) To have the surplus distributed among the partners or their representatives according to their rights.

b) To have business wound up after dissolution

c) To have the property of the firm applied in payment of the debts and liabilities of the firm.

d) All of the above

7. Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with the property of the firm without any final settlement of accounts as between them and the outgoing partner or his estate, then, in the absence of a contract to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since he ceased to be a partner as may be attributable to the use of his share of the property of the firm or to interest at the rate of on the amount of his share in the property of the firm:

a) 9% p.a.

b) 18% p.a.

c) 6% p.a.

d) 12% p.a.

8. The dissolution of partnership means:

a) It means the dissolution of partnership between all the partners of a firm

b) It means the change in the relations of the partners

c) It means the reconstitution of the firm.

d) None of the above.

9. In what circumstances a partner may retire:

a) In accordance with an express agreement by the partners

b) Where the partnership is at will, by giving notice in writing to all the other partners of his intention to retire.

c) With the consent of all the other partners

d) All of the above.

10. What would be the position, where a minor elect not to become a partner:

a) He shall be entitled to sue the partners for his share of the property and profits.

b) His rights and liabilities shall continue to be those of a minor under this section up to the date on which he gives public notice.

c) His share shall not be liable for any acts of the firm done after the date of the notice.

d) All of the above

☉ **State TRUE or FALSE**

1. Consideration, which is of essence for the formation of a contract, is essential for the formation of the partnership.

2. The goodwill shall, subject to contract between the partners, be included in the assets and it may be sold either separately or along with other property of the firm.

3. Debts of the firm shall be paid first out of the property of the firm, but in case of private debts of the partners, it shall be paid last after paying of all the dues of the firm.

4. The implied authority of a partner is to carry on the business of the firm, in the usual way.

5. Subject to contract between the partners, the property of the firm includes acquired, by purchase

or otherwise, by or for the firm, or for the purposes and in the course of business of the firm, the goodwill of the business and all property and rights and interests in property originally brought into the stock of the firm.

Fill in the blanks

1. The partners in a firm may, by contract between the partners, restrict or extend the_____ authority of any partner.
2. When there is any change in the constitution of the firm, the status of the continuing guarantee given to the firm shall be _____ as to future transactions from the date of any change in the constitution of the firm.
3. The State Government may appoint Registrars of Firms for the purposes of this Act, every Registrar shall be deemed to be a_____within the meaning of section 21 of the Indian Penal Code.
4. A firm may be dissolved by the Court order or in accordance with a _____between the partners.
5. A person may be deemed as partner by estoppels or holding out when he by his _____ represents himself to be a partner in a firm.

☉ **Short Essay Type Questions**

1. What are the different types of partnership?
2. Descibe the rights of a partner.
3. Write short notes on-
   (a) Partnership at will
   (b) Liability of a retiring partner

☉ **Essay Type Questions**

1. Discuss the duties of a partner in a partnership firm.
2. Discuss the procedure for dissolution of the firm.
3. When can a partnership firm be dissolved?
4. Discuss the concept of implied authority of a partner.
5. Discuss the procedure for registration of a partnership firm.

☉ **Unsolved Cases**

1. M/s XYZ is partnership firm and X, Y and Z are the partners. During the course of business travel, partner X recovered a sum of Rs.15,000 in cash from the debtor of the firm and credit in his personal bank account. Does the act of X will amount to mis-appropriating the funds of the firm and utilisation of the same for the personal gain.

2. M/s ABC is a partnership firm where Mr. X, Y and Z are partners. Mr. X signs a contract with Coal India Limited for supply of some goods, on behalf of the partnership firm. Can he do so individually or would he require the consent from other two partners?

ANSWER:

Multiple Choice Question:

1. d; 2. d; 3. c; 4. d; 5. d; 6. d; 7. c; 8. b; 9. d; 10. d.

State whether TRUE or FALSE

1. False; 2. True; 3. True; 4. True; 5. True.

Fill in the blanks

1. implied; 2. revoked; 3. public servant; 4. contract; 5. conduct.

6. LIMITED LIABILITY PARTNERSHIP

6.1 CONCEPT, FORMATION, MEMBERSHIP AND FUNCTIONING

INTRODUCTION

A limited liability partnership is another form of doing business in India under the LLP Act, 2008. The benefit of this business form is that it has the feature of limited liability as can be seen in companies. Despite being a partnership, there are many features that an LLP has which are like that of a company. This business form can continue its existence irrespective of changes in partners, much like a company where membership changes hands. LLPs are capable of entering into contracts and holding property in its own name. The LLP is a separate legal entity, as any incorporated association is and has unlimited liability, but the liability of the partners is limited to their pre-determined contribution in the LLP. Similarly, as in a company, individual partners when acting ultra vires or in an independent manner, would not make other members liable for their acts, despite their being the concept of mutual agency. Unlike a company, where articles of association govern, a limited liability partnership is governed by an agreement between the partners or between the partners and the LLP. An LLP has the characteristics of both the partnership firm and company. It is the most preferred form of organization among entrepreneurs as it incorporates the benefits of both partnership firm and company into a single form. LLPs in India are regulated by the Limited liability Partnership Act, 2008.

Among many features, the advantages of incorporating a limited liability partnership are the low amount of cost and less compliances involved in registering the same. Moreover, the statutory obligations of a company to rotate directors within the board, there is no such provision relating to rotation of partners.

The LLP structure is available in countries like United Kingdom, United States of America, various Gulf countries, Australia and Singapore. In India on the advice of experts who have studied LLP legislations in various countries, the LLP Act is broadly based on UK LLP Act 2000 and Singapore LLP Act 2005. Both these Acts allow creation of LLPs in a body corporate form i.e., as a separate legal entity, separate from its partners/ members.

Q NO 1. EXPLAIN ABOUT LIMITED LIABILITY PARTNERSHIP

ANSWER:

CONCEPT OF LLP

1. It is an alternative corporate business from that gives the benefit of limited liability of a company and the flexibility of the partnership;
2. It can continue its existence irrespective of changes in partners;
3. It is capable of entering into contracts and holding property in its own name;
4. It is a separate Legal entity and is liable to the full extent of its assets but liability of the partners is limited to their agreed contribution in the LLP;

5. No partner is liable on account of the independent or un-authorized actions of other partners, thus individual partners are shielded from joint liability created by another partner's wrongful business decisions or misconduct;
6. Mutual rights and duties of the partners within a LLP are governed by an agreement between the partners or between the partners and the LLP as the case may be.

LLP ACT

The Government introduced the 'Limited Liability Partnership Bill, 2006' in the Rajya Sabha on 15.12.2006. The bill was referred to the Department Related Parliamentary Standing Committee on Finance for examination and report. The Committee presented its report on 27.11.2007. The Committee made several recommendations which were examined and considered by the Government. The bill was made an Act in the year 2009. The Act contains 14 chapters with 81 sections and four schedules.

1. **FIRST SCHEDULE** – Provisions regarding matters relating to mutual rights and duties of partners and limited liability partnership and its partners applicable in the absence of any agreement of such matters;
2. **SECOND SCHEDULE** – Conversion from firm into limited liability partnership;
3. **THIRD SCHEDULE** – Conversion from private company into limited liability partnership;
4. **FOURTH SCHEDULE** – Conversion from unlisted company into limited liability partnership.

To implement the provisions of this Act, the Central Government made 'Limited Liability Partnership Rules, 2009' which came into 01.04.2009 except Rules 32 and 33, Rules 38 to 40 which came into effect from 22.05.2009. For the purpose of winding up of a Limited Liability Partnership, the Central Government made 'The Limited Liability Partnership (Winding up and Dissolution) Rules, 2012.

LIMITED LIABILITY PARTNERSHIP

Section 2(1)(n) defines the expression 'limited liability partnership' as a partnership formed and registered under LLP Act.

Q NO 2. WHO MAY BE A PARTNER IN LLP?

ANSWER:

Section 5 provides that any individual or body corporate may be a partner in a LLP. The expression 'body corporate' is defined under Section 2(1)(d) of the Act as a company as defined in Section 3 of the Companies Act, 1956 and includes-

1. a limited liability partnership registered under the Act;
2. a limited liability partnership incorporated outside India; and
3. a company incorporated outside India;

but does not include-

4. a corporation sole;
5. a co-operative society registered under any law for the time being in force; and

6. any other body corporate, not being a company, or a LLP, which the Central Government may, by notification in the Official Gazette, specify in this behalf.

AN INDIVIDUAL SHALL NOT BE CAPABLE OF BECOMING A PARTNER OF LLP, IF-

I. he has been found to be of unsound mind by a Court of competent jurisdiction and the findings is in force.

II. he is undischarged insolvent; or

III. he has applied to be adjudicated as an insolvent and his application is pending.

Example: X Co. Ltd, is a partner of a partnership firm. The partnership firm already has 5 individual partners in it. X Co. Ltd. by virtue of being a limited liability company, can be the 6th partner.

There have been many amendments to sections of the LLP Act, 2008 through The Limited Liability Partnership (Amendment) Act, 2021. For instance, the following changes have been brought about.

Certain offences have been decriminalized. The Act specifies the manner of operations of LLPs, and provides that violating these requirements will be punishable with a fine ranging between two thousand rupees and five lakh rupees.

These requirements include:

i) changes in partners of the LLP,

ii) change of registered office,

iii) filing of statement of account and solvency, and annual return, and

iv) arrangement between an LLP and its creditors or partners, and reconstruction or amalgamation of an LLP. These offences have been decriminalised and a monetary penalty has been imposed. The amendment has also removed some grounds whereby the non-compliance by an LLP of the central government directive to change name of the said LLP, on certain grounds, attracted fines. The amendment now empowers the central government to allot a new name to such an LLP instead of levying a fine. The amendment has also increased the maximum term of imprisonment from two years to five years including a fine between Rs 50,000 and five lakh rupees, in cases of fraudulent activities carried out by an LLP including defrauding its creditors. In such cases the penalty is said to be imposed on every person party to it knowingly.

Under the Act, the central government may compound any offence under the Act which is punishable only with a fine. The amount imposed may be up to the maximum fine prescribed for the offence. The amendment amends this to provide that a regional director (or any officer above his rank), appointed by the central government, may compound such offences.

The amendment allows the central government to establish special courts for ensuring speedy trial of offences under the Act. The special court will consist of:

i) A Sessions Judge or an Additional Sessions Judge, for offences punishable with imprisonment of three years or more; and

ii) A Metropolitan Magistrate or a Judicial Magistrate, for other offences. They will be appointed with

the concurrence of the Chief Justice of the High Court. Appeals against orders of these special courts will lie with High Courts. The amendment also contemplates that appeals before NCLAT cannot be made against an orders of NCLT that have been passed with the consent of the parties. Appeals must be filed within 60 days (extendable by another 60 days) of the order. The amendment empowers the central government may prescribe the standards of accounting and auditing for classes of LLPs, in consultation with the National Financial Reporting Authority

Q NO 3. HOW MANY MINIMUM MEMBERS DOES REQUIRE TO FORM AN LLP

ANSWER:

MEMBERS

MINIMUM NUMBER OF MEMBERS

Section 6 (1) prescribes that every LLP shall have at least two partners.

REDUCTION IN MINIMUM NUMBER OF MEMBERS [SECTION 6(2)]

If at any time the number of partners of a limited liability partnership is reduced below two and the limited liability partnership carries on business for more than six months while the number is so reduced, the person, who is the only partner of the limited liability partnership during the time that it so carries on business after those six months and has the knowledge of the fact that it is carrying on business with him alone, shall be liable personally for the obligations of the limited liability partnership incurred during that period.

Q NO 4. WHAT DO YOU MEAN BY DESIGNATED PARTNERS

ANSWER:

DESIGNATED PARTNER SECTION 7(1)

Every LLP shall have at least two designated partners. The designated partners shall be individual and at least one of them shall be a resident of India, who has stayed in India for a period not less 182 days during the preceding one year. In case all the partners of the LLP are bodies corporate or one or more partners are individuals and bodies corporate then at least two individual partners or nominees of bodies corporate shall act as designated partners.

1. If the incorporation document specifies who are to be designated partners, such persons shall be designated partners on incorporation;
2. If the incorporation document states that each of the partners from time to time of LLP is to be designated partner, every partner shall be a designated partner;
3. Any partner may become or cease to be a designated partner in accordance with LLP agreement;

FILING REQUIREMENT SECTION 7(4)

1. An individual shall give his consent to become a designated partner in Form – 9;
2. The particulars of an individual who has given his consent to act as designated partner shall be filed in Form No.- 4.

3. The individual who has given consent to act as partner or a designated partner shall file consent in Form -2 along with fee.

DISQUALIFICATION TO BECOME DESIGNATED PARTNER

Rule 9 prescribes that a person shall not be capable of being appointed as a designated partner of a LLP, if he-

1. has at any time within the preceding five years been adjudged insolvent; or
2. suspends, or has at any time within the preceding five years suspended payment to his creditors and has not any time within the preceding five years made, a composition with them; or
3. has been convicted by a Court for any offence involving moral turpitude and sentenced in respect thereof to imprisonment for not less than six months; or
4. has been convicted by a Court for an offence involving section 30 of the Act.

LIABILITIES OF DESIGNATED PARTNERS SECTION 8

It provides that unless expressly provided otherwise in this Act, a designated partner shall be –

1. responsible for the doing of all acts, matters and things as are required to be done by the LLP in respect of compliance of the provisions of the Act including filing of any document, return, statement, report under this Act and as specified in the agreement;
2. liable to all penalties imposed on the LLP for any contravention of those provisions.

VACANCY SECTION 9

LLP may appoint a designated partner within 30 days of the vacancy arising for any reason. If no designated partner is appointed, or if at any time there is only one designated partner, each partner shall be deemed to be a designated partner.

PUNISHMENT

Section 10(1) provides the LLP contravenes the provisions of Sections 7(1) the LLP and its every partner shall be punishable with fine which shall not be less than Rs.10,000/- but which may extend to Rs.5 lakhs.

Section 10(2) provides that if the LLP contravenes the provisions of Section 7(4) and (5), Section 8 or Section 9 the LLP and every partner shall be punishable with fine which shall not be less than Rs.10,000 but which may extend to Rs.1 lakh.

Q NO 5. STATE THE PROCEDURE FOR FORMATION OF THE LLP

ANSWER:

FORMATION

INCORPORATION OF LLP

The incorporation of an LLP involves the following steps:

1. Reservation of name;
2. Submission of incorporation documents with Registrar;
3. Registration of LLP.

RESERVATION OF NAME SECTION 16

A person may apply in LLP Form No. 1 along with the payment of fee of Rs.200 to the Registrar having jurisdiction where the registered office of the LLP is to be situate. The application shall indicate the name of the proposed LLP. Rule 18 (1) provides that the name of the LLP shall not be one prohibited under the Emblems and Names (Prevention of Improper Use) Act, 1950. Rule 18(2) gives the list of names that are not generally reserved.

Upon receipt of an application along with the fee the Registrar may, if he is satisfied, subject to the rules, that the name to be reserved is not one which may be rejected on any ground, reserve the name. The Registrar shall inform to the applicant for reservation or non-reservation of the changed name or the name with which the proposed LLP is to be registered within seven days of the receipt of the application. The said name shall be available for reservation for a period of three months from the date of intimation by the Registrar.

