

- Contracts, Voidable Contracts, Void Agreements, Contingent Contracts, Performance of Contracts, Novation, Rescission and Alteration of Contracts (Sections 10 to 67 of Indian Contract Act, 1872)
- Consequences of Breach of Contracts (Sections 73 to 75 of Indian Contract Act, 1872)
- Contracts of Indemnity and Guarantee and Surety's Rights (Sections 124-127 of Indian Contract Act, 1872)
- Bailment and Pledge and Agency (Sections 148 to 238 of Indian Contract Act, 1872)
- Negotiable Instruments Act, 1881
- The Transfer of Property Act, 1882
- The Sale of Goods Act, 1930
- The Code of Civil Procedure, 1908 (Section 9, 10, 11 26 to 32, 38 to 45, 62 to 64, 73, 75 to 78, 89 and Order 21)

CONCEPT OF SURETY

RELEVANT SECTION	CONTENTS	REMARKS
Section 165(8)(a)	Preference transactions- (8) For the purposes of this section, a bankrupt shall be deemed to have entered into a transaction giving preference to any person if – (a) The person is the creditor or surety or guarantor for any debt of the bankrupt;	
PART - II Section 5(5A)	5. Definitions. – (5A) “corporate guarantor” means a corporate person who is the surety in a contract of guarantee to a corporate debtor;	
Section 5(22)	(22) “personal guarantor” means an individual who is the surety in a contract of guarantee to a corporate debtor;	

RELEVANT SECTION	CONTENTS	REMARKS
Section 14(3)(1)	<p>Moratorium. –</p> <p>(3) The provisions of sub-section (1) shall not apply to –</p> <p>(b) a surety in a contract of guarantee to a corporate debtor.</p>	
Section 43(2)(a)	<p>Preferential transactions and relevant time. –</p> <p>(2) A corporate debtor shall be deemed to have given a preference, if–</p> <p>(a) there is a transfer of property or an interest thereof of the corporate debtor for the benefit of a creditor or a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor; and</p> <p>(b) the transfer under clause (a) has the effect of putting such creditor or a surety or a guarantor in a beneficial position than it would have been in the event of a distribution of assets being made in accordance with section 53.</p>	

IMMOVABLE

RELEVANT SECTION	CNTENTS	REMARKS
Section 18(7)(iii)	<p>Duties of interim resolution professional-</p> <p>(f) take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including –</p> <p>(iii) tangible assets, whether movable or immovable;</p>	
Section 35(1)(f)	<p>Powers and duties of liquidator. –</p> <p>Subject to the directions of the Adjudicating Authority, the liquidator shall have the following powers and duties, namely: subject to section 52, to sell the immovable and movable property and actionable claims of the corporate debtor in liquidation by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels in such manner as may be specified:</p>	

RELEVANT SECTION	CNTENTS	REMARKS
Section 36(3)(c)	Liquidation estate- Subject to sub-section (4), the liquidation estate shall comprise all liquidation estate assets which shall include the following: - Tangible assets, whether movable or immovable;	
Section 18(8)(2)	Establishment and incorporation of Board. – (2) The Board shall be a body corporate by the name aforesaid, having perpetual succession and a common seal, with power, subject to the provisions of this Code, to acquire, hold and dispose of property, both movable and immovable, and to contract, and shall, by the said name, sue or be sued.	
THE ELEVENTH SCHEDULE (See section 255) AMENDMENTS TO THE COMPANIES ACT, 2013 (18 Of 2013)	For section 329, the following section shall be substituted, namely: - “329. Transfer not in good faith to be void.- Any transfer of property, movable or immovable, or any delivery of goods, made by a company, not being a transfer or delivery made in the ordinary course of its business or in favour of a purchaser or encumbrance in good faith and for valuable consideration, if made within a period of one year before the presentation of a petition for winding up by the Tribunal under this Act shall be void against the Company Liquidator.”.	

TRANSFER

RELEVANT SECTION	CNTENTS	REMARKS
THE ELEVENTH SCHEDULE (See section 255) AMENDMENTS TO THE COMPANIES ACT, 2013 (18 Of 2013)	For section 334, the following section shall be substituted, namely: - “334. Transfer, etc., after commencement of winding up to be void. - In the case of a winding up by the Tribunal, any disposition of the property, including actionable claims, of the company, and any transfer of shares in the company or alteration in the status of its members, made after the commencement of the winding up, shall, unless the Tribunal otherwise orders, be void.”	

DECREE

RELEVANT SECTION	CONTENTS	REMARKS
Section 3(10)	<p>Definitions:- (10) “creditor” means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder;</p>	
Section 14(1)(a)	<p>Moratorium:- (1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely: - (a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority;</p>	

RELEVANT SECTION	CONTENTS	REMARKS
Section 69(a)	<p>Punishment for transactions defrauding creditors.</p> <p>(a) has made or caused to be made any gift or transfer of, or charge on, or has caused or connived in the execution of a decree or order against, the property of the corporate debtor;</p> <p>(b) has concealed or removed any part of the property of the corporate debtor within two months before the date of any unsatisfied judgment, decree or order for payment of money obtained against the corporate debtor,</p>	
Section 171(3)	<p>Proof of debt:-</p> <p>(3) In case the creditor is a decree holder against the bankrupt, a copy of the decree shall be a valid proof of debt.</p>	

NEGOTIABLE INSTRUMENTS

RELEVANT SECTION	CONTENTS	REMARKS
Section 35(1)(g)	Powers and duties of liquidator. – (g) to draw, accept, make and endorse any negotiable instruments including bill of exchange, hundi or promissory note in the name and on behalf of the corporate debtor, with the same effect with respect to the liability as if such instruments were drawn, accepted, made or endorsed by or on behalf of the corporate debtor in the ordinary course of its business;	

CPC AND CROSS BORDER INSOLVENCY

RELEVANT SECTION	CONTENTS	REMARKS
Section 13, 44A, 51, 45	<p>With respect to the civil matters, the Code of Civil Procedure (CPC) supports recognition and enforcement of foreign judgments. Judgments by foreign courts are considered generally conclusive for the parties with few exceptions identified in Section 13 of the CPC. Section 44A of the CPC provides that the decree of foreign courts may be executed in Indian territory, when conditions such as it being a decree from a superior court and from a 'reciprocating territory.' Such decrees will have the same effect as a decree of the local District Court in India. There are 11 countries recognised as such by the Central Government so far, the latest being the UAE³⁹. Some of the other countries notified as reciprocating territories include United Kingdom⁴⁰, Republic of Singapore⁴¹, Federation of Malaya⁴², and Hong Kong⁴³. A decree from a non-reciprocating country can be enforced through a new suit filed before the relevant Court in India, based on the judgment from the foreign Court or the original cause of action, or both.</p>	

RELEVANT SECTION	CONTENTS	REMARKS
	<p>Section 45 of the CPC provides for execution of decrees of an Indian Court outside the territory of India under conditions that the Central Government establish the transferee court in the foreign country and the State Government notify that the said decree will apply to the foreign court. The CPC also provides for simultaneous execution at more than one place. Section 51 provides for execution of decrees by delivery or/and sale of property for repayment of debt, appointment of a receiver, and arrest and detention with reasonable opportunity for judgement -debtor to present his side.</p>	
Execution of Decrees	<p>Section 45 of the CPC provides for execution of decrees of an Indian Court outside the territory of India under conditions that the Central Government establish the transferee court in the foreign country and the State Government notify that the said decree will apply to the foreign court. The CPC also provides for simultaneous execution at more than one place. Section 51 provides for execution of decrees by delivery or/and sale of property for repayment of debt, appointment of a receiver, and arrest and detention with reasonable opportunity for judgement -debtor to present his side.</p>	

CONTENTS

These sections are being used despite the wide differences in interpretation given by the Indian Courts in interpreting foreign judgments⁴⁴. The use of these sections for cross border insolvency issues (in India for foreign creditors and vice versa) will be further constrained by lack of clear understanding about complex foreign laws and the need to engage legal support in one or more territories. This has implications for cost of insolvency proceedings and may be prohibitive. Furthermore, this option is restricted to enforcement of Court decrees but not cooperation in proceedings, cooperation between courts/insolvency professionals etc., which are required in a cross border insolvency situation. The use is also constrained by long drawn judicial processes and is limited to enforcement of orders from courts only. In insolvency proceedings the insolvency representatives are also empowered to make decisions which are not enforceable through these sections. Enforcement of decrees from non-reciprocating countries is more constrained since a new suit in the Indian Courts is bound to be plagued by delays and consequent costs. Indian businesses use similar provisions available in other countries, (most common law countries have them) to enforce decrees of Indian Courts and would face similar constraints abroad. A mix of instruments, multiple authorities and Courts mean additional costs and delays for enforcing foreign Court orders in India and could be a significant factor influencing countries thinking of reciprocation arrangements with India.

REMARKS

INDIAN CONTRACT ACT, 1872



The Indian Contract Act ,1872

- Contracts, voidable contracts and void agreement;
- Contingent contracts;
- Performance of contract;
- Novation, rescission and alteration of contracts;
- Consequences of breach of contract;
- Indemnity and guarantee and Surety's rights;
- Bailment and pledge and Agency

PRILIMINARY

Section 1

Short Title: This Act may be called the Indian Contract Act, 1872.

Extent, Commencement: It extends to the whole of India, and it shall come into force on the first day of September, 1872.

Saving: Nothing herein contained shall affect the provisions of any Statute, Act or Regulation not hereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract, not inconsistent with the provisions of this Act.

Section 2 (Definitions)

In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:

- 2(a). When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a **proposal**;
- 2(b). When a person to whom proposal is made signifies his assent thereto, the proposal is said to be accepted. Proposal when accepted becomes a **promise**.

2(c). The person making the proposal is called the "**promisor**", and the person

accepting the proposal is called the "**promisee**";

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

2(e). **'Agreement'** as 'every promise or every set of promises forming consideration for each other.

i.e. Promise in return of Promise **Reciprocal Promise**

An Agreement is a promise or a commitment or set of reciprocal promises or commitments. An agreement involves an offer or proposal by one person and acceptance of such offer or proposal by another person.

Section 2

- 2(f) Promises which form the consideration or part of the consideration for each other are called reciprocal promises;
- 2(g) An agreement not enforceable by law is said to be void;
- 2(h) “**Contract** is an agreement enforceable by law”.

Contract = Agreement + Enforceable by law

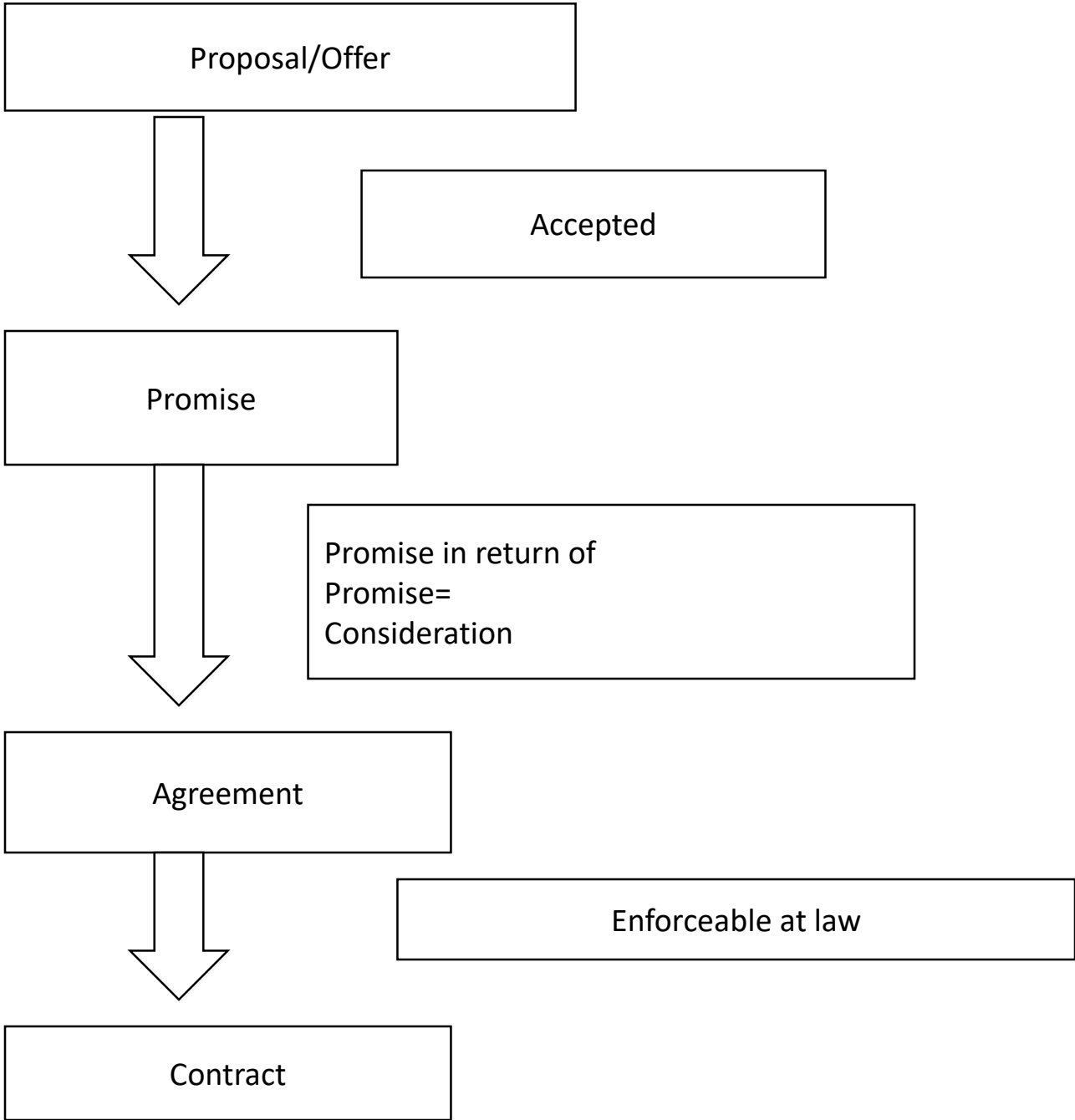
Salmond defines, “An agreement creating and defining obligations between the parties is a Contract.”

Contract = Agreement + Obligations (legal duty to fulfill one’s promise)

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, is a

voidable contract;

2(j) A contract which ceases to be enforceable by law becomes **void** when it ceases to be enforceable.



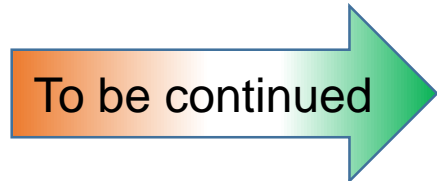
Section 10

Essential Elements of Contract:

- Agreement: “Agreement which is legally enforceable alone is a contract”. An agreement which is not enforceable can be either Void Agreement or Voidable contract. In order to constitute a contract, there must be an agreement in first place. An agreement in turn is composed of two elements- offer and acceptance.

The two important element of agreement are:

- Plurality of persons
- Consensus ad-idem



ESSENTIAL ELEMENTS OF A VALID CONTRACT

- a) **Plurality of persons:** There must be at-least two parties-one making the offer and another accepting it. A person cannot enter into agreement with himself or with an inanimate object.

- b) **Consensus ad-idem:** The promisor and promisee of the agreement should have agreed in same sense & on same thing. There should be meeting of minds.

- c) **Legal intention:** The parties must intend to create a legal relationship. Agreements of social or domestic nature do not contemplate legal relationship, so they are not contracts.
- d) **Lawful Consideration:** The agreement must be supported by a lawful consideration. Consideration means 'something in return'. It is not important whether consideration is adequate or in-adequate. 'Something in return' may be an act or abstinence. But consideration must be real and lawful.
- e) **Capacity:** The parties to an agreement must be capable of entering into a contract i.e.
- a. He shall not be minor (less than eighteen years of age);
 - b. shall be of sound mind
 - c. Shall not be disqualified from contracting by any law to which he is subject.

f) **Lawful object:** The object of agreement must be lawful.

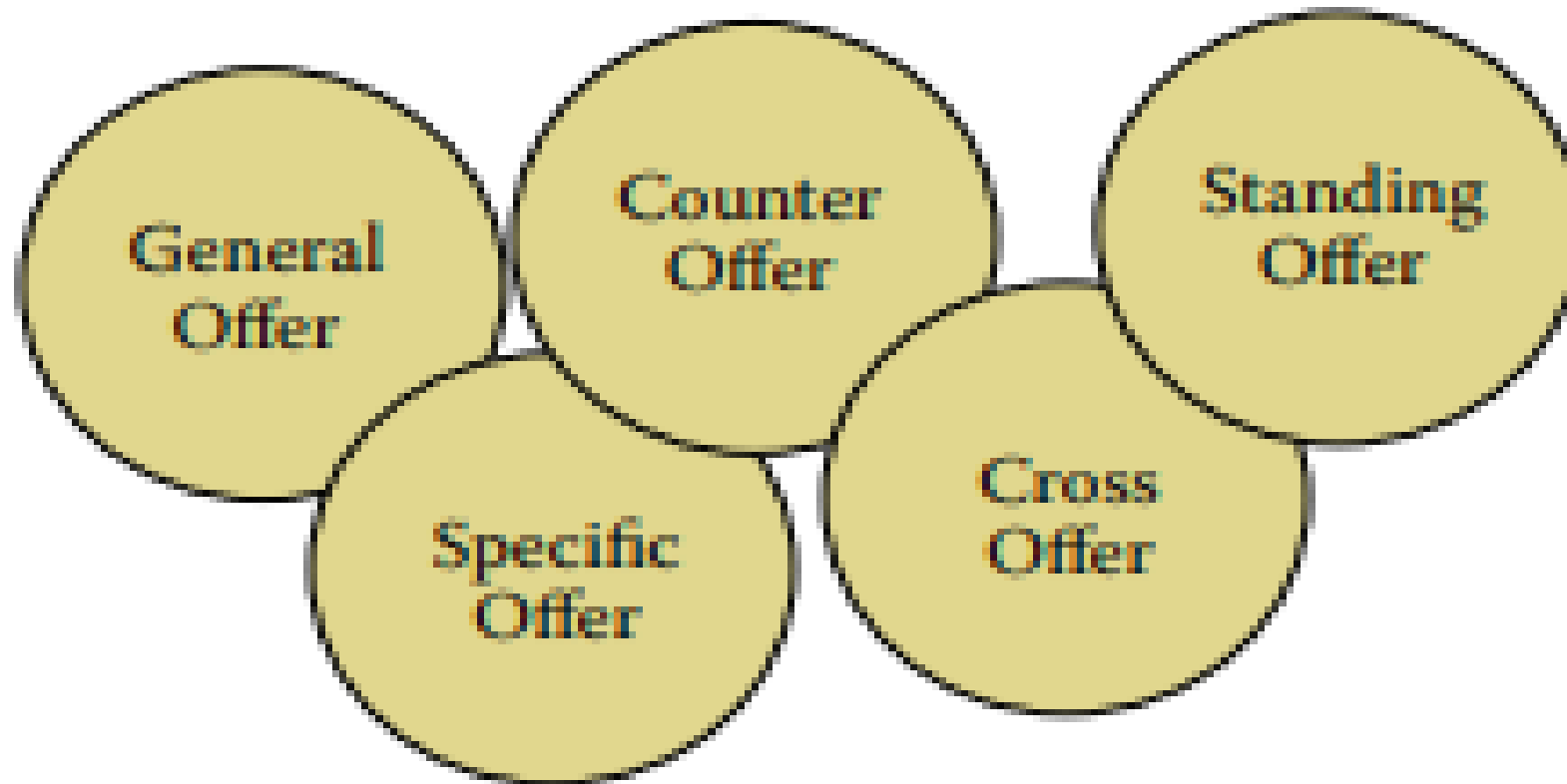
free Consent: The consent of the parties must be free and genuine i.e. not induced by coercion, undue influence, fraud or misrepresentation.

g) **Void Agreement:** The agreement not expressly declared void or illegal by law.

h) **Certainty and Possibility of Performance:** The terms of agreement must be certain and capable of performance.

i) **Legal formalities:** Where nature of agreement is such that it requires compliance of certain formalities, such requirements should be fulfilled. A contract may require registration in addition to being in writing. However as regards to legal effects, an oral contract has same weight-age as a contract in writing.

