

Legal Environment of Business

Workbook

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Brief Summaries of Chapters

Chapter 1: Introduction to Legal Environment

- The main goal of law is justice. Law is an instrument to secure justice because it has the sanction of state behind it.
- The term 'tort' is derived from the Latin term 'tortum' which means 'civil wrong'. 'Tortum' means 'twisted' or 'crooked' and implies conduct which is not straight forward or unlawful. To constitute torts, three conditions must be fulfilled: There must be a wrong committed by a person, the wrongful act must result in a legal damage to some other person, and it must be of such a nature as to give rise to a legal remedy in the form of an action for damages.
- For the governance and administration of the people, of different countries the governments of various nations in the world have passed various rules and regulations. They are called Laws of the nations.
- Mercantile Law is the name given to that branch of law which is generally applied to cases arising out of mercantile transactions. It relates to the rights and obligations arising out of mercantile transactions on one hand and between traders or mercantile persons on the other. The principal sources of mercantile law in India include Justice, Equity and Good Conscience in addition to the four sources of mercantile law of England namely (1) Lex mercatori, now known as Law Merchant; (2) Legislation i.e. Acts of Parliament or Statutes; (3) Common law and (4) Principles of Equity.
- A tariff is a tax on the imported products. The basic purpose of tariffs is to protect the domestic industry by increasing the cost of imported goods. The WTO assists in the implementation, administration and operation of the WTO Agreement and the Multilateral Trade Agreements, and foster their objectives. It also provides the framework, for the implementation, administration and operation of the Plurilateral Trade Agreements.
- Civil actions concern with the disputes between private individuals in which one party seeks remedy for the wrong done to it by another party. Criminal law is concerned with the conduct considered by the society to be undesirable to the extent that the law makes such conduct a criminal offence.

Chapter 2: Business Contracts

- A contract creates self-imposed obligations. It establishes the reciprocal responsibilities of the parties and the extent and standard of their performances. Further a contract also facilitates the allocation of burden of risk in case of any contingency in advance. Finally, it also makes allowance for any loss arising out of any mishap or non-happening of any event. The essential elements of a valid contract are Offer and Acceptance, Free Consent, Capacity, Consideration, Lawful Object, Certainty and Possibility of Performance, a clear term of contract.
- Classification of contracts may be based on the validity of the contracts, the mode of formation or the extent of their performance. The law has provided certain remedies to the aggrieved party in case of breach of contract by the other parties. The important feature in the event of breach of contract is that each party has a responsibility to mitigate its losses at a minimum possible level.
- Agency may be created either by implied or express agreement. An agreement is said to be express when it is given by words spoken or written. Implied agreement is by inference from the circumstances of the case and things spoken or written, or the ordinary course of dealing.

- Commercial agreements represent the conditions agreed by the parties and contain certain clauses which form the basis of the rights and liabilities of the parties. The clauses in corporate and commercial agreements include the description of the parties, the subject matter of the agreement, the consideration paid by the promisor, statutorily implied covenants, the signatures of the parties to the agreement, attestation by witnesses, and if required, endorsements to the agreements or supplemental deeds.
- The employment contract between an employer and employee can be either oral or written specifying the job description, wages, employee rights and duties, and other specific terms and conditions of employment.

Chapter 3: Non-Corporate Business Entities

- In order to conduct or carry on a business, it is not necessary for a person or family to incorporate a company. It is perfectly legal, and possible, to conduct business as a proprietorship or partnership concern. On the other hand, the Hindu Undivided Family business is mostly popular amongst the joint Hindu families.
- In an increasingly litigious market environment, the prospect of being a member of a partnership firm with unlimited personal liability is, to say the least, risky and unattractive. Indeed, this is the chief reason why partnership firms of professionals, such as accountants, have not grown in size to successfully meet the challenge posed today by international competition. This makes the LLP a most suitable vehicle for partnerships among professionals such as lawyers and accountants.
- Insolvency Law provides a clear, readable and comprehensive account of the principles of insolvency law in India, applicable to both corporate and personal debtors. Insolvency is a condition of having more debts (liabilities) than total assets which might be available to pay them, even if the assets were mortgaged or sold, a determination by a bankruptcy court that a person or business firm cannot raise the funds to pay all of the debts. The court will then discharge some or all of the debts, leaving some of the creditors empty handed.

Chapter 4: Law Relating to Corporate Business Entities

- Once the company is incorporated and registered under the Companies Act, it exists as an independent legal person and has its own entity distinct from the persons who constitute it. The company enjoys rights and liabilities, which are not the same as that of its members. Being a distinct legal entity, the company has the capacity to sue and be sued.
- As companies grow, they may move from being privately owned to publicly owned. To fund expansion and development, private companies can raise money by offering securities for sale to the public. When the companies invite the public to participate in their affairs by means of shares, it is known as public issues. A prospectus is an invitation issued to the public to purchase/subscribe shares or debentures of the company. The provisions of the Act relating to prospectus apply only if it is issued to the general public. A single private communication will not be taken as an 'issue' of prospectus.
- A share means share in the share capital of a company, and includes stock except where distinction between stock and shares is expressed or implied.
- The duties of a director may be classified into four categories, viz., (a) fiduciary duties, (b) duties of care, (c) statutory duties and (d) other duties. These duties are in addition to the specific duties as specified by the Companies Act, 1956. Directors should not use unpublished and confidential information belonging to the company for their own purpose. Any knowledge or information that is generated by the company is its own property and cannot be put to unauthorized use. Any gain by the use of such inside information has to be accounted for to the company. A director of a company, like any other agent, is duty bound to exercise reasonable care in the management of its affairs as is expected from the person occupying such position.

- Reconstruction includes reorganization, arrangement and amalgamation. The terms 'reorganization' and 'arrangement' are used when only one company is involved whereas the term 'amalgamation' is used when more than one company is involved (i.e., when two or more companies are amalgamated or where one company is merged with another or where one company is taken over by another). Any amalgamation or reconstruction may take the form of takeover or a merger. Takeover is the passing over of the direct or indirect control of the assets of the target company to the acquiring company. In a merger, the shareholding in the combined enterprise will be spread between the shareholders of the two companies.
- The High Court of a State is empowered to order winding up of a company under specified circumstances. A company may be voluntarily wound up either by passing an ordinary resolution or a special resolution.

Chapter 5: Property Law for Business

- Business or commercial transactions deal with the transfer of property between persons. Property is the thing over which the right of ownership is exercised. The right of ownership is the most comprehensive or supreme right that can be exercised over anything. Property is of different kinds and can be categorized into movable, immovable, tangible and intangible property.
- Sale is different from an agreement to sell. Sale is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. An agreement to sell on the other hand stipulates that where the transfer of property in the goods is to take place at a future time or subject to some conditions thereafter to be fulfilled, such a contract is an agreement to sell.
- Hypothecation is a kind of pledge where the pledged goods remain in the possession of the pledger for his use. Mortgage is a transfer of limited interest of an immovable property as security against a loan, to another. A fixed charge is a charge in some specific and identified asset of the company. It is a legal charge whereas a floating charge is only an equitable charge.
- A major aspect of the hire-purchase agreement is that the financier only acquires the ownership of the goods when the agreement is complete and the owner becomes responsible for any faults found in the goods. A lease is different from a sale involving the transfer of ownership. The lease is only a 'transfer of a right to enjoy' and interest in the land, but not the ownership.
- Exchange involves the transfer of a property, but the transfer must be in consideration of another property movable or immovable. The most essential element is that there should not be any consideration for the gift. Love and affection, spiritual benefit may be the considerations for gift. Assignment is transfer of a claim or right or interest or property (movable or immovable) from one person to another.
- Creations of mind which are termed as intellectual property are granted protection under various categories like patents, copyrights, trademark and so on. Intellectual property right encompasses a bundle of rights – the right to re-produce, distribute, license, sell and exploit intellectual property in any legal fashion.

Chapter 6: Business and Tax Laws

- In India, taxes are broadly classified into Direct Taxes and Indirect taxes. While income tax, wealth tax etc., come under direct taxes, sales tax, excise, customs duty and service tax are classified as indirect taxes. Income earned in a year is taxable in the next year. The year in which income is earned is known as the previous year and the next year in which income is taxable is known as the assessment year.
- Income earned is classified on the basis of its source. For income tax purposes, it is necessary to arrive at taxable income. Incomes are classified into the following heads: income from salaries, income from house property, capital gains, profits or gains from business or profession and income from other sources.

- Wealth tax is charged in respect of the net wealth of every individual, Hindu Undivided Family and company, in respect of every assessment year at the rate of 1 percent of the amount where net wealth exceeds Rs.15 lakh. The term “net wealth” means taxable wealth. It represents the excess of assets over debts. Assets include deemed assets but do not include assets exempted under Section 5.
- Excise duty is an indirect tax. It is a duty that is levied on goods that are manufactured/produced in India. The levy of excise is connected only to the manufacture/production of goods and is unrelated to the sale/realization of sale proceeds of goods. The power to levy central excise duties lies with the central Government. Excise duties are levied uniformly throughout the country and the duty rates/structure are governed through the Tariff/Budget notifications.
- CENVAT provisions are used in Central Excise to implement the concept of VAT at the manufacturing stage by giving the credit of duty paid on inputs. The mandatory Cenvat chain has been abolished.
- Customs duty is a type of indirect tax. It is a tax on the goods and not on the owner of the goods since it is not paid directly by the consumer out of his pocket but is paid at the time of importing or exporting any goods. The Customs Tariff Act also provides for the charge of Counter Veiling Duty (CVD), anti-dumping duty, protective duties etc. Goods imported by sea, air, land, post, passengers as baggage and ship stores are considered to be imported and charged to customs duty.
- Every dealer liable to pay tax under the Central Sales Tax Act, shall within such time as may be prescribed for the purpose, make an application for registration under this Act to such authority in the appropriate as the Central Government may, by general or special order, specify and every such application shall contain such particulars as may be prescribed.
- Service Tax is another type of indirect tax that is to be paid by a customer for certain kinds of services he avail. The Service Tax is applicable to several service providers right from transport operators to hospitality sector. Every year, the Central Government enhances or adds new services to the existing list by identifying new service sectors.
- Value Added Tax (VAT) is a form of sales tax collected by the Government of destination State (i.e., State in which final consumer is located) on consumer expenditure. It is collected through business transactions involving the sale of goods within the State. VAT is a tax on value added in the price of a commodity at each stage, may be due to passing through various hands in a channel of distribution or the value added in its price due to some activity on production or manufacture or process under taken on the commodity.
- Fringe Benefit Tax (FBT) is the tax levied in the hands of employers who provide monetary and non-monetary benefits which are often called as fringe benefits. These benefits are paid by employers to encourage their well-performing employees and to reduce the attrition rate.

Chapter 7: Financial Services – Legal and Regulatory Environment

- The main objective of the Banking Regulation Act, 1949 is to control and supervise the banking companies. The Act is to be read with the RBI Act, 1934, which provides statutory power to RBI for supervision and regulation of banking companies.
- In India, the Negotiable Instruments Act, 1881 was framed as an attempt to consolidate the law that relates to the bills of exchange, cheques and promissory notes. Negotiable Instruments may be categorized by statute and by custom or usage.
- The enactment of Insurance Act, 1938, is a major event in the insurance legislation which is followed by the Life Insurance Act, 1956, and the General Insurance Business (Nationalization) Act, 1972.
- The objective of the SEBI Act is the establishment of a Board to protect the interest of investors in securities and to promote the development of, and to regulate, the securities market and for matters connected therewith. Accordingly, the Securities and Exchange Board of India, was established as a non-statutory body in the year 1988 and was recognized as a statutory body under the SEBI Act in 1992.

- The Securities Contracts (Regulation) Act, 1956 keeps an eye on all the stock exchanges of India and various transactions in securities. The provisions of the Act are administered by the board established under the Securities and Exchange Board of India Act, 1992.

Chapter 8: Business Transactions and Cyber law

- The IT Act is a comprehensive piece of legislation, which aims at policing some of the activities over the Internet. The fundamental approach of the Act is towards validating and legalizing electronic and on-line transactions. The Act, 2000 fills the critical gaps in e-banking by providing protection against the possible abuse and misuse of services.
- The Act provides legal recognition to digital signatures and also envisages a scheme of digital signature certificates to be issued by the third parties. The Model Law offers a broad definition of digital signatures and is technologically neutral.
- The increase in volume of transactions is bound to attract the attendant risks of cyber misconduct, which do not find a place under the existing laws.
- The Information Technology Act, 2000 is a major enactment initiative to provide legal frameworks for security provisions of e-commerce in harmony with international cyber laws.

Chapter 9: Competition and Consumer Protection

- In order to protect the consumers from exploitation and to save them from adulterated and substandard goods and deficient services, the Consumer Protection Act came into force on 15th April, 1986. The Act has been amended three times in 1991, 1993 and 2002. The Consumer Protection Act, 1986 (68 of 1986) is a milestone in the history of socio-economic legislation in the country. The main objective of the Act is to provide for the better protection of consumers. Unlike existing laws which are punitive or preventive in nature, the provisions of this Act are compensatory in nature. The Act is intended to provide simple, speedy and inexpensive redressals to the consumers' grievances, and remedies of a specific nature and award of compensation wherever appropriate to the consumer.
- In the absence of equitable competition rules, there is every possibility that the large business enterprises may take good advantage of exercising the dominant market power, to control the market place activities by nefarious means like the establishment of cartels, which ultimately affect the interests of the business organizations in the developing countries. The enactment of an effective competition law is felt inevitable dire need arose to curtail the monopoly of big business enterprises that are created due to the free and liberalized access to the markets in the international business.
- Spurious goods and services are now regarded as unfair trade practices. It is now compulsory to display information about the content, manner and effect of hazardous goods and services as well. The scope of Restrictive Trade Practices has been widened and includes 'tie-up sales' and 'tying arrangements'.
- The purpose of the product liability law is to protect the consumers from the manufacturers, distributors etc., for putting the product in the market, which is dangerous and defective without proper protections and precautions and for not warning the consumers properly as to its uses or consequences.
- The general rule is that only those people whose fundamental rights have been infringed can go to the Supreme Court under Article 32 of the Constitution of India. Under PIL, Courts take up cases that concern not the rights of the petitioner but of the public at large. The basic purpose of the public interest litigation is the enforcement of public interest or general interest in which the public or class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected.
- Class Action Suits in US are akin to Public Interest Litigation in India. An individual or several individuals on behalf of a particular class of people bring the suit, where there exists some kind of perceived fraud or misconduct that affects them in a similar way.

Chapter 10: Environment Protection and Business Obligations

- The study of environment has become vital because of the pollution caused by scientific and technological advancements and mismanagement of the natural resources. The environmental segments can be divided into Atmosphere, Hydrosphere, Lithosphere, and Biosphere. All these four segments of the environment help the living organisms in various ways to survive on the earth. There are various types of pollution such as Air pollution, Water pollution, Land pollution, and Sound pollution. The causes of environmental pollution are natural as well as Man-made. Natural causes are droughts, floods, cyclones and earthquakes. Man-made causes are population growth, poverty, urbanization, and industrialization.
- The common law remedies against the environmental pollution are available under the Law of Torts. The liability of the polluter under the Law of Torts is one of the major legal remedies to abate pollution. The important tortious liabilities for environmental pollution are nuisance, negligence, trespass and strict liability. The common law remedies are damages, injunctions and abatement. The distinctive efficacy of common law is that, it represents the law of the courts as expressed in judicial decisions. The common law has proved to be the basis for the development of environmental legislations.
- The concept of guilty mind in environmental offences and the problem of enforcement by penal sanctions have attracted the criminal law into the domain of Environmental Law.
- The Indian Constitution contains specific provisions for the environmental protection. The Indian Constitution obligates the state as well as citizens to protect and improve the environment.

Chapter 11: Alternative Dispute Resolution

- Participating in an ADR process will often ultimately improve, rather than worsen, the relationship between the disputing parties. In ADR processes, the disputants outline the process they will use and define the substance of the agreements.
- The arbitration agreement is the fountain head of the jurisdiction of the arbitrator. The arbitration clause in an agreement between the parties is the starting point for an arbitration. The Arbitration and Conciliation Act, 1996 empowers the court to refer the parties to arbitration where there is an arbitration agreement.

Part I: Questions on Basic Concepts

Chapter 1: Introduction to Legal Environment

1. Who defined Law as the body of rules recognized and enforced by courts of law?
 - a. Savigny.
 - b. Austin.
 - c. Sir John Salmond.
 - d. Kelson.
 - e. Roscoe Pound.
2. In *Maneka Gandhi vs. Union of India* the court observed that law must be:
 - a. Prospective.
 - b. Retrospective.
 - c. Vague.
 - d. Just, fair and reasonable.
 - e. Antiquity.
3. According to Salmond, the number of sources of law is:
 - a. Two.
 - b. Three.
 - c. Four.
 - d. One.
 - e. Five.
4. The term 'tort' is derived from the _____ and its English equivalent is _____ .
 - a. Latin term Tortum, wrong.
 - b. Roman term Tortum, mischievous.
 - c. English term Tortum, crooked.
 - d. Greek term Tortum, twisted.
 - e. French term Tortum, delict.
5. Malfeasance is actionable by presumption that
 - a. actual damages cannot be proved.
 - b. malice or negligence is proved.
 - c. special damages are proved.
 - d. actual damage occurs.
 - e. it is actionable under all circumstances.
6. The nature of duty imposed on the wrong doer for non-feasance is:
 - a. Moral duty.
 - b. Legal duty.
 - c. Social duty.
 - d. Public duty.
 - e. Police duty.

7. A right becomes an absolute right when:
- conferred by statutory authority.
 - it is not actionable.
 - it imposes a certain legal obligation on all others.
 - it is actionable per se.
 - it requires proof of loss incurred.

Chapter 2: Business Contracts

8. Which of the following relationships must exist between the parties in order that a contract is enforceable?
- Social relationship.
 - Moral relationship.
 - Legal relationship.
 - Casual relationship.
 - None of the above.
9. 'A' accepts 'B's telephonic invitation for dinner. This is:
- A valid contract.
 - An invalid contract.
 - A voidable contract.
 - A void contract.
 - Not a contract.
10. A contract wholly performed by one of the parties is called as:
- Unilateral contract.
 - Bilateral contract.
 - Executed contract.
 - Executory contract.
 - Quasi-contract.
11. 'A' makes an offer to sell his farm for 1,000 pounds to 'B', but B offers to pay 950 pounds which is rejected by 'A'. Later B agrees to the original offer. State whether it is a valid contract.
- Yes, B knows that he accepted the original offer.
 - Void, A knows that B accepted the offer given by him finally.
 - Voidable, A and B knew that there were a valid offer and a valid acceptance.
 - No, as meeting of minds is missing in this contract.
 - None of the above.
12. The offer to sell automatically lapses _____.
- If it is revoked by the offeror at any time before its acceptance.
 - If the offeror or offeree dies or becomes insane and the other party comes to know of it before acceptance.
 - If the offer is not accepted within the specified time or within a reasonable time.
 - Upon failure to fulfill a condition precedent to acceptance.
 - All of the above.

13. Which of the following offers is valid?
- An auctioneer displays a T.V. set before a gathering in an auction sale.
 - 'A' advertises in a newspaper that he would pay Rs.5,000 to anyone, who finds and returns his lost briefcase.
 - 'B' in possession of three cars purchased in different years tells 'C' that 'I will sell you a car'.
 - A cloth shop owner announces that silk saree prices are reduced by 60%.
 - Ram communicates to Shyam that he will sell his red Maruti 800 car for Rs.1,50,000.
14. The essential elements of a valid offer are:
- Offerer must have an intention to be bound by his offer.
 - Offer must be made to a specific person/party and not to public at large.
 - offer must be definite.
 - Both (a) and (c) of the above.
 - All of (a), (b) and (c) above.
15. Communication of acceptance made by post is complete as against the offeror when the letter of acceptance:
- Reaches the offeror.
 - Is posted to offeror.
 - Is in transit.
 - Is signed by the offeree.
 - Both (a) and (d) above.
16. Who among the following is competent to contract?
- Prudent man.
 - A minor.
 - A person with unsound mind.
 - Insolvent.
 - An alien enemy.
17. The effect of agreements entered due to the mutual mistake of fact under Indian Contract Act, 1872 is:
- The agreement is enforceable as both the parties are under mutual mistake.
 - Partially enforceable as to the terms of agreement.
 - Agreement is void hence not enforceable.
 - Voidable at the option of either of the parties to the agreement.
 - Valid but not enforceable.
18. A, B and C enter into an agreement to divide among themselves all the gains acquired or to be acquired in future by fraud. Is it a valid agreement?
- Yes, as all of them agreed to share the gains.
 - No, as the object is unlawful and fraudulent.
 - Yes, as they are using their skill to gain something.
 - Yes, as all the essentials are present in the contract.
 - None of the above.

19. Which of the following agreements is valid?
- Agreement in restraint of a legal proceeding.
 - Two widows (of the same deceased husband) agree that if any one of them remarries, she must forfeit her right of share in the deceased husband's property.
 - Agreements in restraint of trade.
 - Agreement without consideration.
 - Agreement which is uncertain.
20. Which of the following agreements is void?
- A promises his daughter B that he will purchase a Scooty for her.
 - C promises D that he will compensate D for the past services rendered to him.
 - E promises F to pay a time barred debt which he owes to F.
 - G promises to pay ransom to H for not doing any harm to him.
 - None of the above.
21. A contract with a minor is:
- An illegal contract.
 - Voidable at the option of the party whose consent was obtained by coercion.
 - Void ab initio.
 - Voidable at the option of either of the parties to the contract.
 - An invalid contract.
22. A contract which is wholly performed by both the parties is called as:
- Unilateral contract.
 - Bilateral contract.
 - Executed contract.
 - Executory contract.
 - Quasi contract.
23. Anish aged 17 years, borrowed money from a moneylender representing himself to be a 21 year old. Identify the legal consequence:
- Anish can be sued for fraud.
 - Anish cannot be sued for fraud.
 - Anish is liable to repay the amount.
 - Guardian of Anish is liable to repay the amount.
 - Both (a) and (c) above.
24. Which of the following is a void agreement?
- An agreement collateral to a wager.
 - An agreement to refer all future disputes in connection with a contract to arbitration.
 - An agreement to refer all present disputes in connection with a contract to arbitration.
 - An agreement to agree in future.
 - A contingent contract.

25. A contract entered with a lunatic during his sound state of mind is :
- Valid.
 - Void.
 - Void ab initio.
 - Voidable.
 - None of the above.
26. Which of the following is an exception to the rule that an agreement without consideration is void?
- Promise to pay a time barred debt.
 - Any agreement entered with love and affection.
 - Compensation for voluntary services.
 - Any agreement entered with respect to agency.
 - All of the above.
27. Which of the following statements is **true**?
- Consideration must be real.
 - Consideration can be inadequate.
 - A promise to do something which one is already bound to do by law, will be treated as good consideration.
 - Consideration must be adequate.
 - Both (a) and (b) above.
28. X is indebted to Y, a sum of 1000 rupees. X pays Y Rs.500 at the stipulated time and place in the agreement where the debt was to be discharged in full satisfaction with the consent of Y. State if the payment made by 'X' is valid:
- No, it is not valid as there is no full repayment.
 - No, it is not valid as X deceived Y by fraudulent practice.
 - Yes, it is valid payment, as Y consented for it.
 - No, it is immoral and opposed to public policy.
 - No, it is against the principles of natural justice.
29. Which of the following is an exception to the rule that "an agreement in restraint of trade is void"?
- Agreement in restraint of marriage.
 - Agreement in restraint of carrying of trade after sale of goodwill.
 - Agreement in restraint of legal proceedings.
 - Agreements of trading with enemy.
 - Agreements restricting personal liberty.
30. 'A' agreed to sell his car to 'B', at gun point. This contract is void as it involves _____.
- Undue influence.
 - Compulsion.
 - Coercion.
 - Defamation.
 - None of the above.

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31. An agreement entered under coercion, renders the contract _____.
- Valid.
 - Void.
 - Voidable at the option of the victim.
 - Illegal.
 - Unenforceable.
32. A contract is said to have been discharged by operation of law on _____.
- Performance of the contract by both the parties.
 - Mutual consent of both the parties.
 - Lapse of time in performance of the contract.
 - Insolvency of either of the parties.
 - Breach of contract by either of the parties.
33. Which of the following statements is **true**?
- Time barred consideration is good consideration in case of a contract of guarantee.
 - A contract of guarantee is a *uberrimae fide*.
 - In a contract of guarantee direct consideration between the surety and the creditor is not required.
 - The surety in a contract of guarantee will be held liable even when surety is an insolvent.
 - On the death of the principal debtor, the surety stands discharged.
34. A continuing guarantee can be revoked by _____.
- Novation.
 - Death of surety.
 - Discharge of principal debtor.
 - Loss of security
 - All of the above.
35. In which of the following cases a contract stands discharged by operation of law, where one of the parties breach the contract
- By express consent.
 - By novation of terms of contract.
 - By unauthorized alteration of terms of contract.
 - By renunciation of obligations.
 - By destruction of subject matter.
36. An instrument which is incomplete in some respects is called as _____.
- Ambiguous instrument.
 - Inchoate instrument.
 - Void instrument.
 - Fictitious instrument.
 - Escrow.

37. The damages awarded in case of breach of promise to marry is _____ .
- No damages.
 - General damages.
 - Nominal damages.
 - Exemplary damages.
 - Special damages.
38. A cutting machine was given to a carrier to carry it to a repair shop by the owner. The carrier was not told that in the absence of the cutting machine, work would be stopped. The carrier delays the delivery by several days. Identify the damages that can be awarded to the owner in this case.
- General damages.
 - Special damages.
 - Exemplary damages or vindictive damages.
 - Nominal damages.
 - Liquidated damages.
39. Who among the following mercantile agents on getting additional consideration from his principal, undertakes to perform the financial obligations also?
- Factor.
 - Commission Agent.
 - Del credere* Agent.
 - Broker.
 - None of the above.
40. X promises Y to compensate the loss caused to Y either by him or by another person. The nature of the contract is known as :
- Contract of agency.
 - Contract of bailment.
 - Contract of indemnity.
 - Contract of guarantee.
 - Contract of pledge.
41. The bailment of goods as security for payment of a debt is:
- Lien.
 - Mortgage.
 - Hypothecation.
 - Pledge.
 - Assignment.
42. Which of the following would result in termination of agency by operation of law?
- Insolvency of principal.
 - By an agreement between the parties.
 - On completion of business of the agency.
 - Agent renouncing the business of agency.
 - Principal revoking his authority.

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43. The contract of agency is terminated by _____.
- An agreement between the parties.
 - Principal revoking his authority.
 - The operation of law.
 - On the business of agency being completed.
 - All the above.
44. An agent is personally liable when _____.
- He acts for a principal who cannot be sued.
 - He acts beyond the authority given by principal.
 - His authority is coupled with interest.
 - He acts for an undisclosed principal.
 - All of the above.
45. Who among the following enjoys the right of subrogation in a contract of indemnity?
- Creditor.
 - Principal debtor.
 - Indemnifier.
 - Indemnified.
 - Both (a) and (b) above.
46. Which of the following is a contract of bailment?
- Property deposited with the court in pursuance of its order.
 - Deposit of money in a bank.
 - Agreement between a retailer and the Government for distribution of food through a fair price shop.
 - Goods despatched on consignment basis.
 - Loan given by a bank to one of its customers.
47. The pawnee in case of a pledge _____.
- Can retain the goods pledged, until the debt is paid.
 - Can retain the goods for payment of interest due on the debt.
 - Cannot retain the goods for value more than debt.
 - Cannot sell without notice where pawnor makes default in payment.
 - Both (a) and (b) above.
48. The liability of a cloak room in respect of luggage belonging to a guest is that of a:
- Pawnee.
 - Surety.
 - Bailee.
 - Acceptor.
 - Debtor.

49. A pledge is _____.
- A general contract of promise.
 - A contract of agency.
 - A contract of indemnity.
 - A special type of contract of guarantee.
 - A special type of contract of bailment.
50. The right of a person to retain possession of goods belonging to another until his debt or claim is satisfied is _____.
- Bailment.
 - Assignment.
 - Hypothecation.
 - Lien.
 - Mortgage.
51. A gratuitous bailment is _____.
- Not valid.
 - Void.
 - Illegal.
 - Not supported by adequate consideration.
 - Not supported by any consideration.
52. Identify the type of Lien available to the bankers, factors, wharfingers, attorneys of a High Court and brokers under the Indian Contract Act.
- Particular Lien.
 - Injunction.
 - General Lien.
 - Specific performance.
 - Decree.
53. Which of the following is **not** a mercantile agent?
- Factors.
 - Auctioneers.
 - Brokers.
 - Del-credere* agents.
 - Insurance agents.
54. Which of the following is an example of the contract of indemnity?
- Contract of life insurance.
 - Contract of general insurance.
 - Contract of service.
 - General Lien.
 - None of the above.

55. General insurance is a _____.
- Voidable Contract.
 - Wager.
 - Contract of Guarantee.
 - Contract of Indemnity.
 - None of the above.

Chapter 3: Non-Corporate Business Entities

56. Identify the **correct** statement with regard to the non-registration of the partnership firm.
- Partner of an unregistered firm can sue the firm.
 - An unregistered firm can sue a third party for any right arising out of a contract.
 - The aggrieved partner cannot file suit against any of its partners.
 - An unregistered firm or its partner can claim a set-off.
 - An outsider cannot sue an unregistered firm.

Chapter 4: Law Relating to Corporate Business Entities

57. The corporate veil of a company is lifted:
- When revenue of the state needs to be protected.
 - To determine the character of an enemy company.
 - When the company does not refund the application money.
 - When the doctrine of corporate veil conflicts with public policy.
 - All of the above.
58. A company is regarded as an entity separate from its members, hence:
- The shareholders have insurable interest in the property of the company.
 - The assets and liabilities of the company are also the assets and liabilities of its members.
 - The shareholders can enter into contracts with the company.
 - The shareholders are the agents and trustees of the company.
 - The members of the company can be sued for the debts of the company.
59. A public company can commence business if:
- It has more than 100 members.
 - Obtains certificate of commencement of business.
 - Need not hold the statutory meeting.
 - Can allot shares before the minimum subscription is subscribed.
 - Must have at least 3 directors.
60. A company must issue prospectus within _____ after it is registered with the Registrar of Companies:
- 30 days
 - 45 days
 - 60 days
 - 90 days
 - 120 days.

61. A public company is converted into a private company by _____.
- Passing an ordinary resolution.
 - Passing a special resolution.
 - On approval of the Central Government.
 - Both (a) and (c) above.
 - Both (b) and (c) above.
62. Which of the following resolutions alters the objects clause of the Memorandum of Association?
- Ordinary resolution.
 - Special resolution.
 - Ordinary resolution and confirmation of the NCLT.
 - Special resolution and confirmation of the NCLT.
 - Ordinary resolution and confirmation by the Court.
63. Shifting of a registered office from one state to another:
- Requires an ordinary resolution to be passed at the general meeting of shareholders.
 - Requires a special resolution to be passed at the general meeting of shareholders.
 - Must be confirmed by the CLB.
 - Both (a) and (c) above.
 - Both (b) and (c) above.
64. An act is said to be *Ultra Vires*
- When the transaction is effected beyond the powers conferred by the articles.
 - On winding up.
 - On merger.
 - On acquisition.
 - On change of managing director.
65. Memorandum of association:
- Is the Constitution of the company.
 - Enables outsiders to know the objects of the company.
 - Indicates delegation of powers.
 - Both (a) and (b) above.
 - All of (a), (b) and (c) above.
66. A certified copy of the order of the Central Government confirming the alteration of Memorandum of Association is to be registered with the Registrar of Companies within _____ of its alteration:
- One month
 - Two months
 - Three months
 - Six months
 - Twelve months.

Legal Environment of Business

67. Which of the following situation **does not** require alteration to MoA??
- Reduction of share capital.
 - Reorganization of share capital.
 - Shifting of registered office from one place to another place in the same city.
 - Making the liability of the directors unlimited.
 - All of (a), (b) and (d) above.
68. The Memorandum and Articles of a company are open for inspection for:
- The creditors of the company.
 - The members of the company.
 - The Registrar.
 - The Public.
 - The NCLT.
69. Statutory rights of members are conferred by the:
- Board of Directors.
 - Memorandum of Association.
 - Articles of association.
 - Companies Act, 1956.
 - Registrar of Companies.
70. Articles of Association of a company _____.
- Contains the ancillary objects of the company.
 - Is superior to the memorandum of association.
 - Contains rules beyond the scope of the memorandum.
 - Contains rules beyond the scope of the memorandum but within the scope of the Companies Act.
 - Governs the way in which the objects of the company are to be carried out.
71. There need not be registration of Articles of Association in case of _____.
- A Private Company Limited by Shares.
 - A Public Company Limited by Shares for which Table A of Schedule I is applicable.
 - An unlimited company.
 - A company limited by guarantee.
 - Every company.
72. The doctrine of constructive notice can be invoked by _____.
- A company.
 - An outsider.
 - The NCLT.
 - The Registrar of Companies.
 - The Securities and Exchange Board of India.

73. A person dealing with a company having satisfied himself that the proposed transaction is not in its nature inconsistent with the memorandum and articles, is not bound to enquire into the regularity of the internal proceedings. This is known as:
- Doctrine of *Ultra Vires*.
 - Doctrine of Constructive Notice.
 - Doctrine of Indoor Management.
 - Doctrine of Fraudulent Transfer.
 - Doctrine of Lispendens.
74. An outsider can claim relief on the ground of 'indoor management', if he has
- No knowledge of articles.
 - No knowledge of irregularity.
 - Acted negligently.
 - Entered into a contract with a person who has no authority.
 - None of the above.
75. Every person dealing with a company is presumed to have read and understood the Memorandum and Articles as per the:
- Doctrine of Indoor Management.
 - Doctrine of Election.
 - Doctrine of Constructive notice.
 - Doctrine of Lispendens.
 - Doctrine of Fraudulent transfer.
76. The doctrine of indoor management:
- Can be invoked by the company and operates in its favor.
 - Can be invoked by the company, but does not operate in its favor.
 - Can be invoked by outside parties dealing with the company.
 - Aims at protecting the outsider against the internal affairs of the company.
 - Both (c) and (d) above.
77. Which of the following is the anti-thesis to the Rule of Doctrine of Indoor Management?
- Doctrine of *Ultra Vires*.
 - Doctrine of Constructive Notice.
 - Doctrine of Lifting of the Corporate Veil.
 - Doctrine of Waiver.
 - Doctrine of Fraudulent Preference.
78. When a private company is converted into a public company it can to file a _____ with the Registrar of Companies.
- Information memorandum.
 - Shelf prospectus.
 - Red herring prospectus.
 - Statement in lieu of prospectus.
 - Both (a) and (b) above.

Legal Environment of Business

79. A person induced to subscribe shares, based on a misstatement _____.
- Can rescind the contract after the company goes into liquidation.
 - Can rescind the contract within a reasonable time.
 - Can rescind the contract, but can retain his shares.
 - Cannot rescind the contract.
 - Can only sue for damages.
80. Prospectus issued by an existing company should be signed by _____
- The managing director of the company.
 - The managing director and the secretary of the company.
 - Majority of the directors of the company.
 - All the directors of the company.
 - All such persons whose names appear in the prospectus.
81. A director shall **not** be liable for misstatements in prospectus if he:
- Withdraws his consent before the issue of the prospectus and the same was published without his consent.
 - Had reasonable ground to believe that the statement was true.
 - Relied on the basis of fair representation of a public document.
 - Withdraws his consent giving a reasonable public notice on becoming aware of the untrue statement.
 - All the above.
82. Equity shares issued by a company to its employees or directors at a discount or for consideration other than cash for providing know-how or services are called:
- Bonus shares.
 - Sweat equity shares.
 - Share warrants.
 - Premium shares.
 - Preference shares.
83. Which of the following statements is **false** in relation to the Share Certificate?
- It is an evidence that shows that the person named therein is the holder of specified number of shares of the company.
 - It is to be issued only in pursuance of the Board resolution.
 - It is a Negotiable Instrument.
 - It is issued under the common seal of the company.
 - The certificate is subject to stamp duty as per the Stamp Act of the respective State in which the registered office of the company is situated.
84. Capital invested in stock of goods is called _____.
- Called-up capital.
 - Fixed capital.
 - Loan capital.
 - Circulating capital.
 - None of the above.

85. A company can issue preference shares:
- That can be redeemed after the expiry of a period of 20 years from the date of issue.
 - That are redeemable even if the articles do not provide for it.
 - That can be redeemed out of profits which would otherwise be available for dividend.
 - Both (a) and (b) above.
 - Both (b) and (c) above.
86. Which of the following statements is **false** pertaining to the redeemable preference shares?
- The articles must provide for the issue of shares.
 - These shares are not to be redeemed out of the profits available for dividend.
 - In case of payment of premium on redemption, the same has to be provided from out of the Companies profits.
 - No shares can be redeemed unless they are paid fully.
 - The Capital Redemption Reserve Account has to be credited with equal value of shares redeemed.
87. Which one of the following statements is **true** about Irredeemable Preference Shares?
- Any company can issue irredeemable preference shares.
 - No company shall issue these shares after the commencement of Companies (Amendment) Act, 1988.
 - No company shall issue preference shares after the enforcement of SEBI Act.
 - No company limited by shares shall issue any preference share which is irredeemable after the expiry of a period of twenty years.
 - No company limited by shares shall issue any preference share which is irredeemable after the expiry of a period of thirty years.
88. An irregular allotment:
- Has no consequences.
 - Is valid.
 - Is void "*ab initio*".
 - Is voidable at the option of the applicant.
 - Is avoidable at the option of the Board of directors.
89. Which one of the following statements is **false** about Share Premium of a Company?
- It is in the nature of capital reserve.
 - It can be used for writing off preliminary expenses.
 - It can be used for providing premium payable on redemption of preference shares or debentures of the company.
 - The company transfers the amount of share premium to a separate account called the 'Security Premium Account'.
 - The share premium is available for payment of dividend as it is profit.

Legal Environment of Business

90. A public company, desirous of getting its securities listed on a recognized stock exchange, must apply to the
- Recognized Stock exchange.
 - SEBI.
 - NCLT.
 - Central Government.
 - State Government.
91. The shareholders of the company in a general meeting can _____.
- Insist on payment of dividend at a certain rate.
 - Increase the rate of dividend recommended by board of directors.
 - Decrease the rate of dividend recommended by the board of directors.
 - Remove the directors for recommending a low rate of dividend.
 - Declare dividend based on profits without recommendation by the board.
92. Which one of the following statements is **false** relating to the payment of dividend?
- The power to pay dividend is inherent in a company.
 - The dividend includes interim dividend.
 - The Board of Directors are empowered to declare dividend.
 - The shareholders can reject the recommended rate of dividend and increase the amount of dividend.
 - Dividend can be paid only out of profits and not out of capital.
93. The transferee of a share is legally recognized only _____.
- When the instrument of transfer is delivered to the company.
 - When the company acknowledges receipt of the instrument of transfer.
 - When the instrument of transfer along with the share certificates are delivered to the company.
 - When the instrument of transfer along with the letter of allotment are delivered to the company.
 - When the transfer is registered by the company.
94. A director on appointment needs:
- To take up qualification shares within 1 month.
 - Not to take up qualification shares at all unless provided by articles.
 - To take up qualification shares before his appointment.
 - To take up qualification shares within a period of 15 days of his appointment.
 - Both (b) and (c) above.
95. A casual vacancy of a Director:
- Cannot be filled up.
 - Can be filled up at the Annual General Meeting by passing an ordinary resolution.
 - Can be filled up at a meeting of the Board.
 - Can be filled by passing a special resolution.
 - Must be filled within 10 days from the date of resulting vacancy.

96. A person appointed as a director of a company if required by Articles has to take his qualification shares within:
- One month.
 - Three months.
 - Forty five days.
 - Two months.
 - Six months.
97. The office of the director becomes vacant if he fails to obtain the required share qualifications as per articles:
- Within two months of his appointment.
 - Immediately on his appointment.
 - Before he is appointed.
 - Within one year from the date of appointment.
 - Within six months from the date of appointment.
98. Disqualification of a member to be appointed as a director arises on his failure to pay call money even after:
- Six months.
 - Three months.
 - Two months
 - One month.
 - 45 days.
99. A director after becoming interested in a contract must disclose his interest in such contract at:
- The board meeting at which the contract is being first considered.
 - The first board meeting held after he becomes interested in the contract.
 - Any board meeting after he becomes interested in the contract.
 - The general meeting of the shareholders.
 - The meeting of the committee of the board of directors.
100. The Additional Director of a company can be appointed upto next AGM by:
- Annual General Meeting and Extraordinary General Meeting.
 - Annual general meeting and Board meeting only.
 - Board Meeting and by passing a Resolution by Circulation.
 - Board meeting and Committee meeting only.
 - Board Meeting only.
101. Which of the following is the ordinary business transacted in an Annual General Meeting?
- Alteration of objects clause of the memorandum of association.
 - Borrowings in excess of paid-up capital of the company.
 - Appointment of statutory auditor.
 - Grant of loan to a director.
 - Appointment of a whole time director.

Legal Environment of Business

102. Appointment of an alternate director takes place when the original director absents himself for a period of not less than:
- One month.
 - Three months.
 - Two months.
 - Six months.
 - Five months only.
103. Managing Director of a company may be appointed by virtue of:
- An agreement with the company.
 - A resolution passed in the general meeting of the company.
 - A resolution passed in the meeting of the board of directors of the company.
 - The memorandum and articles of association of the company.
 - Any of (a), (b), (c) and (d) above.
104. Which of the following statements is **false** with regard to the appointment of the Managing Director of the Company?
- He can be appointed for a period of not more than 5 years.
 - Company having a paid-up capital of Rs. five crore or more has to appoint a Managing Director.
 - A person can be appointed as managing director for four private companies at a time.
 - Re-appointment or extension of period of office earlier than two years is not valid.
 - An appointment in contravention to the schedule is referred to the NCLT for its decision.
105. Liability of directors towards the company arises:
- For breach of warranty of authority.
 - For misfeasance.
 - For misstatements in prospectus.
 - Both (a) and (b) above.
 - All of (a), (b) and (c) above.
106. The 'statutory meeting' is to be held by a private company:
- At its discretion.
 - A public company not having share capital.
 - A public company having liability of its members unlimited.
 - A government company.
 - A private company that converts itself into a public company within a period of six months from the date of its incorporation.
107. The quorum for a board meeting shall be:
- Two directors.
 - One-half the total strength of the Board or 2 directors whichever is less.
 - One-third the total strength of the Board or 3 directors whichever is higher.
 - One-half the total strength of the Board.
 - One-third the total strength of the Board or 2 directors whichever is higher.

108. The proper authority for convening a general meeting of the members of a company is the:
- Board of Directors.
 - Managing Director.
 - Manager.
 - Chairman of the Board of Directors.
 - Shareholders of the Company.
109. The minimum number of board meetings to be held by a company in a year are:
- One.
 - Two.
 - Three.
 - Four.
 - Six.
110. A board meeting is called by giving _____ notice to the directors.
- 7 days.
 - 14 days.
 - 21 days.
 - 1 month.
 - No fixed time limit.
111. Which of the following statement is **true** in case of a quorum for a meeting?
- Required only at the beginning of the meeting.
 - Required at the end of the meeting.
 - Required throughout the meeting.
 - Not required at all.
 - Both (a) and (b) above.
112. As per Section 217 of the Companies Act, 1956 the Board's report is adopted in _____.
- General Meeting.
 - Board Meetings.
 - Extraordinary General Meetings.
 - Class Meetings.
 - Board Committee Meetings.
113. For conducting a general meeting of any kind (statutory, annual or extraordinary) at least _____ notice must be given to the members.
- 7 days
 - 10 days
 - 15 days
 - 21 days
 - 30 days.

114. An extraordinary general meeting may be called by _____.
- The Board of Directors on its own.
 - By specified number of members entitled to vote.
 - By the NCLT.
 - Both (a) and (b) above.
 - All of (a), (b) and (c) above.
115. Which of the following statements is **false** in relation to a quorum of a general meeting?
- It is the minimum number of members required to validly transact business.
 - A minimum of seven members for a public company and five members for a private company constitutes a quorum.
 - The members present must be eligible to vote.
 - The quorum must be adjourned to the same day in the next week at the same time and place, if the quorum is not present within half an hour.
 - The meeting stands dissolved for failure of requisition of members presence.
116. The first annual general meeting of a company is to be held within _____ of its incorporation:
- 6 months
 - 12 months
 - 15 months
 - 18 months
 - 24 months.
117. In which of the following situations a special resolution is required to be passed.
- Removal of a director and appointment of another director.
 - Winding up a company voluntarily [Section. 484(1)(a) of the Companies Act].
 - Appointment and fixation of remuneration of liquidators.
 - Payment of interest out of capital.
 - Both (c) and (d) above.
118. Voluntary winding up of a company through the court commences:
- At the time of presentation of petition.
 - On acknowledgement by the court.
 - From the date of resolution of the company.
 - 14 days after passing the resolution.
 - by an order for winding-up by the court.
119. A company **cannot** be wound up by court when:
- It defaults in holding and delivering the statutory report to the Registrar of Companies.
 - It does not commence its business within a year from its incorporation.
 - The number of members required falls below the statutory minimum.
 - The company, by ordinary resolution resolves to be wound up.
 - It is unable to pay its debts.

120. A public company must have atleast:
- Two directors.
 - Seven directors.
 - Eleven Directors.
 - Three directors.
 - Nine directors.
121. A private company must have atleast _____.
- Seven directors.
 - Two Directors.
 - One director.
 - Six directors.
 - Three directors.
122. Which of the following is a just and equitable ground to wind-up a company by court?
- When there is a deadlock in the management of a company.
 - When the company changes its business.
 - If a company is unable to pay salaries t its employees.
 - If a company does not pay dividends.
 - All of the above.

Chapter 5: Property Law for Business

123. The definition of 'goods' under the Sale of Goods Act, **does not** include _____.
- stocks and shares.
 - growing crops, grass.
 - actionable claims and money.
 - things attached to or forming part of the land which can be severed.
 - None of the above.
124. The Transfer of Property Act deals with the transfer of property:
- By inheritance.
 - Between the living persons.
 - By State.
 - By creation of trust.
 - None of the above.
125. Which of the following is **not** the duty of the seller?
- Demand to make delivery at a reasonable hour.
 - To give notice of rejection of goods to the seller.
 - To pay the price.
 - To compensate the buyer for the default of the carrier.
 - To take delivery within reasonable time after the tender of delivery.

126. A floating charge created within the following period prior to the commencement of winding up proceedings becomes invalid:
- One month.
 - Six months.
 - Twelve months.
 - Three months.
 - Two months.
127. The position of the finder of lost goods is that of a:
- Bailor.
 - Bailee.
 - Creditor.
 - True owner.
 - Official receiver.
128. The right exercised by an unpaid seller is to:
- Retain possession under lien.
 - Recover possession.
 - Recover price and other charges.
 - Damages.
 - Both (c) and (d) above.
129. Which of the following are the necessary constituents of a contract of sale of movable property?
- Three distinct parties – seller, buyer and a mediator.
 - Movable goods for a price.
 - Two parties to the contract – seller and buyer.
 - Both (b) and (c) above.
 - All of (a), (b) and (c) above.
130. In which of the following circumstances, the right of lien is impliedly waived.
- Where the seller takes a negotiable instrument or any other security for the price.
 - Where the seller by his conduct, dispenses with payment of the price.
 - Where the seller claims to retain the goods under some other right, instead of right of lien.
 - All of (a), (b) and (c) above.
 - None of the above.

Chapter 6: Business and Tax Laws

131. The year in which income is taxable is known as the _____ year.
- Assessment
 - Financial
 - Previous
 - Accounting
 - Assessment or previous year.

132. The year in which income is earned is known as the _____ year.
- Assessment.
 - Previous
 - Financial
 - Assessment or previous
 - Accounting.
133. The authority to frame the rules relating to governance of the Finance Act is with _____.
- Taxes Regulatory Authority of India.
 - Income Tax Appellate Tribunal.
 - Central Board of Direct Taxes.
 - Ministry of Finance.
 - Ministry of Company Affairs.
134. Income is said to be accrued to a person when:
- He actually receives it.
 - He gets a fixed and unconditional right to receive it.
 - His interest is contingent.
 - His interest is vested.
 - He earns the income.
135. The total income of person in the previous assessment year is determined on the basis of his:
- Nationality.
 - Citizenship.
 - Domicile.
 - Residential Status.
 - NRI.
136. The percentage of net wealth chargeable under the Wealth Tax Act, 1957 is _____.
- 2 percent.
 - 1.5 percent.
 - 2.5 percent.
 - 1 percent.
 - 3 percent.
137. The chargeable limit of the net wealth under the Wealth Tax Act, 1957.
- Rs.10 lakh.
 - Rs.12 lakh.
 - Rs.13 lakh.
 - More than Rs.15 lakhs.
 - Rs.25 lakh.

Legal Environment of Business

138. The net wealth of a minor is included in the net wealth of the parent whose net wealth is:
- lesser than the other spouse.
 - greater than the other spouse.
 - If marriage does not subsist is included in the father's income.
 - If marriage does not subsist is included in the mother's income.
 - more than Rs.50 lakh.
139. Which of the following provisions of the Constitution of India empowers the Central Government to levy the Central Excise duties?
- Entry 82, List I, Schedule VII.
 - Entry 49, List II, Schedule VII.
 - Entry 44, List III, Schedule VII.
 - Entry 84, List I, Schedule VII.
 - Entry 92, List I, Schedule VII
140. The essential condition to be satisfied in order to levy Excise duty on goods must be:
- Immovable.
 - Moveable.
 - Excisable.
 - Serviceable.
 - Caused by Value Added Tax.
141. To determine eligibility for exemption, the value of clearances in the preceding financial year is increased under the Central Excise Act from:
- Rs.5 crore to Rs.6 crore.
 - Rs.4 crore to Rs 5 crore
 - Rs.3 crore to Rs.4 crore.
 - Rs.4 crore to Rs.6 crore.
 - Rs.2 crore to Rs.4 crore.
142. Refund of excess CENVAT is available, when duty is paid:
- by Small Scale Industries.
 - by Sick Industrial Companies.
 - by Medium Scale Industries.
 - on input material used for exported goods.
 - on exported goods used in India.
143. The rate of sales tax on declared goods sold to un-registered dealers under the Central Sales Tax Act, 1956 is:
- 5 percent.
 - 4 percent.
 - twice the rate applicable to sale or purchase of such goods within the State.
 - thrice the rate applicable to sale or purchase of such goods within the State.
 - 10 percent.

144. The customs duty is leviable on the goods transported by:
- Land only.
 - Air only.
 - Water only.
 - Land, air and water.
 - Domestic air ways only.
145. Which of the following statements is **false** about the Value Added Tax?
- It is collected on sale of goods within the State.
 - It is the sales tax levied according to the value added on goods.
 - To avoid cascading.
 - It is a single point tax.
 - Value added in manufacturing activity is the difference between the price at which commodity is sold and the cost of inputs.
146. The Service Tax collected is to be deposited into the Account of:
- State Government.
 - Central Government.
 - Local Government.
 - Both State and Central Governments.
 - The State in which the service is provided.
147. How is the Fringe Benefit Tax collected?
- from the Employee.
 - from the Employer.
 - equally from the employer and the employee.
 - One fourth from the employee and three-fourth from the employer.
 - Three-fourth from the employee and one-fourth from the employer.
148. The tax on perquisites is known as:
- Maintenance charges.
 - Subsistence allowance.
 - Fringe Benefit Tax.
 - Tax on Perquisites.
 - Sales Tax.

Chapter 7: Financial Services – Legal and Regulatory Environment

149. Which of the following constitutes a promissory note?
- I promise to pay Mr. John Rs.10,000 and all other sums which may become due to him.
 - I promise to pay Mr. John Rs.10,000 after deducting any amount which he may owe me.
 - I promise to pay Mr. John Rs.10,000 and all fines according to the rule.
 - I promise to deliver Mr. John 100 bags of wheat.
 - I promise to pay to Mr. John Rs.1,00,000 on demand for value received.

Legal Environment of Business

- 150.** Which of the following is **true** about a cheque?
- An ante-dated cheque is invalid.
 - A cheque is valid for 6 months.
 - A cheque is negotiable by statute.
 - A drawee of a cheque can be only a banker.
 - All of the above.
- 151.** A holder in due course:
- Is affected by any defect in the title of the transferor.
 - Is affected by any defect in the title of any prior party.
 - Can sue upon a negotiable instrument in his own name.
 - Cannot sue upon a negotiable instrument in his own name.
 - Gets the instrument free from defects, when fraud is involved.
- 152.** A person becomes a holder in due course if he obtains the negotiable instrument:
- For consideration.
 - By gift.
 - Before its maturity.
 - After its maturity.
 - Both (a) and (c) above.
- 153.** A person can be a holder of an instrument if:
- He is named as the payee.
 - The instrument is payable to order, and he is the endorsee.
 - The instrument is payable to bearer, and he is the bearer.
 - Both (a) and (b) above.
 - All of (a), (b) and (c) above.
- 154.** Restrictive endorsement implies:
- Negotiation by order.
 - Delivery of an instrument by the holder without indorsing it.
 - No further negotiation.
 - Further transferability.
 - None of the above.
- 155.** To complete transfer by negotiation essential element for bearer instrument is:
- Specific payer.
 - Endorsement.
 - Proof of payee.
 - Consent of drawee.
 - Delivery.