Rule 19(1) provides that a LLP or a body corporate or any other entity which has already a name which is similar to or which too nearly resembles the name of a LLP incorporated subsequently, may apply to the Registrar in Form 23 to give a direction to that LLP to change its name.

The application for this purpose shall state-

i) The LLPIN of LLP, or the CIN of the company or the registration number of the other entity as the case may be;

ii) The name with which the LLP or the company or any other ground was incorporated or registered;

iii) The grounds of objection to the name of the LLP incorporated subsequently.

The application shall be verified by the person making it. The following documents are to be attached with the application-

i) The authority under which he is making such an application;

ii) A copy of the incorporation certificate of the LLP or the company or the registration certificate of the entity as the case may be.

SUBMISSION OF INCORPORATION DOCUMENT

i) Section 11(1) provides that two or more person associated for carrying on a lawful business with a view to profit shall subscribe their names to an incorporation document. The incorporation document shall be in LLP Form No. 2.

ii) According to Section 11(2) the incorporation document shall-

- **i.** State the name of the LLP;
- **ii.** State the proposed business of the LLP;
- **iii.** State the address of the registered office of the LLP;
- **iv.** State the name and address of each of the persons who are to be partners of the LLP on incorporation;
- **v.** State the name and address of the persons who are to be designated partners of the LLP on incorporation;

vi. Contain such other information as may be prescribed. The fee payable for registration of LLP is as detailed below:

LLP whose contribution does not exceed Rs.1 lakh – Rs.500

LLP whose contribution exceeds Rs.1 lakh but does not exceed Rs.5 lakhs – Rs.2,000

LLP whose contribution exceeds Rs.5 lakhs but does not exceed Rs.10 lakhs – Rs.4,000

LLP whose contribution exceeds Rs.10 lakhs – Rs.5,000

The Statement in the prescribed form, made by either an Advocate or a Company Secretary or a Chartered Accountant or a Cost Accountant who is engaged in the formation of the LLP and by anyone who subscribed his name to the incorporation document, that all the requirements of this Act and the rules made there under have been complied with, in respect of incorporation and matters precedent and incidental thereto, is also to be furnished.

iii) Section 11(3) provides that if a person makes such a statement which he knows to be false or does not believe to be true, he shall be punishable with imprisonment for a term which may extend to two years and with fine which shall not be less than Rs.10,000 but which may extend to Rs.5 lakhs.

The incorporation document duly complying with the required provision shall be filed with the Registrar having jurisdiction over the State in which the registered office of the LLP is to be situated.

INCORPORATION BY REGISTRATION SECTION 12(1)

When the requirements have been complied, the Registrar shall retain the incorporation document. If the requirements have not been complied with, he shall within a period of 14 days-

I. Register the incorporation document; and

II. Give a certificate that the LLP is incorporated by the name specified therein.

The Registrar may accept the statement furnished by a Professional engaged in the formation of the LLP, as sufficient evidence that the requirement imposed has been complied with. The Certificate shall be signed by the Registrar and authenticated by his office. This certificate is the conclusive evidence that the LLP is incorporated by the name specified therein.

No LLP shall be registered by a name which, in the opinion of the Central Government is-

I. Undesirable; or

II. Identical or too nearly resembles to that of any other partnership firm or LLP or body corporate or a registered trademark or a trademark which is subject of an application for registration, of any other person under the Trade Marks Act, 1999.

The Registrar shall maintain a Register of LLP in which the names of LLPs shall be entered in the order in which they are registered. Every LLP so registered shall be assigned a LLP identification Number (LLPIN) in one consecutive series.

REGISTERED OFFICE SECTION 13(1)

Every LLP shall have a registered office to which all communications and notices may be addressed and where they shall be received.

Q NO 6. WHAT IS THE EEFECT OF REGISTRATION OF THE LLP

ANSWER:

EFFECT OF REGISTRATION SECTION 14

On registration, a LLP shall, by its name, capable of-

1. Suing and being sued;
2. Acquiring, owning, holding and developing or disposing of property, whether movable or immovable, tangible or intangible;
3. Having a common seal, if it decides to have one; and
4. Doing and suffering such other acts and things as bodies corporate may lawfully do and suffer.

NAME

Every LLP shall have either the words 'limited liability partnership' or the acronym 'LLP' as the last words of its name. Section 21 provides that every LLP shall ensure that its invoices, official correspondence and publications bear the following-

1. The name, address of its registered office and registration number of the LLP; and
2. A statement that is registered with LLP.

Any LLP which contravenes the provisions of Section 13 and 21 shall be punishable with fine which shall not be less than Rs.2,000 but which may extend to Rs.25,000.

Section 20 provides that if any person or persons carry on business under any name or title of which the words 'limited liability partnership' or 'LLP' or any contraction or imitation thereof is or are the last or words, that person of each of those persons shall, unless duly incorporated as LLP, be punishable with fine which shall not be less than Rs.50,000 but which may extend to Rs.5 lakhs.

SERVICE OF DOCUMENTS

Section 13(2) provides that a document may be served on a LLP or a partner or a designated partner by sending it by post under a certificate of posting or by registered post or electronic communication or courier at the registered office and any other address specifically by declared by the LLP for this purpose.

Rule 16 provides that a LLP shall give an address for service of documents within the jurisdiction of the Registrar where its registered office is situate. Such address shall include the PIN code and e-mail address. The LLP may, in addition to the registered office address, declare any other address as its address for service of documents as laid down in the LLP agreement. Where the agreement does not provide for such manner, consent of all partners shall be required for declaring any other address as the address for service of documents.

The intimation of other address for service of document shall be given to the Registrar in Form No. 12 within 30 days of complying with the requirements along with the fee. The effective date for service of documents to LLP at the addressed declared by LLP cannot be prior to the date of filing of the document.

CHANGE OF REGISTERED OFFICE SECTION 13(3)

Section 13(3) provides that a LLP may change the place of its registered office and file the notice of such change with the Registrar by following the procedure as laid down in the LLP agreement. If there is no such agreement, consent of all partners shall be required for changing the place of registered office of a LLP to another place. If the change in place is from one State to another State, the LLP having secured creditors shall also obtain the consent of such secured creditors.

The notice for change of registered office shall be given to Registrar in Form No. 15, within 30 days of complying with the requirements in case of change of registered office is within the same State and within 30 days of complying in the case of registered office from one State to another State, along with the fee.

If the change in place of registered office is from one State to another State, the LLP shall publish a general notice, not less than 21 days before filing any notice with Registrar, in a daily newspaper published in English and in the principal language of the District in which the registered office of the LLP is situated and circulating in that district giving notice of change of registered office.

If the change is within the State from the jurisdiction of one Registrar to the jurisdiction of another Registrar or from one State to another State the LLP shall file the notice in Form 15 with the Registrar from where the LLP proposes to shift its registered office with a copy thereof for the information to the Registrar under whose jurisdiction the registered office is proposed to be shifted.

CHANGE OF NAME

Rule 20 provides that any LLP may change its name by following the procedure as laid down in the LLP agreement. Where the LLP agreement does not provide such procedure, the consent of all partners shall be required for changing the name of LLP. Notice of change of name shall be given to the Registrar in Form No. 5 within 30 days of complying with the requirement along with the required fee. The Registrar, on being satisfied that the changed name is the one as reserved by him shall issue a fresh certificate of incorporation in the new name and the change name shall be effective from the date of such certificate.

CHANGE OF NAME BY CENTRAL GOVERNMENT SECTION 17

Section 17 provides that where the Central is satisfied that a LLP has been registered, whether through inadvertence or otherwise and whether originally or by a change of name, under a name which is undesirable or is identical with or too nearly resembles the name of any other LLP or body corporate or other name as to be likely to be mistaken for it, the Central Government may direct such LLP to change its name. The LLP shall comply with the said direction of the Central Government within 3 months after the date of direction or such longer period as the Central Government may allow.

Any LLP which fails to comply with the above direction, shall be punishable with fine which shall not be less than Rs.10,000 but which may extend to Rs.5 lakhs and the designated partner of such LLP shall be punishable which shall not be less than Rs.10,000 but which may extend to Rs.1 lakh.

Q NO 7. PARTNERS AND THEIR RELATIONS

ANSWER:

Chapter IV of the Act deals with the partners of LLP and the relations prevailing between them. The LLP is governed by the LLP agreement made between the partners. The persons who subscribed their names to the incorporation document shall be its partners on the incorporation of LLP. Any other person may become partner of LLP in accordance with the LLP agreement. The agreement is a vital document in LLP transactions.

An agreement made in writing before the incorporation of a LLP between the persons who subscribe their names to the incorporation document may impose obligations on the LLP. For this such agreement is to be ratified by all the partners after the incorporation of the LLP. The LLP shall file such information in Form 3 with the Registrar within 30 days of the ratification by all the partners along with the fee.

The mutual rights and duties of the partners of a LLP and the mutual rights and duties of a LLP and its partners shall be governed by the LLP agreement between the partners or between the LLP and its partners, save as otherwise provided by the Act.

Every LLP shall file information with regard to the LLP agreement in Form 3 with the Registrar within 30 days of the date of incorporation along with the required fee. Any change is made in the LLP agreement the same shall be informed in Form 3 within 30 days of such change along with the fee.

IN THE ABSENCE OF AGREEMENT AS TO ANY MATTER-

1. the mutual rights and duties of the partners; and
2. the mutual rights and duties of the LLP and the partners shall be determined by the provisions relating to the matter as set out in the First Schedule which is as follows:
3. All the partners of a LLP are entitled to share equally in the capital, profits and losses of the LLP;
4. The LLP shall indemnify each partner in respect of payments made and personal liabilities incurred by him-
   - **i)** in the ordinary and proper conduct of the business of the LLP; or
   - **ii)** in or about anything necessarily done for the preservation of the business or property of the LLP;
5. Every partner shall indemnify the LLP for any loss caused to it by his fraud in the conduct of the business of the LLP;
6. Every partner may take in the management of the LLP;
7. No partner shall be entitled to remuneration for acting in the business or management of the LLP;
8. No person may be introduced as a partner without the consent of all existing partners;
9. Any matter or issue relating to the LLP shall be decided by a resolution passed by a majority in number of the partners. Each partner shall have one vote. However no change may be made in the nature of the business of the LLP without consent of all the partners;

10. Every LLP shall ensure that decisions taken by it are recorded in the minutes within 30 days of taking such decisions and are kept and maintained at the registered office of the LLP;
11. Each partner shall render true accounts and full information of all things affecting the LLP to any partner or his legal representatives;
12. If a partner carries on any business of the same nature as and competing with the LLP without the consent of the LLP, he must account for and pay over to the LLP all profits made by him in that business;
13. Every partner shall account to the LLP for any benefit derived by him without the consent of the LLP from any transaction concerning the LLP or from any use by him of the property, name or any business connection of the LLP;
14. No majority of the partners can expel any partner unless a power to do so has been conferred by express agreement between the partners;
15. All disputes between the partners arising out of the LLP agreement which cannot be resolved in terms of such agreement shall be referred for arbitration as per the provisions of Arbitration and Conciliation Act, 1996.

Q NO 8. STATE THE PROVISIONS RELATED TO CESSATION OF PARTNERSHIP INTEREST

ANSWER:

Section 24 provides the circumstances under which the interest of the partnership is ceased. The cessation of a partner of a LLP is in accordance with the agreement entered with the other partners. In the absence of such agreement a partner who intends to resign may give a notice in writing of not less than 30 days to the other partners.

A person shall cease to be a partner of a LLP on the following grounds-

1. on his death or dissolution of the LLP; or
2. if he is declared to be of unsound mind by a competent court; or
3. if he has applied to be adjudged as an insolvent or declared as an insolvent;

LIABILITY OF THE CEASED PARTNER

Section 24(3) provides that where a person has ceased to be a partner of LLP he is to be regarded as still being a partner of the LLP unless-

1. the person has notice that the former partner has ceased to be a partner of the LLP;
2. notice that the former partner has ceased to be a partner of the LLP has been delivered to the Registrar.

Section 24(4) provides that the cessation of a partner from the LLP does not by itself discharge the partner from any obligation to the LLP or to the other partners or to any other person which he incurred while he is a partner.

ENTITLEMENT TO THE CEASED PARTNER

Section 24(5) provides that where a partner of a LLP ceases to be a partner, unless provided in the agreement, he or a person entitled to his share in case of death or insolvency, shall be entitled to receive from the LLP the following-

1. an amount equal to the capital contribution of the former partner actually made to the LLP; and
2. his right to share in the accumulated profits of the LLP, after the deduction of accumulated losses of LLP, determined as at the date the former partner ceased to be a partner;

RESTRICTIONS ON CEASED PARTNER

Section 24(6) provides that a former partner or a person who is entitled to receive the benefits of the LLP, shall not have any right to interfere in the management of the LLP.

Q NO 9. WHAT ARE THE PROCEDURES TO BE FOLLOWED IN FOR REGISTRATION OF CHANGES IN LLP

ANSWER:

REGISTRATION OF CHANGES IN PARTNERS SECTION 25

1. Section 25(1) provides that every partner shall inform the LLP of any change in his name or address within a period of 15 days of such change in Form No. 6. Section 25(5) provides that if any partner contravenes the same he shall be punishable with fine which shall not be less than Rs.2,000 but which may extend to Rs.25,000.
2. Section 25(2) provides that a LLP shall file a notice with the Registrar where a person becomes or ceases to be a partner in Form No. 4. Where there is any change in the name or address of a partner, the LLP shall file a notice with the Registrar within 30 days of such change in Form No. 4 along with the fee. The form shall be signed by the designated partner of LLP and authenticated in a manner as may be prescribed. If the change is related to an incoming partner, it shall contain a statement by such partner that he consents to becoming a partner, signed by him and authenticated in the manner as may be prescribed. Form 4 shall be accompanied by a certificate from a Chartered Accountant in practice or Cost Accountant in practice or a Company Secretary in practice that he has verified the particulars from the books and records of the LLP and found them to be true and correct.
3. Section 25(4) provides that the LLP fails to file notice in Form 4, the LLP and every designated partner of the LLP shall be punishable with fine which shall not be less than Rs.2,000 but which may extend to Rs.25,000.
4. Section 25(6) provides that a ceased partner of a LLP may himself file with the Registrar the notice if he has reasonable cause to believe that the LLP may not file the notice with the Registrar. In case of any such notice filed by a partner, the Registrar shall obtain a confirmation to this effect from the LLP unless the LLP has also filed such notice. If no confirmation is given by the LLP within 15 days the Registrar shall register the notice made by the ceased partner.

Q NO 10. STATE THE LIABILITIES OF LLP

ANSWER:

LIABILITY OF LLP SECTION 27

The LLP is liable if a partner of a LLP is liable to any person as a result of a wrongful act or omission on his part in the course of the business of LLP or with its authority. An obligation of the LLP whether arising in contract or otherwise, shall be solely the obligation of the LLP.

A LLP is not bound by anything done by a partner in dealing with a person if-

1. the partner has no authority to act for the LLP in doing a particular act; and
2. the person knows that he has no authority or does not know or believe him to be a partner of the LLP.

Section 29(2) provides that where any credit is received by the LLP as a result of the representation of a person to be a partner of LLP, shall also be liable to the extent of credit received by it or any financial benefit derived thereon.

The liabilities of the LLP shall be met out of the property of the LLP.