Classification of Offer



REQUIREMENTS OF A VALID CONSIDERATION

move at the
desire of the
promisor

past or present
or future.

promisee or
any other
person

adequacy of
consideration

not be unlawful,
immoral, or opposed
to public policy

other than the
Promisor's existing
obligation

real and not
illusory

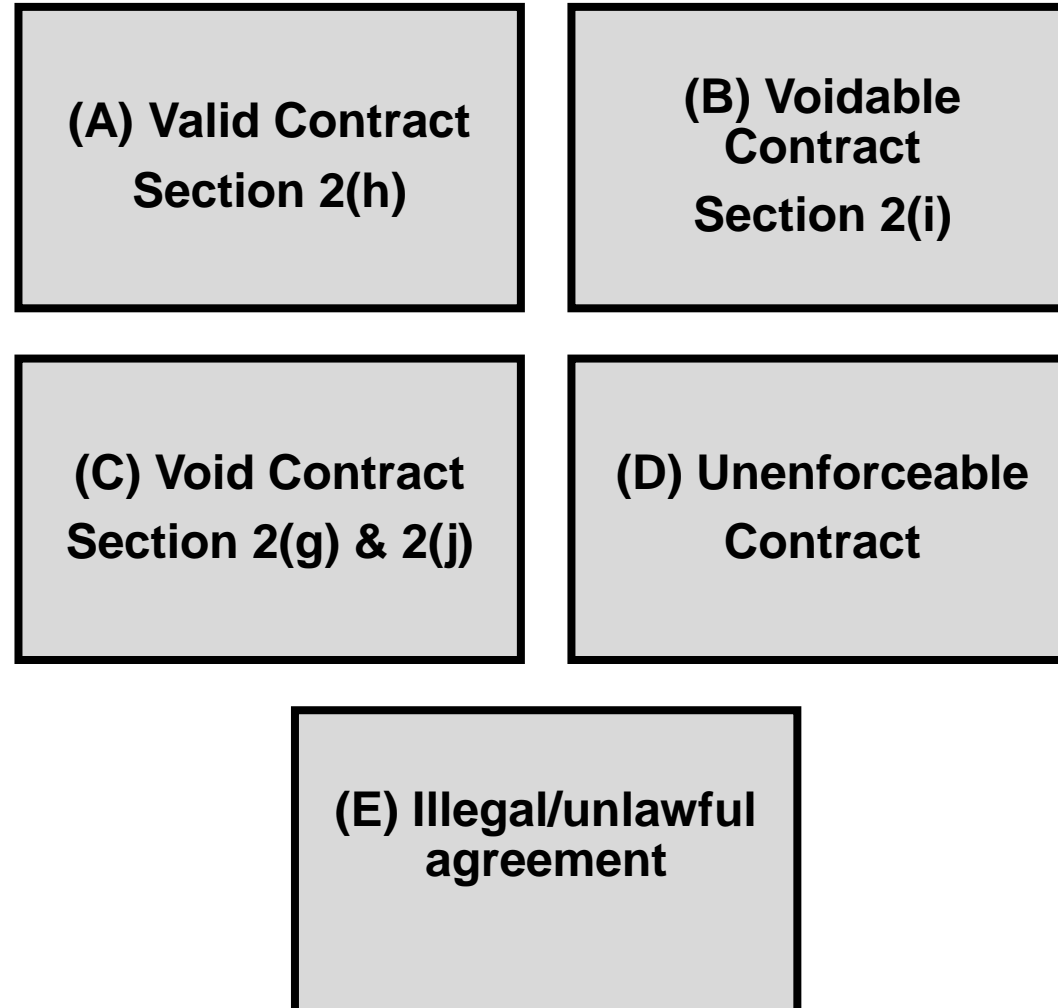
DOCTRINE OF PRIVITY OF CONTRACT

- General Rule –
A STRANGER TO A CONTRACT CANNOT SUE
- EXCEPTIONS :-
 - ✓ Trusts
 - ✓ Family Settlement
 - ✓ Contract By Agent
 - ✓ Acknowledgement of Debt
 - ✓ Covenant attached with immovable property

Agreements Which Are Not Contract

1. Agreements relating to social matters: Intention to create legal obligation is absent.
2. domestic Arrangement between Husband and Wife: It is presumed that there is no intention to create legal relations. (Balfour v Balfour).
3. Agreement to do illegal/unlawful/immoral act e.g. Smuggling.
4. Agreement declared specifically void (unenforceable by law): Agreement to do impossible act (putting life in a dead person), wagering agreement (betting agreement).

1. Types of Contract on the basis of its enforcement



1. Types of Contract on the basis of its enforcement

(A) Valid Contract:

An agreement enforceable by the law is a contract (**Section 2(h)**). To be enforceable it has to satisfy the requirements under **Section 10** of the Indian Contract, 1872. They are:

- There is some consideration for it.
- The parties are competent to contract
- Their consent is free.
- Their object is lawful

Types of Contract on the basis of its enforcement

(B) 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, is a voidable contract.

As mentioned above, free consent which is defined in Section 14 of the Act is an essential element of a valid contract. Consent is free when it is not obtained by coercion, undue influence, fraud, misrepresentation or mistake .

- Where consent to an agreement is caused by coercion, undue influence,

fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused. A voidable contract remains valid until rescinded. A voidable contract can be made valid by the party who has a right to rescind it by giving up his right of rescinding it.

Types of Contract on the basis of its enforcement

Void Contract:

Section 2(g): A void agreement is not enforceable at the option of either party. Section 2(g) of the Act explains the meaning of a void agreement.

Section 2(j) of the Act speaks about a valid contract which subsequently becomes void. “A contract which ceases to be enforceable by the law becomes void when it ceases to be enforceable”.

No obligation or right arises from a void contract. They are not covered by the law. Such contracts cannot be made valid by the parties to the contract by giving their consent.

- If consent to a contract is caused by mistake, the agreement is void as provided in Section 20 of the Act. If the parties to a contract are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

Types of Contract on the basis of its enforcement

Sections 24-30 of the Act deals with **void agreements**. The following types of Agreements are declared to be void:

- Agreements unlawful in part(S. 24)
- Agreements without consideration(S. 25)
- Agreements in restraint of marriage(S. 26)
- Agreements in restraint of trade(S.27)
- Agreements in restraint of legal proceedings(S. 28)
- Uncertainty of meaning agreements(S. 29)
- Wagering agreements(S. 30)

Types of Contract on the basis of its enforcement

Section 24: It comes into play when a part of the consideration for an object or more than one objects of an agreement is unlawful. The whole of the agreement would be void unless the unlawful portion can be severed without damaging the lawful portion.

Every agreement in restraint of marriage of any person, other than minor is void.

It is immaterial whether the restraint is general or partial.

Every agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void. **There is no distinction between total restraint and partial restraint of trade.**

Types of Contract on the basis of its enforcement

Section 28: Section 28 of the Act renders two kinds of agreement void. They are:

- ❑ An agreement by which a party is restrained absolutely from enforcing his rights arising under a contract by the usual legal proceedings in the ordinary tribunals.
- ❑ An agreement which limits the time within which the contract rights may be enforced.

(D) Unenforceable Contract: It is one which is good in substance, but because of some technical defect, one or both parties cannot be sued on it. These defect may be the absence of writing, registration, time-barred by the law of limitation, etc.

Types of Contract on the basis of its enforcement

(E) Illegal/unlawful Contract

Section 23 of the Act describes certain conditions when an agreement may be unlawful or illegal. A distinction has to be made between void contracts and illegal contracts. Agreements whose object or consideration is forbidden by law are called illegal contracts. In the case of void agreements, the law may merely say that if it is made, the courts will not enforce it.

‘All illegal agreements or contracts are void, but all void agreements are Not illegal’.

In the case of both illegal and void contracts, the similarity is that in either case, the primary agreement is unenforceable. Nothing can be recovered under either kind of agreement and if something has been paid, it cannot be recovered back. Thus a guilty party has no right of action on an illegal contract.

Types of Contract on the basis of Mode of Creation

(A) Express Contracts

(B) Implied Contracts

(C) Quasi-Contract

Types of Contract on the basis of Mode of Creation

(A)Express Contracts: The first part of Section 9 of the Indian Contract deals with promises which are expressly made. Contracts arising from expressly made promises are called express contracts.

According to Section 9 “insofar as the proposal or acceptance of any promise is made in words, the promise is said to be express”. Thus contracts entered into between the parties by words, spoken or written, are known as express contracts.

- **(B) Implied Contracts:** The second part of Section 9 of the Act deals with implied contracts. It says “insofar as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.” Thus contracts entered into between parties by virtue of their conduct are called implied contracts.
- The terms of the agreement are not expressed in written or oral form but are inferred from their conduct.

2. Types of Contract on the basis of Mode of Creation

(C) **Quasi-Contract:** A contract which does not arise by virtue of any agreement between the parties, but due to certain special circumstances, the law recognizes it as a Quasi contract. Such contracts come into existence because of interference from courts in the interest of justice.

There are many several situations in which law, as well as justice, require that a certain person is required to conform to an obligation, although he has neither broken any contract nor committed any tort.

The principle is that there should not be “unjust enrichment” i.e., enrichment of one at the cost of another.

The Indian Contract Act does not define the term Quasi-Contract. It does not mean that the principle behind the same hasn't been recognized. Chapter V of the Act deals with such situations under the heading of “Of Certain Relations Resembling Those Created by Contract.”

Types of Contract on the basis of Extent of Execution

(A) Executed Contract

(B) Executory Contract

**(C) Partly Executed or
Partly Executory
Contract**

(D) Unilateral Contract

(E) Bilateral Contract

Types of Contract on the basis of Extent of Execution

(A) Executed Contract: When both the parties have completely performed their respective obligations under the contract, it is said to be executed contract. It means that whatever was the object of the contract has been carried out. In most executed contracts the promises are made and then immediately completed.

The buying of goods and/or services usually falls under this category. There is no confusion about the date of execution of the contract since in most cases it is instantaneous.

(B) Executory Contract: An executory contract is one which is one in which one or both parties are still to perform their obligations. Such contracts are future contracts. In such contracts, the consideration is the promise of performance or obligation. In executory contracts, the consideration for the promise made is carried out sometime in the future.

For example – Delivery and payment are to be made after 15 days. The contract is executory. Another good example of an executory contract is that of a lease.

Types of Contract on the basis of Extent of Execution

(C) Unilateral Contract: They are one-sided contracts. A unilateral promise is a promise from one side only and intended to induce some action by the other party. The promisee is not bound to act, for he gives no promise from his side. But if he carries out the act desired by the promisor, he can hold the promisor to his promise. His act is simultaneously acceptance of and consideration for the promise. “An act done at the request of the offeror in response to his promise is a consideration, and consideration in its essence is nothing else but the response to such a request.”

(D) Bilateral Contract: A bilateral contract is a legally binding contract formed by the exchange of reciprocal promises. Here both parties are outstanding at the time of formation of the contract. In such a case, each party is a promisor and promisee. They are also known as reciprocal contracts because mutuality of obligation is essential for their enforceability. In the case of bilateral contracts, an offer made is accepted in the form of a counter-promise. They are very common in everyday life.

Contingent Contract – Sec 31

A contingent contract is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen.

Essentials features of a contingent contract

- a. It is a contract to do or not to do something.
- b. This contract is dependent on happening or non-happening of an event.
- c. Such an event is a collateral event, i.e., it is collateral to the contract, i.e., the event must not depend upon the mere will of a party.
- d. The event is uncertain.

Rules regarding Contingent Contracts (Sec 32-36)

Contract contingent upon	When can it be enforced?	When does it become void?
Happening of an event	When such event has happened.	When the happening of such event becomes impossible.

A makes a contract to buy B's house if A survives C.

	This contract cannot be enforced by law unless and until C dies in A's lifetime.	A dies before
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A contracts to pay B a sum of money when B marries C

	When B and C marries.	C dies without being married to B. The contract becomes void.
Non- happening of a future event	When the happening of such event becomes impossible.	When such event has happened.
	A contracts to pay B a certain sum of money if a certain ship does not return	

A contracts to pay B a sum of money when B marries C

	The ship is sunk. The contract can be enforced when the ship sinks.	When the ship returns.
Happening of an event within a specified time	When such event has happened within the specified time.	When the happening of such event becomes impossible before the expiry of specified time. When such event has not happened

A promises to pay B a sum of money if a certain ship returns with in a year

	The contract may be enforced if the ship returns within the year.	The contract becomes void if the ship is burnt within the year.
Non-happening of an event with-in a fixed time.	When the happening of such event becomes impossible before the expiry of specified time. When such event has not happened within the specified time.	When such event has happened within the specified time.

A promises to pay B a sum of money if a certain ship does not return within the year.

	The contract may be enforced if the ship does not return within the year or is burnt within the year.	If ship returns within a year
Future conduct of a living person.	When such person acts in the manner as desired in the contract.	When such person does anything which makes the desired future conduct of such person – a. Impossible; or b. Dependent upon certain contingency.

A agrees to pay B ` 1,000 if B marries C.

	B and C married.	C marries D. The marriage of B to C must now be considered impossible although it is possible that D may die and C may afterwards marry B.
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impossible events	Such an agreement cannot be enforced since it is void. Whether the impossibility of the event was known to the parties or not is immaterial.	
	A agrees to pay Rs. 1,000 to B if two straight lines should enclose a space. The agreement is void.	

Performance of Contract

Section 37 to 67 of the Indian Contract Act, 1872 deals with the provisions relating to Performance of Contracts. These provisions are covered below:

Obligations of parties to contract:

The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provision of this Act, or of any other law.

This obligation continues even after death of the promisors and before the performance, unless a contrary intention appears from the contract or where it involves the personal skill of the Promisor.

Note: Merger of Rights-Discharge due to merger of rights-Tenant buying a house.

Types of Contract on the basis of Extent of Execution

(A) Executed Contract

(B) Executory Contract

**(C) Partly Executed or
Partly Executory
Contract**

(D) Unilateral Contract

(E) Bilateral Contract

Effect of refusal to accept offer of performance

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.

Every such offer must fulfil the following conditions:

1. it must be unconditional;
2. 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 been made is able and willing there and then to do the whole of what he is bound by his promise to do;

Effect of refusal to accept offer of performance..contd

3. 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.

Here it should be noted that an offer to one of several joint promises has the same legal consequences as an offer to all of them.

Effect of refusal of party to perform promise wholly:

When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his consent to the continuance of the contract.

Person by whom promises is to be performed

If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself, such promise must be performed by the promisor.

In other cases, the promisor or his representative may employ a competent person to perform it.

Effect of accepting performance from this person:

Only the Promisor or his representative or his duly authorized agent can perform the promise.

However, when a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.

Devolution of joint liabilities

When two or more persons have made a joint promise, then, unless a contrary intention appears by the contract, the following persons shall fulfil the promise;

- a. all such persons, during their joint lives, and,
- b. after the death of any of them, his representative jointly with the survivor or survivors, and,
- c. after the death of the last survivor the representatives of all jointly

Any one of joint promisors may be compelled to perform.

When two or more persons make a joint promise, the promisee may, in the absence of express agreements to the contrary, compel any one or more of such joint promisors to perform the whole promise.

Devolution of joint liabilities.. contd

Each promisor may compel contribution: Each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract.

Sharing of loss by default in contribution: If any one of two or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares.

Explanation: Nothing in this section shall prevent a surety from recovering, from his principal, payments made by the surety on behalf of the principal, or entitle the principal to recover anything from the surety on account of payments made by the principal.

Effect of release of one joint promisor

Where two or more persons have made a joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor, neither does it free the joint promisor so released from responsibility to the other joint promisor or joint promisors.

Devolution of joint rights: When a person has made a promise to two or more persons jointly, then unless contrary intention appears from the contract, the right to claim performance rests;

- a. as between him and them, with them during their joint lives, and,
- b. after the death of any one of them, with the representative of such deceased person jointly with the survivor or survivors, and,
- c. after the death of the last survivor, with the representatives of all jointly.

Time for performance of promise, where no application is to be made and no time is specified

Where, by the contract, a promisor is to perform his promise without application by the promisee, and where no time for performance is specified, the engagement must be performed within a reasonable time. *Explanation:* The question “what is a reasonable time” is, in each particular case, a question of fact.

Time and place for performance of promise, where time is specified and no application to be made

When a promise is to be performed on a certain day, and the promisor has undertaken to perform it without the application by the promisee, the promisor may perform it at any time during the usual hours of business on such day and at the place at which the promise ought to be performed.

Application for performance on certain day to be at proper time and place

When a promise is to be performed on a certain day, and the promisor has not undertaken to perform it without application by the promisee, it is the duty of the promisee to apply for the performance at a proper place within the usual hours of business. *Explanation:* The question “what is proper time and place” is, in each particular case, a question of fact.

Place for the performance of promise, where no application to be made and no place fixed for performance When a promise is to be performed without application by the promisee, and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise, and to perform it at such a place.

Performance in manner or at time prescribed or sanctioned by promisee

The performance of any promise may be made in any manner, or at any time which the promisee prescribes or sanctions.

Promisor not bound to perform, unless reciprocal promisee ready and willing to perform

When a contract consists of reciprocal promises to be simultaneously performed, the promisor need not perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

Order of performance of reciprocal promises

- Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order, and where the orders is not expressly fixed by the contract, they shall be performed in that order which the nature of transaction requires.

Liability of party preventing event on which contract is to take effect

When a contract contains reciprocal promises and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation from the other party for any loss which he may sustain in consequence of the non-performance of the contract.

- **Effect of default as to the promise which should be performed, in contract consisting or reciprocal Promises:**
- When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract.

Effect of failure to perform at fixed time, in contract in which time is essential

When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before a specified time and fails to do such thing at or before a specified time, and fails to do such thing at or before a specified time, the contract or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of essence of the contract.

1. Effect of such failure when time is not essential : If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

Effect of failure to perform at fixed time, in contract in which time is essential

2. Effect of acceptance of performance at time other than agreed

upon: If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than agree, the promisee cannot claim compensation of any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of acceptance, he give notice to the promisor of his intention to do so.

Agreement to do an impossible Act

An agreement to do an act impossible in itself is void. Contract to do 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.

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.

Reciprocal promise to do things legal, and also other things illegal

Where persons reciprocally promise, firstly to do certain things which are legal, and, secondly under specified circumstances, to do certain other things which are illegal, the first set of promise is a contract, but the second is a void agreement.

Alternative promise, one branch being illegal

In the case of an alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced.

Application of payment where debt to be discharged is indicated

Where a debtor, owing several distinct debts to one person, makes a payment to him, either with express intimation, or under circumstances implying, that the payment is to be applied to the discharge of some particular debt, the payment if accepted, must be applied accordingly.

Application of payment where debt to be discharged is not indicated

Where the debtor has omitted to intimate, and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitations of suits.

Application of payment where neither party appropriates

Where neither party makes any appropriation, the payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law in force for the time being as to the limitation of suits. If the debts are of equal standing, the payment shall be applied in discharge of each proportionally.

Effect of novation, rescission, and alteration of contract

If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

Exception: Surrender

Promisor may dispense with or remit performance of promisee

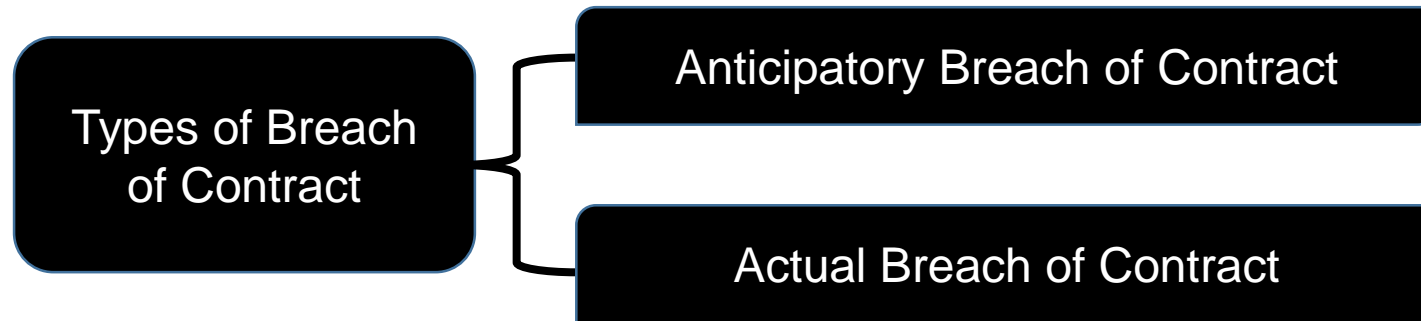
Every promisor may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit.

Consequence of rescission of voidable contract

When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is the promisor. The party rescinding a voidable contract shall, if he has received any benefit thereunder from another party to such contract restore such benefit, so far as may be, to the person from whom it was received.

Breach of Contract

Section 64: If one of the parties to a contract refuses or fails to carry out agreed obligation, the party injured thereby, has not only a right of action for damages but he is also discharged from performing his part of the contract.



Anticipatory Breach of contract:

1. When a party refuses to perform the contract before the time fixed for its performance
2. When a party by his own act disables himself from performing the contract in its entirety e.g. A contracts to sell car to B. Before the agreed date, A sells car to C.

Anticipatory Breach of Contract

There may exist two situations for promisee:

1. Promisee may put an end to the contract and treat anticipatory breach as actual breach of contract.
2. Promisee may wait till due date.

Consequences:

1. Promisee is excused from his performance.
2. He need not wait till due date of performance before suing the promisor for breach of contract.
3. Amount of damages= Price on date of refusal to perform (–) Contract price
4. Promisee may elect to keep the contract alive till the date of performance.