156. On crossing of cheque with words "Account payee":
- It becomes the responsibility of the drawee bank not to make payment.
 - The drawee bank is obliged to make payment only to the bank to which the cheque is crossed.
 - The words Account Payee on a cheque is direction to the collecting banker to collect the amount for anyone.
 - On adding words Account Payee to crossing of cheque it becomes direction to pay only to the payee.
 - The title of the transferee when words 'not negotiable' is mentioned on crossed cheque is not perfect.
157. Which of the following statements is **true** in case of a cheque crossed generally?
- The drawee bank cannot make payment otherwise than to the account.
 - The drawee bank is responsible to make payment on the counter.
 - The drawee bank is responsible to endorse the cheque.
 - The drawee bank shall not make payment in accordance with the apparent tenor of the instrument.
 - All (a), (b) and (c) above.
158. In which of the following situations a notice of dishonor of cheque is unnecessary?
- When it is expressly waived.
 - When the note is not negotiable.
 - When there is implied waiver of notice.
 - When the drawer countermands payment.
 - All of the above.
159. In case a cheque drawn by a person is dishonored for insufficiency of funds, the drawer of the cheque is punishable with:
- Fine up to the amount of cheque or one year imprisonment or with both.
 - Fine up to twice the amount of cheque or two years imprisonment or both.
 - Fine of Rs.50,000.
 - Imprisonment up to two years.
 - Both (c) and (d) above.
160. The basic functions of SEBI are:
- Regulate the business in stock exchanges.
 - Regulation of market intermediaries.
 - Prohibit insider trading in securities.
 - All of the above.
 - Both (a) and (b) above.

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- 161.** Which of the following is the objective of the Securities Exchange Board of India?
- Not to promote fair dealings by the issuers of securities.
 - Does not provide protection to the investors.
 - To regulate and develop a code of conduct and fair practices among intermediaries like brokers, merchant bankers etc., with a view to make them competitive and professional.
 - It is not conferred with the statutory powers to deal effectively with all matters relating to the capital market.
 - Has no power to supervise, oversee and control the operations of the stock exchanges.
- 162.** The Chairman of SEBI is appointed by the:
- Central Government.
 - RBI.
 - Joint committee consisting of the directors of IDBI, IFCI, ICICI and UTI.
 - Members of SEBI.
 - The RBI and State Bank of India.
- 163.** _____ approval is required for the bye-laws framed by the depositories:
- SEBI
 - Ministry of Finance
 - RBI
 - Stock Exchange
 - State Government.
- 164.** The members of SEBI are appointed by:
- Chairman of SEBI.
 - The chairman of the stock exchanges.
 - Reserve Bank of India.
 - Leading brokers of the stock markets.
 - Central Government.
- 165.** The main purpose of Securities Contract (Regulation) Act is to:
- To prevent undesirable transactions in securities.
 - To prevent Exchanges from functioning.
 - To prevent Dealers from colluding.
 - To prevent desirable transactions in securities.
 - All of the above.
- 166.** _____ can withdraw the recognition granted to the stock exchange after giving notice, if it is of the opinion that, it is in the interest of trade and public interest:
- Any member of the Stock Exchange.
 - The Court.
 - SEBI.
 - The Central Government.
 - Mumbai Stock Exchange.

167. Every recognized stock exchange can make or amend any rules, by-laws subject to the approval of:
- Central Government.
 - State Government.
 - RBI.
 - SEBI.
 - NASDAQ.
168. Among the following functions of the depositories under Depositories and Participants Act the most important function is :
- To dematerialize securities and enable their transaction in a book-entry form.
 - To govern and regulate the stock exchanges in India.
 - Granting recognition of stock exchanges.
 - Regulation and control of business dealing in spot delivery contracts.
 - To prevent undesirable transactions in securities.

Chapter 8: Business Transactions and Cyber Law

169. Which of the following is excluded from Information Technology Act, 2000?
- Provides legal recognition to transactions carried out by means of electronic data interchange.
 - Facilitates electronic filing of documents with government departments/ agencies.
 - It has no extra territorial operation and hence is applicable to India but not to Jammu and Kashmir.
 - The Act recognizes and authenticates electronic transactions, records and digital signatures.
 - A legal framework for regulating the e-commerce transactions and imposition of punishments and penalties for violating the provisions.
170. Which of the following is the **correct** explanation for hacking?
- It is publishing of digital Signature Certificate with false particulars.
 - It is securing access to electronic record disclosing electronic documents.
 - Creating, publishing or making available a Digital Signature Certificate for any fraudulent or unlawful purpose.
 - It is causing wrongful loss or damage to public or any person by deleting, altering, destroying any information from the computer.
 - Computer contamination or injecting virus.
171. The punishment provided under the IT Act for publishing or transmitting obscene material in electronic form is:
- Imprisonment up to 2 years and fine up to Rs.1 lakh.
 - Imprisonment up to 3 year and fine up to Rs.2 lakh.
 - Up to Rs.10,000 per day.
 - Not exceeding Rs.1.50 lakh for each day.
 - Imprisonment up to 5 years and fine up to Rs. 1 lakh for first conviction

172. Which of the following statements is the **correct** explanation about “A truncated cheque”?
- It is the Xerox copy of a paper cheque.
 - It is the cheque certified by bank.
 - It is the cheque generated, written and signed by a secure system.
 - Cheque either by the clearing house or by the bank whether paying or receiving payment, immediately on generation of an electronic image for transmission.
 - It is a manually written, and presented to the paying banker.

Chapter 9: Competition and Consumer Protection

173. On receipt of a consumer complaint it has to be decided within _____.
- 6 months of its receipt.
 - 3 months of its receipt.
 - 9 months of its receipt.
 - 12 months of its receipt.
 - 5 months of its receipt.
174. The consumer complaint where the goods require analysis or testing of commodities be decided within:
- 6 months.
 - 3 months.
 - 5 months.
 - 9 months.
 - 4 months.
175. State the limitation period for filing a consumer complaint from the date of cause of action under the Consumer Protection Act, 1986:
- three years.
 - one year.
 - six months.
 - two years.
 - four years.
176. The amount required to be deposited by the party in case of appeal to the State Commission against the order of the District Forum is:
- 50% of the ordered amount or Rs.25,000, whichever is less.
 - 45% of the ordered amount or Rs.35, 000, whichever is less.
 - 40% of the ordered amount or Rs.35, 000, whichever is less.
 - 30% of the ordered amount or Rs.35, 000, whichever is less.
 - 60% of the ordered amount or Rs.60, 000, whichever is less.

177. The amount required to be deposited by the party, who seeks an appeal against the order of the State Commission to the National Commission is:
- 45% of the ordered amount or Rs. 35,000/- whichever is less.
 - 40% of the ordered amount or Rs.35,000/-, whichever is less.
 - 30% of the ordered amount or Rs.30,000/-, whichever is less.
 - 60% of the ordered amount or Rs.60,000/-, whichever is less.
 - 50% of the ordered amount or Rs.35,000/-, whichever is less.
178. The amount required to be deposited by the party, seeking an appeal against the order of the National Commission to the Supreme Court is:
- 45% of the ordered amount or Rs.75, 000/-, whichever is less.
 - 60% of the ordered amount or Rs.1 lakh, whichever is less.
 - 50% of the ordered amount or Rs.Rs.50,000/-, whichever is less.
 - 70% of the ordered amount or Rs.5 lakh, whichever is less.
 - 75% of the ordered amount or Rs.10 lakhs, whichever is less.
179. Which of the following institutions is vested with the power of review under the Consumer Protection Act of 1986?
- Supreme Court.
 - State Commission.
 - National Commission.
 - District Forum.
 - Supreme Court and National Commission.
180. State Government can establish more than one District Forum in one of the following situations:
- Has no power to establish additional Forums.
 - The assent of the President of India needed.
 - Depending upon the increase in number of consumer disputes in the District.
 - When the population of the district exceeds 10 lakh.
 - On consultation with the National Commission.
181. The time limit within which an appeal from the decision of one forum to the other can be filed is:
- 45 days.
 - 30 days.
 - 60 days.
 - 90 days.
 - 15 days.
182. The number of members to be present in the National Commission other than the President is:
- One.
 - Two.
 - Five.
 - Four.
 - Three.

183. Which of the following objectives of the Competition Act, 2002 is **false**?
- To promote the spirit of competition.
 - To provide a regulatory framework covering the critical areas of competition.
 - To promote free and fair competition in India and to protect the interests of the importers and exporters.
 - Future possibilities that impact the sustainable economic development.
 - Penalties for contravention of orders of Commission.
184. Offering of gifts, prizes etc., by creating an impression that something is being given free of charge when it is fully or partly covered by the amount charged in the transaction as a whole by the seller is the:
- Restrictive Trade Practice.
 - Unfair Trade Practice.
 - Tie-up Sale.
 - Restrictive and tie-up sale.
 - Unfair and tie-up sale.

Chapter 10: Environment Protection and Business Obligations

185. Which of the following statements is **false** in relation to the Rule of Strict Liability?
- The rule was formulated in accordance with the prevailing social and economic circumstances.
 - The thing collected should be capable of doing mischief on escape.
 - There is no liability if the damage caused within the premises due to the thing collected by the defendant.
 - Collection of harmful thing in large quantity amounts to non-natural use of land.
 - The defendant is not made liable for the harm caused to plaintiff even though it is intentional.
186. Which of the following is **false** as to the application of Rule of Absolute Liability in India?
- The rule was first evolved in *M.C. Mehta vs. Union of India* case.
 - The rule does not have any exceptions.
 - The rule imposes an absolute and non-delegable duty.
 - The owner is not liable, when the escape of substance is due to the act of a stranger.
 - is applicable to the present socio-economic circumstances.
187. Identify the Constitutional Provisions which protect the interests of the aggrieved parties by means of writs:
- Article 12 and Article 36.
 - Article 352 and Article 356.
 - Article 32 and Article 226.
 - Article 13(1) and Article 13(2).
 - Article 47 and Article 51A(g).

Chapter 11: Alternative Dispute Resolution

188. Which of the following is adopted by the Legal Services Authorities Act, 1987 in Alternate Dispute Resolution System?
- Arbitration.
 - Lok Adalats.
 - Conciliation.
 - Mediation.
 - Negotiation.
189. Which of the following matters can be referred to Arbitration?
- Matrimonial matters.
 - Testamentary matters.
 - Lunacy proceedings.
 - Matters relating to breach of contracts.
 - Criminal proceedings.
190. The disputes that can be referred to Alternate Dispute Resolution are:
- Matrimonial and matters connected with conjugal rights.
 - Industrial disputes and revenue matters.
 - Labour disputes, service matters, consumer protection, taxation, excise.
 - Testamentary issues under Succession Act, 1925.
 - Insolvency, dissolution and winding up proceedings under Companies Act, 1956.
191. The arbitrators shall make their award within _____ months of reference of the dispute to them.
- 2
 - 3
 - 4
 - 6
 - 12.
192. Which of the following statements is **true** concerning arbitration?
- Suits pending before courts may be settled by arbitration.
 - Parties wanting to settle their case pending before the court can opt for arbitration.
 - Parties intending to opt for arbitration need to apply to the court for an order of reference to an arbitrator.
 - All of (a), (b) and (c) above.
 - Both (b) and (c) above.
193. Identify the **false** statement in relation to Arbitration.
- The arbitrator makes the decision based on the facts of the case, contractual obligations between the people, and the applicable law.
 - The arbitral award is subjected to review by a court.
 - In arbitration the dispute is viewed as a legal analysis and hence a solution based on entitlement and rights is made.
 - The award of arbitrator is always final.
 - Arbitration has a statutory base.

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194. Civil Disputes relating to _____ can be referred to arbitration.
- Matrimonial matters
 - Time barred claims
 - Testamentary matters
 - Lunacy proceedings
 - Matters of criminal nature.
195. Which of the following statements is **false** with regard to Mediation?
- Involves selection of a neutral third party who helps the parties communicate with each other.
 - Parties get a “win-win” situation.
 - Mediation is applied to resolve the matters connected with family disputes, business disagreements and contract disputes.
 - Mediator enables the parties to communicate constructively.
 - Mediation is conducted publicly and is transparent.
196. Which of the following is **false** regarding 5 thumb rules of the negotiation process?
- Without jeopardizing major issues, it send signals of cooperation politely.
 - If the other side is competitive, rebuff that aspect.
 - Retaliate if the parties are not heeding the words.
 - Clarity and consistency in approach and predictability.
 - For better assimilation.
197. Which of the following types of Alternate Dispute Resolution methods a neutral third party is legally employed to resolve the dispute?
- Conciliation only.
 - Arbitration only.
 - Arbitration and Mediation.
 - Mediation and Negotiation.
 - Conciliation and Negotiation.
198. Which of the following statements is **false** with regards to conciliation procedure?
- A written invitation to conciliation is must.
 - In case of three conciliators, each party appoints one, and the third conciliator appointed act as presiding conciliator.
 - The Conciliator is to be guided by the principles of objectivity, fairness and justice.
 - The settlement signed by the parties is final and binding on them.
 - The admissions made in the arbitration and conciliation proceedings can be adduced as evidence.

Part I: Answers on Basic Concepts

Chapter 1: Introduction to Legal Environment

1. (c) Sir John Salmond in his work Jurisprudence defined Law as body of principles recognized and applied by the State in the administration of justice.
2. (d) Justice Bhagwati in Passport case: *Maneka Gandhi vs. Union of India* observed Law to be valid, the procedure so established by it also must be just, fair and reasonable.
3. (a) According to Salmond the two main sources of law were formal and material.
4. (a) The term 'tort' is derived from the Latin term '*tortum*' and its English equivalent is 'wrong'. In Roman Law 'tort' is equivalent to 'delict'. '*Tortum*' means 'twisted' or 'crooked' and implies conduct which is not straight forward or lawful.
5. (d) It is actionable *per se* and law presumes that actual damage has occurred.
6. (b) Legal duty arises when there is failure to perform an obligatory act, which results in the violation of legal duty.
7. (d) A right is said to be an absolute right when it is *actionable per se* and requires proof of the wrong done.

Chapter 2: Business Contracts

8. (c) Legal Relationship: One of the essential conditions for a valid contract is that there must be legal relation-ship between the parties, i.e. *vinculum juris*.
9. (e) The agreement between A and B does not give rise to any legal obligation as there is no contract between them.
10. (a) Unilateral contract is one in which only one party has to perform his obligation.
11. (d) No, it is not a valid contract as there is counter offer wherein the offeree attempts to change the terms of the offer initially made by the offeror. A counter offer implies rejection of the original offer.
12. (e) All of the above. Offer automatically lapses, in the following occasions:
 - (a) If it is revoked by the offeror at any time before its acceptance.
 - (b) If the offeror or offeree dies or becomes insane and the other party comes to know before acceptance.
 - (c) If the offer is not accepted within the specified time or within a reasonable time.
 - (d) Upon failure to fulfill a condition precedent to acceptance.
13. (e) Ram's communication to Shyam that he will sell his Red Maruti 800 car for Rs.1,50,000 is a valid offer.
14. (e) By making an offer, the offeror expresses his willingness 'to do' or 'not to do' something with a view to obtain consent of the other party to such act or abstinence. An offer can be made either to a specific person or to the public at large. Further the terms of the offer should be definite and unambiguous.
15. (b) Communication of acceptance made by post is complete as against the offeror when the letter of acceptance is posted to him.
16. (a) A prudent man: As a prudent man alone can form a rational judgment as to the terms of the contract and hence is competent to contract.
17. (c) Agreement is void, as per Section 20 of the Indian Contract Act, 1872 which states that an agreement is void when the parties to an agreement are under the mistake of fact.

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18. (b) The agreement entered by A, B, C is fraudulent as they intended to share gains from the fraudulent business; and this defeats the provisions of Indian Contract Act.
19. (b) This kind of agreement is not in restraint of marriage, as nothing in the agreement reflects any restraint imposed upon either of the two widows from remarriage.
20. (d) G promises to pay ransom to H as H would have tried to influence G either by coercion, undue influence or fraud, etc. Hence any promise made under threat or fear is not a valid acceptance as the consideration is forced.
21. (c) Indian Majority Act, Section 3 says, a person below the age of 18 years is considered as minor, and any contract entered into with a minor is *void ab initio* as minor has no capacity to contract as per sec 10 of the Indian Contract Act, 1872.
22. (c) As both the parties to the contract have discharged their obligations under the contract, it is an executed contract.
23. (b) If a minor by misrepresenting his age induces the other party to contract with him, he can always plead minority. Hence, Anish cannot be sued for fraud.
24. (d) If the parties have not agreed upon the terms of their contract, but have made an agreement to agree in future is void agreement.
25. (a) The contract entered with a lunatic during his sound state of mind is valid. A person who is usually of unsound mind but occasionally of sound mind may enter a contract when he is of sound mind.
26. (e) The general rule of law is that an agreement without consideration is void. However, a promise to pay a time barred debt either wholly or in part is valid provided it is in writing and is signed by the debtor or his authorized agent. Similarly, an agreement entered with love and affection is valid even without consideration provided it is in writing and is registered. A promise to pay for a past voluntary service is binding. Also, no consideration is necessary to create an agency.
27. (e) As per the Contract Act, 1872 consideration must be real, competent and of some value in the eyes of the law. Thus, it must be real and need not be adequate. The law simply requires that a contract should be supported by consideration.
28. (c) It is valid payment made to Y towards full satisfaction of his loan amount Payment of full amount is not material, whereas the amount was accepted by 'Y' or not is important.
29. (b) Public policy requires that every man should be at liberty to work for himself and an agreement which interferes with the liberty of a person to engage himself in any lawful trade is referred to as 'an agreement in restraint of trade'. An exception to this rule is the sale of goodwill. A seller of goodwill of a business may be restrained from carrying on a similar business subject to certain conditions.
30. (c) According to the Indian Contract Act, 1872 coercion is (a) the committing or threatening to commit, any act forbidden by the Indian Penal Code or (b) the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement. As A's consent was given at gun point it amounts to coercion.
31. (c) An agreement brought about by coercion renders the contract voidable at the option of the person whose consent was so obtained.
32. (d) On a party to the contract becoming insolvent, the contract is said to be discharged by the operation of law.
33. (c) A contract of guarantee is to be supported by consideration, and it is not necessary that consideration should have passed between the creditor and the surety. It is sufficient if the creditor has done something for the benefit of the debtor.
34. (e) All the alternatives indicated result in revocation of a continuing guarantee.

35. (c) Where a party to a contract makes any material alteration in the contract without the consent of the other party, the other party can avoid the contract.
36. (b) An inchoate instrument is an incomplete negotiable instrument in some respects.
37. (d) Exemplary damages are awarded in case of breach of promise to marry.
38. (a) General damages can be awarded as the damages arose in the usual course of things naturally. However, loss of profit cannot be claimed as the owner did not inform the carrier about the significance of the cutting machine.
39. (c) Del credere agent undertakes to fulfill financial obligations of third person when such person fails to fulfill the same, as he acquires the position of surety and agent. However the del credere agent cannot recover from the third person whatever amount paid to the principal but can get extra commission.
40. (c) A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself or by the conduct of any other person is called a Contract of Indemnity.
41. (d) Pledge is the security for the bailment of goods for payment of a debt.
42. (a) Insolvency of principal puts an end to agency relationship.
43. (e) The contract of agency can be terminated by
- the mutual agreement between the principal and agent at any point of time.
 - Principal may revoke the authority of the agent any time before the authority has been exercised so as to bind the principal.
 - The various circumstances in which an agency gets terminated by operation of law are on performance of the contract, on expiry of time, death of the principal or principal becomes one of unsound mind.
 - On completion of a contract of agency which is formed to do a particular type of business.
44. (e) Where the agent acts on behalf of a principal who is incompetent to enter into a contract, for example a minor, then the agent is personally liable. Also, when the contract is made by an agent for the sale or purchase of goods for a merchant residing abroad, the agent is personally liable. Similarly, when an agent has an interest in the subject matter (agency coupled with interest), he has the right to sue or be sued but only to the extent of his interest in the subject matter. Even when an agent acts for an undisclosed principal, he is personally liable.
45. (c) Indemnifier is a person who compensates the indemnified and gets the right of subrogation.
46. (d) Bailment involves change of possession of goods from one person to another person for some specific purpose.
47. (e) The pawnee of goods is entitled to retain the goods pledged until his dues and interest on it are cleared. He can also claim necessary expenses incurred by him for maintenance of the pledged goods.
48. (c) The liability in respect of the luggage belonging to a guest in the cloak room is that of a bailee, hence he should take as much care of the goods as a prudent man would take of his own goods under similar circumstances.
49. (e) The bailment of goods as security for payment of a debt or performance of a promise is called 'pledge'.
50. (d) The right of a person to retain possession of some goods belonging to another, until debt or claim of the person in possession is satisfied is the right of Lien.
51. (e) A gratuitous bailment is one which is not supported by consideration.

52. (c) General lien is available only to a select class of people under section 171 of the Contract Act. The bankers, factors, wharfingers, attorneys of a High Court and policy brokers may retain as a security for a general balance of account any goods bailed to them.
53. (e) Insurance agent is a non-mercantile agent whereas factors, auctioneers, brokers, and bankers are classified as mercantile agents.
54. (b) A contract of insurance is an example of a contract of indemnity as in consideration of a premium the insurer promises to make good the loss suffered by the assured on account of destruction of his property insured against fire, theft, accident etc.
55. (d) A contract of insurance except life insurance is a contract of indemnity. In a contract of indemnity, 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.

Chapter 3: Non-Corporate Business Entities

56. (c) The aggrieved partner cannot file suit against or any of its partners in case of unregistered firm.

Chapter 4: Law Relating to Corporate Business Entities

57. (e) The business of the artificial person is carried by and for the benefit of some individuals. As an artificial person is not capable of doing anything illegal or fraudulent, the facade of corporate personality might have to be removed to identify the persons who are really guilty. The corporate veil may be lifted when the state's revenue has to be protected. Thus, when the company does not refund application money on failure to make allotment the corporate veil may be pierced. Even when the doctrine is opposed to public policy it becomes necessary to pierce the corporate veil.
58. (c) A company is regarded as an entity separate from its members and has an independent existence. The effect of separate corporate personality is that the shareholders have no insurable interest in the property of the company, the company's money and property belong to the company and not to the shareholders. A shareholder is not an agent of the company and thus has no power to bind the company by his acts. Also, the creditors of a company can proceed only against the company and not against the members individually or even jointly. In other words, the members can enter into contracts with the company in the same manner as any other individual.
59. (e) There is no restriction on the maximum number of members a public company can have. Hence, a public company can commence its business only after obtaining the certificate of commencement of business.
60. (d) A company issuing a prospectus to the public should issue it within 90 days after it is registered with the ROC.
61. (e) As per the Companies Act, 1956 conversion of a public company will require the passing of a special resolution, and also the approval of the Central Government.
62. (b) Special resolution is to be passed to alter the objects clause of the Memorandum of Association.
63. (e) Shifting the registered office from one State to another State involves alteration of the memorandum. Registered office of a company can be shifted from one state to another by passing a special resolution and confirmation thereof by the company law board.
64. (a) A company has power to do all such things as are – (i) Authorized to be done by the Companies Act, 1956. (ii) Essential to the attainment of its objects specified in the memorandum and articles of association (iii) Reasonably and fairly incidental to its objects. Everything else is ultra vires the company. The term ultra vires a company means that the doing of the act is beyond the legal power and authority of the company as conferred upon it by the memorandum and articles of association of the company.

65. (d) The Memorandum of Association of a company contains the fundamental conditions upon which alone the company has been incorporated. The memorandum enables shareholders, creditors and all those who deal with the company to know its powers and the range of its activities.
66. (c) A certified copy of the order of the Central Government relating to the alteration of the Memorandum of Association is to be registered with the Registrar of Companies within three months from the date of its alteration.
67. (c) Shifting of a registered office from one place to another place in the same city does not require alteration of memorandum because in the registered office clause of the memorandum, it is only the name of the state which is mentioned and not the address of the registered office.
68. (d) The memorandum and articles on registration with the Registrar assume the character of public documents. As such, they are open and accessible to all. Hence, the memorandum and articles of a company are open for inspection to everybody.
69. (d) Statutory rights are conferred upon a member by the Companies Act, while contractual rights occur via the Memorandum and Articles of Association of a Company.
70. (e) The articles of association are the rules, regulations and bye-laws for the internal management of the affairs of a company. They are framed with the object of carrying out the aims and objects as set out in the memorandum of association. The articles are subordinate to and controlled by the memorandum.
71. (b) As per Section 28, a public company limited by shares may either frame its own set of articles or may adopt all or any of the regulations contained in Table A of Schedule I to the Act. If such a company does not register the articles, Table A automatically applies. However, unlimited companies, companies limited by guarantee or private companies limited by shares should have their own articles.
72. (a) Doctrine of constructive notice is to be invoked by a company.
73. (c) The persons who deal with the company are not bound to enquire into the regularity of the internal proceedings and will not be affected by irregularities of which they had no notice is based on the doctrine of indoor management.
74. (b) An outsider can claim relief on the ground of indoor management, if he has no knowledge of irregularity.
75. (c) Every person dealing with the company is presumed to have read the memorandum and articles and understood them in their true perspective as per the doctrine of constructive notice.
76. (e) The 'doctrine of indoor management' allows all those who deal with the company to assume that the provisions of the articles have been observed by the officers of the company. Hence, the doctrine can be invoked by outside parties dealing with the company.
77. (b) Doctrine of Constructive Notice: The doctrine assumes that the outsider has the knowledge of the memorandum and articles as these are public documents which have to be read by persons dealing with the company.
78. (d) A private company on becoming a public company has to file a prospectus or statement in lieu of prospectus with the Registrar of Companies.
79. (b) A person who has taken shares relying on a prospectus containing misstatements can rescind the contract within a reasonable time before proceeding to wind up the company have commenced and before he does anything which is inconsistent with the right to repudiate. The effect of the rescission is that the shareholder would give up the shares and get back his money with interest. The allottee can also claim damages from the company.
80. (d) No prospectus shall be issued by a company unless it is signed by all the persons named therein as director or proposed director.

81. (e) A director will not be held liable for misstatements in the prospectus when he withdraws his consent and gives a public notice to that effect stating that his name is included without his knowledge and consent. Thus, any action contrary to this will make him liable.
82. (b) Equity shares issued by a company to its employees or directors at a discount or for consideration other than cash for providing know how or services are called sweat equity shares.
83. (c) The share or other interest of any member in a company must be movable property, transferable in the manner provided by the articles of the company; hence a Negotiable Instrument cannot take that place. Therefore, a share certificate is not a negotiable instrument.
84. (d) Capital invested in the stock of goods is called circulating capital.
85. (c) Subject to an authority in the articles of association, a public limited company may issue redeemable preference shares to be redeemed either at a fixed date or after a certain period of time during the life time of the company provided the articles provide for the issue of such shares. Also such preference shares may be redeemed only out of profits available for dividends. The Companies (Amendment) Act, 1988, as further amended in 1996 has prohibited the issue of any preference shares which is irredeemable or is redeemable after the expiry of a period of 20 years from the date of its issue.
86. (b) Redeemable preference shares may be redeemed out of profits available for dividend or out of the proceeds of a fresh issue of shares made for the purpose of redemption.
87. (d) No company limited by shares shall, after the commencement of the Companies (Amendment) Act, 1996, issue any preference share which is irredeemable or is redeemable after the expiry of a period of twenty years from the date of its issue.
88. (d) An irregular allotment is voidable at the option of the applicant.
89. (e) The share premium raised is not available for payment of dividend as it is not a profit. If a company distributes the amount lying in the account for purposes other than those stated, in a, b, c, d it shall amount to reduction in capital.
90. (a) Section 73 of the Companies Act, 1956 requires that every company intending to offer shares or debentures to the public for subscription by the issue of a prospectus shall, before such issue, make an application to one or more recognized stock exchanges for permission for the shares or debentures intended to be so offered to be dealt on the stock exchange.
91. (c) The shareholders of the company in a general meeting can decrease the rate of dividend recommended by the board of directors but cannot increase it.
92. (d) The shareholders have no right to enhance the rate of dividend declared by the Board of Directors but can lower the rate of dividend. (U/s 173 of Companies Act).
93. (e) A transfer is complete as between the transferor and the transferee when the transfer deed is executed and share certificates are handed over to the transferee. Whereas, between the company and the transferee transfer is complete only when it is registered in the Company's register.
94. (b) A director need not take up qualification shares unless provided by the articles.
95. (c) According to Section 262, if the office of any director appointed by the company in a general meeting is vacated before his term of office expires in the normal course, the resulting casual vacancy may, subject to any regulations in the articles of the company, be filled by the Board of Directors at a meeting of the Board.
96. (d) According to Section 270 of the Companies Act, if the articles require a director to take up qualification shares, then he must acquire such qualification shares within two months from his date of appointment as director.
97. (a) Share qualifications, if required by the articles, should be acquired by the director, within 2 months of his appointment as director.

98. (a) A person who has not paid call money in respect of shares of the company alone or jointly with others within six months from the last date fixed for the payment of the call is disqualified from being appointed as Director under Sec. 274(1)(e) of the Companies Act.
99. (b) In case of a proposed contract, the director having interest in it will have to make disclosure at the meeting of the board at which the question of entering into the contract or arrangement is first taken into consideration. Whereas, in the case of any other contract or arrangement, the disclosure shall be made at the first meeting of the Board held after the director becomes interested in the contract or arrangement.
100. (c) As per S.260 of the Companies Act, when the board, appoints an additional director then such director shall hold office up to the next annual general meeting. Thus an additional director may be appointed either at a meeting of the Board or by passing a resolution by circulation.
101. (c) According to Section 173 of the Companies Act, ordinary business to be transacted at an annual general meeting relates to the following matters: (i) consideration of accounts, balance sheet and the reports of the board of directors and auditors; (ii) declaration of dividends; (iii) appointment of directors in place of those retiring; (iv) appointment of auditors and fixation of their remuneration.
102. (b) As per Sec.313 of the Companies Act, the Board of directors of a company can appoint an alternate director in place of the original director when he absents himself for a period not less than three months from the State in which board meetings were held.
103. (e) A Managing Director may be appointed by virtue of
- (a) an agreement with the company.
 - (b) a resolution passed by the company in the general meeting.
 - (c) a resolution passed in the board of directors meeting.
 - (d) Memorandum/Articles of association of the company.
104. (c) As per Sec.316 of the Companies Act, a person can be appointed as a Managing Director of any number of private companies not being subsidiaries of a public company.
105. (d) In case of misstatements in the prospectus, directors will be liable to third parties. However, in case of breach of warranty of authority and misfeasance (which means misconduct), the directors will be liable to the company.
106. (e) As per Section 155 of the Companies Act, 1956, when a private company converts itself into a public company within of six months from the date of its incorporation it has to conduct a statutory meeting.
107. (e) The quorum for a board meeting shall be one-third the total strength of the board or 2 directors whichever is higher.
108. (a) The proper authority for convening a general meeting of the members of a company is the Board of directors.
109. (d) A company other than a charitable company shall hold a minimum of four Board meetings every year.
110. (e) Section 286 provides that notice of every meeting of the Board of directors of a company must be given in writing to every director for the time being in India and at their usual address. There is no time limit fixed by the Act for convening a board meeting.
111. (a) The articles of association of a company require the presence of the quorum at the time when the meeting proceeds to business then such requirement will be deemed to be complied with if the quorum is present at the beginning of the meeting. This means quorum need not present throughout the meeting or when the meeting proceeds to vote.
112. (a) As per Section 217 of the Companies Act, 1956 a board report is to be prepared and annexed to the balance sheet along with the auditors report to be adopted in General Meeting.

113. (d) As per Section 171 of the Companies Act, 1956 at least 21 days notice must be given to two members of a company for conducting a general meeting.
114. (e) An extraordinary general meeting may be called (i) by the board of directors of its own accord (ii) by the directors on requisition (iii) by the requisitionists themselves (iv) by the NCLT.
115. (b) As per Sec. 174(1) of the Companies Act, to constitute quorum a minimum of five members should be personally present at the meeting of a public company and a minimum of two members in case of a private company.
116. (d) The first annual general meeting of a company is to be conducted within 18 months of its incorporation.
117. (e) Appointment and fixation of remuneration for liquidators in case of members voluntary winding-up as well as payment of interest out of capital requires passing of a special resolution.
118. (c) As per Section 441 of the Companies Act, where a resolution has been passed for voluntary winding-up, before presentation of the petition, then such winding-up shall be deemed to have commenced at the time of passing of the resolution.
119. (d) The court may order winding up of a company, when the company passes a special resolution for its winding up under section 433(a) of the Companies Act, 1956.
120. (d) As per Sec.252 (1) of the Companies Act, a public company shall have at least three directors.
121. (b) As per Sec. 252(2) of the Companies Act, a private company shall have at least two directors.
122. (a) A company may be wound up by the court on 'Just and Equitable ground', when there is a deadlock in the management of a company. The court may order winding-up of a company under specified circumstances mentioned in (b), (c) and (d).

Chapter 5: Property Law for Business

123. (c) The Sale of Goods Act excludes certain movables under Sec.2 (7), which includes actionable claims and money.
124. (b) It deals with the transfer of property *inter-vivos*, i.e. a transfer between the living persons only.
125. (d) As per Sec 56 of the Sale of Goods Act, in a suit by the seller for wrongfully neglecting or refusing to accept and pay for the goods by the buyer, the buyer has to compensate him for damages for non-acceptance.
126. (c) As per Sec.534 of the Companies Act, 1956, a floating charge on the undertaking or property of the company created within twelve months immediately preceding the commencement of winding up is declared invalid if the charge is not satisfied.
127. (b) The person to whom the goods are delivered, is called the bailee hence the position of the finder of lost goods in law is that of a bailee.
128. (a) The right of lien is exercised by an unpaid seller to retain the possession of the property.
129. (d) Only two parties i.e., a buyer and a seller are required for a contract of sale. Secondly, there must be some goods which is or is to be transferred from the seller to the buyer. Consideration for the contract of sale is price, and it must be in the form of money.
130. (d) As per the Sale of Goods Act, the right of lien is impliedly waived, where the seller takes a negotiable instrument or any other security for the price or where the seller by his conduct dispenses with payment of the price or where the seller claims to retain the goods under some other right, instead of the right of lien.

Chapter 6: Business and Tax Laws

131. (a) According to Sec.2(9) of the Income Tax Act, 1961, assessment year means the period of 12 months starting from 1st April of every year and ending on 31st March of the next year. Income earned in a year is taxable in the next year. The year in which income is taxable is known as the assessment year.
132. (b) As per Sec.3 of the Income Tax Act, 1961, income earned in a year is taxable in the next year. The year in which income is earned is known as the previous year.
133. (c) Central Board of Direct Taxes (CBDT) is empowered to frame rules to achieve the purpose of the enactment and ensure proper governance of the Finance Act.
134. (b) Income is said to have accrued if there arises a fixed and unconditional right to receive it.
135. (d) The total income of any person in the previous year is determined according to his residential status for the previous assessment year.
136. (d) The wealth tax chargeable in respect of net wealth of an individual, in respect of every assessment year is at the rate of 1 percent of the amount.
137. (d) The wealth tax is chargeable in respect of every assessment year at the rate of 1 percent of the amount by which the net wealth exceeds Rs.15 lakh.
138. (b) The net wealth of a minor has to be included in the net wealth of that parent whose net wealth is greater than the other spouse.
139. (d) The Central Government is vested with the power to levy excise duty by virtue of Entry 84, List I, Schedule VII of the Constitution of India.
140. (c) For levying the excise duty on goods in India the goods should be excisable goods and such goods should have been produced or manufactured in India.
141. (c) The value of clearances in the preceding financial year, for determining eligibility for the exemption, is increased to Rs.4 crore from Rs.3 crore.
142. (d) Though there is no provision for refund of the excess CENVAT credit, the only exception is in case of exports where duty paid on input material used for exported goods is refundable.
143. (c) It is twice the rate applicable to sale or purchase of goods within the State. Thus, if the rate applicable to sale or purchase is 4 % then the rate chargeable to the unregistered dealer is 8%.
144. (d) Customs duty is leviable if the transport of goods is on land, air and water.
145. (d) Sales tax is generally a single point tax levy while VAT is a multi-point levy. In sales tax no tax is being levied on the value addition on subsequent sales. In VAT full set-off of the tax paid at the earlier stage is granted.
146. (b) The collected service tax is to be deposited into the Central Government's account within a stipulated period.
147. (b) The tax on the fringe benefits is called Fringe Benefit Tax (FBT), and is collected from the hands of employer.
148. (c) Perquisites are the benefits, monetary and non-monetary, provided by the employer to his employees in addition to the salary or wages and tax on these benefits is called Fringe Benefit Tax (FBT).

Chapter 7: Financial Services – Legal and Regulatory Environment

149. (e) Promise to pay to Mr. John Rs.1,00,000 on demand for value received' is a valid promissory note.
150. (e) As per the Negotiable Instruments Act, 1881 the fact that a cheque is antedated or post-dated does not affect its validity. A cheque will be valid for 6 months from the date the cheque bears. Moreover, a cheque is a negotiable instrument, negotiable by statute. And the drawee of a cheque should be a banker alone.

151. (c) Where the negotiable instrument passes through the hands of a holder in due course, it gets cleansed of all its defects, provided the holder is not a party to the fraud. A holder in due course can, therefore, sue upon a negotiable instrument in his own name.
152. (e) Consideration is necessary to establish the title of a holder in due course. The holder in due course should have acquired the instrument any time before the amount became payable. Hence, any person is a holder in due course if he has obtained the negotiable instrument for consideration and before its maturity.
153. (e) According to the Negotiable Instruments Act, to be a holder of an instrument, the person must be named in the instrument as the payee, or the endorsee or the bearer thereof.
154. (c) Where an instrument is indorsed restrictively, it implies that the instrument cannot be negotiated further.
155. (e) To complete negotiation, delivery of the negotiable instrument is essential whether the instrument is payable to bearer or order. The delivery must be voluntary, and the object of delivery should be to pass the property in the instrument to the person to whom it is delivered so as to constitute that person the holder thereof. The delivery may be actual, constructive or conditional.
156. (d) The words "Account Payee" on a cheque are direction to the collecting banker that the amount collected on the cheque is to be credited to the account of the payee. "Account Payee" cheques are not negotiable.
157. (a) The drawee bank has the responsibility that in case of a cheque crossed generally is received for payment, shall not pay on the counter but has to make payment through the account of the payee.
158. (e) Notice of dishonor may be expressly waived by the person entitled to it. In such a case notice of dishonor is not necessary. Where a note is not negotiable, failure to give notice of dishonor, is unlikely to affect the interest of any party. Notice of dishonor is said to have been waived impliedly, where the person entitled to receive notice, having full knowledge of facts, agrees, after dishonor, to unconditionally make payment of the amount due on the instrument. When the drawer countermands payment there is no need for a notice of dishonor. The reason behind this is that the drawer himself is responsible for preventing the holder from obtaining payment.
159. (b) If a cheque drawn by a person is dishonored for insufficiency of funds, the drawer of the cheque is punishable with imprisonment for a term which may extend to two years or twice the amount of the cheque or both.
160. (d) As per the SEBI guidelines, a company which announces its bonus shares should implement the proposal within a period of six months from the date of approval of the proposal.
161. (c) To regulate and develop a code of conduct and fair practices among intermediaries like brokers, merchant bankers etc., with a view to make them competitive and professional.
162. (a) The Chairman of SEBI is appointed by the Central Government.
163. (c) SEBI's approval is required for bye-laws framed by the depositories.
164. (e) The chairman and members of SEBI are appointed by the Central Government.
165. (a) The main purpose of Securities Contracts (Regulation) Act, 1956 is to prevent undesirable transactions in securities by regulating the business of dealing therein, and by providing for certain other matters connected therewith.
166. (c) SEBI can withdraw the recognition granted to the stock exchange after giving notice, if it opines that, it is for the best interest of trade and public.
167. (d) Every recognized stock exchange may make or amend any rules made by it relating to the restriction of voting rights to members, regulation of voting rights, restriction on the appointment of proxy and such incidental, consequential and supplementary matters as may be necessary, with the approval of SEBI.
168. (a) The main function of this depository is to dematerialize securities and enable their transaction in a book-entry form.

Chapter 8: Business Transactions and Cyber Law

169. (c) The Information Technology Act, 2000 came into force on 17.10.2000 and covers all states including Jammu and Kashmir, hence it is made applicable to cyber crimes committed in and outside India.
170. (d) Causing wrongful loss or damage to the public or any person deleting, altering, and destroying any information in the computer system is punishable with imprisonment up to 3 years or with fine up to Rs. 2 lakh or with both under Sec. 66 of the Information Technology Act, 2000.
171. (e) Imprisonment up to 5 years and fine up to Rs. 1 lakh for first conviction. Imprisonment up to 10 years and fine up to Rs. 2 lakh for second and subsequent convictions under Sec.67 of the Information Technology Act, 2000.
172. (d) As per Explanation I (b) to Section 6 of Negotiable Instrument Act, 'A truncated cheque' means a cheque which is truncated during the clearing cycle, either by the clearing house or by the bank.

Chapter 9: Competition and Consumer Protection

173. (b) As per Sec.13 (3A) of the Consumer Protection Act, 1986, every consumer complaint has to be decided within three months from the date of receipt of notice by the opposite party.
174. (c) According to Section 13(3A) of the Consumer Protection Act, a complaint must be decided within a period five months if it requires analysis or testing of commodities.
175. (d) Limitation for filing a complaint under Section 24-A of the Consumer Protection Act is within two years from the date on which the cause of action has arisen.
176. (a) Pursuant to Sec. 15 of the Consumer Protection Act, 1986, no appeal by a person, who is required to pay an amount in terms of an order of the District Forum, shall be entertained by the State Commission unless the appellant has deposited in the prescribed manner 50% of that amount or Rs.25,000 whichever is less.
177. (e) As per Sec.19 of the Consumer Protection Act, 1986 no appeal from a person, who is required to pay an amount in terms of an order of the State Commission shall be entertained by the National Commission unless the appellant has deposited in the prescribed manner 50% of that amount or Rs.35,000 whichever is less.
178. (c) Under Sec.23 of the Consumer Protection Act, 1986, no appeal by a person, who is required to pay an amount in terms of an order of the National Commission to the Supreme Court unless that person has deposited in the prescribed manner fifty percent of that amount or fifty thousand rupees, whichever is less.
179. (c) The National Commission is empowered under Section 22(2) to review its own decision/order where there is a patent error.
180. (c) As per Sec.9 (a) of the Consumer Protection Act, 1986, the State Government may if it seems fit, establish more than one district forum in the district depending upon the consumer disputes in the district.
181. (b) As per Sec. 15, 19, 23 of the Consumer Protection Act, 1986, the appeals against the decision of a District Forum or State Commission or National Commission can be filed within a period of thirty days from the date of the order.
182. (d) As per Sec. 20 (1) (b) of the Consumer Protection Act, 1986, not less than four members and one among them shall be a women.
183. (c) The aim is to promote free and fair competition in India and to protect the interests of the consumers and not to promote importers and exporters.
184. (b) Offering gifts, prizes etc., with the intention of not providing them as offered or creating the impression that something is being given or offered free of charge when it is fully or partly covered by the amount charged in the transaction as a whole is an unfair trade practice.

Chapter 10: Environment Protection and Business Obligations

185. (e) Under the rule of strict liability, defendant is liable for the harm even though the same is unintentional and also without any negligence on part of the defendant.
186. (d) When the escape of substance is due to the act of a stranger, the owner is made liable under the rule as it is an absolute liability.
187. (c) The Constitution of India has provided certain remedies under Article 32 (right to move Supreme Court) and Article 226 (right to move High Court) by appropriate proceedings for the enforcement of the rights conferred.

Chapter 11: Alternative Dispute Resolution

188. (b) Lok Adalat is an Alternate Dispute Resolution system that functions under the Legal Services Authorities Act, 1987.
189. (d) Matters relating to breach of contracts can be referred to Arbitration.
190. (c) Large number of tribunals are working under different statutes in India for settling various types of disputes such as labour disputes, service matters, consumer protection, taxation, excise, motor accidents etc. The proceedings of all these tribunals fall within the description of Alternate Disputes Resolution.
191. (c) The arbitrators shall make their award within 4 months after the dispute is referred to them.
192. (d) All the alternatives are correct. Sections 21 to 25 of the Arbitration Act states that where the parties to a suit which is pending before a court decide to settle it by arbitration, they may apply in writing to the Court for an order of reference any time before the judgment is pronounced by the court. The court shall, by order, refer to the arbitrator, who is appointed in such manner as may be agreed upon between the parties.
193. (d) The award of arbitrator may or may not be final. However, there is no conclusive proof as to the award of an arbitrator that it is final.
194. (b) Only civil disputes can be referred to arbitration, thus even time barred claims fall under this category.
195. (e) Mediations are usually conducted privately and are confidential, thus only the parties and those they designate attend it.
196. (c) Let live and live, forgive and forget is the principle, but not the concept of retaliation if the parties do not heed the words.
197. (b) A neutral third party is legally employed only in arbitration proceedings as per Arbitration and Conciliation Act, 1996.
198. (e) The parties are not to rely on or introduce as evidence in any arbitral or judicial proceedings, the views, suggestions or admissions made by a party or a proposal made by the conciliator or any willingness expressed to accept any proposal by any party.

Part II: Caselets (Questions)

Chapter 1: Introduction to Legal Environment

1. Aditya drives a taxi without a license. Unaware of this, some passengers hired his services. Unfortunately, the taxi collides against a lorry, which is parked by the side of the road and the passengers get injured. In view of this illustration, discuss the following:
 - a. Whether Aditya is guilty of breach of duty. Identify the nature of his act.
 - b. Meaning and nature of a Tort.
2. Arjun, who holds a valid driving license drives at a speed of 50 Kmph on a road, where traffic boards instruct the drivers to maintain the speed limit at 15 Kmph, and hits Bobby a pedestrian.
 - a. Can Bobby file a suit against Arjun for the breach of duty?
 - b. Distinguish between malfeasance and misfeasance.
3. 'B', suffering with severe headache, approaches 'A', who is the only doctor available in his village. After investigations 'A' diagnoses that 'B' has brain tumour and requires an immediate surgery. He even fixes a date for the operation. However, on the said date when the operation has to be conducted, 'B' finds that 'A' has gone to a nearby city on a personal visit and will be back only after a week. During this time, 'B' suffers from severe paralytic stroke. In view of this illustration, explain the following:
 - a. Is 'A' guilty of breach of his duty? Give valid reasons in support of your answer.
 - b. Meaning of misfeasance and its distinction from non-feasance.
4. X entered into a contract with Y for manufacturing and supplying 500 garments within a period of 45 days, failing which Y was to make good the loss suffered by X to the extent of Rs.1,50,000. Y failed to meet the requirement under the contract. With reference to this, discuss the following:
 - a. What is the remedy available to X?
 - b. Distinguish between a tort and a contract.
5. Mr. Ashish, a qualified voter at a parliamentary election, was wrongfully denied by a returning officer from casting his vote. As a result, Mr. Ashish was deprived of his right to vote. Despite this denial of the right to vote, the candidate for whom Mr. Ashish wanted to vote won the election with a resounding majority. In view of the above circumstances, examine the following:
 - a. Whether Mr. Ashish can file a suit against the returning officer for not allowing him to exercise his right to vote.
 - b. *Injuria Sine Damnum* with the help of a landmark case.
6. One Mr. David, sets up a school opposite to another school run by one Mr. Joseph. As a result Mr. Joseph has to reduce his school fees from Rs.200 to Rs.150 per student per quarter. With reference to this illustration, state the following:
 - a. Can Mr. Joseph file a suit against Mr. David for damages?
 - b. *Damnum Sine injuria*, stressing the court observations in the case of *Ushaben vs. Bhagyalaxmi Chitra Mandir*.
7. Mr. Ram exports certain goods to Australia for industrial purposes. He was advised to pay tariff for the goods, which were exported. In view of the given facts, discuss the following:
 - a. Is Mr. Ram correct in paying industrial tariff for the exported goods? Mention the reasons for imposing tariffs by the government.
 - b. Effects of imposing tariffs by the Government.

Legal Environment of Business

8. “The objective of WTO is to reduce the existing barriers to trade and by preventing new ones from developing”. With reference to this statement, explain the following:
- Basic principles of the WTO.
 - Benefits of being a WTO member country.
9. Gaurav handed over his race horse to Kailash for its safe custody and maintenance for a week. He also paid Rs.500/- to Kailash for the maintenance of the horse. However, Kailash neglected to feed the horse properly and in consequence, the horse fell sick. On returning back Gaurav had to spend more than Rs 2000/- to treat the sick horse. In relation to this illustration, discuss the following:
- Can Gaurav claim damages for the act of Kailash?
 - Ubi Jus ibi remedium.*
10. Nirajan entered into a contract with Lokesh for exporting dry fruits. Lokesh delivers the specified goods at the destination point. However, Nirajan failed to pay the consideration to Lokesh despite several reminders. With reference to this illustration, answer the following:
- Can Lokesh file a suit against Nirajan?
 - Justice delivery system in India.
11. A Municipal Corporation maintaining a public park fails to unearth a tree bearing poisonous berries. Ignorant about the poisonous nature of the berries, Bipin plucks and eats the berries and dies on the spot. Referring to this context, discuss the following:
- State whether the Corporation is liable, and explain the nature of the act.
 - Distinguish a Tort from a Crime.
12. An advertisement company which is responsible for maintaining its hoarding on the main road in the heart of the city did not fix it properly. The Hoarding fell on Mr. Sagar a passerby, which resulted in his death. In this context, answer the following:
- Whether the advertisement company is liable to Mr. Sagar’s family.
 - The general conditions for liability in torts.
13. A nine year old child was drowning in a river. Sadanand, a bystander did not try to save the child even though he knew swimming. After knowing the facts, the parents of the child sued Sadanand. With reference to the above facts, discuss:
- Whether Sadanand is liable for not saving the child.
 - The term ‘act’ under the law of torts.
14. Mr. Mohan enters into a contract with Ms. Suvarna for the purchase of machinery, through 40 monthly installments at the rate of Rs.4,000 per month. The terms of the contract state that non-payment of one installment by Mr. Mohan will lead to breach of the contract and the future installments would be treated as only damages. Mr. Mohan fails to pay the fifteenth installment; in consequence Ms. Suvarna recovered the machinery and demanded to pay the rest of the installments amounting to Rs.1,04,000 as damages. In this context, discuss:
- Can Mr. Mohan file a suit against Ms. Suvarna for the breach of contract?
 - The concept of hire purchase agreement for machinery.
15. Mr. Mahavir hires some factory equipment from Mr. Giridhar Rao. The contract of lease provides that in the event of Mr. Mahavir’s failure to pay the rent for one month, the lease contract will be terminated and the security deposit as against the lease will be retained by Mr. Giridhar Rao as damages.
- State whether Mr. Giridhar Rao can claim damages.
 - Concept of ‘lease’ under the Transfer of Property Act, 1882.

16. Mr. Abhishek engages Mr. Nandu for getting the machinery repaired within a week. As per the agreed terms, the machinery is to be delivered within the stipulated period after repairing. Mr. Nandu fails to deliver the machinery within the specified period due to which Mr. Abhishek lost a tender (contract). In the light of the above illustration, discuss
- Whether Mr. Abhishek can succeed in claiming damages for the loss of tender.
 - Classification of the term 'law'.

Chapter 2: Business Contracts

17. A and B are friends. A invites B for dinner at his house on his birthday, which is on a working day i.e. on Monday. B reaches A's house on Monday by keeping aside other engagements. But he finds that A's house is locked and the party is cancelled. In the light of the given situation, explain the following.
- Can B recover any damages from A? Decide with the help of case law.
 - Basic requirements of a contract.
18. Krishna entered into a contract with Gopal for the purchase of Gopal's house. Gopal has two houses, one in Mumbai and another at Pune. At the time of execution of the sale deed, they came to know that Gopal wanted to sell his house, which was at Mumbai, but Krishna intended to buy Gopal's house, which was at Pune. In the light of the above stated facts, answer the following:
- Whether the contract between Gopal and Krishna is valid.
 - Essential elements of a valid contract.
19. Mr. George offered Mr. Jolly to sell his house for Rs.20 lakhs. Mr. Jolly accepted to buy the house, but for Rs.18 lakhs. With reference to this situation:
- Is it a valid acceptance?
 - Explain the rules for valid acceptance.
20. Ajay wanted to purchase a bike from Naveen. He wanted to buy the bike for an amount of Rs.15,000, which was only $\frac{1}{4}$ th of its actual price. Naveen agreed to sell his bike to Ajay at the above stated price, though the bike was a new one. With reference to this situation answer the following:
- Is the consideration valid and adequate in the above said sale?
 - Whether the statement 'All contracts are agreements, but all agreements are not contracts' is true.
21. 'A' promises to deliver goods to 'B' on a certain day on payment of Rs.1, 000. A died before the stipulated day. 'B' came to know about A's death and asked A's representatives to perform the contract between him and 'A'. Answer the following, with reference to the above situation.
- Can 'B' ask A's representative to perform the contract between him and A?
 - What are the obligations of the parties to perform the contract?
22. Akash enters into a contract with Badshah to deliver 100 bales of cotton of particular quality on a fixed date at Badshah's warehouse. But Akash could deliver only 96 bales within the said date. Akash however promised to send the remaining bales to Badshah within a short time. But Badshah refused to accept 96 bales. In the light of the above circumstance, answer the following:
- Can Badshah refuse to accept 96 bales?
 - Doctrine of 'Substantial Performance'.