Q NO 11. STATE THE LIABILITIES OF THE PARTNERS IN LLP

ANSWER:

LIABILITY OF PARTNER

The liabilities of the partner are discussed in detail as below:

1. Section 28 provides that a partner is not personally liable solely by reason of being a partner of LLP. But he will be personally liable for his own wrongful act or omission. But he shall not be personally liable for the wrongful act or omission of any other partner of the LLP;
2. Section 29 provides that any person, who by words spoken or written or by conduct represents himself, or knowingly permits himself to be represented to be a partner in a LLP is liable to any person, who has on the faith of any such representation given credit to the LLP, whether the person representing himself or represented to be a partner does or does not know that the representatives has reached the person so giving credit.

UNLIMITED LIABILITY

Section 30 provides that any act with intent to defraud creditors of the LLP or any other person, the liability of LLP and partners shall be unlimited for all or any of the debts or other liabilities of the LLP. If such act is carried out by a partner, the LLP is liable to the same extent as the partner unless it is established by the LLP that such act was without the knowledge or the authority of the LLP.

PUNISHMENT

Section 30(2) provides that where any business is carried on with such intent to defraud the creditors of LLP, every person who was knowingly a party to the carrying on the business shall be punishable with imprisonment for a term which may extend to 2 years and with fine which shall not be less than Rs.50,000 but which may extend to Rs.5 lakhs.

In such cases the LLP or any partner or designated partner or employee shall be liable to pay compensation to any person who has suffered any loss or damage by reason of such conduct.

Section 31 provides for reduction of penalty awarded under Section 30(2). According to Section 31 the Court or Tribunal may reduce or waive any penalty imposed on any partner or employee of a LLP, if it satisfied that-

1. such partner or employee of a LLP has provided useful information during investigation of such LLP;or
2. when any information given by any partner or employee leads to LLP or any partner or employee of such LLP being convicted under this Act or any other Act.

No partner or employee of any LLP may discharged, demoted, suspended, threatened, harassed or in any other manner discriminated against the terms and conditions of his LLP or employment merely because of his providing information or causing information to be provided by him.

Q NO 12. MISCELLANEOUS PROVISIONS

ANSWER:

CONTRIBUTIONS

It is the obligation of a partner of LLP to make contribution as per the LLP agreement. A partner may contribute to the LLP-

1. tangible or intangible property; or
2. moveable or immovable property; or
3. other benefit including money, promissory notes, other agreements to contribute cash or property and contracts for services performed or to be performed.

The money value of contribution of each partner shall be accounted for and disclosed in the accounts of the LLP. The same shall be valued by a practicing Chartered Accountant or practicing Cost Accountant or by approved valuer from the panel maintained by the Central Government.

MAINTENANCE OF BOOKS AND ACCOUNTS SECTION 34

The LLP to maintain proper books of account relating to its affairs for each year and for filing of an annual Statement of Account and solvency with the Registrar. The accounts of LLP shall be audited. The Central Government is given power to exempt any class or classes of LLP from the requirements of this section.

Rule 24 provides that every LLP shall keep books of accounts which are sufficient to show and explain the LLP's transactions to-

1. disclose with reasonable accuracy, at any time, the financial position of the LLP at that time; and
2. enable the designated partners to ensure that any Statement of Account and Solvency prepared complies with the requirements of the Act;

BOOKS OF ACCOUNTS

The books account shall contain-

1. particulars of all sums of money received and expended by the LLP and the matters in respect of which the receipt and expenditure takes place;
2. a record of the assets and liabilities of the LLP;
3. statements of cost of goods purchased, inventories, work-in-progress, finished goods and cost of goods sold; and
4. any other particulars which the partners may decide.

The books of account of a LLP are required to preserve for 8 years from the date on which they are made.

STATEMENT OF ACCOUNT AND SOLVENCY

Every LLP shall file a Statement of Account and Solvency in Form No. 8 with the Registrar, within a period of 30 days from the end of six months of the financial year to which the Statement of Account and Solvency relates, along with the prescribed fee. If a LLP has closed the financial year on 31.03.2011, it shall file the Statement of Account and Solvency in Form No.8 with the Registrar within a period of 60 days from the date of end of 6 months of the financial year to which the Statement of Account and Solvency relates.

The Statement of Account and Solvency of an LLP shall be signed on behalf of the LLP by its designated partners. Each designated partner shall be taken to be a party to its approval unless he shows that he took all reasonable steps to prevent their being approved and signed.

AUDIT OF ACCOUNTS

Rule 24(8) provides that the accounts of every LLP shall be audited. If the turnover of a LLP does not exceed, in any particular year Rs.40 lakhs, or whose contribution does not exceed Rs.25 lakhs shall not be required to get its accounts audited. But if the partners of such LLP wants to get the accounts audited the same shall be audited in accordance with the rules. If they decide not to audit, then the Statement of Account and Solvency shall include a statement by the partners to the effect that the partners acknowledge their responsibilities for complying with the requirements of the Act and the Rules with respect to preparation of books of account and a certificate in the Form No.8.

APPOINTMENT OF AUDITOR

A Chartered Accountant in practice is qualified for appointment as an auditor. The auditor(s) shall be appointed for each financial year of the LLP for auditing its accounts. The designated partners may appoint an auditor(s)-

1. at any time for the first financial year but before the end of the first financial year;
2. at least 30 days prior to the end of each financial year (other than the first financial year);
3. to fill a casual vacancy in the office of auditor, including in the case when the turnover or contribution of LLP exceeds the limits; or
4. to fill up the vacancy caused by removal of an auditor.

If the designated partners have failed to appoint auditor(s), the partners may appoint an auditor or auditors. An auditor appointed shall hold office in accordance with the terms of his or their appointment and shall continue to hold such office till the period-

1. the new auditors are appointed; or
2. they are re-appointed.

Rule 24 (14) provides that where no auditor has been appointed, any auditor in office shall be deemed to be re-appointed unless-

1. the LLP agreement requires actual reappointment; or
2. the majority of partners have determined that he should be reappointed and have given a notice to this effect to the LLP.

A notice may be in hard copy or electronic form and must be authenticated by the person or persons giving it. The above shall be applicable to removal and resignation of auditors.

The remuneration of an auditor may be fixed by the designated partners or in accordance with the procedure laid down in the LLP agreement.

REMOVAL OF AUDITOR

Rule 24(18) provides that the partners of a LLP may remove an auditor from office at any time by following the procedure as laid down in the LLP agreement. If the agreement does not provide for the removal of an auditor,

consent of all partners shall be required for removal of the auditor from his office.

RESIGNATION OF AUDITOR

Rule 24(19) provides that an auditor of an LLP may resign his office by depositing a notice in writing to that effect at the LLP's registered office. If an auditor is not willing to be re-appointed, he shall give a notice in writing to the LLP not less than 14 days before the end of the time allowed for appointing the new auditor. The notice is not effective unless it is accompanied by the statement of the circumstances connected with his ceasing to hold office. The auditor's term comes to an end as on the date on which the notice is deposited or on such later date as may be specified in the notice.

ANNUAL RETURN SECTION 35

Every LLP shall be required to file with the Registrar an Annual Return duly authenticated every year in Form No. 11 along with the fees. The annual return of an LLP having turnover up to Rs.5 crore during the corresponding financial year or contribution up to Rs.50 lakhs shall be accompanied with a certificate from a designated partner, other the signatory to the annual return, to the effect that the annual return contains true and correct information. In all other cases, the annual return shall be accompanied with a certificate from a Company Secretary in practice to the effect that he has verified the particulars from the books and records of the LLP and found them to be true and correct.

The Central Government is given power to prescribe, by rules, the contents and manner for filing of such return. If any LLP fails to comply with the filing of Annual Return shall be punishable with fine which shall not be less than Rs.10,000 but which may extend to Rs.1 lakh.

INSPECTION OF DOCUMENTS SECTION 36

The following documents of LLP shall be available with the Registrar for inspection by any person on payment of fee-

1. incorporation document;
2. names of partners and changes, if any made therein;
3. statement of account and solvency; and
4. annual return.

PENALTY FOR FALSE STATEMENT SECTION 37

If in any return, statement or other document required by or for the purposes of any of the provisions of this Act, any person makes a statement-

1. which is false in any material particular, knowing it to be false; or
2. which omits any material fact knowing it to be material, he shall, save as otherwise expressly provided in the Act, be punishable with imprisonment for a term which may extend to 2 years, and shall also be liable to fine which may extend to Rs.5 lakhs but which shall not be less than Rs.1 lakh.

POWERS OF REGISTRAR SECTION 38

Powers to Registrar, to obtain such information, may require any person including any present or former partner or designated partner or employee of a LLP to answer any question or make any declaration or supply any details or particulars in writing to him within a reasonable period. If any person does not answer such question or make such declaration or supply such details or particulars within a reasonable time or time given by the Registrar or when the Registrar is not satisfied with the reply or declaration or details or particulars provided by such person, the Registrar shall have power to summon that person to appear before him or an inspection or any other public officer whom the Registrar may designate, to answer any such question or make such declaration or supply such details, as the case may be.

Any person who, without lawful excuse, fails to comply with any summons or requisitions of the Registrar shall be punishable with fine which shall not be less than Rs.200 but which may extend to Rs.25,000.

COMPOUNDING OF OFFENCES SECTION 39

The Central Government may compound any offence under this Act which is punishable with fine only, by collecting from a person reasonably suspected of having committed the offence, a sum which may extend to the amount of the maximum fine prescribed for the offence.

PRESERVATION OF RECORDS

The following records are to be **PRESERVED PERMANENTLY**:

1. incorporation document;
2. notice of situation of registered office;
3. information with regard to LLP agreement or any change made therein;

4. notice of other address of any LLP partnership at which documents to be served.

The following documents are to **BE PRESERVED FOR 21 YEARS**-

1. all papers, registers, refund orders and correspondence relating to the LLP liquidation accounts;

The following documents are to be preserved for 5 years-

2. copies of Government orders relating to LLP;
3. registered documents of LLP which have been fully wound up and finally dissolved together with
4. the correspondence relating to such LLP;
5. papers relating to legal proceedings from the date of disposal of the case and appeal; if any;
6. copies of statistical returns furnished to Government;
7. all correspondences including correspondences relating to scrutiny of accounts, annual returns, prosecutions, reports to the Central Government and the Tribunal and the correspondences relating to complaints;
8. Statement of compliance with the requirements of the Act by an Advocate or Company Secretary or Chartered Accountant or Cost Accountant in while time practice and by any person who subscribed his name to the incorporation document;'
9. Notice of a person ceasing to be a partner and any change in the name or address of a partner;
10. Registered documents relating to LLP struck off under Section 75 together with correspondence or copy of the order of restoration of the LLP into the register;
11. Annual Return of a LLP;
12. Consent of candidate to act as designated partner to be filed with the Registrar;
13. Consent to act as a partner;
14. Statement by all the partners of firm containing particulars of firm along with application for its conversion into LLP;
15. Statement by all shareholders containing particulars of private company/unlisted company along with the application for its conversion into LLP;
16. Certified copy of the order(s) of the Tribunal under Section 60/61/62;
17. Copy of the order of dissolution of LLP by Tribunal;
18. Statement of Account and Solvency;

In case of prosecution matter, the date is to be recorded from the date of disposal of the case appeal, if any.

The following records to be **PRESERVED FOR THREE YEARS**-

1. All books, records and papers, other than those specified above;
2. Routine correspondence regarding payment of fees, additional filing fees and correspondences about the return of documents.

DESTRUCTION OF OLD RECORDS

Rule 27 provides that subject to previous orders of the Registrar, the records in the office of the Registrar may be destroyed after the expiry of the period of their preservation as discussed above.

The Registrar shall maintain a Register of destroyed documents in two parts wherein he shall center brief particulars of the records destroyed and shall certify therein the date and mode of destructions.

Q NO 13. STATE THE PROVISIONS RELATED TO CONVERSION OF LLP

ANSWER:

CONVERSION TO LLP

Chapter X of the Act deals with the conversion to LLP from other r types of business types. The Act allows the following conversion-

1. Conversion from firm into LLP;
2. Conversion from private company into LLP;
3. Conversion from unlisted company into LLP.

The second schedule deals with the procedure of conversion of firm into LLP. The third schedule deals with the procedure of conversion from private company into LLP. The fourth schedule deals with the procedure of conversion from unlisted public company into LLP.

CONVERSION OF FIRM INTO LLP

Para 1(a) of the second schedule defines the term 'firm' as a firm as defined in Section 4 of the Indian Partnership Act, 1932. Para 1(b) defines the term 'convert' in relation to a firm converting into a LLP as a transfer of the property, assets, interests, rights, privileges, liabilities, obligations and the undertaking of the firm to LLP.

A firm may convert into a LLP on the condition that the partners of the firm shall be bound by the provisions of the second schedule that are applicable to them. A firm may apply to convert into a LLP if and only if the partners of the LLP into which the firm is to be converted, comprise, all the partners of the firm. Except the partners in the partnership no other person will be allowed to be a partner in LLP after its conversion.

A firm may apply to the Registrar by filing-

i) A statement by all of its partners in Form No. 17 and accompanied by fee containing the following particulars-

ii) the name and registration number, if applicable, of the firm; and

iii) the date on which the firm was registered under the Indian Partnership Act, 1932 or under any other law, if applicable; and

iv) Incorporation document and statement.

On receipt of the above said documents, the Registrar shall register the documents and issue a certificate of registration in Form No. 19 as the Registrar may determine stating that the LLP is, on and from the date specified in the certificate, registered under the Act. The Registrar may require the documents to be verified in such manner, as he considers fit. The LLP shall within 15 days of the date of the registration, inform the concerned Registrar of Firms with which it was registered under the provisions of Indian Partnership Act about the conversion and the particulars of the LLP.

The Registrar may refuse registration if he is not satisfied with the particulars or other information furnished. In such cases appeal may be filed before the Tribunal.

CONVERSION FROM PRIVATE LIMITED COMPANY INTO LLP

Para 1(b) of the third schedule defines the term 'convert' in relation to a private company converting into a LLP, as a transfer of the property, assets, interests, rights, privileges, liabilities, obligations and the undertaking of the private company to the LLP in accordance with the third schedule.

A company may apply to convert itself into a LLP if and only if-

i) there is no security interest in its assets subsisting or in force at the time of application; and

ii) the partners of the LLP to which it converts comprise all the shareholders of the company and no one else.

Upon the conversion of a private company into an LLP, the company and its shareholders, the LLP and the partners of the LLP shall be bound by the provisions of this schedule that are applicable to them.

The company has to apply with the Registrar by filing the following documents:

i) A statement by all its shareholders in Form No. 18 and fees containing the following particularS

i. The name and registration number of the company;

ii. The date on which the company was incorporated; and

ii) Incorporation document and statement;

On the receipt of the above said documents, the Registrar shall register the documents subject to the provisions of the Act and the rules made there under. The Registrar may require the documents to be verified as he considers fit. The Registrar shall issue a certificate of registration in Form No. 19 as the Registrar may determine stating that the LLP is, on and from the date specified in the certificate.

The LLP shall inform the concerned Registrar of Companies within 15 days of the date of registration about the conversion and of the particulars of LLP in Form along with the fees.