Anticipatory Breach of Contract

Consequences:

1. If promisor elects to perform on due date, promisee is bound to accept the performance.
2. If during the time the contract remains open and some event happens which discharges the contract by supervening impossibility or illegality, the contract will become void. Promisor will be discharged from his liability. Promisee will have no right of action against the promisor.
3. Amount of damage = Price prevailing on the date of performance (–) Contract Price

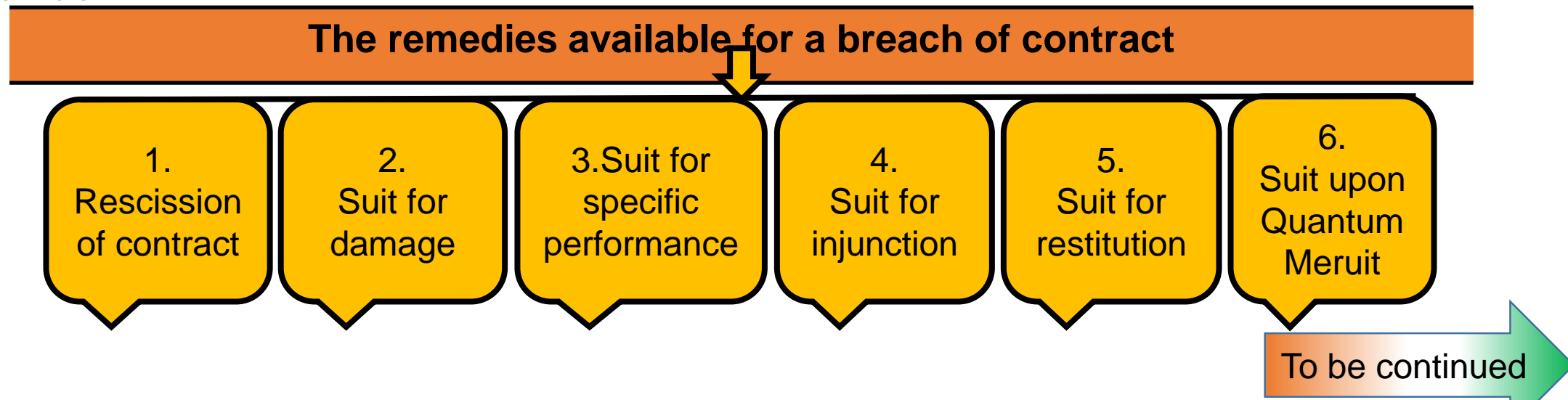
Actual Breach of Contract

1. It is a case of refusal to perform the promise on the scheduled date or during the performance.
2. The parties to a lawful contract are bound to perform their respective promises.
3. But when one of the parties breaks the contract by refusing to perform his promise, he is said to have committed a breach.
4. In that case, the other party to the contract obtains a right of action against the one who has refused to perform his promise.

E.g.: On May 1, a seller S contracts to deliver chairs to railway company in instalment. After few instalments, the delivery was stopped. This is actual breach of contract during performance by S and B can claim damages for breach.

Effect of Actual Breach

- I. When one party commits breach of contract, the aggrieved party can rescind the contract and can sue for damages.
- II. When time is the essence of contract, the aggrieved party can rescind the contract and can claim damages.
- III. When time is not the essence of contract, the aggrieved party cannot rescind the contract, but he can claim damages caused by delayed performance.



Rescission of contract

- i. It means a right not to perform the contract.
- ii. When a contract is broken by one party, the other party may sue to treat the contract as rescinded and refuse further performance.
- iii. In such a case, he is absolved or discharged from all his obligations under the contract and is entitled to compensation for any damages that he might have suffered. E.g.: A promises B to deliver 50 bags of cement on a certain day. B agrees to pay the amount on receipt of the goods. A failed to deliver the cement on the appointed day. B is discharged from his liability to pay the price.

Damages may be awarded in case of Breach of Contract under the Law of Contract

- i. Damages may be defined as monetary compensation in respect of loss suffered as a result of breach.
- ii. Breach of contract entitles the injured party to file a suit for damages, which are the monetary compensation awarded to a person by the court.

Section 73: Purpose of the law to award damages is:

- i. To put the aggrieved party in the same financial position he would have, had the contract been performed.
- ii. not to punish a defaulting party but by his wrongful act, as the other party has suffered loss, the Court will compel the party in breach to compensate the loss by paying damages to the other party.

Types of Damages

- 1. Compensatory damages:** These damages are compensatory in nature. These damages are not allotted to punish the party who has breached the contract.
- 2. General damages / Liability for ordinary damages:**
 - i. These damages arise in the ordinary course of events from the breach of contract.
 - ii. These damages constitute the direct loss suffered by the injured party.
 - iii. These damages are the natural outcome of breach of contract.
 - iv. The measure of ordinary damages is the difference between the contract price and the market price on the date of the breach.

Types of Damages

General damages / Liability for ordinary damages:

E.g.: If the subject matter of the contract is the sale of a car and the contract is breached by the buyer, the seller has incurred damages by not collecting the purchase price. If seller breaches, buyer has sustained damages by not getting the car.

Thus general damages are related to the direct consequences and not to the indirect losses or consequences of the breach of contract.

3. Special damages / Liability for special damages:

- i. Where a party to a contract receives a notice of special circumstances affecting the contract, he will be liable not only for damages arising naturally and directly from the breach, but also for special damages.

Types of Damages

- ii. Such damages are awarded by the court only when, at the time of making the contract, these special circumstances were communicated to the defaulted party.
- iii. A compensation can also be claimed for any loss or damage which the party knew when they entered into the contract, as likely to result from the breach. That is to say, special damage can be claimed only on a previous notice

Example: A contracted with B to buy 1000 tons of Iron @ Rs.80 per ton, and told him that he needs it by June 5 to deliver it to Z to make a profit out of it. B fails to deliver the same by June 5 and A claims loss of profits from B amounting to Rs.20,000 (which he would have earned by selling 1000 tons of Iron @ Rs.100 per ton to Z).

Here B is liable to pay these damages to A3

Types of Damages

4. Nominal damages

- i. Sometimes, a person brings a legal action for breach of contract and proves that breach has actually occurred but he has not in fact suffered any real damage and fails to prove that any actual damages have been suffered. In such a situation, injured party is awarded nominal damages.
- ii. Such damages are awarded simply to recognize the right of the injured party to claim damages, and are of very small amount. It is awarded just to establish the right to decree for the breach of contract. The amount may be a rupee or even 10 paise.
Example: A contracted to purchase 'LML Scooter' from B, a dealer, for Rs.25,000. But A failed to purchase the Scooter. However, B could sell the Scooter to Z for Rs.25,000 i.e. without any loss or profit. Here if B makes a claim upon A for breach of contract, he will be entitled to nominal damages only.

Types of Damages

5. Liquidated damages and penalty:

- i. Sometimes the contracting parties may agree to pay certain sum of money in case of breach of contract by either party.
- ii. The sum so specified is the maximum amount aggrieved party can claim as compensation subject to discretion of Court.
- iii. It is not necessary to prove that actual damages have been caused or not.
- iv. It may be termed as either 'liquidated damages' or 'penalty' depending upon the purpose to fix the sum.
- v. At the time contract is entered into, it appears that if contract is breached, damage will occur. But amount of damage is uncertain. Parties agree upon the amount that will be paid by defaulting party to other.

Types of Damages

5. Liquidated damages and penalty:

- vi. If sum so specified is reasonable and fair pre-estimate of damage likely to result due to breach, it is called “**Liquidated** damages.”
- vii. If sum so specified is extravagant and unconscionable as compared to the greatest possible loss conceivable then it is “penalty.
- viii. The purpose of fixing a sum as ‘liquidated damages’ is to compensate the injured party for the loss to be incurred by the breach of the other party. Thus it is an estimate of the loss to be caused by non-performance of the contract.
- ix. The purpose of providing a ‘penalty’ in a contract is to discourage a party from breaching it and to provide a special punishment if the contract is breached any way. Thus it is a sum which has no relation to the probable loss.

Types of Damages

5. Liquidated damages and penalty: But the sum named in the contract is not awarded as damages. It is left to the court to ascertain the actual loss. However it does not exceed the sum named in the contract.

The courts in India allow only reasonable compensation not exceeding the specified sum (Sec. 74). Penalty is also allowed in appropriate circumstances.

Under English law, liquidated damages are enforceable but not penalty.

Example: A agreed to sell his house to B for Rs.1,05,000. It is further provided that on the breach of contract, the defaulting party will pay Rs.10,000 as damages to the other. B has broken the contract and A resold the house for Rs.1,04,000. A sued B and claimed Rs.10,000. It was held that A cannot recover Rs.10,000 as liquidated damages or penalty. He could only get the actual loss suffered by him i.e. Rs.1000.

Types of Damages

5. Liquidated damages and penalty:

Exception: The whole amount mentioned in bond is payable if bond is executed for bail bonds.

Stipulation for interest: (Sec74)		
Interest rate	Period for which it is to be paid	Liquidated damages/ penalty
Reasonable	Default period	Liquidated Damages
Abnormally high	Rate increased from the date of default	Penalty
High	From the date of bond and not from date of default	Penalty
Reasonable	Reduced if paid interest regularly	Penalty
High	From the date of default	Penalty
Compound Interest (Interest on interest)		

To be continued

Types of Damages

5. Liquidated damages and penalty:

Stipulation for interest: (Sec74)		
At the same rate as simple interest	<ul style="list-style-type: none">• A stipulation in a bond for payment of compound interest on failure to pay simple interest at the same rate as payable upon the principal is not a penalty.	
At the rate higher than simple interest	<ul style="list-style-type: none">• A stipulation in a bond for payment of compound interest at a rate higher than that of simple interest is a penalty and relief will be granted against it.	
Payment of interest at a lower rate if interest is paid on due date:	<ul style="list-style-type: none">• Where a bond provides for payment of interest say, at 24% p.a., with a provision that if the debtor pays interest punctually at the end of every year, the creditor would accept interest at a lower rate say 18% p.a. Such a clause is not in the nature of penalty.	

To be continued

Types of Damages

6. Vindictive or exemplary damages:

- i. Sometimes breach of contract by one party not only results in monetary loss to the injured party but also cause him to suffer mental agony/emotional trauma or hurt his respect.
- ii. In such cases monetary compensation alone cannot provide an appropriate remedy to the sufferings of the injured party.
- iii. Thus the need for vindictive damages arises.
- iv. Vindictive damages are awarded as a punishment to the wrong doer. Such damages are unusual and quite heavy in amount. The concept is borrowed from the English Law. Generally speaking, these damages are not awarded in the ordinary course of breach of contract.

Types of Damages

However, in the following two kinds of contracts Indian courts award vindictive damages /

These damages may be awarded only in two cases, viz

i. for breach of promise to marry; and

ii. wrongful dishonor by a banker of his customer's cheque:

a. Breach of promise to marry: In this case the amount of damages will depend upon the extent of injury to the party's feelings

b. Wrongful dishonor by a banker of his customer's cheque: Where a banker refuses to honor the cheque of a customer while having sufficient funds in the account and the customer thereby suffers loss of reputation. The amount of damages recoverable by the drawer of cheque from his banker in case of wrongful dishonor of his cheque may be quite heavy, depending upon the loss of credit and reputation suffered on that account in case of trader, lower the amount higher will be the damage.

Types of Damages

7. Damages for deterioration caused by delay:

- i. In the case of deterioration caused to goods by delay, damages can be recovered from carrier even without notice.
- ii. The word 'deterioration' not only implies physical damages to the goods but it may also mean loss of special opportunity for sale.

Wilson's case: "A" bought velvet to make caps to be sold in spring season. But delivery was delayed in transit. It arrived after season.

Damage for deterioration = fall in value of velvet + loss of opportunity to sale.

Types of Damages

8. Remote or indirect damages:

- i. The remote or indirect damages are not due to natural and probable consequences of the breach of the contract, i.e., these are the damages which arise indirectly from the breach.
- ii. These damages are not in contemplation of the parties at the time of making the contract, and are not recoverable. No compensation is payable for any remote or indirect loss.
- iii. Sometimes, damages are awarded for inconvenience and discomfort e.g. in flights— for delay or inconvenience to passenger.

How to Calculate the Damages

- i. Under a contract for the sale of goods, the measure of damages, when the buyer breaks the contract, is the difference between the contract price and the market price at the date of breach.
- ii. If the contract is broken by the seller, the buyer is entitled to recover from the seller the difference between the market price and the contract price at the date of breach.
- iii. duty to mitigate the loss: The party who suffers in consequence of the breach of contract must take all reasonable steps to mitigate the loss/minimize the loss from such a breach. He cannot claim as damages any loss which he has suffered due to his own negligence.

How to Calculate the Damages

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Suit for Specific Performance

No substitute in the market

Money not an adequate compensation

Urgency/ Emergency of the work

Quantum meruit and Restitution

Quantum Meruit:

- i. The phrase 'quantum meruit' literally means "as much as is earned" or "according to the quantity of work done".
- ii. When a person has begun the work and before he could complete it, the other party terminates the contract or does something which make it impossible for the other party to complete the contract, he can claim for the work done under the contract.
- iii. He may also recover the value of the work done where the further performance of the contract becomes impossible.
- iv. The claim on quantum meruit must be brought by a party who is not at default. However, in certain cases, the party in default may also sue for the work done if the contract is divisible.

Quantum meruit and Restitution

Following are the cases in which a claim or quantum meruit may arise:

- a. Where an agreement is discovered to be void: Where the work has been done and accepted under a contract which is subsequently discovered to be void, in such a case, the person who has performed the part of the contract is entitled to recover the amount for the work done and the party, who receives and accepts the benefit under such contract, must make compensation to the other party.
- b. Where something is done or delivered without intention to do gratuitously: Where a person does some act or delivers something to another person with the intention of receiving payments for the same (i.e. non-gratuitous act), in such a case, the other person is bound to make payment if he accepts such services or goods, or enjoys their benefit.

Quantum meruit and Restitution

C. Where the contract is divisible: The compensation for the work done may be recovered on the basis of quantum meruit, where the contract is divisible and a party performs part of the contract and refuses to perform the remaining part. In such a case, the party in default may sue the other party who has enjoyed the benefits of the part performance.

Examples:

1. X wrongfully revoked Y's (his agent) authority before Y could complete his duties. Held, Y could recover, as a quantum meruit, for the work he had done and the expenses he had incurred in the course of his duties as an agent.
2. A agrees to deliver 100 bales of cottons to B at a price of Rs. 100 per bale. The cotton bales were to be delivered in two installments of 50 each. A delivered the first instalment but failed to supply the second. B must pay for 50 bags.

Stipulation for interest: (Sec74)

Basis of distinction	Ordinary damages	Liquidated damages
meaning	Ordinary damages means the damages which are fairly and reasonably considered as arising naturally from breach of a contract.	Liquidated damages are the amount of fair and genuine pre-estimate of probable damages which are likely to result from breach of a contract
nature of loss	Ordinary damages arise only on actual breach of contract.	Liquidated damages are the amount of probable loss in the opinion of the parties that may result from the breach of contract.
Time of calculation	These are calculated only when actual damages are suffered	It is calculated before actual damages are suffered
Amount	These are actual amount of damages which injured party is entitled to claim.	These are estimated maximum amount of damages with in which actual damages may be claimed.

**Obligation of person who has received advantage under void agreement,
or contract that becomes void:**

When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore, it, or to make compensation for it, to the person from whom he received it.

Mode of communicating or revoking rescission of voidable contract:

The rescission of a voidable contract may be communicated or revoked in the same manner, and subject to some rules, as apply to the communication or revocation of the proposal.

Effect of neglect or promise to afford promisor reasonable facilities for performance:

If any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise, the promisor is excused by such neglect or refusal as to non-performance caused thereby.

Section (124 to 127)

- ❖ A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person is called as **Contract of Indemnity**
- ❖ The person who promises to make good the loss is called the **Indemnifier**
- ❖ The person whose loss is to be made good is called the **Indemnified**
- ❖ The liability of the indemnifier to the indemnified is **Primary and independent**
- ❖ A contract of indemnity may be called as **Contingent contracts**
- ❖ In the contract of indemnity there is **One contract**
- ❖ A contract to perform the promise, or to discharge the liability of a third person in case of his default is called as **Contract of guarantee**
- ❖ In a contract of guarantee there are **Three parties**
- ❖ In a contract of indemnity there are **Two parties**
- ❖ The persons who given the guarantee is called **Surety**

Contract of Indemnity

Promise to save the loss

Loss may be
caused by

Conduct of
Promisor

Conduct of any other
person

Indemnifier :
promises to make
good the loss

Indemnified :
His loss is to be
made good



Contract of Guarantee

- Three Parties
- Principal Debtor
Creditor
Surety



Liabilities:

- Primary :Principal Debtor
- Secondary or collateral:
Surety



Three Contracts

- Principal Debtor & Creditor
Surety and Creditor
Principal Debtor and
Surety



- ❖ In a contract of guarantee, the liability of the surety to the creditor is **Secondary or Collateral**
- ❖ In the contract of guarantee there are **Three contracts**
- ❖ The person in respect of whose default the guarantee is given is called **The principal debtor**
- ❖ The person to whom the guarantee is given is called **The creditor**
- ❖ **At the request of the debtor** the surety should give the guarantee
- ❖ A surety on discharging the debt due by the principal debtor steps into the shoes of the **Creditor**
- ❖ Anything done or any promise made for the benefit of the principal may be **Sufficient consideration** to the surety for giving guarantee
- ❖ The liability of the surety is co-extensive with that of **The principal debtor** unless it is otherwise provided by the contract
- ❖ A guarantee which extends to a series of transactions is called **Continuing guarantee**
- ❖ When can a continuing guarantee be revoked by the surety:
 - It can be revoked by the surety at any time as to future transactions by notice to the creditor
- ❖ A surety has the rights against the **creditor, principal debtor, co-sureties**
- ❖ A continuing guaranteed can be revoked **By notice to the creditors, death of the**

Discharge of Surety

Variation in terms
without his
knowledge

Release of Principal
Debtor

Release by Contract

Release by act or
omission of the
creditor

No discharge if surety
assents or release of
one surety in case of
co-sureties

Surety & Notation

- ❖ Where the terms of the contract between the principal debtor and the creditor are changed /varied without the consent of the surety. **It will discharge the surety as to transactions subsequent to the variance**
- ❖ The surety stands discharged in the following cases:
 - There is a contract between the creditor and the principal debtor to release the principal debtor
 - By any act or omission of the creditor, the legal consequences of which is the discharge of the principal debtor
 - If by virtue of a contract between the creditor and the principal debtor, the creditor makes a composition with or promises to give time to or not sue the principal debtor. However It will not discharge the surety, in case the surety has assented to such transactions
- ❖ Y owes to Z debt guaranteed by X. The debt becomes payable. Z does not sue Y for a year after the debt has become payable. Whether the surety X is discharged
 - No he is not discharged
- ❖ Where there are co-sureties, a release by the creditor of one of them does not discharge the others; neither does it free the surety so released from his responsibility to the other co-sureties

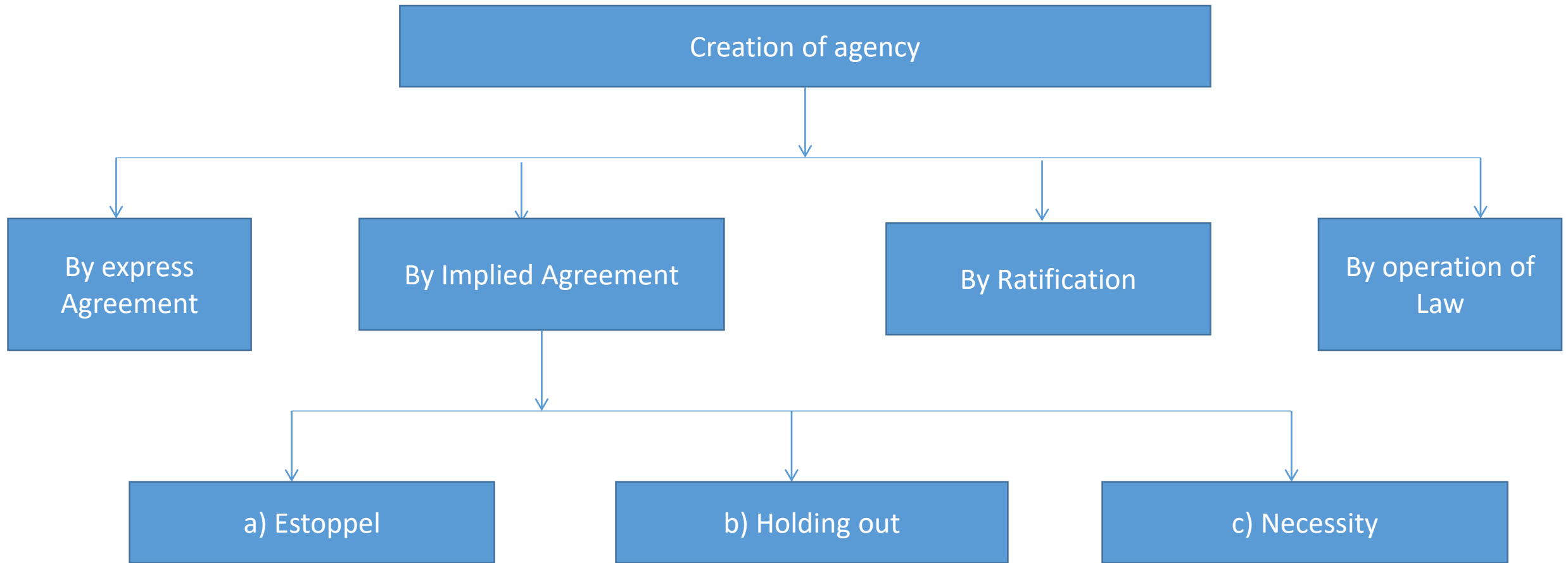
❖ If the creditor does any act which is inconsistent with the rights of the surety or omits to do any act which his duty to the surety requires him to do and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged

Sections Bailment and Pledge (148 to 181)

- ❖ A 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, is called as **bailment**.
- ❖ The person delivering the goods is called **Bailor**
- ❖ Bailee means the person to whom they are delivered
- ❖ A bailment necessarily involves delivery of possession of goods by bailor to Bailee. However the delivery of possession may be **Actual, constructive, symbolic**
- ❖ If the goods have some faults, the bailor is bound to disclose the faults, if he is aware about it
- ❖ A contract of bailment is voidable at the options of the bailor if the Bailee does any act with regard to the goods bailed, inconsistent with the conditions of the bailment

A right to retain any property belonging to other party in respect of any payment lawfully due, provided the property is in the possession of the person exercising the right is General Lien

- ❖ A right to retain a particular goods until the payment for services rendered is received is called **Particular lien**
- ❖ In the absence of the contract to the contrary, the bankers have the **General lien**
- ❖ The bailment of goods as security for payment of a debt or performance of a promise is called **Pledge**
- ❖ The pawnee may retain the goods pledged for **Payment of the debt, Performance of the promise and interest of the debt**
- ❖ If the pawnor (Say A) has obtained possession of the goods pledged by him under a contract voidable (Between A and B) under section 19 or section 19A, but the



Contract of Agency (Section 182)

Agent: An **agent** is a person employed

- i. to do any act for other or
- ii. to represent another in the dealings with the third persons.