23. Raghu has many businesses. He appointed Mohan as a manager to administer the manufacturing of tyres, which is legal. But he also told Mohan to do certain illegal businesses. For this Raghu offered to pay Mohan a considerable salary of Rs.50,000 per month and Mohan happily accepted the same. With reference to the above set of facts, answer the following.
- Is the agreement between Raghu and Mohan valid?
 - When do agreements become void?
24. In Chandinichowk, Delhi there are two shops, which sell dress materials. Ashok is the owner of one shop. He told Showkath the owner of the other shop that he was ready to pay a high price as consideration if Showkath accepted to sell his shop to him with the goodwill. He also proposed that Showkath should not do any other business at Chandinichowk thereafter. Showkath accepted Ashok's offer. With reference to the given situation, answer the following:
- Is the agreement between Ashok and Showkath valid?
 - Statutory exceptions for the above stated contracts.
25. 'B' wants to purchase A's white horse. 'A' expressed his intention to sell the white horse for Rs.5000 or Rs.10000. Meanwhile the said horse died which was not known to both the parties. Answer the following:
- Is the agreement between 'A' and 'B' valid?
 - Can 'B' ask 'A' to specifically enforce the agreement?
 - What are the limitations of valid contracts?
26. Vinayak is a LRO (Land Revenue Officer) in Gwalior. When Rajeev bought one acre of land and wanted to register it, Vinayak asked him to pay Rs.5000 as bribe, which Rajeev paid. Rajeev however filed a complaint against the LRO in the Anti Corruption Cell. Later the LRO offered Rajeev that he would repay the bribe money and an additional amount of Rs.20,000, if Rajeev agreed to withdraw the complaint. Rajeev accepted the above offer. With reference to this situation, discuss the following:
- Whether Rajeev can restrain the legal proceedings against the LRO.
 - Whether the agreement between the LRO and Rajeev is valid.
27. In *Mohiri Bibi vs Dharmadhas Ghosh's case*, a minor fraudulently represented to a moneylender that he was a major and executed a mortgage deed for Rs.10,000, which he promised to repay within the stipulated time. After the expiry of the said time for repayment of the money, the moneylender demanded his money from the minor and the minor pleaded his minority as a defence. Answer the following, with reference to the above set of facts,
- Is the moneylender entitled to claim back the amount?
 - Whether a minor is competent to enter into a contract.
28. Veerendar, a moneylender advanced Rs.10,000 to Shabana a pardanashin lady and an agriculturist. The moneylender made her to execute a bond for Rs.20,000 with interest at 8 percent per month. With reference to the given situation, answer the following.
- Is the bond executed by Shabana valid?
 - When is the consent of a party said to be free?
29. A sold his horse to B. A knew that the horse was unsound and on being asked by B about the horse's soundness, A remained silent. Later when B took the horse, he realized that the horse was unsound. Now he wants to sue A for fraud. In the light of the given facts, answer the following.
- Does A's silence amount to fraud?
 - Bring out the various acts, which constitute fraud under the Indian Contract Act.

30. In *Hadley vs. Baxendele* case, it was held that damages should be restricted according to the usual course of things from which the breach of contract arises. With reference to the given case, discuss the following:
- Facts and decision of the above cited case.
 - Suit for damages.
31. 'A' sent some samples of his goods for display in an exhibition held in Pune. After the exhibition, he handed over the samples to an agent of a courier service for carriage to another exhibition, which would commence in Delhi after 5 days. On the courier parcel he specifically mentioned a note stating that samples must reach Delhi, on the date specified. Due to the delay by the courier service, the samples arrived after the exhibition was closed. He wants to claim damages for this special circumstance under which he incurred loss. With reference to the above stated facts, answer the following:
- What is the kind of damages that 'A' can claim from the courier services?
 - What are the different kinds of damages?
32. X engaged Y to write a series of books on Consumer Law. For this work, X promised Y to pay considerable amount after completion of work. After the completion of one book, Y did not want to continue to write for the whole series. In the light of the above situation, answer the following.
- Is Y entitled to take remuneration for the work he has completed, even after refusing to do the further work or is he liable for the breach of contract?
 - What are the remedies provided for the breach of contract?
33. Ananth, a producer of films, entered into an agreement with actress Babitha. She agreed to work with his production company only for a year. However in the same year Babitha entered into another contract with C&C Entertainers, a company for producing movies. She agreed to act for C&C Company as they offered her a higher remuneration than what Ananth was giving. Answer the following with reference to this context:
- Can Ananth restrain Babitha from acting in the movies produced by C&C?
 - Can Ananth file suit against Babitha for specific performance of contract?
34. Arjun and Company manufactures spare parts of motor vehicles and it has engaged Raman Distributors to sell its products. With reference to the given situation, discuss the following:
- The relationship between Arjun Company and Raman Distributors.
 - How is the said relationship created under the Indian Contract Act, 1872?
35. Xavier, who resides in Ahmedabad, owns a shop in Hyderabad. He visits his shop occasionally. The shop is managed by Yathinder who orders goods from Zakir in the name of Xavier. The transactions are paid from Xavier's funds with his consent. Explain the following, with reference to the given situation.
- Under what authority does Yathinder orders goods from Zakir in Xavier's name?
 - Which law is applicable to the above stated situation?
36. Aakash owes Rs.1 Lakh to Vishnu. Aakash authorises Vishnu to sell Akash's land, and pay himself, out of the proceeds. Answer the following, with reference to the above facts.
- Can Aakash revoke or terminate the authority given to Vishnu?
 - When can such authority be terminated?
37. Babu guarantees to make payment to Krishna the price of five sacks of flour, which is to be delivered by Krishna to Chandan. The payment is to be made within a month. Krishna delivers five sacks to Chandan and Chandan pays for them. Afterwards, in another transaction, Krishna delivers four sacks to Chandan, but this time Chandan does not pay for the sacks. With reference to this situation, answer the following:
- Is Babu liable to pay the guaranteed amount to Krishna for the second transaction?
 - Define the contract of guarantee.

38. Safin owes certain amount to Robin. Mary promises Safin to save him from indebtedness. Robin wants Safin to repay the debt with interest. On the failure of Safin to repay, Robin filed a suit against Safin. In the light of the above illustration, answer the following.
- What kind of contract has Mary and Safin entered into?
 - Rights of Safin when sued.
39. A gives a water heater for repair to an electric appliances shop. He says that he will take the water heater only when it is completely repaired. The electric appliances shopkeeper repairs the water heater and refuses to hand over the water heater until he is paid for his services. In the light of the above stated facts, answer the following:
- Under which right the shopkeeper can retain the water heater?
 - What are the different kinds under which the above said right can be exercised?
40. Seenu is an office boy in a corporate office. At the time of appointment there was an agreement between him and the employer that Seenu can be terminated at any time without mentioning any cause. In the light of the given situation, discuss the following:
- Can Seenu be fired without any reason?
 - Explain the employee and employer relation and the procedure of termination of service of an employee.

Chapter 3: Non-Corporate Business Entities

41. Mr. Kasturilal started a new business and did not want to go for forming a company for his business. The ownership of the business rested only with Mr. Kasturilal. In the light of this example, answer the following:
- What is the legal identity of Mr. Kasturilal?
 - Merits and limitations of ownership held by Mr. Kasturilal.
42. Mr. Sohanlal, the karta of a Hindu Undivided Family runs the family business and the same was facing financial crisis. To stabilize the HUF business, he raised a loan from a finance company without the consent of the other coparceners of the HUF. The said loan was not repaid. In the light of these facts, bring out suitable answers to the following:
- Will all the coparceners of the joint family business be liable for the loan? What are the features of Hindu Undivided Family?
 - Difference between a Company and a Hindu Undivided Family.
43. Fifteen people in a trade come together to conduct a business. They are in a state of confusion regarding the type of the business entity that they want to establish. In the light of the above facts, answer the following:
- Difference between a Company and a Partnership
 - The legal formalities and registration of Partnership Firms.
44. 'X' one of the partners of an unregistered partnership firm was aggrieved that he was not given the due share of profits of the firm. Hence, he decided to file a civil suit for the recovery of the profits due from the other partners. In the light of the above situation, explain the following:
- Does X have a right to claim the share of profits in the Civil Suit? Bring out the other rights of a partner?
 - Effects of non-registration of a partnership firm and its exceptions.
45. X, Y and Z form a partnership firm. X and Y take an important business decision together regarding the firm without consulting Z. Z comes to know about this fact and demands for his share of profits. In the light of the above illustration, discuss the following:
- Are X and Y liable to Z? Justify your answer.
 - Sharing of profits in a business.

46. Ganesh and Suresh have started a business as a Limited Liability Partnership (LLP). At the time of constitution of the firm, they entered into an agreement for the division of profits and losses in accordance with the capital contributed by them. However, Suresh died after two years. Now the representatives want the share in profits and later want to transfer the interest in the LLP to a third party. In the light of the above facts, answer the following:
- Whether the representatives of Suresh are entitled to a share in the profits of the firm earned even after his death?
 - Can the economic interests in a Limited Liability Partnership be transferred by a partner of the LLP to a third party.
47. A group of 40 people in Hyderabad wish to register a Cooperative Society for providing housing loans to the members. Subsequently they succeed in their idea to form a Cooperative Society and register it. In view of the above illustration, explain the following:
- The nature of a Cooperative Society formed by these 40 people.
 - Discuss the requirements for forming a cooperative society.
48. Apex Co-operative society which has its branches in 5 different states of India wants to register themselves as a Multi- State Co-operative Society. In reference to the above example answer the following:
- Bring out the procedure that has to be followed by Apex Cooperative Society for the acquisition of membership and the registration of a Multi-state Cooperative Society.
 - Advantages and disadvantages of Cooperative Societies.
49. A group of women in Raipur intend to start a Non-Governmental Organization (NGO) to be named as 'Stree' for serving the needs of abandoned children. They want to register their NGO. In view of the above facts, elucidate on the following:
- The registration procedure of an NGO as a Society.
 - The procedure for registering an NGO as a Trust.
50. Mr. Karodimal a rich businessman in Mumbai had a flourishing business for more than two decades. Later he had to face some financial crisis. He borrowed a huge amount of money from some creditors to continue his business. He borrowed some more money from some other creditors to repay his debts and also transferred all his property in the name of his creditors. Few creditors still remained unpaid. He wants to file a suit to get himself declared as insolvent. In view of the above illustration, answer the following,
- Bring out the legal position of Mr. Karodimal? What do you mean by Insolvency?
 - What are the consequences of Mr. Karodimal's act?
 - How can Mr. Karodimal get discharged?

Chapter 4: Law Relating to Corporate Business Entities

51. In *Saloman vs. Saloman & Co. Ltd.* case the principle of 'Limited Liability' was recognized by the courts. With reference to this statement, discuss the following:
- The facts and decision of the case.
 - The principle of Limited Liability and Lifting the Corporate Veil.
52. Solar Pvt. Ltd Co. wants to issue a Prospectus inviting the public for the subscription to shares of their company. In view of the above facts, answer the following:
- What are the matters that are to be stated in the Prospectus of Solar Pvt. Ltd Co?
 - Can there be a civil liability if there are misstatements in the prospectus?
53. 'The Companies Act, 1956 lays down certain statutory provisions for lifting corporate veil of a company'. In light of this quote, discuss the following:
- Reduction of Membership as a ground for lifting the veil.
 - Lifting the veil in case of Holding and Subsidiary Companies.

54. In the case of *PNB Finance vs. Shital Pd. Jain (1983)*, a person borrowed money from the company and invested it in shares of three different companies in all of which he and his son were the only members. In view of the above facts,
- The decision in the above case and prevention of fraud and improper conduct as a ground for lifting the corporate veil.
 - Facts and decision in the case of *Gilford Motor Company vs. Horne (1933)*.
55. Rotak Ltd. Co. which manufactures electric appliances wants to convert itself into a public limited company. In this context, explain
- The features of a Public Company.
 - The procedure for the conversion.
56. 'Incorporation brings a company into existence'. In reference to this statement, answer the following:
- What are the aspects that have to be looked into for the incorporation of a company?
 - List of documents required to incorporate a company.
57. In the case of *Lakshmanaswami Mudliar vs. Life Insurance Corporation of India*, the directors of a company were authorized to make payments towards any charitable or benevolent object, or for any general or other useful object. Following the shareholders resolution, the directors paid two lakh rupees to a trust formed for the purpose of promoting technical and business knowledge. In regard to this statement, answer,
- What was the decision in the above case? Explain the Doctrine of *Ultra Vires*?
 - What are the consequences of *Ultra Vires* transactions?
58. 'The doctrine of indoor management has its genesis in the case of *Royal British Bank vs. Turquand*.' With reference to this rule, describe the following:
- Discuss the facts and decision of *Royal British Bank vs. Turquand* and the Doctrine of Indoor Management.
 - Exceptions to the doctrine of Indoor Management.
59. XYZ Co. wants to go for a public issue. Rahul wants to invest in shares of XYZ Co but does not have any knowledge as to shares and purchase of shares and other formalities to be fulfilled. With regard to these facts,
- Explain to Rahul the meaning and nature of Shares.
 - Types of Shares.
60. Magnus Co Ltd has gone for a public issue. Jagjit wants to purchase its preference shares. However, he is in a dilemma as to which type of preference shares are issued by the company and as to their features.' In view of this situation, answer the following:
- Explain to Jagjit the nature of Participating Preference Shares.
 - Cumulative and Non-cumulative Shares.
 - Redeemable and Irredeemable Preference Shares.
61. Zaheerudin held shares in a Public Ltd Co. After his death, his son has applied for transfer of shares. In reference to the above facts, answer the following:
- What does this transfer amounts to?
 - Transfer of Shares.
62. The director of Aditya Pvt. Ltd borrowed money from an outsider exceeding his authority and misused the money without the knowledge of the other directors and shareholders. With regard to the above facts, discuss,
- Liability of the director of Aditya Pvt Ltd for having misused the money.
 - Statutory duties of a director.
 - Personal liability of director for *ultra vires* transactions.

63. 'Surya Co. Ltd. wants to alter the articles of association of its company and wants to call a meeting to that effect.' In reference to this context, discuss the following:
- The procedure to be followed by Surya Co. Ltd for calling a meeting. How should a Notice of Meeting be intimated to the members of the Company?
 - What do you mean by Resolution at Meetings?
 - Quorum at Meetings.
64. Amit & Co. had been facing the problem of mismanagement for past one year. Hence, Amit & Co. passed a special resolution for winding up the business of the Company. In view of these facts, explain the following.
- Is it a Voluntary Winding-up?
 - The role of Court in winding-up proceedings.
65. 'Ramesh and Co. moves an application in the court for the transfer of the whole of the business to another company.' In reference to the above statement, discuss the following:
- The procedure followed by the court on receiving an application for amalgamation by the sale of undertaking.
 - Amalgamation by the sale of shares.

Chapter 5: Property Law for Business

66. Mr. X owes Mr. Y a sum of Rs.50,000/-. Mr. Y assigns his right to recover the sum from Mr. X to a third party. With reference to the given facts, explain the following:
- Whether the transaction comes under the Sale of Goods Act, 1930.
 - Requisite conditions for the transfer of property between the seller and the buyer.
67. An institute of engineering and technology in Hyderabad purchased a land in the outskirts of the city for the purpose of constructing the administrative building. In the said land there is standing timber worth Rs.5,00,000. With reference to the given facts, explain the following:
- Does the sale come within the purview of the Transfer of Property Act, 1882? Discuss about the interpretation of the relevant provision as applicable to the above situation.
 - Stages of the performance of a contract of sale.
68. Ms. Sahitya purchased a second hand car from Mr. Hemanth. Due to some reasons, Mr. Hemanth could not deliver the car to Ms. Sahitya. Meanwhile, while Hemanth was driving the car, he met with an accident and the car was totally damaged. In the light of these facts, explain the following:
- Decide as to who should bear the risk, the buyer or the seller? Mention the relevant provisions of the Sale of Goods Act, 1930 that are applicable to the above situation.
 - Buyer's right.
69. 'Aakash' acquired certain goods from 'Teja' by falsely representing that he was acting on behalf of 'Bobby' and was authorized to collect the goods. 'Aakash' later sold the goods to 'Dinesh' without intimating about the same to Bobby. In the light of the above facts, discuss the following:
- The rule in relation to the transfer of title with reference to the above illustration.
 - Exceptions to the maxim '*nemo dat quod non habet*'.
70. Sharath is an authorized mercantile agent of Mr. Sasidhar. Sharath acts on behalf of his owner and pledges the goods to a Pawnee in the ordinary course of business. In this context, explain the following:
- Will the said transfer of goods be valid under the Sale of Goods Act, 1930?
 - Kinds of mercantile agents.

71. Mr. Ravi has pledged certain goods with Mr. Jitendhar, a Pawnee. According to their terms and conditions, Mr. Ravi fails to repay the loan amount within three years. In view of the given illustration, explain the following:
- Is the Pawnee empowered to sell the goods of Mr. Ravi? Give the appropriate reasoning in support of your answer?
 - Movable and immovable property.
72. Abhiram found a basket of mangoes near a tree besides his house. He genuinely tried to trace out the true owner of the fruit basket but failed. As the fruits were likely to perish in a couple of days, he sold away the fruit basket to one of his friends for an amount of Rs.200. In view of the given illustration, explain the following:
- Is Abhiram, entitled to sell the fruits? In what capacity can he deal with the goods?
 - Transfer of title by a Non-owner.
73. Rajini, a vendee bought a second hand refrigerator from Rohith for an amount of Rs.1200. The vendee took the delivery of the refrigerator and later informed that the refrigerator was in a good condition. After a couple of days, the vendee informed that the refrigerator was not in a working condition. The vendor took away two parts of the refrigerator for further repairs. As the vendee failed to pay the full cost of the original repairs, as demanded by the vendor, the vendor refused to give back the parts taken. In this context, explain the following:
- Is the vendor entitled to withhold the parts of the refrigerator against the repair cost and revive the contract?
 - What are the rights of the unpaid seller under the Sale of Goods Act, 1930?
74. 'A', the owner of a theatre borrowed money by hypothecating his cinema projector and the accessories with a bank. The bank allowed the property to remain with the owner, i.e. the borrower itself since it formed the equipment of a running cinema. Later on the owner of the theatre sold the machinery. In view of the above illustration, explain the following:
- Does the above sale is subject to hypothecation?
 - Differentiate between pledged and hypothecated goods.
75. Vedanth, a minor mortgaged his land admeasuring 25 acres with Mr. Motilal. Mr. Motilal who did not know about the fact of minority advanced money on the said land. Despite several reminders by Motilal, Vedanth failed to repay the amount within the stipulated period. In view of this, explain the following:
- Can Mr. Motilal proceed legally against Vedanth? State the reasons for your answer.
 - Concept of the mortgage of immovable property.
76. Mr. Harvansh Rai has mortgaged his house with Mr. Ahluwalia against promise to pay Rs.1,00,000. Mr. Ahluwalia has promised to pay the mortgage money as per the mortgage agreement but failed to do so. In this context, answer the following:
- Is it a valid mortgage? Discuss the significance of consideration in a mortgage.
 - Essential elements of a mortgage.
77. Mr. Lallu Ram mortgaged a property, which is worth Rs.10,000. It was a mortgage by deposit of title deeds and was not registered. In view of this, explain the following:
- Discuss the enforceability of the above mentioned mortgage. Explain the mortgage of deposit of title deed.
 - Kinds of mortgage.

78. Mr. Giri entered into a hire-purchase agreement with Mr. Goverdhan. Mr. Goverdhan (owner) delivered the goods to Mr. Giri on the condition that Giri should pay the agreed amount in monthly installments. Mr. Giri failed to pay the fifth installment and as a result, Mr. Goverdhan tried to terminate the agreement. In this context, discuss the following:
- Can Mr. Goverdhan terminate the said agreement?
 - Significance and nature of a hire-purchase agreement in India.
79. Mr. Amrit Singh wants to sell trees that were to be cut and removed within a period of two weeks. With reference to this situation, explain the following:
- Identify the category of the transaction and examine as to which law such agreement to sell comes under.
 - Concept of *demise or partial transfer* of immovable property.
80. Robert bartered a house with David for a piece of land in a prime area. The value of the house and that of the land are equivalent. With reference to the given illustration, explain the following:
- Will this transfer amount to an exchange? Explain the essentials of a valid exchange.
 - Distinguish between a sale and an exchange.
81. Mr. Das Gupta has received the bill of lading, which implies a lawful transfer of goods. But the goods are still in possession of Ms. Manisha, who is the seller. Though Das Gupta has received the bill of lading, he is not in a position to pay the price of the goods. Though the seller has passed the title she has retained the goods and stopped the delivery as she has not yet received the price. In this context, explain the following:
- Can Ms. Manisha exercise such a right to retain the goods?
 - The case of *E C Edulji vs. Cafe John Brothers*.
82. Mr. Purandhar Rao gifted a house to Ms. Saritha but failed to register it. He gifted the house by an oral statement. In view of these facts, discuss the following:
- Can it be enforced before a Court of Law? Mention the essentials of a valid gift under the Transfer of Property Act, 1882.
 - Concept of 'gift' under the Mohammedan Law.
83. Ms. Jahnvi gifted a car to Ms. Swetha. The gift was accepted by Swetha. Later on due to some reasons, Jahnvi wanted to take back the car. In the light of the above situation, answer the following:
- Can Jahnvi take back the gift? What are the conditions that have to be followed in order to revoke the gift?
 - Conditions for revocation of a gift under the Mohammedan Law.
84. Archana owes a debt to Shanti. Sudha, who happens to be a tenant of Archana; owes arrears of rent to Archana. In lieu of the debt owed by Archana to Shanti; Archana assigns the arrears of rent payable by Sudha in favour of Shanti. In the light of the above stated facts, explain the following:
- Is the above said transaction valid?
 - Define the term '*actionable claim*' under section 3 of the Transfer of Property Act, 1882.
85. Mr. Prasad approaches Mr. Sahil an advocate to settle his land dispute. On Mr. Sahil settling the dispute, Mr. Prasad wanted to pay the advocate's fees. However, Mr. Sahil asked Prasad to transfer a piece of land by way of gift on his name, instead of fees. Mr. Prasad being an illiterate under undue pressure of advocate gifted the piece of land to Mr. Sahil. In the light of the above situation, discuss the following:
- Can Mr. Prasad revoke the gift?
 - Comment on the observations of the court about revocation of the gift in *Subramanian vs. Kanni Ammal* case.

86. M/s Swan Laboratories was granted a patent for bio-petrol. M/s Devi Labs unauthorizedly manufactured, distributed and sold the said patented product of M/s Swan Laboratories. With reference to the stated facts, explain the following:
- Can M/s Swan Laboratories file a suit against M/s Devi labs for infringement of their patent? Discuss the remedies available to a patent right holder?
 - Various other categories of intellectual property.
87. M/s ABC Lever has registered 'Trishul' as its trademark for the products manufactured by them. M/s XYZ co. has also introduced a new product similar to the ABC Lever and has used the same trademark for that product, thereby creating a situation where the potential customers of M/s ABC Lever are deceived. In the light of the given facts, explain the following:
- Will M/s ABC Lever succeed in its claim for the trademark infringement? Examine the remedies available for the violation of a trademark.
 - Classification of intellectual property rights.
88. Mr. Arshad purchases a television for Rs.20,000 from Mr. Rohit. As per the agreement, consideration is to be paid on delivery. Mr. Rohit delivers the television to Mr. Arshad. The latter fails to pay the consideration. In view of the above illustration, explain the following:
- Is it a valid sale? Examine the relevant provisions of the Sale of Goods Act, 1930.
 - Rights of an unpaid seller.
89. Mr. Raj agrees to buy some machinery from M/s. Yash & Co. for a consideration of five lakh rupees. Mr. Raj pays an advance of one lakh rupees with regard to the agreement. Unfortunately, M/s. Yash & Co. receives an order from the Court to stop the production in the company, as a result of which the company ceased to operate. Consequently M/s Yash & Co. fails to sell the machinery to Mr. Raj. In view of the given circumstances, discuss the following:
- Whether Mr. Raj will succeed if he files a suit against M/s. Yash & Co. for not performing the sale. Explain the nature of an agreement to sell.
 - Concept of sale.
90. Mr. Ajay bought goods from Mr. Mohiuddin and paid fifty percent of the total value of the goods. Mr. Mohiuddin continues to possess the goods. Despite several reminders, Mr. Ajay fails to pay the balance amount for more than three months, wherein the stipulated period was only one month. In the light of the above illustration, explain the following:
- Can Mr. Mohiuddin sell the goods of Mr. Ajay? Define the term 'unpaid seller'.
 - Unpaid seller's right to withhold the delivery of goods.
91. Under the contract of hypothecation, Mr. Rahul has taken an auto-rickshaw from the Corporation Bank of India for an amount of Rs.80,000. The terms and conditions of hypothecation states that if the hypothecator fails to pay the amount within a period of two years, the bank shall takeover the auto-rickshaw. Mr. Rahul could not pay the last five installments and so the bank takes over the auto-rickshaw. With reference to this, discuss the following:
- Can Mr. Rahul file a suit against the bank for return of his auto-rickshaw?
 - Explain the rights of a hypothecatee in selling the hypothecated goods.
92. Aarya hires flour mill machinery from Chakravarthi. The amount is promised to be returned within a year and the machinery will be transferred after the last payment of the instalment. Aarya fails to repay the amount within the stipulated period. Chakravarthi thereby exercises his right of sale over the flour mill, machinery, so as to recover the amount. In the light of the given facts, explain the following:
- Bring out the legal relationship of Aarya and Chakravarthi in the above illustration.
 - Origin of the above said transactions in the mercantile usage.

93. Badrinath purchases a tractor on the condition that he shall repay the agreed amount in fifty monthly installments. On payment of the fifth installment, the possession shall pass to Badrinath and the right to terminate the agreement exists with the seller of the tractor any time before the final installment is paid. In this context, explain the following:
- Whether the said agreement can be regarded as a hire-purchase.
 - Contents of a hire-purchase agreement.

Chapter 6: Business and Tax Laws

94. Mahesh wants to know as to who are the persons to whom the Income Tax Act, 1961 is applicable. In the light of this context, write about the following:
- Applicability of the Income Tax Act, 1961.
 - Incomes that are exempted from Income Tax Act, 1961.
95. Suresh, a businessman wants to get his assets valued for the calculation of his Net wealth of the assessment year 2006. In view of this illustration, explain the following:
- The meaning of the word 'net wealth' and the assets that are exempted from the net wealth under the Wealth Tax Act.
 - Central Excise and the different kinds of Excise duties.
96. Rasiklal, a businessman who does importing and exporting of raw materials, wants to calculate his sales turnover. With reference to this context, write about the following:
- Help Rasiklal in understanding the legal terms involved in the calculation of sales turnover.
 - Exemptions on imports and exports.
97. Sohan is an employee of Nityam Computers at Hyderabad. Apart from his salary, he is entitled to fringe benefits such as entertainment allowances, gifts and club facilities. With regard to the above facts, answer the following:
- Whether Sohan is liable to pay the taxes for the fringe benefits. What do you mean by fringe benefits?
 - What are the various purposes for which the employer is liable to pay the fringe benefit taxes?
98. ABC Corporation is an advertising agency and has its registered office in Hyderabad. They want to know whether they are governed by the Central Sales Tax Act, 1956. With regard to the above facts discuss the following:
- Whether the Central Sales Tax Act, 1956 can be applicable to the ABC Corporation.
 - Meaning of CENVAT.

Chapter 7: Financial Services – Legal and Regulatory Environment

Banking Law and Regulation

99. Sneha Urban Cooperative Bank is seeking a license from RBI for carrying on banking business. The registered office of Sneha Urban Cooperative Bank is situated in Hitec city, Hyderabad. In its application for license, Sneha Urban Cooperative Bank has stated that there is no other cooperative bank in that particular area and it has a chance of expanding its banking activities. In the light of the above context, answer the following:
- Is Sneha Urban Cooperative Bank eligible to get the license?
 - When can RBI cancel the license of a Banking Company?

100. Rakesh wrote a note stating “On demand, I promise to pay Rahim or order the sum of rupees Twenty Five thousand only for value received”. With regard to this illustration, answer the following,
- Is the note given by Mr.Rakesh a Promissory Note?
 - Essentials of a Promissory note.
101. Mr. Sunil made an instrument drawn on Kapur which states “Three months after date pay to Sohan or order the sum of rupees Sixty Thousand only.” The instrument is given against sale of goods:
- What is the above instrument called under the N.I Act, 1881?
 - Parties to the said instrument.
102. In *Durga Shah Mohan Lal Bankers vs. Governor General in Council*, it was held that mere failure to prove the consideration between the payee and the drawer will not disentitle the endorsee as a holder in due course. In view of this statement, discuss the following:
- Facts of the case and meaning of Holder in due course.
 - Privilege of Holder in due course.
103. A cheque was issued by Mahendra Ltd in the name of Surya Ltd. On the face of the cheque Mahendra Ltd put two parallel transverse lines with the words “& company”. In the light of this illustration, answer the following:
- What kind of crossing is done by Mahendra Ltd.?
 - What do you mean by crossing of cheques?
104. ‘X’ draws a cheque on a bank ‘payable to B or bearer’. The cheque is lost. Y a finder of the cheque forges the signatures of B and indorses it in his favor. The bank makes payment on the cheque. In view of the above illustration discuss the following:
- Discuss the liability of the drawee bank in the above-mentioned illustration and also in other circumstances where signatures are forged.
 - When can a drawee bank refuse to honor the customer’s cheques?
105. *Commercial Finances vs. Thressia* case discusses the notice to an indorser of a cheque. With reference to the above statement, discuss the following:
- Facts and decision of the above-mentioned case.
 - Liability of an indorser.
106. Rohit indorses a bill as, “Pay Shyam or order Rs.500 being the unpaid amount of the bill.” In the light of this illustration, answer the following:
- What kind of indorsement has Rohit made?
 - Discuss the effects of indorsement.
107. ANZ Bank has extended a loan of Rs.20,00,000 to Zebra company against the hypothecation of two buses and two lorries as security for the loan by Zebra company. The Zebra company failed to pay the installments of the loan. Now the bank wants to seize the vehicles under the SARFAESI Act, 2002. In regard to this example, explain the following:
- Procedure to be followed by ANZ Bank.
 - Objectives of enacting SARFAESI Act, 2002.
108. A secured creditor can initiate the enforcement under the SARFAESI Act, 2002 once a secured debt is classified as a non-performing asset as per the regulations of the Reserve Bank of India. In this context, explain the
- Enforcement of Security Interest under the SARFAESI Act, 2002.
 - Process of enforcement under the SARFAESI Act, 2002.

Insurance Law and Regulation

- 109.** Mr. Aadesh, who is engaged in the business of export and import by sea, intends to secure his goods from perils or risks. In the light of the above facts, answer the following:
- Enlighten Mr. Aadesh on the essentials required to enter into a marine insurance policy under the Marine Insurance Act, 1963.
 - Types of marine insurance policies.
- 110.** Mr. Darshan took a life insurance policy and was very regular in paying the premium. He met with an accident in the year 2007 and was declared partially disabled. In view of this illustration, discuss the following:
- Can Mr. Darshan claim compensation?
 - Mention the standard clauses in a life insurance policy.
- 111.** Mr. Ekansh has taken three health insurance policies from three different insurance companies and has been prompt in paying the premiums. Now due to some health problems he has to undergo a major surgery, for which the medical expenditure may go up to Rs.3,00,000. After the surgery, he seeks to claim the amount of 3,00,000 from each one of the companies. In view of the given facts, discuss the following:
- Can Mr. Ekansh claim the amount from all the insurances companies simultaneously?
 - Concept of *subrogation*.
- 112.** Mr. Kamal borrowed a sum of Rs.1,00,000 from Mr. Khan. Now Mr. Khan wants to take a life insurance policy in Mr. Kamal's name. In view of these facts, discuss the following:
- Can Mr. Khan take the life insurance policy for Mr. Kamal?
 - Presence of *insurable interest* in life insurance policies.
- 113.** "The contract of insurance is an aleatory, voluntary, executory and a conditional contract between the two parties." With reference to this statement, discuss the following fundamental principles:
- Principle of Indemnity
 - Proximity of Cause.
- 114.** M/s Kranthi Exports Ltd. that carries on the business of overseas exports has insured its goods in the warehouse against all the risks. The goods in the warehouse were damaged following a major hurricane. In consequence, the company could not replace the goods quickly and lost the business. Although the peril was implied part of the insurance claim, the insurance company denied to pay the compensation. In view of the above illustration, explain the following:
- Whether M/s Kranthi Exports Ltd. will succeed in the claim. Bring out the fundamental principles of insurance.
 - The parties to the contract of insurance.
- 115.** Mr. Vikram, purchased a life insurance policy for Rs.5,00,000 on his second wedding anniversary. Later on some differences cropped up between the couple and he was staying away from his wife and son. Though they did not go for a divorce, he started living with another lady. Mr. Vikram met with an accident and died. Both the ladies, i.e. the wife and the second lady claimed for the insurance amount. In view of the given facts, discuss the following:
- Whether both of them are entitled for the insurance claim. Examine the nature of a contract of insurance.
 - Significance of the insurable interest in the above illustration.

116. Mr. Harish took life insurance policy on his life. He declared that he did not suffer from any disease. The policy was accepted and he started paying the premium. He died suddenly. The doctors from the insurance company reported that Mr. Harish died of a dreadful disease, which he might have been suffering for ten years. Mrs. Harish claimed for the policy amount and the insurance company rejected the liability to pay on the ground that Mr. Harish acquired the policy by giving false information. In the light of the given facts, explain the following:
- Can his wife succeed in her claim against the company?
 - Essential principles of the contract of insurance.
117. Mr. Rajeev insures all his house property along with the movable property inside the house under a fire insurance policy. The entire house and other valuable goods were totally burnt due to a short circuit. The burnt property included some valuable documents such as promissory notes, share certificates, Fixed Deposit Certificate worth Rs.2,00,000. Keeping in view the above situation, discuss the following:
- The liability of insurers with respect to the property and loss of documents by fire of Mr. Rajeev.
 - Various risks covered under the fire insurance policy.
118. Mr. Tushar Kapoor had a life insurance policy for a sum of Rs.25,00,000. He nominated his wife and his two daughters to be the beneficiaries on his death. He had taken up loans to meet his extravagant habits. He died suddenly without repaying any of his debts. In this context, discuss the following:
- Can the creditors claim the amount from the insurance policy?
 - The parties to an insurance contract.
119. A fire occurred in the factory of Mr. Talwar. The fire brigade was immediately informed and due to their intervention the fire could be controlled. But during the course of extinguishing the fire, the goods stored in the neighboring factory of Mr. Franklin were also damaged. The neighbor's factory has no insurance policy. In the light of the given facts, explain the following:
- The remedy available to Mr. Franklin.
 - Coverage of risk under the contract of fire insurance.
120. *"In marine insurance contracts, the owner of the ship proposes to the insurance company to insure the vessel, crew and other cargo on board to secure the same from the marine perils."* With reference to this statement, explain the following:
- Importance of warranties in Marine Insurance Act, 1963.
 - The law of marine insurance in India.

Chapter 8: Business Transactions and Cyber Law

121. Mr. Chaitanya tendered a contract for the construction of his house to which Mr. Deepak quoted a price. Impressed with the quality parameters, Mr. Chaitanya accepted the offer; which was sent by email to Mr. Deepak. In the light of the given illustration, discuss the following:
- At what point of time is the acceptance deemed to be complete in the above cited illustration?
 - Relevant provisions under the Indian Contract Act, 1872 and the Information Technology Act, 2000 that are applicable for the formation of an electronic contract.
122. Ms. Chandrika bought a pen drive through e-shopping. The sale was according to the terms and conditions of sale as mentioned in the website. Chandrika accepted the contract by clicking on the option "I agree". She paid the purchase amount through the electronic payment system. With reference to the given facts, explain the following:
- The nature of contract entered by Ms. Chandrika.
 - Main objectives of the Information Technology Act, 2000.

123. Ms. Dhatri and Ms. Samatha enter into an online contract. The terms of the contract stipulate that the electronic record shall be binding on the receipt of acknowledgement. Ms. Dhatri who is the originator of the contract has not received acknowledgement as per the terms of the contract. In the light of the above cited facts, explain the following:
- Does the above said contract have a binding affect? Write about authentication of an electronic record.
 - Time of formation of a contract.
124. Mr. Robert attacked the computer network of Ms. Susan. He gained access to the system and downloaded data from her system, without her permission. Subsequently, Mr. Robert diverted the said data to Ms. Susan's competitors and thereby caused loss to her firm. In view of the above facts, write about the following:
- The nature of the offence committed by Mr. Robert and the penalty prescribed against it under the Information Technology Act, 2000.
 - Classification of cyber crimes.
125. Mr. Avnish secured unauthorized access to the computer system of Mr. Krishna Manohar. He thereby deleted, altered and destroyed confidential information that was present in Mr. Krishna Manohar's computer. In this context, briefly discuss the following:
- The nature of offence committed by Mr. Avnish and the relevant provisions applicable to the said offence under the IT Act, 2000.
 - Breach of confidentiality under the IT Act, 2000.
126. "E-mail contracts may be categorized as the non-instantaneous forms of communication". In this context, discuss the following:
- Bhagavandas vs. Giridharilal's* case.
 - Validity of online contracts.

Chapter 9: Competition and Consumer Protection

127. Mr. Ramesh books an apartment for Rs.18,00,000 with Mohit Constructions Ltd. He makes full payment for the said apartment. However, he subsequently finds that the construction is of a substandard quality and there are cracks in the walls, even before taking the possession. He wants to take legal action against the builders, i.e. Mohit Constructions. In the light of the above stated illustration, answer the following:
- Which is the appropriate forum in which Mr.Ramesh can file a complaint under the Consumer Protection Act, 1986 and write about the pecuniary jurisdiction of the Consumer forums.
 - Salient Features of the Consumer Protection Act, 1986.
128. Sudesh purchased a washing machine from a retailer. While using it, the washing machine got burnt and was rendered useless. Mr. Sudesh asked the retailer to replace the washing machine, but the retailer refused to do so. Mr.Sudesh filed a complaint for deficiency of service. But unfortunately the matter was not immediately taken up by the Consumer Redressal Forum and the complaint had been pending for more than 6 months.
- Discuss about the time limit for disposal of case in a Consumer forum with reference to the above cited illustration.
 - Write about the content of a complaint.
129. Farhat, an employee in a private firm purchased a computer for his home. However, the computer never worked properly right from the day of installation. Despite several complaints to the retailer, the retailer did not turn up either to repair or replace the computer. Farhat wants to know the type of complaint entertained by the Consumer Forums.
- Meaning of consumer under the Consumer Protection Act, 1986.
 - Meaning of Service under the Consumer Protection Act, 1986.

- 130.** Ravi Kumar purchased a scooter from Patni Automobiles. The scooter had a warranty period of two years. However, within five months of purchase, the scooter broke down. Ravi Kumar filed a complaint before the District Forum. The District Forum pronounced its judgment in favor of Ravi Kumar and awarded damages of Rs.10,000. Not satisfied with the decision of the district forum, Ravi Kumar wants to file an appeal. In view of the above facts, answer the following:
- Where can Ravi Kumar file an appeal? Explain the procedure for filing such an appeal?
 - Can there be a further review of the above said appeal?
- 131.** Mr. Mohan had filed a complaint against Ajanta Hospitals, Mumbai for medical negligence. During the pendency of the suit, the District Forum passed an interim order for payment of Rs.25000 to Mr. Mohan.
- How can Mr.Mohan get the interim order enforced?
 - The legal provisions regarding the service of notice under the Consumer Protection Act, 1986.
- 132.** A group of citizens filed a complaint against an LPG distributor alleging that he had indulged in unfair competition by forcing the citizens to buy a gas stove along with a gas connection. It was a complaint for Unfair Trade Practice.
- Can the complaint be maintainable under the Competition Act, 2002, for Unfair Trade Practice?
 - What are the objectives and framework of the Competition Act, 2002?
- 133.** Bollywood, a newly opened retail shoe shop in Bengaluru is offering the products to the customers at a price less than its cost of production and as a consequence the other shoe sellers in the city are losing their sales. In the light of the above facts, answer the following:
- Does such a sale amount to a wrong under the Competition Act, 2002?
 - What do you mean by anticompetitive practices under the Competition Act, 2002?

Chapter 10: Environment Protection and Business Obligations

- 134.** Rama Fertilizers released its chemical waste directly into the nearby canal without conducting the necessary process of cleaning the industrial waste. The everyday release of these chemicals discoloured the ground water and posed grave health risks to the residents in the vicinity, especially to those living by the side of the canal. In the light of the above facts, explain the following:
- Whether the act of Rama Fertilizers amounts to water pollution?
 - Man-made causes of environment pollution.
- 135.** Mining operations were being conducted in a forest located in Himachal Pradesh, India. Due to the mining operations the natural habitat in the region got disturbed. Many species got extinguished due to massive deforestation and pollution of the water bodies. Discuss the following with reference to the above situation.
- What is the kind of pollution that was committed by the miners?
 - Meaning of environment.
- 136.** Waste material was collected from the city of Berhampur and dumped at an open place in the outskirts of the city. Such waste was kept open and no attempts were made to clean the waste. Upon questioning the municipal authorities stated that cleaning of such waste was a costly affair due to high labor charges. With reference to this situation, discuss the following:
- What is the pollution for which the authority can be made responsible for dumping the waste in an open place?
 - What are the four segments of environment?

137. At a marriage function, songs were played over loud speakers continuously for two days. The volume was so high that the people living in surrounding areas had gone through sleepless nights. They want to file a complaint against the persons concerned for causing such disturbance. Answer the following, with reference to the above situation.
- What kind of pollution is caused in this case?
 - What are the common law remedies available for environmental pollution?
138. In *Rylands vs. Fletcher* case, strict liability rule was established for the first time by the House of Lords. Under this rule the defendant is held liable for the harm even though the same is unintentional and also without any negligence on his part. With reference to this case, explain the following:
- The facts of the above-cited case and the decision made therein.
 - Exceptions to the Rule of Strict Liability.
139. An industry for plastic items burnt its waste products in an area outside the city, far away from the residential areas of that region. Nevertheless, gases were released in the process and caused a noxious atmosphere in the residential areas. People living in the residential area filed a case against the owners of the industry. With reference to the above facts, answer the following:
- Whether the owners of industry are liable in this situation.
 - Bring out the facts and decision of *Oleum gas leakage* case.
140. “Dolly Limited Co.” is a pharmaceutical company situated within the limits of the Greater Municipal Corporation of Hyderabad. The Rajiv Gandhi Colony is situated a few kilometers away from the factory. The people living in that colony complain of suffering from skin diseases, lung infections, migraine, etc because of the hazardous substances released by the factory. Answer the following, in the view of the above situation.
- What is the wrong committed by the pharmaceutical company? To whom should the residents complain?
 - Various acts affecting environment as offences under IPC, 1860.
141. “The Indian Constitution contains specific provisions for the environmental protection. It also obligates the state as well as citizens to protect and improve the environment”. In the light of the above statement, answer the following:
- Discuss the various constitutional provisions on environmental protection.
 - What are the various environmental legislations in India?

Chapter 11: Alternative Dispute Resolution

142. A is a contractor. B is a public undertaking company, which issued an advertisement inviting tenders for the construction of the servants' quarters. B entered into contract with A and both of them want to resolve their future disputes by non-judicial determination. In the light of this context, explain the following:
- What is the procedure that can be adopted by A and B?
 - Advantages and disadvantages of the above said procedure.
143. Sarita and Rakesh got married on 12 December 2006. Within few months of their marriage, their relations got strained and hence they decided to submit their family dispute to arbitration. With reference to the above situation, write about the following.
- Define arbitration and bring out the different types of arbitration.
 - Whether Sarita and Rakesh can submit their matrimonial dispute to arbitration.

- 144.** Kailash & Co. was a manufacturer of toys. The Company entered into an agreement with Mohit & Co., which was in the business of distribution. Mohit & Co agreed to distribute the products of Kailash & Co. Both the parties agreed to incorporate an arbitration clause in their formal agreement to resolve their existing and future disputes by arbitration. But one of the parties later takes the defence that it should have been in a separate agreement and therefore the said clause was not valid. With reference to the above facts, answer the following.
- Define the arbitration agreement.
 - Discuss whether the above stated parties can incorporate an arbitration clause in their formal agreement only or not.
- 145.** 'A' a producer of a film and 'B' a distributor entered into a contract for the distribution of A's films. In the agreement it was mentioned to have a separate arbitration agreement to be signed by both 'A' and 'B' that will be binding for resolution of future disputes. However, 'A' only has put his signature in the arbitration agreement, whereas 'B' has expressed his willingness but has not signed the arbitration. Explain the following with reference to the above situation.
- Is 'B' bound by the arbitration agreement in case he does not contradict same in writing?
 - What are the legal attributes of the arbitration agreement?
- 146.** "Conciliation proceedings shall have to commence before any steps are taken for the appointment of arbitrators." In the light of this statement, answer the following:
- Define conciliation and bring out its characteristics.
 - Discuss the procedure to be adopted by a conciliator.
- 147.** M/s Kawalji Enterprises and M/s Sunil Enterprises submit their dispute to conciliation and accept the terms of settlement proposed by the conciliator. Discuss the following, with reference to the above situation.
- Whether the above said settlement through conciliation has any legal effect.
 - Can the conciliator act as an arbitrator?
 - Commencement of conciliation and the procedure for appointment of a conciliator.
- 148.** Kisan and Aditya submitted their business dispute to conciliation. However, during the pendency of the conciliation proceedings, both the parties felt that their dispute could not be solved by conciliation; hence they decided to take the said cause of action to the court. With reference to the above situation, answer the following:
- Can Kisan and Aditya refer the matter to the court for settlement during the pendency of the conciliation?
 - Whether the conciliator is bound to maintain confidentiality of all the matters of conciliation proceedings.
 - Who has to bear the costs of the conciliation proceedings?

Part II: Caselets (Answers)

Chapter 1: Introduction to Legal Environment

1. a. Yes, Aditya is guilty of breach of duty on his part as the passengers hired his services presuming that he is a driver and hence their travel would be safe. Whereas driving a car without a licence was an act which he was under a legal duty not to do. Therefore, the tortious act committed by him in this case comes under 'malfeasance'.

The term 'malfeasance' refers to the commission of an unlawful act, especially when there exists a legal duty to refrain from doing such an act. All the acts done in the form of malfeasance are *actionable per se* and do not need the proof of malice or negligence. Same is the case with Aditya, thus there is no necessity to prove negligence.

- b. The term 'tort' is derived from the Latin term '*tortum*' and its English equivalent is 'wrong'. In Roman law 'tort' is equivalent to '*delict*'. '*Tortum*' means 'twisted' or 'crooked' and implies conduct which is not straight forward or lawful. The Law of Tort is modeled as a device for making people stick on to the standards of logical behavior and respect the rights and interests of one another.

A tort is a form of civil wrong. In order to understand what a tort is, one must first understand what a civil wrong is. Some one will commit a civil wrong, if he/she breaches a legal duty owed to another. Not all civil wrongs amount to torts. Sometimes someone who commits a tort may at the same time commit a crime and become liable to suffer criminal punishment for what he has done.

To constitute a tort there must be a wrongful act. The word 'act' has two connotations – a positive act or a negative act. The term 'act' is associated with human actions as distinguished from natural occurrences such as lightening, earth quakes, floods etc. Secondly, acts differ from human thoughts and intentions because thoughts and intentions by themselves do not constitute acts.

2. a. Yes, Bobby has a right to file a suit against Arjun for breach of legal duty. Bobby has right to safety while walking on the road and whereas a corresponding duty lies on Arjun not to expose Bobby to any such danger by driving at an excessive speed. Arjun has breached his duty towards Bobby by injuring him. Causing injury to Bobby is in consequence of an improper performance of an act which Arjun is under a legal duty to perform properly. Arjun is therefore, guilty of *misfeasance* under the law of torts.

Misfeasance is the improper performance of a lawful act; an act which a person has a legal right to do; it is an act that the person should have done properly. It is used with reference to improper conduct in performing an act.

Malfeasance: The term 'malfeasance' refers to the actual commission of an unlawful act. It consists in doing an act which one has a legal duty to refrain from doing. All the acts done in the form of malfeasance are *actionable per se* and do not need the proof of malice or negligence. Trespass is an unlawful act, it is an act of malfeasance and it is *actionable per se*.

Misfeasance: Misfeasance is the improper performance of a lawful act; an act which a person has a legal right to do; it is an act that the person should have done properly. It is used with reference to improper conduct in performing an act. Even if a person has undertaken to do something gratuitously, he is liable if he commits a misfeasance.

The distinction between malfeasance and misfeasance is that in the former the act itself is unlawful and in the latter the act, though lawful, may become unlawful by the manner in which it is done.

3. a. Yes, 'A' is guilty of non-feasance as A has not performed the surgery which he was under a legal duty to perform. Hence, B can claim damages for non-feasance.

Non-feasance means non-performance of an act, when one is under a legal duty to perform. It is the failure or omission to perform an obligatory act. Thus, where there is an obligatory duty and the failure or omission to do such duty causes injury to a person, it gives rise to a cause of action in favor of such individual towards whom such duty exists.

- b. **Misfeasance:** Misfeasance is the improper performance of a lawful act; an act which a person has a legal right to do; it is an act that the person should have done properly. It is used with reference to improper conduct in performing an act. Even if a person has undertaken to do something gratuitously, he is liable if he commits a misfeasance.

The distinction between misfeasance and non-feasance is that misfeasance is the doing of something which a reasonable and prudent person would not do, while non-feasance is omitting to do something which a reasonable and prudent person would do.

4. a. As per the contractual terms and conditions, Y is liable to pay damages to X for failing to meet the contractual obligations. The nature of damages to be paid is liquidated damages and fixed according to the terms and conditions of the parties. The purpose of the damages is only to compensate the loss occurring due to the said breach.

A breach of contract is an infringement of a right in *personam*, i.e., of a right available only against some determinate person or body, in which the community at large has no concern. Under the law of contracts a duty is fixed by the will and consent of the parties. It is owed to definite persons.

- b. There are a few clear-cut distinctions between a Tort and a Contract:

- A contract is based upon consent and a tort is inflicted against somebody and without his consent.
- A contract demands a privity between the parties to it; where as in torts no such privity is needed.
- A breach of contract is an infringement of a right in *personam*, i.e., of a right available only against some determinate person or body, in which the community at large has no concern; whereas torts are a violation of a right in rem, i.e., a right placed in some determinate person, either personally or as a member of the community, and available against the world at large.
- For a breach of gratuitous undertaking of any service, there lies no action under the Contract Act, but insofar as tort is concerned, any negligent performance of it does invite an action.

In the case of a contract, the duty is fixed by the will and consent of the parties. It is owed to definite persons; whereas in the case of a tort, the duty is one imposed by the law and is owed to the community at large.

- In breach of contract, the mental element for the breach is immaterial; in a tort it is sometimes taken into consideration.
- In a breach of contract, damages are only for the purpose of compensating the breach but in tort, compensation, is the only remedy. In cases of injury to the person, character, or feelings, and if the facts disclose improper conducts like fraud, malice, violence, cruelty, etc., which increase the plaintiff's injury, different kinds of damages are awarded like exemplary damages.
- In a contract, the damages are liquidated and fixed according to the terms and conditions of the parties; but in tort the damages are generally unliquidated and are determined by the Court on the facts and circumstances of the case.
- In a contract, time of limitation begins from the breach, in tort it is from the occurrence of the damage.

5. a. Yes, Mr. Ashish can file a suit against the returning officer, though no harm or loss has happened to the candidate for whom Ashish wanted to vote, as he won the election with a resounding majority. But, the returning officer is liable for violating the legal right of Mr. Ashish. This is based on the principle of *Injuria Sine Damno*.

Injuria means injury, *sine* means without and *damno* means damage. Thus, it means injury without damage. In other words it means violation of a legal right without causing harm, loss or damage to the plaintiff. This is a tort which is *actionable per se*, i.e., actionable without proof of any damage or loss. For example, trespass on land is *actionable per se* even though no damage might have been caused by the act of trespass. For a successful redressal, the plaintiff has to prove only that he suffered legal injury even though there was no physical harm or damage.