If the Registrar is not satisfied with the particulars or other information furnished the Registrar may refused to register. Against this order appeal may be made before the Tribunal.

CONVERSION FROM UNLISTED PUBLIC COMPANY INTO LLP

Para 1(b) of the fourth schedule defines the term 'convert' in relation to a company converting into a LLP, as a transfer of the property, assets, interests, rights, privileges, liabilities, obligations and the undertaking of the company to the LLP in accordance with the provisions of the schedule.

Para 1(c) defines the term 'listed company' as defined in SEBI (Disclosure and Investor Protection) Guidelines, 2000 issued by SEBI under Section 11 of the SEBI Act, 1992 which defines as a company which has any of its securities offered through an offer document listed on a recognized stock exchange and also includes Public Sector Undertakings whose securities are listed on a recognized stock exchange.

Para 1(d) defines the term 'unlisted company' as a company which is not a listed company.

A company may apply to convert into a LLP if and only if-

I. there is no security interest in its assets subsisting or in force at the time of application; and

II. the partners of the LLP to which it converts comprise all the shareholders of the company and no one else.

A company is also to file the following documents-

i) A statement by all its shareholders in Form No.18 along with fee containing the following particulars-

- **i.** the name and registration number of the company;
- **ii.** the date of which the company was incorporated; and

ii) Incorporation document and statement;

On receipt of the above statements the Registrar shall register the documents, subject to the provisions of the Act and the rules made there under. The Registrar may require the documents to be verified as he considers fit. The Registrar shall issue a certificate of registration in Form No. 19 as the Registrar may determine stating that the LLP is, on and from the date specified in the certificate, registered under the Act.

The LLP shall inform the concerned Registrar of Companies within 15 days of the date of registration about the conversion and the particulars of the LLP in Form

The Registrar, if is he is not satisfied with the particulars or other information furnished, may refuse to register. Against this order an appeal may be filed before the Tribunal.

EFFECT OF REGISTRATION

On registration of conversion from a partnership firm into a LLP, a private company into a LLP and an unlisted public company into a LLP the following will be the effects-

1. There shall be a LLP by the name specified in the certificate of registration registered under this Act;
2. All tangible and intangible property vested in the company, all assets, interests, rights, privileges, liabilities, obligations relating to the company and the whole of the undertaking of the company shall be transferred to and shall vest in the LLP without further assurance, act or deed; and
3. The partnership firm/private limited company/unlisted public company shall be deemed to be dissolved and removed from the records of the Registrar of firms/Registrar of Companies.

REGISTRATION IN RELATION TO PROPERTY

If any property is registered with any authority, the LLP shall, as soon as practicable, after the date of registration, take all necessary steps as required by the relevant authority to notify the authority of the conversion and of the particulars of the LLP in such form and manner as the authority may determine.

PENDING PROCEEDINGS

All proceedings by or against the partnership firm/company which was pending before any Court or Tribunal or before an authority on the date of registration may be continued, completed and enforced by or against the LLP.

CONTINUANCE OF CONVICTION, RULING, ORDER OF JUDGMENT

Any conviction, ruling, order or judgment of any Court, Tribunal or other authority in favor of or against the

firm/company may be enforced by or against the LLP.

EXISTING AGREEMENTS

Every agreement to which the firm/company was a party immediately before the date of registration, whether or not of such nature that the rights and the liabilities could be assigned shall have the effect as from that date as if-

1. the LLP were a party to such an agreement instead of the company; and
2. for any reference to the firm/company, there were substituted in respect of anything to be done on or after the date of registration a reference to the LLP.

EXISTING CONTRACTS

All deeds, contracts, schemes, bonds, agreements, applications, instruments and arrangements subsisting immediately before the date of registration relating to the company or to which the company is a party shall continue in force on and after that date as if they relate to the LLP and shall be enforceable by or against the LLP as if the LLP were named therein or were a party thereto instead of the firm/company.

CONTINUANCE OF EMPLOYMENT

Every contract of employment shall continue in force on or after the date of registration as if the LLP were the employer there under instead of the firm/company.

EXISTING APPOINTMENT, AUTHORITY OR POWER

Every appointment of the company in role or capacity which is in force immediately before the date of registration shall take effect and operate from that date as if the LLP were appointed. Any authority or power conferred on the company which is in force immediately before the date of registration shall take effect and operate from that date as if it were conferred on the LLP

The above shall apply to any approval, permit or license issued to the company under any other Act which is in force immediately before the date of registration of the LLP, subject to the provisions of such other Act under which such approval, permit or license has been issued.

NOTICE OF CONVERSION IN CORRESPONDENCE

The LLP shall ensure that for a period of 12 months commencing not later than 14 days after the date of registration, every official correspondence of the LLP bears the following-

1. A statement that it was, as from the date of registration, converted from a company into a LLP; and
2. The name and registration number of the company from which it was converted.

Any LLP which contravenes the above shall be punishable with fine which shall not be less than Rs.10,000 but which may extend to Rs.1 lakh and with a further fine which shall not be less than Rs.50 but which may extend to Rs.500 for every day after the first day after which the default continues.

Q NO 14. STATE PROVISIONS RELATED TO FOREIGN LLP

ANSWER:

FOREIGN LLP

Chapter XI deals with foreign LLP. The term 'foreign LLP' is defined under Section 2(m) of the Act as a LLP formed, incorporated or registered outside India which establishes a place of business within India.

Rule 34(1) provides that a foreign LLP shall file with the Registrar in Form No. 27 within 30 days of establishing a place of business in India-

1. a copy of the certificate of incorporation or registration and other instrument(s) constituting or defining the constitution of the LLP;
2. the full address of the registered or principal office of the LLP in the country of its incorporation;
3. the full address of the LLP in India which is to be deemed as its principal place of business in India; and
4. list of partners and designated partners, if any, and the names and addresses of two or more persons resident in India, authorized to accept on behalf of the LLP, service of process and any notices or other documents required to be served on the LLP.

Rule 34(2)(i) provides that if the LLP is incorporated in any country which is a part of the commonwealth, the copies of the documents mentioned in Section 34(1) shall be certified as true copies-

1. by an official of the Government to whose custody the original is committed; or
2. by a Notary (Public) in that Part of the Commonwealth; or
3. by an officer of the LLP, on oath before a person having authority to administer an oath in that part of the Commonwealth.

Rule 34(2)(ii) provides that if the LLP is incorporated in a country falls outside the Commonwealth but is a party to The Hague Apostille Convention, 1961-

1. the copies of the document mentioned in Section 34(1) shall be certified by an official of the Government to whose custody the original is committed and be duly apostilled in accordance with the Hague Convention;
2. a list of partners and designated partners of the LLP, if any, the name and address of persons resident in India, authorized to accept notice on behalf of the LLP shall be duly notarized and be apostilled in the country of their own in accordance with Hague Convention.

Rule 34(2)(iii) provides that if the LLP is incorporated in a country outside the Commonwealth and is not a party to the Hague Convention, the copy of the incorporation document shall be certified-

1. by an official of the Government to whose custody the original is committed; or
2. a Notary (Public) of such country; or
3. by an officer of the LLP.

Rule 34(2) (iv) provides that the signature or seal of the official or the certificate of Notary shall be authenticated by a Diplomatic or Consular Officer empowered in this behalf under Section 3 of the Diplomatic and Consular Officers (Oaths and Fees) Act, 1948 or where there is no such officer, by any of the officials mentioned in Section 6 of the Commissioners of Oaths Act, 1889 or in any Act amending the same.

Rule 34(2)(v) provides that the certificate of the officer shall be signed before a person having authority to administer an oath provided under Section 3 of the Diplomatic and Consular Officers (Oaths and Fees) Act, 1948 or as the case may be, by Section 3 of the Commissioners of Oaths Act, 1889 the status of the person administering the oath in the latter case being authenticated by any official specified in Section 6 of the Commissioners of Oaths Act, 1889 or in any Act amending the same.

ALTERATION

Rule 34(3) provides that if any alteration is made or occurs in-

1. the instrument constituting or defining the constitution of a LLP incorporated or registered outside India;
2. the registered or principal office of a LLP incorporated or registered outside India; or
3. the partner or designated partner, if any, of a LLP incorporated or registered outside India

the foreign LLP shall file in Form No. 28 such alterations with the Registrar within 60 days of the close of the financial year.

If any alteration is made or occurs in-

1. the certificate of incorporation or registration of LLP incorporated or registered outside India;
2. the name or address of any of the persons authorized to accept service on behalf of a foreign LLP in India; or
3. the principal place of business of foreign LLP in India, the foreign LLP shall file in Form 29 such alterations with the Registrar within 30 days from the date on which the alteration was made or occurred.

TRANSLATED DOCUMENT

Rule 34(5) provides if any document mentioned above is not in the English language, there shall be annexed to it a certified translation thereof. Where the translation is made outside India, it shall be authenticated. If such translation is made within India, it shall be authenticated-

1. by an Advocate, Chartered Accountant, Company Secretary or Cost Accountant; or
2. by an affidavit of a person who, in the opinion of the Registrar has adequate knowledge of the language of the original and of English.

FILING WITH REGISTRAR

Rule 34(4) provides that every foreign LLP shall file with the Registrar the Statement of Account and Solvency in Form 8 duly signed by the authorized representatives within a period of 30 days from the end of six months of the financial year.

Rule 34(5)(ii) provides that the translation of documents into English are required to be filed with the Registrar or shall be certified to be correct.

NAME TO BE MADE KNOWN

Rule 34(6) provides that every foreign LLP shall cause the name of the foreign LLP and of the country in which the LLP is incorporated, to be stated in the legible English characters in all invoices, official correspondence and publications of the LLP.

SERVICE OF DOCUMENT

Rule 34(7) provides that where any foreign LLP makes default in delivering to the Registrar the name and addresses of persons resident in India who are authorized to accept on behalf of the LLP service of process, notices or other documents; or if at any time all the persons whose names and addresses have been so delivered are dead or have ceased so to reside, or refuse to accept service on behalf of the LLP or for any reason, cannot be served, a document may be served on the LLP by leaving it at or sending it by post to, any place of business established by the LLP in India.

REGISTRATION

Rule 34(10) provides that the Registrar shall, on registration of Form 27, issue a certificate for establishment of place of business in India by the foreign LLP in Form No. 30.

CESSATION

Rule 34(8) provides that if any foreign LLP ceases to have a place of business in India, it shall give notice to the Registrar in Form 29 within 30 days of its intention to close the place of business and as from the date on which notice is so given, the obligation of the LLP to file any document to the Registrar shall cease, provided it has no other place of business in India and it has filed all the documents due for filing as on the date of the notice.

Q NO 15. WRITE THE PROVISIONS RELATED TO COMPRAMISE OR ARRANGEMENT

ANSWER:

COMPROMISE OR ARRANGEMENT

Section 60(1) provides that a compromise or arrangement may be proposed-

1. between a LLP and its creditors; or
2. between a LLP and its partners.

The following may apply before the Tribunal for compromise, rearrangement-

1. the LLP; or
2. any creditor of the LLP; or
3. any partner of the LLP; or
4. in the case of a LLP which is being wound up, of the liquidator.

The application shall be supported by an affidavit. A copy of the proposed compromise or arrangement shall be annexed to the affidavit in Form 20.

Where the LLP is not the applicant a copy of the summons and of the affidavit shall be served on the LLP or where the LLP is being wound up it shall be served on liquidator. This shall be served not less than 14 days before the date fixed for the hearing of the summons. The summons shall be in Form 21.

Upon the hearing of the summons or any adjourned hearing, the Tribunal shall give such directions as it may think necessary in respect of the following matters-

1. determining the creditors and/or of partners whose meeting is have to be held for considering the proposed compromise or arrangement; fixing the time and place of meeting;
2. appointing a Chairman for the meeting to be held;
3. fixing the quorum and the procedure to be followed at the meeting including voting by proxy;
4. determining the values of the creditors and/or of the partners, whose meetings have to be held;
5. notice to be given of the meeting and the advertisement, if any of such notice;
6. the time within which the Chairman of the meeting is to report to the Tribunal the result of the meeting; and
7. such other matters as the Tribunal may deem necessary.

Q NO 16. STATE THE PROCEDURE FOR MEETING OF CREDITOR

ANSWER:

PROCEDURE OF MEETING OF CREDITORS/PARTNERS

1. The notice of the meeting is to be given to the creditors and/or partners individually by the Chairman or by the LLP, if the Tribunal or any other person as the Tribunal may direct;
2. The notice shall be sent by post under certificate of posting to their last known address not less than 21 clear days before the date fixed for the meeting;
3. The notice shall be accompanied by a copy of the proposed compromise or arrangement along with statement material interest of the designated partners, if any, and a form of proxy in Form No. 26;
4. The notice of the meeting shall be advertised, if so decided by the Tribunal, in such newspapers and in such manner as the Tribunal may direct;
5. Every creditor or partner entitled to attend the meeting shall be furnished by the LLP, free of charge, within 48 hours of a requisition made for the same, with a copy of the proposed compromise or arrangement;
6. The Chairman shall file an affidavit not less than 7 days before the date fixed for the holding of the meeting showing that the directions regarding the issue of notices and the advertisement have been duly complied with;
7. In default the summons shall be posted before the Tribunal for such orders as the Tribunal may think fit to make.
8. The proxy shall be signed by the person entitled to attend and vote at the meeting shall be filed with the LLP at its registered office not later than 48 hours before the meeting;

9. A body corporate may authorize any person to act as its representative at the meeting. A copy of authorization of such person to act as its representative at the meeting and certified to be a true copy by a designated partner or other authorized officer of such body corporate shall be lodged with LLP at its registered office not later than 48 hours before the meeting;

10. The Chairman of the meeting shall, within the time fixed by the Tribunal or where no time has been fixed, within 7 days after the conclusion of the meeting, report the result of the meeting to the Tribunal;

11. The report shall state accurately the number of creditors or the partners, who were present and who voted at the meeting either in person or by proxy, their individual values and the way they voted;

12. Where the proposed compromise or arrangement is agreed to with or without modification by the creditors/partners three fourth of its value, the LLP or liquidator shall present a petition to the Tribunal for confirmation of the compromise or arrangement within 7 days of the filing of the report by the Chairman to the Tribunal;

13. Where a compromise or arrangement is proposed for the purposes a scheme for reconstruction of any LLP or the amalgamation of any two or more LLP, the petitioner shall pray for appropriate orders and directions of the Tribunal;

14. If the LLP fails to present the petition for confirmation of the compromise or arrangement, it shall be open to any creditor or partner, with the leave of the Tribunal to present the petition for confirmation and LLP shall be liable for the costs thereof;

15. Where no petition for confirmation is presented to or where the compromise or arrangement has not been approved by the requisite majority the report of the Chairman shall be placed for consideration before the Tribunal for such orders as may be necessary;

16. If the Tribunal is satisfied that the LLP or any other person by whom an application has been made, has disclosed to the Tribunal, by affidavit or otherwise, all material facts relating to the LLP including its latest financial position and the pendency of any investigation proceedings in relation to the LLP the Tribunal may sanction the scheme;

17. The order of the Tribunal is binding on all the creditors or of all the partners and also on LLP; or in the case of LLP which is being wound up, binding on the liquidator and contributories of the LLP;

18. An order may be the Tribunal shall be filed by the LLP with the Registrar within 30 days of making such an order in Form 22 along with the fee. In computing the period of 30 days from the date of order the requisite time for obtaining a certified copy of the order shall be excluded;

19. An order shall have effect only after it is filed with the Registrar.; The Tribunal may, at any time after an application has been made stay the commencement or continuation of any suit or proceeding against the LLP on such terms as the Tribunal thinks fit until the application is disposed of;

PENALTY

Section 60(4) provides that if default is made in complying with filing of order of Tribunal with Registrar, the LLP and every designated partner shall be punishable with fine which may extend to Rs.1 lakh.