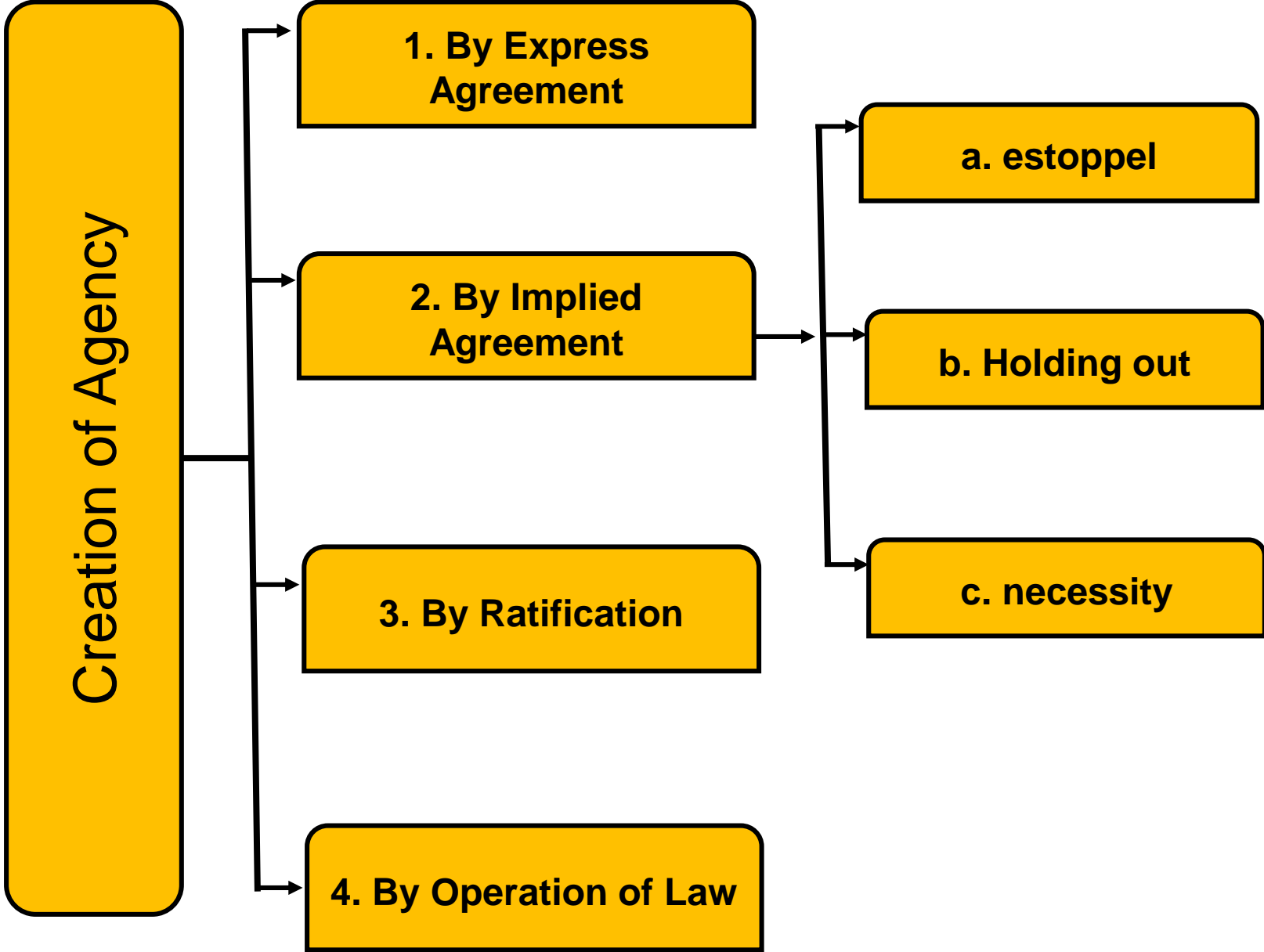
The person for whom such act is done, or who is so represented, is called “**principal**”.

The function of an agent is essentially to bring about contractual relationship between the principal and third parties.

Test of Agency:

Where a person has the capacity to –

- i. Create contractual relations between the principal and a third party;
- ii. Bind the principal by his own acts,



Essentials of relationship of Agency

Agreement

- i. Agency depends on agreement but not necessarily on contract.
- ii. It may arise out of an agreement which does not amount to a contract because one of the parties may lack contractual capacity, or there may be no consideration.

1. Principal is liable for the acts of agent

- i. The principal is liable for all the acts of an agent which are lawful and within the scope of agent's authority.
- ii. The contracts entered into by the agent on behalf of the principal have the same legal consequences as if these contracts were made by the principal himself.

Who may be an Agent?

Any person may employ an agent if:

- i. He is of the age of majority; and He is of sound mind.

Essentials of relationship of Agency

Who can be an agent?

- i. As between the principal and the third persons, any person may become an agent. (Sec. 184)
- ii. This leads to conclude that an agent may be a person who is not competent to the contract.
- iii. The principal is liable for the acts of such an agent;
- iv. Capacity to contract is not essential to enable a person to act as an agent.

Liability of Agent:

- i. Generally an agent is liable to the principal
- ii. An agent is not liable to the principal if he is a minor or is of unsound mind.

Requirement of consideration

- i. No consideration is necessary to create an agency (Sec. 185).
- ii. The fact that the principal has agreed to be represented by the agent is a sufficient 'detriment' to the principal to support the contract of agency.

Essentials of relationship of Agency

Kinds of Agents

1. Mercantile Agents

- i. One who is authorized to sell goods or consign goods for the purpose of sale or to buy goods or to raise money on the security of goods.
- ii. Includes Banker, Factor, Auctioneer, Broker, Commission Agent, & Del Credere Agent

2. non – mercantile Agents

Not engaged in business of selling or buying goods, but act in their respective professional capacities. i.e. render professional services for their Principal and Includes Solicitors, Attorneys, C & F Agents, Insurance Agents, etc.

Rights and Liabilities of the agent, the Principal and third parties

1. Position of Principal

The principal is bound by all the acts of the agent done within the scope of his actual authority (Sec. 238).

2. Position of an agent

- i. When an act is done by the agent, in the course of his employment as an agent and within the scope of his authority, the agent is liable neither to the principal nor to the third parties.
- ii. He has a right to claim remuneration from the principal in respects of such acts.
 - a. Where the agent acts for unnamed principal:
 - i. Where the agent discloses that he is acting for an unnamed principal, In such a case, the agent is not personally liable on the contracts entered into by him with the third parties, unless there is trade custom to the contrary.

Rights and Liabilities of the agent, the Principal and third parties

ii. It is however essential that the unnamed principal exists when the agent enters into a contract with third party.

b. When the agent acts for an undisclosed principal:

i. Sometimes, an agent enters into a contract with third person without disclosing at all the fact of agency.

ii. He not only conceals the name of the principal but also the fact that he is an agent.

iii. This gives rise to the doctrine of undisclosed principal.

iv. The agent in such a case gives impression to the third party as if he is contracting in an independent capacity.

Rights and Liabilities of the agent, the Principal and third parties

3. Position of third parties :As regards third parties, they can enforce the rights arising out of the contract entered into by the agent on the behalf of the principal only against the principal provided the agent:
 - i. Acted within the scope of his authority
 - ii. Did not incur any personal liability
 - iii. Disclosed the facts of agency to the third parties.

Sub-Agent: “A sub-agent is a person employed by, and acting under the control of the original agent in the business of the agency” (Sec. 191)

Section 190: General Rule: “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 trade a sub agent may, or from the nature of the agency, a sub-agent must, be employed.”

Rights and Liabilities of the agent, the Principal and third parties

Exceptions: There are exceptions to the general rule as laid down in Sec. 190:

- i. The custom of the trade may permit the appointment of a sub-agent.
- ii. The nature of the agency may be such that a sub agent may be necessary.
- iii. Where the principal is aware of the intention of the agent to delegate his authority but does not object to it.
- iv. Where the unforeseen emergencies arise rendering the appointment of the sub-agent necessary.
- v. Where the act to be done is purely ministerial not involving the confidence or discretion.
- vi. Where the power of the agent to delegate can be inferred from the conduct of both the principal and the agent.
- vii. Where the principal permits appointment of a sub-agent.

Relationship between the Principal and Sub-Agent

The legal relation between the principal and the sub-agent depends upon this critical question, i.e. whether the appointment of the sub-agent is proper or improper.

1. Where the appointment of sub-agent is proper

- i. Where a sub-agent is properly appointed, the principal is bound by the acts of the sub-agent as if he was an agent originally appointed by the principal.
- ii. The agent is responsible to the principal for the acts of the sub-agent.
- iii. The sub-agent is responsible for his acts to the agent, but not to the principal except in the case of fraud or willful neglect. (Sec. 192.)

2. Where the appointment is improper.

- i. Where an agent, without having authority to do so, has appointed a sub agent, the agent is responsible for the acts of the sub-agent to the principal and the third parties.
- ii. The principal in such case, is not represented by or responsible for the acts of the sub-agent, nor is the sub-agent responsible to the principal. (Sec. 193)

2. Where the appointment is improper.

- i. Where an agent, without having authority to do so, has appointed a sub agent, the agent is responsible for the acts of the sub-agent to the principal and the third parties.
- ii. The principal in such case, is not represented by or responsible for the acts of the sub-agent, nor is the sub-agent responsible to the principal. (Sec. 193)

Substituted Agent: A substituted agent is a person who is named by the agent holding an express or implied authority from the principal, to act for the principal. in other words, he is the agent of the principal though he is named, at the request of the principal, by the agent. (Sec. 194)

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

Personal Liability of an Agent

The general rule is that only the principal can enforce and can be held liable on a contract entered into by the agent except where there is a contract to the contrary. (Sec. 230)

An agent is personally liable in the following cases:

1. When the contract expressly provides. A person while entering into a contract with the agent may expressly stipulate that he would hold the agent personally liable in the case of the breach of the contract.
2. When the agent acts for foreign principal. When the contract is made by an agent for the sale or the purchase the goods for a merchant residing abroad, the agent will be personally liable. (Sec. 230)
3. When the agent acts for a concealed principal. Where an agent acts for a concealed principal, he would be personally liable, though the principal, on being discovered by the third person, will also be liable.

Personal Liability of an Agent

4. Where the agent acts for the principal who cannot be sued. Where the principal is incompetent to enter into a valid contract, e.g. where a principal is minor, the agent will be personally liable as the credit shall be presumed to have been given to the agent and not to the principal.
5. Where an agent acts for a principal not in existence. The promoters of a company (yet to be incorporated) sometimes enter contracts on the behalf of the company, though in such a case the alleged principal (the company) has no legal existence till the time of incorporation. In such case the agent is held to have contracted on his own account.
6. Where an agent is liable for the breach of the warranty. Where an agent professes to act as an agent but has no authority from the alleged principal or exceeds his authority, he is personally liable for the breach of the warranty.
7. Where the agent signs a contract in his own name in that case he is personally liable for the contract.

Personal Liability of an Agent

8. Where the agent receives or pays money by mistake or fraud. Where an agent receives from, or pays money to, a third party by mistake or fraud, he will be personally liable to the third party.
9. Where the authority of the agent coupled with interest. Where an agent has an interest in the subject matter of the contract entered into by him with a third party, his authority is coupled with the interest. He has, in such case, the right to sue or be sued, but only to the extent of his interest.
10. Where the trade usage or custom makes agent personally liable. Where there is a trade usage or custom making the agent personally liable, he will be so liable unless there is a contract to the contrary.
11. Where an agent signs the negotiable instrument in his own name without mentioning that he is signing as an agent.
12. Where the agent acts for the pretended principal and that principal refuses to ratify the agents' act.

Agency Coupled with interest

- i. When an agency is created for securing certain benefits to the agent over and above his remuneration as an agent, it is called as agency coupled with interest.
- ii. The interest should exist at the time of creation of the agency.
- iii. The agency coupled with the interest can't be terminated even on the death or the insanity of the principal. Thus such agency is irrevocable up to the extent of such interest.

Example. A owes Rs.500 to B and appoints him as his agent to sell his goods and pay him (B) the debt out of the sale proceeds. The authority of B is coupled with interest.

Irrevocable Agency

When an agency cannot be terminated or put an end to, it is said to be an irrevocable agency in following cases:

1. Where the agency is coupled with interest.

Where an agent has an interest in the subject matter of the contract entered into by him with a third party, his authority is coupled with the interest. He has, in such case, the right to sue or be sued, but only to the extent of his interest. (sec 202)

2. Where the agent has incurred a personal liability.

When an agent incurs personal liability, the agency becomes irrevocable. The principal cannot, in such case, withdraw leaving the agent exposed to the risk or liability he has already incurred.

3. Where the agent has partly exercised the authority

The principal cannot revoke the authority given to his agent after the authority has been partly exercised; so far as regards such acts and obligations as arise from the acts already done in agency. (Sec. 204)

Termination

1. Termination by act of the parties Agreement:

- i. The relation of the principal and the agent is generally founded on the mutual consent. It may be brought to an end by the same process with the originated it. i.e. by agreement.
- ii. The agency can be terminated at any time and at any stage by the mutual agreement between the principal and the agent.

Revocation by the principal:

- i. An agency may be terminated by the principal at any time by giving a notice to the agent. (Sec. 203).
- ii. If the agent is appointed to do a single act, the authority may be terminated at any time before the act actually begun, the agency can only be terminated subject to any claim which the agent may have for the breach of the contract. (Sec. 204).

Termination

- iii. The revocation may be expressed or implied.
- iv. However when the agency is coupled with the interest the principal can't revoke the agency to the extent of such interest.
- v. Moreover if the agent has already partly exercised his authority then also the agency can't be terminated.

Revocation by agent:

- i. An agency may be terminated by an express renunciation on the part of the agent after giving a reasonable notice to the principal. (Sec. 203).
- ii. Where the agency is for a fixed period, and the agent renounce it without a sufficient cause, he shall have to compensate the principal for any loss.
- iii. Renunciation may be expressed or implied.

Termination

2. Termination by operation of law

Performance of the contract: The most obvious mode of putting an end to the agency is to do what agent has undertaken to do (Sec. 201). Where, therefore, the agency is for particular object, it is terminated when the object is accomplished or when the accomplishment of the object becomes impossible.

expiry of time: Where the agent is appointed for a fixed period of time, it comes to an end after the expiry of that time even if the work is not completed.

death: When the death of the agent or principal takes place, the agency is terminated. When such termination takes place by the death of the principal, the agent must take all responsible steps for the protection of the interests of the principal entrusted to him.

Insanity: An agency comes to an end when the principal or agent becomes of unsound mind. (Sec. 209)]

Insolvency: The insolvency of the principal puts an end to the agency though nothing is mentioned in Sec. 201 as regards insolvency of the agent. The insolvency of the agent, if accepted, also terminates the agency.

Destruction of the subject matter: An agency which is created to deal with a certain subject matter will come to an end by the destruction of the subject matter.

Principal becoming alien enemy: Where the agent and the principal are aliens the contract of agency is valid so long as the two countries are at peace. If war breaks out between the two countries, the contract of agency is terminated.

Termination by sub-agent's authority: The termination of an agent's authority puts an end to the sub-agent's authority also. (Sec. 210)

Irrevocable Agency

When an agency cannot be terminated or put an end to, it is said to be an irrevocable agency in following cases:

Where the agency is coupled with interest:

Where an agent has an interest in the subject matter of the contract entered into by him with a third party, his authority is coupled with the interest. He has, in such case, the right to sue or be sued, but only to the extent of his interest. (sec 202)

Where the agent has incurred a personal liability:

When an agent incurs personal liability, the agency becomes irrevocable. The principal cannot, in such case, withdraw leaving the agent exposed to the risk or liability he has already incurred.

Where the agent has partly exercised the authority:

The principal cannot revoke the authority given to his agent after the authority has been partly exercised; so far as regards such acts and obligations as arise from the acts already done in agency.(Sec. 204)

SUMMARY

- ❑ Agreement such as relating to Social matters, domestic arrangements between husband and wife, to do illegal/unlawful/immoral act i.e. smuggling and declared specifically void one not contracts.
- ❑ Pricing of securities offered on preferential basis need not be determined by Registered Valuer in case of listed company.
- ❑ Pricing of securities offered on preferential basis is finally determined by the company on the basis of report of Registered Valuer
- ❑ An Agreement is a promise or a commitment or set of reciprocal promises or commitments. An agreement involves an offer or proposal by one person and acceptance of such offer or proposal by another person.

SUMMARY

- ❑ All agreements are contracts if they are made by the free consent of the parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.
- ❑ When one person signifies to another his willingness to do or to abstain from doing anything with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal.
- ❑ A contingent contract is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen.
- ❑ 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 provision of this Act, or of any other law.

SUMMARY

- ❑ This obligation continues even after death of the promisors and before the performance, unless a contrary intention appears from the contract or where it involves the personal skill of the Promisor.
- ❑ Section 64: If one of the parties to a contract refuses or fails to carry out agreed obligation, the party injured thereby, has not only a right of action for damages but he is also discharged from performing his part of the contract.
- ❑ The phrase 'quantum meruit' literally means "as much as is earned" or "according to the quantity of work done".

- ❖ A person employed to do any act for another, or to represent another in dealings with third person is called Agent
- ❖ Major may employ agent
 - Any person may become an agent between the principal and third person
 - Whatever a person can do personally, he can do through an agent
 - No consideration is required in contract of agency
 - An agent having an authority to do an act has authority to do Lawful thing which is necessary in order to do such act
 - In an emergency, an agent has authority to do:
 - All such acts for the purpose of protecting his principal from loss
 - All such acts which a person of ordinary prudence, in his own case do under similar circumstances
 - An agent cannot lawfully employ another to perform act which he has expressly or impliedly undertaken to perform Personally

- ❖ A sub-agent is a person employed by and acting under the control of The original agent
- ❖ When 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 called An agent of the principal for such part of the business of the agency as is entrusted to him
- ❖ Where acts are done by one person on behalf of another, but without his knowledge or authority:
 - He may elect to ratify
 - He may disown such acts
 - After ratification, he will be liable for all the acts done by such person(agent)
 - Ratification of unauthorised act of a person can be ratified by the principal In full
 - An agency may be terminated:
 - By the principal revoking the authority of the agent

- By the business of the agency being completed
- ❖ What would be the position where the agent becomes a person of unsound mind:
 - The agency will be terminated
 - ❖ 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
 - ❖ Partly exercised authority by the agency cannot be revoked
 - ❖ The termination of the authority of an agent does not, so far as regards the agent, take effect:
 - Before it becomes known to him
 - ❖ Test of determining whether a person is agent of another person or not:
 - If the person has
 - the capacity to bind the principal
 - If the person can make the principal answerable to third person
 - ❖ How the agency can be created:

- By express or implied agreement

- By ratification

- By operation of law

- ❖ Duties of an agent:

- To render proper accounts to his principal on demand

- To use all reasonable diligence in communicating with his principal and in seeking to obtain his transactions

- To pay the sums received on behalf of the principal

- ❖ Position where one person employs another to do an act which is criminal:

- The employer is not liable to indemnify him against the consequences of such criminal act. Say Act of Supari killing.