- b. ***Injuria Sine Damnum***: *Injuria* means injury, *sine* means without and *damno* means damage. Thus, it means injury without damage. In other words it means violation of a legal right without causing harm, loss or damage to the plaintiff. This is a tort which is *actionable per se*, i.e., actionable without proof of any damage or loss. For example, trespass on land is *actionable per se* even though no damage might have been caused by the act of trespass. For a successful redressal, the plaintiff has to prove only that he suffered legal injury even though there was no physical harm or damage.

- *Ashby vs. White* is a landmark case explaining the maxim *Injuria Sine Damno*. The plaintiff succeeded in his action even though the defendant did not cause any damage. In this case, the plaintiff was a qualified voter at a Parliamentary election, but the defendant, a returning officer wrongfully did not allow the plaintiff to cast his vote. No harm or loss was suffered by this refusal because the candidate for whom the plaintiff wanted to vote won the election with a resounding majority. But the legal right of the plaintiff was violated. It was held that the defendant was liable.
- In *Marzetti vs. Williams* a banker was held liable for refusing to honor the customer's cheque when sufficient funds were available in the customer's account. Even though, the customer did not sustain any actual loss or damage, but he suffered legal injury. Hence the above maxim is applicable.

6. a. No, Mr. Joseph cannot file a suit against Mr. David for damages as there was no injury to Mr. Joseph's legal rights. The relevant principle of law is *Damnum Sine Injuria*.

Damnum means damage, *sine* means without and *Injuria* means injury. Thus, it means damage without injury. In other words, it means the damage has occurred without a legal injury. No action lies, even when actual and substantial loss occurs if there is no infringement of any legal right. The facts mentioned herein are similar to that of *Gloucester Grammar School Case*, wherein the plaintiff, a schoolmaster (defendant) set up a rival school against the plaintiff. Because of the defendant's school, the plaintiff had to reduce the fees from 40 pence to 12 pence per scholar per quarter. Thus, the plaintiff suffered financial loss. But there was no injury to his legal rights. Hence, the above maxim is applicable here. The plaintiff could not get any compensation from the defendant.

- b. *Damnum* means damage, *sine* means without and *Injuria* means injury. Thus, it means damage without injury. In other words, it means the damage has occurred without a legal injury. No action lies, even when actual and substantial loss occurs if there is no infringement of any legal right.

In *Ushaben vs. Bhagyalaxmi Chitra Mandir*, the plaintiff filed a case to get permanent injunction against the defendant to restrain him from exhibiting the film named "Jai Santoshi Maa". The contention of the plaintiff was that the film hurts his religious feelings. Goddesses Sarawati, Laxmi and Parvati were pictured and depicted as being jealous of each other and were ridiculed. The Court observed that the movie did not hurt religious feelings. Hence, it was not recognized as a legal wrong. Further, no person has a legal right to enforce his religious feelings on another. No person could restrain another from doing a lawful act, merely because it did not suit his feelings of religion. As there was no violation of a legal right, the plea of the plaintiff for injunction was rejected.

7. a. No, Mr. 'Ram' was wrongly advised in paying tariff for the exported goods. A tariff is a tax on imported products. Tariffs are considered as a protectionist measure, as they increase the price of imported goods in the domestic market.

Reasons for imposing Tariffs by the Governments:

- The importing country believes that the tariffs are beneficial to the economy as a whole. But some times it may happen that they act in ignorance of the damage, which tariffs are inflicting on the country. One possibility is the availability of some other non-economic benefits, which are considered sufficiently important to justify the economic cost.
- Another reason for imposition of tariffs is the possibility that they may bring some economic gains, which more than offsets the static welfare loss measured by the conventional model.
- Another reason why tariffs are imposed is that a sudden surge of imports can cause serious adjustment problems for the importing country. Adjustment difficulties arise because of imperfections in both product and factor markets. If markets were perfect, a sudden surge of imports need not cause any problem for an importing country.

- b. The five different effects of imposing tariffs are:

- It leads to reduction in consumption in the importing country – The consumption effect.
- It increases the domestic production of products – the protective effect.
- It improves the balance of trade position of that country – the balance of trade effect.
- It generates the revenue for the importing country – the revenue effect.
- It reduces the economic welfare in the importing country – the welfare effect.

The imposition of tariff on one hand increases the incomes of domestic producers and the government on the other hand it reduces the real incomes of consumers by raising the price of the imported product. The welfare loss to consumers in the importing country exceeds the gains to be reaped by the domestic producers and its government. As a result, the importing country suffers a net welfare loss. It is the last effect, which makes tariffs harmful when viewed from a purely economic point of view.

8. a. The WTO aims to achieve its objectives by reducing existing barriers to trade and by preventing new ones from developing. It seeks to ensure fair and equal competitive conditions for market access, and predictability of access to all traded goods and services by employing certain well-laid principles. The basic principles of the WTO are:

- Trade without Discrimination.
- No Most Favored Nation (MFN) Treatment – no special deals to trading partners, all members of WTO must be treated with the same status.
- No National Special Treatment – locals and foreigners are treated equally.
- Freer Trade.
- Predictability through Binding – promising not to raise tariffs is called binding a tariff and binding leads to greater certainty for businesses.
- Promoting Fair Competition.
- Encouraging Development and Economic Reform.

These principles are the foundation of the multilateral trading system.

b. **Benefits to Member Countries of WTO:**

By being members of WTO, the member countries are eligible to get the following benefits:

- The system helps promote peace
- Disputes are handled constructively
- Rules make life easier for all
- Freer trade cuts the costs of living
- Provision of more choice of products and qualities
- Trade free from disputes raises incomes
- Trade stimulates economic growth
- The basic principles make life more efficient
- Governments are shielded from lobbying
- The system encourages good government
- The system helps to promote peace
- The system contributes to international peace. Peace is partially an outcome of two of the most fundamental principles of the trading system.

9. a. Yes, Gaurav can claim damages from Kailash for his negligence in maintaining the horse. The act of Kailash in leaving the horse to starve amounts to a negligent act. Breach of any negligent performance of a gratuitous undertaking of any service can be made liable under torts. A tort is inflicted against somebody and without his consent. Torts are a violation of a right in *rem*, i.e., a right placed in some determinate person, either personally or as a member of the community, and available against the world at large. The duty under torts is one imposed by the law and is owed to the community at large. Hence in the present case, Kailash is liable for breach of gratuitous undertaking of the service.

- b. ***Ubi Jus Ibi Remedium***: It is the cardinal principle of law that law will provide remedy for every injury. Literally *ubi jus ibi remedium* means 'where there is a right, there is a remedy' meaning thereby that if there is a right, there shall be a remedy for its breach. In other words, there is no legal wrong without remedy. *Jus* signifies the 'legal authority to do or demand something' and *remedium* is the 'right of action or the means afforded by law to assert the right or to cover something under it'. The Law of Torts has accepted this principle and consequently advanced remedy for each and every legal wrong. In fact, the law of torts owes its origin and development to this maxim. In essence, it implies that if all remedies to enforce a right are gone, the right in point of law ceases to exist. Infact, earlier it was *ubi remedium ibi jus*. The real significance of legal damage is illustrated by two maxims namely, *injuria sine damno* and *damnum sine injuria*.

10. a. Lokesh owed a duty towards Nirajan to export the specified goods. Nirajan owed a duty to pay consideration as per the terms of the contract. The duty owed towards Lokesh was not fulfilled and hence Lokesh can file a suit for breach of the contractual terms especially for not fulfilling the obligation of payment of consideration. A duty is fixed by the will and consent of the parties. It is owed to definite persons. As the damages in contracts are generally liquidated and fixed according to the terms and conditions of the parties, the limitation period begins from the time of breach. Hence, Lokesh has a right to file a suit against Nirajan for recovery of his consideration amount.

- b. The Court means 'a body in government to which the administration of justice is delegated'. The courts are administrated and supervised by the Supreme Court, which is the head of the Judiciary in all the countries. To reduce the burden of work the judiciary has divided the court's hierarchy, on the basis of jurisdiction, nature of offence, claims etc. According to William J. Hughes, "a court is a permanently

organized body, with independent judicial powers defined by law, meeting at a time and place fixed by law for the judicial public administration of justice.” All the courts in the country follow a uniform working system. The term ‘court system’ means ‘the network of courts in a jurisdiction.’

The distinctive feature of the court system in any country is the adoption of a system and existence of Central and State Acts, which provide a single integrated system of courts to administer both Union and State Laws. Judiciary is independent, impartial and guided by the doctrine of ‘Rule of Law’. Sound functioning of the judicial system of a country depends on the systematic establishment and smart functioning of a court system in the country.

The court system must be designed to meet the needs of the society. The main aim of the court is to deliver justice to individuals in the society. Individuals approach the court according to the jurisdiction through a lawyer. The jurisdiction of the courts is decided by the nature of the law in question. To determine the nature of law in question there is a need to classify the law into Civil and Criminal Law.

11. a. Yes, the corporation would be liable for its omission to remove away the poisonous tree from the premises of the public park. The act of the corporation being a civil wrong amounts to torts. To constitute a tort there must be a wrongful act which is either positive or negative. A person is said to commit a civil wrong if he/she breaches a legal duty owed to another, the same applies here too. Hence the corporation is liable for its failure to perform its legal duty.

b. **Tort vis-à-vis Crime:**

In *P.Rathinam Nagbhusan Patnaik vs. Union of India* the Supreme Court differentiated a tort from a crime. In brief, the following are the points of distinction between a crime and a tort:

- Crime is a wrong against the society. Tort is a wrong against an individual.
- As crime is a wrong against the society, the State initiates action against the accused. In tort, the individual who is the victim initiates action.
- In crime, the State action is called prosecution. In tort the individual action is called a suit.
- As a rule the object of criminal justice is punishment of the accused. In tort, the object is compensation to the victim.
- Thus, Criminal Law looks to the accused and Law of Torts looks to the victim. Restoration of the status of the victim is the purpose of tortious action.
- Crime, as a rule, is non-compoundable. Tort is compoundable.
- Though fine by way of money is imposed in crime, it goes to the State and not to the victim. Whereas in tort compensation amount must be paid to the victim.

12. a. Yes, the advertisement company is liable for its omission to take due care of the hoarding. Had the company exercised proper care in maintaining the hoarding, the accident would not have taken place and Sagar would have survived. The first requirement to claim damages under the law of torts is that the act complained should be legally wrongful, which in turn results in a real damage called ‘injury’, giving rise to a legal remedy in the form of action for damages. The wrongful act must come under the category of wrongs for which the remedy is civil action for damages. Although there are other remedies, it is primarily the right to damages that brings such wrongful acts within the category of torts. Hence, Mr. Sagar’s family can claim damages from the advertisement company for losing their only source of income, love and security.

- b. The following three conditions must be fulfilled to constitute torts:
1. **There must be a Wrong Committed by a Person:** The first requirement for a tort is that the act complained of should be legally wrongful or that there must be the violation of the legal right. A person who invades the legal right of another person is said to commit a legal wrong or wrongful act. The wrongful act may take any one of the three forms namely, malfeasance, misfeasance or non-feasance.
 2. **Wrongful Act must Result in a Legal Damage:** When the damage is recognized by law, it is called the legal damage. The three ingredients of legal damage are:
 - Infringement of a legal right i.e., Right in *rem*
 - Presumption of damage or injury in law, in case an absolute right is violated;
 - Proof of actual damage suffered, in case the right infringed is not of absolute nature; but of a qualified right.

The wrongful act complained of must result in legal damage to another. Every infringement of the plaintiff's right or unauthorized interference with his property imposes a legal damage. A person may not suffer pecuniary loss, yet, if it is shown that there was a violation of some right, the law presumes damage.
 3. **A Legal Remedy in the form of an Action for Damages:** The third essential condition to constitute a tort is that the wrongful act complained of must be of such a nature that it must give rise to legal remedy in the form of action for damages. The wrongful act must come under the category of wrongs for which the remedy is civil action for damages.

13. a. No, Sadanand cannot be made liable for not saving the drowning child as it is only a moral wrong and therefore, no liability can arise for that unless it can be proved that there was a legal duty to save the drowning child. Therefore, no liability can arise for that unless it can be proved that there was a legal duty to save the drowning child. To constitute a tort there must be a wrongful act. The word 'act' has two connotations – a positive act or a negative act. The term 'act' is associated with human actions as distinguished from natural occurrences such as lightening, earth quakes, floods etc. The Law of Tort is modeled as a device for making people stick on to standards of logical behavior and respect the rights and interests of one another.
- b. To constitute a tort there must be a wrongful act. The word 'act' has two connotations – a positive act or a negative act. The term 'act' is associated with human actions as distinguished from natural occurrences such as lightening, earth quakes, floods etc. Secondly, acts differ from human thoughts and intentions because thoughts and intentions by themselves do not constitute acts. Generally, a tortious act is explained in terms of:
- Malfeasance;
 - Misfeasance; and
 - Non-feasance.

'Feasance' means 'doing'. Malfeasance and misfeasance result from commission, i.e. positive acts. Non-feasance refers to omission, i.e. negative acts.

Malfeasance: The term 'malfeasance' refers to the actual commission of an unlawful act. It consists in doing an act which one has a legal duty to refrain from doing. All the acts done in the form of malfeasance are *actionable per se* and do not need the proof of malice or negligence. Trespass is an unlawful act, it is an act of malfeasance and it is *actionable per se*.

Misfeasance: Misfeasance is the improper performance of a lawful act; an act which a person has a legal right to do; it is an act that the person should have done properly. It is used with reference to improper conduct in performing an act. Even if a person has undertaken to do something gratuitously, he is liable if he commits a misfeasance.

Non-feasance: It consists in non-performance of an act, when one is under a legal duty to perform it. It is the failure or omission to perform an obligatory act. Non-feasance of gratuitous undertaking does not impose a liability. But, where there is an obligatory duty and the failure or omission to do such duty causes injury to a person, it gives rise to a cause of action in favor of such individual towards whom such duty exists.

14. a. Yes, Mr. Mohan can file a suit against Ms. Suvarna for breach of contractual terms of hire purchase. As per the terms of contract Ms. Suvarna can claim the rest of the installment amount as damages and she cannot simultaneously takeover the machinery. If the terms of the agreement specify the damages to be paid in case of breach or termination, the same shall apply. In the absence of the contractual terms, damages shall be fixed depending on the loss incurred by the aggrieved party. A contract is based upon consent of the parties and privity of contract exists between them. Breach of a contract is an infringement of a right in personam, i.e., of a right available only against some determinate person or body, in which the community at large has no concern. The duty is fixed by the will and consent of the parties and it is owed to definite persons.
- b. The concept of hire purchase agreement actually developed in the nineteenth century and comprised of an alternative to buy as per the choice of the hirer and the terms and conditions of the agreement. This method of credit was used to finance the trader's acquisition of furniture, sewing machines and musical instruments. In the year 1890, two English cases proved helpful in developing the hire purchase law in the form of a financial creation. Hire purchase started progressing in the early decades of this century, but due to the depression in the 1930's, the agreements were slowly misused.

A major aspect of the hire purchase agreement is that the financier only acquires the ownership of the goods when the agreement is complete and the owner becomes responsible for any faults found in the goods. When statutory regulation of hire purchase dealings was practiced, snatch-back too was followed. In this practice, the financier seized the goods from the hirer, if the hirer was at fault irrespective of the worth of the goods. The payments were made by the hirer or any other similar issue. Subsequently, remedial legislation was executed in England and Australia. The Australian legislation had many shortfalls and disparities.

The implementation of hire purchase transactions among states was common. These differences made the Commonwealth and State Ministers to introduce a new method of uniform legislation for the Commonwealth States.

15. a. Yes, Mr. Giridhar Rao can claim damages from Mr. Mahavir for breach of the lease contract. As per the contract of lease non-payment of rent for one month is itself sufficient for termination of the lease agreement and thereby entitling the safety deposit to Mr. Giridhar Rao by way of damages. The principal remedy for breach of contract is damages and the parties to contract have a choice either to perform the contract or pay damages. Damages restore the position of the aggrieved party by making good the loss in the event of non-performance of the contract. The aggrieved party must prove that there was a breach and has caused in some kind of financial loss. A contract generates a potential right to damages, but the burden of proof lies on the aggrieved party to show the loss incurred.
- b. A lease of immovable property is a transfer of a right to enjoy the possession for a limited period of time.
- It can be created orally and in perpetuity. An oral lease for more than a period of one year is considered as the monthly tenancy.
 - The consideration for a lease is rent or premium and it should be in terms of the price including money or any service or thing of value.
 - The test for the existence of a lease is that whether any right of interest is created in the immovable property or not.

- The right of possession is an essential element in the lease. A license is different from a lease in many ways. For instance, the former is only a grant of right, whereas a right in the property is given in the latter, creating interest in the property. There is no such interest in the property in the case of the former.

Sections 105 to 117 under Chapter V of the Transfer of Property Act deal with the leases of immovable property. Section 105 of the Transfer of Property Act 1882, defines a lease as follows: “A lease of an immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a 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 occasions to the transferor by the transferee, who accepts the transfer on such terms.”

A lease is different from a sale involving the transfer of ownership. The lease is only a ‘transfer of a right to enjoy’ and interest in the land, but not the ownership.

Salmond explains the concept of lease as where a person has rightful possession and use of the property that is owned by other person and it clearly distinguishes the right of ownership from the possession of property.

16. a. No, Mr. Abhishek will not succeed in claiming damages from Mr. Nandu. Though the contract specified the period within which the machinery has to be returned after repairing, the consequences of delay in delivery has not been mentioned. Since the consequences of the delay in delivery of the machinery are not communicated to Mr. Nandu, Mr. Abhishek cannot recover for the loss of tender (contract), which is incidental to the ordinary course of business. Hence, Mr. Nandu is no way liable for damages.
- b. To determine the nature of law in question there is a need to classify the law into Civil and Criminal Law.

Civil and Criminal Law: Law is broadly classified into two categories – Civil Law and Criminal Law. This is classified on the basis of the nature and principal substance of Law. The procedure followed by both is entirely different. Initially there was no procedural difference to proceed for action before the court. The cases in these laws were proceeded under one roof with difference in the liability. During the 19th century, the need for differentiation between civil and criminal law was felt necessary to ensure the effective functioning of the courts.

Civil law: Civil law to some extent is based on the personal laws. it governs the litigation arising between individuals over properties, monetary affairs, partnership, accident cases etc. the nature of penalty is civil in nature. Liability to compensate the affected party will be in the monetary form. The civil law is governed under the code of civil procedure.

Criminal law: In criminal cases, the government for violation or injury to public rights files suits. In criminal cases the government takes the initiative to file the case. if an individual violates the provisions of law even against any person, it is treated that the violation affected the public as a whole. The objective of the criminal law is to govern the cases arising out of theft, murder; cheating etc. In these cases the nature of cognizance is given importance before pronouncing the judgment. The nature of punishment is both monetary and imprisonment; in very rare cases capital punishment is awarded too. The criminal law is governed under the code of criminal procedure.

Chapter 2: Business Contracts

17. a. A contract is the result of a promise to do a certain thing in exchange for a promise from another person. Contract law assures that the promise so made is legally enforced, if any one of the parties fails to abide by the contract.

A contract is said to create a legal bond – a *vinculum juris*. This arises only when the parties have intended to create a legal relationship between them. The infringement of such obligations will make the parties liable to the extent of the loss suffered by the aggrieved party for non-performance of the agreed act.

In the given situation A and B are friends. B went to A's house on Monday for dinner in spite of having many other engagements, as A had invited for his birthday. But A was not at home and the house was locked when B reached A's house. For this inconvenience B cannot file a case for damages. Because an agreement between them does not impose any legal obligation and an invitation to a birthday party was just a social obligation.

Non-business, religious or charitable agreements need not be contracts. Casual agreements between friends and family or household agreements are not held as contracts. This can be observed from the following case:

Balfour vs. Balfour: Balfour was employed in Ceylon and he promised to send his wife, 40 pounds a month so long as they had to remain separate. The wife, owing to her ill health, had to stay in England and could not accompany him to Ceylon. Subsequently the husband failed to send the money as agreed. The wife sued for breach of contract. It was held that this agreement was not a contract enforceable in a Court of Law.

- b. All the definitions of contract refer to agreements between individuals; which are enforceable by law. Thus, the two basic requirements of a contract are an agreement and legal enforceability of that agreement.

According to Section 2(h) of the Contract Act, "An agreement enforceable by law is a contract."

According to Section 2(e) of the Act, "Every promise and every set of promises, forming the consideration for each other, is an agreement."

Section 2(b) defines a promise as: "When the person to whom a proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal when accepted becomes a promise."

Section 2(a) defines a proposal as: "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."

Thus, a contract is an agreement; an agreement is a promise and a promise is an accepted proposal.

18. a. In the given facts both Gopal and Krishna were not sure of the subject matter (house) of their contract. Gopal wanted to sell his house, which was at Mumbai, but Krishna intended to buy Gopal's house, which was at Pune. Both of them have different houses in their mind. The contract between them for sale of house was not at consensus ad idem and therefore it does not validate the contract, which is one of the essentials of a valid contract. Having the same thing in mind between the parties is very important for contracts.

'Consensus ad idem'

One of the most essential elements in the making of a contract is that the promisor and the promisee must agree about the same thing in the same sense. There should be a meeting of minds. The identity of minds is called *consensus ad idem*. This is the theory underlying the formation of contracts. In a contract of sale of house between 'A' and 'B' where A has two houses in Hyderabad and Chennai respectively; and A intends to sell his house at Hyderabad but B intends to buy A's house at Chennai, there is no *consensus ad idem* between the contracting parties and hence no valid contract ensues.

- b. **Essential elements of a valid Contract**

Section 10 of the Indian Contract Act, 1872 describes the requirements of a valid contract. According to this Section, "All agreements are contracts if they are made by the free consent of parties competent to contract for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void."

“Nothing herein contained shall affect any law in force in India and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents.”

From this definition we understand that an agreement becomes a contract when it involves competent parties, valid consideration, free consent and legal object.

The essential elements of a valid contract are free consent, offer and acceptance, capacity, consideration, lawful object, certainty and possibility of performance, term of contract should be clear, agreement must not be declared void, and legal formalities.

19. a. In the given situation Mr. George offered Mr. Jolly to sell his house for Rs.20 lakhs. Mr. Jolly accepted to buy the house but for Rs.18 lakhs. It is not a valid acceptance by Mr. Jolly as he made counter offer. A counter offer cannot be considered as an acceptance.

An acceptance must be clear and unconditional. The acceptance becomes invalid if the terms of the offer differ from the original offer, at the time of acceptance or after acceptance. An acceptance can be valid even after the difference in terms of offer, if the terms of counter-offer are acceptable to the original offeror. A counter-offer is a situation wherein the offeree attempts to change the terms of the offer initially made by the offeror. A counter-offer implies rejection of the original offer. Counter-offer terminates the original offer, if the terms of counter-offer are not acceptable to the original offeror. A counter-offer or conditional acceptance operates as a rejection of the offer and causes it to lapse.

- b. Acceptance is the next step of an offer. Unless and until an acceptance is communicated to the offeror, it cannot be held as a valid and an effective acceptance. Acceptance takes place only when the offeree gives his consent to the terms of the offer. Just as in case of offer, acceptance may also be express or implied. An acceptance is said to be express when it is communicated by words spoken or written or by doing some required Act. It is implied when it is to be gathered from the surrounding circumstances or the conduct of the parties. In an auction sale, the highest bidder is assumed to be the buyer of the goods once the deal is struck.

In order to convert an offer into a promise, acceptance should be absolute and unqualified. It is also essential that the acceptance is given in some usual and reasonable manner. If the offer prescribes the manner in which the acceptance is to be given, then the acceptor should adhere to the prescribed mode. On failure to do so, the offeror can insist that his offer will be accepted only if it is given in the prescribed manner.

The following are the essential conditions for a valid acceptance:

- It must be made by the offeree.
- It should be absolute and unqualified.
- It shall be in a prescribed form.
- It should be within the specified time.
- Communication of acceptance.
- Acceptance during the course of negotiations.
- Acceptance must be positive.

20. a. **Consideration**

Section 25 of the Contract Act declares that, an agreement made without consideration is void. No right of action arises out of an agreement not supported by consideration. *Ex nudo pacto non oritur*, nobody would part with anything unless he gets a proper price. Hence, a contract without consideration raises a doubt as to its genuineness.

In *Misa vs. Currie* consideration has been defined as “the price for which a promise is brought’. Consideration itself means “some right, interest, profit, or benefit accruing to one party or some forbearance, detriment, loss of responsibility given, suffered or undertaken by the other.”

In other words, the return promised or the *quid pro quo* for the performance of the contract is consideration. Without consideration, there cannot be a contract excepting in those cases where it is specifically exempted. Consideration must result in some benefit to the plaintiff or some loss to the defendant.

Indian Law: Section 2 (d) of the Indian Contract Act, 1872 defines consideration as “when at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or abstain from doing, something, such act or abstinence or promise is called a consideration for the promise.”

Consideration means the element of exchange in a bargain, in order to satisfy the requirements of the governing law. Consideration is necessary for the formation of a contract. Consideration need not be adequate. It is either a benefit to the promisor or a detriment to the promisee, negotiated for and given in exchange for a promise. It must have the exchange value that can be measured in terms of money or money’s worth.

In the given situation Ajay wants to purchase Naveen’s bike for 1/4th of its actual price. Basing on the above explanation contract between Ajay and Naveen is valid though the consideration is not adequate.

- b. **‘All contracts are agreements, but all agreements are not contracts’:** The basis for this statement is that the existence of a mutual set of promises does not suffice for the courts to accord legal recognition to such promises unless the intention to create legal relations is clearly established. Unless the element of this intention exists the party aggrieved by the breach of contract would not be in a position to legally enforce his rights. To don the mantle of a contract, an agreement must give rise to a legal obligation i.e. a duty enforceable by law. A contract is therefore a species of agreement; the latter being the *genus* and a wider term than the former. Moreover agreements of moral, religious or social nature are mere agreements and not contracts as the parties to the agreement do not intend legal consequences to arise therefrom. The Indian Contract Act restricts the term ‘contract’ only to those agreements, which give rise to legal obligations between the parties.

However, conversely, all legal relationships and obligations do not always arise out of agreements only. There is a large area of legal obligations imposed and enforced by law. Therefore, obligation to look after wife and children, obligation to follow the law of the land or to comply with orders of authorities do not fall within the ambit of the Law of Contract. Salmond had rightly observed: “The Law of Contracts is not the whole law of agreements, nor is it the whole law of obligations. It is the law of those agreements which create obligations, and those obligations, have their source in agreements.”

21. a. In the given situation, ‘A’ promised to deliver goods to ‘B’ on a certain day on payment of Rs.1,000. ‘A’ died before the stipulated day. ‘B’ came to know about A’s death and asked A’s representatives to perform the contract between him and ‘A’. ‘B’ can bind the representatives of ‘A’ to perform the contract as per section 37 of the Indian Contract Act 1872 unless otherwise specifically decided by the parties.

Obligation of Representatives of the Promisor to Perform

Section 37 of the Indian Contract Act provides that – “promises bind the representatives of the promisors in case of death of promisors before performance, unless a contrary intention appears from the contract.”

Legal representatives of the promisor may perform the contracts that do not involve any personal skill, if the promisor dies before performance, unless a contrary intention appears from the contract. The promisee can compel the legal representatives to perform. However, the liability of the legal representatives is limited to the extent of the estate of the deceased promisor, which has come to their hands.

b. **Obligation of Parties to Contract**

Section 37 of the Indian Contract Act provides as follows:

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

“Promises bind the representatives of the promisor in case of death of such promisor before performance, unless a contrary intention appears from the contract.”

So, it appears from the above definition that it is the duty of each party to the contract to perform, or offer to perform, the contract, unless the performance is excused under the provisions of the Act or any other law. Performance may be: Actual performance, or Attempted performance or tender of performance.

Actual Performance

If a party to a contract has fulfilled all his obligations under the contract, he is said to have actually performed his promise. When both parties have performed their respective promises, a contract is said to have been actually performed. Actual performance of the obligations brings the contract to an end. When the promisor dies the promisee has to sue all the heirs on whom the promisor's property has devolved. If the promisee neglects to do this, his suit is liable to be dismissed.

Attempted Performance or Tender of Performance.

Persons by whom Promise is to be Performed: Section 40 of the Act provides: “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 representatives may employ a competent person to perform it.”

Obligation of Representatives of the Promisor to Perform

This was explained above.

Promisor Employs Third Persons to Perform

Section 40 provides that: “in other cases the promisor or his representatives may employ a person to perform it.”

Where the contract does not show an intention that promisor alone should perform the promise personally, he or his representatives can employ a competent person to perform the contract. So, under some circumstances third party may also perform the promises.

22. a. In the given situation ‘Akash’ has supplied 96 cotton bales according to the terms of contract and he was unable to supply only negligible amount, which he promised to supply without any further delay. Therefore ‘Badshah’ cannot refuse to take delivery of bales supplied as he bound to accept under the bales under section 38 of the Indian Contract Act, 1872. As the contract has been performed substantially.

Effect of prevention of performance by the promisee

Section 38 of the Indian Contract Act provides that –

“Where a promisor has made an offer of performance to the promisee, and the offer has not been accepted, the promisor is not responsible for non-performance nor does he thereby lose his rights under the contract. Every offer must fulfil the following conditions:

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

b. **Doctrine of ‘Substantial Performance’**

Where the contract is substantially performed, there is authority that the injured party is not discharged from the obligation to pay, but is protected by a counterclaim or set-off for any loss which may have been sustained by reason of the incomplete or defective performance. A Court will hold a contract to have been substantially performed if the actual performance falls not far short of the required performance, and if the cost of remedying the defects is not too great in amount in comparison with the contract price. For instance, if the builder has acted in good faith and has completed the job in substantial compliance with the contract, he can enforce the contract and collect the contract price. Any damages that result from noncompliance can be collected by the buyer or deducted from the amount of the contract price. Perfection is not required. However this principle will not be applied where the builder has intentionally substituted inferior materials or used other production shortcuts.

23. a. In the given set of facts, Mohan agreed to administer Raghu’s two businesses as a manager for a salary of Rs.50,000 per month. However between the two businesses one of the businesses was illegal, thereby the object of part of the contract is unlawful and consideration taken for that part is also unlawful. Therefore the agreement between Raghu and Mohan was void as per section 24 of the Indian Contract Act, 1872.

Agreement that is Unlawful in Part (Section 24)

Section 24 of the Indian Contract Act says:

Agreements are void, if considerations and objects are unlawful in part – If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object is unlawful, the agreement is void.

Where the object or consideration is illegal in part and is not severable from the rest the whole agreement is void. If any part of single consideration for one or more objects is unlawful, the agreement is void. Or if any one or any part of any one of several considerations for a single object is unlawful the agreement is void. Thus in other words, Section 24 comes into play when a part of the consideration for an object or more than one object 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.

b. **Void Agreements**

Section 2(g) of the Act defines a void agreement as, “An agreement not enforceable by law is said to be void.” A contract may be void *ab initio* (from the inception) or may be rendered void subsequently. A valid contract may be made void by some subsequent impossibility or when a voidable contract is made void by the aggrieved party. For instance, where the consent of the aggrieved party was not a free consent, the contract becomes void though at the beginning it was an enforceable contract. Following are the instances of void agreements:

Void Agreements

- Agreements by incompetent parties (Section 11)
- Agreements under mutual mistake of fact material to the agreement (Section 20)
- Agreements with unlawful consideration or object (Section 23)
 - immoral and illegal agreements
 - agreements opposed to public policy
- Agreements unlawful in part (Section 24)
- Agreements without consideration (Section 25)
- Agreements in restraint of marriage (Section 26)
- Agreements in restraint of trade (Section 27)
- Agreements in restraint of legal proceedings (Section 28)
- Agreement which are uncertain and ambiguous (Section 29)
- Agreement by way of wager or wagering agreements (Section 30)

24. a. In the given problem, Ashok and Showkath were owners of shops and they had immense competition in Chandinichowk, Delhi. Showkath accepted Ashok's offer to sell his shop with goodwill and not to do any business at Chandinichowk forever. The agreement between Ashok and Showkath is void because it is against Section 27 of the Indian Contract Act, 1872 which bars restraint of trade.

Agreements in Restraint of Trade (Section 27)

According to Section 27 of the Indian Contract Act, every agreement, by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is void to that extent.

The citizens of India are free to carry on any business or occupation or engage themselves in any trade. This right and freedom is given by the Constitution of India under Article 19(1)(g). Just as the legislature by means of any of its legislation cannot deprive the citizens of their legitimate right to freedom of trade and occupation, the individuals also cannot barter it away by agreement. The Indian public policy requires that every man is at liberty to work for himself. So by entering into a contract with others he must not deprive himself from choosing the suitable trade/occupation for him.

Illustration: In *Madhub Chander vs. Raj Coomar*, there were two rival shopkeepers in a locality, and one of them agreed to pay a sum of money to the plaintiff if he would close the business in that area. The plaintiff accordingly did so, but the defendant refused to give any money to him. The court held the agreement to be void.

- b. All the agreements in restraint of trade are void. Whether the restraint is partial or general or specific or complete, it is void unless it falls within any of the statutory or judicially created exceptions. There are two kinds of exceptions to the rule,
- those created by statute; and
 - those arising from judicial interpretations of Section 27.

Statutory Exceptions

The exception mentioned in the Section 27 of the Contract Act, relates to sale of goodwill, i.e., exception no. 1: One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer or any person deriving title to the goodwill from him, carries on a like business therein, provided that such limits appear to the court as reasonable with regard to the nature of the business.

25. a. In the given problem 'A' and 'B' entered into an agreement to sell A's white horse to 'B' for Rs.5000 or Rs.10000. As the terms of agreement between A and B were uncertain regarding price of horse, it is void agreement under section 29 of the Indian Contract Act, 1872.

Agreement, which is Uncertain and Ambiguous (Section 29)

Any agreement the meaning of which is not certain or capable of being made certain, is void. This provision is explained in Section 29 of the Indian Contract Act, 1872.

In *Guthing vs. Lynn*, a horse was bought for a certain price coupled with a promise to give 5 pounds more if the horse proved lucky. The agreement was held to be void for uncertainty. The court had no machinery to determine what luck, bad or good, the horse has brought to the buyer. Such cases have generally arisen in connection with the sale of goods, bearing uncertainty as to the price.

The terms of the agreement should not be vague. The agreement where the parties fail to express their intention clearly, is void. But where there is any possibility of making the meaning certain, the agreement is valid. So where the price is left to be decided by a third party, the agreement is not void. But an agreement to agree in future is void for there is no certainty whether the parties will be able to agree or not.

- b. In the given problem, B cannot ask A for specific performance of agreement i.e. to sell the white horse, because it is impossible to perform the above stated agreement as the said horse is died during the transaction.

Agreement to do Impossible Acts (Section 56) – Void

According to Section 56 of Indian Contract Act, “An agreement to do an act which is impossible to perform is void.”

“Where one person has promised to do something which he knew or with reasonable diligence, might have known that the promise is impossible or unlawful, such promisor must make compensation to such promisee for any loss which the promisee sustains through the non-performance of the promise.”

- c. **Limitations of Valid Contracts**

A contract which fulfills all the requirements prescribed by Section 10 of the Act is a valid contract. In other words, where an offer is made and is accepted in return by competent parties with free consent for a lawful consideration in furtherance of a lawful object, a valid contract is said to have been entered into. These contracts are enforceable by law and are binding on the parties. If any of the essential elements is missing, the contract is rendered invalid.

26. a. In the given situation Rajeev filed a complaint against Vinayak (LRO) for taking Rs.5,000 as bribe to register one acre of land on Rajeev’s name. Vinayak has offered Rajeev that he will repay the bribe money and give additional amount of Rs.20,000 if Rajeev agrees to withdraw complaint. Rajeev accepted Vinayak’s offer. This agreement to withdraw complaint between them is void as it amounts to restraint of legal proceedings under section 28 of the Indian Contract Act, 1872.

Agreement in Restraint of Legal Proceedings (Section 28)

For any contract to become valid it must be enforceable by law. Therefore any clause in the agreement restraining either of the party to enforce his agreement is void.

Section 28 of the Indian Contract Act provides that:

“Every agreement, (a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunal, or which limits the time within which he may thus enforce his rights; or

(b) which extinguishes the rights of any party thereto, or discharges any party thereto from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights is void, to that extent.”

Thus, Section 28 applies to the agreements, which restrain enforcement of contractual rights.

The following agreements are declared as void under Section 28:

Agreement which restricts absolutely the parties from enforcing their legal rights under a contract, and

Agreement, which limit the time within which a party may enforce his contractual rights.

Section 28 does not apply to the agreements which restrict the enforcement of legal right partially.

This Section states that “An agreement which restrains a person from enforcing his rights absolutely void.”

- b. In the given situation Rajeev and Vinayak entered into an agreement. According to the agreement Rajeev had to withdraw the complaint against Vinayak, who agreed to repay the bribe amount and also give an additional amount of Rs.20,000. This agreement is not valid as its object i.e. restraint of legal proceedings is unlawful. Thereby the consideration in this agreement also becomes unlawful under section 23 of the Indian Contract Act, 1872.

Unlawful Object and Consideration

The consideration of the agreement is the content of agreement as to, 'what is to be done under it'. For example, 'X' lets out his house for Rs.500 to 'Y', for residential purpose. Y intends to run a gambling den in that rented premises for which X do not have any objection. The consideration in this agreement may be lawful but the object is unlawful. Section 10 requires that both the object and the consideration must be lawful.

Section 10 of the Indian Contract Act, 1872 reads as follows:

All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

Nothing herein contained shall affect any law in force in [India], and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents."

Thus, all agreements are contracts if made for lawful consideration and with lawful object.

Section 23 covers the illegality of both the object of the contract and the consideration for it.

The consideration or object of an agreement is lawful, unless it:

- is forbidden by law; or
- is of such nature that, if permitted, it would defeat the provisions of law; or
- is fraudulent; or
- involves or implies injury to the person or property of another; or
- the court regards it as immoral, or opposed to public policy.

Thus if the object or consideration of any contract falls under any of these circumstances it is not lawful and such contracts are not valid. Section 23 clearly specifies the nature of consideration and objects that are not lawful. The agreement is illegal if the object or consideration of that agreement is unlawful for any of the reasons as mentioned in Section 23.

27. a. In *Mohiri bibi vs. Dharmadhas Ghosh's* case, minor fraudulently represented to a moneylender that he was major and executed a mortgage deed for Rs.10,000 to repay within the stipulated time. After the expiry of said time for repayment of money, moneylender demanded his money from minor and minor pleaded his minority as a defence. The money lender cannot ask for application of Rule of Estoppel, even if the Minor has represented himself as a major in writing, as the Rule of estoppel cannot be enforced against minor

No Estoppel against a Minor

There is no estoppel against a minor. Estoppel is a rule of evidence by which a person is not allowed to go back upon his previous representations. Section 115 of the Indian Evidence Act, 1872 lays down the law of estoppel as "When one person has, by his declaration, act or commission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing." This rule is not applicable to a minor. A minor who has made an agreement by misrepresenting his age may disclose his real age and there is no estoppel against him.

b. **In Competence to Contract**

Section 10 of the Indian Contract Act explains that an agreement becomes a contract if it is made between parties who are competent to contract. Section 11 explains that “Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.” According to the above definition the following three categories are incompetent to contract:

- A person who has not attained the age of majority,
- A person of unsound mind, and
- A person who has been disqualified from contracting by any law to which he is subject.

Minors

Generally, an infant is legally considered to lack the capacity of comprehension regarding the implications of contracts and hence they cannot enter into contracts until they reach the age of majority. They are not bound by agreements unless they are meant for supply of necessities. Every person is a minor who has not completed 18 years of age according to Section 3 of the Indian Majority Act, 1875. The following two situations stand as an exception to the age of majority, where majority is attained at the age of 21 years and not 18 years.

Every minor for whose person or property or both a guardian has been appointed under the Guardians and Wards Act, 1890.

Every minor whose property is under the superintendence of any court of wards before he attains 18 years of age. However the age of majority shall be determined according to the law to which the minor is subject to.

28. a. In the given situation Veerendar, moneylenders advanced Rs.10,000 to Shabana pardanasin lady and an agriculturist and have unduly influenced her to execute a bond for Rs.20, 000 with interest at 8 percent per month. Shabana signed on bond. But this amounts to an agreement entered into under undue influence. This kind of agreement is considered to be void under the Indian Contract Act, 1872.

Undue Influence: It is the use of a relationship of trust and confidence to exploit the other party to derive some contractual advantage. This kind of relationship is also called as a fiduciary relationship. The domination of one person’s will over the other person is quintessential to the element of undue influence.

b. **Free Consent of the Parties**

The parties must have entered into the contract out of their own free will. Consent implies agreeing upon the same thing in the same sense. According to Section 14 of the Act, the consent is said to be free when it is not caused by:

- Coercion, as defined in Section 15, or,
- Undue influence, as defined in Section 16, or,
- Fraud, as defined in Section 17, or,
- Misrepresentation, as defined in Section 18, or,
- Mistake, subject to the provisions of Section 20-22.

Coercion: Coercion (known as Duress under English Law) is to induce a person forcibly to enter into a contract. Coercion must be so extreme that the person is left with no other option but to give his assent against his will. Coercion may be by use of physical force or a threat involving imminent danger to life or health of a person.

Fraud: To constitute fraud there must exist a fact and the fact must be misstated and the materiality of the fact must be proved, and the main factor that determines the essence of fraud is the defendant’s knowledge of the falsity of his or her statement. The intention of the defendant to deceive must also exist. In short, it is a false statement made with an intention to deceive another person.

Misrepresentation: Misrepresentation and fraud are similar except the fact that misrepresentation lacks *scienter* and intention to deceive. Professor G. Fridman states that four conditions must be met before a court will accept that there has been fraudulent misrepresentation:

- That the representations complained of were made by the wrongdoer to the victim (before the contract);
- That these representations were false in fact;
- That the wrongdoer, made them recklessly without knowing whether they were false or true; and
- That the victim was thereby induced to enter into the contract in question (a legal presumption exists in this regard).

Mistake: It takes place when the parties to the contract are ignorant about the existing fact pertaining to the transaction. A mistake may be unilateral or bilateral. Where one party makes mistake to the contract, it is called a unilateral mistake. Similarly, where there is mistake on both sides of the parties there is a bilateral mistake. In *Smith v. Hughes*, there was a contract for supply of oats between the plaintiff and the defendant. The defendant has refused to accept the shipment on the grounds that the contract was for “old oats.” The words old oats were not used at any point of time in the contract. The court held that the contract be performed as it appeared that the words “old oats” were never used at the moment of “meeting of minds.”

The presence of fraud, undue influence etc., in the formation of the contract does not negate the consent. There is consent but it is not freely given. The result of the consent given under fraud, coercion etc. is that the contract becomes voidable at the option of the other party. The party can either reject the contract or accept it. Consent must be voluntary, and if there is any force or deception by either party to obtain agreement of the other party and the contract may be voided by the injured party. If the agreement is induced by bilateral mistake, the agreement is void and not voidable.

29. a. In the given situation A sold his horse to B. A knows that the horse is unsound and when B asked about horse soundness, A remains silent. A did not reveal the truth to B. A's silent amounts affirmation of soundness of horse which is fraud under section 17 of the Indian contract act, 1872. The contract is void due to absence of free consent.

Fraud (Section 17)

Before entering into a contract, the person who makes the offer or his agent may make any representations so as to obtain the acceptance or consent from the other party. In the course of these representations, many of them may be false, which the person making it may or may not be aware. The false representation when made with an intention to deceive the other party is called ‘fraud’.

“A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is cheating intended to get an advantage.” The term fraud includes all intentional or willful misrepresentation of facts, which are material for the formation of a contract. The most important factor involved in the fraud is the intention to mislead the other party.

According to Section 17 of the Indian Contract Act of 1872, ‘fraud’ means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:

- The suggestion, as to a fact, of that which is not true, by one who does not believe it to be true;
- The active concealment of a fact by one having knowledge or belief of the fact;

- A promise made without any intention of performing it;
- Any other act fitted to deceive;
- Any such act or omission as the law specially declares to be fraudulent.

- b. Section 17 of the Act enumerates various acts, which constitute fraud. According to Section 17, the following acts, committed by a party or his agent to deceive the other party amount to fraud:

Where there is false statement of fact: When a person knowingly states a fact, which is actually not true, and which even he does not believe it to be true, it is considered as fraud. This kind of statement must be relating to a matter of fact and not of opinion.

Where a person conceals material fact: If a person intentionally takes steps to conceal a material fact which is very important for the formation of a contract, it amounts to fraud. Moreover, if he knows that disclosure of such concealed facts would be detrimental to his interest, it is an act of fraud.

When a person promises without intention to perform: If a person enters into a contract without having an intention to perform it, it is a fraud. This kind of act implies the intention to deceive the other party.

Another acts to deceive: Any other acts, which are done with an intention to deceive the other party, are defined as fraudulent. In addition to the above, all such acts that are declared as fraudulent by law of the country also come under fraudulent acts.

30. a. In *Hadley vs. Baxendale* case, a broken shaft was given to a carrier to bring it to a repair shop. The carrier was not told that the absence of the shaft would completely stop the work of the owner. The carrier was in breach of contract because the delivery was delayed by several days. Admitting to damages, the defendant nevertheless argued that the damages for loss of profit were too remote.

The court said that damages should be restricted to what “may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both the parties, at the time they made the contract, as the probable result of the breach of it.” Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both the parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily arise from a breach of contract under these special circumstances so known and communicated.”

- b. **Suit for Damages**

Damages are a monetary compensation allowed to the injured party by the court for the loss of injury suffered by him by the breach of a contract. The object of awarding damages for the breach of a contract is to put the injured party in the same position, so far as money can do it, as if he had not been injured i.e., place him in the position in which he would have been had there been performance and not breach. This is called as “*the doctrine of restitution (restitution in integrum)*”. The fundamental basis of awarding damages is compensation for the pecuniary loss, which naturally arises from the breach.

Section 73 of the Contract Act, which deals with the “compensation for loss or damage caused by breach of contract”, is based on the judgment in the above case. The rules as given in Section 73 are as follows:

When a contract has been broken, the injured party is entitled to:

Such damages which naturally arose in the usual course of things from such breach. This relates to ordinary damages arising in the usual course of things;

Such damages which the parties knew, when they made the contract, to be likely to result from the breach. This relates to special damages. But, such compensation is not to be given for any remote or indirect loss or damage sustained by reason of the breach; and such compensation for damages arising from breach of a quasi-contract shall be same as in any other contract.

In estimating the loss of damage arising from a breach of contract, the means, which existed of remedying the inconvenience caused by the non-performance of the contract, must be taken into account. In case a conflict persists between the parties after the breach, the court has to perform the difficult task of measuring the amount of damages. In this task the court takes into account the provisions of law and the circumstances attached to the contract. In order to quantify the loss, the court identifies the nature of loss that has resulted in the breach of contract and based on that factor the loss is quantified.

31. a. In the given problem 'A' handed over sample of his goods to an agent of a courier service and specifically mentioned that the samples must reach Delhi on specific date. Due to the delay by the agent of the courier services, the samples arrived after the exhibition closed. Because of this delay, he could not exhibit his goods in the examination and he had to incur losses. For these losses 'A' can claim for special damages.

Special Damages

Special damage is what arises in the peculiar circumstances of a particular case, quite apart from the usual course of things. While making the contract, one party to the contract may bring to the notice of the other party about the particular type of losses that he would suffer under certain special circumstances. In case the contract is not performed properly and if the other party still proceeds to make the contract, it is construed that the other party has expressly agreed to be responsible for the special losses that may be caused by improper performance of his obligation. Compensation for such special losses is called as "special damages."

In accordance with the provisions of Section 73 of the Act, when a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract the compensation for any loss or damage caused to him thereby or which the parties knew, when they made the contract, to be likely to result from the breach of it. These damages are called as special damages.

- b. Damages can be classified under the following types based on the courts' judgments and the provisions of Section 73 of the Indian Contract Act, 1872 and also depending upon the circumstances of the case.

General or Ordinary damages: The losses that naturally and directly arise out of the breach of the contract in the usual course of the things are called as general damages. They would be the unavoidable and logical consequence of the breach. The damages for such losses are called as general damages or ordinary damages.

Indirect Damages (Loss of Profits): The following illustration shows the nature of the indirect damages:

"A delivers to B, a courier company, a machine to be delivered overnight to A's factory. B does not deliver the machine on time, and A, in consequence, loses a profitable contract with the Government. A is entitled to receive from B, by way of compensation, the average amount of profit which would have been made by the working of the factory during the time that delivery of it was delayed, but not the loss sustained through the loss of the Government contract."

Exemplary or Vindictive Damages: The principle underlying the award of damages is compensation to the aggrieved party. But, law generally would find it difficult to heal the mental pain or suffering or sense of humiliation that may be caused to the aggrieved party by the breach. In two exceptional cases, the courts award damages that can be punitive. i.e., by way of punishment. These are: (1) Breach of promise to marry, (2) Bank dishonouring a customer's cheque, though customer has sufficient funds in his account. Damages awarded in these two exceptional cases are called exemplary damages or vindictive damages.

Breach of Promise to Marry: An agreement to marry a person is like any other contract. If the obligation is broken even before the marriage takes place, it would cause enormous amount of mental agony, emotional hurt and loss of reputation in the society to the aggrieved person. It may be very difficult for the courts to measure exactly such losses in terms of money. Under such circumstances, the courts would award a large amount as damages to the aggrieved party which could cause a certain degree of discomfort to the guilty party.

Unjustified Dishonour of Cheques by Banks: Section 31 of the Negotiable Instruments Act, 1881 stipulates the liability to the drawee of a cheque as, “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 to do so, and, in default of such payment, must compensate the drawer for any loss or damage caused by such default.” If a bank wrongfully dishonours a cheque that is drawn by its customer on his account when there is sufficient money in that account to meet that cheque at the time the cheque is presented for payment, it results in loss of reputation in the business (market) as well as a lot of mental agony to that customer. This loss is very difficult to be measured in terms of money or otherwise. Under such situations, the aggrieved customer shall be allowed punitive damages by the courts.

Nominal Damages: Sometimes the breach of a contract does not cause any loss. If the market is rising, i.e. prices are going up, a breach by the buyer does not entail loss to the seller for the seller can easily sell even for a higher price. Still the breach of a contract being a wrong, the seller can recover damages in a technical sense. The damages awarded in such a case are called nominal damages (for example, one rupee or even one pie).

Liquidated Damages: Usually it is for the court to determine the quantum of damages. It is always contemplated whether the courts would award the same amount towards the damages that the parties themselves have specified in the contract towards the damages for breach of contract. If this is done, the stipulated damages would be known as ‘liquidated damages.’ Liquidated damages are in the nature of ascertained damages.

32. a. In the given problem X engaged Y to write a series of books on Consumer laws. For this work, Y did not receive remuneration from X as X promised Y to pay considerable amount after completion of work. After completion of one book, Y decided not to do the work with X. And Y asked for remuneration for the work he has completed. Y can ask for remuneration for the work done by him. If X fails pay it amounts to breach of contract as he promised to pay and Y can file a suit under the principle of Quantum Meruit.

Quantum Meruit: *Quantum meruit* means, simply, “for what it’s worth.” Quantum meruit also means “as much as he deserves.” Even where there is no contract, *per se*, there may be a cause of action where a person gives value to another under circumstances that would cause the first person (if reasonable) to believe the second person will give fair market value for what he received. *Quantum meruit* offers recovery of “whatever the thing was worth.” It is a beautiful invention of wise judges in the past that recognized that very often there is not a written or even a verbal contract between two persons yet an understanding exists upon the passing of some value, that is monetary in nature, from one to the other. The law recognizes the right of one to recover from the other for sums delivered for which no return value is given. This right gives rise to the cause of action known as ‘*quantum meruit*’.

The term “*quantum meruit*” actually describes the measure of damages for recovery on a contract that is said to be “implied in fact.” The law imputes the existence of a contract based upon the situation where the service rendered by one party must have been understood and intended to pay the compensation for it. Therefore, recovery in *quantum meruit* is said to be based upon the “assent” of the parties and, being contractual in nature, to recover under quantum meruit one must show that the recipient: (1) acquiesced in the provision of services; (2) was aware that the provider expected to be compensated; and (3) was unjustly enriched thereby.

Quantum meruit recovery is appropriate where the parties, by their conduct, have formed a relationship which is contractual in nature, even though an enforceable contract may never have been created. For illustration, where a written agreement between an owner and a contractor is deemed unenforceable as a result of a technical deficiency or because it violates public policy, the contractor may still recover in *quantum meruit*. As a general rule, one should not look to recover in *quantum meruit* unless there have been direct dealings between the parties that create the basis for the contract to be “implied in fact.”

Since specific terms in an implied contract are absent, the law supplies the missing contract price by asking what one would have to pay in the open market for the same work. Thus the measure of damages under *quantum meruit* is defined as “the reasonable value of the labor performed and the market value of the materials furnished” to the project.

b. **Remedies to the breach of contract**

The law has provided certain remedies to the aggrieved party in case of breach of contract by the other parties. The important feature in the event of breach of contract is that each party has a responsibility to mitigate its losses at a minimum possible level.