Q NO 17. MENTION PROVISONS OF TRIBUNAL POWERS IN SANCTIONING SCHEME OR ARRANGEMENT

ANSWER:

POWER OF THE TRIBUNAL

Section 61 provides that where the Tribunal makes an order sanctioning a scheme or an arrangement in respect of a LLP it shall have power to supervise the carrying out the compromise or an arrangement and may, at the time of making such order or at any time thereafter, give such directions in regard to any matter or make such modifications in the compromise or arrangement, as it may consider necessary, for the proper working of the compromise or arrangement. If the Tribunal is satisfied that a compromise or arrangement sanctioned cannot be worked satisfactorily, it may make an order for winding up of the LLP.

RECONSTRUCTION OR AMALGAMATION

Rule 12(i) provides that an arrangement for revival and rehabilitation of any LLP may be proposed –

1. Where on a demand by the creditors of the LLP representing 50% or more of its outstanding amount of debt, the LLP has failed to pay the debt, within 30 days of the service of the notice of demand or to secure or compound it to the reasonable satisfaction of the creditors; or
2. Where a petition for winding up of a LLP is pending before the Tribunal, in terms of the directions given by the Tribunal on the winding up petition; or
3. Where the liquidator has failed his report before the Tribunal, in terms of directions given by the Tribunal on the report of the liquidator.

The LLP or any creditor or partner of the LLP, or in the case of LLP which is being wound up, the Liquidator may make application for sanction of the arrangement for revival and rehabilitation before the Tribunal.

APPLICATION BEFORE TRIBUNAL

Rule 35 (13) provides that an application shall be accompanied by-

1. Statement of account and solvency of LLP for the immediately preceding financial year;
2. Particulars and documents relevant to the scheme, proposed restructuring or rescheduling of the debts or any undertaking or undertaking, in case from bank or financial institution through a letter or any other case through an affidavit of concerned party or parties or in any other form as may be directed by the Tribunal;
3. Proposed scheme of revival and rehabilitation of the LLP including proposal for appointment of an LLP Administrator.

The application is to be made to the Tribunal within 90 days from the date of expiry of demand notice or from the date of direction of the Tribunal. The Tribunal may hear all the parties concerned within 60 days of receipt of application. The Tribunal may admit or dismiss the application. If the Tribunal admits the application, it may make provisions for all or any of the following matters-

1. Holding of meetings of the creditors for approval of scheme proposed for revival and rehabilitation of LLP;
2. Procedure to be followed by the LLP Administrator proposed in the scheme in connection with holding of the meeting including the appointment of Chairman for such meeting;
3. Any other direction as may be considered necessary.

LLP ADMINISTRATOR

Rule 35(17) provides that the LLP Administrator shall be appointed from a panel maintained by the Central Government for winding up and dissolution of LLPs. The terms and conditions of the appointment including the fee of LLP Administrator shall be such as may be ordered by the Tribunal. The Tribunal may, on a reasonable cause being shown and for reasons to be recorded in writing, remove the LLP Administrator and may appoint another LLP Administrator. In case of removal, death or incapacity of the LLP Administrator, the Tribunal may appoint another LLP Administrator.

REPORT OF LLP ADMINISTRATOR

The LLP Administrator shall submit his preliminary report including the decision of the meeting to the Tribunal within 60 days of order by the Tribunal. On consideration of his report and other materials available, if the Tribunal is satisfied that the creditors representing three fourths in value of the amount outstanding against that LLP have, with or without modification of the scheme, resolved that it is not possible to revive and rehabilitate the LLP, the Tribunal may, within 60 days of the receipt of such report, order-

1. that the proceedings for the winding up of the LLP be initiated; or
2. the LLP be wound up, or the liquidator to continue; or
3. sanction for arrangement for revival and rehabilitation of LLP as approved by such creditors with such modifications considered necessary by the Tribunal and make orders for continuation of the LLP Administrator or appointment of a new LLP Administrator.

The Tribunal may consider for its approval including the appointment of any other LLP Administrator if the arrangement is approved by three fourth majorities, in value of creditors.

ORDER OF TRIBUNAL

The order of sanction of the arrangement by the Tribunal may make provisions for all or any of the following-

1. powers and functions of the LLP Administrator;
2. the time period within which various actions proposed in the arrangement to be completed;
3. any such direction to the LLP or its officers or to the creditors, or to the LLP Administrator or to any other person, as may be considered necessary, for the purpose of implementation of the

arrangement of revival and rehabilitation; and

4. any other order or orders as may be considered necessary.

The LLP Administrator shall complete all the actions relating to the implementation of the scheme and submit his final report before the Tribunal within such time directed by the Tribunal but not exceeding 180 days of the order. The LLP Administrator shall, within 30 days of the making or order or orders cause certified copy to be filed with the Registrar concerned in Form 22 along with the fee. Section 62 provides that where an application is made to the Tribunal for sanctioning of a compromise or arrangement which relates to reconstruction of LLP or the amalgamation of two or more LLPs and under a scheme the whole or any part of the undertaking, property or liabilities of any LLP in the scheme is to be transferred to another LLP, the Tribunal may, either by the order sanctioning the compromise or arrangement or by a subsequent order, make provisions for matters like transfer to the transferee LLP of the whole or any part of the undertaking, property or liabilities of any transferor LLP, the continuation by or against the transferee LLP of any legal proceedings pending by or against any transferor LLP. The dissolution without winding of any transferor LLP, the provisions to be made for any person who, within such time and in such manner as the Tribunal directs, dissent from the compromise or arrangement and such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out. It also provides that if default is made in complying with provisions relating to filing of such order of Tribunal with the Registrar, the LLP and every designated partner of the LLP shall be punishable with fine which may extend to Rs.50,000.

ENFORCEMENT OF DUTY TO MAKE RETURNS ETC.

Section 41 provides that in case any LLP is in default in complying with the provisions relating to filing with the Registrar of any return, account or other document or giving of any notice to him, the Registrar may make an application before the Tribunal for making an order for directions in order to make good the default within a time frame.

ASSIGNMENT AND TRANSFER OF PARTNERSHIP RIGHTS

Section 42 provides that the rights of a partner to a share of the profits and losses of the LLP and to receive distributions shall be transferable in accordance with the LLP agreement. Such transfer shall not by itself cause the disassociation of the partner or a dissolution and winding up of the LLP. Such transfer would not entitle the transferee to participate in the management of LLP.

Q NO 18. STATE THE INVESTIGATION PROCEDURE FOR LLPS

ANSWER:

INVESTIGATION

Chapter IX of the Act deals with the investigation procedure against LLPs. The Central Government is to appoint inspectors to cause investigations against the LLPs. The investigation is of two types – one is on the order of Court or Tribunal and the other is by the Central Government itself.

INVESTIGATION ON ORDERS OF COURT OR TRIBUNAL

Section 43(1) provides that the Central Government shall appoint one or more Inspectors to investigate the affairs of a LLP if-

1. the Tribunal, either *suo motu* or on an application received from not less than one fifth of the total number of partners of LLP, by order, declares that the affairs of the LLP ought to be investigated; or
2. any Court, by order, declares that the affairs of a LLP ought to be investigated.

INVESTIGATION BY CENTRAL GOVERNMENT

Section 43(2) provides that the Central Government may appoint one or more Inspectors to investigate the affairs of a LLP and to report on them in such manner as it may direct. Such appointment may be made-

1. if not less than one fifth of the total number of partners of LLP make an application with supporting evidence and security amount as may be prescribed; or
2. if the LLP makes an application that the affairs of the LLP ought to be investigated; or
3. if, in the opinion of the Central Government, there are circumstances suggesting-
   - **i)** that the business of the LLP is being or has been conducted-
   - **ii)** with an intent to defraud its creditors, partners or any other person; or
   - **iii)** for a fraudulent purpose; or
   - **iv)** unlawful purpose; or
   - **v)** in a manner oppressive; or
   - **vi)** unfairly prejudicial to some or any of its partners; Or
   - **vii)** the LLP was formed for any fraudulent or unlawful purpose; or
4. that the affairs of the LLP are not being conducted in accordance with the provisions of this Act; or
5. that, on receipt of a report of the Registrar or any other investigating or regulatory agency, there are sufficient reasons that the affairs of the LLP ought to be investigated.

INSPECTORS AND THEIR POWERS

No firm, body corporate or other association shall be appointed as an Inspector. The Inspector shall have the power to carry out investigation into the affairs of related entities and shall report on the affairs of the other entity or partner or designated partner, so far as he thinks that the results of his investigation are relevant to the investigation of the affairs of the LLP. For that the Inspector has to get the prior approval of the Central Government. Before according approval the Central Government shall give the entity or partner or designated partner a reasonable opportunity to show cause why such approval should not be accorded.

The Inspector may require any entity to furnish such information to, or produce such books and papers before him or any person authorized by him in this behalf, if the production of such books and papers is relevant or necessary for the purposes of his investigation.

An Inspector may examine on oath-

1. any of the entity, partner, designated partner etc.;
2. the affairs of the LLP or any other entity; and
3. may administer an oath accordingly and for that purpose he may require any of the persons to appear before him personally.

In the course of investigation, if the Inspector has reasonable ground to believe that the books and papers of or relating to the LLP or other entity or partner or designated partner of such LLP may be destroyed, mutilated, altered, falsified or secreted, the Inspector may make an application to the Judicial Magistrate for an order for the seizure of such books and papers.

The Magistrate may, by order, authorize the Inspector-

1. to enter, with such assistance, the place or places where such books and papers are kept;
2. to search that place or those places in the manner specified in the order; and
3. to seize books and papers which the Inspector considers it necessary for the purposes of his investigation.

INSPECTOR'S REPORT

Section 49 provides that the Inspectors shall make interim reports to the government and on the conclusion of the investigation shall make a final report to the Central Government in the mode as directed by the Government. The Central Government shall forward a copy of any report to the LLP and to any person at their request.

PROSECUTION

Section 50 provides that the Central Government based on the report of the Inspection if it appears to it that any person in relation to the LLP or in relation to any other entity has been guilty of any offence for which he is liable, the Central Government may prosecute such person for the offence. It shall be the duty of all partners, designated partners and other employees and agents of the LLP or other entity to give the Central Government all assistance in connection with the prosecution which they are reasonable able to give.

Section 51 provides that if it appears to the Central Government from the report made by an Inspector that it is expedient to do so by reason that the business of the LLP is being conducted with an intent to defraud its creditors, partners or any other person, or otherwise for a fraudulent or unlawful purpose, or in a manner oppressive or unfairly prejudicial to some or any of its partners, or that the LLP are not being conducted in accordance with the provisions of the Act may take action for the winding up of the LLP.

RECOVERY OF DAMAGES

Section 51 provides that the Central Government may bring an action against the LLP for the recovery of-

1. damages in respect of any fraud, misfeasance or other misconduct in connection with the promotion or formation or the management of the affairs; or

2. any property of such LLP which has been misapplied or wrongfully retained.

EXPENSES OF INVESTIGATION

Section 52 provides that the expenses of and incidental to an investigation by an Inspector appointed by the Central Government shall be defrayed by the Central Government in the first instance and reimbursed from the concerned LLP or entity. Any amount for which a LLP or other entity is liable, shall be a first charge on the sums or property recovered by such LLP or other entity during investigation. The amount to be recoverable from LLP and other persons may be recovered as arrears of land revenue

INSPECTOR'S REPORT TO BE EVIDENCE

Section 54 provides that a copy of any report of any Inspector or Inspectors appointed shall be admissible in any legal proceeding as evidence in relation to any matter contained in the report.

STRIKING OFF NAME OF DEFUNCT LLP

Rule 37 provides that where a LLP is not carrying on any business of operation for a period of 2 years or more and the Registrar has reasonable cause to believe the same, *suo motu* action for striking of the name of the LLP. In this case the Registrar shall send a notice to the LLP and all its partners intimating his intention to strike off the name the LLP from the register and requesting them to send their representation along with relevant copies of documents within a period of one month from the date of receipt of notice.

If the LLP is regulated under a special law, the notice shall be accompanied by approval of regulatory body under that law. The notice and its contents shall also be displayed in the web site of Ministry of Corporate Affairs for the information of general public for a period of one month.

On the expiry of the notice period, the Registrar may, by an order, unless cause to the contrary is shown by the LLP, or the Registrar is satisfied that the name should not be struck off the register, and shall publish notice in the Official Gazette. On this the LLP shall stand dissolved. The Registrar before passing such order, shall, where he has sufficient cause to believe that the LLP has any asset or liability, satisfy himself that sufficient provision has been made for the realization of all amount due to the LLP and for the payment or discharge of its liabilities and obligations of the LLP within a reasonable time and if necessary obtain necessary undertakings from the designated partner or partner of other persons in charge of the management of the LLP.

The liability of every designated partner of the LLP dissolved, shall continue and may be enforced as if the LLP had not been dissolved.

Where a LLP is not carrying on any business of operator for a period of one year or more the LLP in Form 24 may apply to the Registrar, with the consent of all partners, for striking off its name from the register. For this no notice is required to be issued to the LLP and the partners. The other procedure as discussed will be applicable.

6.2. DISSOLUTION

Q NO 1. STATE THE PROVISIONS RELATED TO WINDING UP OF A COMPANY VOLUNTARILY

ANSWER:

WINDING UP OF LIMITED LIABILITY PARTNERSHIP

Chapter XIII of Limited Liability Partnership Act provides for winding up and dissolution. Section 65 gives powers to the Central Government to make rules for the provisions in relation to winding up and dissolution of LLP. The Central Government made Limited Liability Partnership (Winding up and Dissolution) Rules, 2010. In suppression of this rules, in exercise of the powers conferred by Section 6t read with Section 79 of the Act, the Central Government made the rules called as 'Limited Liability Partnership (Winding up and Dissolution) Rules, 2012 vide Notification No. GSR 550 (E), dated 10.07.2012. These Rules came into effect from 10.07.2012.

MODES OF WINDING UP

Rule 4 provides that the winding up of an LLP may be either voluntary or by the Tribunal. The Tribunal means the National Company Law Tribunal constituted under the Companies Act.

VOLUNTARY WINDING UP

Part III of the Rules deals with the procedure for voluntary winding up. The LLP may be wound up voluntarily if the LLP passes a resolution to wind up the LLP with the approval of at least three fourths of the total number of its partners. If the LLP has creditors, whether secured or unsecured, the approval of such creditors is to be obtained for the voluntary winding up. A copy of the resolution shall be filed with the Registrar within 30 days of passing resolution in Form No. 1.

COMMENCEMENT OF VOLUNTARY WINDING UP

Rule 6 provides that a voluntary winding up shall be deemed to commence on the date of passing of the resolution for voluntary winding up.