- ❖ Factor:

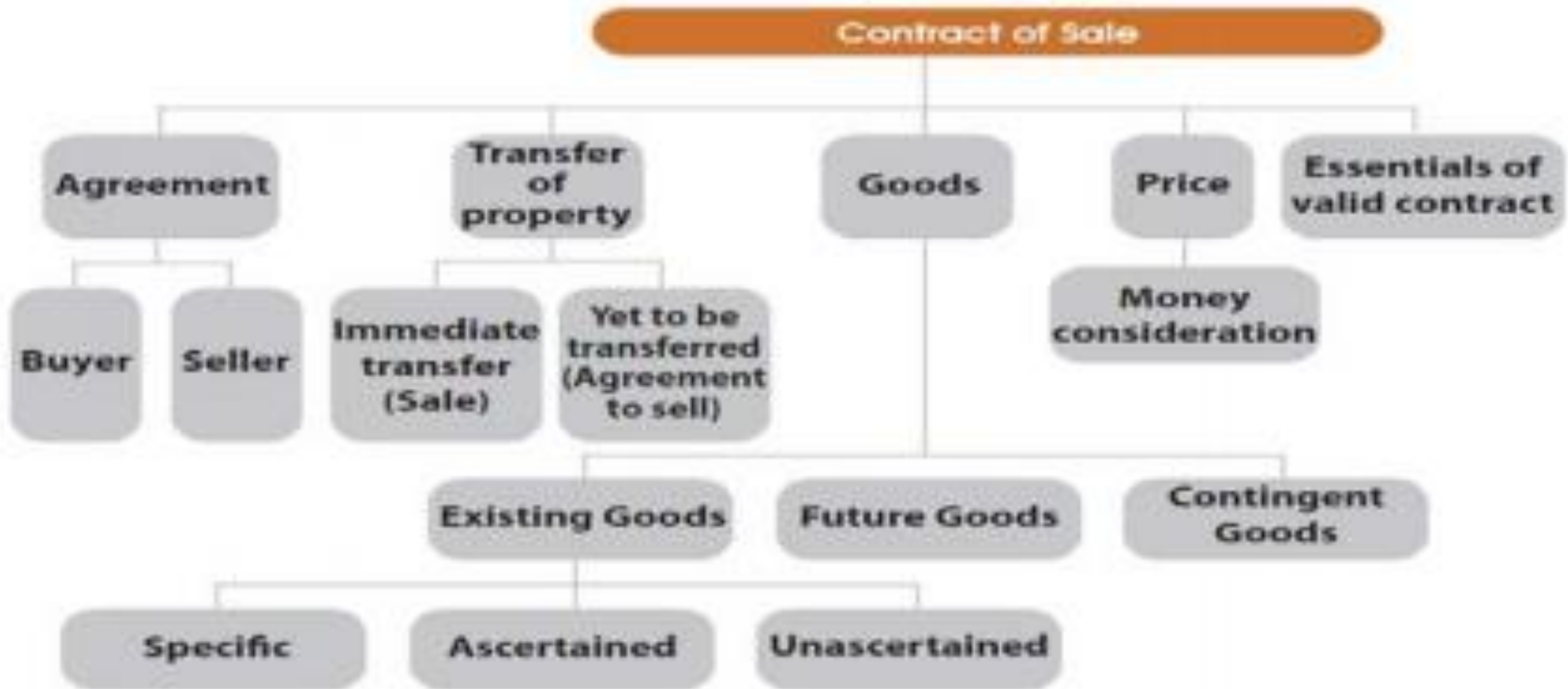
- A factor is a mercantile agent entrusted with the possession of goods for the purpose of selling them

- A factor has a general lien on the goods of his principal for a general balance of account between him and the principal
- A factor has the authority to receive the price and give a good discharge to the purchaser
- An agent who in consideration of an extra commission, guarantees his principal that the persons with whom he enters into contract on behalf of the principal, shall perform their obligations is called as Del crudel agent. Basically he guarantees against realization of amount.

***THE SALE OF GOODS ACT,
1930***

Sec 4(1) - CONTRACT OF SALE

It is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price.



Delivery

It means Voluntary transfer of possession from one person to another.

Three Kinds of delivery

It is actual when the goods are physically delivered to the buyer.

When it is affected without any change in the custody or actual possession of thing.

Where there is a delivery of thing in token of a transfer of something else.

E.g. Delivery by attornment (acknowledgement)
E.g. Where a warehouseman holding goods on behalf of A, agrees to hold them on behalf of B, at A request

E.g. Delivery of goods in transit by handing over the documents to title(ownership) to goods, Bill of lading, Dock warrant, Delivery of key of a Warehouse

Formation. The contract of sale may provide for any of the following methods

S.No.	Delivery	Payment of price
1	Immediate	Immediate
2	At future date	Immediate
3	Immediate	Future date
4	Future	Future
5.	Installment	Installment
Delivery or payment or both will be made a future date		

Types of Goods

Existing (i) Specific (ii) Ascertained (iii) Unascertained	Future	Contingent Goods
<p>Existing Goods Goods which are in existence at the time of contract of sale i.e. those owned & possessed by the seller.</p>	<ul style="list-style-type: none">• Future goods are those goods, which do not exist at the time of the contract of sale.• Those goods are to be manufactured or acquired by the seller after making of the contract of sale. Say Making an Almirah as per specifications.• Future goods cannot be sold but there can only be an agreement to sell.	<ul style="list-style-type: none">• It is a kind of future goods.• It is goods, the acquisition of which is contingent upon the happening or non-happening of an uncertain event.

<p>Specific goods:</p> <ul style="list-style-type: none"> • Means goods identified & agreed upon at the time when a contract of sale has been made. • The goods must be both identified and agreed upon. 	<p>Future Goods Contd..</p> <p>Example:</p> <p>A, a manufacture agrees to sell 5 tables and 50 chairs to B at Rs. 10,000. B agrees to purchase it. However, tables and chairs are yet to be manufactured by A.</p>	<p>Contingent Goods Contd..</p> <p>Examples:</p> <p>A agrees to sell the goods loaded on the ship “Titanic”, which is coming from London to Bombay. The ship may or may not arrive. So, these goods will be called as contingent goods.</p>
<p>Ascertained Goods</p> <p>Means goods identified in accordance with the agreement after the contract of sale has been made</p> <ul style="list-style-type: none"> • Identified but not agreed upon <p>“Unascertained” or “Generic” goods:</p> <ul style="list-style-type: none"> • Means goods defined only by description. • Neither identified nor agreed upon. 		

Price Means the money consideration for sale of goods 2(10)

The following are the modes of determining price: {Sec 9}

1. Price is specified under the contract

- It is the most common method of determining the price.
- Generally, parties decide the price in advance.

2. Price is not determined under the contract

(i) Method of determining price is specified in the contract.

Example:
Delivery of rice on 1st December 2020 at the rate prevailing on that day.

(ii) Price may be determined in accordance to custom and usage of trade.

This method is applicable if parties regularly trade

(iii) Where the price is not fixed as above, the buyer shall pay the seller a reasonable price

What is a reasonable price is a question of fact and circumstances.

3. Fixation of price by third party Section 10

If it is so, contract shall specify name of third party

- If third party fails to specify, contract is void but if goods are delivered to buyer and used by him, he is required to pay reasonable price.
- If the third party is prevented from fixing price, defaulting party is liable for the damages.

Distinction Between Condition and Warranty

CONDITION	WARRANTY
Essential to the main purpose of contract.	Collateral to the main purpose of contract
Aggrieved party can repudiate the contract or claim damages or both in case of breach of condition.	Aggrieved party can claim only damages in case of breach of warranty.
A breach of condition may be treated as breach of warranty	A breach of warranty cannot be treated as breach of condition.

The Sale Of Goods Act, 1930

- The object :To Define and amend the law relating to the sale of goods
- Before the separate enactment of The Sale Of Goods Act, 1930, it was contained in The Indian Contract Act, 1872
- Came into force on 1st day of July, 1930
- **Extends to The whole of India.**
- Distribution of assets on dissolution of the partnership firm among the partners in the ratio as mentioned in the partnership deed does not amount to sale.
- Buyer means a person who buys or agrees to buy goods
- Delivery means Voluntary transfer of possession from one person to another
- The goods are said to be in a deliverable state When they are in such state that the buyer would under the contract be bound to take delivery of them

- The “Documents of title to goods” includes:
 - Bill of lading dock-warrant
 - Warehouse keeper’s certificate
 - Wharfinger’s certificate
- Future goods means goods to be manufactured or produced or acquired by the seller after making of the contract of sale
- Goods may be Existing, Future, Contingent
- Goods mean every kind of moveable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale
- Transfer of immovable property is regulated by The Transfer Of Property Act, 1882

- “Mercantile agent” means an agent having in the customary course of business as such agent 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 goods
- “Specific goods” means: Goods identified and agreed upon at the time a contract of sale is made
- Sections (4 to 17)
- A contract of sale of goods is a contract whereby the seller:
- Transfers or agrees to transfer the property in goods to the buyer at a price . There may be a contract of sale between one part owner and another
- A contract of sale may be Absolute or Conditional
- 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, but where the transfer of the property in the goods is to take place at a future time or subject to some conditions thereafter to be fulfilled, the contract is called An agreement to sell

❖ An agreement to sell becomes a sale:

- When the time elapses or the conditions are fulfilled subject to be which the property in the goods is to be transferred

❖ The contract of sale may provide for:

- The immediate delivery of the goods
- The immediate payment of the price
- The delivery or payment by installments, or that the delivery or payment or both shall be postponed

❖ A contract of sale may be made:

- In writing or by word of mouth
- Partly in writing and partly by word of mouth
- It may be implied from the conduct of the parties

❖ The goods which form the subject of a contract of sale may be :

- Existing goods
- Owned or possessed by the seller
- Future goods
- ❖ Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as:
 - An agreement to sell the goods
- ❖ Where there is a contract for the sale of specific goods, The contract is void if the goods without the knowledge of the seller have, at the time when the contract was made, perished or become so damaged as no longer to answer to their description in the contract
- ❖ Where there is an agreement to sell specific goods, and subsequently the goods perish without any fault on the part of the seller or buyer or become so damaged as no longer to answer to their description in the agreement before the risk passes to the buyer:
 - The agreement is thereby avoided

- Fixed by the contract itself
- Left to be fixed in an agreed manner
- Determined by the course of dealing between the parties
- ❖ Where the price is not determined by the parties to the contract of sale of goods, the buyer shall pay the seller a reasonable price.
- ❖ Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party and such third party cannot or does not make such valuation, the agreement is thereby avoided
- ❖ Whether the stipulation of time in a contract of sale of goods is essential:
 - Usually time is not of essence in the contract of sale of goods, unless a different intention appears from the contract
 - ❖ A stipulation in a contract of sale with reference to goods which are the subject thereof may be a condition or warranty

- A condition is a stipulation essential to the main purpose of the contract, the breach of which gives rise to a right to treat the contract as repudiated
- A warranty is a stipulation collateral to the main purpose to the contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated
- A breach of condition may be treated as a breach of a warranty. However a breach of warranty may not be treated as breach of condition.
- When the stipulation of condition may be treated as warranty:
- The buyer may waive the condition or elect to treat the breach of the condition as a breach of warranty
- Where a contract of sale is not severable and the buyer has accepted the goods or part thereof

- ❖ The conditions and warranties in a sale of goods may be Express or implied
- ❖ An implied condition on the part of the seller is that, in the case of a sale He has a right to sell the goods and that, in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass
- ❖ There is an implied undertaking in a contract of sale of goods that:
 - The buyer shall have and enjoy quiet possession of the goods
 - The goods shall be free from any charge or encumbrance
- ❖ Where there is a contract for the sale of goods by description, there is an implied condition that:
 - The goods shall correspond with the description
 - If the sale is by sample as well as by description, the goods must correspond both with the sample and with the description

- ❖ **Assumptions in Cases where the buyer wants the goods for a specific purpose :**
- ❖ 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
- ❖ Where the **buyer makes known to the seller** the particular purpose for which the goods are required, so as to show that the buyer relies on the skill or judgement of the seller, and the goods are of a description which it is in the course of the seller business to supply, there is an implied warranty that the goods shall be reasonably fit for such purpose
- ❖ In the case of a contract for the sale of a specified article under its **patent or other trade name**, there is no implied condition as to its fitness for any particular purpose
- ❖ Where goods are bought by description from a **seller who deals in goods of that description**, there is an implied condition that the goods shall be of merchantable quality

- An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade
- An Express warranty or condition does not negative a warranty or condition implied by this act unless inconsistent there with
- In a case of a contract for sale by sample there is an implied condition:
- That the bulk shall correspond with the sample in quality
- That the buyer shall have a reasonable opportunity of comparing the bulk with the sample
- That the goods shall be free from any defect, rendering them merchantable, which would not be apparent on reasonable examination of the sample

Sections (18 to 30)

- ❖ Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer in the goods unless and until the goods are ascertained
- ❖ Where there is 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
- ❖ Where there is an unconditional contract for the sale of specific goods in deliverable state, the property in the goods passes to the buyer:
 - When the contract is made
- ❖ 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
- ❖ Where 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

- ❖ 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 express or implied, and may be given either before or after the appropriation
- ❖ 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 to the contract
- ❖ 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:
 - When he signifies his approval or acceptance to the seller or does any other act adopting the transactions
 - 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
 - If no time has been fixed, on the expiration of a reasonable time
- ❖ In a contract of sale of goods the seller is under no duty to reveal unflattering truths about the goods sold. This doctrine is called as Caveat emptor which means Let the buyer beware.

- ❖ Unless otherwise agreed, the goods remain at The seller risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer risk whether delivery has been made or not
- ❖ 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 his conduct precluded from denying the seller authority to sell
- ❖ When the seller of goods has obtained possession thereof under a contract voidable under section 19 or section 19A of The Indian Contract Act, 1872, but the contract has not been rescinded at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title

PERFORMANCE OF THE CONTRACT

- ❖ It is the duty of the seller to deliver the goods and of the buyer **To accept and**

- A delivery of part of the goods, with an intention of severing it from the whole:
- Does not operate as a delivery of the remainder
- Apart from any express contract, the seller of goods is not bound to deliver them until the buyer applies for delivery
- 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.
- 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 and until such third person acknowledges to the buyer that he holds the goods on his behalf
- Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state shall be borne by the seller
- Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them

❖ Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may:

- Accept the goods
- Reject the extra goods,
- Reject the whole goods

❖ 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
- Reject the rest of the goods
- Reject the whole of the goods
- Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments
- Where, in pursuance of a contract of sale, the seller is authorised to send the goods to the buyer through a carrier:

- It shall be deemed to be a delivery of the goods to the buyer
- ❖ Unless otherwise agreed, where goods are delivered to the buyer and he refuses to accept them, having the right so to do:
 - He is not bound to return them to the seller
 - He has to intimate to the seller that he refuses to accept them
- ❖ When the seller is ready to deliver the goods and request the buyer to take delivery, and the buyer does not within a reasonable time take delivery of the goods:
 - The buyer is liable to the seller of any loss occasioned by his neglect or refusal to take delivery
 - The buyer is liable for a reasonable charge for the care and custody of the goods

Sections (45 to 61)

- ❖ A seller of goods shall be deemed to be an **“unpaid seller”**
 - When the whole of the price has not been paid or tendered
 - When a bill of exchange or other negotiable instrument has been received as

Rights of an Unpaid Seller



❖ Rights of the unpaid seller

- A **lien** on the goods for the price while he is in possession of them
- In case of the insolvency of the buyer a **right of stopping the goods in transit** after he has parted with the possession of them
- A **right of re-sale** as limited by this act

❖ Circumstances when an unpaid seller, who has possession of the goods may exercise lien over the goods:

- Where the goods have been sold without any stipulation as to credit
- Where the goods have been sold on credit, but the term of credit has expired
- Where the buyer becomes insolvent

❖ A lien can be exercised by the unpaid seller only:

- When the goods are still in possession of the unpaid seller

❖ When the lien exercised by the unpaid seller comes to an end:

- When he delivers the goods to a carrier or other Bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods
- When the buyer or his agent lawfully obtains possession of the goods
- By waiver thereof
- The unpaid seller of goods, having a lien thereon, does not lose his lien by reason only that he has obtained a decree for the price of the goods:
- When a seller can stop the goods in transit:
- When the buyer of goods becomes insolvent and goods are in transit
- How stoppage in transit is affected by the unpaid seller:
- By taking actual possession of the goods
- By giving notice of his claim to the carrier in whose possession the goods are there.
- By giving notice of his claim to the other Bailee in whose possession the goods are there.

❖ When a seller can sue the buyer:

- He may sue for the price and interest
- He may ask for the damages for non-acceptance of the goods
- Suit for damages for repudiation of the contract

❖ When a buyer can sue the seller:

- He may initiate suit for delivery of the goods, if not delivered
- He may ask for the specific performance, if this being the part of the contract
- He may initiate for the breach of the warranty

The Transfer Of Property Act, 1882

(Sections 1 to 137)

INTRODUCTORY AND INTERPRETATION CLAUSE

• INTRODUCTORY

- Commencement (w.e.f) : 1st July, 1882.
- Before the TP Act came into force, TPA matters were governed on the basis of Equity, Justice and Good conscience. (scope of varied interpretation, no uniformity; hence the law)
- General Outlook : VIII Chapters; 137 Sections; A Preamble; A Schedule.
- Object : Define and amend certain parts of the law relating to the transfer of property by act of parties.
- It regulates all transfer of immovable property by act of parties and also certain movable property like :Exchange; Gift; Actionable Claim.
- Characteristics : Defining, Amending, Not Exhaustive (TPA+ICA+IRA) (can be regarded as extension of Law of Contracts) , intervivos transfer only, transfer of immovable property , not applicable on – transfer by ‘operation by law’.

INTERPRETATION CLAUSE – Sec. 3 of Transfer of Property Act, 1882 (hereafter as TPA).

- Immovable Property

Standing Timber
Growing Crops
Grass

- Does not Include

(Definition of Exclusion)

- Sec. 3(26) General Clauses Act, 1897

- V. P. Pakruddin Haji v. SBI
- *Embedded or not? Whether the thing was intended to be part of the land? Purpose of Annexation?*

Land
Benefits to arise out of Land
Things Attached to the Earth (Further Defined in Sec. 3) <ol style="list-style-type: none">1. Things embedded in the earth.2. Things Attached to what is so embedded in the earth.3. Things rooted in the earth. Except: Standing timber, growing crops and grass.

○ **“Attached to the earth” means:**

- Rooted in the earth, as in the case of trees and shrubs
- Imbedded in the earth, as in the case of walls or buildings
- Attached to wall is so imbedded for the permanent beneficial enjoyment of that to which it is attached

○ **“Actionable claim” means:**

- A claim to any debt, other than a debt secured by mortgage of immoveable property or by hypothecation or pledge of moveable property
- Any beneficial interest in moveable property not in the possession, either actual or constructive, of the claimant, which the civil courts recognise as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent

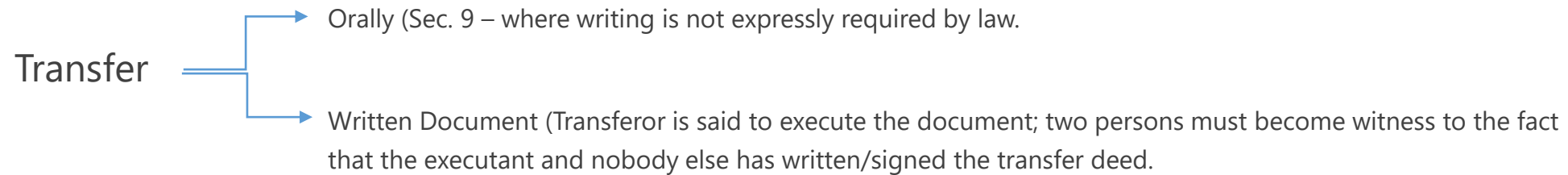
Section (5 to 53A)

- “Transfer of property” means: An act by which a living person conveys property in present or in future to one or more other living persons or to

- **Movable Property**

- As per General Clauses Act, 1897: Property of every description Except immovable property.

- **Attestation**



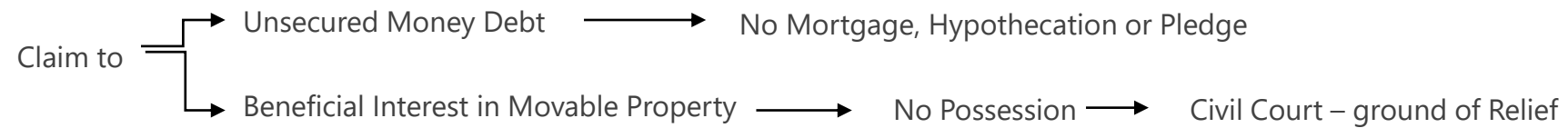
The act of becoming witness is known as *attestation* and when these *attesting witnesses* have done so the deed is said to have been *attested*.

- Object: Ensure authenticity or truthfulness of its execution.

- No particular form; Attesting witnesses must be of the age of majority and possess sound mind. Parties to the transaction cannot attest.

- Essentials of Attestation:
 - 1. Two or more persons.
 - 2. Attesting witness to sign in presence of executant. (Vice versa also *Abhinash Chandra v. Dasrath*)
 - 3. Attesting witness must : (a) see the executant signing/fixing mark; or (b) see some other person signing in presence of and under direction of executant; or (c) received personal acknowledgment of such signature / mark (as above) from the executant.
- **Registration**
 - Process of officially recording a document. It takes place under the provisions of Indian Registration Act, 1908.
 - Certain transfers made only through a registered deed. Ex. Gift of immovable property; Sale above Rs. 100.
 - Sec. 3 : if a document is duly registered in any part of the country where the Act extends it would be deemed as 'registered' as such for other places as well.