The following are the remedies provided in the Indian Contract Act, 1872:

- The Indian Contract Act, 1872 specifies the remedies available to the parties for the breach of contract in Sections 73, 74 and 75;
- Section 73 deals with the compensation for loss or damage caused by breach of contract;
- Section 74 deals with the compensation of breach of contract where penalty is stipulated for; and
- Section 75 provides that the Party who is rightfully rescinding the contract is entitled to compensation.
- Section 73 of the Indian Contract Act states that, “When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. Such compensation is not to be given for any remote and indirect loss of damage sustained by reason of the breach.”
- Section 73 of the Act further states that, “when an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.”

“Explanation: In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by non-performance of the contract must be taken into account.”

Remedies: A condition to perform the obligation by the parties is a major term of the contract. When a contract is broken, the injured party has one or more of the following remedies: Suit for Rescission, Suit for injunction, Suit for specific performance, Suit for damages, and Suit for *Quantum Meruit*.

33. a. In the given situation Ananth can file a suit for injunction to restrain Babitha from acting under the banner of C&C Entertainers, as she has already entered into a contract with Ananth to work only with him.

Suit for Injunction

Injunction is the order from a court that prohibits a party to do or refrain from doing a certain act. This is available in contract actions in only limited circumstances. Such an order of injunction from a court that is granted at the instance of the aggrieved party against the person who has breached the contract acts as remedy and makes the guilty party refrain from doing or not doing precisely the act, which is causing the breach of contract.

The guilty party may be committing a violation to certain negative terms of the contract, which ultimately leads to some loss or injury to the aggrieved party. The order of injunction acts as a negative relief to the aggrieved party. The positive relief is in other forms like damages.

- b. In the given situation Ananth can also seek for specific performance of contract between him and Babitha, as Babitha had agreed to work for one year.

Suit for Specific Performance

“Specific performance” means doing exactly what had been intended to be done by the parties in the contract. The specific performance is the remedy granted by the courts to the aggrieved party in equity only in cases where it is absolutely essential to grant it. Specific performance is a rare remedy at law, but sometimes available where the subject of the breached contract is special and irreplaceable. The courts order the guilty party to actually perform his obligation only when monetary compensation (by way of damages) will not be an adequate remedy. Specific remedies direct the party in default to do or to forbear the very thing, which he is bound to do or forbear or make a declaration of rights which the nature of the case may require.

In Indian law, the various modes of specific relief are mentioned in the Specific Relief Act, 1963, which came into force from 1.3.1964. They are:

Restoration of possession: The court orders that the disputed property is be delivered to the rightful claimant.

Specific performance of contracts: The court can order the defendant to perform the very act, which he has contracted to do.

Injunction: An injunction is granted to the plaintiff to prevent the breach of an obligation existing in his favour by a mandatory injunction. The court directs the defendant to do the requisite acts to prevent the breach of his obligation.

Declaratory relief: The court may grant a declaration as to the rights of the parties.

Other forms of specific relief are Rectification of documents, Rescission of contracts and Cancellation of instruments.

34. a. Arjun Company manufactures spare parts of motor vehicles and it has engaged Raman as its distributors to sell its products. The relation established between them is principal and agent. Raman distributors will be called as agent acting on behalf of or representing Arjun Company and Arjun Company will be called as principal.

Contract of agency: Modern business is growing and becoming competitive day by day. To keep pace with this development it is not possible for a businessman to carry on all his business transactions on his own. This impossibility necessitates him to allow another person to work on his behalf. This means he is delegating some of his powers to another person to carry on some of his business transactions on his behalf. Here, the other person is an agent and the person who delegated the powers is the principal. The contract, which binds the principal and agent, is called an agency.

The Indian Contract Act 1872 is the relevant statute, which regulates the contract of agency. The provisions of Sections 183 to Section 238 of the Act regulate the contract of agency.

Section 182 of the Indian Contract Act, 1872 defines Agent and Principal as:

“Agent” means a person employed to do any act for another or to represent another in dealing with the third persons and the “Principal” means a person for whom such act is done or who is so represented.

Mere designation of a person as an ‘Agent’ in an agreement does not by itself make him an agent, and his position depends on the nature of legal relationship.

In a contract of agency, it is the agent who brings about a legal relationship between two persons. It should be noted that an agent is not merely a connecting link between the principal and a third person. The agent is also capable of binding the principal by acts done within the scope of his authority.

An agent does not act on his own behalf but acts on behalf of his principal. He either represents his principal in transactions with third parties or performs an act for the principal. The question as to whether a particular person is an agent can be verified by finding out if his acts bind the principal or not.

b. **Creation of Agency**

Any person who is of the age of majority and is of sound mind may employ an agent. [Section 183]

Between the principal and the third persons, any person may become an agent. But no person who is a minor and of unsound mind can become an agent. [Section 184]

No consideration is necessary to create an agency. [Section 185]

It is not essential that a contract of agency be entered into. It is sufficient if a person acts on behalf of another and is accepted by the latter.

An agency can be created either in writing or orally. An oral appointment is a valid appointment even though the contract of agency by which the agent is authorized has to be in writing.

Express Agreement

An agency may be created either by Express agreement, i.e., an agreement is said to be express when it is given by words spoken or written. (Section 187)

Under normal circumstances, an agency is created by an express agreement, specifying the scope of the authority of agent. The agent may, in such a case, be appointed either by word of mouth or by an agreement in writing. However, in certain cases, e.g. to execute a deed for sale or purchase of land, the agent must be appointed by executing a formal power of attorney on a stamped paper.

Implied agreement

Implied agreement is, by inference from the circumstances of the case and things spoken or written, or the ordinary course of dealing. (Section 187)

Implied agency comes into existence where there is no express agreement appointing a person as agent. It arises from the conduct, situation or relationship of parties. This means the authority to act as an agent may be inferred from the nature of business, the circumstances of the case, the conduct of the principal or the course of dealing between the parties.

Types of implied agency are: agency by estoppel, agency by necessity, agency in emergency, agency by ratification, and agency by operation of law.

35. a. Xavier who resides in Ahmedabad, owns a shop in Hyderabad. He visits his shop occasionally. The shop is managed by Yathinder who orders goods from Zakir in the name of Xavier and pays the amount out of Xavier’s funds with Xavier’s knowledge. This means Yathinder has an implied authority from Xavier to order goods from Zakir in the name of Xavier. As in all the earlier transactions the payment was made through Xavier’s account and this has been followed as a practice, it also comes under the implied authority.

Implied agreement

Implied agreement is, by inference from the circumstances of the case and things spoken or written, or the ordinary course of dealing. (Section 187)

Implied agency comes into existence where there is no express agreement appointing a person as agent. It arises from the conduct, situation or relationship of parties. This means the authority to act as an agent may be inferred from the nature of business, the circumstances of the case, the conduct of the principal or the course of dealing between the parties.

Implied Agency includes the following:

Agency by Estoppel or Holding out: When a person, by his conduct or by statement, leads willfully another person to believe that a certain person is his agent, he is estopped from denying subsequently that such person is not his agent.

Agency by Necessity: Where there is no opportunity of communicating to the concerned parties about any urgency and a person in such a situation acts as the agent for the benefit of the other, agency by necessity is said to have arisen.

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

As per Section 189 of the Indian Contract Act, 1872, an agent has authority, in an emergency; to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence, in his own case, under similar circumstances.

Agency by Ratification: Where acts are done by one person on behalf of another but without his knowledge or authority, he may elect to ratify or to disown such acts. If he ratifies them, the same effects will follow as if they had been performed by his authority. The ratification may be express or implied.

- b. In the given situation Yathinder manages Xavier's shop and orders goods from Zakir and pays from Xavier's fund with Xavier's consent. This means Yathinder acting as agent to Xavier. Therefore the contract of agency applies to their agreement.

Contract of agency: Modern business is growing and becoming competitive day by day. To keep pace with this development it is not possible for a businessman to carry on all his business transactions on his own. This impossibility necessitates him to allow another person to work on his behalf. This means he is delegating some of his powers to another person to carry on some of his business transactions on his behalf. Here, the other person is an agent and the person who delegated the powers is the principal. The contract, which binds the principal and agent, is called an agency.

The Indian Contract Act, 1872 is the relevant statute which regulates the contract of agency. The provisions of Sections 183 to Section 238 of the Act regulate the contract of agency.

Section 182 of the Indian Contract Act, 1872 defines Agent and Principal as:

“Agent” means a person employed to do any act for another or to represent another in dealing with the third persons and the “Principal” means a person for whom such act is done or who is so represented.

Mere designation of a person as an ‘Agent’ in an agreement does not by itself make him an agent, and his position depends on the nature of legal relationship.

In a contract of agency, it is the agent who brings about a legal relationship between two persons. It should be noted that an agent is not merely a connecting link between the principal and a third person. The agent is also capable of binding the principal by acts done within the scope of his authority.

An agent does not act on his own behalf but acts on behalf of his principal. He either represents his principal in transactions with third parties or performs an act for the principal. The question as to whether a particular person is an agent can be verified by finding out if his acts bind the principal or not.

36. a. Aakash owes Rs.1 lakh to Vishnu. Aakash gives authority to Vishnu to sell his land, and to pay himself, out of the proceeds. Aakash cannot revoke this authority, as it the contract entered into is an irrevocable agency created under section 204 of the Indian Contract Act, 1872.

Meaning of Irrevocable Agency

When an agency cannot be put an end to, it is said to be irrevocable agency. An agency is irrevocable where the agent himself has an interest in the property, which forms the subject matter of the agency. Such an agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest.

When agent has incurred a personal liability the agency becomes irrevocable.

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

b. Termination of Agency

According to Section 201, an agency is terminated by:

- by an agreement between the parties, or
- by the principal revoking his authority; or
- by the agent renouncing the business of agency; or
- by the business of agency being completed; or
- by either the principal or the agent dying or becoming of unsound mind; or
- by the principal being adjudicated an insolvent under the provisions of any Act for the time being in force for relief of insolvent debtors.

Thus an agency may be terminated by Agreement, Revocation of authority by the Principal and by operation of Law.

Agreement: The relation of principal and agent like any other agreement may be terminated at any time and at any stage by the mutual agreement between the principal and the agent.

Revocation of authority by the principal: Section 203 provides that a principal may revoke the authority of the agent any time before the authority has been exercised so as to bind the principal. However, where the agent has himself an interest in the property which forms the subject matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest.

Where the authority given to the agent has been partly exercised, it cannot be revoked with regard to acts already done in the agency [Section 204].

Where there is an express or implied contract that the agency should be continued for a fixed period of time, the principal must make compensation to the agent or the agent to the principal, as the case may be, for any previous revocation or renunciation of the agency without sufficient cause [Section 205].

By operation of law: There are certain circumstances where agency is terminated by operation of law such as: On performance of the contract. Where an agent is appointed to perform a specified transaction, his authority comes to an end on the completion of the said transaction; On expiry of time.

When the agent or the principal dies or becomes of unsound mind. The death of the agent terminates his authority.

The death of one of the joint agents will terminate the agency only as far as he is concerned, while it will continue to be valid as regards the other surviving agents in the absence of a contrary intention.

- On the insolvency of the principal.
- On the destruction of the subject matter.

- On the principal becoming an alien enemy.
 - On the dissolution of a company.
 - On termination of sub-agent's authority.
37. a. Babu guarantees Krishna for the payment of five sacks of flour delivered to Chandan and Chandan also paid the same. Afterwards in the next month Krishna delivers four sacks to Chandan, this time Chandan does not pay for these sacks. As the guarantee given by Babu was not intended to be a continuing guarantee, Babu is not liable for the price of four sacks that were delivered in the next transaction.

Types of Guarantees

A guarantee may be specific or continuing.

Specific Guarantee: A specific guarantee covers only one transaction or objective, is limited to a certain sum of money and is limited as to time. Any amount paid towards the advance by the borrower in his debt account with the creditor will go to reduce the guarantor's liability.

Continuing Guarantee: A continuing guarantee is defined in Section 129 of the Indian Contract Act. It covers a series of transactions; subject to the limit as mutually agree upon, irrespective of the payments towards the advance and irrespective of the fluctuations of the balance in the debtor's account between debit and credit. Whether a guarantee is a continuing guarantee or not depends upon the construction of the document. If there are several documents covering a debt and guarantee, all the documents must be read as whole. In case of ambiguity in the contract, the nature of the contract is to be determined basing upon the surrounding circumstances.

In *Nottingham Hide Co. vs. Bottrill* it was held that the following words used in a guarantee made the guarantee a continuing one: "Having every confidence in him, he as but to call on us for a cheque and have it with pleasure for any account he may have with you and when to the contrary we will write to you."

b. **Contract of Guarantee**

Section 126 deals with Contract of Guarantee. As per this Section 'contract of guarantee' is a contract to perform the promise, or discharge the liability of a third person in case of his default. The person who gives the guarantee is called the 'surety', the person in respect of whose default the guarantee is given is called the 'principal debtor', and the person to whom the guarantee is given is called the 'creditor'. A guarantee may be either oral or written.

The purpose of a contract of guarantee is to provide additional security to the creditor in the event of default by the principal debtor. In a contract of guarantee, there are three parties i.e., the creditor, the debtor and the surety. Also, there are three contracts in a contract of guarantee (i.e., between the creditor and the debtor, between the creditor and the surety and between the debtor and the surety).

It should also be noted that a contract of guarantee presupposes the existence of a debt. If there is no existing liability, there cannot be a guarantee. Therefore, if the debt to be guaranteed is already time barred, guarantee given will not be valid and the surety will be discharged from his liability.

38. a. Safin owes certain amount to Robin. Mary promises to Safin to save from the proceedings which Robin may take against Safin in respect of due amount. The contract between Mary and Safin is called contract of indemnity, which is defined under section 124 of the Indian Contract Act, 1872.

According to Section 124 of the Indian Contract Act, 1872 a contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself or by the conduct of any other person, is called a 'contract of indemnity'.

A contract of insurance is an example of a contract of indemnity according to English Law. In consideration of a premium the insurer promises to make good the loss suffered by the assured on account of the destruction by fire of his property insured against fire. The person who promises or makes good the loss is called the indemnifier (promisor) and the person whose loss is to be made good is called the indemnified or indemnity holder (promisee).

However, a contract of life insurance does not come under the category of a contract of indemnity. This is because, in the case of life insurance, the insurer agrees to pay a certain sum of money either on the death of a person or on the expiry of a stipulated period of time. The question of having suffered a loss does not arise. Moreover, as the life of a person cannot be valued, the whole of the sum assured becomes payable and for that reason also it is not a contract of indemnity.

The contract of indemnity in a real sense is a contingent contract. It must have all essentials of a valid contract. It can be expressed or implied. It is relevant to discuss the following cases in this regard.

The definitions given in Section 124 and Section 125 of the Contract Act are not exhaustive of the law of indemnity as it does not include implied promises to indemnify and cases where loss arises from accidents and events not depending on the conduct of the promisor or any other person.

- b. Mary promised Safin to save from the proceedings, which may be taken up by Robin. Safin therefore acts as an indemnity holder who can ask Mary to indemnify when he sued. This right conferred on Safin under section 125 of the Indian Contract Act, 1872.

Rights of Indemnity Holder when Sued

Certain rights have been granted to the indemnity holder under Section 125.

The promisee in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor;

- all damages within the scope of the terms of the indemnity;
- all costs which he may be compelled to pay in any such suit if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the indemnifier authorized him to bring or defend the suit;
- all sums to be paid under the terms of any compromise of any such suit, provided the compromise is not contrary to the orders of the indemnifier, and should be authorized by him.

Though the Indian Contract Act does not grant specific rights to the indemnifier, we can however, as in English Law, draw the rights of the indemnifier to be the same as those of the surety which are detailed in the foregoing paras.

The Indian Contract Act does not specify the time of commencement of the indemnifier's liability. Different courts have been following different rules with regard to this. Some courts contend that the indemnifier's liability will begin only when the indemnity holder actually suffers a loss. On the other hand, some have held that an indemnity holder may compel an indemnifier to fulfill his promise even before actually incurring the loss. Buckley L J in *Richardson, ex parte etc.* has made the following observation: 'Indemnity is not given by repayment after payment. Indemnity requires that the party to be indemnified shall never be called upon to pay'.

39. a. 'A' gives a water heater for repair to an electric appliances shop and says that he will take back the water heater only when it is completely repaired. The electric appliances shopkeeper repairs the water heater and refuses to hand over the water heater until he is paid for the same. This right of shopkeeper is called lien.

Lien

Lien is the right of a person (usually the creditor) to retain the possession of the goods and securities belonging to another person (the debtor) till the amounts due to him from such owner are fully realized. The lien can be defined as “the right to retain the lawful possession of the property of another until the owner fulfills a legal duty to the person holding the property, such as the payment of lawful charges for work done on the property. A mortgage is a common lien.”

A lien has judicially been defined as “a right in one man to retain that which is in his possession belonging to another until certain demands of the person in possession are satisfied.”

The right of exercising Lien may arise in three ways:

- By express contract in between the parties;
- From implied contract in accordance with the general or particular usage of trade;
- By legal relation between the parties.

In order to create a valid lien, the following factors are essential.

- The party who acquired the property should have the absolute title of ownership over that property;
- That the party claiming the lien should have an actual or constructive possession of property or goods with the assent of the party against whom the claim is made;
- The lien should arise upon an agreement, express or implied and not be for a limited or specific purpose inconsistent with the express terms or the clear intent of the contract; e.g., when goods are deposited to be delivered to a third person or to be transported to another place.

In general, the right of the holder of the lien is confined to the mere right of retainer. But when the creditor has made advances on the goods of a factor, he is generally invested with the right to sell. In the absence of express contract a lien does not of itself carry (subject to a few exceptions) a right of sale of goods/property on the part of the lienee (the person who exercises the right). However, when such right of sale is incorporated as a matter of special contract in between the owner and the lienee, the lienee will have to closely observe the contractual rights given to him and should be careful to serve any notices of his intention to sell the goods/property according to the terms of the contract and he should follow the necessary procedures stipulated by the contract meticulously.

- b. There are two kinds of lien – particular lien and general lien.

Particular Lien

A person claims the right to retain property in respect of money or labor expended on such particular property. This right is known as particular lien. In Indian law, particular lien is available to all the classes of people other than those mentioned in Section 171 of the Indian Contract Act.

The creditor with a particular lien can retain the possession of the goods only till the dues from the debtor for a particular debt for which the securities were handed over have been satisfied. He can not retain them for any dues from the debtor on other accounts.

Example: A, the goldsmith is given the gold by B, the owner to convert it in the form of golden ornaments. He can retain the possession of the ornaments only till the service charges for making those ornaments are paid by the owner, but not for any other liability to be discharged by the owner of the golden ornaments.

General Lien

“A general lien is one which the holder thereof is entitled to enforce as a security for the performance of all the obligations, or all of a particular class of obligations, which exist in his favor against the owner of the property.”

A general lien is a lien in respect of all monies owed to the lienee. A particular lien is limited to monies owed to the lienee in respect of the goods over which the lien is sought to be exercised.

Illustration: ‘X’ has borrowed from the bank in the form of two types of loans, one is the agricultural loan for cultivation of crop and the other is a personal loan against the security of his gold ornaments to meet his personal expenditure. The agricultural loan has become due for repayment. If there is no specific agreement in between the bank and the borrower in consistent with the lien, when the personal loans is repaid, the bank can exercise the right of general lien by retaining the possession of golden ornaments after the borrower repays the entire liability in his personal loan till the dues accrued in the agricultural loan are repaid. But, the bank cannot exercise the right of lien when the agricultural loan is not due for repayment at the time when the personal loan is closed.

40. a. Seenu is an office boy in a corporate office. At the time of appointment there was an agreement between them that Seenu can be fired at any time without mentioning any cause. Therefore Seenu can be terminated without showing any cause. This kind of agreement is called, as employment at will, where the employer and the employee agree with each other to terminate the relationship just by giving a notice of fixed period of time.

Employment at Will

The doctrine of “employment at will” gives free hand to both as the employee can quit, or the employer can fire an employee at his will, at any time and for any reason and without any prior notice.

The doctrine of “employment at will” is a “default” rule of contract law, thus it applies whenever the employee and employer have not agreed on something else or an alternative.

- b. Employer-employee relationship has acquired a new meaning and significance with the phenomenal rise of globalization, market economy and free trade. Employers can no longer dictate terms to employees. Employees have become the equal partners and players in the economic sector. In fact, the positive role being played by both the employer and the employee in all sectors of activity – Public and Private, is immensely contributing towards achieving peace, prosperity and happiness of the humankind. Efficient corporate governance is recognized as the key to progress.

The Employer-Employee Relationship

- The employer-employee relationship is primarily determined by the terms of the employment contract, which can be either oral or written.
- The contract should specify a job description, wages, employee rights and duties, and other specific terms and conditions of employment.
- A contract for employment is generally presumed to be “at will” unless otherwise specified.
- An employer or employee can terminate an “at will” employment relationship at any time, and for any reason, unless the law provides a specific exception to this general rule.

Termination

Before the employee is discharged or disciplined, he has to be given an opportunity to explain or have some kind of hearing. Discipline will be “progressive.” For example, there should be a warning (rather than immediate discharge) for the first offense. If the employee is to be laid off, there must be advance notice and severance pay.

An employer would include in an express contract the following conditions:

- An agreement not to compete (non-competition agreement).
- An agreement not to use the employer's trade secrets, customer lists, and so on.
- An agreement to arbitrate disputes rather than taking them to court.

Chapter 3: Non-Corporate Business Entities

41. a. Mr. Kasturilal's entity will be called as a sole proprietorship concern because a sole proprietorship business has a single owner.

Features of Sole Proprietorship

- A sole proprietorship is an unincorporated business owned by one person. It is the most simplest form of business and is very easy to maintain. The business is owned and represented legally by an individual.
- The ownership of the business by a sole person is the distinct feature of the sole proprietorship business. The life of a sole proprietorship is limited to the owner's life span and hence does not enjoy perpetual existence.
- A sole proprietorship need not be registered.
- All the liabilities that arise from a sole proprietorship are the personal liabilities of the owner.
- The sole proprietorship has no existence apart from its owner. If the business owned by a person is carried through a company, it ceases to be a sole proprietorship. Likewise, if the individual shares the ownership of the business even with his/her spouse, it will not be a sole proprietorship.
- The owner of the sole proprietorship is known as the 'sole proprietor'.
- The sole proprietorship business can be carried out in the name of the sole proprietor or under a trade name.
- A sole proprietorship can engage any number of employees or independent contractors for the carrying on of business.
- All the incomes and expenses of the business are included in the sole proprietor's income tax returns.
- Examples of sole proprietorships are part-time businesses, direct sellers, some are not sole proprietorships, Contractors and Consultants.

b. **Merits and limitation of a Sole Proprietorship**

- A sole proprietorship has the advantage of low start-up costs and ease of formation. This is beneficial for persons who do not have enough capital but aim at doing business.
- Better control and effective business administration can be retained.
- Quick decisions can be taken by the sole proprietor.
- The reporting requirements are minimal.
- Filing of tax returns is much easier when compared to that of a corporation. The sole proprietor's individual and business losses or profits are considered the same and have to be included in the tax returns on the basis of self-employed taxes.

Limitations

- Personal liability or unlimited liability of the sole proprietor is the major disadvantage of a sole proprietorship business. All the personal wealth and assets are at stake in the event of failed business.

- Unlike a corporation, a sole proprietorship does not necessitate the maintenance of books of accounts and does not lay the strict standards of financial control. This leads to unwarranted expenses, thus harming the business structure.
 - All the decisions, activities and results rest on the sole proprietor, thus affecting the productivity and creativity of the business.
 - Raising capital for the business is difficult when compared to that for a corporation.
42. a. Yes, the coparceners of the joint family will be liable for the loan taken by Mr. Sohanlal, who is the karta of the Hindu Undivided Family.

Meaning and Features of Hindu Undivided Family

- The joint Hindu family system is a unique feature of the ancient Indian social life.
- The joint family business carried out by the members of a Hindu family, is legally called as the 'Hindu Undivided Family' and is governed by the Hindu law.
- A Hindu Undivided Family consists of people who have lineally descended from a common ancestor, and includes the wives and unmarried daughters.
- A Hindu Undivided Family arises from the status, i.e. the persons acquire by birth an interest in the Joint Family property. It is not a creation of a contract.
- All the members of a Hindu Undivided Family carry on business which is funded out of the joint funds of such members, under the control and supervision of the head of the family.
- It has a separate legal entity and cannot enter into a partnership with other persons, as a partnership is not a legal person, but the karta of a HUF can. However, two kartas of two different Hindu Undivided Families can form a partnership, but the individual members of the two HUFs do not, automatically, become partners.
- The business in HUF is administered by the senior most person of the family, known as the 'karta' or 'Manager'.
- The karta is bestowed with full control over the affairs of the family business and is not questioned on the acts done for the benefit and in the name of the family. He is a deemed caretaker of the firm's assets.
- The male members of the joint family business are called as coparceners and the female members are referred as 'members'. The coparceners are entitled for the partition of HUF property, whereas the members receive only the maintenance from the HUF.
- The family business is considered as a part of ancestral property and is a subject matter of co-parcenary interest.
- Registration is not compulsory for the carrying on of HUF business.
- A coparcener can demand the partition of the joint family business.
- A HUF being a separate legal entity is assessed to tax as a separate person. It is eligible for all the deductions and exemptions, including the benefit of basic limit chargeable to tax and wealth tax available to an individual.
- The income earned on the utilization of the HUF's assets and on the investment of its funds is regarded as the HUF's income which is assessed separately and is taxed. However, the income should have been earned on using the HUF property or funds only.

b. **Difference between a Company and a Hindu Undivided Family Business**

Hindu Undivided Family	Company
A Hindu undivided family business consists of homogenous members since it consists of members of the joint family itself.	A company consists of heterogeneous members.
The Karta (manager) has the sole authority to contract debts for the purpose of the business, other co-parceners cannot do so.	There is no such system in the company.
A person becomes a member of Joint Hindu Family business by virtue of birth.	There is no provision to that effect in the company.
Registration is compulsory for carrying on business even if the number of members exceeds twenty.	Registration of a company is compulsory.

43. a. In the given facts fifteen people in a trade together want to conduct the business. With the help of the following differences they can understand the type of the business entity that they want to establish.

Difference between a Partnership and a Company

Partnership	Company
A partnership firm is not distinct from the several persons who compose it.	A company is a distinct legal person.
In a partnership, the property of the firm is the property of the individuals comprising it.	In a company, the property belongs to the company and not to the individuals comprising it.
Creditors of a partnership firm are creditors of individual partners and a decree against the firm can be executed against the partners jointly and severally.	The creditors of a company can proceed only against the company and not against its members.
Partners are the agents of the firm. A partner can dispose the property and incur liabilities as long as he acts in the course of the firm's business.	Members of a company are not its agents to dispose the properties and incur the liabilities of a company.
A partner cannot contract with his firm.	A member of a company may contact with his firm.
A partner cannot transfer his share and make the transferee a member of the firm without the consent of the other partners.	Transferability of shares is one of the key characteristics of a company.
Restrictions on a partner's authority contained in the partnership contract do not bind outsiders.	Restrictions incorporated in the articles are effective, as the public are bound to augment themselves with them.
A partner's liability is always unlimited.	Shareholder may be limited either by shares or by guarantee.
The death or insolvency of a partner dissolves the firm, unless otherwise provided in the partnership deed.	A company has perpetual succession, i.e., the death or insolvency of a shareholder or all of them does not affect the life of the company.

Partnership	Company
A partnership firm cannot have more than 20 members in any business other than banking and cannot have more than 10 in the case of banking business.	A company may have any number of members except in the case of a private company which cannot have more than fifty members (excluding the past and present employee members). The minimum number of members in a public company must not be less than seven persons and, in a private company, not less than two.
The accounts of a firm are audited at the discretion of the partners.	A company is legally required to have its accounts audited annually by a chartered accountant.
A partnership firm is the result of an agreement and can be dissolved at any time by agreement.	A company, being a creation of law, can only be dissolved as laid down by law.

b. **Legal formalities and Registration of Firms [Sections 58 and 59]**

- The registration of partnership firms is not compulsory and can take place at any time during the continuance of the partnership firm.
- If a partnership firm wants to get registered, the partners are required to fill in a prescribed application form along with the prescribed fees and submit it to the Registrar of Firms.
- Such application must be signed by all the partners or by anyone authorized in this behalf. The particulars to be mentioned in the application are:
 - The name of the firm,
 - The place or principal place of business of the firm,
 - The names of any other places where the firm carries on business,
 - The date when each partner joined the firm,
 - The names in full and the permanent addresses of the partners,
 - The duration of the firm, if any.
- On being satisfied of all the particulars furnished, the Registrar shall record an entry of the statement in a register called the Register of Firms, and shall file the application/statement. The particulars mentioned in the application may be altered by giving a notice to the Registrar of Firms along with the prescribed fees.

44. a. No, X cannot file a civil suit to claim the share of profits by filing a civil suit because the firm was not registered.

Rights of a Partner

- Every partner has a right to take part in the partnership business.
- Every partner is bestowed with the right to be consulted in matters of partnership business and has the freedom to express his views before any decision is taken by the other partners.
- A partner has the right to have access to and inspect and take copy of any books of accounts of the firm. A minor partner may access to and inspect any of the accounts of the firm but not the 'books'.
- In the absence of any agreement to the contrary, the partners are entitled to an equal share in the profits and losses of the firm.
- A partner has the right to be indemnified for the losses incurred by him in the course of business. This right of indemnification extends to acts done in emergency to protect the firm from a probable loss.

- A partner has a right to receive interest on capital, if the same is agreed in the partnership agreement.
- A partner has the authority to do all acts necessary to protect the firm from losses, as would have done by a man of ordinary prudence.
- Every partner has a right not to be expelled unless on the exercise of powers in good faith. [Section 33(1)]
- Every partner has a right to retire from the firm,
 - with the consent of all the other partners, or,
 - in accordance with the terms of the deed, or,
 - by giving notice to all the other partners. [Section 32(1)]
 - In case of a partnership at will, every partner has a right to dissolve the firm by giving a notice to all the other partners specifying his intention to dissolve the firm [Section 43].

b. Effects of Non-Registration [Section 69]

- A partner of an unregistered firm cannot sue the firm or any partner of such firm by way of a civil suit to enforce any right accrued from a contract, i.e. a partnership deed or conferred by the Partnership Act. However, the aggrieved partner can institute criminal proceedings against such firm or any of its partners.
- An unregistered firm cannot sue a third party for any right arising out of a contract. However, a third party/outsider can sue such an unregistered firm for any right acquired therein.
- An unregistered firm or its partners cannot claim a set-off or other proceeding based on a contract. Where an outsider sues the firm to recover a sum of money, the firm cannot claim a set-off, which means the firm cannot ask the outsider who is also to pay some money to the firm to adjust the amount due on him towards the amount which the firm has to pay to the outsider. If an unregistered firm institutes a suit for the reduction of rent against its landlord, such a suit is not maintainable as the suit falls under the disability relating to 'other proceeding' to enforce a right arising from a contract.

Exceptions

There are certain exceptional circumstances wherein the non-registration of a firm does not affect the following rights:

- The right of third parties/outsiders to sue the firm or any partner.
- The right of a firm or partners of a firm having no place of business in India.
- The partners have the option to sue for the criminal proceedings against the other partners of the firm or against the third parties.
- The right of a partner to sue for the dissolution of the firm, or for the accounts of a dissolved firm, or for share of the property of the dissolved firm.
- The powers of an official assignee, Receiver or the Court to realize the property of an insolvent partner of an unregistered firm.

45. a. Yes, X and Y are liable towards Z.

Duties of a Partner

- To conduct the business to the greatest common advantage of all the partners.
- To attend diligently to his duties in the conduct of the business.
- To be just and faithful to each other.

- To render true accounts and full information, relating to and, affecting the firm or any partner of the firm, or his legal representative.
- To indemnify the other partners for the fraud or willful neglect committed by him in the course of business activities.
- Unless there is an agreement to the contrary, a partner shall not ask for any remuneration for the purpose of taking part in the conduct of the business.
- A partner is under an obligation to contribute towards the losses sustained by the firm.
- A partner is prohibited to acquire any secret profits from any transactions of the firm, or from the use of the property of the firm or by using the firm name or any of its business connections, except when there is a contract to the contrary.
- A partner is not supposed to carry on a business which competes to the present business of the firm. This can be done if there is an agreement to the contrary.

b. **Sharing of Profits of Business**

The purpose of a partnership must be to make profit. The profit must be distributed among the partners in the agreed ratio. Every partner is entitled to a share in profits. However, the sharing of losses is not the essential criteria, only some partners may share the loss. As a general rule all partners are entitled for a share in the profits.

The partnership business must be carried on by all or any one of them acting for all. Every partner has a two fold character. He can act as an agent (as he can bind the other partners by his acts) and a principal (by being bound by the acts done by other partners. Thus, the type of relationship among the partners for the purpose of carrying on the business is termed as "mutual agency". Whether a partnership exists between two or more persons can be determined by the test of mutual agency, i.e. whether the business is carried on by all the partners or by any one acting for all.

46. a. Yes, the legal representatives of the deceased partner (Suresh) are entitled to receive a share in the profits of the firm. On ceasing to be a partner, the representatives of the partner are entitled to compensation amounting to his capital contribution and his share in the accumulated profits. However, the Registrar of Companies is to be intimated with a prior notice of 30 days when a person becomes or ceases to be a partner or about any changes in the name and address of the partners.
- b. Yes, the economic interests in the Limited Liability Partnership can be freely transferred his economic interests either in whole or in part to a third person. Such transfer, however, shall neither cause the dissociation of the partner with the Limited Liability Partnership, nor the dissolution, or the winding up of the Limited Liability Partnership. However, such a transferee shall be disabled from participating in the conduct of the Limited Liability Partnership business and from accessing information of the Limited Liability Partnership activities.
47. a. A group of 40 people in Hyderabad wish to register a Cooperative Society for providing housing loans to the needy. Subsequently they succeed in their idea to form a Cooperative Society and register it. The nature of a Cooperative Society formed by these 40 people is a State Co-operative society as the minimum membership of a State Cooperative Society is 10 in case all the applicants are individuals and a minimum of 50 members in case of a Multi-State Cooperative Society.

Cooperative societies are enterprises or business-oriented organizations owned by an association of persons, wherein the members have a common interest to achieve common goals (i.e. access to products or services, sale of their products or services, employment).

According to International Cooperative Alliance (ICA), “a Cooperative is an autonomous association of persons united voluntarily to meet their common, economic, social and cultural/needs and aspirations through a jointly owned and democratically -controlled enterprise.”

A cooperative society is a separate legal entity and enjoys perpetual existence.

The cooperative societies should aim at transparency in the running of the society’s affairs. The object of a cooperative society is both economic and social. For example, social development or local economic development through job creation or the provision of goods and services which are generally unavailable.

The cooperative societies operate democratically which means, one man, one vote, and through two bodies, i.e. the members and the board of directors.

b. **Requirements for forming a Cooperative Society**

- Minimum membership of a State Cooperative Society is 10 in case all the applicants are individuals and a minimum of 50 members in case of a Multi-State Cooperative Society.
- The object of the formation of society must be the promotion of the economic interests of its members.
- The proposed society should be economically sound and is expected to be so in the long run.
- The registration of the proposed society should not cause an impression that it adversely affects the cooperative movement.
- The prospective members should be willing to contribute a minimum amount of the share capital as prescribed by the Registrar of the Cooperative Societies for the particular type of society.

48. a. In the given example, Apex Cooperative Society will have to go for registration of a Multi-state Cooperative Society and has to follow the following procedure.

Registration of a Cooperative Society

A Multi-State Cooperative Society: A multi-state cooperative society has to undergo the following registration procedure:

- (i) The application forms can be obtained from the Office of Registrar of Cooperatives situated nearby.
- (ii) An application in the prescribed form shall be signed,
 - (a) in the case of a multi-state cooperative society of which all the members are individuals, by at least fifty persons from each of the states concerned.
 - (b) in case the members are cooperative societies, by duly authorized representatives on behalf of at least five such societies as are not registered in the same state.
 - (c) in case the members are other multi-state cooperative societies and other cooperative societies, by duly authorized representatives of each of such societies.
 - (d) if the members are cooperative societies or multi-state cooperative societies and individuals, by at least (i) fifty persons, being individuals from each of the two states or more and, (ii) one cooperative society each from two states or more or one multi-state cooperative society.
- (iii) The application shall be accompanied by copies of the proposed bye-laws.
- (iv) The application shall specify the following:
 - name of the proposed multi-state cooperative society,
 - head quarters and address to be registered,

- the area of operation,
- the main objectives of formation,
- a certificate from the bank stating the credit balance of the proposed multi-state cooperative society.

b. **Advantages and Disadvantages of Cooperative Societies**

Advantages

- Social and educational needs are served.
- A cooperative activity can stimulate community development in remote areas.
- It enjoys perpetual existence, i.e. the life of the cooperative society does not end with the death of a shareholder.
- Community needs are met with remarkable efficiency.

Disadvantages

- Members in the cooperative societies investing the larger capital have no advantages over the smaller contributors.
- Due to the democratic, social and educational objectives, business decisions are more likely to be made for reasons other than the return on investment.

49. a. A group of women in Raipur intend to start a Non-Governmental Organization (NGO) to be named as 'Stree' for serving the needs of abandoned children. They want to register their NGO. For this purpose they have to follow the following procedure.

NGO as a Society

An NGO society is formed when people come together for achieving a common purpose which is both legal and useful for others. It generally does not indulge into profit making activities. NGO societies are registered under the Societies Registration Act, 1860.

Registration Formalities

Registration of an NGO society can be done either,

- at the state level (i.e. in the office of the Registrar of Societies), or
- at the district level (in the office of the District Magistrate or the local office of the Registrar of Societies).

The procedure for registration is different for each state. Generally the application for registration should be submitted along with:

- A memorandum of association and rules and regulations/bye-laws,
- Consent letters of all the members of the managing committee,
- Authority letter duly signed by all the members of the managing committee,
- An affidavit sworn by the president or secretary of the society on a non-judicial stamp paper together with a court fee stamp and
- A declaration by the members of the managing committee that the funds of the society will be used only for the purpose of furthering the aims and objects of the society.

All the documents should be submitted in duplicate, together with the required registration fee. The memorandum of association and rules and regulations need not be executed on a stamp paper.

b. **NGO as a Trust**

An NGO trust is a legal entity set up by the people who decide to commit themselves to setting aside some of their income or assets for some charitable cause. Such trusts are independent of any governmental or external control. The only criteria is that they should work for charitable purposes and in accordance with the powers embodied in the Trust Deed.

Registration Formalities

The application for registration should be made to the officer having jurisdiction over the region in which the trust is sought to be registered.

After providing details (in the prescribed form) regarding the name by which the public trust shall be known, names of trustees, mode of succession, etc., the applicant has to affix the required court fee stamp to the form and pay a nominal registration fee, depending on the value of the trust property.

The application form should be signed by the applicant before the regional officer or superintendent of the regional office of the charity commissioner or a notary. The application form should be submitted, together with a copy of the trust deed.

An affidavit and consent letter should also be submitted.

50. a. As Mr. Karodimal is unable to repay his debts and has no assets left with him to repay his creditors Mr. Karodimal will have to file an insolvency petition.

Insolvent Defined

The term 'insolvent' has not been defined by the Acts but refers to a person who cannot or does not pay his debts in full or has committed an 'act of insolvency', and has been adjudged insolvent by an Insolvency Court.

Any person who is competent to enter into a contract can be adjudged an insolvent. A minor, who is not competent to enter into contract, can in no circumstances be adjudged an insolvent, not even for the expenses incurred for the supply of necessaries to him.

A person in order to be adjudged as an insolvent,

- must be competent to enter into a contract,
- must be a 'debtor', and
- must have committed an 'act of insolvency'.

- b. The Consequences of the acts of insolvent Karodimal are:

- The debtor gets protection against legal proceedings initiated by his creditors,
- On the basis of order of adjudication, his properties are assigned to the Court or the Official Assignee or Receiver of the court.
- On being discharged, the debtor is at liberty to start a new life afresh.
- An insolvent is disqualified of his civil rights. The disqualifications suffered as to the extent that he cannot be appointed as a magistrate, or be elected a member of any body, nor can he vote.

- c. **Discharge of Mr. Karodimal as an insolvent** – For his discharge, an insolvent must apply to the court for discharge, at the time after the order of adjudication. Thereon, the court shall fix a date of hearing and serve a notice of the same to all the creditors. After considering the report of the Official Receiver regarding the conduct and affairs of the insolvent and on hearing the creditors, if any, the court may grant, or refuse to grant, or conditionally grant, the discharge of the insolvent.

Where the insolvent fails to apply for his discharge within the specified time (if any), or fails to appear on the date of hearing for discharge, the court may annul the order of adjudication or may make such other order as it may think fit.

An order of discharge releases the insolvent from all debts, except,

- any debt due to the Government,
- any debt incurred by fraud or fraudulent breach of trust,
- any debt in respect of which he has obtained forbearance by any fraud,
- any liability to provide maintenance for his wife or children.

Chapter 4: Law Relating to Corporate Business Entities

51. a. Facts and decision in the case of *Saloman vs. Saloman Co .Ltd*

One of the important features of a company is its separate legal entity once it is incorporated or registered under the Companies Act.

The case of *Salomon vs. Salomon & Co. Ltd.*, is noteworthy in the light of this discussion. Salomon was a prosperous leather merchant who converted his company into a limited company named as Salomon & Co. Ltd. The company so formed consisted of Solomon, his wife and five of his children as members. The company purchased the business of Salomon for £39,000, and the purchase consideration was paid in terms of debentures worth £10,000 conferring a charge over the company's assets, and 20,000 shares of £1 each fully paid-up. The balance was contributed in cash. The company in less than one year ran into difficulties and liquidation proceedings commenced.

It was held by the House of Lords that the business belonged to the company and not to Salomon.

b. The principle of Limited Liability and lifting the corporate veil

The case of *Salomon vs. Salomon & Co Ltd.* also recognized the principle of 'limited liability'. No member can be called upon to pay anything more than the unpaid value of the shares held by him or the amount guaranteed by him.

But, in the case of companies formed with unlimited liability of members, the liability of the members in such cases is not limited only to the extent of the face value of their shares and the premium, if any, unpaid thereon but members will also be required to contribute further to meet the debts of the company in the event of winding-up.

Lifting the Corporate Veil

As it can be seen from the case of *Salomon vs. Salomon & Co Ltd.*, a company is given a distinct legal entity in comparison to the individuals who are managing the affairs of the company. This provides a 'veil' for the persons who run the incorporated company as its 'arms' and 'heads'. The courts generally consider themselves bound by the principle of separate legal entity and adopt a cautious approach while piercing a corporate veil.

However, there have been instances where the courts lift the corporate veil of an incorporated company either to expose the ingenuous persons behind the company or to find out the real purpose of incorporating it. The corporate veil is said to be lifted or pierced when the court ignores the company and concerns itself directly with the members or management.

52. a. Matters to be Stated in the Prospectus

Section 56 of the Act lays down that every prospectus issued by the company shall conform to the requirements of Schedule II of the Companies Act. As per the schedule, Part I shall disclose matters specified therein and Part II shall set out certain reports. Explanatory statement shall be given in Part III.

Solar Pvt. Ltd. has to state the following matters in its prospectus:

- General information
- Capital structure
- Terms of present issue

- Management and Project
- Management perception of risk factors.

No prospectus can be issued unless it is registered with the Registrar.

b. **Civil Liability for Misstatements in Prospectus**

Civil Liability under Section 62 will arise in case of an untrue statement in the prospectus. The following persons will be held liable under Section 62 in case a subscriber has sustained loss because of an untrue statement in the prospectus.

- Every person who is a director of the company at the time of issue of prospectus.
- Every person who has authorized himself to be named and is named in the prospectus as a director, or as one having agreed to become a director, either immediately or after an interval of time.
- Every promoter of the company.
- Every person (including an expert) who has authorized the issue of the prospectus.

The misrepresentation should relate to a material fact. Where it is represented that something will happen or be done in future, this does not amount to a representation of fact. It is only an estimate or a forecast. Hence, there should be a misstatement relating to an existing fact. In *Bentley vs. Black* it was held that a calculation of future profits is not a representation of fact.

Remedies for misstatement in a prospectus against the company: Any person who takes shares from the company relying on a prospectus containing misstatements or omission of material facts may (a) rescind the contract to take the shares (b) claim damages. Rescission of the contract can be resorted to only when an investor subscribes to shares based on a material misrepresentation of fact in the prospectus. The aggrieved investor should also ensure that he rescinds the contract within a reasonable time.

It must be noted that the allottee cannot both retain the shares and get damages from the company. Damages are normally claimed from the directors, promoters and other persons who had authorized the issue of the prospectus personally, or from experts who had signed reports referred to in the prospectus.

53. a. **Reduction of Membership:** Section 45 specifies that “If any time the number of members of a company is reduced, (i) in the case of a public company, below seven, (ii) or in the case of a private company, below two and (iii) the company carries on business for more than six months while the number is so reduced, every person who is a member of the company... and is cognizant of the fact... shall be severally liable for the payment of the whole debts of the company contracted during that period”. In this case, the privilege of limited liability of shareholders is lost and the law pierces the corporate veil making persons behind the company personally liable despite their limited liability. It must be noted that Section 45 provides for a grace period of six months for bringing back the number of members to the required number.

b. **Holding and Subsidiary Companies:** A subsidiary company is considered as a separate legal entity in the eyes of law without any affiliation to the parent company; except under certain circumstances. This viewpoint is reaffirmed by the decision in the case of *Freewheel (India) Ltd vs. Dr. Veda Mitra (1969)*. A company with a 52% stake of the parent company, offered to issue further capital to the existing holder of equity shares. The holding company objected and sought for subsidiary to be restrained from going ahead with the issue, as it would deprive the holding company of its controlling interests and would also result in depreciation in the value of shares. The Court refused to issue the injunction following the principle of corporate veil.

However, a holding company is required to disclose to its members the accounts of its subsidiaries. Sections 212 and 214 provide that every holding company shall attach to its balance sheet, the balance sheet, profit and loss account, director's reports and cash flow statement and auditors report, etc., in respect of each of subsidiary companies.

54. a. In case of *PNB Finance vs. Shital Pd. Jain (1983)*, the person borrowed money from the company and invested it in shares of three different companies in all of which he and his son were the only members. The lending company was permitted to attach the assets of such companies as they were created only to hoodwink the lending company.

Prevention of Fraud or Improper Conduct: Where the machinery of incorporation has been used for some fraudulent purpose like defrauding creditors or defeating or circumventing law, the courts have resorted to piercing the corporate veil and looking into the realities of the situation.

- b. In the case of *Gilford Motor Company vs. Horne (1933)*, Horne had been employed by the company under an agreement that he shall not solicit the customers of the company or compete with it for a certain period of time after leaving its employment. However, Horne started a company that carried on a similar business and solicited the customers of his erstwhile company. It was held that the formation of the company was a mere 'cloak or sham' to enable him to break his agreement with the plaintiff and was restrained from such solicitation.
55. a. Yes. Rotak Ltd Co can convert into a public limited company due to the interest shown by the State Government of Maharashtra.

Features of Public Companies

According to Section 3(1)(iv) of The Companies Act, 1956, 'public company' means a company which

- Is not a private company.
- Has a minimum paid-up capital of five lakh rupees or such higher paid-up capital, as may be prescribed.
- Is a private company which is a subsidiary of a company which is not a private company.

Every public company, existing on the commencement of the Companies (Amendment) Act, 2000, with a paid-up capital of less than five lakh rupees, shall within a period of two years from such commencement, enhance its paid-up capital to five lakh rupees.

However, a company registered under Section 25 of the Companies Act, 1956 before or after the commencement of the Companies (Amendment) Act, 2000 shall not be required to have the minimum paid-up capital as specified above.

- b. **Conversion of a private company into a public company by choice.**

There is always a choice for the company to convert itself into a public company. Conversion of a private limited company into a public limited company by choice will necessarily involve a change in the name of the company. Any change in the name will require the passing of a special resolution as provided by Section 21.

In addition to the passing of a special resolution, the following requirements will have to be fulfilled.

- The company will have to alter its articles so as to delete the provisions of clause (iii) of Subsection (1) of Section 3. On the date of such alteration, the company will cease to be a private company.
- The company shall within thirty days from the passing of the resolution, file a prospectus or a statement in lieu of prospectus with the Registrar.
- If the number of members is less than seven, such number should be raised to at least seven.
- The number of directors should be raised to not less than three in case it is less than three.

56. a. **Incorporation of a company**

For incorporation of a company, the promoters have to *inter alia* decide on the following aspects:

- Type of the company.
- Name of the company.
- Filing of the following documents with the Registrar:
 - Memorandum of Association
 - Articles of Association
 - List of Directors
 - Declaration stating that all requirements of the Companies Act have been complied with
 - Preparation of other documents.
- Payment of the required fees.
- Obtaining the Certificate of Incorporation.
- Obtaining the Certificate of Commencement of Business.

b. **List of Documents required to incorporate a Company**

Following are the list of documents required to incorporate a company:

- (i) Declaration of compliance in Form No.1 by an advocate of the Supreme Court or a High Court, an attorney or a pleader entitled to appear before a High Court or a Secretary or a Chartered Accountant, in whole-time practice in India who is engaged in the formation of a company, or by a person named in the Articles as a director, manager or secretary of the company that all the requirements of the Companies Act, 1956 and the rules thereunder have been complied with in respect of registration and matters precedent and incidental thereto.
- (ii) The stamped and signed copy of the Memorandum and Articles of Association.
- (iii) Notice of the situation of the registered office of the company in Form No.18.
- (iv) Particulars in favor of one of the subscribers to the memorandum of association or any other person authorizing him to file the documents and papers for registration and to make necessary corrections, if any. This should be executed on non-judicial stamp paper of the requisite value.
- (v) Any other agreement, if referred to in the Memorandum and Articles of Association, as in that case, it will form a part of the Memorandum and Articles.
- (vi) Any agreement which the company to be incorporated proposes to enter into with any individual for appointment as its managing or whole-time director or manager.
- (vii) Original true copy of the Registrar of Companies' letter intimating about the availability of name.

57. a. In *Lakshmanaswami Mudliar vs. Life Insurance Corporation of India* case, the payment was held to be *ultra vires*. The court held that the directors could not spend the company's money on any charitable or general object of their choice. They could spend for the promotion of only such charitable objects as would be useful for the attainment of the company's own objects. The company's business having been taken over by Life Insurance Corporation, it had no business left to promote. It can be interpreted that a company's funds cannot be directed to every kind of activity just because such activity has been approved to that effect in the company's memorandum.

Doctrine of *Ultra Vires*

A purported activity beyond the powers of the company will be ineffective even if ratified by all the members. This rule is commonly known as 'doctrine of *ultra vires*'.

The powers exercisable by a company are to be confined to the objects specified in the memorandum. While the objects are to be specified, the powers exercisable in respect of them may be express or implied and need not be specified. However, it is prudent to include the following powers expressly in the objects clause:

- to acquire any business similar to company's own business;
- to enter into agreements with other persons or companies for carrying on business in partnership or for sharing profits, joint venture or other arrangements;
- to take shares in other companies having similar objects;
- to promote other companies and help them financially;
- to use funds for political purpose;
- to give gifts and make donations or contributions for charities not relating to the objects stated in the memorandum.

b. Consequences of *Ultra Vires* Transactions

- Injunction may be obtained by any shareholder to restrain the company from carrying out an *ultra vires* act.
- Directors are personally liable for any diversion of the funds for purposes other than what is specified in the company's memorandum. A shareholder can bring about an action against the directors for restoration of company funds used for *ultra vires* objects. They can also be held personally liable for breach of warranty of authority.
- In case the company's money has been spent *ultra vires* in purchasing some property, the company's right over that property must be held secure as it represents the company's funds. Hence, any property legally and by formal transfer or conveyance transferred to a corporation, is in law, duly vested in such corporation, even though the corporation was not empowered to acquire such property.
- The rule of *ultra vires* was devised for the protection of the company's interest and it is not capable of being used against the company's interest. Therefore, others cannot sue on the ground of *ultra vires* the claim of a company which has matured.

58. a. In the case of *Royal British Bank vs. Turquand* the directors of *Royal British Bank* company borrowed a sum of money from the plaintiff. The company's articles provided that the directors might borrow on bonds from time to time to be authorized by a resolution passed at a general meeting of the company. The directors gave a bond to Turquand without the authority of any such resolution. It was held that Turquand could sue the company on the strength of the bond, as he was entitled to assume that the necessary resolution had been passed.