DECLARATION OF SOLVENCY

Rule 7 provides that in case of voluntary winding up the majority of its designated partners, not being less than two, shall make a declaration in Form No. 2 verified by an affidavit to the effect that the LLP has no debt or that it will be able to pay its debts in full within such period as may be specified in the declaration, but not exceeding one year from the commencement of the winding up.

The declaration shall be delivered to the Registrar in Form No. 3 within 15 days immediately preceding the date of passing of the resolution for winding up of LLP. The declaration shall be accompanied by a statement of assets and liabilities inform No. 4 for the period commencing from the date up to which the last account was prepared and ending with the latest practicable date immediately before the making of the declaration duly attested by at least two designated partners. The declaration shall also be accompanied by a report of the valuation of the assets of the LLP prepared by a valuer, if there are any assets.

MEETING OF CREDITORS

The meeting of creditors shall be convened for seeking approval of such creditors. The notice shall be sent by registered or speed post or any other mode prescribed. Where the two thirds in value of creditors give their consent that the winding up in the interest of all partners and creditors, the LLP shall within 14 days thereafter, file an application before the Tribunal for winding up. Notice of any decision of creditors shall be given to the Registrar in Form No. 5 within 15 days from the date of receipt of consent of creditors.

PUBLICATION

The LLP shall within 14 days of the receipt of the creditors' consent, give notice of the resolution by advertisement in a newspaper circulating in the district where the registered office or the principal office of the LLP is situated.

APPOINT OF LLP LIQUIDATOR

The term 'LLP Liquidator' is defined in Section 2(a)(i) as a liquidator appointed in connection with voluntary winding up of a LLP from the panel maintained by the Central Government consisting of the names of practicing Chartered Accountants, Advocates, practicing Company Secretaries, practicing Cost Accountants or forms or bodies corporate having Chartered Accountants, Advocates, Company Secretaries, Cost Accountants and such other professionals as may be notified by the Central Government.

The LLP shall within 30 days of passing of resolution of voluntary winding up shall appoint a voluntary liquidator as LLP liquidator and this would be effective only after it is approved by two thirds of the creditors in value of the LLP. If the creditors do not approve this appointment, the creditors shall appoint another LLP liquidator and fix the remuneration to be paid to him. The liquidator appointed by the creditor shall be LLP liquidator. If no liquidator is appointed the Tribunal may appoint an LLP liquidator on such remuneration as may be determined by it.

The LLP liquidator shall file a declaration in Form No. 6 disclosing conflict of interest or lack of independence in respect of his appoint, if any, with the LLP or the creditors, as the case may be, and such obligation shall continue throughout the term of his or its appointment.

REMOVAL OF LLP LIQUIDATOR

The Tribunal may, on cause being shown, remove an LLP liquidator and appoint any another LLP liquidator in his place. The Tribunal may also appoint or remove an LLP liquidator on an application made by the Registrar in this behalf. Before removal the liquidator shall be given a reasonable opportunity of being heard.

The LLP liquidator may also be removed by the partners of the LLP or creditors where such appointment is approved by the partners, as the case may be, the creditors. The liquidator shall be given notice and given a reasonable opportunity of being heard.

DUTIES OF LLP LIQUIDATOR

Rule 13 provides that on appointment of a LLP liquidator, all the powers of the designated partner

and other partner, if any, shall cease, except for the purpose of giving notice of such appointment of the LLP liquidator to the Registrar. Rule 14 prescribes the following duties-

He shall settle the list of creditors or partners, which shall prima facie evidence of the liability of the persons therein to the creditors or partner;

1. He shall obtain approval of partners or creditors for any purpose he may consider necessary;
2. He shall maintain register and proper books of accounts in the form and manner as specified;
3. He shall the debts of the LLP and shall adjust the rights of the partners among themselves;
4. He shall observe due care and diligence in the discharge of duties.

AUDIT OF LLP LIQUIDATOR'S ACCOUNT

Rule 15 provides that the accounts of the LLP liquidator shall be audited.

SUPERVISION OF WINDING UP

Rule 16 provides that the partners or the creditors may appoint such committees as they consider appropriate to supervise the voluntary winding up and assist the LLP liquidator in discharging the functions.

The LLP liquidator shall report quarterly on the progress of the winding up of the LLP in Form No. 8 to the partners or creditors which shall be made before the end of the following quarter. Where the fraud is reported against any person other than a partner or designated partner, the LLP liquidator, before sending a report to the Tribunal, may intimate it to the partners or designated partners and include their views in the report.

The Tribunal is having power to make any order to transfer the winding up proceedings from voluntary winding up to compulsory winding up by Tribunal.

DISSOLUTION OF LLP

Rule 19 provides that as soon as the affairs of a LLP are fully wound up, the LLP liquidator shall prepare a report stating the manner in which the winding up has been conducted and property has been disposed off, final winding up accounts and explanations, in Form No.9, showing that the property and assets of the LLP have been disposed of and its debts fully discharged to the satisfaction of the creditors and thereafter seek the approval of the partners or the creditors on the said report and the final winding up accounts and explanation in the meeting of partners or creditors.

If two thirds of total number of partners or two thirds in value of creditors, as the case may be, after considering the report, accounts and explanations of the LLP liquidator are satisfied that the LLP shall be wound up, they shall pass a resolution, within 30 days of receipt of such report, winding up accounts and explanations for its dissolution.

Within 15 days after the resolution passed, the LLP liquidator shall-

1. send to the Registrar a copy of the final winding up accounts, explanations and report in Form No. 10; and
2. file an application with the Tribunal along with a copy of the final winding up accounts, explanations and report, for passing an order of dissolution of the LLP.

If the Tribunal is satisfied that the process of winding up has been duly followed, the Tribunal may pass an order, within 60 days of the receipt of such application the LLP stands dissolved. The LLP liquidator shall file a copy of the order with the Registrar within 30 days in Form No. 11. The Registrar shall forthwith public a notice in the Official Gazette that the LLP stands dissolved.

If the affairs of the LLP are not fully wound up within a period of one year from the date of commencement of voluntary winding up, the LLP liquidator shall file an application before the Tribunal explaining the reasons thereof and seek appropriate directions.

DISTRIBUTION OF PROPERTY OF LLP

Rule 21 provides that the assets of an LLP shall, on its winding up, be applied in satisfaction of its liabilities *pari passu* and, subject to such application, shall, unless the LLP Agreements otherwise provides, be distributed among the partners according to their rights and interests in the LLP.

COSTS OF VOLUNTARY WINDING UP

Rule 24 provides that all costs, charges and expenses properly incurred in the winding up, including the fee of the LLP liquidator, shall, subject to the rights of secured creditors, if any, and workmen, be payable out of the assets of the LLP in priority to all other claims.

Q NO 2. STATE THE PROVISIONS RELATED TO WINDING UP OF LLP BY ORDER OF TRIBUNAL

ANSWER:

WINDING UP BY TRIBUNAL

Petition for winding up Rule 26 provides that an application to the Tribunal for the winding up of an LLP shall be by a petition presented by-

1. the LLP or any of its partner or partners;
2. any secured creditor or creditors, including any contingent or prospective creditor or creditors;
3. the Registrar; or
4. any person authorized by the Central Government in this behalf;
5. the Central Government, in a case falling under Section 64(d).

A petition filed by the LLP or any of its partner or partners for winding up before the Tribunal shall be admitted only if accompanied by a statement of affairs of the LLP on the date of petition and a resolution of three fourths of the total number of partners.

The Registrar shall not a present a petition on the ground that the LLP is unable to pay its debts unless it appears to him either from the financial condition of the LLP as disclosed in its Statement of Accounts and Solvency or from the report of an Inspector that the LLP is unable to pay its debts. Further the Registrar shall obtain the previous sanction of the Central Government to the presentation of a petition. The Central Government shall not accord its sanction for the presentation of the petition unless the LLP concerned has been given a reasonable opportunity of making representations, if any.

INABILITY TO PAY DEBTS

Rule 25 provides an LLP shall be deemed to be unable to pay its debts-

1. if a creditor, to whom the LLP is indebted for an amount exceeding Rs.1 lakh then due, has served on the LLP, by causing it to be delivered at its registered office, by registered post or otherwise, a demand requiring the LLP to pay the amount so due and the LLP has failed to pay the such amount within 21 days after the receipt of such demand or to provide adequate security or re-structure or compound the debt to the reasonable satisfaction of the creditor;
2. if any execution or other process issued on a decree or order of any Court or Tribunal in favor of a creditor of the LLP is returned unsatisfied in whole or in part; or
3. if it is proved to the satisfaction of the Tribunal that the LLP is unable to pay its debts, and, in contingent and prospective liabilities of the LLP.

POWERS OF TRIBUNAL

1. dismiss it, with or without costs;
2. make any interim order, as it thinks fit;
3. direct the action for revival or rehabilitation of the LLP in accordance with the procedure laid down in Section 60 to 62 of the LLP Act;
4. appoint a liquidator as provisional liquidator of the LLP till the making of a winding up order;
5. make an order for the winding up of the LLP with or without costs;
6. any other orders or orders as may be considered fit.

DIRECTIONS FOR FILING STATEMENT OF AFFAIRS

Rule 28 provides that the Tribunal, where a petition for winding up is filed by any person other than the LLP, if satisfied that a prima facie case for winding up is made out, by an order direct the LLP to file its objections along with a statement of its affairs within the time specified in the order. The Tribunal may direct the petitioner to deposit such security for costs as it may consider reasonable as a precondition to issue directions to the LLP. If the LLP fails to file, the statement of affairs the LLP lose the change to oppose the petition.

APPOINTMENT OF LIQUIDATORS

Rule 29 provides that the Tribunal may appoint a liquidator who may be called by either an official liquidator or a liquidator appointed by an order of the Tribunal from the panel maintained by the Central Government. In the absence of such order the Official Liquidator shall act as liquidator or provisional liquidator.

Every liquidator appointed from the panel, shall, before entering upon his duties as a liquidator of the LLP, furnish security of such sum and in such manner as the Tribunal may direct.

WINDING UP ORDER TO BE COMMUNICATED

Rule 31 provides that where the Tribunal makes an order for the winding up of a LLP, it shall within a period of not exceeding 15 days from the date of passing of the order, cause intimation thereof to be sent to the Liquidator and the Registrar in Form No. 12. On receipt of the intimation, the Registrar

shall make an endorsement to that effect in his records relating to the LLP and notify in the Official Gazette that such order has been made.

On receipt of intimation, the Liquidator shall send notice to the registered office of the LLP, its partners, designated partners, officers, employees including Chief Executive Officer, Chief Financial Officer and auditors and secured creditors, if any, within 15 days of the receipt of the intimation for the purpose of custody of the property, assets, effects, actionable claims, books of accounts or other documents.

The winding up order shall be deemed to be a notice of discharge to the officers, employees and workmen of the LLP except when the business of the LLP is continued. An order of winding up of an LLP shall operate in favor of all creditors and all the partners.

JURISDICTION OF TRIBUNAL

Rule 32 provides that the Tribunal shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of-

1. any suit or proceeding by or against the LLP;
2. any claim made by or against the LLP, including claims by or against any of its branches in India;
3. any application made under Sections 60 to 62 of the Act;
4. any scheme submitted under the Act or any other law, for the time being in force, for revival or rehabilitation of LLP;
5. any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or arise in the course of winding up of the LLP, whether such suit or proceeding has been instituted or such claim or question has arises or arises or such application is made or has been made or such scheme is submitted or has been submitted, before or during the pendency of winding up petition or after the winding up order is made.

REPORT BY LIQUIDATOR

Rule 34 provides that where the Tribunal has made a winding up order, the Liquidator shall, within 60 days from the date of winding up of the order, submit to the Tribunal, a report containing the following particulars-

1. the nature and details of the assets, cash balance in hand and in bank, if any and the marketable securities, if any held by the LLP;
2. amount of contribution received and outstanding from partners;
3. the existing and contingent liabilities of LLP;
4. debts due to the LLP;
5. guarantees given by the LLP;
6. list of partners and dues if any payable by them and details of any outstanding contributions;
7. details of intangible assets;
8. details of subsisting contracts, joint ventures and collaborations, if any;
9. details of other LLPs or companies in which LLP has any stake;

10. details of legal cases filed by or against the LLP;

11. details of the properties, assets, books or records and other documents taken under the custody of the Liquidator;

12. scheme of revival or rehabilitation of LLP, if any; and

13. any other information which the Tribunal may direct or the Liquidator may consider necessary to include.

The Liquidator may make in the report, the viability of the business of the LLP or the steps which, in his opinion, are necessary for maximizing the value of the assets of the LLP.

DIRECTIONS OF TRIBUNAL ON THE REPORT

Rule 35 provides that the Tribunal shall, on consideration of the report, fix a time limit within which the entire proceedings shall be completed and the LLP dissolved. The Tribunal may, at any stage of the proceedings, if it considers that it will not be advantageous or economical to continue the proceedings, reduce the time limit within which the entire proceedings shall be completed and the LLP dissolved. If it is in the opinion of the Liquidator that the proceedings could not be completed within the time allowed by the Tribunal, the Tribunal after satisfying itself on an application of the Liquidator, may extend the time, but not exceedingly further 30 days.

SALE OF LLP

The Tribunal may, on an examination of the reports of the Liquidator and after hearing the liquidator, creditors, partners, order the sale of the LLP as going concern or its assets or part thereof. The Tribunal may appoint a Sale Committee consisting of such creditors, partners and officers or employees of the LLP to assist the Liquidator in this regard.

REVIVAL OR REHABILITATION OF LLP

If the Tribunal is of the opinion that an LLP can be revived or rehabilitated, it may, direct that an action for revival or rehabilitation may be taken in accordance with Sections 60 to 62 of the Act.

FRAUD

Where a report of the liquidator indicates the fraud committed in respect of the LLP, the Tribunal shall, without prejudice to the process of winding up, order for investigation and on consideration of the report of such investigation it may pass order and give such directions as it may think appropriate.

CUSTODY OF LLP'S PROPERTIES

Rule 36 provides that where a winding up order has been made or where a provisional liquidator has been appointed, the liquidator on the order of the Tribunal, forthwith take into his custody or under his control all the property, assets, effects and actionable claims to which the LLP is or appears to be entitled to and take such steps and measures, to protect and preserve the properties of LLP.

On the order of the Tribunal, any partner, trustee, receiver, banker, agent etc., are required to pay, deliver, surrender or transfer to the liquidator the money, property or books and papers in their custody within the time specified by the Tribunal.

APPLICATION OF ASSETS

The assets of the LLP shall be applied first for the payment of cost including expenses, charges or fees and remuneration of the Liquidator incurred in the winding up of the LLP and thereafter be applied for the discharge of its liability *pari passu* with the provisions of the Act and the rules.

COMMITTEE OF INSPECTION

Rule 39 provides that the Tribunal may, at the time of making an order for the winding up of an LLP or any time thereafter, direct that there shall be appointed a committee of inspection to act with the liquidator. The committee shall consist of such number of members not exceeding 12. The Committee shall meet at such times as it may from time to time appoint and the Liquidator or any member of the Committee may also call a meeting of the committee as and when he thinks necessary. As soon as possible after the holding of the meetings of the Committee, the Liquidator shall report the result to the Tribunal for further directions.