- **Actionable Claims** (Def. included in Sec. 3 after Amending Act of 1900)



- Existent, accruing, conditional or Contingent ; Ex- Arears of Rent, Unpaid Dower, etc



- **Notice**

- Notice means to have knowledge of something i.e. to know something. In law, it means knowledge of a fact. It is used to decide on conflicting claims of two parties.
- Under Section 3 of TPA Notice can be; “Actual or express Notice” or “Constructive Notice”,
- **Actual Notice** : When a person actually knows about the existence of a fact. Direct or express knowledge of a fact. Essentials : *Definite Information; Knowledge of Parties only; Related to Transaction in question.*
- **Constructive Notice**: Constructive notice of facts are those facts which a person ought to have known, but because of gross negligence or willful abstention does not know it. (Court presumes it; legal presumption)
- 1. Willful abstention from inquiry or search
- 2. gross negligence
- 3. Registration – where it is compulsory
- 4. title of actual possessor of immovable property
- 5. Notice to agent

Transfer of Property

- Chapter II (Secs. 5-53A): Transfers of Property by Act of Parties.
- Secs. 5-37 : General principles of Transfer of Property; whether movable or immovable
- Secs. 38-53A: Transfer of immovable property.
- **Definition of “Transfer of Property”**
- **Sec. 5**
- An Act by which *living person* conveys property, in present or in future, to
 - A) one or more other living persons,
 - B) or to himself,
 - C) or to himself and one or more or other living persons,
 - and to “transfer of property” is to perform such act.

Note: As per Sec. 2 - "nothing in the second Chapter of this Act shall be deemed to affect any rule of Muhammadan law."

Living Person includes:
A company, or
An association, or
Body of Individuals (incorporated or not)

- **What may be Transferred (Sec. 6)**

- Property of any kind may be transferred; except as provided by the Act or any other law in force.
- Non transferable properties under Sec 6:
 - 1. *Spes – Successionis* : expectation of succession ; chance of heir to estate; relation getting legacy; other possibility.
 - 2. *Mere right of re-entry* – resuming possession on breach of any condition. (usually lease)
 - 3. *Easement* – apart from dominant heritage.
 - 4. *Restricted interest* – to owners personally, res extra commercium
 - 5. *Right of future maintenance*- personal right + restricted interest.
 - 6. *Mere right to sue* – uncertain and indefinite
 - 7. *Public Office or Salary of a public office*
 - 8. *Stipends* (military, naval, air force, civil pensioner) and *political pensions*
 - 9. *Transfer opposed to nature of interest created* (res communes – air, light, space) ; *unlawful object or consideration* (Sec. 23 of ICA); *disqualified transferee*
 - 10. *Untransferable occupancy rights* of : tenant; farmer of estate; lessee of estate

Non Transferable properties under other laws:

1. Hindu Law: Coparcenary property, property dedicated to god, etc.
2. Muslim Law: Waqf property, mutawalli office etc.
3. Sec 60 of CPC: Attachment – cooking vessels, artisan tools etc.
4. Local Laws: agricultural tenancies.

Rule against Perpetuity (Sec. 14)

- The term perpetuity means an indefinite or uncertain period.
- Objective: proper and free regulation of property both for trade and commerce as well as for the advancement of property which is useful for society.
- Perpetuity may arise in two ways:
 - By taking away the power of alienation from the transferor. (Sec. 10); Or By creating a remote interest in the future property. (Sec. 14)
- **Conditions necessary for section 14**
 - 1. Transfer of property should be there
 - 2. Transfer of property be such that it should create interest in favour of the unborn person. (Ultimate beneficiary getting absolute interest)
 - 3. Prior life interest in favour of living person.
 - 4. The unborn person should be in existence before the death of last living person. There should not be any interval between termination of prior interest and consequent vesting in the ultimate beneficiary.
 - 5. The vesting of the interest in favour of the ultimate beneficiary may be postponed only up to the life or lives of living persons plus the minority of the ultimate beneficiary but not beyond that.
- **Perpetuity period – Extent – Maximum possible remoteness of vesting:**
 - Life of preceding interest + period of gestation of UB + minority period of the UB.

Vested and Contingent Interest

- On the basis of time of accruing (when transferee gets interest) interest can be either vested or contingent.
- **Vested Interest (Sec. 19)**
 - 1. No time has been specified;
 - 2. Specified that it takes effect immediately;
 - 3. It is to take effect on happening of an event which must happen (i.e. certain)
- **Not Effected by (explanation)**
 - Postponement of enjoyment; Prior interest; Direction for accumulation of income; Conditional limitation (sec. 28-event – interest passed to another person)
- **Nature**
 - Present fixed right; Title is complete on completion of transfer; transferable and heritable; can be Attached and brought to sale in execution of decree.

- **Contingent Interest (Sec. 21)**
- Vesting depends upon any contingency (uncertain future event);
- Dependent upon happening or not happening of any uncertain future event
- **Such interest takes effect only:**
 - 1. some specified future event happens; or
 - 2. specified uncertain event does not happen.
- **It becomes vested:**
 - 1. on happening of the event (when dependent on happening of specified uncertain event).
 - 2. when happening of the event becomes impossible (when dependent upon non- happening).
- Exception: getting interest upon attaining a particular age and also gets income from that interest before that age; It is vested interest.
- **Nature:**
 - Future possible interest; Not Heritable; Transferable, but transferee gets imperfect title; cannot be attached or brought to sale.

Conditional Transfer (Sec. 25)

- Transfer of property with certain conditions is known as conditional transfer.
- Conditions may be of three kinds:
- **1. Condition Precedent**
- It is prior to the transfer, i.e. precedes transfer. Terms of the transfer impose a condition to be fulfilled before a person can take interest in the property.
- Sec. 25 states that an interest dependent upon a condition fails, if: fulfillment of condition becomes impossible; forbidden by law; if permitted – defeat the law; fraudulent; implies injury to person or property; court- immoral or opposed to public policy.
- Sec. 26 condition substantially complied; deemed fulfilled; doctrine of cypress; law favors vesting;
- **2. Condition Subsequent**
- Such condition is required to be fulfilled after the transfer has taken place. Interest vested in the transferee is affected by fulfillment or non- fulfillment of that condition.
- Sec. 29 states that condition subsequent upon fulfillment of which second transfer is to take place must be strictly fulfilled.
- Sec. 10 (Restraining Alienation), Sec. 11 (Repugnant Interest); Sec. 12 (Interest determinable on insolvency/alienation); Sec. 17 (Accumulation beyond certain period) deals with void condition subsequent.
- **3. Collateral Condition**
- Condition required to be fulfilled simultaneously with the transfer.

Doctrine of Election (Sec. 35)

- Equitable Principle: No one can approbate and reprobate at the same time;
- The doctrine implies choosing between two alternative and inconsistent rights;
- 1. A person professes to transfer a property **not his own**;
- 2. In lieu of transfer, the transferor confers certain **benefits upon the owner** of property (direct);
- 3. The '*Transfer of property*' and '*conferring of benefits*' form part of the **same transaction** (independent and inseparable); Then the owner is bound to elect either: to take the benefit and transfer; or retain the property and give up benefit.
- Disappointed Transferee (when elected against transfer): reasonable compensation equal to value of the property from transferor/LR
- Mode: Express or Implied; Presumed to Accept: enjoyed benefit for 2 years without refusal; exhausts the benefit;
- The farm of Sultanpur is the property of C and worth Rs. 800. A by an instrument of gift professes to transfer it to B, giving by the same instrument Rs. 1,000 to C. C elects to retain the farm. He forfeits the gift of Rs. 1,000.
- In the same case, A dies before the election. His representative must out of the Rs. 1,000 pay Rs. 800 to B

Specific Transactions

Paid; or
Promised; or
Part-paid and part-promised

- **Sale** (Ch. III, Secs. 54-57)

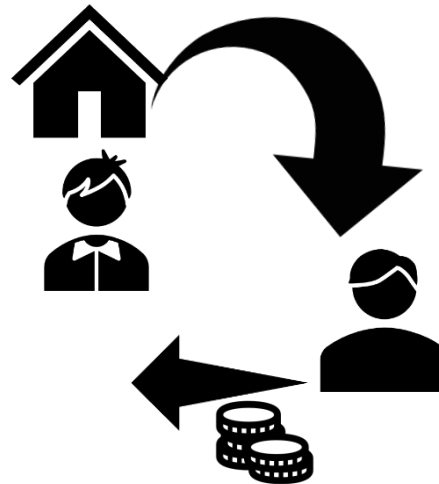
Sec. 54 – Sale is *Transfer of ownership* in exchange for *price*

Elements:

1. Parties: Seller must be competent; buyer may be any person (minor) but not disqualified by law.
2. Subject matter: Immovable property existent on the date of transfer.
3. Price: Fixed or deferred. Money consideration.
4. Conveyance: Transfer as prescribed under law: Delivery of possession / Registration

Contract for sale: agreement to sell; different from “of”; executory; intention to sell at a future date; terms settled between parties.

- **Mortgage** (Ch. IV, Secs. 58 – 104)
- As per Sec. 58 (a) - Mortgage is the *transfer of an interest in the specific immovable property for the purpose of securing*
- the payment of money advanced or to be advanced by way of loan, or
- an existing or future debt, or
- the performance of an engagement which may give rise to a pecuniary liability.
- **Essential Elements:**
- 1. Transfer of some interest;
- 2. Specific immovable property;
- 3. Purpose: Consideration of Mortgage



The transferor is called a **mortgagor**, (debtor)

the transferee a **mortgagee**; (creditor)

the principal money and interest of which payment is secured for the time being are called the **mortgage-money**

the instrument (if any) by which the transfer is effected is called a **mortgage-deed**.

- **Kinds of Mortgage:**

- **Simple Mortgage**

- No delivery possession; Mortgagors personal obligation; Right to cause sale.

- **Mortgage by Conditional Sale**

- Ostensible sale; Non payment- absolute; payment – void; Condition in same document

- **Usufructuary Mortgage**

- Delivery of possession; enjoyment of rents/profits; no personal liability; No foreclosure or sale

- **English Mortgage**

- Mortgagor binds to repay; transfers absolutely; proviso to retransfer on repayment.

- **Mortgage by Deposit of Title Deeds**

- Debt; Deposit of Deed; Intention to create security; Territorial Restrictions

- **Anomalous** (Combination of two or more: SMU ; UM by CS; customary)

Nature	Personal Liability of Mortgagor	Possession of Mortgagor	Registration	Right of foreclosure	Consequences if debt is not paid
1. Simple	✓	X	Always u/s 59	No	money decree or sale
2. MCS	X	X	✓ if > ₹100	Yes u/s 67(a)	ostensible sale converts to absolute sale
3. UM	X	✓	✓ if > ₹100	No	M'gee to retain possession until debt is paid.
4. EM	✓	✓	✓ if > ₹100	No	Money decree Sale of M. property
5. MDTD	✓	X	No Reg.	No	Money decree Sale

- **Mortgagor's Right of Redemption**: (calling back the interest) (Absolute Right)
- Introduced by Equity Courts in England to rescue mortgagor, who in default loses all rights in his property
- Sec. 60 : Mortgagor's right to recover the property after payment of loan.
- ***"once a mortgage, always a mortgage"*** – His right of redemption cannot be defeated by any contrary agreement even though mortgagor agreed to it.
- **Clog on redemption** (condition preventing redemption) is void, if:
 - Imposed by mortgagee (not a stranger)
 - Incorporated in mortgage deed itself
 - Against public policy; malafide; unreasonable
 - Absolute restraint on redemption; unreasonably long period
- **Instances**: Sale in default; restraining alienation; postponement in default etc.
- ***Kreglinger v. New Patagonia Meat & Cold Storage Co.***

- **Mortgagee's Right of Foreclosure or Sale:** Sec. 67 (Not an Absolute Right)
- Foreclosing the Mortgagor's right of redemption.
- Right arises at any time after mortgage money has become due and before a decree for redemption.
- Remedy depends upon type of Mortgage; Ex. In MCS suit for sale is not required, mortgagee files a suit for foreclosure.
- In Foreclosure the mortgagee becomes absolute owner of the property and the debt is discharged.

Lease (Ch. V, Secs. 105-117)

- **Sec 105:** Lease is transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of price paid or promised, or of money, a share of crops, service or any other thing, of value, to be rendered periodically or on specified occasion to the transferor by the transferee who accepts the transfer on such terms.
- **Essentials:**
- Contracting Parties: Lessor and Lessee ; both must be competent;
- Transfer of limited interest: right to enjoy
- Immovable Property: Lessor must have the right to make such transfer.
- Term: fixed, ascertainable or perpetual.
- Consideration: premium or rent

Section 106 provides for the duration of the lease in the absence of the lease agreement.

A lease of immovable property (other than for agricultural or manufacturing purposes	lease from month to month, terminable, on the part of either lessor or lessee, by 15 days notice
A lease of immovable property for agricultural or manufacturing purposes	lease from year to year, terminable, on the part of either lessor or lessee, by 6 months notice
lease of immovable property from year to year, or for any term exceeding one year or reserving a yearly rent,	can be made only by a registered instruments
All other (other than from year to year, or for any term exceeding one year or reserving a yearly rent) leases of immovable property may be made	Either by a registered agreement or by oral agreement accompanied by delivery of possession.

- **Determination of lease**

- Section 111 states about the determination of the lease, which lays down the ways in which lease is terminated:
- Lapse of time – When the prescribed time of the lease expires, the lease is terminated.
- Specified event – When there is a condition on time of lease depending upon a happening of an event.
- Interest – Lessor's interest to lease the property may cease, hence resulting in the termination of the lease.
- Same owner – When the interest of both lessor and lessee are transferred or vested in the same person.
- Express Surrender – This happens when the lessee ceases to have an interest in the property and comes into a mutual agreement with the lessor.
- Implied Surrender – When the lessee enters into a contract with another for the lease of property, this is an implied surrender of the existing lease.
- Forfeiture – There are three ways by which a lease can be terminated:
 - When there is a breach of an express condition by the lessee. The lessor may get the possession of the property back.
 - When lessee renounces his character or gives the title of the property to a third person.
 - When the lessee is termed as insolvent by the banks, and if the conditions provide for it, the lease will stand terminated.
- Expiry of Notice to Quit – When the notice to quit by the lessor to the lessee expires, the lease will also expire.

Gift (Ch. VII, Secs. 122-129)

- Gift is defined in **Section 122** of the act as:
- “the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.”
- **Essential Elements Of Gift**
- **Parties to the gift** - There must be two parties i.e. the donor and the donee. The transferor is called the donor and he must be a competent person (competency as defined in Indian Contract act 1872). The transferee is called the donee and he need not be competent to contract. A gift made to a minor or an insane person or even if it is made to an unborn person is valid and can be accepted by their guardian.
- **Transfer of ownership:** When a property is transferred through gift, the right created in favor of donee is an absolute right i.e. ownership of property is transferred.
- **Subject matter:** The subject matter of gift can be moveable or immovable property, but it should be in existence and the donor should have vested right in that property and not contingent.
- **Without consideration:** A gift must be gratuitous i.e. without consideration. It must be a pecuniary consideration.
- **Voluntarily:** It must be made with donor’s free will and free consent without any force, coercion, undue influence. If it is not done voluntarily then the gift is void. Voluntarily done also means that donor had full knowledge about the transaction and its nature.
- **Acceptance of gift:** A gift must be accepted by the donee. Acceptance made can be expressed or implied but it must be accepted before the death of the donee and before the revocation by the donor.

- **Section 123: Transfer how effected**

- According to section 123 of the Transfer of Property Act, there are two ways to execute the transfer:

- By registration

- By delivery

- The method of execution mainly depends upon the nature of the property. When it is a movable property, delivery of possession is sufficient but when it is an immovable property registration is compulsory irrespective of the valuation of the property.

- **Sec. 127: Onerous Gift**

- Burdened with liabilities; if accepting the benefit also accept the burden. (burdened shares and profitable shares)

- Se. 128: Universal Donee: A person who gets all the properties of the donor

- The donee is liable for all the debts and liabilities of the donor due at the time of the gift. However, his liability is only to the extent of property comprised in the gift.

***The Negotiable Instruments Act,
1881***

MEANING OF NEGOTIABLE INSTRUMENT

Negotiable Instruments is an instrument (the word instrument means a document) which is freely transferable (by customs of trade) from one person to another by mere delivery or by indorsement and delivery. The property in such an instrument passes to a *bonafide* transferee for value.

The Act does not define the term 'Negotiable Instruments'. However, Section 13 of the Act provides for only **three kinds of negotiable instruments** namely, **bills of exchange, promissory notes and cheques, payable either to order or bearer.**

The Negotiable Instruments Act, 1881

- ❑ Is an act to define and amend the law relating to Promissory notes, Bills of exchange, Cheques
- ❑ Extends to the whole of India
- ❑ Does not affect The Indian paper currency act, 1871
- ❑ Came into force with effect from **first day of march, 1882**
- ❑ “Banker” includes any persons acting as a banker and any post office saving bank
- ❑ 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, or to the order of, a certain person, or to the bearer of the instruments – Sec 4
- ❑ An IOU is not an example of “promissory note”. “Mr. B, I.O.U Rs . 1,000.” is not a promissory note. As against this, “I acknowledge myself to be indebted to B in Rs 1,000, to be paid on demand, for value received” is an example of a promissory note.

- ❑ A promissory note does not contain a conditional undertaking
- ❑ A “promissory note” is an instrument to pay a certain sum of money to the order of, a certain person, or to the bearer of the instrument
- ❑ In a promissory note, two parties are involved
- ❑ A “promissory note” contains an unconditional promise by maker to pay the payee
- ❑ The definition of “promissory note” has been defined in the NI act in section 4
- ❑ 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 instruments
- ❑ Section 5 of the NI act deals with Bills of exchange
- ❑ In case of “bills of exchange”, the acceptance is necessary if the bill is payable after sight

- ❑ 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 – Sec 6
- ❑ A cheque is a BOE and has been defined under The Negotiable Instrument Act, 1881
- ❑ A cheque is a BOE drawn upon a specified banker and payable on demand
- ❑ The cheque cannot contain a conditional order
- ❑ The maker of a bill of exchange or cheque is called The drawer
- ❑ **Drawee in case of need:**
 - When the bill or in any endorsement thereon the name of any person is given in addition to the drawee to be resorted to in case of need, such person is called a “drawee in case of need”

- ❑ The person who is directed by the maker of a BOE or cheque to pay is called the **Drawee**
- ❑ The person named in the instruments, to whom or to whose order the money is by the instrument directed to be paid, is called a **Payee**
- ❑ The “**holder**” of a promissory note, BOE or cheque means:
 - Any person entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto
- ❑ Holder is entitled at the time of loss or destruction of a note, bill or cheque
- ❑ “**Holder in due course**” means any person who for consideration became the possessor of a promissory note, BOE or cheque if payable to bearer, or the payee or indorsee thereof, if payable to order, before the amount mentioned in it became payable and without having sufficient cause to believe that any defect existed in the

title of the person from whom he derived his title

❑ A holder in due course is a person who becomes the possessor of the instruments:

○ For consideration

○ Before maturity

○ Without any notice as to the defect in title of the transferor

❑ **A “holder in due course” of a negotiable instruments:**

○ **Can sue on the instruments in his own name**

❑ **“Payment in due course”** means the payment in accordance with the apparent tenor of the instruments 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

❑ **Inland instruments** means a promissory note, BOE or cheque drawn or

- ❑ A promissory note, BOE or cheque drawn or made out of India and made payable in, or drawn upon any person resident in India shall be deemed to be Foreign instrument
- ❑ A “negotiable instrument” means a promissory note, bill of exchange and cheque payable either to order or to bearer
- ❑ A promissory note, BOE or cheque is payable to bearer which is expressed to be so payable or on which the only or last endorsement is an endorsement in blank
- ❑ A negotiable instruments may be made payable:
 - To two or more payees jointly
 - In the alternative to one or two

- To or some of several payees

- The following are negotiable instruments:

- A promissory note, BOE or cheque is payable to order which is expressed to be so payable or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it shall not be transferable

- **Section 13 of the NI act defines the words , “negotiable instruments”**

- Banker demand draft are the negotiable instruments

- A promissory note, BOE or cheque is transferred to any person, so as to constitute the person the holder thereof, The maker or holder of a negotiable instrument signs the same, otherwise than as such maker, for the purpose of negotiation, on the back or face thereof or on a slip of paper annexed thereto, or so signs for the same purpose a stamped paper intended to be completed as a negotiable instrument, he is said to indorse the same. This activity is called as Endorsement

- ❑ **Blank Endorsement**: The endorser signs his name on the back of the instrument only.
- ❑ An instrument which may be constructed either as a promissory note or BOE is called as ambiguous instrument
- ❑ If the amount mentioned on the cheque differs in words and figures the amount stated in words should be considered.
- ❑ A promissory note or BOE are payable on demand in which no of time for payment is specified .
- ❑ Where one person signs and delivers to another a paper stamped in accordance with the law relating to negotiable instruments then in force in India, and either wholly blank or having written thereon an incomplete negotiable instruments, he thereby gives prima facie authority to the holder thereof to make or complete, as the case may be upon it a negotiable instrument, for any amount specified therein and not exceeding the amount covered by the stamp. This is called Inchoate stamped instrument
- ❑ The days of grace of maturity of promissory note or BOE is the third day after the day on which it is expressed to be payable
- ❑ Instruments entitled to 'period of grace' is a bill or note payable 'after sight'
- ❑ A negotiable instrument dated 29th January, 2018, is made payable at one month after date. The instrument is at maturity on the third day after the 28th February, 2018