Doctrine of Indoor Management

This doctrine lays down that the persons dealing with the company having satisfied themselves that the proposed transaction is not in its nature inconsistent with the memorandum and articles, are not bound to inquire into the regularity of the internal proceedings. That is, while the persons contracting with a company are presumed to know the provisions or contents of the memorandum and articles, they are entitled to assume that the provisions have been observed by the officers of the company. An outsider is not bound to see that the company carries out its own internal regulations. This rule has been found to be of less rigor as compared to Doctrine of Constructive Notice.

The Doctrine of Constructive Notice says that every person who contemplates to enter into a contract with a company has the means of ascertaining the propriety of the contract being entered into, as the Memorandum and Articles of Association are public documents.

b. **Exceptions to the Doctrine of Indoor Management**

The following are the exceptions where an outsider cannot claim relief on the grounds of 'indoor management'.

Knowledge of irregularity: If the outsider already had the knowledge of lack of authority of the person on behalf of the company, but still enters into a contract with the same person, he cannot seek protection under this doctrine.

No knowledge of articles: The rule assumes that the outsider has the knowledge of the memorandum and articles as these are public documents which have to be read by persons dealing with the company.

Negligence: The doctrine of indoor management does not encourage negligence. An outsider cannot enter into a contract with an officer of a company who ordinarily is not permitted to enter into a contract on behalf of the company.

Forgery: This is an obvious exception. The directors cannot be held responsible for the signatures they never made nor can the company do anything about it. Consequently, it is not the title of the person that is defective but there is no title at all.

Non-existent authority of the company: If a contract has been entered into by an outsider which is ultra vires to the activities of the company itself, then there is no question of the contract being ultra vires the director.

59. a. In order to make Rahul understand the meaning and nature of shares and its investments, the following provision needs to be explained to him.

Meaning and Nature of Shares: According to Section 2(46) of the Companies Act, a share means share in the share capital of a company, and includes stock except where distinction between stock and shares is expressed or implied. By a 'share' in a company it also means a right to participate in the profits made by a company, while it is a growing, and in the assets of the company when it is wound up.

Section 82 states that the share or other interest of any member in a company shall be movable property, transferable in the manner provided by the articles of the company. A share is not a negotiable instrument. The purchaser of shares cannot be denied registration of the shares purchased by him/her on any ground other than those stated in the articles. Also, a share certificate is not a share in itself – it is only a prima facie evidence of the title of the share.

b. **Types of Shares**

A company may have many different types of shares that come with different conditions and rights.

There are four main types of shares:

- Ordinary shares are standard shares with no special rights or restrictions. They have the potential to give the highest financial gains, but also have the highest risk. Ordinary shareholders are the last to be paid if the company is wound up.
- Preference shares typically carry a right that gives the holder preferential treatment when annual dividends are distributed to shareholders.
- Cumulative preference shares give holders the right that, if a dividend cannot be paid in one year, it will be carried forward to successive years.
- Redeemable shares come with an agreement that the company can buy them back at a future date. A company cannot issue only redeemable shares.

60. a. Participating preference shares are those which and entitle to fixed preferential dividends Jagjit has to be advised in the following ways.

Participating Preference Shares: Participating preference shares are those shares which are entitled to fixed preferential dividend and which carry a right to participate in the surplus profits along with equity shareholders after dividend at a certain rate has been paid to them. In the event of winding up, surplus left after paying back to both the preference and equity shareholders will be distributed to the participating preference shareholders.

- b. **Cumulative and Non-cumulative Shares:** With regard to the payment of dividends, preference shares may be cumulative or non-cumulative.

- A cumulative preference share confers a right on its holder to claim fixed dividend of the past and the current year(s) out of future profits and the dividend is accumulated till the time it is paid.
- Whereas non-cumulative preference share gives right to its holder to a fixed amount or a fixed percentage of dividend out of the profits of each year only and the dividend will not be accumulated.
- Preference shares are cumulative unless expressly stated to be non-cumulative.

- c. **Redeemable and Irredeemable Preference Shares:** Redeemable preference shares are those which are redeemed either at a fixed date or after a certain period of time during the life time of the company. Section 80 lays down the following conditions for the issue of redeemable preference shares.

- The articles must provide for the issue of such shares;
- They may be redeemed only out of profits available for dividend or out of the proceeds of a fresh issue of shares made for the purpose of redemption;
- In case of payment of premium on redemption, the same has to be provided for out of profits or out of company's security premium account, before the shares are redeemed;
- No such shares can be redeemed unless they are paid fully;
- Where the shares are redeemed otherwise than out of the proceeds of the fresh issue, a sum equal to the nominal amount of the shares redeemed shall be transferred out of profits which would otherwise have been available for dividend, to the "Capital Redemption Reserve Account". This fund may also be used to issue fully paid bonus shares;
- No company limited by shares shall, after the commencement of the Companies (Amendment) Act, 1996, issue any preference share which is irredeemable or is redeemable after the expiry of a period of twenty years from the date of its issue.

61. a. **Transmission of Shares**

The transfer of shares to deceased Zaheerudins's son is known as Transmission of shares by operation of law.

Where the right to any shares has passed to a person by operation of law such as the death, insolvency, lunacy of the shareholder or by acquiring shares by purchase in a court sale, a transmission of shares takes place. The process of transmission is not the same as a transfer, and does not require any instrument of transfer to be lodged with the company. Similarly, there is no payment of stamp duty in case of transmission of shares. However, the company may insist upon evidence such as a succession certificate, production of probate or letter of administration.

Where the persons acquire interest in shares by virtue of transmission, they will not be eligible to exercise voting rights or receive dividends in case they do not get the shares registered in their names. However, any calls due on such shares will be enforced against them in their capacity as legal representatives of the deceased shareholder.

Where a company refuses a transmission without sufficient cause, the transmittee of shares will be entitled to the same remedies available to a transferee under Section 111.

b. Transfer of Shares

A transfer of shares will be registered by the company only when a proper instrument of transfer accompanied by the share certificates or the letter of allotment is lodged with the company. The instrument of transfer should be properly stamped. It is not enough if only the transferor executes the transfer deed. In order to pass the title in the shares, it is essential that the deed should be executed by the transferor as well as the transferee.

In case the share certificate or the letter of allotment and the instrument of transfer is lost, a registration of transfer cannot be effected unless a duplicate certificate is obtained from the company.

Subsection 1-A of Section 108 lays down that the instrument of transfer of shares duly signed by or on behalf of the transferor and before any entry is made therein, should first be presented to a person already in government service who will endorse the date on which it is presented. Then the instrument, after it is executed by both the transferor and the transferee should be delivered to the company:

- at any time before the date on which the register of members is closed in case of shares dealt on the stock exchange or within 12 months from the date of presentation to the person in government service for endorsement whichever is later;
- within two months from the date of presentation for endorsement, in any other case.

Where documents have been lodged as per the provisions of Subsection 1-A, it amounts to a good delivery.

A transfer is complete as between the transferor and the transferee when the transfer deed is executed and share certificates are handed over to the transferee. However, as between the company and the transferee it is complete, only when the transfer is registered in the Company's Register. Until the transfer is actually registered in the company's register, the title of the transferee to the shares is incomplete and the legal title vests with the transferor.

Even a legal representative of a deceased member is empowered to transfer the shares of the deceased member provided he follows the procedure for transfer of shares.

- 62.** a. The director of Aditya Pvt. Ltd. will be liable for breach of his fiduciary duties for borrowing money beyond his authority and misusing it without the knowledge of the other directors of the company.

Fiduciary Duties

The first duty or obligation of directors is not to exceed their authority and powers and to act with honesty and in good faith. They should not engage in any activity which is *ultra vires* the company or illegal.

The obligation of Directors is to act honestly and with utmost good faith.

Directors should not use unpublished and confidential information belonging to the company for their own purpose. Any knowledge or information that is generated by the company is its own property and cannot be put to unauthorized use. Any gain by use of such inside information has to be accounted for to the company.

b. Statutory Duties

According to Section 297, a director of a company or his relative, a firm in which the director or his relative is a partner, or any other partner of a firm in which such director is a member or director should not enter into contracts with the company for sale, purchase or supply of any goods, materials or services unless with the consent of the Board of Directors [(Subsection (1))].

Section 297(1) further provides that in case of a company having a paid-up share capital of rupees one crore or more, no such contract shall be entered without the prior approval of the Central Government.

According to Section 299, every director who is interested directly or indirectly in any contract, whether present or future should reveal his interest at a meeting of the Board of Directors.

Disclosure of his interest may be made by giving a general notice to the Board which shall be treated as adequate disclosure of interest in relation to any contract so made.

c. **Directors personal liability for *Ultra Vires* transactions.**

The act on part of the directors *ultra vires* the company may render the directors liable to indemnify the company in respect of any consequent loss or damages sustained. If the directors apply the company's money for purposes which the company cannot sanction, they become personally liable to replace it, however honestly they may have acted.

63. a. In order to call a meeting of its board of directors, Surya Co Ltd has to issue a notice to its directors.

Notice of Meeting

A written notice of the board meeting should be sent to every director for the time being in India and to his usual address in case of every other director. The notice should be issued under the authority of the company.

An officer who fails to give such a notice will be punishable with fine which may extend to rupees one thousand.

Any such failure to give notice will render the proceedings of the meeting invalid.

b. **Resolution**

A motion when passed is called resolution. Motions may relate to closure of discussion or postponement of the discussion.

With respect to general body meetings, there are two kinds of resolutions – ordinary resolutions and special resolutions. As per Section 189 (1), a motion passed by a simple majority of the members voting at a general meeting is said to have been passed by an ordinary resolution. An ordinary resolution is a simple majority resolution which requires that votes cast in favor of the resolution should be more than votes cast against the resolution. In respect of special resolutions, the notice as per the provisions of the Companies Act must have been duly given specifying the intention to propose the resolution as a special resolution.

According to Section 189 (2), a resolution is a special resolution when –

- The intention to propose the resolution as a special resolution has been duly specified in the notice calling the general meeting or other intimation given to the members;
- The notice required under the Act has been duly given of the general meeting; and
- The votes cast in favor of the resolution by members present (in person or in proxy either by poll or by show of hand, as applicable) are not less than three times the number of votes, if any, cast against the resolution. Abstentions, if any, are not to be taken into account.

c. **Quorum**

Quorum is the minimum number of members who must be present at a meeting required by law/rules. The idea is to avoid situations where decisions taken by a minority of people are imposed on the vast majority of members. A minimum of five members should be personally present at the meeting of a public company and a

minimum of two members in case of a private company. The members present as quorum should be the members who are eligible to vote in respect of business on the agenda of the meeting. If the quorum is not present within half an hour from the appointed time, (i) the meeting if called upon the requisition of members shall stand dissolved; (ii) in any other case, the meeting shall be adjourned to the same day in the next week at the same time and place or to such other day, time and place as the board of directors may determine.

64. a. Yes, Amit & Co. can voluntarily wind up the company due to the problem of mismanagement happening in the company for the past one year.

Voluntary Winding Up

Sections 484 to 520 deal with voluntary winding up of a company. A company may be voluntarily wound up either by passing an ordinary resolution or a special resolution.

- A company may pass an ordinary resolution in a general meeting requiring the company to be wound up voluntarily when the period, if any, fixed for the duration of the company by its Articles, has expired, or the event if any, has occurred, on the occurrence of which the articles provide that the company should be dissolved [Section 484(1)(a)].
- Under Section 484(1)(b), the company may also be wound up voluntarily by passing a special resolution. This is when the members want to wind up the company voluntarily, in spite of the company being solvent.

It was held in *British Water Gas Syndicate vs. Noirs Derby Water Gas Co. Limited.*, that even an injunction by the court cannot take away this statutory right of the company.

A voluntary winding up does not mean that the existence of the company comes to an end. The company continues to exist until it is dissolved. The directors will continue to exercise those powers to the extent allowed by the liquidator. Further, a voluntary winding up will neither result in a stay of existing proceedings nor will it prevent the institution of new proceedings.

Notice of the resolution passed by the company should be given by advertisement in the Official Gazette and also in some newspaper circulating in the district where the registered office of the company is situated. This notice should be given within fourteen days of passing the resolution. The company and every officer who commits a default in complying with this requirement will be punishable with fine which may extend to five hundred rupees for every day during which the default continues.

A voluntary winding up will be deemed to have commenced from the date of the passing of the resolution. From the commencement of the voluntary winding up, the company will cease to carry on business except so far as may be required for the beneficial winding up of such business. However, it retains its corporate status and powers until it is dissolved.

- b. **Winding-Up subject to the Supervision of Court (Section 522)**

According to Section 522, at any time after a company has passed a resolution for voluntary winding up, the court may make an order that the voluntary winding up should continue subject to the supervision of the court and with such liberty for creditors, contributories or others to apply to the court and generally on such terms and conditions as the court thinks just.

The winding up will commence from the date of the resolution passed by the company for the said purpose.

Where an order is made for a winding up subject to supervision, the court may, by that or any subsequent order, appoint an additional liquidator or liquidators [Section 524(1)].

The court is empowered to remove any liquidator so appointed or any liquidators continued under the supervision order, and fill any vacancy occasioned by the removal or by death or resignation [Section 524(2)].

A liquidator appointed by the court under Section 524 shall have the same powers, subject to the same obligation, and in all respects stand in the same position, as if he had been duly appointed in accordance with the provisions of this Act with respect to the appointment of liquidators in a voluntary winding up [Section 525].

65. a. Ramesh and Co. moved an application in the court for the transfer of the whole of the business to another company. The Court can allow the application under section 394 of the Companies Act, 1956 and the procedure is called as amalgamation by sale of undertaking.

Amalgamation by Sale of Undertaking

If a petition is made to the court under the scheme that the whole or any part of the undertaking, property or liabilities of any company is to be transferred to another company, the court may make the following provisions for all or any of the following matters as per Section 394:

- the transfer to the transferee company of the whole or any part of the undertaking, property or liabilities of any transferor company;
- the allotment or appropriation by the transferee company of any shares, debentures, policies, or other like interests in that company which, under the compromise or arrangement, are to be allotted or appropriated by that company;
- the continuation by or against the transferee company of any legal proceedings pending by or against the transferor company;
- the dissolution, without winding-up, of any transferor company;
- the provision to be made for any persons who, within such time and in such manner as the court directs, dissent from the compromise or arrangement; and
- such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out.

A copy of the order made under Section 394 is required to be filed with the Registrar for registration within thirty days of the making of the order.

- b. **Amalgamation by Sale of Shares (Section 395)**

This is the most often heard amalgamation or takeover. Shares are sold and registered in the name of the purchasing company or on its behalf. The shareholders who are selling shares receive compensation in the form of cash or shares in the acquiring company.

Section 395 contains provisions for the compulsory acquisition by the transferee company of shares of the dissenting minority. It lays down that:

- Where the transferee company has offered to acquire the shares or any class of shares of the transferor company, the scheme or contract embodying such offer has to be approved by the shareholders concerned within four months. The approval must be given by the holders of not less than 9/10th in value of the shares whose transfer is involved. In computing 9/10th value of shares, the shares already held by the transferee company or its nominee or subsidiary are excluded.
- If the offer is approved, the transferee company may, at any time within two months of the expiry of the said four months, give a notice to the dissenting shareholders that it desires to acquire their shares.

- If the transferee company already holds in the transferor company, shares of the class whose transfer is involved, to a value more than 1/10th of the total value of all shares of that class in that company, then the above provisions will not apply and the transferee company need not acquire the shares of the dissenting members.
- The transferee company will be entitled and bound to acquire such shares on the same terms as that of the approving shareholders or on such other terms as may be agreed or as ordered by the court, on the application of the transferee company or the shareholder.

Where notice has been given by the transferee company to the dissenting shareholders expressing its desire to acquire their shares and the court has not made an order on the application of the dissenting shareholders modifying the scheme of transfer, then the transferee company must send a copy of the notice to the transferor company on the expiry of one month from the date of notice, together with an instrument of transfer executed by the transferee company either by itself or through any of its persons. This time period of one month shall also run in a case where a court reference was made by the dissenting shareholder and the court disposed off the petition only after the notice was given, then from the date the petition was disposed off. The transferee company must also pay or transfer to the transferor company the amount or consideration representing the price of the shares which it is entitled to acquire under the section. Thereupon, the transferor company shall register the transferee company as the holder to those shares and inform the dissenting shareholder of the fact within one month of registration. The transferor company will also deposit the amount so received in a separate bank account to be held in trust for the holders of shares in respect of which such amount has been received.

Chapter 5: Property Law for Business

66. a. No, Mr. Y cannot assign his right to recover the sum from Mr. X. Under the Sale of Goods Act, 1930, as 'actionable claims' and 'Money' are not goods. An actionable claim means a claim to any debt or any beneficial interest in movable property not in possession. It is something, which can only be enforced in an action in a court of law.

The Sale of Goods Act excludes certain movables and includes other under the definition of goods. According to Section 2 (7), 'goods' means *every kind of movable property other than actionable claims and money; and includes stocks 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.*

- b. In case of transfer of property as between seller and buyer the following conditions shall be fulfilled:

- Goods must be ascertained:

Thus, the ascertainment of goods is a condition precedent for transfer of property from the seller to the buyer.

Where the goods sold have been ascertained and where the property in the goods has already passed to the buyer, the fact that the seller mixes those goods with other goods, will not, in any way affect the rights of the buyer.

- Property in the goods passes when intended to pass:

– 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.

– For the purposes of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

However, even when the goods are ascertained it is not necessary that the property in the goods should be transferred. It should be noted that the passing of property does not depend on payment of price or on delivery of the goods or on both, but depends on the intention of the parties to the contract. The word 'intention' means expressed intention.

67. a. No, the sale of the standing timber by the institute does not come within the purview of the Transfer of Property (TP) Act, 1882 as the Act only deals with Immovable property. Standing timber being a movable property comes under the purview of the Sale of Goods Act, 1930.

Though the Transfer of Property Act does not define immovable property but interprets it in the following words: "immovable property does not include standing timber, growing crops or grass". Thus term 'immovable property' includes land, buildings, hereditary allowances, rights to way, light, ferries, fisheries, or any other benefit to arise out of land like rents of land and things attached to the earth or permanently fastened to any thing which is attached to earth, except standing timber, growing crops or grass.

- b. The performance of a contract of sale constitutes three stages:
- Passing of risk;
 - Transfer of possession of the goods; and
 - Transfer of ownership of goods (title) from the seller to the buyer.

The terms 'property' and 'possession' have different meanings. Even though the property in the goods has passed to the buyer, the seller might still have possession of the same. 'Property in the goods' means ownership of the goods while 'possession of the goods' means mere custody or control of the goods. Thus, a servant or an agent entrusted with goods has possession of the same, but not the property in them.

The time when property in the goods passes from the seller to the buyer, is of considerable importance. According to Section 26, unless otherwise agreed, the goods remain at the seller's 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's risk, whether delivery has been made or not except that 'where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault'.

68. a. Mr. Hemanth, the seller has to bear the risk as he still possessed the car and failed to deliver it to Ms. Sahitya though she made full payment. The time when property in the goods passes from the seller to the buyer, is of considerable importance, the same is explained under the Sale of Goods Act, 1930. Thus in the present situation Section 26 of the Sale of Goods Act, 1930 applies which states that unless otherwise agreed, the goods remain at the seller's 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's risk, whether delivery has been made or not except that 'where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party at fault as regards any loss which might not have occurred but for such fault.'

- b. **Buyer's rights:**

- **Buyer's Right of Examining the Goods:** Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

- **Acceptance of Delivery:** The buyer is deemed to have accepted the goods in the following circumstances:
 - When he intimates to the seller that he has accepted them, or
 - When the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or
 - When, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

The act of the purchaser in selling and delivering a part of the goods to sub-purchasers indicates that he has accepted the goods. The fact that this act was done before the expiration of the time of examination of goods or after the expiration of the time of examination of goods will be of no relevance.

Where there has been a defective delivery, and where the person entitled to rescind the contract, accepts the defective performance, such acceptance does not discharge the seller from his liability. The buyer can still claim damages for insufficient performance.

- **Buyer not bound to return rejected goods:** According to Section 43, where goods are sent to the buyer and where it is discovered that the goods do not answer to the description given, the buyer has the right to reject the goods. However, the buyer is not bound to return the goods to the seller. While the goods are in his possession, he occupies the position of a bailee and is required to take care of them. The responsibility of removing the goods from the buyer's possession lies with the seller. Also, while the goods are in the possession of the buyer, all risks attached to such goods will lie with the seller.
- **Re-sale of rejected goods:** The buyer has the right to sell the rejected goods in case the seller does not remove them in spite of a notice of rejection. In such a case, the buyer may sell the goods immediately, while the question as to whether the goods conformed to the contract or not may be decided subsequently. Re-sale of rejected goods may also be resorted to, where the goods are of a perishable nature or are expensive to keep or of fluctuating value.
- **Burden of expense:** Where a buyer incurs expenses as a bailee, he can recover the same from the seller.

69. a. The sale of goods to Dinesh is not a valid one. Dinesh cannot acquire any title to the goods against Teja. Aakash does not have the ownership to the goods as the mode of acquiring the possession of the goods was by false representation, which is unlawful. A person cannot transfer a better title to the goods which he himself doesn't possess. Hence the sale of goods to Dinesh is not a valid transaction and Dinesh cannot acquire a better title to the goods.

The rule for transfer of title is '*nemo dat quod non habet*' (no person can give a better title than he has) are provided. Property is transferred on transfer of title from the seller to the buyer. For the transfer of a defectless title, the seller should have a good title to the goods. Where there is a sale of goods by a person who is not the owner or where a person sells goods without the authority or consent of the true owner, the buyer of such goods does not acquire a good title. In such a case, the title of buyer is no better than that of the seller.

- b. **Exceptions to the maxim '*nemo dat quod non habet*':**

The seller of goods, though not being the owner of the goods, can confer a better title to the buyer:

- Where he sells the goods with the authority and consent of the true owner.
- Where the true owner is prevented by his conduct from denying the seller's authority to sell.

- The buyer of goods from a mercantile agent who has no authority to sell, gets a good title to the goods if –
 - the agent is in possession of the goods or documents of title to the goods with the consent of the owner.
 - the agent sells the goods while acting in the ordinary course of business of a mercantile agent
 - the buyer acts in good faith
 - the buyer has not at the time of sale notice that the agent has no authority to sell.
 - Where there is a sale by one of the joint owners.
 - Where there is a sale by person in possession under a voidable contract.
 - Where there is sale by seller in possession after sale, provided the second purchaser does not have notice of the defective title of the seller.
 - Where there is a sale by buyer in possession after having bought or agreed to buy goods, provided the second purchaser receives the same in good faith and without notice of any lien or other right of the original seller in respect of the goods.
 - Where there is sale by an unpaid seller.
70. a. Yes, Sharath being a mercantile agent of Mr. Sasidhar is authorised to pledge the goods and it is a valid transfer. According to section 178 of the Indian Contract Act, 1872, a mercantile agent when acting on behalf of and with the consent of the owner can pledge the goods, though he is not possessing the title to the goods. This is an exception to the principle of 'nemo dat quod non habet' (no person can give a better title than he has). The other exceptions to the rule include the following:
- A thief or finder of a negotiable instrument endorsed in blank or payable to bearer can give a good title to a person who purchases it for value and without notice of the defect in title.
 - The finder of goods is empowered to sell the goods if the true owner cannot be traced or where the goods are of a perishable nature. He can also sell the goods, where the lawful charges incurred in respect of the goods amount to two thirds of its value and the owner refuses to pay such lawful charges.
- b. They are of four kinds of mercantile agents basing on the nature of work they perform:
- **Factor:** He is a mercantile agent to whom goods are entrusted for sale with wide discretionary powers. He may sell such goods on his own name and may pledge the goods as well on such terms as he thinks fit. Further, he has a general lien on the goods of his principal for the general balance of account between him and the principal.
 - **Commission Agent:** He is the mercantile agent who buys or sells goods for his principal on terms as he thinks fits and receives commission for such work done. It is immaterial whether he possess such goods or not.
 - **Del credere Agent:** The term del credere means 'of entrusting'. Normally the duty of an agent is to enter into an agreement with the third person on behalf of his principal and he is not personally liable for the defaults of third persons towards his principal.
 - **Broker:** He is the mercantile agent who is employed to negotiate and make contracts for the purchase and sale of goods. He has neither control nor possession of goods. He serves as a connecting link and tries to bring out a business contract between the principal and the third party. In case the deal materializes then he receives the commission called brokerage.

- **Auctioneer:** He is an agent entrusted with the possession of goods for sale to the highest bidder in public competition and authorized only to deliver the goods on receipt of the price. Further he has implied authority to sign a contract or memorandum of sale on behalf of the vendor and the purchaser.
71. a. Despite the general rule that a person who does not own cannot confer a better title, Mr. Jitendhar is empowered to sell the goods of Mr. Ravi. As per the terms and conditions of the pledge, Mr. Ravi was supposed to repay the pledge amount within a period of three years, failing which he has to forego the right over the pledged goods. This is an exception to the general principle of '*nemo dat quod non habet*' (no person can give a better title than he has). The other exceptions to the rule are:
- A thief or finder of a negotiable instrument endorsed in blank or payable to bearer can give a good title to a person who purchases it for value and without notice of the defect in title.
 - The finder of goods is empowered to sell the goods if the true owner cannot be traced or where the goods are of a perishable nature. He can also sell the goods, where the lawful charges incurred in respect of the goods amount to two thirds of its value and the owner refuses to pay such lawful charges.

b. **Movable and Immovable Property:**

Movable property is usually referred to as goods. They are transitory in nature and generally liable to be consumed or destroyed in usage and are not the subject of perpetual or uniform enjoyment. Immovable property, on the other hand, is indestructible and is capable of perpetuity or uniform continuity of use or enjoyment. Under the English law the immovable property is termed as Real Property and the movable as Personal Property. The movable property is dealt with by the Sale of Goods Act, whereas the immovable property is dealt with under the Transfer of Property Act.

The term 'goods' means every kind of movable property, but the Sale of Goods Act excludes certain movables and includes others under the definition of goods. According to Section 2 (7) of the Act, 'goods' means *every kind of movable property other than actionable claims and money; and includes stocks 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.*

72. a. As per the Sale of Goods Act, 1930; Abhiram is empowered to sell the goods. In the given illustration, the Abhiram can deal with the goods in the capacity of a 'finder of goods'. A finder of goods is empowered to sell the goods if the true owner cannot be traced or where the goods are of a perishable nature. This is against the general rule of for transfer of title i.e. a person who does not possess the title to the goods cannot transfer a better title. The other exceptions to the rule are:
- The Pawnee of goods is empowered to sell the goods pawned, under certain conditions. (Section 178 of the Indian Contract Act).
 - A thief or finder of a negotiable instrument endorsed in blank or payable to bearer can give a good title to a person who purchases it for value and without notice of the defect in title.

b. **Transfer of Title:**

Property is transferred on transfer of title from the seller to the buyer. For the transfer of a defectless title, the seller should have a good title to the goods. Where there is a sale of goods by a person who is not the owner or where a person sells goods without the authority or consent of the true owner, the buyer of such goods does not acquire a good title. In such a case, the title of buyer is no better than that of the seller.

Sale by Non-owners: However, certain exceptions to the rule '*nemo dat quod non habet*' (no person can give a better title than he has) are provided. The seller of goods, though not being the owner of the goods, can confer a better title to the buyer.

73. a. No, the vendor Rohith is not supposed to withhold the parts of the refrigerator against the repair cost and thereby cannot revive the performed contract. As the contract had already been fully performed and the goods were also given back, the right of lien had come to an end, and hence could not be revived, this is despite of the fact that the cost of repairs had not been fully paid by the vendee i.e. Rajini. Under the Common Law, when the seller agrees to act as an agent of the buyer, he is said to have waived his right of lien. However, if the buyer becomes insolvent, the Common Law provides that the seller need not deliver the goods to the insolvent buyer as the lien is revived. The seller may exercise lien, notwithstanding the fact that he holds custody of the goods as an agent or bailee for the buyer.

This is applicable only when the seller acts as an agent on behalf of the buyer without any change in the possession of the goods. Hence, if the seller delivers the goods to the buyer or his agent in pursuance of the contract of sale and later constitutes himself as an agent of the buyer, he cannot claim a lien on the goods by subsequent possession of the goods.

- b. The unpaid seller of goods who is in possession of them is entitled to retain such possession until payment or tender of the price in the following cases:
- 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.

The seller may exercise his right of lien notwithstanding that he is in possession of the goods as an agent or bailee for the buyer. The seller's lien on the goods is applicable only when the goods are in his possession or in the possession of his agent. Where he loses possession of the goods, his right of lien also ceases. In some cases, the seller will be deemed to be in possession of the goods, even when the buyer is entrusted with some degree of control over the goods, as where the buyer is given the inner key while the seller retains the outer key. An unpaid seller can exercise lien on the goods in his possession, irrespective of the fact that the documents transferring the title to the goods have been parted with.

74. a. The sale in the given illustration is subject to the hypothecation of bank. The borrower is accountable to the bank, with whom the said goods are hypothecated.

b. **Pledge and Hypothecation:**

Pledged goods are stored in the godown under the lock and key of the bank under the bank's supervision. Thus they remain under the physical possession of the bank and no withdrawals or additions of the stock in the godown are permissible without the bank's permission.

Hypothecated goods in case of bank, strictly speaking are not under the lock and key of the bank. They are allowed to be kept at the premises of the borrower without any lock and key of the bank as such but are supposed to be under the constructive possession of the bank by virtue of the deed of hypothecation under which the borrower is obliged to submit regular returns to the bank indicating the increase and decrease of the value of the said goods to enable the bank from time to time to determine the drawing of the borrower in this regard. While pledged goods are in actual possession of the bank, in hypothecation they are in actual possession of the borrower.

75. a. Mr. Motilal cannot take any legal action against Vedanth. He is minor and incompetent to enter into a contract. According to Section 11 of the Indian Contract Act, 1872; the parties must be competent to contract.

b. **Mortgage of Immovable Property:**

The expression 'mortgage' literally means transfer of an interest by pledging (delivering) a property as security against an advance as loan; or an existing or future debt; or for performance of an act or engagement, which gives rise to liability. It is a transfer of limited interest of an immovable property as security against a loan, to another.

Chapter IV containing Sections 58 to 98 (Section 99 repealed) of the Transfer of Property Act, 1882 lays down the provisions relating to Mortgages of Immovable Property.

Section 58 (a) provides for the definition of 'Mortgage'. The associated terms are: 'Mortgagor', 'Mortgagee', 'Mortgage Money', and 'Mortgage Deed'.

"A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability."

The transferor is called a 'mortgagor', the transferee a 'mortgagee'; the principal money and interest of which payment is secured for the time being are called the 'mortgage money' and the instrument (if any) by which the transfer is effected is called a 'mortgage deed.'

The transferor is called a 'mortgagor', the transferee a 'mortgagee'; the principal money and interest of which payment is secured for the time being are called the 'mortgage money' and the instrument (if any) by which the transfer is effected is called a 'mortgage deed.' The following amendments have been made by the Amending Act 20 of 1929:

- i. A proviso has been inserted in Section 58(c);
- ii. Section 58(d) has been made more exhaustive by the inclusion of the case where the mortgagee is entitled to appropriate a portion only of the income of property mortgaged in payment of the mortgage money; and
- iii. Clauses (f) and (g) have been newly inserted. The Act recognized a Mortgage by Deposit of Title Deeds in Section 59 and an Anomalous Mortgage in Section 98.

76. a. No, the mortgage by Mr. Harvansh Kai is not a valid mortgage as Mr. Ahluwalia has failed to pay the consideration in accordance with the mortgage agreement. One of the essential elements i.e. the party has failed to give consideration in the given transaction. Hence, it is an invalid mortgage.

A mortgage like every other contract requires 'consideration' which means something in return. Hence, the purpose referred to in the Section is the consideration for the mortgage. The consideration may be of some advance or an existing or future debt or in performance of an engagement-giving rise to a pecuniary liability. It may take any one or more of the several types mentioned in the definition. On a partial failure of consideration, the effect is given to the extent of the consideration that is valuable.

'Pecuniary liability' means a legal obligation to pay damages. Suppose the parties enter into an engagement to do something and if one of them does not do what he agreed to do, an obligation to pay damages may arise. That is, there may be a pecuniary liability. In a mortgage there could be a transfer of interest to secure the performance of such an obligation, that is, if the engagement was not performed, to secure the discharge of the pecuniary liability that would arise on such non-performance.

The words 'money advanced' means an existing debt and a debt, which has become barred by limitation. It is also to be noted that an existing debt means a debt, which is not so barred. A mortgage may be obtained not only for an existing debt or money advanced, but also as a security against advances to be made in future.

- b. **Essential Elements of Mortgage:**

A mortgage comprises the following elements:

- i. Transfer of Interest;
- ii. Specific Immovable Property;

- iii. Security;
- iv. Consideration or purpose;
- v. Competence of parties; and
- vi. Registration.

Transfer of Interest: In mortgage, only an interest in property is transferred. The term 'transfer of interest' signifies that the interest, which passes to the mortgagee, is not ownership or dominion. The right of mortgagee is only an accessory right, which is intended merely to secure the due payment of a debt. Any right that is transferable without infringing Section 6 can be the subject of a mortgage.

Specific Immovable Property: The subject matter of mortgage must be a specific immovable property. It must be distinctly specified. The property described in the mortgage deed should be properly identified, that is, the property should be described by boundaries, location, area, etc., and identified by the mortgagor. Further the word 'specific' is to be distinguished from the word 'general.' For instance, 'my house and land' are said to be vague and general.

Security: The purpose of mortgaging the property is to provide the security of payment or performance of work or repayment of a debt.

Consideration: A mortgage like every other contract requires 'consideration' which means something in return. Hence, the purpose referred to in the Section is the consideration for the mortgage. The consideration may be of some advance or an existing or future debt or in performance of an engagement-giving rise to a pecuniary liability. It may take any one or more of the several types mentioned in the definition. On a partial failure of consideration, the effect is given to the extent of the consideration that is valuable.

Competence of Parties: The parties namely, mortgagor and mortgagee must be competent to contract, within the meaning of Section 11 of the Indian Contract Act, 1872. Further, the mortgagor must have a title or authority to transfer.

Registration (Section 59): Registration is necessary if the value of the property is Rs.100 and above. It is optional, if the value is below Rs.100. The registered instrument (if any) is to be signed by the transferor and attested by two witnesses.

77. a. The mortgage by Mr. Lallu Ram is valid and enforceable and it requires no registration.

Mortgage by Deposit of Title Deeds or Equitable Mortgage

Section 58(f) of the Transfer of Property Act provides for the Mortgage by Deposit of Title Deeds. It runs as follows:

Where a person –

- i. in any of the following towns, namely, the towns of Calcutta, Madras, Bombay, and in any other town, which the State Government concerned may by Notification in the Official Gazette, specify in this behalf, for example, Ajmeer, Allahabad, Delhi, Jaipur, Mysore etc;
- ii. delivers to a creditor or his agent documents of title to immovable property;
- iii. with intent to create a security thereon –
- iv. such transaction is called a 'Mortgage by Deposit of Title Deeds.'

This is a common type of mortgage in commercial borrowings. In view of the following merits –

- Creation of mortgage is simple and there is no public notice regarding the transaction.
- Transaction requires no registration.
- It has some legal validity as that of other mortgage.

b. Section 58 of the Transfer of Property Act envisages the following six kinds of mortgages:

- **Simple Mortgage [Section 58(b)]:** It is a mortgage wherein the delivery of the possession of the mortgaged property binds the mortgagor personally to pay the mortgage money; and agree that in the event of his failure to pay, the mortgagee shall have right to sell the mortgage property.
- **Mortgage by Conditional Sale [Section 58(c)]:** It is a mortgage where the mortgagor apparently sells the property to the mortgagee subject to certain condition.
- **Usufructuary Mortgage [Section 58(d)]:** It is a kind of mortgage wherein the mortgagor delivers possession, or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee; and thereby authorizes him to retain such possession, receive the rents and profits accruing from the property and appropriate them in lieu of interest or in payment of mortgage money until the repayment of the mortgage money.
- **English Mortgage [Section 58(e)]:** Where the mortgagor binds himself to repay the mortgage money on a certain date; and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that, the mortgagee will retransfer it to the mortgagor upon payment of the mortgage money as agreed.
- **Mortgage by deposit of title deeds [Section 58(f)]:** Where a person in any of the specified towns delivers to a creditor or his agent documents of title to immovable property with an intention to create a security thereon is called a Mortgage by deposit of title deeds.
- **Anomalous Mortgage [Section 58(g)]:** This mortgage is a combination of the different forms of mortgage.

78. a. Mr. Goverdhan can terminate the agreement at any point of time before the property passes on to Giri. As Mr. Giri failed to pay the fifth installment, Mr. Goverdhan opted to terminate the hire-purchase agreement. A hire-purchase transaction can be compared to a cancelable lease contract with a call (purchase) option. In installment sale and conditional sale the buyer is compelled to pay the entire price, but in a hire-purchase agreement it is not essential to pay the entire price. But there should be no default in paying the installments either. Another major difference is that in installment sale, the ownership of the asset is transferred to the buyer once the first installment is paid. However, in a hire-purchase agreement the ownership is transferred to the hirer only when he exercises an option to buy or on payment of the last installment. In the given case, as there is default by Mr. Giri in paying the installments, Mr. Goverdhan can terminate the agreement before the property passes on to Mr. Giri.

b. **Significance of Hire-purchase agreements in India:** In India, the legal nature of the hire-purchase agreement and the lease purchase agreement and their operational procedures are almost the same. There are no separate laws for them. The hire-purchase is a method to sell goods and finance their price. Generally the goods are lent for hire and the price is to be paid in installment. The hirer may purchase the goods only after paying all the installments. Among the alternative asset-based financing plans offered by the finance companies, hire-purchase is one of the most popular plans. In India this method of financing is gaining importance nowadays. A hire-purchase can be defined as a contractual arrangement under which the owner lets his goods on hire to the hirer and offers an option to purchase the goods in accordance with the terms of the contract. A hire-purchase transaction was envisaged by the Hire-Purchase Act, 1972 but the Act was repealed in May, 2005. Hence the hire-purchase contracts are governed by the Indian Contract Act, 1872.

79. a. The transaction by Mr. Amrit Singh, in the given case comes under the purview of sale of moveable property. As the subject matter of the transaction is itself moveable property, it is neither lease nor sale within the meaning of Transfer of property Act, 1882. The facts mentioned in the above case are similar to the case of Dan Singh vs. Janki Saran, wherein the court held that if the transferee is entitled to appropriate the produce or benefit out of the trees during a certain period of time amounts to the lease of an immovable property. If such trees are sold for being cut and has to be removed within a specified time, that amounts to the sale of a movable property but not the lease within the meaning of the TP Act. To constitute a lease, the subject matter should be an immovable property and the same is governed under the provisions of the TP Act. The definition of immovable property as mentioned under the General Clauses Act is used in Section 3 of the TP Act. It is negative and non-exhaustive, as it states that the immovable property does not include standing timber, growing crops and grass. For instance, land, house and buildings, minerals, mines, and benefits arising from the land, right to enter upon the land, lease, right of way, a fishery, etc. are examples of the immovable property.

b. **Demise or Partial Transfer of Immovable Property:**

The term 'demise' is derived from the Latin word '*demitto*' that means a transfer or conveyance and it is also used in the English Law. Such term is not used in the Indian enactment. It is commonly used by conveyancers in India in the context of partial transfer by way of lease. Lease is a partial transfer of property, i.e., right to enjoy the land for a period or in perpetuity for a consideration but not the transfer of ownership. The lease creates a *right in rem* as it is a transfer of an interest in the land and lessee has the possession and peaceful enjoyment of the land for the period of lease. Hence, the transfer of ownership amounts to the sale, whereas the partial transfer is the lease. In *Byramjee Jeejeebhoy (P) Ltd., vs. State of Maharashtra, Shah J*, held that a lease contemplates, 'a demise or a transfer of a right to enjoy land for a term or in perpetuity in consideration of a price paid or promised or services or other things of value to be rendered periodically or on specified occasions to the transferor'.

80. a. The said transaction by Robert with David is termed as 'exchange'. Where the ownership in the property (thing) is transferred in consideration of the transfer of ownership in another thing, as such it is an exchange. Otherwise, it amounts to a sale if one of the things transferred is money. But, if both the things transferred are money, then it is an exchange. Rights arising in sale are different from those in exchange.

Essentials of a valid exchange under the Transfer of Property Act, 1882:

- At least, two parties are required for a transfer of exchange under the Act.
- The parties to the exchange should hold properties in their name exclusively.
- The parties to the exchange should transfer the property mutually. One should exchange the ownership of a property for the ownership of another in the exchange.
- The transfer includes exchange of movable as well as immovable properties. However, intangible properties cannot be exchanged under the Act.
- Any transfer of property for a price amounts to sale under the Act. The exchange of ownership to ownership of another is considered as 'exchange' under the Act.
- The mode of transfer of property by exchange is same as the sale under the Act.

b. **Distinction between Sale and Exchange:**

The concept of exchange is different from those of sale and partition. The sale is always the transfer of ownership for a price, whereas the exchange is the transfer of ownership of one specific property to another specific property in return. The latter

may partly consist of price money. The court in *Commissioner of I-Tax vs. Motor and General Stores (P) Ltd.*, held that 'It is not an exchange if one of the items transferred is money, but is a transaction of sale as the consideration is price'. The instances for exchange are: a house may be exchanged for a piece of land; or a piece of land may be exchanged for some trees. In all the above-mentioned situations where the ownership in the property (thing) is transferred in consideration of the transfer of ownership in another thing, as such it is an exchange. Otherwise, it amounts to a sale if one of the things transferred is money. But, if both the things transferred are money, then it is an exchange. Rights arising in sale are different from those in exchange.

81. a. Yes, Ms Manisha as an unpaid seller can retain the goods and stop the delivery of the goods. Even though the delivery of a bill of lading transfers legal property, it does not affect the seller's right of lien on the goods as long as they are in his/her possession; as observed in the *Imperial Bank vs. London & St Katherine Dock Co.*

The possession contemplated here is lawful possession and where there is unlawful possession of the goods, the seller cannot claim a lien. If as per the terms of the contract, delivery of the goods is to precede payment of price, the seller cannot wrongfully detain the goods. In such an event, the buyer can sue the seller for wrongful retention of the goods.

The seller's lien on the goods is applicable only when the goods are in his possession or in the possession of his agent. Where he loses possession of the goods, his right of lien also ceases. In some cases, the seller will be deemed to be in possession of the goods, even when the buyer is entrusted with some degree of control over the goods, as where the buyer is given the inner key while the seller retains the outer key. An unpaid seller can exercise lien on the goods in his possession, irrespective of the fact that the documents transferring the title to the goods have been parted with.

- b. In *E C Edulji vs. Cafe John Brothers*, a second-hand refrigerator was purchased for Rs.120. Later it was agreed between the vendee and the vendor that the refrigerator should be put in order at a cost of Rs.320. The vendee took delivery of the refrigerator on February 20 and informed the vendor that the refrigerator was in good working condition. Later, he informed the vendor that the refrigerator was not in working order. The vendor took away two parts of the refrigerator for further repairs. As the full cost of the original repairs had not been paid, the vendor claimed a lien on the parts taken. It was held that when the contract was fully performed and when the goods were handed back (although the cost of repairs had not been fully paid) the lien had come to an end, and could not be revived because the buyer asked for further repairs.

Under the Common Law, when the seller agrees to act as an agent of the buyer, he is said to have waived his right of lien. However, if the buyer becomes insolvent, the Common Law provides that the seller need not deliver the goods to the insolvent buyer as the lien is revived. The seller may exercise lien, notwithstanding the fact that he holds custody of the goods as an agent or bailee for the buyer.

This is applicable only when the seller acts as an agent on behalf of the buyer without any change in the possession of the goods. Hence, if the seller delivers the goods to the buyer or his agent in pursuance of the contract of sale and later constitutes himself as an agent of the buyer, he cannot claim a lien on the goods by subsequent possession of the goods.

82. a. The gift of house by Mr. Purandhar Rao to Ms. Saritha is unenforceable before the court of law as it is only given by way of oral statement. An oral gift cannot be enforced before Court of Law. The gift of an immovable property can be made only

through a registered deed, signed by or on behalf of the donor and must be attested by at least two witnesses. The following are the essentials of a valid gift:

- The donee must accept the gift during the lifetime of the donor.
- Any transfer of a movable property by way of gift will be effective either by a registered instrument or by mere delivery of the possession. But, the gift of an immovable property can be done only through a registered deed, signed by or on behalf of the donor and must be attested by at least two witnesses.
- The gift cannot be revoked in general, but in case of fraud, misrepresentation, undue influence or mistake, or by an agreement of revocation by the parties, it can be revoked.

- b. **Gift under Mohammedan Law:** The concept of gift under the TP Act differs from that under the Mohammedan law. The TP Act governs the Hindus, whereas the provisions of Mohammedan law govern the Mohammedan gift and it includes – Hiba and Ariat. Hiba and gift are used synonymously and Hiba does not require registration. ‘Hiba’ is an unconditional transfer of the ownership of property or right without any consideration or with some returns, whereas ‘Ariat’ is only a grant of limited interest in respect of the use of property. The age of majority under the Muslim law is to be determined as per Section 3 of the Indian Majority Act, 1875 and not in accordance with the personal law. In respect of all matters, except those relating to marriage, dower, divorce and adoption, the age of majority is as per the above Majority Act. The required qualifications of the donor to make a gift under the Mohammedan law are that he should have attained the age of majority, which is 18 years and 21 years (in case the guardian is appointed by a Court of law) and should be of sound mind. The gift should not be made under any compulsion, as the property should be transferred voluntarily with free will and gratuitously. The following three essentials are to be fulfilled to gift a property under Mohammedan Law:

- (i) Declaration of the gift by the donor.
- (ii) Acceptance of the gift by the donee or any one on his behalf.
- (iii) Delivery of possession of the gifted property.

If any of the above mentioned conditions are not fulfilled, the gift is invalid and cannot be enforced in any Court of law. The gift under Mohammedan law need not be in writing, irrespective of the moveable or immovable character of a property. But, if the property is gifted by a written deed, the registration of the deed is compulsory. If the subject matter of property being immovable, which is more than the value of Rs.100 and in writing, attracts registration as per Section 17 of the Registration Act, 1908.

83. a. Jahnvi cannot claim back the gift once she has given it to a donee. She can revoke the gift before it was accepted. In the given illustration, Jahnvi cannot revoke the gift as it is accepted by Ms. Swetha. Thus once the donee accepts the gift, it is complete. The donor does not have any right to claim back the property already gifted.

The provisions relating to revocation of a gift is mentioned under Section 126 of Transfer of Property Act, 1882. The gift once made cannot be revoked as it is binding on the parties. Donor cannot take a plea that the property gifted is non-transferable. In *Seetharamaraju vs. Bayanna*, the court held that the donor could not accuse later when the gift is made under undue influence and subsequently he agrees to it. The burden of proof shifts on to the donee, in case of a gift by an old, infirm and weak person. Donee has to prove that the gift is made in the absence of undue influence, and that the donor was fully conscious and aware when executing the gift deed.

The gift can be revoked on the ground of undue influence, when it is made between persons in fiduciary relationships such as solicitor and client, principal and agent, parent and child, spiritual adviser and disciple, etc. The period of limitation for the revocation of a gift is 3 years as per the provisions of the Limitation Act.

- b. The gift can be revoked on the ground of undue influence, when it is made between persons in the fiduciary relationships such as solicitor and client, principal and agent, parent and child, spiritual adviser and disciple, etc. The period of limitation for the revocation of a gift is 3 years as per the provisions of the Limitation Act.

Section 126 of the Transfer of Property Act, 1882 is not at all applicable to Mohammedans. A Mohammedan has the right to revoke a gift even after the delivery of possession except in the following cases:

- When a gift is made by the husband to his wife or vice-versa.
- When the donee is related to the donor within prohibited degrees.
- When the gift is made to charity or for any religious purpose.
- Death of the donee.
- When the gift has been passed out from the donee to others by way of sale, gift, etc.
- When the subject matter of the gift is destroyed or lost.
- When the donor received some other property in exchange of the gift, etc.

84. a. Assignment of the arrears of rent by Archana to Shanthi through Sudha in lieu of the debt is a valid transfer and is covered under the purview of assignment. Assignment is transfer of a claim or right or interest or property (movable or immovable) from one person to another. The Transfer of Property Act, 1882 envisages transfer of movable and immovable property through various modes, such as, sale, mortgage, lease, pledge, bailment, etc., wherein interest and possession the property or ownership in the property are transferred. Sections 130, 131 and 132 of the Transfer of Property Act, 1882 deals with the transfer of actionable claims. The general rules applying to an assignment are:

- It should be in writing, which enables the assignee to sue in his own name.
- It should be addressed to the assignee.
- No particular form of words is necessary so long as the intention is clear

Assignment by way of Security:

- To deal with an actionable claim by way of security amounts to an assignment.
- A future debt may be transferred by way of security.

The mode of assignment prescribed by Section 130 does not apply to negotiable instruments. Section 137 expressly provides in this regard.

- b. Section 3 of the Transfer of Property Act, 1882, defines an “actionable claim” as a claim to any debt, other than a debt secured by mortgage of immovable property, 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, whether such debt or beneficial interest be existent, accruing, conditional or contingent –

- Arrears of rent,
- Amount standing to the credit of the member of a provident fund,
- Interest of the partner in a dissolved partnership,
- Annuities under a deed of wakf,
- Right of a vendor to recover money left with vendee,

- Money due under a life insurance policy,
- Benefit of a contract before breach,
- Amount payable under a decree,
- Fixed deposit in a bank,
- Beneficial interest in movable property not in possession, could be made by way of assignment.

85. a. Yes, Mr. Prasad can revoke the gift made to Mr. Sahil on the ground of undue influence. The transfer of gift made between persons in the fiduciary relationship i.e. solicitor and a client can be revoked. In the given case, Mr. Sahil being a Solicitor exercised undue influence on Mr. Prasad, his client. Though it was against his will, Mr. Prasad, had to accept the proposal of his Solicitor. Mr. Prasad has every right to revoke the gift made to his solicitor on the pretext of undue influence.

Some of the fiduciary relationships are solicitor and client, principal and agent, parent and child, spiritual adviser and disciple, etc. The period of limitation for the revocation of a gift is 3 years as per the provisions of the Limitation Act. In general, a gift is irrevocable. It is a settled principle of law that the gift cannot be revoked when accepted by the donee. Any agreement to the effect that at the will of the donor a gift can be revoked is void as per Section 126 of the Act. But, a gift can be suspended or revoked, if the donor and the donee make an agreement to that effect on the happening of any specified event, which does not depend on the will of the donor, provided the agreement is a valid one.

- b. In *Subramanian vs. Kanni Ammal*, the court held that the following essential conditions are to be fulfilled for the revocation of the gift:

- Donor and donee must agree for the suspension or revocation of the gift on the happening of a specified event.
- Such event should not depend on the will of the donor.
- The condition must be accepted at the time of the gift by the donor and the donee.
- Such condition should neither be illegal nor immoral and should not be repugnant to the estate created under the gift.

The right to revoke the gift being a personal right cannot be transferred, as right to sue, which is not a transferable right under section 6 of the Act. The right to revoke the gift will not be extinguished by mere laches or delay in filing the suit unless it is barred by limitation.

86. a. M/s Swan Laboratories can file a suit against M/s Devi Labs for infringement of their patent right. The person who has been granted the patent right has the right to exclusively use of his invention, and if any other party uses the right without having authority to do so, it amounts to infringement. The unauthorized use, sale or distribution of a patented product or process amounts to infringement. Action for infringement of a patent must be instituted by filing a suit in the Court having jurisdiction. The right to sue for infringement belongs to the patentee.

Remedies: The Indian Patents Act, 1970 has specified remedies for infringement in the form of injunction and at the option of the plaintiff, either damages or an account of profit and infringing goods can be seized, forfeited or destroyed, as the Court deems fit under the circumstances of the case without payment of any compensation. The action against infringement can be brought in a District Court or a High Court having jurisdiction to do so.

- b. **Various Categories of Intellectual Property:**

The expression “intellectual property” covers inventions and industrial designs. To distinguish between the two, inventions are new solutions to technical problems, and industrial designs are aesthetic creations determining the appearance of industrial products.

Patents: A patent is a document, issued, upon application, by a government office, or a regional office acting for several countries, which describes an invention and creates a legal situation in which normally the patented invention can only be exploited.

Copyright: The rights of authors of literary and artistic works (such as books and other writings, musical compositions, paintings, sculpture, computer programs and films) are protected by the copyright.

Trademarks: A trademark is any sign that individualizes the goods of a given enterprise and distinguishes them from the goods of its competitors.' For practical purposes a trademark may be defined simply as, 'A sign which serves to distinguish the goods of one enterprise from those of other enterprises' as defined in the WIPO Model Law for Developing Countries on Marks, Trade Names and Acts of Unfair Competition of 1967.

Geographical Indications: 'Geographical Indications' is a category of IP that has made its foray into the legal realms only recently. The term 'geographical indication' refers to the protection as a category of IP, names and symbols, which indicate a certain geographical origin of a given product.