PERIODICAL REPORTS

Rule 40 provides that the Liquidator shall report quarterly on the progress of winding up of the LLP in Form No. 13 to the Tribunal which shall be made before the end of the following quarter. The Tribunal may review any order made by it and make such modifications as it thinks fit with or without any further directions.

ASSISTANCE TO LIQUIDATOR

Rule 42 provides that the Liquidator may, with the sanction of the Tribunal, appoint one or more practicing Chartered Accountants or practicing Company Secretaries or practicing Cost Accountants or legal practitioners entitled to appear before the Tribunal or such other professions or experts or valuers or agency as he considers necessary to assist him in the performance of his duties and functions under the Act or the rules.

APPEAL AGAINST THE DECISION OF LIQUIDATOR

Rule 43(5) provides that any person aggrieved by any act or decision of the Liquidator may apply to the Tribunal. The Tribunal may confirm, reverse or modify the act or decision complained of and make such further order as it thins just in the circumstances.

BOOKS OF ACCOUNTS

Rule 44 provides that the liquidator shall keep proper books of accounts in the manner prescribed in which he shall cause entries or minutes to be made or proceedings of the meetings. The accounts of the liquidator shall be audited in the form and manner specified in Rule 56. The liquidator shall cause the statement of accounts when audited or a summary thereof to be printed and shall send a printed copy of the statement of accounts or summary thereof by post to every creditor and every partner.

CONTROL OF CENTRAL GOVERNMENT OVER LIQUIDATOR

Rule 48 provides that the Central Government shall take cognizance of the conduct of the Official Liquidators of LLPs which are being wound up by the Tribunal and if a Tribunal does not faithfully perform his duties and duly observe all the requirements imposed on him by the Act and Rules with

respect to performance of his duties or if any complaint is made to the Central Government by any creditor or partner in regard thereto, the Central Government shall inquire into the matter and take such action thereon as it may thin expedient. The Central Government may also direct a investigation to be made of the books and vouchers of such liquidators.

Q NO 3. STATE THE PROVISIONS WHICH ARE APPLICABLE FOR ALL TYPES OF WINDING UP

ANSWER:

PROVISIONS APPLICABLE TO EVERY MODE OF WINDING UP

Part V of the Rules provides the provisions that are applicable to all type of winding up.

POWERS OF LIQUIDATOR

Rule 51 provides that the LLP liquidator, with the sanction of the Tribunal in case of winding up by the Tribunal or with the sanction of a resolution by three fourths of total number of partners, in case of voluntary winding up, has the following powers-

1. pay any class of creditors in full;
2. make any compromise or arrangements with creditors;
3. compromise any money due from partners including outstanding, unrealized or unrecovered contribution etc.,

PROOF OF DEBTS

Rule 50 provides that all debts payable on a contingency and all claims against the LLP, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the LLP.

EVIDENCE

Rule 53 provides that all books and papers of the LLP, LLP liquidator and Liquidator shall, as between the partners of the LLP, be prima facie evidence of the truth of all matters purporting to be recorded therein.

INSPECTION OF BOOKS AND PAPERS

Rule 54 provides that at any time after making of an order for the winding up of a LLP by the Tribunal any creditor or partner of the LLP may inspect the books and papers of the LLP subject to conditions specified. The conditions are not applicable on the Central Government or a State Government or any authority or officer of the Government.

DISPOSAL OF RECORDS

Rule 55 provides that when the affairs of a LLP have been completely wound up and it is about to be dissolved, its books and papers and those of the LLP liquidator may be disposed of as follows-

1. in case of winding up by the Tribunal, in such manner as the Tribunal directs; and
2. in case of voluntary winding up, in such manner as the LLP approves it by three fourths of the total number of partners with the prior approval of the secured creditors.

After expiry of five years from the dissolution of LLP, no responsibility shall devolve on the LLP, the LLP liquidator or the liquidator on the books and papers of the LLP, the liquidator. The Central Government may, by notification direct for such period not exceeding five years from the dissolution of the LLPs for the prevention of the destruction of the books and papers of a LLP which has been wound up and of its LLP Liquidator or Liquidator.

REMITTANCE OF MONEY

Rule 57 provides that every liquidator shall pay the moneys received by him as Liquidator of any LLP into the public account of India in the RBI or any scheduled bank. If the Tribunal considers that it is advantageous for the creditors or partners of the LLP, it may permit the account to be opened in such other bank specified by it.

The liquidator shall not deposit any money received by him in his capacity into any private account. The liquidator can retain at any time for more than ten days a sum of Rs.50,000 on the authorization of the Tribunal. For this the liquidator is to make application and explains the retention to the satisfaction of the Tribunal. If the liquidator fails he is liable to pay interest and also penalty.

FILING RETURNS

Rule 62 provides that every liquidator shall file, deliver or make any report, statement of accounts or any other document or give any notice which is required to be filed, delivered or made or given, as the case may be, pursuant to any rule, within the time specified in such rule. The Central Government may also specify any other report, statement of accounts or other documents to be filed within the time specified.

DISSOLUTION VOID

Rule 64 provides that the where an LLP has been dissolved the Tribunal may at any time within two years of the date of the dissolution, on application by the Liquidator or by any other person, make an order, upon such terms as the Tribunal may think fit, declaring the dissolution to be void, and thereupon such proceedings may be taken as if the LLP has not been dissolved. The copy of the said order is to be filed within 30 days with the Registrar in Form No. 11, who shall register the same.

COMPUTING PERIOD OF LIMITATION

Rule 66 provides that in computing the period of limitation specified for suit or application in the name and on behalf of a LLP which is being wound up by the Tribunal, the period from the date of commencement of the winding up of the LLP to a period of one year immediately following the date of winding up order shall be excluded.

FILING WITH REGISTRAR AND FILING FEE

Rule 67 provides that a notice, document, form, resolution etc., or notification required to be filed with the Registrar shall be filed in electronic form along with the fee specified. In case of winding up by the Tribunal, the Central Government may waive the fee, if it deems fit. No fee shall be payable if any LLP under liquidation by the order of the Tribunal does not have funds and the liquidator submits a certificate that the LLP does not have any fund.

Q NO 4. STATE THE GENERAL PROCEEDINGS OF WINDING UP

ANSWER:

PROCEEDINGS AND GENERAL PROCEDURES

Part VI of the rules provides for the proceedings and general procedures of the winding up. The following is the procedure enumerated in Part VI of the Rules-

1. All proceedings shall be instituted before the Bench of the Tribunal having jurisdiction as may be notified by the Central Government;
2. All petitions, applications, affidavits etc., shall be written, typewritten or printed neatly and legibly on substantial paper of foolscap size in duplicate and separate sheets shall be stitched together;
3. The contents shall be divided into separate paragraphs, which are numbered serially;
4. The general hearing in all proceedings before the Tribunal and in all advertisements and notices shall be in Form No. 16;
5. Fees on applications as specified shall be paid;
6. The proceedings shall be in English or Hindi;
7. No documents other than in English or Hindi, unless translated into Hindi or English shall be accepted;
8. No rules shall be deemed to limit or otherwise affect the inherent powers of the Tribunal to make such orders as may necessary for the ends of justice or to prevent abuse of the process of the Tribunal;
9. The Tribunal shall have the power to dispense with the requirements of any of these rules subject to such terms and conditions and for the reasons recorded to be in writing;
10. Where any particular number of days is specified, the same shall be reckoned exclusively of the first day and inclusively of the last day, unless the last day shall happen to fall on a day on which the offices of the Tribunal are closed, in which case the time shall be reckoned exclusively of that day also and of any succeeding day or days on which the offices of the Tribunal continued to be closed;
11. The Tribunal shall keep the following registers in physical or digital format or both the format, relating to the proceedings under the Act and the Rules-
    - **i)** LLP Petitioner's Register;
    - **ii)** LLP Applications' Register;
    - **iii)** Liquidation Registers;
    - **iv)** LLP Document Registers;
    - **v)** Appearance of the person before the Tribunal;
12. Every application or petition shall bear its distinctive serial number.;
13. Every petition shall be verified by an affidavit by the petitioner and such affidavit shall be in Form No. 18 and shall be filed along with the petition;
14. Every application/petition shall be accompanied by the documents required to be annexed;

15. Where a petition is filed, an application shall be made by along with summons in Form No. 19 to the Member for directions as to the advertisement of the petition, the notices to be served and the proceedings to be taken;

16. Where any petition is required to be advertised, be advertised not less than 7 days before the date fixed for hearing in one issue each of a daily newspaper in English language and a daily newspaper in regional language circulating in the State or the Union territory concerned as may be fixed by the Member;

17. The advertisement shall be in Form No. 20 and shall include the required information;

18. Every petition shall be served on the respondent;

19. Notice of every petition required to be served upon any person shall be in Form No. 21 not less than 7 days before the date of hearing;

20. The petitioner shall be responsible for the service of all notices, summons and other processes for the advertisement and publication of notices, required to be effected by these rules or by order of Tribunal;

21. An affidavit of service on a LLP or its liquidator shall be in Form No. 22 or 23 as the case may be;

22. Every person who intends to appear the hearing of a petition, whether to support or oppose the petition, shall serve on the petitioner or his advocate, notice of his intention at the address given in the advertisement;

23. The petitioner or his advocate or authorized representative shall prepare a list of the names and addresses of the persons who have given notice of their intention to appear at the hearing of the petition in the form No. 25 and shall be filed in Tribunal before the hearing of the petition;

24. At the time of hearing the Member may either dispose of the petition finally or give such directions as may be deemed necessary for filing of counter affidavit and reply affidavits;

25. All adjournments and postings will be subject to time schedule prescribed under the Act or the rules;

26. It shall not be necessary give notice of the adjourned hearing to any person;

27. The date of order shall be the date on which it was actually made notwithstanding that it is drawn up and issued on a later date;

28. The costs should be awarded for every adjournment on the party seeking adjournment at the time of granting adjournment except in cases of serious illness and such similar circumstance;

29. Where costs are awarded to a party in any proceeding, the order shall direct that the party liable to pay the costs shall pay the same.

INSPECTION AND COPIES OF PROCEEDINGS

Rule 79 provides that records of every proceedings pending before the Tribunal will be available for the inspection of the parties or their authorized representatives on making an application in writing and on payment of a fee as specified. A person who is not a party to the proceedings is not entitled for inspection of records or proceedings except with the consent of the parties by whom they were

presented or produced or under the orders of the Tribunal on payment of fee. A person not a party to the proceedings on which final orders have been passed can obtain copy of the orders on payment of such fee specified.

PETITION FOR WINDING UP

The following is the procedure for winding up-

1. A petition for winding up an LLP shall be in Form No. 26 or 27 or 28 as the case may be, with such variations as the circumstances may require;
2. The petition shall be in duplicate;
3. Where the petition is filed by the LLP the petition shall be accompanied with the Statement of affairs of LLP on the date of petition;
4. The Registrar shall note on the petition the date of its presentation;
5. The petition shall be posted before the Member in chambers for admission and to fix hearing date;
6. The member may direct notice to be given to LLP before advertisement;
7. The petition by a contingent or prospective creditor may be presented accompanying an application for the leave of the Tribunal for the admission of the petition;
8. Every partner or creditor of the LLP shall be entitled a copy of petition within 24 hours on payment of the charges as specified;
9. The advertisement shall be in Form No. 29 and advertised within the time and in the manner provided;
10. A petition shall not be withdrawn after presentation without the leave of the Tribunal;
11. The Tribunal may substitute creditor or partner for original petitioner;
12. An affidavit intended to be used in opposition shall be filed not less than 5 days before the date fixed for the hearing of the petition;
13. A copy of the affidavit shall be served on the petitioner; the statement of affairs of the LLP shall also be filed;
14. An affidavit intended to be used in reply to the affidavit filed in opposition to the petition shall be filed not less than 2 days before the day fixed for the hearing of the petition and a copy of the affidavit shall be served on the other party;
15. After the admission of the petition, the Tribunal, if it thinks fit, and upon such terms and conditions may appoint the liquidator to be the provisional liquidator pending final orders on the winding up petition;
16. The order appointing the provisional liquidator shall be set out the restrictions and limitations, if any, on his powers and imposed by the Tribunal in Form No. 30;
17. All costs and charges and expenses properly incurred by the Liquidator shall be paid out of the assets of the LLP;
18. The Registrar of the Tribunal shall forthwith send to the liquidator appointed by the Tribunal notice of the order under the seal of the Tribunal in duplicate in Form No. 31 or 32 together with a copy of the petition;

19. The order shall be in Form No. 33 with such variations as may be necessary;

20. The liquidator shall make out a report for direction with regard to the performance by the liquidator of all or any of the duties or any other matter requiring the directions of the Tribunal;

21. The Tribunal may give such directions as it thinks fit in regard to various matters including fixing of time before which the various matter shall be completed;

22. The Tribunal shall, at the time of making the winding up order or at any time thereafter, give directions as to the advertisement of the order and the persons if any on whom the order shall be served;

23. Every order for the winding up shall within 14 days of the date of making the order, be advertised by the petitioner in Form No. 34;

24. An application for stay of proceedings in the winding up shall be made to the Tribunal upon notice to the parties to the winding up petition;

25. If stay order is granted the applicant shall within 15 days file a certified copy of the order with the Registrar in Form No. 10;

26. An application for leave of the Tribunal to commence or continue any suit proceedings against the LLP shall be made to the Tribunal upon notice to liquidator and other parties to the suit or proceedings sought to be commenced or continued;

27. An application for transfer to the Tribunal of any suit or proceeding by or against the LLP pending in court, other than High court and Supreme Court, or any Tribunal shall be made upon the notice to the liquidator and to the parties to the suit or proceedings sought to be transferred;

28. A notice by the liquidator to any person to submit and verify a statement of affairs of LLP, shall be in Form 35 after the order of winding up;

29. The Statement of Affairs shall be in Form No. 37 and shall be made out in duplicate, one copy of which shall be verified by affidavit;

30. An affidavit of concurrence in the statement of affairs shall be in Form No. 38;

31. The liquidator shall verify the Statement of Affairs and affidavit of concurrence and submit one copy to the Tribunal and retain the duplicate copy;

32. Partners and other officers of LLP shall attend before the Liquidator and furnish the required information;

33. The report shall be submitted by the Liquidator in Form No. 40 and the same shall contain the required information;

34. Further report is to be filed by the liquidator in case fraud has been detected;

35. On consideration of the Report the Tribunal may pass such orders and give such directions as it may think fit including directions of examination of designated partners, partners, officers and employees past and present of the LLP.