- ❑ A negotiable instrument, dated 30th august, 2017, is made payable three months after date. The instrument is at maturity on the 3rd december, 2017
- ❑ A promissory note or bill of exchange, dated 31st august, 2017 is made payable three months after date. The instruments is at maturity on the 3rd december, 2017
- ❑ When the day on which a promissory note or BOE is at maturity is a public holiday, the instrument shall be deemed to be due on the next preceding business day
- ❑ A minor may draw, endorse, deliver and negotiate such instruments so as to bind all parties except himself
- ❑ The **drawee** of a cheque having **sufficient funds** of the drawer in his hands properly applicable to the payment of such cheque must pay the cheque when duly required so to do, and, in default of such payment, must compensate the drawer for any loss or damage caused by such default. This is governed by **section 31** of the NI act .
- ❑ A negotiable instrument made, drawn, accepted, indorsed or transferred without consideration:
 - Creates no obligation of payment between the parties to the transactions
- ❑ A promissory note, BOE or cheque payable to bearer is negotiable by delivery thereof

- ❑ A promissory note, bill of exchange or cheque payable to order, is negotiable by endorsement and delivery thereof
- ❑ Where an endorsement by express words, restrict or exclude the right of further negotiability of the instrument, it is called Restrictive endorsement
- ❑ Where the holder of an instrument endorses it in a manner that does not incur any liability as an endorser, such endorsement is called as Sans recourse endorsement
- ❑ Part amount on the instrument cannot be endorsed
- ❑ A holder of an instrument cannot sue in his own name in relation to the instrument
- ❑ Sole maker, drawer, payee, indorse , all of several joint makers, drawers ,payee or indorsees can make negotiation of a negotiable instrument
- ❑ **The liabilities of a collecting banker:**
 - To present cheque within a reasonable time else liable for damages
 - To handover the proceeds after the realisation without delay

- ❑ When no rate of interest is specified in the instrument, interest on the amount due thereon shall, notwithstanding any agreement relating to interest between any parties to the instrument, be calculated at the rate of 18% pa
- ❑ Under **section 85 a paying banker is protected where a cheque payable to order purports to be endorsed** by or on behalf of the payee, the drawee bank is discharged by payment in due course
- ❑ The liability of a banker when a cheque has been materially altered but does not appear to have been so altered, and payment thereof has been made according to the apparent tenor thereof at the time of payment and otherwise in due course:
 - The banker shall discharge from all liability thereon, and such payment shall not be questioned by reason of the instrument having been altered
- ❑ **A bill is said to be dishonoured:**
 - By non-acceptance by the drawee
 - One of several drawee makes default in acceptance upon being duly required to accept the bill
 - Where presentment is excused and the bill is not accepted

❑ The protection to paying bank for crossed cheque is covered under **section 128**

❑ Conditions for availing statutory protections available to a banker under section 131:

○ Banker has in **good faith and without negligence** received payment

○ The payment is **received for a customer** of the bank

○ Cheque is **crossed generally or specially** before it is presented to the paying bank

❑ The liability of the drawer of a foreign bills of exchange is regulated in all essential matters by the law of the place where the instrument is made

❑ 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 the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this act, be punished with:

○ **Imprisonment for a term which may be extended to 2 years, or with fine which may extend to twice the amount of the cheque, or with both - Sec 138**

❑ For invoking section 138 of NI act, the payee or the holder in due course of the cheque, as the case may be, shall have to make a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, Within 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid

❑ For invoking the provisions of section 138 whether a legally enforceable debt or other liability should exist.

❑ Courts eligible to entertain any offence punishable under section 138:

○ Court not inferior to that of a metropolitan magistrate

○ Court not inferior to that of a judicial magistrate of the first class

❑ Notwithstanding anything contained in the code of criminal procedure, 1973 no court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque and such complaint is made Within one month of the date on which the cause of action arises under clause (c) of the provision to section 138

❑ With respect to multicurrency cheque dishonour the offence under section 138 shall be inquired into and tried only by a court within local jurisdiction of the payee or the holder or the drawer .

- ❑ In the case of any conviction in a summary trial under section 143, it shall be lawful for the magistrate to pass a sentence of imprisonment for a term not exceeding one year and an amount of fine exceeding 5000 rupees
- ❑ The court trying an offence under section 138 may order the drawer of the cheque to pay interim compensation to the complainant, which shall 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
- ❑ The interim compensation payable under section 143A may be recovered as if it were a fine as per the provisions of the code of criminal procedure, 1973
- ❑ Notwithstanding anything contained in the code of criminal procedure, 1973 (2 of 1974), every offence punishable under the NI act shall be Compoundable
- ❑ In an appeal by the drawer against conviction under section 138, the appellate court may order the appellant to deposit such sum which shall be a minimum of 20% of the fine or compensation awarded by the trial court

THE CODE OF
CIVIL
PROCEDURE,
1908

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Rule 58. Adjudication of claims to, or objections to attachment of, property.

Courts to try all civil suits unless barred (SECTION 9)

The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

Explanation I— A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to **religious rites or ceremonies**.

Explanation II — For the purposes of this section, it is immaterial whether or not any fees are attached to the office referred to in Explanation I or whether or not such office is attached to a particular place.

COMMENTS

Jurisdiction of court

- The jurisdiction of the court and the right of a party emerging from section 9 of the code is not an absolute right, but contains inbuilt restrictions. Jurisdiction of the court can be executed by law or by clear intendment arising from such law; Chloro Controls (I) Pvt. Ltd. V. Seven Trent Water Purification Inc. JT 2010 (10) SC 187: (2012) 9 SCALE 595: 2012 (6) R.A.J. 1.
- i. The appropriate forum for resolution of an industrial dispute is the forum constituted under Industrial Disputes Act, 1947. Jurisdiction of Civil Court is impliedly barred in such cases: C.T. Nikam v. Municipal Corporation of Ahmedabad, AIR 2002 SC 997.
- ii. Telephone bill – Jurisdiction of Civil Court – The civil court has jurisdiction to enforce the right of a subscriber under section 7B of the Telegraph Act; Union of India v. Sasi S., AIR 1999 Ker 36

- iii. The application for grant of interim relief would not be disposed off till decision on question of jurisdiction although ad-interim relief can be granted in view of provisions under section 9A(2)
- iv. Under section 9 of the CPC, the jurisdiction of Civil Court with regard to a particular matter can be said to be excluded if there is an express provision or by implication it can be inferred that the jurisdiction is taken away; Union of India v. Sasi S., AIR 1999 Ker 36.

Stay of suit (SECTION 10)

No Court shall proceed with the **trial of any suit** in which the **matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending** in the same or any other Court in India have jurisdiction to grant the relief claimed, or in any Court beyond the limits of India established or continued by the Central Government and having like jurisdiction, or before the Supreme Court.

Explanation — The pendency of a suit in a foreign court does not preclude the courts in India from trying suit founded on the same course of action.

COMMENTS

- (i) The Language of section 10 suggests that it is referable to a suit instituted in the civil court and it cannot apply to proceedings of other nature instituted under any other statute; National Institute of Mental Health and Neuro Sciences v. C. Parmeshwara, AIR 2005 SC 242.
- (ii) Two suits – Between same parties- Involving same subject- matter and same questions- Held, subsequent suit should be stayed; Radhika Konel Parekh v. Konel Parekh AIR 1993 Mad 90: (1993) LW 159: (1993) 1 Mad LJ 163

Res judicata (SECTION 11)

No Court shall try any suit or issue in which the matter directly and substantially in issue has been in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been **heard and finally decided** by such Court.

Explanation I. — The expression “former suit” shall denote a suit which has been decided prior to a suit in question whether or not it was instituted prior thereto.

Explanation II. — For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Explanation III. — The matter above referred to must in the former suit have been alleged by

one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV. — Any matter which **might and ought to have been made ground of defence or attack** in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V. — **Any relief** claimed in the plaint, which is **not expressly granted** by the decree, shall for the purposes of this section, **be deemed to have been refused.**

Explanation VI. — Where persons litigate bona fide in respect of a **public right or of a private right claimed in common for themselves and others**, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

- Explanation VII. — The provisions of this section **shall apply to a proceeding for the execution of a decree** and references in this section to any suit, issue or former suit shall be construed as references, respectively, to a proceeding for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.

- Explanation VIII. — **An issue heard and finally decided by a Court of limited jurisdiction**, competent to decide such issue, shall operate as res judicata in a subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised.

COMMENTS

- i. In order to operate as res judicata, the finding must be such, that it disposes of a matter that is directly and substantially in the issue of the former suit, and that the said issue must have been heard and finally decided by the court trying such suit. **A matter which is collaterally or incidentally in issue for the purpose of deciding a matter which is directly issue in the case, cannot be made the basis for a plea of res judicata;** Rami Gupta v. Gobi Krishna Agrawal, AIR 2013 SC 3099
- ii. The principal of res judicata is a procedural provision. **A jurisdictional question if wrongly decided would not attract the principles of res judicata.** When an order is passed without jurisdiction, the same becomes a nullity. When an order is a nullity, it cannot be supported by invoking procedural principle; Management of Sonapat Co-op. Sugar Mills Ltd. V. Amit Singh, AIR 2005 SC 1050
- iii. First writ petition filed on the ground of **apprehended bias and subsequent second petition was filed on allegations of actual bias, is not barred by res judicata;** G.N. Kayak v. Goa University, AIR 2002 SC 790

- iv. There is a **distinction between issue estoppel and res judicata** debars a court from exercising its jurisdiction to determine the lies if it has attained finality whereas the **doctrine of issue estoppel is invoked against the party**. If such issue is decided against him, he would be estopped from raising the same in the latter proceedings. The doctrine of res judicata creates a different kind of estoppel viz. estoppel by Accord; Bhang Kumar Jain v. Archana Kumar, AIR 2005 SC 626
- v. Section 11 of the CPC has no doubt some technical aspects for instance the rule of constructive res judicata may be said to be technical but the basis of which the said rule rests is founded on the consideration of Public Policy; Sumer Mal v. State of Rajasthan, AIR 2000 Raj 1
- vi. Where the Sangh has been **duly represented in the previous court proceedings and were litigating bona fidely which resulted in failure cannot be allowed to lay any objection in execution or to plead nullity of decree hence doctrine of res judicata applies**. The decree of ejectment will bind every member of Sangh; Songhai Lal Chand Jain v. Rasthriya Swayam Sewak Sangh, Panna, JT 1996 (3) SC 64

Institution of suits (SECTION 26)

(1) Every suit shall be instituted by the **presentation of a plaint** or in such other manner as may be prescribed.

(2) In every plaint, **facts shall be proved by affidavit:**

Provided that such an affidavit shall be in the form and manner as prescribed under Order VI of rule 15A.

Summons to defendants (SECTION 27)

Where a suit has been duly instituted, a **summons** may be issued to the defendant to appear and answer the claim and may be served in manner prescribed on such day **not beyond thirty days from date of the institution of the suit.**

Service of summons where defendant resides in another State (SECTION 28)

(1) A summons may be sent for service in another State to such Court and in such manner as may be **prescribed by rules in force in that State.**

(2) The Court to which such summons is sent shall, upon receipt thereof, **proceed as if it had been issued by such Court and shall then return the summons to the Court of issue together with the record (if any) of its proceedings** with regard thereto.

(3) Where the **language of the summons sent** for service in another State is **different** from the language of the record referred to in sub-section (2), a **translation** of the record,—

(a) in Hindi, where the language of the Court issuing the summons is Hindi, or

(b) in Hindi or English where the language of such record is other than Hindi or English, shall also be sent together with the record sent under that sub-section.

Service of foreign summonses (SECTION 29): Summonses and other processes issued by

(a) any Civil or Revenue Court established in any part of India **to which the provisions of this Code do not extend**, or

(b) any Civil or Revenue Court established or continued by the authority of the **Central Government outside India**, or

(c) any other Civil or Revenue Court outside India to which the Central Government has, by notification in the Official Gazette, declared the provisions of this section to apply, may be sent to the Courts in the territories to which this Code extends, and served as if they were summonses issued by such Courts.

Power to order discovery and the like (SECTION 30): Subject to such conditions and limitations as may be prescribed, the Court may, at any time, either of its own motion or on the application of any party,—

- (a) make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of **interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents** or other material objects producible as evidence;
- (b) **issue summonses to persons whose attendance** is required either to give evidence or to produce documents or such other objects as aforesaid;
- (c) order any fact to be proved by affidavit.

Summons to witness (SECTION 31): The provisions in **sections 27, 28 and 29 shall apply to summonses** to give evidence or to produce documents or other material objects.

Penalty for default (SECTION 32): The Court may compel the attendance of any person to whom a summons has been issued under section 30 and for that purpose may—

(a) issue a **warrant for his arrest**;

(b) **attach and sell his property**;

(c) **impose a fine upon him not exceeding five thousand rupees**;

(d) order him to **furnish security** for his appearance and in default commit him to the civil prison.

Court by which decree may be executed (SECTION 38): A decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution.

COMMENTS

- (i) Retransfer of execution proceedings at the instance of the judgement debtor do not preclude the decree-holders from initiating fresh execution proceedings against other judgement debtors at original court; Om Prakash v. M/s. Hargovind raj kumar, AIR 1993 Raj 68
- (ii) Injunction decree is not enforceable. However, it can be enforced by seeking police aid on necessary directions from the court; Matha Gavarayya v. District Collector, E.G Distt., AIR 1993 AP 103

Transfer of decree (SECTION 39):

(1) The Court which passed a decree may, on the application of the decree-holder, send it for execution to another Court of competent jurisdiction-

(a) if the person against whom the decree is passed actually and voluntarily **resides or carries on business, or personally works for gain**, within the local limits of the jurisdiction of such other Court, or

(b) if such person has **not property** within the local limits of the jurisdiction of the Court which passed the decree **sufficient to satisfy such decree** and has property within the local limits of the jurisdiction of such other Court, or

(c) if the decree directs the **sale or delivery of immovable property situate outside the local limits** of the jurisdiction of the Court which passed it, or

(d) if the Court which passed the decree considers **for any other reason**, which it shall record in writing, that the decree should be executed by such other Court.

(2) The Court which passed a decree may of its own motion send it for execution **to any subordinate Court** of competent jurisdiction.

(3) For the purposes of this section, a Court shall be deemed to be a Court of competent jurisdiction if, at the time of making the application for the transfer of decree to it, such Court would have **jurisdiction to try the suit in which such decree was passed.**

(4) Nothing in this section shall be deemed to authorise the Court which passed a decree to execute such decree against any person or property outside the local limits of its jurisdiction. **(For Execution outside its Jurisdiction, Transfer of decree is essential)**

Transfer of decree to Court in another State (SECTION 40): Where a decree is sent for execution in another State, it shall be sent to such Court and executed in such manner **as may be prescribed by rules in force in that State.**

Result of execution proceedings to be certified (SECTION 41): The Court to which a decree is sent for execution **shall certify to the Court which passed it the fact of such execution, or where the former Court fails to execute the same the circumstances attending such failure.**

Powers of Court in executing transferred decree (SECTION 42):

(1) The Court executing a decree sent to it shall have the **same powers in executing such decree as if it had been passed by itself**. All persons who disobey or obstruct the execution of the decree shall be punishable by such Court in the same manner as if it had passed the decree. And its order in executing such decree shall be subject to the same rules in respect of appeal as if the decree had been passed by itself.

(2) Without prejudice to the generality of the provisions of sub-section (1), the powers of the Court under that sub-section shall include the following powers of the Court which passed the decree, namely:—

(a) **power to send the decree for execution to another Court** under section 39;

(b)(b) power to execute the decree **against the legal representative** of the deceased judgment-debtor under section 50;

(c) power to **order attachment** of a decree.

(3) A Court passing an order in exercise of the powers specified in sub-section (2) shall send a copy thereof to the Court which passed the decree.

(4) Nothing in this section shall be deemed to confer on the Court to which a decree is sent for execution any of the following powers, namely:—

(a) power to order execution at the instance of the transferee of the decree;

(b) in the case of a decree passed against a firm, power to grant leave to

execute such decree against any person, other than such a person as is referred to in clause (b), or clause (c), of sub-rule (1) of rule 50 of Order XXI.(admitted/adjudged as a partner ; individually summoned as a partner)

Execution of decrees passed by Civil Courts in places to which this Code does not extend (SECTION 43):

Any decree passed by any Civil Court established in any part of India to which the **provisions of this Code do not extend**, or by any Court established or continued by the authority of the Central Government **outside India**, may, if it cannot be executed within the jurisdiction of the Court by which it was passed, be executed in the manner herein provided within the jurisdiction of any Court in the territories to which this Code extends. **(Gives power of execution to competent courts)**

Execution of decrees passed by Revenue Courts in places to which this Code does not extend (SECTION 44): The State Government may, by notification in the Official Gazette, declare that the decrees of any Revenue Court in any part of India to which the provisions of this Code do not extend, or any class of such decrees, **may be executed in the State as if they had been passed by Courts in that State.**

Execution of decrees passed by Courts in reciprocating territory (SECTION 44A):

(1) Where a certified copy of a decree of any of the superior Courts of any reciprocating territory has been filed in a District Court, the decree may be executed in India as if it had been passed by the District Court.

(2) Together with the certified copy of the decree shall be filed a certificate from such superior Court stating the extent, if any, to which the decree has been satisfied or adjusted and such certificate shall, for the purposes of proceedings under this section, be conclusive proof of the extent of such satisfaction or adjustment.

(3) The provisions of section 47 shall as from the filing of the certified copy of the decree apply to the proceedings of a District Court executing a decree under this section, and the District Court shall refuse execution of any such decree, if it is shown to the satisfaction of the Court that the decree falls within any of the exceptions specified in clauses (a) to (f) of section 13. (When foreign judgements are not conclusive)

Explanation 1.— “Reciprocating territory” means any country or territory outside India which the Central Government may, by notification in the Official Gazette, declare to be a reciprocating territory for the purposes of this section; and “superior Courts”, with reference to any such territory, means such Courts as may be specified in the said notification.

Explanation 2.— “Decree” with reference to a superior Court means any decree or judgment of such Court under which a sum of money is payable, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty, but shall in no case include an arbitration award, even if such an award is enforceable as a decree or judgment.

Execution of decrees outside India (SECTION 45): So much of the foregoing sections of this Part as empowers a Court to send a decree for execution to another Court shall be construed as empowering a Court in any State to send a decree for execution to any Court established by the authority of the Central Government outside India to **which the State Government has by notification in the Official Gazette declared this section to apply.**

- **Seizure of property in dwelling-house (SECTION 62):**

- **(1)** No person executing any process under this Code directing or authorizing seizure of movable property shall enter any dwelling-house **after sunset and before sunrise.**

- **(2)** No outer door of a dwelling-house shall be broken open unless such dwelling-house is in the occupancy of the **judgment-debtor and he refuses or in any way prevents access** thereto, but when the person executing any such process has duly gained access to any dwelling-house, he may break open the door of any room in which he has reason to believe any such property to be.

(3) Where a room in a dwelling-house is in the **actual occupancy of a woman who, according to the customs of the country, does not appear in public**, the person executing the process shall give notice to such woman that she is at liberty to withdraw; and, after allowing reasonable time for her to withdraw and giving her reasonable facility for withdrawing, he may enter such room for the purpose of seizing the property, using at the same time every precaution, consistent with these provisions, to prevent its clandestine removal.

Property attached in execution of decrees of several Courts (SECTION 63):

(1) Where property not in the custody of any Court is under attachment in execution of decrees of more Courts than one, the Court which shall receive or realize such property and shall determine any claim thereto and any objection to the attachment thereof shall be the **Court of highest grade, or, where there is no difference in grade between such Courts, the Court under whose decree the property was first attached.**

(2) Nothing in this section shall be deemed to invalidate any proceeding taken by a Court executing one of such decrees.

Explanation.—For the purposes of sub-section (2), “proceeding taken by a Court” does not include an order allowing, to a decree-holder who has purchased property at a sale held in execution of a decree, set off to the extent of the purchase price payable by him. **(Set off may be allowed to be adjusted against the auction purchase price)**

Private alienation of property after attachment to be void (SECTION 64):

(1) Where an attachment has been made, **any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment,** shall be void as against all claims enforceable under the attachment.

(2) Nothing in this section shall apply to any private transfer or delivery of the property attached or of any interest therein, made in pursuance of any contract for such **transfer or delivery entered into and registered before the attachment.**

COMMENTS

Sale of attached property before dismissal of execution application is void; Nancy John Lyndon v. Prabhati Lal Chodhary, AIR 1987 SC 2061

Explanation. — For the purpose of this section, claims enforceable under an attachment include claims for the rateable distribution of assets.

DISTRIBUTION OF ASSETS

Proceeds of execution-sale to be rateably distributed among decree-holders (SECTION 73):

(1) Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have **not obtained satisfaction thereof**, the assets, **after deducting the costs of realization, shall be rateably distributed** among all such persons:

Provided as follows :—

(a) where any property is sold subject to a mortgage or charge, the mortgage or incumbrancer shall not be entitled to share in any surplus arising from such sale;

(b) where any property liable to be sold in execution of a decree is subject to a mortgage or charge, the Court may, with the consent of the mortgagee or incumbrancer, order that the property be sold free from the mortgage or charge, giving to the mortgagee or incumbrancer the same interest in the proceeds of the sale as he had in the property sold;

(c) where any immovable property is sold in execution of a decree ordering its sale for the discharge of an incumbrance thereon, the proceeds of sale shall be applied—

First, in defraying the **expenses of the sale**; **Secondly**, in discharging **the amount due under the decree**;

thirdly, in discharging the **interest and principal monies due on subsequent incumbrances (if any)**; and **fourthly**, rateably among the holders of decrees for the **payment of money against the judgement-debtor**, who have, prior to the sale of the property, **applied to the Court which passed the decree ordering such sale for execution of such decrees**, and have not obtained satisfaction thereof.