Industrial Designs: Industrial design refers to the creative activity of achieving a formal or ornamental appearance for mass-produced items that, within the available cost constraints, satisfies both the need for the item to appeal visually to potential consumers, and the need for the item to perform its intended function efficiently.

Lay-out Designs of Integrated Circuits: Lay-out designs or topographies of 'Integrated Circuits' are the subject matter of the Treaty on Intellectual Property in Respect of Integrated Circuits.

Traditional Knowledge: Traditional Knowledge is a category of creations of the human intellect that are on the verge of being admitted into the hallowed realms of IP protection. Traditional knowledge embraces all kinds of scientific, agricultural, technical, architectural, herbal, medicinal and ecological knowledge.

Protection of Plant Varieties: Article 27.3 of the TRIPS agreement provides, 'protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof.' An international *sui generis* system devised for the protection of plant varieties is embodied in the International Convention for the Protection of New Varieties of Plants.

87. a. M/s ABC Lever can file a suit against M/s XYZ for infringement of its trademark and for introducing a deceptive practice. M/s XYZ co. tried to deceive the potential customers of ABC Lever by manufacturing similar product with identical trademark. Hence M/s ABC Lever will definitely succeed in its claim. Trademarks can be protected in the following three ways:

(i) **By Registration:** The best way to protect a trademark is by registration. Infringement of such a registered trademark can be claimed in the Court of law. Registration of the Trademark gives an exclusive right to the use of the trademark in relation to the goods for which it is registered, and obtain relief in respect of infringement of the trademark, as provided by the Act.

(ii) **By action for passing off:** Relief in suits for infringement or for passing off has been specified under Section 135 as follows –

The relief that court grants in a suit for infringement or for passing off is inclusive of injunction and at the option of the plaintiff damages or an account of profits along with or without an order for the delivery up of the infringing labels and marks for the purpose of destruction or erasure. In an action for Passing off, the basic principle is that no one has any right to represent for trade purposes, his goods or business as being the goods or business of somebody else. The object of this law is to protect the goodwill and reputation of a business from encroachment by dishonest competitors.

- (iii) **By Criminal Action against Infringer:** Whether the mark is registered or not, criminal action against the infringer is available, provided the two marks very closely resemble to each other. Though the intention to deceive need not be proved, evidence of such intention will be an important factor in favor of the complainant.
- b. Intellectual property rights are basically private rights. By means of intellectual property rights, law confers an interest that is akin to a monopoly, with the sole purpose of stimulating innovations and creativity. Protection is granted to the rights holders not merely to convey an exclusive title for the creations but also includes the right to reproduce, distribute and gain commercial returns for their creations.

Classification of Intellectual Property Rights:

Intellectual property is traditionally divided into two branches, “Industrial property” and “Copyright.” The Convention Establishing the World Intellectual Property Organization (WIPO) provides under Article 2 (viii) that intellectual property shall include rights relating to:

- Literary, artistic and scientific works,
 - Performances of performing artists, phonograms, and broadcasts,
 - Inventions in all fields of human endeavor,
- Scientific discoveries,
- Industrial designs,
- Trademarks, service marks, and commercial names and designations,
- Protection against unfair competition, and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.

TRIPS Agreement through Section I to Section VII lists out the following categories of intellectual property:

- Copyright and Related Works
 - Rights of artists, painters, musicians, sculptors, photographers and authors for copyright in their works;
 - Rights of computer programs whether in source or object code for a copyright in their programs and compilation of data;
 - Rights of performers, producers of phonograms (sound recordings) and broadcasting organizations for a copyright in their work.
- Rights of traders in their Trademarks.
- Rights of manufacturers and producers for Geographical Indications in relation to such products and produce.
- Rights of designers for their distinctive Industrial Designs.
- Right of inventors to be granted Patents for their inventions.
- Rights of computer technologists for their Layout Designs of Integrated Circuits.
- Rights of businessmen for protection of their Undisclosed Information of Technology and Management i.e., trade secrets/confidential information or simply ‘know-how’.

88. a. No, it is not a valid sale. As per the provisions of the Sale of Goods Act, 1930; the buyer and the seller are vested with certain duties to be fulfilled so as to constitute a valid sale. In the given illustration Mr. Rohit has fulfilled his promise to deliver the Television within the specified period, while Mr. Arshad has failed to pay the consideration for the same. As per Section 4(1) of the Sale of Goods Act, a contract

of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. Such contract of sale may either be absolute or conditional.

b. **Rights of unpaid seller:**

The term 'unpaid seller' is defined by Section 45 of the Sale of Goods Act, 1930. As per this Section, the seller of goods is deemed to be an 'unpaid seller' within the meaning of the Act –

- When the whole of the price has not been paid or tendered.
The payment of price should be absolute and may be made either in cash, or by a transfer of property or by execution of a negotiable instrument. As long as some portion of the price remains unpaid, the seller will be considered as an unpaid seller.
- When a bill of exchange or other negotiable instrument has been received as conditional payment and the condition on which it was received has not been fulfilled by reason of the dishonor of the instrument or otherwise.

The term 'seller' includes any person who is in the position of a seller as, for instance, an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has paid him, or is directly responsible for the price. Where the buyer becomes insolvent before the maturity of the negotiable instrument, he is regarded as not having fulfilled the condition upon which the seller received the instrument. Notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law,

- **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 their possession.
- A right of **re-sale** as limited by this Act.

Where the property in goods has not passed to the buyer the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transit where the property has passed to the buyer. The plaintiff has to prove that:

- He is an unpaid seller;
- The buyer is insolvent;
- The goods were in transit;
- The property in the goods has passed to the buyer.

89. a. Yes, Mr. Raj will succeed if he files a suit against M/s Yash & Co. as the agreement to sell is merely a contract, pure and simple, and creates '*jus in personam*' i.e., gives a right to the buyer against the seller to sue for damages. M/s. Yash & Co. is liable to return the advance amount to Mr. Raj for not performing the agreement. An agreement to sell is an executory contract. In an agreement to sell, transfer of property in the goods is to take place at a future time or subject to certain conditions to be fulfilled. If the buyer, who has paid the price, finds that the seller has become insolvent, he can only claim rateable dividend and not the goods because property has not yet passed to him.

An agreement to sell is mostly in case of future and contingent goods, although in some cases it may refer to unascertained existing goods. In an agreement to sell, if the goods are destroyed, the loss falls on the seller, even though the goods are in the possession of the buyer. In an agreement to sell, if there is a breach of contract by the buyer, the seller can only sue for the damages and not for the price even though the goods are in the possession of the buyer. In an agreement to sell, in case of re-sale, the buyer, who takes the goods for consideration and without notice of the prior agreement, gets a good title. In an agreement to sell, if the buyer becomes insolvent

and has not yet paid the price, the seller is not bound to part with the goods, until he is paid for. In an agreement to sell, if the buyer, who has paid the price, finds that the seller has become insolvent, he can only claim rateable dividend and not the goods because property in them has not yet passed to him. In the given case, though the seller is not insolvent, but the factory has been ceased temporarily, due to which M/s Yash & Co. could not dispose the machinery to Mr. Raj. Hence Mr. Raj can claim damages from M/s Yash & Co to the extent of loss suffered.

- b. **Sale:** As per Section 4 (1) of the Sale of Goods Act, a contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. Such contract of sale may either be absolute or conditional.

Section 4(3) deals with the concept of an agreement to sell and stipulates that where the transfer of property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, such a contract is an agreement to sell.

Sale is an executed contract, wherein the property in the goods passes from the seller to the buyer immediately so that the seller is no more the owner of the goods sold. A sale can only be in case of existing and specific goods. If the goods are destroyed, the loss falls on the buyer even though the goods are in possession of the seller. If the buyer fails to pay the price of the goods or if there is a breach of contract by the buyer, the seller can sue for the price even though the goods are still in possession. The seller cannot re-sell the goods. If he does so the consequent buyer does not acquire title to the goods. A sale is a contract plus conveyance, and creates '*jus in rem*', i.e., gives right to the buyer to enjoy the goods as against the world at large including the seller. If the buyer becomes insolvent before he pays for the goods, the seller, in the absence of a lien over the goods, must return them to the official receiver or assignee. He can only claim a rateable dividend for the price of the goods. In a sale if the seller becomes insolvent, the buyer, being the owner, is entitled to recover the goods from the official receiver, or assignee.

90. a. Yes, Mr. Mohiuddin can sell the goods of Mr. Ajay as he fails to pay the balance amount within the agreed period of time i.e. one month. Despite several reminders and grace period of three months, Mr. Ajay failed to pay the balance amount to Mr. Mohiuddin. However advance amount has to be returned to Mr. Ajay after adjusting the expenses. An unpaid seller, who is in possession of the goods, is entitled to retain such goods until the payment or tender of the price in the following cases:

- 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.

Unpaid Seller: The term 'unpaid seller' is defined under Section 45 of the Sale of Goods Act, 1930. As per this Section, the seller of goods is deemed to be an 'unpaid seller' within the meaning of the Act –

- When the whole of the price has not been paid or tendered.
- The payment of price should be absolute and may be made either in cash, or by a transfer of property or by execution of a negotiable instrument. As long as some portion of the price remains unpaid, the seller will be considered as an unpaid seller.

- b. **Unpaid seller's right to withhold the delivery of goods:** Where the property in goods has not passed to the buyer the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transit where the property has passed to the buyer. The plaintiff has to prove that:

- He is an unpaid seller;
- The buyer is insolvent;
- The goods were in transit;
- The property in the goods has passed to the buyer.

Also, it is essential that the rights of the unpaid seller are consistent with other provisions of the Sale of Goods Act as well as provisions under any other law for the time being in force. The unpaid seller has the right to detain the goods till the price is paid. The lien discussed in this Section is different from the Common Law lien. In a Common Law lien, the person in possession of the goods can only detain the goods, but cannot deal with them. The following two conditions need to be fulfilled for the accrual of the right of stoppage of goods in transit:

- the goods should be in transit, and
- the buyer should have become insolvent.

The fact that the buyer fails to pay debts in the ordinary course of his business or pays debts as they become due, gives the unpaid seller the right of stoppage of goods. However, this right should be exercised with caution. The right of stoppage of transit accrues and continues so long as the goods are in the hands of middlemen (i.e., when they pass out from the custody of the seller until they reach the buyer). When goods are delivered to a carrier or a wharf, the goods are supposed to be in transit until the carrier or the wharf atones for the buyer, or consents to hold the goods on the buyer's behalf.

91. a. Rahul cannot claim the recovery of vehicle from bank as the hypothecation agreement allows the bank to seize the vehicle in case of default of loan. Hypothecation is not a statutory creation but is a product of trade usage. It is a kind of pledge where the pledged goods remain in the possession of the pledger for his use. Hypothecator holds such goods as an agent and not as the owner. The goods are liable to be returned to the hypothecatee under the circumstances stated in the contract of parties. If the hypothecator refuses to return the goods to the hypothecatee, then the hypothecatee has a right to seek court help in recovering them. The decision of the Andhra Pradesh High Court in *Bank of Chittor vs. Narsimhulu* is a landmark case in this regard, wherein the Court held that the sale was subject to the pledge. "There was a constructive delivery or delivery by attornment to the bank.
- b. **Sale by Hypothecatee:** A hypothecatee is not in actual possession of the goods. He grants the right of use to the borrower. He naturally has a right to take possession of the goods if the borrower makes default. He can then sell them in his capacity as a pledgee. Intervention of the court is not necessary. Where, however, the hypothecator is not voluntarily handing over possession, recovery of possession would have to be effected through legal process. Where the goods have been subjected only to charge within the meaning of Section 100 of the Transfer of Property Act, not amounting to pledge, intervention of the court would be necessary to bring about the sale of the property charged. The terms of the agreement would be a guiding factor to find out whether what was created was a pledge or charge.
92. a. The transaction between Aaryan and Chakravarthi in the given illustration is that of a hire-purchase agreement. A major aspect of the hire-purchase agreement is that the hirer acquires the ownership of the goods when the payment is completed and the owner becomes responsible for any faults found in the goods. When statutory regulation of hire-purchase dealings is practiced, snatch-back too is followed. In this practice, the financier seizes the goods from the hirer, if the hirer is at fault irrespective of the worth of the goods.

Nature of hire-purchase agreement:

An agreement that fulfills the following conditions is termed as a hire-purchase agreement:

- The goods are delivered by the owner to a person on a condition that the person receiving such goods should pay the agreed amount in some timely installments.

- The property in such goods is to pass completely to the person who hires the goods on the payment of the last installments only.
- The person has the right to terminate the agreement at any time before the property passes on.

A hire-purchase transaction can be compared to a cancelable lease contract with a call (purchase) option. In installment sale and conditional sale the buyer is compelled to pay the entire price, but in a hire-purchase agreement it is not essential to pay the entire price. But there should be no default in paying the installments either. Another major difference is that in installment sale, the ownership of the asset is transferred to the buyer once the first installment is paid. However, in a hire-purchase agreement the ownership is transferred to the hirer only when he exercises an option to buy or on payment of the last installment. The British concept of hire-purchase has been in existence in India for over 6 decades. The first hire-purchase company is considered to be the Commercial Credit Corporation, which was a descendant of the Auto Supply Company. It was believed to exist in the 1920s and the 1930s. There was tremendous development in the area of hire-purchasing and the development gave rise to two offshoots – consumer durables and automobiles. The consumer durables hire-purchase was encouraged by the dealers in the respective equipment. The number dealers in commercial vehicles and the pure financing companies increased at a fast pace.

- b. The concept of hire-purchase agreement actually developed in the nineteenth century and comprised of an alternative to buy as per the choice of the hirer and the terms and conditions of the agreement. This method of credit was used to finance the trader's acquisition of furniture, sewing machines and musical instruments. In the year 1890, two English cases proved helpful in developing the hire-purchase law in the form of a financial creation. Hire-purchase started progressing in the early decades of this century, but due to the depression in the 1930's, the agreements were slowly misused.

The ownership of the goods when the agreement is complete and the owner becomes responsible for any faults found in the goods. When statutory regulation of hire purchase dealings was practiced, snatch-back too was followed. In this practice, the financier seized the goods from the hirer, if the hirer was at fault irrespective of the worth of the goods. The payments were made by the hirer or any other similar issue. Subsequently, remedial legislation was executed in England and Australia. The Australian legislation had many shortfalls and disparities.

The implementation of hire purchase transactions among states was common. These differences made the Commonwealth and State Ministers to introduce a new method of uniform legislation for the Commonwealth States.

93. a. Yes, the above transaction constitutes a hire-purchase agreement. Under a hire-purchase agreement, the ownership shall pass to the purchaser only on payment of last installment. In the above transaction the only possession is to be transferred after the fifth installment itself. The hire-purchase is a method to sell goods and finance their price. Generally the goods are lent for hire and the price is to be paid in installment. The hirer gets ownership only after paying all the installments. Among the alternative asset-based financing plans offered by the finance companies, hire-purchase is one of the most popular plans. In India this method of financing is gaining importance nowadays. A hire-purchase can be defined as a contractual arrangement under which the owner lets his goods on hire to the hirer and offers an option to purchase the goods in accordance with the terms of the contract.

According to the Hire-Purchase Act, 1972 (since repealed) an agreement that fulfills the following conditions is termed as a Hire-Purchase Agreement:

- The goods are delivered by the owner to a person on a condition that the person receiving such goods should pay the agreed amount in some timely installments.

- The property in such goods is to pass completely to the person who hires the goods on the payment of the last installments only.
- The person has the right to terminate the agreement at any time before the property passes on.

b. Contents of Hire-Purchase Agreement

The following are the contents of Hire-Purchase Agreement:

- The hire-purchase price of the goods.
- The cash price of the goods at which the hirer may buy the goods for cash.
- The date of the commencement of the number of installments by means of which the hire-purchase price is to be paid.
- The amount that is paid in these installments.
- The date when the installment is to be paid should be mentioned and also the mode of calculation of the date.
- The name of the person to whom the payment of the installment is to be made with the place where the payment is to be made.

If there is any agreement between the parties that the mode of payment of a part of hire-purchase price is to be paid in any other form than in cash or by the means of cheque. The hire-purchase agreement must contain a detailed and apt depiction of that part of the hire-purchase price.

Chapter 6: Business and Tax Laws

- 94.** a. With the help of the following explanation Mahesh can understand the applicability of the Income Tax Act, 1961.

The Income Tax Act, 1961 is applicable to all persons of India. According to Section 2(31) of the Income Tax Act, a person means and includes:

- i. an individual;
- ii. a Hindu Undivided Family(HUF);
- iii. a company;
- iv. a firm;
- v. an Association of Persons (AOP) or a body of individuals, whether incorporated or not;
- vi. a local authority; and
- vii. every artificial juridical person, not falling within any of the above clauses.

According to Section 4 of the Income Tax Act, 1961 the gross taxable income of every person during the previous year is the basis of calculation of income tax. The rate of tax depends upon the class of assessee he belongs to. For example, if assessee is an individual his rate of tax ranges between 10% and 30% according to his income that is beyond Rs.100000. If the assessee is a domestic company, then the rate of tax is a flat of 30% on the income.

- b. Section 10 of the Act provides exemption for certain incomes from the calculation of Total Income. That means those incomes need not be considered as taxable income. Some of those incomes are:
- i. Agricultural Income.
 - ii. Receipts by an individual HUF member out of the income of the family.
 - iii. Share of profit of a partner in a firm.
 - iv. Any sum received under a life insurance policy including the sum allocated by way of bonus on such policy.

- v. Income by way of interest, premium on redemption or other payment securities, bonds or certificates etc., notified for this purpose.
- vi. Scholarships granted to meet the cost of education.
- vii. Any long-term capital gain arising out of transfer or a listed security being equity in a listed company.
- viii. Incomes and allowances of MLAs and MPs arisen from such position.
- ix. Incomes of Former Rulers.
- x. Incomes of Local Authorities.
- xi. Incomes of Political Parties.
- xii. Incomes of Trade Unions.
- xiii. Incomes of Charitable and Religious Trusts.
- xiv. Incomes of New Undertakings in FTZ/EPZ/SEZs.
- xv. Incomes of new Undertaking which are 100% Export Oriented Units.

95. a. Suresh can get his assets valued for the calculation of his net wealth of the assessment year 2006 as per section 5 of the Income Tax Act, 1961.

The term “net wealth” means taxable wealth. It represents the excess of assets over debts. Assets include deemed assets but do not include assets exempted under Section 5. The net wealth is calculated on the consideration of certain assets. To arrive the figure of net wealth, the “assets” includes property of every description, movable or immovable, but does not include,

- i. Agricultural land and growing crops, grass or standing trees on such land;
- ii. Any building owned or occupied by a cultivator of, or receiver of rent or revenue out of, agricultural land;
- iii. Animals;
- iv. A right to any annuity in any case where the terms and conditions relating thereto preclude the commutation of any portion thereof into a lump sum grant; and
- v. Any interest in property where the interest is available to an assessee for a period not exceeding six years from the date the interest vests in the assessee.

- b. Central Excise is the duty that is collected on a product, that manufactured or produced in India. It comes under indirect taxes as it is collected from the manufacturers or producers of the goods. It is levied on every product that is manufactured or produced, irrespective of its sale/realization of value. It is governed by the Central Excise Act, 1944.

Kinds of Duties

Basic excise duty is the primary duty levied, on the goods produced/manufactured, by the Excise Department. In addition to this, the other duties that are levied are:

- Special excise duty under the Finance Acts;
- Additional duties of excise in lieu of sales tax under the Additional Duties (Goods of Special Importance) Act, 1957; and
- Additional duties on specified items under other Acts.

96. a. Rasiklal can calculate sales turnover of his business as per the following provisions of the Income Tax Act, 1961.

Calculation of Sales Turnover

Sales Tax is payable on the sales turnover of a period. Rate of Tax is determined as per Section 8, and the turnover is determined as per Section 2(j).

Turnover: The sales turnover (also known as 'taxable turnover') is the aggregate of the sale price received and receivable by the dealer in respect of sales of any goods in the course of inter state trade or commerce made during any prescribed period. It is determined as per the provisions of the Central Sales Tax Act Rules.

Section 8A(1) states that for determining the turnover, deduction of sales tax should be made from the aggregate of sale price.

Prescribed period means the period that stipulated by the local sales tax law, for filing the sales tax returns. It is usually a quarter and in some states it is monthly.

b. **Import and Export – Exemptions**

Import: According to Section 2(23), import with its grammatical variations and cognate expression means bringing into India from a place outside India.

Imported Goods: According to Section 2(25), imported goods means any goods brought into India from a place outside India but does not include goods, which have been cleared for home consumption. They include:

Goods imported by sea, air, land, post, passengers as baggage and ship stores considered to be imported and charged to customs duty.

Export: According to Section 2(18), with its grammatical variations and cognate expressions, export means taking out of India to a place outside India.

Export Goods: According to Section 2(19), export goods means any goods, which are to be taken out of India to a place outside India. They include:

Goods exported by sea, air, land, post, passengers as baggage and stores and fuel supplied to foreign going vessel/aircraft/etc. which are considered to be exports.

Exporter: According to Section 2(20), exporter in relation to any goods at any time between their entry for export and the time when they are exported includes any owner or any person holding himself out to be the exporter.

Goods: According to Section 2(22), goods includes

- vessels, aircrafts and vehicles;
- stores;
- baggage;
- currency and negotiable instruments; and
- any other kind of moveable property.

The liability to pay import duty commences as soon as goods enter the territorial waters of India. It is collected when the goods are unloaded on the land of India, therefore it may be payable at a later date or with reference to the rate of duty applicable at a later date. However, no customs duty is leviable on goods which are in transit in the same ship or if goods are in transit from one ship to another. Once the goods leave the territorial waters of India the liability to pay export duty arises. However, for administrative purposes, it is collected when the goods are on the vehicle for transport out of India.

97. a. No, Sohan is not liable to pay the taxes for the fringe benefits. It is his employer, Nityam Computers who has to pay taxes for the fringe benefits given to Sohan.

Taxable Fringe Benefits

Perquisites are the benefits, both monetary and non-monetary, provided by the employer to his employees in addition to the cash salary or wages. These perquisites are often called as fringe benefits. These benefits are paid to encourage the well performing employees.

The tax on these fringe benefits or perquisites is called Fringe Benefit Tax (FBT). Usually, these perquisites are taxed in the hands of employees, but this tax is collected from the hands of employer. It means the employer has to bear the tax on payment of fringe benefits.

Fringe benefits mean any privilege, service, facility or amenity directly or indirectly provided by an employer to his employees (including former employees) by reason of their employment.

An employer is required to furnish a return of fringe benefits before the due date as given in section 115WD for paying the fringe benefit tax.

The procedure for the assessment of the return of fringe benefits filed by the employer and the determination of tax or interest payable or refund due and in either case the issue of intimation to that effect is provided in Section 115WE.

b. The following are the various purposes of payment of fringe benefits that are taxable in the hands of employer if he claims the expenses of:

- Entertainment;
- Festival celebrations;
- Gifts;
- Use of club facilities;
- Provision of hospitality of every kind to any person whether by way of food and beverage or in any other manner, excluding food or beverages provided to the employees in the office or factory;
- Maintenance of guest house;
- Conference;
- Employee welfare;
- Use of health club, sports and similar facilities;
- Sales promotion, including publicity;
- Conveyance, tour and travel, including foreign travel expenses;
- Hotel boarding and lodging;
- Repair, running and maintenance of motor cars;
- Repair, running and maintenance of aircraft;
- Consumption of fuel other than industrial fuel;
- Use of telephone; and
- Scholarship to the children of the employees.

98. a. ABC Corporation which is an advertising agency in Hyderabad will come under the purview of the Central Sales Tax Act, 1956.

Applicability of Central Sales Tax: Basically the applicability of Central Sales Tax (CST) is as follows:

- Tax is levied on interstate sales.
- Sales tax thus collected is retained by the collecting state.
- Sales tax under this scheme is payable in the state from where movement of goods begin.

The CST Act, formulates principles for determining whether a sale or purchase of goods has taken place:

- In the course of interstate trade or commerce; or
- Outside a state; or
- In the course of import into or export from India.

It provides for collection, levy, distribution of tax on sale of goods in the course of interstate trade or commerce. It may declare specific goods to be of special importance in interstate trade or commerce and stipulate the restrictions and conditions in respect of the state laws which seek to impose tax on the sale or purchase of goods which have been declared to be of special importance.

b. Meaning of CENVAT

The term 'CENVAT' stands for Central Value Added Tax. Till March 2000, MODVAT was in practice, and that was modified into CENVAT. These are the provisions used in Central Excise to implement the concept of VAT at the manufacturing stage by giving the credit of duty paid on inputs.

The CENVAT scheme is principally based on the system of granting credit of duty paid on inputs. Under CENVAT, a manufacturer has to pay duty as per normal procedure on the basis of 'Assessable Value' (which is mainly based on selling price). However, he gets credit of duty paid on inputs.

Credit will be available for duty paid on:

- Raw materials (not all),
- Material used in relation to manufacture,
- Packaging material, and
- Paints.

Chapter 7: Financial Services – Legal and Regulatory Environment

Banking Law and Regulation

99. a. Yes, Sneha Urban Cooperative Bank is eligible to get license. The RBI shall having regard to the banking facilities available in the proposed principal area of operations of the company, the potential scope for expansion of banks already in existence in the area and other relevant factors the grant of the license would not be prejudicial to the operation and consolidation of the banking system consistent with monetary stability and economic growth.

Licensing of Banking Companies

Section 22 of the Banking Regulation Act, 1949 specified that the RBI will issue license to a banking company after inspecting the books of the banking company and after satisfaction of the following conditions –

- that the company is or will be in a position to pay its present or future depositors in full as their claims accrue;
- that the affairs of the company are not being, or are not likely to be, conducted in a manner detrimental to the interests of its present or future depositors;
- that the general character of the proposed management of the company will not be prejudicial to the public interest or the interest of its depositors;
- that the company has adequate capital structure and earning prospects;
- that the public interest will be served by the grant of a license to the company to carry on banking business in India;
- any other condition, the fulfillment of which would, in the opinion of the Reserve Bank, be necessary to ensure that the carrying on of banking business in India by the company will not be prejudicial to the public interest or the interests of the depositors.

b. **Cancellation of License of a Banking Company**

The RBI can cancel the license of a bank if it finds the following-

- if the company ceases to carry on banking business in India; or
- if the company at any time fails to comply with any of the conditions imposed upon it under Subsection (1);
- if at any time, any of the conditions referred to in Subsection (3) 2 [and Subsection (3A)] is not fulfilled.

Section 23 of the Banking Regulation Act, 1949 deals with opening of branches.

100. a. Yes, the note given by Mr. Rakesh is a promissory note because it is an undertaking promise to pay Rahim or order the sum of rupees Twenty Five Thousands only on demand.

Promissory Notes

Section 4 defines a promissory note as 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 instrument”. However, Section (1)(4)(a) of the Information Technology Act provides that the Act will not apply to promissory notes. Thus, a promissory note cannot be made by electronic means.

A promissory note normally states:

“I promise to pay ‘S’ on order Rs.1,000”.

“I acknowledge myself to be indebted to ‘S’ for Rs.2,000 to be paid on demand, for value received”.

- b. **Essentials of a Promissory Note:** A promissory note should conform to certain requirements as:

- It must be in writing: The basic objective is to exclude an oral agreement from the purview of the Act. The writing on the promissory note may be either in pencil or in ink and also includes printing, lithography or any other form of depicting the words in a viewable form.
- It must contain an express promise to pay: An implied promise is not enough to constitute a promissory note.
- The promise or undertaking to pay must be definite and unconditional.
- The maker must sign the negotiable instrument without which it is taken as incomplete and ineffective. The signature signifies that the person is personally authenticating and giving effect to the contract contained in the instrument.
- The negotiable instrument must clearly point out the maker.
- A promissory note may be made either jointly or jointly and severally. The sum payable must be certain without any scope of contingent additions or subtractions.
- The payment must be in money and not in kind. If the instrument contains an agreement to pay in kind then it cannot be considered as a promissory note.
- The promissory note must be properly stamped in accordance with the provisions of the Indian Stamp Act. Each stamp must be duly cancelled by the maker’s signature.
- It may be payable on demand or after a specified period.
- It cannot be made payable to bearer on demand.

101. a. The instrument in the above mentioned illustration is a Bill of Exchange under the Negotiable Instrument Act, 1881 because it is a unconditional order to pay Rs.60,000.

Bill of Exchange: This form of negotiable instrument has been in usage for a very long time. It was initially used for payment of debts by traders residing in one country to another country with a view to avoiding transmission of coins. These days, it is used as a trade bill both for domestic as well as foreign trade, known as inland bill and foreign bill respectively.

According to Section 5, “A bill of exchange is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument”. Section (1)(4)(a) of the Information Technology Act provides that the Act will not apply to a bill of exchange. Thus, a bill of exchange cannot be made by electronic means.

- b. **Parties to a Bill of Exchange:** There are basically three parties to a bill of exchange. They assume different roles, as explained below:

- The person who draws the bill is called the *Drawer*.
- The person on whom the bill is drawn is called the *Drawee*.
- The person who accepts the bill (he may be the drawee or a stranger on behalf of drawee) is called the *Acceptor*.
- The person to whom the sum stated in the bill is payable (either the drawee or any other person) is the *Payee*.
- The person who is in the lawful possession of the bill is called the *Holder*.
- The person who indorses the bill in favor of another person is called *Indorser*.
- The person in whose favor the bill is indorsed is called the *Indorsee*.

When in the bill or any indorsement thereon, the name of any person is given by the drawer or inserted subsequently by any of the indorsers, in addition to the drawee, as the person to be referred to in case of need, such person is called a drawee in case of need.

A person, who on the refusal by the original drawee to accept the bill or to furnish better security, when demanded by the notary, accepts the bill in order to safeguard the honor of the drawer or any indorser, is called the acceptor for honor.

102. a. In *Durga Shah Mohan Lal Bankers vs Governor in Council* case, a bank purchased two cheques indorsed to it by the payee. On dishonor of the cheques, the bank claimed the amount from the drawer. The drawer denied his liability on the ground that the payee had failed to fulfill the promise made by him. The bank was entitled to recover the amount from the drawer. It was held that the bank was not required to verify if the payee had fulfilled his promise or not and even if the payee had failed to deliver the goods as contracted for, there was no reason for it to have any doubt regarding the payee’s title to the cheques.

Holder in Due Course

A holder in due course can claim to be so, only if it can be proved that he acquired the instrument for valuable consideration. According to the Indian Contract Act, one of the essential requirements of a contract is the presence of consideration. It is also necessary that the consideration is not illegal, immoral, opposed to public policy or injurious to a third person. Further, Section 2(d) of the Indian Contract Act prescribes that consideration should pass at the desire of the promisor. Where consideration does not pass at the desire of the promisor, the contract is not a valid contract.

The definition of a holder in due course as given by Section 9 lays down that the holder in due course should show that for consideration he became the payee or indorsee of the instrument, if it is payable to order. In such a case, it is also important that the instrument should have been indorsed and delivered to him, as his title to the instrument will be incomplete without delivery.

b. **Privileges of a Holder in Due Course:** A holder in due course obtains title to the instrument free from equity. He also enjoys certain privileges as:

- A person who has signed and delivered to another, a stamped but otherwise inchoate instrument, is prevented from asserting, as against a holder in due course, that the instrument has not been filled in accordance with the authority given by him, the stamp being sufficient to cover the amount. (Section 20)
- Until the instrument is duly satisfied, every prior party to a negotiable instrument is liable thereon to a holder in due course.
- If a bill or note is negotiated to a holder in due course, the other parties to the bill or note cannot avoid liability on the ground that the delivery of the instrument was conditional or for special purpose only. (Section 46)
- Once the negotiable instrument passes through the hands of a holder in due course, it gets cleansed of all its defects, provided the holder is not a party to the fraud. (Section 53)
- The defenses on the part of a person liable on a negotiable instrument cannot be set-up against a holder in due course if that negotiable instrument has been lost, or obtained from such person by means of an offense or fraud or unlawful consideration.
- The law presumes every holder as a holder in due course, although the presumption could be rebutted.
- The validity of the instrument as originally made or drawn cannot be denied by the maker/drawer/acceptor for honor in a suit initiated by a holder in due course.
- The indorser of a negotiable instrument cannot, in a suit thereon by a subsequent holder, deny the signature or capacity to contract any prior party to the instrument. (Section 122)

103. a. The company Mahendra Ltd has made a general crossing on the cheque.

General crossing

According to Section 123, where a cheque bears across its face an addition of the words “and company” or any abbreviation thereof, between two parallel transverse lines, or of two parallel transverse lines simply, either with or without the words “not negotiable”, that addition shall be deemed a crossing, and the cheque shall be deemed to be crossed generally. Where a cheque is crossed generally, it is the responsibility of the drawee bank not to make payment otherwise than to a bank. (Section 126).

b. **Crossing of Cheques**

A cheque can be either an open cheque or a crossed cheque. Open cheques can be encashed directly across the counter by presenting to the drawee bank. In this case, as the cheque is not required to go through a bank before being presented to the drawee bank for payment, there are certain risks attached. If such a cheque is lost or stolen, the finder or the thief may get it encashed with the drawee bank unless the drawer has in the meanwhile countermanded payment. The concept of crossing cheques was introduced with a view to avoid the losses that may result because of open cheques.

Crossing of a cheque is a direction given to the paying bank to pay the money generally to a bank or to a particular bank as the case may be. The basic intention of crossing is to secure payment to a bank in order to be able to locate the person for whose use the money has been received and also to force the holder of the instrument to present it through a source of recognized respectability.

It should be kept in mind that crossing of a cheque does not affect its negotiability unless the words 'not negotiable' are inserted in addition to the crossing. Where the words 'not negotiable' are added to the crossing, the cheque is not negotiable although it remains transferable.

104. a. In the given illustration, 'X' had drawn a cheque on a bank 'payable to B or bearer'. The cheque was lost. Y a finder of the cheque forges the signature of B and indorses it in his favor. The bank makes payment on the cheque. For this act the bank is not liable towards 'B' as the instrument is a bearer instrument and the paying bank is under no obligation to verify the genuineness of indorsement.

It is the responsibility of the drawee bank to get acquainted with its customer's signature and hence when payment is made on a cheque that bears the forged signature of the customer, the bank cannot claim statutory protection. This is the case, even when the forgery cannot be distinguished from the customer's signature as per the bank's records. On the other hand Section 85 of the Act provides protection to a drawee bank paying a cheque that carries a forged indorsement. According to this Section, where a cheque payable to order purports to be indorsed by or on behalf of the payee, and the bank on which it is drawn makes payment in due course, then the bank is discharged from its liability notwithstanding the fact that the indorsement of the payee might turn out to be forged.

The customer should also take reasonable care so as not to mislead the bank. It was held in *Young vs. Grote*, that if the bank has made payment because of the negligence of the customer, then it is the customer who is liable to bear the loss.

Similarly, if a cheque is drawn in such a way so as to facilitate alteration of the same, the onus will lie upon the customer and any loss incurred as a result of payment made by the bank on the altered cheque will have to be borne by the customer.

Unless otherwise provided by the banker-customer contract, it is not the duty of the customer to bring to the notice of the banker any discrepancy in the passbook or the statement of accounts. The banker cannot plead that the customer had acted irresponsibly by not checking the entries in the passbook/statement of accounts. In *Canara Bank vs Canara Sales Corporation*, one of the officials of the company had committed forgeries for over a decade. However, the company did not raise any objection to the entries made in the pass-sheets during that period. It was observed that the bank cannot escape its liability keeping in view the fact that the contract between the banker and the customer did not specify that discrepancies should be brought to the notice of the banker. Also, there was no ratification of the same by the customer.

- b. A banker may refuse to honor the customer's cheques on the following grounds:
- Where a post-dated cheque is presented for payment prior to the date it bears, then the banker will be justified in refusing to honor the cheque.
 - Where a customer does not have sufficient funds to his credit (i.e., there are no funds or funds available are not enough to cover the amount of the cheque), then the banker may dishonor the cheque.
 - If the funds of the customer are subject to a lien by the banker, the customer's cheque is likely to be dishonored.
 - A banker will also be justified in dishonoring a cheque that is ambiguous, unclear or contains a material alteration.

- The cheques of a customer who has been declared insolvent is also liable to be dishonored.
- Similarly, where the customer has countermanded payment, the banker is justified in refusing payment of the customer's cheques.
- Where the banker receives notice of either the customer's death or insanity, he may refuse payment. However, any payment made before notice of death will be valid.

105. a. In *Commercial Finances vs. Thressia*, it was held that where a cheque is returned unpaid by the drawee bank with the words 'refer to drawer', even then notice of dishonor should be given to the indorser of the cheque in order to make him liable.

In addition to the amount due on the instrument, the indorser is required to make good the loss suffered by the holder because of a dishonor. However, he may limit his liability by using appropriate words. For example, he may give a qualified indorsement by using the words 'sans recourse' or 'without recourse to me' or any other similar expression.

- b. **Liability of Endorser (Section 35)**

- Every indorser after dishonor is liable as upon an instrument payable on demand to every subsequent holder.

An indorser of a negotiable instrument is in the position of a new drawer and his relationship with the holder of the instrument is conditional. By endorsing a bill, the endorser undertakes that the instrument will be accepted and paid according to its tenor on presentment and in case it is dishonored, he will compensate the holder or a subsequent indorser who is compelled to pay for it, subject to due notice of dishonor being given to him.

The undertaking of an indorser of a note is similar to that of an indorser of a bill except that in case of a note there is no undertaking as to acceptance as a note is incapable of being accepted.

It should be noted that the indorser's liability under this section will not commence until the indorsed instrument is delivered to the transferee. Also due notice of dishonor of the instrument should be given to him in order to make him liable on the instrument.

- In *Commercial Finances vs Thressia*, it was held that where a cheque is returned unpaid by the drawee bank with the words 'refer to drawer', even then notice of dishonor should be given to the indorser of the cheque in order to make him liable. In addition to the amount due on the instrument, the indorser is required to make good the loss suffered by the holder because of a dishonor. However, he may limit his liability by using appropriate words. For example, he may give a qualified indorsement by using the words 'sans recourse' or 'without recourse to me' or any other similar expression.

106. a. Rohit has made a Partial indorsement because he has paid only part of the amount due on the instrument and the remaining part is unpaid.

Partial Indorsement

According to Section 56, no writing on a negotiable instrument is valid for the purpose of negotiation if such writing purports to transfer only a part of the amount appearing to be due on the instrument; but where such amount has been partly paid, a note to that effect may be indorsed on the instrument, which may then be negotiated for the balance.

- b. **Effect of Indorsement**

The indorsement of a negotiable instrument followed by delivery transfers to the indorsee the property therein with the right of further negotiation but the indorsement may, by express words, restrict or exclude such right, or may merely

constitute the indorsee an agent to indorse the instrument, or to receive its contents for the indorser, or for some other specified person. (Section 50)

According to Section 50, indorsement may be either unconditional or restrictive. Where there is an unconditional indorsement of an instrument followed by an unconditional delivery so as to transfer the property in the instrument to the indorsee, then the indorsee will be vested with the right to sue all the parties whose names appear on the instrument. Further, he may negotiate the bill with anyone he pleases. However, he cannot sue third parties on the original consideration.

Similarly, an indorsee of a promissory note can sue prior parties on the note itself and cannot sue them (an exception being his immediate transferor) on the original consideration unless he is also the assignee of the original debt.

Where an instrument is indorsed restrictively, it implies that the instrument cannot be negotiated further. The person, to whom the bill is restrictively indorsed, can deal with the bill only as directed by the indorser. By this, he is empowered to receive payment on the bill and to sue any party whom the indorser could have sued. However, he cannot transfer his rights to any other person unless authorized to do so.

Section 50 prescribes that where a bill is indorsed with an intention of restricting its further negotiability, then such an indorsement should contain express words to that effect. The mere fact that a special indorsement is not accompanied by words of negotiability does not make it restrictive.

107. a. Yes, ANZ bank can seize the hypothecated vehicles in view of the provisions in the SARFAESI Act, 2002, regarding the enforcement of right over movable property, which is hypothecated or charged to banks and financial institutions. The inclusion of such provisions empower the banks and financial institutions to take possession of assets directly by way of seizure. The bank has to issue a notice under Section 13(2) and if the amount is not paid within 60 days from the date of notice bank can seize under the Act.
- b. **Objectives of the Act**

The Act is a comprehensive legislation aimed at helping Banks and Financial Institutions in recovery of Non-Performing Assets (NPAs). It is a blend of three concepts viz., Securitization, Asset Reconstruction and Enforcement of Security Interest. The Act deals with three measures namely,

- Legal framework for securitization of assets.
- Transfer of NPAs to asset Reconstruction Company for disposal of assets and realizing the proceeds.
- Enforcement of security interest without the Court intervention.

It extends to the whole of India. The Act has its own procedure laid down in the rules prescribed under the provisions of the Act. A provision in the Transfer of Property Act regarding enforcement of right over immovable property, which is hypothecated or charged to banks and financial institutions, is taken into the purview of the Act. The inclusion of such provisions empowers the banks and financial institutions to take possession of assets directly by way of seizure.

The prime objective of securitization is to sell the secured NPA loans to investors through a special purpose vehicle called Securitization Company. Once the securitization company takes over financial asset, the company will be treated as secured creditor for all the purposes [Section 5(3)]. Securitization Company will formulate a separate scheme for each set of assets and invites QIBs (Qualified Institutional Buyers) for investment in the scheme. The securitization company will issue security receipts to QIBs. The security receipt represents individual interest in such financial assets [Section 2(1) (219)]. The securitization company will realize the financial asset and redeem the investment by paying the proceeds to QIB under each scheme (Section 7).

Government of India has taken several steps to improve the recovery of bad debts of banks and financial institutions. One such step was the enactment of 'the Recovery of Debts due to Banks and Financial Institutions Act, 1993'. The Act was enacted with the objective to speed up the debt recovery process that would in turn reduce the continuance of non-performing assets. It led to establishment of nearly twenty-nine Debt Recovery Tribunals (DRTs) and five Debts Recovery Appellate Tribunals (DRATs). Since the recovery performance through DRTs was not encouraging the Government preferred the enactment of an Act with special emphasis on the control of NPAs and the creditor's right of enforcement of security interest. Accordingly, an Act called "The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002" was enacted.

The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 that extends to whole of India came into force from 21st June 2002. The Act is divided into six Chapters with forty-two Sections. The Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2004 has been passed to amend the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the Companies Act, 1956. The amendments follow the Supreme Court ruling – which upheld the constitutional validity of the Act but struck down Sub-section 2 of Section 17 of that required defaulters to deposit atleast 75% of the outstanding claim [*Mardia Chemicals vs. ICICI Bank*].

108. a. Enforcement of Security Interest

Security Interest [Section 2(zf)] means right, title and interest upon property created in favor of any secured creditor including mortgage, charge, hypothecation and assignment other than those exempted under Section 31.

Property [Section 2(s)] means immovable property, movable property, any debt or right to receive property, any debt or right to receive payment of money (whether secured or unsecured), receivables whether existing or future, intangible assets such as knowledge, patent, copyright, trademark, license, franchise or any other business or commercial right.

b. Process of Enforcement under the Act

Secured Creditor can initiate the enforcement once a secured debt is classified as a non-performing asset as per the guiding regulations of Reserve Bank of India. Section 13 of the Act provides the detailed process (as illustrated in Exhibit I).

The requirements of Section 13 can be summarized as:

- Classification of secured debt as non-performing asset (Section 13(2)).
- Issuing notice to borrower in writing with details of amount due and the details of security interest to be enforced in case dues are not recovered within 60 days from the date of notice [Section 13(2) and Section 13(3)].
- After the expiry of sixty days period, secured creditor can select any or all the options to recover his dues (Section 13(4)), such as:
 - Possession/appoint a person to manage the assets under possession.
 - Take over of management.
 - Transfer by sale/lease/assignment.
 - Demand the payment from any person who has acquired the secured assets.

At this stage of proceedings, Section 13(1) of the Act operates as a *non-obstante* clause and allows the secured creditor to enforce a mortgage also without the intervention of the court. This is in addition to overriding clause of Section 35 of the Act.

The borrower is provided with an opportunity to raise any objections to the enforcement rights of the secured creditor within the grace period of sixty days. Secured creditor is also under obligation to give all reasons for his proposed enforcement action. Judicial scrutiny is also envisaged under Section 17 of the Act by which an aggrieved borrower can approach Debt Recovery Tribunal (DRT) within 45 days from the date of measures taken under Section 13(4) of the Act. Section 18 of the Act provides for second appeal against DRT award.

In addition to above leverage, the authorized officers are required to obtain valuation of immovable property and give a notice of 30 days before the date of proposed sale.

Secured creditor should claim security interest within the period of limitation prescribed under the Limitation Act, 1963.

- Any security interest created in favor of any secured creditor may be enforced without intervention of court or tribunal [Section 13(1)].
- A notice by secured creditor to the borrower is necessary before enforcing the rights. The notice *inter alia* must include the following:
- Notice period of *sixty days* from date of notice for discharging full liabilities [Section 13(2)].
- Details of amount payable by borrower and secured assets to be enforced in the event of non-payment [Section 13(3)].
- If, on receipt of the notice under Sub-section (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within *one week* of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower:

Provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under Section 17 or the Court of District Judge under Section 17A.

Insurance Law and Regulation

109. a. Mr. Aadesh, who is engaged in the business of export and import through seaways, has to comply with the following essential elements so as to secure his goods from maritime peril or risk:

Important elements of each and every valid contract are the offer, acceptance, communication and the consideration for the promises made by the parties. In marine insurance contracts, the owner of the ship proposes to the insurance company to insure the vessel, crew and other cargo on board to secure the same from the marine perils. The insurance company accepts the offer for a payment of consideration called the premium. Thereafter, the insurance company agrees to compensate the proposer for the losses suffered by him due to risks or perils covered.

The other important element of the insurance contract is the consideration. The consideration in a marine insurance is the promise made by the offeror for payment of premium for a promise made by the insurance company to compensate him for the losses and sufferings experienced by the assured on the happening of the event insured. The marine insurance contract, being a part of the general insurance

contract, is a short-term contract, for a maximum period of one year or for a period of voyage or for such period till such act or purpose is completed. As such, the premium is paid in one lump sum and for one time.

The premium is the consideration paid by a policyholder to keep an insurance policy in force. It is the amount paid to secure an insurance policy. It is the consideration paid by the promisor for the promise made by the insurance company to cover the loss.

The presence of insurable interest in the Marine Insurance contract makes the contract valid. The Act defines the insurable interest that 'a person has an insurable interest if he is interested in the marine adventure'. It further says that the person should have legal or equitable relation to the adventure or of the insurable property. Insurable interest need not be present at the time of conclusion of a contract, but it must present at the time of happening of event.

The insured and the insurer are under obligations to deal with the contracts of insurance with good faith and good intention. Indemnity arises when 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.

b. **Types of Marine Insurance Policies:** The policies of marine insurance may be:

- **Voyage Policy:** It contains the particulars of the subject matter assured, and the place (from and to).
- **Time Policy:** The insurance of the subject matters is made for a definite period of time, in the particular policy.

If the policy contains both the voyage and time clauses, then it is called voyage time policy.

Other policies include –

- Valued policy
- Open or unvalued policy
- Floating policy.

110. a. No, Mr. Darshan cannot claim compensation, as partial disability is not covered by the life insurance policies unless and until the policy covers the claim for partial disablement also. The important element of a life insurance policy is the 'life' of a human being. The life insurance of a person is a contract by which the insurer in consideration at a certain premium, either in a gross sum or periodical payments, undertakes to pay the person for whose benefit the insurance is made, a stipulated sum, or annuity equivalent, upon the death of the person whose life is insured. However, partial and complete disabilities are covered by the accident policies which are part of general insurance.

b. The common life insurance policy contains the following information:

- a. The name of the plan governing the policy;
- b. Whether it is participating in profits or not;
- c. The basis of participation in profits such as cash bonus, deferred bonus, simple or compound reversionary bonus;
- d. The benefits payable and the contingencies upon which they are payable and the other terms and conditions of the insurance contract;
- e. The details of the riders attached to the main policy;
- f. The date of commencement of insurance and the date of maturity or dates on which the benefits are payable;

- g. The premia payable, periodicity of payment, the date the last installment of premium will be due, the implication of discontinuing the payment of installment(s) of premium and also the provisions of a guaranteed surrender value;
- h. The age at entry and whether the same has been admitted;
- i. The policy requirements for (a) conversion of the policy into paid up policy, (b) surrender (c) non-forfeiture and (d) revival of lapsed policies;
- j. Contingencies excluded from the scope of the cover, both in respect of the main policy and the riders;
- k. The provisions for nomination, assignment, and loans on security of the policy and a statement that the rate of interest payable on such loan amount shall be as prescribed by the insurance company at the time of taking the loan;
- l. Any special clauses or conditions such as first pregnancy clause, suicide clause etc.;
- m. The existence of an Insurance Ombudsman, other grievance redressal mechanism for resolution of disputes like claims review committee with Zonal/Regional/Head Offices/Central Office; and
- n. The address of the insurer to which all communications in respect of the policy shall be sent.
111. a. No, Mr. Ekansh cannot claim the full value of his interest from all the three insurance companies simultaneously. Though he has been paying the premium amount promptly, he cannot claim the amount from each one of them independently and for full value of his interest. This is covered under the concept of double insurance. Double or multiple insurance is insurance of the same risk with more than one insurer. This happens when the insured insures the same risk with two or more independent insurers, and the total sum insured exceeds the value of the subject matter, the insured is said to be over-insured by double insurance. Both double insurance and over-insurance are perfectly lawful, unless the policy otherwise provides.
- If a loss occurs, he may claim payment from the insurers in such order as he thinks fit. But in any event, he shall not be entitled to recover more than his loss, because, a contract of insurance is a contract of indemnity only. Any excess amount recovered by the insured is to be held by him in trust for the other insurers in accordance with their respective rights. The insurers as between themselves are liable to contribute to the loss in proportion to the amount for which each one is liable. The purpose served by double insurance is that it protects the insured against his loss in the event of one or more of the insurers becoming insolvent.
- b. **Subrogation:**
- Subrogation is one of the essential elements of insurance contract. It is defined as the transfer of rights and remedies from the insured to the insurer who has indemnified the insured in respect of the loss. This doctrine is applicable to fire and marine insurances. In such cases, the insured has the right to subrogation when the insurer pays for a total loss. In case of partial losses, the insurer is not eligible for the title of the subject, but he is subrogated to all rights and remedies of the assured in and in respect of the subject matter insured as from the time of the loss or to an extent of the amount paid. Apart from this, the other fundamental principles of insurance contract are:
- Good Faith (*Uberrimae Fide*)
 - Insurable Interest
 - Law of Indemnity

- Proximity of Cause
- Risk
- Mitigation of loss
- Contribution.

112. a. Yes, Mr. Khan will have insurable interest in the life of Mr. Kamal so as to protect his interest. Presence of an insurable interest is an essential prerequisite; otherwise the policy will be void, as a wager. One, who has a pecuniary claim against the other, or a legal right to support from him, has an insurable interest in the life of the other. A creditor has insurable interest to take policy in the name of debtor and can secure his interest by assignment from the debtor.

Life insurance is not a contract of indemnity. It is a fixed amount that becomes payable on the happening of the specified event, viz.; death or on the expiry of a fixed period of time. The human life is incapable of being measured in terms of money.

b. **Insurable Interest and Life Insurance Policies:**

- i. **One's own life:** In a life insurance policy a person need not prove the insurable interest when the policy is on one's own life. A person has insurable interest in his own life to an unlimited extent.
- ii. **Husband and wife:** The law recognizes the existence of insurable interest in the life of one's spouse. This is an exception to the general rule that insurable interest is a pecuniary interest. The interest in this case is much higher than the pecuniary interest. But policies purchased on the life of woman whom he has already divorced are not valid for want of insurable interest and the policies are valid if divorce has been obtained from wife or husband and the insurable interest still exists even after the divorce has occurred.
- iii. **Parent and Child:** Law of England and India does not recognize the insurable interest in the policies taken by the parents on the life of their children. But in USA, the courts have recognized the insurable interest if the parents purchase policy on life of their child.
- iv. **Other relations:** Insurable interest is also recognized in the policies where the creditor has purchased the policy in the name of a debtor and by an employer in the name of an employee. A business partner has the insurable interest in the life of his business co-partner to the extent of the partner's share in the business.

113. a. **Principle of Indemnity:**

The insurance mechanism has two fundamental characteristics; shifting or transferring of a risk of loss or damage, from owners and thereby sharing of losses by all the members of the group. Thus a contract of insurance is a contract by which one party undertakes to make good the loss of another, in consideration of a sum of money, on the happening of a specified event. For example, fire accident or death.

In general, the contract of insurance is the contract of indemnity in which the insurer promises to indemnify the insured from the loss or damage of asset due to risk attributed to it. It is the payment of money or the pecuniary interest that is compensated due to happening of a certain event to the insured subject. This principle, in India, is applicable to all the policies other than life policies, because the valuation of life cannot be made. Marine insurance, fire insurance and property insurance stand in relation to the principle of indemnity. Payment of insurance amount, i.e., pecuniary benefit depends upon various factors. In England and also in USA, it is a very much-recognized principle.

b. **Proximity of Cause:**

A contract of insurance is a contract of risk. The product and subject matter, i.e. risks are intangible assets in the hands of the insured and the insurer. The insured, by knowing the quality and quantity of the risk, proposes for a contract and the insurer by knowing the facts and conditions laid down in the standard form of proposal and after considering the proposal of the insured sells the insurance product to him.