SETTLEMENT OF LIST OF CREDITORS

The procedure for settlement of creditors is as follows-

1. The liquidator, in any mode of winding up, shall issue notice not less than 14 days before the date of hearing to the creditors of the LLP to prove their debts or claims and to establish any title for they may have to priority under preferential payments or to be excluded from the benefit of any distribution made before such debts or claims are proved, or, as the case may be, from objecting to such distribution;
2. The liquidator shall give not less than 14 days of notice so fixed by advertisement which shall be released within 30 days from the date of confirmation of sale and in Form No. 41;
3. If the number of creditors does not exceed 100, individual notice may be given within 30 days from the date of confirmation of sale;
4. The liquidator shall also give not less than 14 days notice of the date fixed, to every person mentioned in the Statement of Affairs in Form No. 42 or 43;
5. Every creditor shall prove his debt, unless the Member in any particular case directs that any creditors or class of creditors shall be admissible without proof;
6. An affidavit proving a debt shall contain a statement of accounts showing the particulars of the debt and shall specify the vouchers or bills or contracts or any other material documents, by which the same can be substantiated and shall state whether the creditor is a secured creditor, or a preferential creditor and if so, shall set out the particulars of the security or the preferential claims and the affidavit shall be in Form No. 44;
7. Claims for workmen may be in Form No. 45. Such proof shall have a schedule annexed thereto setting forth the names of the workmen and others and the amounts severally due to them;
8. A creditor is also to prove the future debts;
9. The liquidator shall examine every proof lodged with himself and the grounds of the debt; if it requires further evidence the liquidator shall send notice in Form No. 46 to produce further evidence;
10. The liquidator is having power to summon any person in connection with the investigation;
11. Unless otherwise ordered by the Member, a creditor shall bear the costs of proving his debt;
12. The notice of admission of the proof shall be in Form No. 48;
13. The notice of rejection of the proof shall be in Form No. 47;
14. Any creditor, aggrieved against the order of the Liquidator, may file appeal before the Tribunal;
15. The liquidator is not personally liable for costs in relation to an appeal from his decision rejecting any proof wholly or in part;
16. The liquidator shall, within two months from the last date for proving the debts, file in Tribunal a certificate in Form No. 49 containing a list of creditors who submitted proofs of their claims, the amount of claims etc.;

17. In the event of there being a surplus after payment in full of all the claims admitted to proof, creditors whose proofs have been admitted shall be paid interest from the date of winding up order up to the date of final distributable sum at a rate not exceeding the prime lending rate fixed by the RBI;
18. In the event of there being a surplus after payment to creditors in full the partners are entitled for return of asset; for this purpose the liquidator shall give a provisional list of partners of the LLP with their names and addresses, the amount of contribution in Form No. 50;
19. The liquidator then send notice to every person included in the provisional list in Form No. 51 not later than one month from the date of filing of the provisional list;
20. On the hearing date the liquidator hears any objections if any;
21. The liquidator then shall prepare the final list for settlement;
22. Within 7 days after the settlement of the list, the liquidator shall file in Tribunal a certificate of the list of partners as finally settled by him in Form No. 52;
23. The liquidator then issue notice to every person placed on list of partners as finally settled, stating the amount of contribution in Form No. 53;
24. The liquidator may vary the final list and file application for rectification and the Tribunal may rectify or vary the list as it may think fit;
25. An order varying such a list of partners shall be in Form No.54.

MEETING OF CREDITORS OR PARTNERS IN A WINDING UP

1. The procedure for meeting of creditors or partners in a winding up by Tribunal and of creditors in a voluntary winding up is as follows-
2. The liquidator shall summon all meeting of creditors or partners by giving not less than 14 days notice of the time of meeting;
3. The notice of the meeting shall be advertised in the newspapers;
4. The notices shall be in such Form No. 55, 55A, 55B, 55C and 55D as may be appropriate;
5. The place of the meeting shall be at the convenient of the most of the creditors;
6. Different times or places or both may, if thought fit, be appointed for the meetings of creditors and the meetings of partners;
7. If any officer fails to attend the liquidator, the liquidator may report such failure to the Tribunal in form No.56;
8. The liquidator shall file affidavit for proof of notice in Form No. 57;
9. The cost of call meetings at the instance of creditor or partner shall be borne by the applicant;
10. If the meeting is summoned by the liquidator, he or some person nominated by him shall be the Chairman of the meeting; the nomination shall be in form No. 58;
11. In case of voluntary winding up the Chairman shall be such person as the meeting by resolution appoint;

12. At a meeting of creditors, a resolution shall be deemed to be passed, when a majority in value of creditors present personally or by proxy and voting on the resolution has voted in favor of the resolution;

13. At a meeting of partners, a resolution shall be deemed to be passed when a majority of the partners present personally or by proxy and voting on the resolution have voted in favor of the resolution;

14. The liquidator shall file in Tribunal a copy of every resolution certified by him;

15. The Chairman may, with the consent of the partners or creditors present in the meeting adjourn it from time to time;

16. The quorum for the meeting is at least two creditors entitled to vote if there are more than 2 or in case of a meeting of partners at least two partners;

17. If there is no quorum, the meeting shall be adjourned to the same day in the following week at the same time and same place, or to such other day, or time or place as the Chairman may appoint, but the day appointed shall be not less than 7 days or more than 14 days;

18. The Chairman shall have power to admit or reject a proof for the purpose of voting, but his decision shall be subject to appeal to the Tribunal;

19. The Chairman shall within 7 days of the conclusion of the meeting, report the result thereof to the Tribunal and such report shall be in Form No. 59;

20. The Chairman shall cause minutes of the proceedings at the meeting to be drawn up and fairly entered in the boom and the minutes shall be signed by him or by the Chairman of the next meeting;

21. A list of creditors or partners present at every meeting shall be made and kept as in Form No. 60;

COLLECTION AND DISTRIBUTION OF ASSETS IN A WINDING UP BY TRIBUNAL

Rule 203 provides that the duties imposed on the Tribunal with regard to the collection of assets of the LLP and the application of the assets in discharge of LLP's liabilities shall be discharged by the liquidator as an officer of the Tribunal subject to the control of the Tribunal.

The liquidator shall, for the purpose of acquiring and retaining possession of the property of the LLP, be in the same position as if he were a Receiver of the property appointed by the Tribunal and the Tribunal may on his application enforce such acquisition or retention accordingly.

Where the person who is required to pay, deliver, convey, surrender or transfer to or into the hands of the liquidator any money, property, documents, books or papers which happened to be in his hand for the time being, the Liquidator may apply to the Tribunal for appropriate orders and the notice shall be in form No. 62;

Rule 206 provides that the liquidator is to realize unrealized contribution etc.,

COMPROMISE OR ABANDONMENT OF CLAIMS

Rule 235 provides that no claim by the LLP against any person shall be compromised or abandoned by the Liquidator without the sanction of the Tribunal upon notice to such person as the Tribunal may direct.

Rule 236 provides that every application for sanction of a compromise or arrangement with any person shall be accompanied by a copy of the proposed compromise or arrangement and shall be supported by an affidavit of the liquidator stating that for the reasons set out in the affidavit, he is satisfied that the proposed compromise or arrangement is beneficial to the LLP and the Tribunal may, if it thinks fit, direct notice of the application to be given to the Committee of Inspection, if there is one, and to such other person as it may think fit.

SALES BY THE LIQUIDATORS

Rule 237 provides that no property belonging to LLP shall be sold by the liquidator without previous sanction of the Tribunal and every sale shall be subject to confirmation by the Tribunal and such order of confirmation may be passed within 60 days of the filing of the report by the Liquidator.

Rule 238 provides that every sale shall be held by the liquidator by an agent or an auctioneer approved by the Tribunal and subject to the terms and conditions, if any, as may be approved by the Tribunal. All sales shall be made by public auction or by inviting sealed tenders or in such manner as the Member may direct.

Rule 239 provides that the gross proceeds shall, unless the Tribunal otherwise orders, be paid over to the Liquidator by such auctioneer or agent and the charges and expenses connected with the sale shall afterwards be paid to such auctioneer or agent in accordance with the scales, if any fixed by the Tribunal or as approved by the Tribunal.

DISTRIBUTABLE SUM AND RETURNS OF ASSETS

Rule 240 provides that no distributable sum to creditor or return of assets to partners shall be declared by the liquidator without the sanction of the Tribunal. No payment shall be made to the creditors which would be deemed to distributable sum without filing list of creditors and sanctioned by Tribunal as distributable sum and no payment shall be made to the partners without filing final settlement of the list of settlement of partners and sanctioned by the Tribunal.

Rule 241 provides that liquidator shall give notice of the declaration of distributable sum not less than one month prior to the date fixed for payment. The advertisement shall be in form No. 82. The notice to the creditor shall be in Form No. 83.

Rule 242 provides that a person to whom distributable sum is payable may lodge with the liquidator an authority in writing to pay such distributable sum to another person named therein in Form No.84.

Rule 243 provides that distributable sum may, at the request and risks of the persons to whom they are payable, be transmitted to him by registered post or any other mode as approved by the Tribunal, by cheques or demand drafts or any other manner a s may be appropriate or as approved by the Tribunals within 45 days from the date of filing the list of creditors before the Tribunal.

Rule 244 provides that every order by which the liquidator is authorized to make a return to partners of the LLP, shall, unless Tribunal otherwise directs, contain or have appended there to a list setting out in a tabular form the name, amount etc., and interest which have been made or the variations in the list of partners which have arisen since the date of settlement of the list of partners and such

other information as may be necessary to enable the return to be made. This list is in Form No. 85. The liquidator shall send a notice of return to each partner by ordinary post in Form No. 86. The payment may be sent by registered post or any other mode as may be appropriate or as approved by the Tribunal at the risk of the partners.

Rule 245 provides that where a claim made in respect of a distributable sum due to a deceased creditor or a return of contribution due to a deceased partner is Rs.500 or less, the liquidator may, upon satisfying himself as tp the claimant's right and title to receive the distributable sum or the return, apply to the Tribunal for sanctioning the payment of such distributable sum or the return without production of a succession certificate or like authority and where the Tribunal sanctions the payment, the liquidator shall make the payment upon obtaining a personal indemnity from the payee.

TERMINATION OF WINDING UP

Rule 246 provides that as soon as the affairs of the LLP have been fully wound up, the liquidator shall file his final account with the Tribunal in Form No. 89 and apply for orders as to the dissolution of the LLP. The application shall not be heard until the accounts are audited.

Rule 247 provides that upon hearing the application, the Tribunal may, after hearing the liquidator and any other person to whom notice may have been ordered by the Tribunal, order for the dissolution of the LLP.

Rule 248 provides that upon the order of dissolution being made, the liquidator shall forthwith pay into the LLP's Liquidation Account in the public account of India any unclaimed or unpaid distributable sum payable to the creditors or undistributed or unpaid assets refundable to partners in his hands on the date of order of dissolution, and such other balance in his hands as he has been directed by the Tribunal to deposit into the LLPs Liquidation Account.

A copy of the order of dissolution shall, within 30 days from the date of order, be forwarded to the liquidator in Form No. 11 who shall make in his books a minute of the dissolution of LLP. A copy of the same shall be filed with the Registrar along with a Statement signed by him that the directions of the Tribunal regarding the application of the balance as per his final account have been duly complied with.

CONCLUSION OF WINDING UP

Rule 249 provides that the winding up of a LLP shall be deemed to be concluded, in the case of-

1. An LLP wound up by order of the Tribunal, at the date on which the order dissolving the LLP has been reported by the Liquidator to the Registrar;
2. An LLP wound up voluntarily, at the date of dissolution of the LLP, unless at such date any fund or assets of the LLP remain unclaimed or undistributed in the hands or under the control of LLP liquidator, or any person who has acted as liquidator, in which case the winding up shall not be deemed to be concluded until such funds or assets have either been distributed or paid into the LLP Liquidation Account.

APPLICATION TO DECLARE DISSOLUTION VOID

Rule 250 provides that an application shall be made upon notice to the Central Government and the Registrar. Where the Tribunal declares the dissolution to have been void, the applicant shall file a certified copy of the order with the Registrar not later than 30 days from the date of order.

APPEAL FROM ORDER OF TRIBUNAL TO NCLAT

Rule 301 provides that any aggrieved person may prefer an appeal against the order or decision of the Tribunal to the National Company Law Appellate Tribunal within a period of 45 days from the date on which the order is delivered in such manner as may be provided by that Appellate Tribunal.

EXERCISE

⊙ **Multiple Choice Question:**

1. Which of the following is true about a Limited Liability Partnership?

a) A Limited Liability Partnership is not a

b) A Limited Liability Partnership is a legal distinct entity from its partners entity separate from its partners

c) A Limited Liability Partnership is a body

d) Both b and c are correct corporate

2. Which of the following is true about the number of designated partners required in a Limited Liability Partnership?

a) A Limited Liability Partnership can have

b) A Limited Liability Partnership can have at least two designated partners at least three designated partners

c) A Limited Liability Partnership can have

d) A Limited Liability Partnership can have at least seven designated partners at least four designated partners

3. What is the exact time limit under which a Limited Liability Partnership must file its annual return with the registrar?

a) A Limited Liability Partnership must file its

b) b) A Limited Liability Partnership must file its annual return within 30 days from the closing annual return within 45 days from the closing of its financial year of its financial year

c)A Limited Liability Partnership must file its

d) A Limited Liability Partnership must file its annual return within 15 days from the closing annual return within 60 days from the closing of its financial year of its financial year

4. Every Limited Liability Partnership must maintain its books of accounts diligently. Those books of accounts should maintain.

a) Particulars of the receipts and expenditures

b) b) An inventory of the cost of goods purchased, at the Limited Liability Partnership with work in progress, inventories, finished goods the details of those transactions as well as the cost of goods sold

c) A complete record of the assets and liabilities

d) All of the above of the Limited Liability Partnership

5. As per Sale of Goods Act, this is not included:

a) A Limited Liability Partnership should maintain

b) A Limited Liability Partnership should maintain its accounts at the branch office its accounts at the corporate office

c) A Limited Liability Partnership should maintain

d) A Limited Liability Partnership should maintain its accounts at the head office its accounts at the registered office

6. As per Sale of Goods Act, this is not included:

a) A Limited Liability Partnership should maintain

b) A Limited Liability Partnership should its books of accounts on the accrual basis maintain its books of accounts on the cash basis

c) A Limited Liability Partnership should maintain

d) All of the above its books of accounts based on the double-entry system of accounting

☉ **Fill in the blanks**

1. Section 2 (d) of the LLP Act, 2008, defines___.

2. "Foreign limited liability partnership" means a limited liability partnership formed, incorporated or registered___India which establishes a place of business within India.

3. A limited liability partnership is a formed and incorporated under this Act and is a legal entity separate from that of its partners.

4. An individual shall not be capable of becoming a partner of a limited liability partnership, if he has been found to be of__by a Court of competent jurisdiction and the finding is in force.

5. Every limited liability partnership shall have at least partners.

6. When the requirements imposed by clauses (b) and (c) of sub-section (1) of section 11 have been complied with, the_shall retain the incorporation document.

☉ **Short Essay Type Questions**

1. Who may be a partner in LLP?

2. Discuss the power of the Registrar?

3. Write short notes on -

(a) Compounding of offences

(b) Report by Liquidator

☉ **Essay Type Questions**

1. How does LLP differ from Traditional Partnership and Company?

2. What are the essential documents required for LLP Registration?

3. What are the advantages of an LLP.

4. Discuss the difference between LLP & a Company.

☉ **Unsolved Cases**

1. XYZ company was appointed as the partner for a Limited Liability Partnership. The company was also appointed as the designated partner for the partnership. The regulatory and legal compliances were not completed in full and therefore, the designated partners were held liable. Is this justified?

2. Mr. A was appointed as a partner of an LLP but just after 2 months he was declared as an undischarged insolvent. Can he continue as a partner as he was appointed when he was solvent?

ANSWER:

Multiple Choice Question:

1. d; 2. a; 3. a; 4. d; 5. b; 6. d.

Fill in the blanks

1. Body Corporate; 2. Outside; 3. Body Corporate; 4. Unsound; 5. Two; 6. Registrar.

THE END