(2) Where all or any of the assets liable to be rateably distributed under this section are **paid to a person not entitled to receive** the same, any person so entitled may sue such person to **compel him to refund the assets**.

(3) Nothing in this section affects any right of the Government.

Power of Court to issue commissions (SECTION 75): Subject to such conditions and limitations as may be prescribed, the Court may issue a commission_(e.g. Shah Commission)—

- (a)** to examine any person;
- (b)** to make a local investigation;
- (c)** to examine or adjust accounts; or
- (d)** to make a partition;
- (e)** to hold a scientific, technical, or expert investigation;
- (f)** to conduct sale of property which is subject to speedy and natural decay and which is in the custody of the Court pending the determination of the suit;
- (g)** to perform any ministerial act.

Commission to another Court (SECTION 76): (1) A commission for the examination of any person may be issued to any Court **(not being a High Court) situate in a State other than the State in which the Court of issue is situate and having jurisdiction in the place in which the person to be examined resides.**

(2) Every Court receiving a commission for the examination of any person under sub-section (1) shall examine him or cause him to be examined pursuant thereto, and the commission, when it has been duly executed, shall be returned together with the evidence taken under it to the Court from which it was issued, unless the order for issuing the commission has otherwise directed, in which case the commission shall be returned in terms of such order.

Letter of request (SECTION 77): In lieu of issuing a commission the Court may issue a letter of request to examine a witness residing at any place not within India.

Commissions issued by foreign Courts (SECTION 78): Subject to such conditions and limitations as may be prescribed the provisions as to the execution and return of commissions for the examination of witnesses shall apply to commissions issued by or at the instance of—

- (a)** Courts situate in any part of India to which the provisions of this Code do not extend; or
- (b)** Courts established or continued by the authority of the Central Government outside India; or
- (c)** Courts of any State or country outside India.

Settlement of Disputes outside the Court (SECTION 89)

(1) 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 –

- (a) arbitration;
- (b) conciliation;
- (c) judicial settlement including settlement through Lok Adalat; or
- (d) mediation

(2) Where a dispute has been referred-

- (a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;
- (b) 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 Authorities Act, 1987 and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;
- (c) 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 Authorities Act, 1987 shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;
- (d) for mediation, the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed." The objective of Section 89 is to ensure that the court makes an endeavour to facilitate out-of-court settlements through one of the ADR processes before the trial commences.

Order 21:

Order 21 of the Code of Civil Procedure deals with the solemn act of execution of the decrees passed by the Courts from grassroots to the top. Ultimately, after the judgment attains finality or where there is no stay in the execution by any Appellate or Revisional Court, it is the **Court of original jurisdiction which performs this sacred act of implementation of the execution.** It has been often seen that in view of less number of units prescribed for execution of the decree, the executions are not give that much time and importance as required and desired.

It is only the execution, which reveals and signifies the importance of the decrees to be passed and the pedestal of the Court and sanctity of the document. As such, the decrees are required to be executed with force, so that the Decree Holder having a document containing declaration of his rights may not feel cheated or helpless having earned no fruits of the lis got settled by him from the Court even after spending decades altogether.

This Order can be **divided into six parts**. If the Courts deal the executions while considering the applications/objections topic wise, it would be easy for them to adjudicate the matter easily.

The main classification is as under:-

(1) Applications for execution and the process to be applied.

(2) Stay of executions.

(3) Mode of executions.

(4) Sale of immovable property and movable property.

(5) Adjudication of the claims and objections.

(6) Resistance and delivery of possession.

ORDER 21

Rule No	Title	Comment/Remarks
Rule 1	Method of adjustment in money decree	
Rule 42	Attachment before judgment in execution	
Rule 29	Whether the decree of other Court could be stayed	
Rule 35 (3) and Rule 97	These two Rule provides a right to the Decree Holder to complain against a person, who creates resistance in the execution of the decree.	

Rule No	Main Head	Comment/Remarks
Rule 41	Arrest and detention	
Rule 16	The assignment and transfer of the decree made, when assignment is complete. It was observed by the Hon'ble Supreme Court in Jugalkishore's case (supra), as under	
Rule 99	Dispossession by decree holder or purchaser	
Rule 105	Hearing of application	

Rule No	Main Head	Comment/Remarks
Rule 106	Setting aside orders passed ex parte	
Rule 92(2)	The conditions when the sale could be set aside after auction	
Rule 89	The Hon'ble Supreme Court in case Tribhovandas Purshottamdas Thakkar Vs. Ratilal Motilal Patel and others, 1968 AIR (SC) 372	
Rule 90	Deals with the situations when the sale could be set aside	

Rule No	Main Head	Comment/Remarks
Rule 58	Attachment of mortgaged property	
Rule 35(2)	Attachment of share of coparcenary property and limitation to take possession of such property:-	
Rule 35(3)	Extent of force to be used to take possession	
Rule 17, 34, 4, 15, 14	Recovery of maintenance by sale of the property over which charge was created-	

Order 21 Rule 1 CPC: Method of adjustment in money decree –

Order 21 Rule 1 of the CPC provides for the modes of paying the money decree. First of all, the Court should appropriate the amount towards **interest, then towards the costs and thereafter, towards the principal, unless**, of course, the deposit is **indicated to be towards specified heads by the judgment debtor** while making the deposit and intimating the decree holder of his intention. This Order also provides mode for executing the decrees and implementation of even decrees of specific performance, permanent injunction, restitution of conjugal rights and possession etc.

As an illustration, we can take the following situation. Suppose, a decree is passed for a sum of Rs.5,000/- by the trial court along with interest and costs and the judgment debtor deposits the same and gives notice to the decree holder either by approaching the executing court under Order XXI Rule 2 of the Code or by making the deposit in the execution taken out by the decree-holder under Order XXI Rule 1 of the Code. The decree holder is not satisfied with the decree of the trial court.

He goes up in appeal and the appellate court enhances the decree amount to Rs.10,000/- with interest and costs. The rule in terms of Order XXI Rule 1, as it now stands, in the background of Order XXIV would clearly be, that the further obligation of the judgment debtor is only to deposit the additional amount of Rs. 5,000/- decreed by the appellate court with interest thereon from the date the interest is held due and the costs of the appeal.

The decree holder would not be entitled to say that he can get further interest even on the sum of Rs.5,000/- decreed by the trial court and deposited by the judgment debtor even before the enhancement of the amount by the appellate court or that he can re-open the transaction and make a re-appropriation of interest first on Rs.10,000/-, costs and then the principal and claim interest on the whole of the balance sum again.

Certainly, at both stages, if there is short-fall in deposit, the decree holder may be entitled to apply the deposit first towards interest, then towards costs and the balance towards the principal. But that is different from saying that in spite of his deposit of the amounts decreed by the trial court, the judgment debtor would still be liable for interest on the whole of the principal amount in case the appellate court enhances the same and awards interest on the enhanced amount. This position regarding execution of money decrees has now become clear in the light of the amendments to Order XXI Rule 1 by Act 104 of 1976.

The principle appears to be that if a part of the principal has been paid along with interest due thereon, as on the date of issuance of notice of deposit, interest on that part of the principal sum will cease to run thereafter. In other words, there is no obligation on the judgment debtor to pay interest on that part of the principal which he has already paid or deposited.”

Order 21 Rule 42 CPC: Attachment before judgment in execution:-

Order 21 Rule 42 CPC deals with the attachment before the Court holds an inquiry as to rent or mesne profits (compensation for wrongful possession) or any other matter, the property of the judgment debtor could be attached, before the amount due is ascertained in the terms of Order 38 Rule 5 CPC.

Order 21 Rule 29 CPC: whether the decree of other Court could be stayed-

For the applicability of Order 21 Rule 29 CPC, two conditions are to be fulfilled; (1) a proceeding in execution of the decree of that Court started at the instance of the decree holder against the judgment debtor and (2) a suit at the instance of the same judgment-debtor against the holder of the decree of that Court.

Transferee Court has no power to stay the execution of the decree pending in its Court because the decree is not passed by that Court.

The scope of Rules 26 to 29 of Order 21 CPC:-

“6. Order 21, Civil Procedure Code deals generally with the execution of decree and orders. That order is divided into several topics, each topic containing a number of rules. The first four topics cover rules 1 to 25 and the fifth topic, namely, stay of execution comprises 4 rules, namely, Rules 26 to 29.

Rules 26 to 28 deal with the powers and duties of a Court to which a decree has been sent for execution. Under Rule 26, that Court can stay the execution of the decree transferred to it for execution for a reasonable time to enable the judgment-debtor to apply to the Court by which the decree was passed or to any Court having appellate jurisdiction over the former for an order to stay execution or for any other order relating to the decree or execution which might have been made by the Court of first instance or the appellate Court. Rule 26 the transferee Court has a limited power to stay execution before it. Moreover, under sub rule (2) if any property is seized by it in the course of execution, it may even order the restitution of the property pending the result of the application made by the judgment-debtor to the Court of the first instance or to the appellate Court.

Rule 27 says that any such restitution made under sub-rule (2) of Rule 26 will not prevent the property of the judgment-debtor from being retaken in execution of the decree sent for execution

Rule 28 provides that any order of the Court by which the decree was passed, in relation to the execution of such decree, shall be binding upon the Court to which the decree was sent for execution.

Rule 29 is as follows:

“Where a suit is pending in any Court against the holder of a decree of such Court, on the part of the person against whom the decree was passed the Court may, on such terms as to security or otherwise, as it thinks fit stay execution of the decree until the pending suit has been decided.”

It is obvious from a mere perusal of the rule that there should be simultaneously two proceedings in one Court. One is the proceeding in execution at the instance of the decree-holder against the judgment-debtor and the other a suit at the instance of the judgment debtor against the decree holder.

But there is a snag in that rule. It is not enough that there is a suit pending by the judgment-debtor, it is further necessary that the suit must be against the holder of a decree of such Court. The words “such Court” are important “Such Court” means in the context of that rule the Court in which the suit is pending. In other words, the suit must be one not only pending in that Court but also one against the holder of a decree of that Court. That appears to be the plain meaning of the rule.”

Order 21 Rule 35 (3) and Rule 97 CPC: These two Rule provides a right to the Decree Holder to complain against a person, who creates resistance in the execution of the decree.

Order 21 Rule 41 CPC- Arrest and detention:- In case of money decree, where the decree cannot be executed otherwise by way of attachment or sale of the property, the Court could make an order for the attendance and examination of such Judgment Debtor, or officer or any other person and for the production of any books or documents. If the **decree remained unsatisfied for 30 days or otherwise the Judgment Debtor disobeys the decree**, the Court may direct the person disobeying the order to be **detained in the civil prison for a term not exceeding three months.**

Order 21 Rule 16 CPC:- The assignment and transfer of the decree made, when assignment is complete.

The Code of Civil Procedure does not prescribe any mode in which an assignment in writing has got to be executed in order to effectuate a transfer of a decree. The only other statutory provision in regard to assignments in writing is to be found in Chapter VIII of the Transfer of Property Act which relates to transfers of actionable claims and an actionable claim has been defined in section 3 of the Act as "a claim to any debt..... or to any beneficial interest in movable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognize as affording grounds for relief.....”

A judgment debt or decree is not an actionable claim for no action is necessary to realise it. It has already been the subject of an action and is secured by the decree.

A decree to be passed in future also does not come as such within the definition of an actionable claim and an assignment or transfer thereof need not be effected in the manner prescribed by section 130 of the Transfer of Property Act.

The assignment in writing of the decree to be passed would thus result in a contract to assign which would become a complete equitable assignment on the decree being Passed and would fulfil the requirements of Order XXI, rule 16 in so far as the assignment or the transfer of -the decree would in that event be effectuated by an assignment in writing which became a complete equitable assignment of the decree when passed.

Order 21 Rule 99 CPC: Rule 99 of Order 21 provides an objector, other than the Judgment Debtor, to raise objection claiming any right in the property from which he is directed to be dispossessed. Rule 99 of Order 21 reads as under:-

“99. Dispossession by decree holder or purchaser

(1) Where any person other than the judgment debtor is dispossessed of immovable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the court complaining of such dispossession.

(2) Where any such application is made, the court shall proceed to adjudicate upon the application in accordance with the provisions herein contained.”

The other question to be noticed is that normally the Courts frame the issues while deciding the lis between the parties, but the law does not provide that in each case, the issues are required to be framed. Where the objections raised by the third party are superfluous, then the Court can refuse to entertain the same and such objections could summarily be tried.

Where objections have some merits, then the Court could decide those objections after seeking reply and evidence of the parties.

Rules 105 and 106 of Order 21 CPC, govern the procedure for adjudication of the objection:- These Rules read as under:-

“105. Hearing of application

(1) The court, before which an application under any of the foregoing rules of this Order is pending, may fix a day for the hearing of the application.

(2) Where on the day fixed or on any other day to which the hearing may be adjourned the applicant does not appear when the case is called on for hearing, the court may make an Order that the application be dismissed.

(2) Where on the day fixed or on any other day to which the hearing may be adjourned the applicant does not appear when the case is called on for hearing, the court may make an Order that the application be dismissed.

(3) Where the applicant appears and the opposite party to whom the notice has been issued by the court does not appear, the court may hear the application ex parte and pass such Order as it thinks fit.

Explanation : An application referred to in sub-rule (1) includes a claim or objection made under rule 58.

106. Setting aside orders passed ex parte, etc

(1) The applicant, against whom an Order is made under subrule (2) of rule 105 or the opposite party against whom an Order is passed ex parte under sub-rule (3) of that rule or under sub-rule (1) of rule 23, may apply to the court to set aside the order, and if he satisfies the court that there was sufficient cause for his non-appearance when the application was called on for hearing,

the court shall set aside the order on such terms as to costs or otherwise as it thinks fit, and shall appoint a day for the further hearing of the application.

(2) No Order shall be made on an application under sub-rule (1) unless notice of the application has been served on the other party.

(3) An application under sub-rule (1) shall be made within thirty days from the date of the order, or where, in the case of an ex parte order, the notice was not duly served, within thirty days from the date when the applicant had knowledge of the order.”

Restoration of the objections:-

Rule 106 of this Order indicates that if the objector fails to appear, then the application could be dismissed and on showing the sufficient cause, the Court could restore the said objection petition and decide the same on merits.

Order 21 Rule 92 (2):- The conditions when the sale could be set aside after auction:

Order 21 Rule 92 (2) provides that **if the deposit is made within 30 days from the date of sale and an application is filed, then the Court would have no discretion but to set aside the sale and if the amount is not deposited within 30 days, but within 60 days, then it will be within the discretion of the Court, whether or not to grant the application.** However, the application could be filed within 60 days. Rule 92 (2) of Order 21 CPC reads as under:-

(2) Where such application is made and allowed, and where, in the case of an application under rule 89, the deposit required by that rule is made within sixty days from the date of sale, or in cases where the amount deposited under rule 89 is found to be deficient owing to any clerical or arithmetical mistake on the part of the depositor and such deficiency has been made good within such time as may be fixed by the court, the court shall make an Order setting aside the sale:

PROVIDED that no Order shall be made unless notice of the application has been given to all persons affected thereby:”

Order 21 Rule 89 CPC:

Primary condition precedent to set aside the sale of a mortgaged property is to pay the mortgage money in addition to depositing of 5 percent of the purchase money in the Court.

Other conditions where sale could be set aside

Order 21 Rule 90 CPC: deals with the situations when the sale could be set aside:-

Mere to establish irregularity or fraud is not sufficient to set aside the sale. The applicant must establish that material irregularity or fraud has resulted in substantial injury to the applicant. There is no specific provision under Order 21 Rule 67 CPC that sale must be advertised in the local newspaper. Therefore, irregularity cannot be given weight in the absence of any such order made by the Court.

The Hon'ble Apex Court in case Saheb Khan Vs. Mohd. Yusufuddin and others, 2006 AIC (SC) 1871, has further observed as under:-

The applicant must go further and establish to the satisfaction of the Court that the material irregularity or fraud has resulted in substantial injury to the applicant. Conversely even if the applicant has suffered substantial injury by reason of the sale, this would not be sufficient to set the sale aside unless substantial injury has been occasioned by a material irregularity or fraud in publishing or conducting the sale.

Order 21 Rule 58 CPC- Attachment of mortgaged property:- Attachment before judgment- Suit under Order 21 Rule 58 CPC to release the property from attachment. If the property is under attachment in another money suit and the mortgagee is not in actual or constructive possession of the property on that date, then the objection by such objector under Order 21 Rule 58 CPC to such attachment is not maintainable.

Order 21 Rule 35 (2) CPC- Attachment of share of coparcenary property and limitation to take possession of such property:-

Decree against father and four sons. Execution against Joint Family property- Auction purchaser purchased at the auction sale was the share of four sons' with joint family property. Sons' original share was $\frac{4}{5}$ th reduced to $\frac{2}{3}$ rd on the date of auction sale, after the birth of another son- $\frac{1}{6}$ th share also allotted in partition suit to auction purchaser, but he was entitled only to four sons' share that is $\frac{2}{3}$ rd share in the property.

Alienation by coparceners of undivided interest – Alienee is not entitled to possession of interest purchased by him till a partition has made that being so, it is arguable that the coparceners can never be in adverse possession of the properties as against him as possession can be adverse against a person only when he is entitled to possession.

Now, it is well settled that the purchaser of a coparcener's undivided interest in joint family property is not entitled to possession of what he has purchased. His only right is to sue for partition of the property and ask for allotment to him of that which on partition might be found to fall to the share of the coparcener whose share he had purchased. His right to possession “would date from the period when a specific allotment was made in his favour”: **Sidheshwar Mukherjee v. Bhubneshwar Prasad Narain Singh, 1954 SCR 177 at P.188.**

Order 21 Rule 35 (3) CPC :- Extent of force to be used to take possession-

This Rule provides that even if the possession of some premises is not delivered, then the Court, after giving reasonable warning and facility to any woman not appearing in public according to the customs of the country to withdraw, remove or open any lock or bolt or break any door or do any other act necessary for putting the Decree-Holder in possession.

Order 21 Rule 17, Order 34 Rule 4, Rules 14 and 15:- Recovery of maintenance by sale of the property over which charge was created-

Execution for maintenance after the charge has been created by the Court on many lots of the properties. Even if the purchase of one lot is found to be made by the decree-holder prior to the execution,

then the recovery of maintenance could be effected from the other properties over which, the charge has been created.

In case Janapareddy Latchan Naidu Vs. Janapareddy Sanyasamma, 1963 AIR (SC) 1556, the Hon'ble Apex Court has observed as under:- “

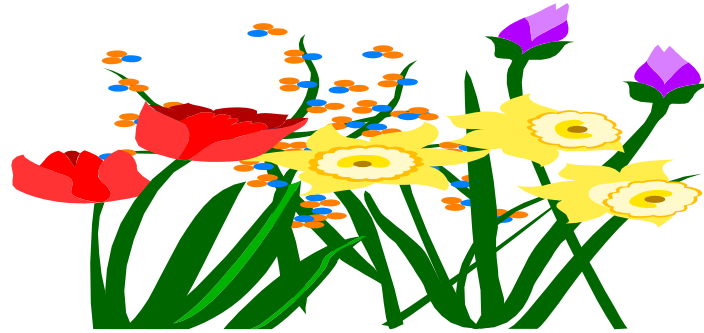
“6. The argument involves a fallacy because it assumes that a charge created by a decree on a number of properties disappears when the chargeholder in execution of the charge decree purchases one lot of properties.

An executory charge-decree for maintenance becomes executable again and again as future sums become due. The executability of the decree keeps the charge alive on the remaining properties originally charged till the future amount ceases. In other words the charge subsists as long as the decree subsists. By the execution the charge is not transferred in its entirety to the properties purchased by the charge-holder. Nor is the charge divided between those properties and those which still remain with the judgment debtor. The whole of the charge continues over all the properties jointly and severally. Nor is any priority established between the properties purchased by the charge-holder and those that remain. It is not permissible to seek an analogy from the case of a mortgage. A charge is different from a mortgage.

A mortgage is a transfer of an interest in property while a charge is merely a right to receive payment out of some specified property. The former is described as jus in rem and the latter as only a jus ad rem. In the case of a simple mortgage there is a personal liability express or implied but in the case of charge there is not such personal liability and the decree, if it seeks to charge the judgment debtor personally, has to do so in addition to the charge.

CPC ORDERS & RULES ALONG WITH REMEDIES

S. NO	NATURE OF PROCEEDINGS	PROVISIONS	REMEDY
1.	Stay of Unit	Section 10 & Section 151 of CPC 1908	Revision
2.	Objection relating to title of interest of claimant in attached property in execution process	Order 21, Rule 62, 103	Appeal
3.	Application for setting aside sale in execution proceeding	Order 21, Rule 72, 92	Appeal
4.	Application for setting aside decree/order on ground of fraud etc.	Section 12(2)	Revision



Thank You

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