The proximity of cause is the other important element of insurance contract. The payment of compensation depends upon the nature and proximity of the cause resulting in the loss to the asset. Proximate cause is the immediate cause that resulted in the loss of the asset. It is that cause without which the loss would not have occurred. It is the cause which is most closely and directly connected with the loss not necessarily in time but in efficiency and effectiveness. This doctrine is applicable when the insured peril need not be the initial cause and it is not direct result of the operation of an external peril, but then risk insured against must actively take place. An insurer is liable for any loss proximately caused by a peril insured against.

114. a. Yes, M/s Kranthi exports will succeed in claiming the damages as the insurance company is liable to indemnify the loss. If the policy provides for a certain type of coverage, and the insurance company refuses to allow the claim, the claimant has every right to file a suit for breach of contract. The following are the fundamental principles of insurance, on which the contract of insurance rests:

- **Uberrimae Fide:** The Uberrimae Fide is the foundation on which the insurance policy is constituted and the insurance contracts are exceptions to a cardinal rule of commercial principle that, he who buys should be aware (caveat emptor). The product and subject matter, i.e. risks are intangible assets in the hands of the insured and the insurer.
- **Insurable Interest:** Consideration is the payment of money or the pecuniary interest that is compensated due to happening of a certain event to the insured subject. Proximate cause is the immediate cause that resulted in the loss of the asset.
- **Principle of Indemnity:** In general, the contract of insurance is the contract of indemnity in which the insurer promises to indemnify the insured from the loss or damage of asset due to risk attributed to it. It is the payment of money or the pecuniary interest that is compensated due to happening of a certain event to the insured subject.
- **Proximate cause:** It is that cause without which the loss would not have occurred. The risk in a contract can be assumed only from the date on which the premium has been paid. The insurer can avoid the payment of loss attributable to his negligence.
- **Risk:** The insurer undertakes to protect the insured from a specified loss. The insurer, after taking the factors influencing risk, calculates the risk and a notice for payment of the premium is issued to the insured. The risk in a contract can be assumed only from the date on which the premium has been paid.
- **Mitigation of Loss:** In the event of some mishap to the insured property, the insured must take all necessary steps to mitigate or minimize the loss, just as any prudent person would do in those circumstances. If he does not do so, the insurer can avoid the payment of loss attributable to his negligence.

b. **Parties to the insurance contract:**

The parties to the contracts of insurance are the 'insurer' and the 'insured'. The person who undertakes the risk under the contract is called the 'insurer' and the person to whom the undertaking is given is the 'insured'. Section 2(a) of the Insurance Act defines insurer and it gives a list of persons who can be qualified an insurer. As per the provisions of the section the insurer means:

- a. An individual,
- b. An unincorporated body of individual,
- c. Body corporate incorporated under the laws of the country other than in India carrying on insurance business,
- d. Body corporate incorporated under any law in force in India or under the Indian Companies Act, 1913 and carrying on the business of insurance in India,
- e. Any subsidiary company incorporated under the provisions of Companies Act and carrying on business of insurance in India,
- f. Any person, who in India having a contract under writers with the 'society of Lloyds' authorized to undertake the insurance business in India till the expiry of the contract,
- g. An Indian Insurance Company, which is termed and registered with a provision to wind up the business as per the provisions of the Companies Act, 1956,
- h. An association of partnership firm registered and eligible to be governed by the provisions of Indian Partnership Act, or
- i. Any agency permitted or sanctioned to undertake the insurance business either under Section 30 of Life Insurance Act of India, or Sections 18 and 19 of General Insurance Act.

115. a. The important objective of the life insurance is to provide the social security to the dependants. "Life insurance is husband's privilege, a wife's right and children's claim". Though Mr. Vikram has been staying away from his wife and started living with another lady, his wife and son are the rightful claimants regarding his insurance policy as he has not yet obtained divorce from his wife and the law of succession applies.

b. Where the object of contract is wagering in nature it is not a lawful contract. On the other hand in existence of insurable interest, in an insurance contract has made the insurance contract as valid contract. The Insurance Act does not define the insurable interest. Presence of property right, interest, life or potential liability as a subject matter of the contract and is essential feature of insurable interest. There should be recognized relation under the law between the insured and subject matter of the contract. The insurable interest may be created by the operation of common law by a contract or by a statute.

116. a. Yes, Mrs. Harish may succeed in her claim against the insurance company. Though the doctors of the insurance company are of the opinion that Mr. Harish was suffering from the disease from the past ten years, the proposal form clearly admits that he did not suffer from any disease. Hence the act of Mr. Harish did not amount to misrepresentation of facts or fraud. It could be ignorance of the disease by the assured and did not amount to breach of warranty. Hence, the insurers cannot repudiate their contract on such basis. Hence, the assured's wife is entitled to receive the amount of the policy from the insurers as per the judgement precedents.

- b. **Essential principles of the contract of insurance:**
- i. **The Proposal (or) Offer:** In an insurance contract, the proposal or offer is made by the insured, expressing his willingness to create a contract of insurance on the subject matter mentioned therein. In insurance contract the proposal originally originates from the insured and not from the insurer. It is called the 'invitation to offer'.
 - ii. **Acceptance:** In the insurance contract, the proposal forms received by the insurers are processed and verified to find out what risks are to be covered and to assess the intensity of the insurance claims and other related matters. After verification and satisfying themselves, the proposals are accepted provided they are otherwise in order. After accepting the proposal, the insurer informs the promisor that the proposal has been accepted. The acceptance is communicated to the party either by giving a notice or through any of its agent or intermediary. The acceptance may be absolute or conditional.
 - iii. **Communication:** The communication of proposal and acceptance is one of the important elements of insurance contract. The insured, in the first instance, communicates offer by submitting the filled standard form of proposal, by signing. The submission of proposal form to the other party, the insurance company, expressing the willingness to pay the premium when a proposal is accepted is treated as communication of proposal. The insurance company has to intimate the insured about his willingness to accept the proposal. A valid contract of insurance comes into force as soon as the communication of acceptance is completed and the conditions are fulfilled.
 - iv. **Consideration:** Consideration in the contract of insurance is the payment or the consent to pay the premium by the proposer and a promise to pay or compensate or indemnify by the insurer in accordance with the terms and conditions incorporated in the policy. Thus, there are two promises by the proposer and promisee. These are reciprocal promises undertaken and agreed by the parties. A premium is the price for the risk insured. A premium is the price for the risk undertaken by the insurer. It is the consideration receivable by the insurer from the insured in exchange for their volunteering to pay the sum insured in case of happening of the event.

117. a. **Liability of insurers with respect to the loss of documents by fire:** A fire insurance contract is a special contract dealing specifically with the risk to the asset is from fire or incidental to fire. All the essential elements of the Contract Act are applicable to a fire insurance contract. The fire insurance policies are of short duration. The plain meaning of fire means and includes ignition and combustion. The insurers are liable to indemnify the insured in respect of damage caused due to fire. Ignition and combustion are important ingredients of fire, without which the fire policy is not operative. The fire policy also covers the damage due to explosion and implosion of boiler, damage to aircraft or property dropped from aircrafts, damage from missile testing operations. The fire policy covers the property of a person both tangible movable and immovable. However, a fire insurance policy does not cover or include documents such as promissory notes, share certificates, Indra Vikas Patra, etc. If no mention is made in the policy document that the above documents are also insured against fire, the insurer's liability does not extend to the above documents gutted in the fire.

In the given illustration, Mr. Rajeev insures all his house property along with the other movable property inside the house under a fire insurance policy; but the policy does not include valuable documents such as promissory notes, share certificates, fixed Deposit certificate amounting to Rs.2,00,000. Hence the insurance company is not liable and need not reimburse/indemnify the value of the certificates.

b. **Risk covered under the fire insurance policy:** The fire policy covers the following risks that are incidental to fire and directly attached to fire:

- Damage caused due to explosion or implosion other than the destruction or damage caused to boilers, machinery or apparatus that are used in specialized industries.
- The damage to aircraft or to the property dropped from the air crafts.
- The damage caused from missile testing operations.
- Damage of bush fire excluding the forest fire.
- It will not cover the loss, destruction or damage caused by war and kindred perils.
- Loss, destruction or damage caused to the insured property by pollution or contamination, nuclear peril, loss or destruction caused to the stocks that are placed in cold store units is not covered by the fire policy.

The fire policy covers the property of a person such as buildings may be of residential or commercial nature, furniture or machinery or other property that are movable and tangible.

118. a. No, the creditors of Mr. Tushar Kapoor cannot claim the amount from the insurance policy. The Act is of special nature for the properties of insured if he nominates the wife or children to be the beneficiaries on his death. A policy of insurance effected by any married man on his own life, and expressed on the face of it to be for the benefit of his wife or of his wife and children or any of them shall ensure and be deemed to be the trust for the benefit of his wife or of his wife and children or any of them according to the interest so expressed and shall not so long as any object of the trust remains. It is an established principle that the insurance money due under a policy settled for the benefit of the wife and children is not available for the satisfaction of the debts of the assured even if they are due to Crown. Thus, the knowledge of provisions of the Act will help the insurer to act properly while settling the claims under the insurance business.

b. **Parties to the Insurance Contract:**

The parties to the contracts of insurance are the 'insurer' and the 'insured'. The person who undertakes the risk under the contract is called the 'insurer' and the person to whom the undertaking is given is the 'insured'. Section 2(a) of the Insurance Act defines insurer and it gives a list of persons who can be qualified an insurer. As per the provisions of the section the insurer means:

- a. An individual,
- b. An unincorporated body of individual,
- c. Body corporate incorporated under the laws of the country other than in India carrying on insurance business,
- d. Body corporate incorporated under any law in force in India or under the Indian Companies Act, 1913 and carrying on the business of insurance in India,
- e. Any subsidiary company incorporated under the provisions of Companies Act and carrying on business of insurance in India,
- f. Any person, who in India having a contract under writers with the 'society of Lloyds' authorized to undertake the insurance business in India till the expiry of the contract,
- g. An Indian Insurance Company, which is termed and registered with a provision to wind up the business as per the provisions of the Companies Act, 1956,

- h. An association of partnership firm registered and eligible to be governed by the provisions of Indian Partnership Act, or
- i. Any agency permitted or sanctioned to undertake the insurance business either under Section 30 of Life Insurance Act of India, or Sections 18 and 19 of General Insurance Act.

But does not include a Principal Agent, Chief Agent, Special Agent or an Insurance agent either appointed under any Act or recognized by the Act undertaking the insurance business, and includes a Government Company and a provident society as defined in Section 65 of Insurance Act.

119. a. Mr. Franklin can claim damages and the insurance company is liable to compensate. Though the fire accident has taken place in the factory of Mr. Talwar, the neighboring factory is also affected by the accident and the damage caused to the assured because of the property blown up to save other property from the fire spreading. The damage caused by the water which is used to control the fire during the fire fighting, damage caused by the fire brigade in execution of its duties, loss to property removed from a burning building due to rain, theft and actual loss caused while removing the property from the fire vicinity, and any damage caused to the asset due to fall of walls of burning building or losses suffered by the assured while acting to mitigate the loss from the operation of fire are covered by the fire insurance policy as the loss is incidental to the fire accident.

- b. **Coverage of risk under the contract of fire insurance:** The fire policy covers the following risks that are incidental to fire and directly attached to fire:

- Damage caused due to explosion or implosion other than the destruction or damage caused to boilers, machinery or apparatus that are used in specialized industries.
- The damage to aircraft or to the property dropped from the air crafts.
- The damage caused from missile testing operations.
- Damage of bush fire excluding the forest fire.
- It will not cover the loss, destruction or damage caused by war and kindred perils.
- Loss, destruction or damage caused to the insured property by pollution or contamination, nuclear peril, loss or destruction caused to the stocks that are placed in cold store units is not covered by the fire policy.

The fire policy covers the property of a person such as buildings may be of residential or commercial nature, furniture or machinery or other property that are movable and tangible.

120. a. **Warranties:**

In marine insurance contracts, the term 'warranty' is used as a synonym for the term 'condition'. All the warranties attached to a policy have to be followed whether they relate to the material facts of a contract or not. A warranty, in a marine insurance business policy, which contains the risk, is a special condition. The important condition attached to the policy is to comply with the terms of the warranty. Warranties may be express or implied. An express warranty is one which is expressly stated in the policy of insurance, whereas an implied warranty is a condition not incorporated in a policy but assumed to have been included in the policy by law, custom or general agreement.

- b. **The Law of Marine insurance in India:**

The Law of Marine Insurance was enacted in the year 1963, in India. The Act is based on the English Marine Insurance Act of 1906. The Indian Marine Insurance Act became operative on August 1st, 1963. The Marine Insurance Law developed in its full form from that date and removed some of the difficulties faced by the courts while defining insurable interest, good faith and other important concepts of the insurance business.

A contract of marine insurance is an agreement whereby the insurer undertakes to indemnify the assured, in the manner and to the extent thereby agreed, against marine losses, that is to say, the losses incidental to marine adventure (Section 3). It also includes liability to a third party incurred by the owner of the ship or other person interested in the property assured on happening of the maritime event. This maritime peril or event of risk is consequent on, or incidental to, the navigation of the sea, that is to say, perils of the seas, fire, war perils, pirates, rovers, thieves, captures, seizures, restraints and detentions of princes and peoples, jettisons, barratry and any other perils which are either of the like kind or may be designated by the policy.

Business Transactions and Cyber Law

121. a. In case of e-mail contracts the question that would arise is when has the acceptance been conveyed, i.e. (a) when the e-mail was sent; or (b) when it was received by addressee; or (c) When it reaches the 'host computer', which provides the e-mail facility to the addressee. In the given illustration the acceptance of contract by Mr. Chaitanya is said to be complete when it comes to the mailbox of Mr. Deepak.
- b. A combined application of section 4 of the Contract Act, 1872 and section 13 of the IT Act, 2000 would reveal the following law for contract formation in the case of electronic contracts in the event that nothing contrary has been agreed to between the parties in their contract:
- a. The communication of an offer becomes complete at the time when the electronic offer enters any information system designated by the offeree for the purpose, or, if no system is designated for the purpose, when the electronic offer enters the information system of the offeree, or if any information system has been designated, but the electronic offer is sent to some other information system, when the offeree retrieves such electronic record.
- b. The communication of an acceptance is complete – as against the offeror when the electronic acceptance is dispatched such that it enters a computer resource outside the control of the acceptor.
122. a. The contract entered by Ms. Chandrika is a click-wrap agreement. Click-wrap or web-wrap agreements are commonly used in connection with e-commerce transactions. These agreements are typically used to specify the terms and conditions applicable to the use of the website as well as to the products and services purchased over the Internet. With these agreements the buyer or user usually explicitly assents to these terms by clicking on a button stating "I agree" or "I accept" after having had an opportunity to review the terms. An act by the buyer affirmatively assenting to the terms of the click-wrap agreement significantly enhances its enforceability. Some sites, for instance, indicate that continuing use of the site by the user or buyer manifests assent to be bound by the terms and conditions applicable to using the site. It is critical that the users have an opportunity to review the terms of use applicable to the site. If they are buried or otherwise inconspicuous, they will be more difficult to enforce.

Click-wrap agreements are considered to be more enforceable than "shrink-wrap" which are entered based on the licensee opening the software products' packaging or failing to return the product within a specified period, typically 7 to 30 days. Click-wrap agreements are entered into by an affirmative assent as opposed to the failure to act. However, if the agreements are too overbearing or contain unusually harsh terms it is possible, especially in a consumer law context that the click-wrap agreement, even if assented to, may be found unconscionable and unenforceable. To mitigate that possibility, click-wrap agreements should provide a clear and simple mechanism allowing the consumer to return the products for a refund within a reasonable period of time. It is also recommended that the terms and conditions of the agreement be available for inspection in booklet form at physical locations.

b. **Objectives of the Information Technology Act, 2000:**

- To provide legal recognition to transactions carried out by means of electronic data interchange and other electronic communication commonly referred to as electronic commerce (e-commerce) e-commerce is regarded as an alternative to paper based method of communication and storage of information.
- To facilitate electronic filing of documents with government departments/agencies.
- To bring suitable amendments to existing laws in pursuit of the objectives of the Act.
- To give favorable consideration to the model law recommended by UNCITRAL to maintain harmony with international laws.

123. a. No, the contract between Ms. Dhatri and Ms. Samatha does not have binding effect. As per Section 12 of the Information Technology Act, 2000 if the originator stipulates that electronic record shall be binding on receipt of acknowledgement of record, only then it is binding.

Authentication of electronic Record: A record is the documentation of a transaction that happens as a result of someone taking a particular action at a particular time - so it is the *evidence*, the proof, of what has happened, who was involved and when. There have been discussions during the past decade of what a record is in an electronic environment. Electronic records are extremely good at generating and storing data, but much less adequate at identifying when that data could be considered a record.

Purpose: *Records* are kept to provide evidence of business activity; *documents* may be kept for a wide range of purposes, including for use of the information they contain and for recycling into other documents.

Context: Records are created in the course of business and thereby document business transactions; documents may or may not be created in the course of business and be connected with a business transaction.

On this basis, most records are also documents and some documents are also records. But a document only functions as a record if it was created or received in the course of business *and* has been kept as evidence of that business activity. In other words, a document becomes a record when it takes part in a business transaction and is kept to provide evidence. One creates a document when one composes an electronic mail message; it becomes a record when one sends it.

b. **Time of Formation of Contract:**

The importance of time of the formation of contract is well known viz., to decide priorities between competing claims, to determine the law applicable to the contract etc. The time aspect of the contract formation is also important in ascertaining the place aspect of the contract formation.

Coming back to the Indian Information Technology Act, 2000 section 13 provides the framework for understanding the principles of contract formation in the cases of electronic contracts. It lays down *inter alia*, that unless otherwise agreed:

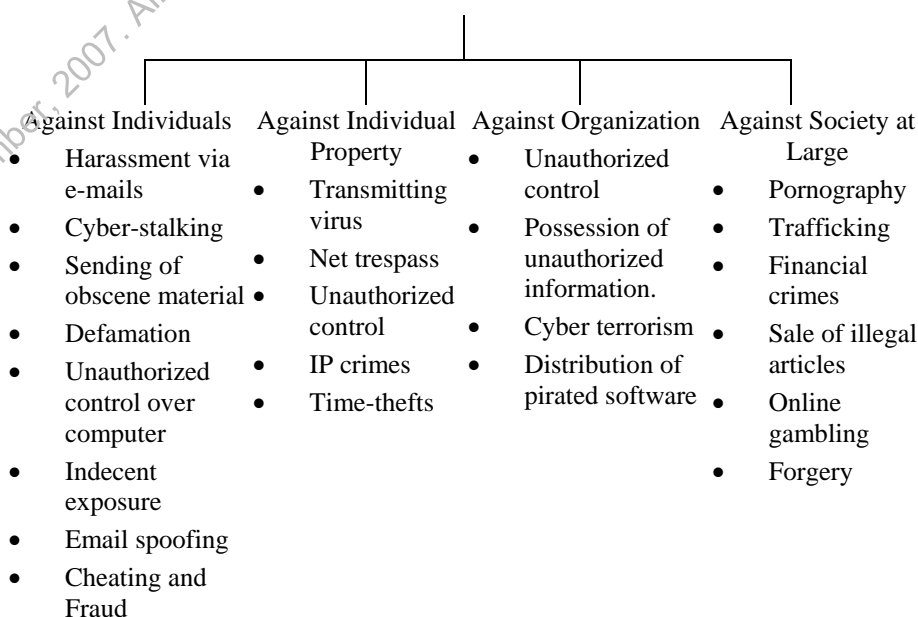
- The dispatch of an electronic record occurs when it enters a computer resource outside the control of the originator.
- The time of receipt of an electronic record is the time when the record enters the designated computer resource (if the addressee has a designated computer resource).
- If the electronic record is sent to a computer resource of the addressee that is not the designated computer resource, receipt occurs at the time when the electronic record is retrieved by the addressee.
- If the addressee has not designated a computer resource along with specified timings, if any, receipt occurs when the electronic record enters the computer resource of the addressee.

However, the above rules do not tell us anything more than when the dispatch and receipt of electronic records takes place. Therefore, in order to understand the rules relating to the electronic contract formation, the principles of the Indian Contract Act will have to be applied in this context.

124. a. Mr. Robert is liable for damaging, computer system. Damage to a computer system is explained under section 43 of the Information Technology Act, 2000. The nature of contravention is damage to computer, computer system, etc. Section 43 states that if any person without permission of the owner or any other person who is incharge of a computer, computer system or computer network —
- (a) accesses or secures access to such computer, computer system or computer network;
 - (b) downloads, copies or extracts any data, computer data base or information from such computer, computer system or computer network including information or data held or stored in any removable storage medium;
 - (c) introduces or causes to be introduced any computer contaminant or computer virus into any computer, computer system or computer network;
 - (d) damages or causes to be damaged any computer, computer system or computer network, data, computer data base or any other programmes residing in such computer, computer system or computer network;
 - (e) disrupts or causes disruption of any computer, computer system or computer network;
 - (f) denies or causes the denial of access to any person authorised to access any computer, computer system or computer network by any means;
 - (g) provides any assistance to any person to facilitate access to a computer, computer system or computer network in contravention of the provisions of this Act, rules or regulations made thereunder;
 - (h) charges the services availed of by a person to the account of another person by tampering with or manipulating any computer, computer system, or computer network, shall be liable to pay damages by way of compensation not exceeding one crore rupees to the person so affected.

b. **Classification of crimes under the Information Technology Act, 2000:**

Classification of Crimes



125. a. Mr. Avnish is liable for Hacking under section 66 (2) of the IT Act, 2000. Having secured unauthorized access to the computer system of Mr. Krishna Manohar, he also committed the offence of deleting, altering and destroying the confidential information existing in the computer of Mr. Krishna Manohar. Hence, Mr. Avnish is liable for imprisonment upto 3 years or fine up to Rs 2 Lakhs or both as prescribed under section 66 (2) of the IT Act, 2000.

The following table explains the nature of offence, penalty and the relevant provision applicable to the offence of hacking:

Hacking	Punishment	Section
Hacking with computer system causing wrongful loss or damage to public or any person. <ul style="list-style-type: none"> deleting, altering, destroying any information residing in the computer. 	Imprisonment up to 3 years or fine up to Rs.2 lakh or both.	66(02)

- b. Section 72 of the proposed amendments to the Information Technology Act, 2000 discusses the constituents of breach of confidentiality and privacy. It explains that if any person secures access to any electronic record, book, register, correspondence, information, document or other material without the consent of the person concerned intentionally discloses such material to any other person shall be punished with imprisonment for a term which may extend up to two years, or with fine which may extend to five lakh rupees or with both. The following table shows the relevant provision, punishment applicable to breach of confidentiality and privacy:

Breach of Confidentiality and Privacy	Punishment	Section
Securing access to electronic record disclosing electronic record/information documents.	Imprisonment upto 2 years or fine upto Rs. Five lakh or both. (as per the proposed amendments to the IT Act, 2000)	72

126. a. Section 4 of the Indian Contract Act, 1872 deals with the rule regarding completion of communication of acceptance. As per this Section, the communication of acceptance is complete *as against the offeree*, when it is put in a course of transmission to him so as to be the out of power of the acceptor. The Supreme Court in *Bhagwandas vs. Girdharilal* has held that Section 4 of Contract Act is only applicable in cases of non-instantaneous forms of communication and would not apply when instantaneous forms of communication are used. The contract is complete only at the end of the offeror when he received the acceptance to offer. The place of offeror where acceptance is received shall have jurisdiction for enforcement.

In the case of e-commerce acceptance is made via e-mail or by pressing the ‘Accept’ or ‘Buy’ icons. A contract through Internet is complete only when an acceptance is received at the end of the originator. E-mail contracts may be categorized under the non-instantaneous forms of communication. Though the sender receives an acknowledgement, it does not indicate whether the other party has the knowledge of the receipt. Thus the above rule enunciated in *Bhagwandas vs. Girdharilal*, would be applicable to e-mail contracts.

- b. **Validity of online contracts:** The validity and the formation of a contract forms the most important part of e-commerce law. The Indian Contract Act, 1872 gives a statutory effect to the basic common law contractual rule that a valid contract may be formed if it is made by free consent of the parties, competent to contract, for a lawful consideration and for a lawful object and which is not *void ab initio*. The contract Act does not prescribe or favour any particular way of communicating offer and acceptance. It may be done by word of mouth, writing or even by conduct. Thus, there is no requisite of writing for the validity of contracts except for cases,

which are specifically required by law to be in writing. It would appear that even in the absence of any specific legislation validating online contracts cannot be challenged solely on such technical grounds. Therefore, the IT Act avoids incorporating any specific provision giving validity to online contracts.

Competition and Consumer Protection

127. a. Mr. Ramesh can get a relief under the Consumer Protection Act, 1986 as Consumer Protection Act, 1986 includes construction service under the definition of service. Mr. Ramesh can file his complaint before the Consumer redressal forum alleging deficiency of Service.

The pecuniary jurisdiction of the Consumer Forums have been increased under the Consumer Protection Act, 1986 to lessen the burden of the appellate forums and henceforth,

- Under Section 11(1), the District Consumer Redressal Forum can entertain complaints where the value of goods or services and compensation claimed does not exceed a sum of Rs.20,00,000 (Twenty Lakhs).
- Similarly, under Section 17(1) the State Commission can entertain complaints where the value of goods or services and compensation claimed exceeds a sum of Rs.20,00,000 (Twenty Lakhs) but does not exceeds Rs.1,00,00,000 (One Crore).
- The National Commission is empowered to entertain only those complaints whose value exceeds Rs.1,00,00,000 (One Crore) as per Section 21(a)(i).

The place of residence or of carrying on business or where cause of action arose etc. will have a bearing on which State Commission the suit is instituted. Complaints against foreign concerns were admissible before the redressal agencies, even under the principal Act, if they had a branch office within the local jurisdiction of the agency.

- b. The salient features of the Consumer Protection Act, 1986 are summed up as under:
- The Act applies to all goods and services unless specifically exempted by the Central Government.
 - It covers all the sectors whether private, public or cooperative.
 - The provisions of the Act are compensatory in nature.
 - A provision for issue of interim orders by the redressal forums.
 - Power to issue punitive damages.
 - Recovery of compensation amount through a certificate in the same manner as arrears of land revenue.
 - Creation of benches of State and National Commissions.

128. a. Mr Sudesh can claim for the timely disposal of his consumer case under Section 13(3)(A) of the Consumer Protection Act, 1986.

Time-limit for disposal of cases: According to Section 13(3)(A), a complaint shall be decided within a period of *three months* from the date of receipt of notice by the opposite party where the complaint does not require analysis or testing of commodities and within five months if it requires analysis or testing of commodities. Before any sample of the goods is referred to any appropriate laboratory, the District, State or National Forum will ask the complainant to deposit fees to the credit of the Forum, for payment to the appropriate laboratory for carrying out the necessary analysis or test in relation to the goods in question. The amount will be remitted to the appropriate laboratory. A copy of the report will be forwarded to the opposite party. Objections in regard to the report may be made to the appropriate laboratory. Thereafter the complainant as well as the opposite party will be given opportunity of being heard as to the correctness or otherwise of the report. The National Commission and State Commissions are required to decide the appeal as far as possible, within 90 days from the first date of hearing.

- b. **Contents of a Complaint:** A complaint should contain the following information:
- The name, description and the address of the complainant.
 - The name, description and address of the opposite party or parties, as the case may be, as far as they can be ascertained.
 - The facts relating to complaint and when and where it arose.
 - Documents, if any, in support of the allegations contained in the complaint.
 - The relief which the complainant is seeking.

129. a. Concept of Consumer under Consumer Protection Act, 1986

A consumer is a user of goods and services. Any person paying for goods and services which he uses is entitled to expect that the goods and services are of a nature and quality promised to him by the seller. Consumers do not include persons who obtained goods and services for commercial purposes. The earlier distinction was that this qualification did not apply to consumers of services. This will no longer be the case. Even persons who avail of services for commercial purpose will fall outside the scope of consumers under the Act. Thus, the persons who buy goods or avail services for resale or for commercial purpose fall outside the scope of this Act. The purchase of magnetic crack detector by a limited company and the purchase of bearings were held to be purchased for commercial purpose (Act not applicable) while in *State Government of Maharashtra vs. Hindustan Computers Ltd.*, the purchase of photo-copying machine by State Government for complying with statutory provisions of photo-copying registered documents for public was held a purchase not for commercial purpose.

In view of the above Farhat can file the case.

b. **Meaning of Service under the Consumer Protection Act, 1986**

‘Service’ means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, finance, insurance, transport, processing, supply of electrical or other energy, boarding or lodging or both, housing construction, entertainment, amusement, medical care or the purveying of news or other information but does not include the rendering of any service free of charge or under a contract of personal service.

- 130. a.** Mr. Ravi can file an appeal against the decision of a District Forum before the State Commission, appeal against the decision of a State Commission can be filed before the National Commission and appeal against the orders of the National Commission can be filed before the Supreme Court. The time to file an appeal is within a period of thirty days.

No appeal by a person who is required to pay any amount in terms of an order of the District Forum, shall be entertained by the State Commission unless the appellant has deposited in the prescribed manner fifty percent of that amount or twenty five thousand rupees (thirty-five thousand in case of the National Commission and fifty thousand in case of the Supreme Court), whichever is less.

A careful reading of Section 17 allows the State Commission to entertain appeals against orders of the District Forum and the orders of the State Commission may be appealed against in the National Commission under Section 21 of the principal Act. Section 17(b) confers revision jurisdiction on the State Commissions. This is not its original jurisdiction and no appeal will lie against the orders passed under its revision jurisdiction. Section 19 only allows appeals to the National Commission from the exercise of its original jurisdiction of the State Commission. If the appeals are not filed within the prescribed time limit of 30 days from the date of the order, such order of the District Forum, State and National Commission becomes final (Section 23). There is no prescribed time limit for revision.

- b. Yes, there can be a further review of the said appeal before the National Commission.

Judicial Review by the National Commission. The National Commission is now empowered under Section 22(2) to review its own decision/order where there is a patent error. This power is limited to review errors apparent from the records and not all errors. There is no similar power to the District Forum or the State Commission. Further, according to Section 22 A, the National Commission can set aside its own *ex-parte* orders, where the aggrieved party has filed an application to set aside the order in the interests of justice. This power is conferred exclusively on the National Commission and hence any party aggrieved by the orders of the lower forums can only file an appeal against the order.

131. a. Mr. Mohan can get the interim order enforced passed by District Forum as per section 25 (1) and (2) of the Consumer Protection Act, 1986.

Enforcement of Interim Orders: Section 25(1) provides that where the interim orders of the Redressal Agencies are not complied with, the Forums may order attachment of the property of the person who has not complied with the order, which shall be effective for a period of three months. If the non-compliance continues, the property attached shall be sold and damages will be awarded to the complainant from out of the sale proceeds [Section 25(2)].

- b. **Service of Notice:** Section 28-A(2) has been inserted to overcome the difficulty caused by the opposite party when they try to avoid service of notice. The Section provides for service of notice by registered post, registered courier or even by fax and also implies service by e-mail. Section 28A(3) provides that where the acknowledgement or any other receipt purported to be signed by the opposite party is received by the Commission/Forum, notice will be declared to have been received by the opposite party. Further, the refusal to accept notice amounts to its due service. If the acknowledgement is lost or misplaced or not received by the Commission/Forum after the notice has been properly addressed, pre-paid and duly stamped, notice shall be deemed to be duly served.

132. a. The complaint is maintainable as the LPG distributor has indulged in restrictive trade practice of tie-up arrangement thus causing unfair competition. A tie-in arrangement includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods.

The following categories of unfair trade practices that were dealt by the MRTP Act are now dealt under the Competition Act. They are:

- Misleading advertisement and false representation emanating from statements made orally or in writing by the visual representation.
- Bargain sale or supply of goods or services that are not intended to be offered for sale or supply at the bargain price or for a period that is, and in quantities that are, reasonable having regard to the nature of the market in which the business is carried on, the nature and size of business and the nature of the advertisement.
- Offering of gifts, prizes etc., with the intention of not providing them as offered or creating the impression that something is being given or offered free of charge when it is fully or partly covered by the amount charged in the transaction as a whole.
- Conduct of any contest, lottery, game of chance or skill for the purpose of promoting directly or indirectly the sale, use or supply of any product or any business interest.
- Permitting the sale or supply of goods intended to be used or are of a kind likely to be used by consumers knowing or having reason to believe that the goods do not comply with the standards prescribed by competent authority relating to performance, composition, content, etc.
- Hoarding or destruction of goods, or refusal to sell the goods or to make them available for sale.

A representation containing a statement apparently correct may have the effect of misleading the buyer by using tricky language, similarly a statement which may be inaccurate in the technical literal sense can convey the truth and sometimes more effectively too than a literally correct statement. It is, therefore, necessary to examine whether the representation complained of contains any element of misleading the buyer. It is also to be examined that if any misleading act so found will make any impact on general public or a specific category. The position is to be viewed with objectivity in an uncongenial manner.

- b. The regulatory objectives of the Competition Law are intended to serve the
- Safety and stability of domestic markets.
 - Transparency of business practices.
 - Prevention of abusive practices.
 - Institutionalization of supervision over barriers to fair competition.
 - Sustained benefits to consumers.

Framework of Competition Act, 2002

The object of Competition Act, 2002 is to position the competition policy with pragmatic options to promote the spirit of competition and harmonize the conflicts caused by the volatility of globalized markets. The Act provides for a regulatory framework of rules covering the critical areas of competition namely:

- Anti-competitive agreements among enterprises.
- Abuse of dominant position in the market.
- Combinations/Mergers between enterprises.

Competition Act, 2002 aims at promoting free and fair competition in India and to protect the interests of consumers. The act provides for the establishment of a regulatory body called “Competition Commission of India” with the following basic functions:

- Administration and enforcement of law.
- Competition advocacy.

Competition Act, 2002 is a comprehensive enactment addressing contemporary concerns of competition and future possibilities that impact the sustainable economic development.

133. a. The type of sales undertaken by Bollywood is a restrictive trade practice and is forbidden by the Competition Act, 2002.

Meaning and definition of Restrictive Trade Practices: A restrictive trade practice is defined to mean a trade practice which has or may have the effect of preventing, distorting or restricting competition in any manner and particular

- i. which tends to obstruct the flow of capital or resources into the stream of production, or
- ii. this tends to bring about manipulation of prices or conditions of delivery or to affect the flow of supplies in the market relating to goods or services in such manner as to impose on the consumers unjustified costs of restrictions.

Thus, the trade practice which tends to obstruct the flow of capital or resources into the stream of production or to bring about manipulation of prices, or conditions of delivery or to affect flow of supplies of goods or services so as to impose unjustified cost or restrictions on consumers, is a restrictive trade practice.

- b. **Anticompetitive practices under the Competition Act**

Under the Act any agreement which is anticompetitive is void. It recognizes four kinds of anticompetitive agreements. An agreement entered into between enterprises or association of enterprises or persons or association of persons or between any

person and enterprise, including cartels, engaged in identical or similar trade of goods or provisions of services, which do the following:

- (a) directly or indirectly determines purchase or sale prices;
- (b) limits or controls production, supply, markets, technical development, investment or provision of services;
- (c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;
- (d) directly or indirectly results in bid rigging or collusive bidding.

However, the same shall not apply to a joint venture if the agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.

The following are examples of anticompetitive agreements that have been recognized under the Indian Act:

- (a) **Tie-in arrangement:** A tie-in arrangement includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods.
- (b) **Exclusive supply agreements:** It includes any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person.
- (c) **Exclusive distribution agreement:** It includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods.
- (d) **Refusal to deal:** It includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought.
- (e) **Resale price maintenance:** It includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.
- (f) **Bid rigging:** Bid rigging means an agreement between enterprises or persons engaged in identical or similar production or trading in goods or provisions of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.
- (g) **Predatory pricing:** It is the use of short-run price cutting in an effort to exclude rivals on a basis other than efficiency in order to gain or protect market power and as pricing so low that competitors quit rather than compete, permitting the predator to raise prices in the long run. Predatory pricing is “an investment in future monopoly, as sacrifice of today’s profits for tomorrows”.

Environment Protection and Business Obligations

134. a. In the given problem the industrial waste chemicals released in canal by Rama Fertilizers without conducting the process of cleaning, discoloured the ground water and put the residents living within the vicinity with many health problems, especially those residents who live very near to the canal. Rama Fertilizers act amounts to water pollution as it reduced the quality of ground water.

With an increase in the industries and progress made in the agricultural sector many unwanted chemicals and substances are being released into the water, decreasing the water quality, called as water pollution. The water pollutants can be classified into: Inorganic pollutants, Organic pollutants, Sediments and oils, Domestic waste, Industrial and agricultural waste and Fluorides.

Water Pollutants and their Effects

Class of Pollutant	Effect
A) Inorganic Pollutants: Salts, trace elements like copper, zinc, arsenic etc., metals coming out from chromium plating industry.	Affects humans and aquatic animals.
Metals and complex compounds.	Metals disturb the water system. Algae cannot grow properly in such surroundings. This decreases photosynthesis and increases air pollution indirectly.
Cyanides, hydrogen sulphides carbon dioxide, nitrogen dioxide and sulphites	Physical condition of the water varies and becomes toxic to aquatic animals.
Algal nutrients: Nutrients like carbon dioxide, hydrogen, oxygen, nitrogen, nitrates, phosphates, sulphates, and micro nutrients like boron, chlorine, copper, iron, manganese, vanadium, zinc, etc.	Eutrophication of the ponds cause excess growth of the algae and subsequently the ponds get dried up.
Heavy metals like lead and mercury.	Water becomes toxic.
Fluorides present in water.	Water cannot be used for drinking purposes; Bones and teeth of human beings also get affected.
B) Organic Pollutants: Waste coming from industries and agricultural fields.	Water becomes toxic.
C) Sewage, domestic and commercial food processing and industrial effluents.	Consumes dissolved oxygen.

- b. The causes of environmental pollution are broadly classified into natural causes and man-made causes.

Natural Causes

The natural causes of pollution include floods, cyclones, earthquakes, and molten lava from volcanoes. Since they are the agents of nature and the man has no control over them, they are known as the natural causes.

Man-made Causes

Man-made causes of pollution include population growth and industrialization, poverty and unhygienic settlements, urbanization, depleting natural resources and rising population, and deforestation etc.

Certain foreign substances pollute the atmosphere constantly, such as smoke and sulphur dioxide from industrial furnaces, domestic fires, and exhausts from motor vehicles including carbon monoxide, which at higher level of discharge can be fatal to man. Foreign particles in the atmosphere, act as nuclei for water vapor to condense resulting in haze, fog, thicker clouds and eventually precipitation in the form of hail or rain.

Population Growth: The earth is finite whereas the world population is infinite, hence a finite world cannot support infinite population. In other words natural resources shrink as people multiply, resulting in the increased demand for fuel, food, water, and pollution. Free air, space to live and healthy conditions of life. Increased population in the urban areas substantially contributes to the land, air, and water pollution resulting in poverty.

Urbanization: Rapid and unplanned urbanization due to the rapid population growth and unending migration of the poor from small towns and villages to the urban centers is another cause for pollution.

Industrialization: Industry is the axis to gear up the economy of the modern society. On the other side, it has been identified as the major source of environmental degradation and pollution. Industrialization poses a serious threat not only to human beings, but also to animals, aquatic life and vegetation cover. The following table depicts the effects of various kinds of pollution on the human being.

135. a. Miners have polluted the land by their mining operations, which they are conducting in the forest located in Himachal Pradesh, India. In the consequences, the natural habitats in the forests have got disturbed. Due to these mining operations the river water too has got polluted and many species got extinguished due to massive deforestation. Therefore the mining operations conducted in the forest amount to land pollution because the unbridled mining operations in hilly areas and for mining operations damage natural streams and pollute the streams' and render them unfit for drinking and agricultural purposes.

As land pollution means to divest the earth from its natural landscape through deforestation, denudation, and discharge of untreated toxic substances on the land. The contamination of land not only affects the natural environment on earth but also affects the quality and wholesomeness of underground water, which in turn affects the bird and animal kingdom. Unbridled mining operations in hilly areas and for mining operations damage natural streams and pollute the streams' and render them unfit for drinking and agricultural purposes. In addition to the slums and their unhygienic conditions dumping of garbage, bio-medical wastes and hazardous wastes from industries are the other biggest sources of land pollution.

- b. **Meaning of Environment:**

Life consists of five elements i.e., earth, water, air, ether and fire. These five elements also constitute environment. Thus 'environment' and 'life' are synonymous and are intermingled homogeneously. In today's world, man is concerned with the environment, as he spends most of his time in it. Hence, environmental pollution is a grave problem all over the world; making the study of environment mandatory.

The Environment may be defined as "our physical and biological system in which man and organisms live as a whole and these systems have many interacting capacities. These capacities of the environment generally include rocks, minerals, soil and water, its land and their forests and potential vegetation, its animal life and potentiality of livestock, husbandry, and its climate." According to Section 2(a) of the Environment (Protection) Act, 1986, "environment" includes water, air and land and the inter-relationship, which exists among and between water, air and land, and human beings, other living creatures, plants, micro-organisms and property. Keeping these in view, it can rightly be said that our environment consists of plants, animals, micro-organisms and non-living objects as water, air, light, soil and temperature present in the nature etc. Therefore, damage to any one of them damages the environment.

136. a. In the given problem waste material was collected from the city of Berhampur and dumped at an open place in the city and is left open to air. And the municipal authorities made no attempts to clear these waste materials. The act of dumping waste material open to air amounts to solid waste pollution.

Solid waste pollution: The problem of solid waste pollution is mainly faced by developed countries where collection of waste is costly affair due to higher labor charges. In developing countries this problem is not yet so serious as old junk, newspapers, books, tins, glass bottles, etc., are collected by rag pickers. For controlling the solid waste pollution, methods employed are – recycling, burning the waste and utilization of heat and by preparing manure and bio-gas by decomposing the organic matters.

- b. The environment can be better understood by dividing it into four segments. The environmental segments can be divided into Atmosphere, Hydrosphere, Lithosphere, and Biosphere. All these four segments of the environment help the living organisms in various ways to survive on the earth.

Atmosphere: The layer of the air present around the earth is called the atmosphere. It absorbs a portion of electromagnetic radiations coming from the Sun and transmits Ultra Violet (UV) rays. It plays an important role in maintaining the heat balance on the earth.

Hydrosphere: Water occupies four fifths of the earth surface and is called the hydrosphere. Out of this, 97% is present in the form of seawater and the remaining 3% is in the form of ice in the polar ice caps and only a small percentage of water is available for drinking, agriculture and other purposes. The growth and decline of the ancient civilizations were closely linked to the availability of water resources.

Lithosphere: Leaving hydrosphere the rest of the earth space, about one fifth of the total earth surface, is in the form of land. While the inner surface of the earth contains minerals, the deeper layer contains natural gas and oil. All these layers form the Lithosphere.

Biosphere: All living organisms like plants, animals and human beings constitute the biosphere. Biosphere and other segments of the environment are inter-related. For example, the levels of oxygen and carbon dioxide depend on the plants present in the biosphere.

137. a. In the given situation, at a marriage function, songs were played continuously for two days with loud speakers at high volume. By this act people living in surrounding areas had go through two sleepless nights. The act of the hosts of the marriage function amounts to sound pollution. The Constitution of India contains specific provisions for the environmental protection, which obligates the state as well as citizens to protect and improve the environment. Article 21 of the Indian Constitution confers right to life and personal liberty, which includes right to live in pollution free environment. Right to religion under the Indian Constitution does not include right to perform religious activities on loudspeaker and electronic goods, which produce high velocity of noise.

Sound pollution: Sound is a form of energy, measured in decibels (dB). Sounds from industrial estates, airports, railway stations, road traffic, and sound systems used for public meetings and functions are responsible for sound pollution. Human ear can tolerate a certain range of sound (60 dB), whereas if it exceeds the limit, the sensitivity of the ear is lost. Therefore, when the sound exceeds 60 dB it is identified as Noise. Causes of noise pollution can be divided into two categories –

Natural causes – Noise Pollution is caused by air, volcanoes, seas, rivers, voices of living organisms including man and mammals, rustling of trees, etc.

Man-made causes – Noise from machines and modern equipment of various types, automobiles, trains, aero planes, religious and social functions, construction works, loudspeakers, household gadgets, type machines, etc.

Noise pollution is identified as slow killer as it affects human beings causing disturbance in sleep pattern, communication, mental and physical health and restlessness. It all cumulatively affects the longevity and efficiency of a man.

- b. **The Common Law Remedies**

The common law offers various remedies, which will be sought by the plaintiff depending upon the particular circumstances of each case, as given below:

- **Damages:** The object of damages in the law of tort is to put the plaintiff into the position he would have been in, had the harm or damage not happened. This is particularly difficult to calculate in relation to an environmental damage, because it is often the case that the cost of environmental damage can never be calculated for many years, as clean up may take several years or

the damage can never be fully rectified. The most common form of damages to be awarded by the courts are compensatory damages, where the plaintiff is compensated for any loss that has been suffered.

- **Injunction:** In addition, or as an alternative to damages, the plaintiff may seek an injunction. An injunction allows the court to require the defendant to discontinue the operation, which is causing the damage. Injunctions can be mandatory in which case the court will order the defendant to 'undo' the wrongful act. Whereas in case of a prohibitory injunction the defendant is ordered not to commit a wrongful act. The plaintiff may apply for an interim or interlocutory injunction, which would prevent the offending action being continued pending the arrangements of a full hearing.
- **Abatement:** Under the common law, abatement is known as a self-help remedy, because an occupier of the land affected may take action to abate the damage.

138. a. In *Rylands vs. Fletcher case*, the defendant got a reservoir constructed, through independent contractors, over his land for providing water to his mill. There were old disused shafts under the site of the reservoir, which the contractors failed to observe and so did not block them. When the water was filled in the reservoir, it burst through the shafts and flooded the plaintiff's coalmines on the adjoining land. The defendants did not know of the shafts and had not been negligent although the independent contractors had been. Even though the defendants had not been negligent, they were held liable on the basis of the rule laid down in this case. The rule is: If a person brings on his land anything which is likely to do mischief if it escapes, he will be prima facie answerable for the damage caused by its escape though he had not been negligent. The rule is applicable not only when there has been collection of water, it applies to gas, electricity, vibration, yew trees, sewages, explosives, noxious fumes and rusty wire.

For the application of the rule, there must be:

Dangerous thing: The thing collected should be capable of doing mischief by escape. The rule has been applied to water, gas, electricity, poisonous trees, sewages, explosives, noxious fumes and rusty wire.

Escape: If the damage is caused within the premises when the defendant had collected the thing, the liability under the rule does not arise.

Non-natural use of land: Collection of water in such a big quantity in *Rylands vs. Fletcher* was held to be a non-natural use of land. Keeping water for domestic purpose is a natural use. Fire in a house in a grate is an ordinary, natural, proper, everyday use of the fireplace in the room and if this fire spreads to the adjoining premises, the liability under the rule cannot arise.

- b. **Exceptions to the Rule of Strict Liability**

Plaintiff's own default: Damage caused by the escape due to the plaintiff's own default was considered to be a good defence in *Rylands vs. Fletcher* itself.

Act of God: If the escape has been unforeseen and because of supernatural forces without any human intervention and the damage due to the escape cannot be avoided in spite of the reasonable care, the defence of act of God can be pleaded. If the embankments of ornamental lakes give way due to extraordinary rainfall, the person so collecting the water would not be liable under the rule.

Consent of the plaintiff: In case of *volenti non fit injuria*, i.e., where the plaintiff has consented to the accumulation of the dangerous thing on the defendant's land, the liability under the rule does not arise. Such consent is implied where the source of danger is for the common benefit of both the plaintiff and the defendant.

Act of third party: If the harm has been caused due to the act of a stranger, who is neither the defendant's servant or agent nor the defendant has any control over him, the defendant will not be liable under the rule.

Statutory Authority: An act done under the authority of a statute is also a defence when an action under the rule in *Rylands vs. Fletcher* is brought.

139. a. The liability of the Polluter, under the law of tort is one of the major and oldest legal remedies to abate pollution. The most important tortious liabilities for environmental pollution are Nuisance, Trespass, Negligence and Strict Liability. In addition to these categories, the Supreme Court of India has added a new class based on the principle of Absolute Liability. The principle of Absolute Liability was developed by the Supreme Court in the post Bhopal Gas Tragedy period in response to the spread of hazardous industries and was later adopted by the Legislature. Under each one of the rules the liability of the defendant is 'no-fault' liability. Such liability can arise even if the defendant is not at fault, i.e., he may not be negligent, or he does not cause the harm intentionally or even if he has taken care to see that his act does not cause any harm.

The Rule of Strict liability appeared to be failing in its application for its exceptions and hence was not considered being a fit rule to be applied in the conditions prevailing today, in India. The Supreme Court in *M.C. Mehta vs. Union of India* (1987) recognized another rule – Rule of Absolute Liability in which the liability was absolute, more stringent than that under the Strict Liability rule, and also not subject to the exceptions to the rule in *Rylands vs. Fletcher*.

In the given situation the industry, which manufactures plastic items burnt its waste products outside the city, far away from the residential area. Nevertheless the gases released in the process and caused a noxious atmosphere in the residential areas. People living in the residential area filed case against owners of the industry. Though there was no negligence on part of the owners of the industry, they are liable under the principle of absolute liability, as it has affected their health and the area where they live. This principle of liability arose through the decision of Supreme Court in *MC Mehta vs. Union of India*, where the industry cannot take any defence for their act.

- b. *M.C. Mehta vs. Union of India* case is also known as oleum gas leakage case. In this case there was a leakage of oleum gas from one of the units of Shriram Food Fertilizer Industries in the city of Delhi, on 4th and 6th December, 1985, resulting in the death of an advocate and all the ill effects were felt by several other persons. There was a claim of compensation through a writ petition filed in the Supreme Court by way of public interest litigation. It was in the mind of the Court that just a year earlier, there was a disaster in Bhopal when MIC gas had leaked from one of the plants belonging to the Union Carbide, resulting in the death of at least 3,000 persons and various kinds of ailments, generally serious, to lacs of others. The Court found that such victims could not be provided relief by applying the rule of Strict Liability laid down in *Ryland vs. Fletcher*. This was so, mainly because of the various exceptions to that rule, whereby the defendant could avoid his liability. For instance, when the escape of gas was due to the act of a stranger, say, it was a case of sabotage, the defendant was not liable under that rule. In this background, the Supreme Court held that it was not bound by the rule of English law formulated in a different context in the 19th century, and evolved a new rule, the rule of 'Absolute Liability'. According to this rule, when an enterprise is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of people, it owes an absolute and non-delegable duty to ensure that no harm results to anyone from such activity. If the harm results to anyone due to such activity, the enterprise must be absolutely liable to compensate for such harm and should not be allowed to avoid liability by pleading that it was not negligent. It was further held that the rule of Absolute Liability is not subject to any of the exceptions to the rule in *Ryland vs. Fletcher*. Since the payment of compensation could be awarded by the filing of a suit in an appropriate Court rather than through a writ petition, the Supreme Court directed that those organizations, who had filed this petition, may file actions on behalf of the sufferers of the leakage of Oleum gas, in the appropriate Court within 2 months and claim compensation on their behalf.

140. a. In the given situation, people living in Rajiv Gandhi colony are suffering from several diseases like skin diseases, lung infections, migraine etc., because of the hazardous substances released by the Dolly Ltd. Pharmaceutical company situated in the vicinity of colony. Aggrieved colony people can complain against pharmaceutical company to state pollution control committee under the Hazardous Waste Management Rules, 1989

The Hazardous Wastes (Management and Handling) Rules, 1989: The Hazardous Waste Management Rules, 1989 provide for the control of generation, collection, treatment, transport, import, storage and disposal of wastes listed in the schedule annexed to these rules. The rules are implemented through the State Pollution Control Boards and Pollution Control Committees in the states and union territories.

Besides these rules, in 1991, the Ministry of Environment and Forests, issued Guidelines for Management and Handling of Hazardous Wastes for (a) generators of waste, (b) transport of hazardous waste, and (c) owners/operators of hazardous waste storage, treatment and disposal facilities. These guidelines also provide for the mechanisms for the development of a reporting system for the movement of hazardous waste and the procedures for the closure and post-closure requirements for landfills.

- b. One of the most pressing global issues is the predominance of national and multinational corporations in economic transactions and their accountability resulting in environmental pollution. In this context, the development of corporate criminal liability, which is a multi-dimensional issue, has become a problem, being handled by a growing number of prosecutors and courts. Indian Penal Code, 1860 identifies various acts affecting environment as offences. Relevant Provisions of the Code, which protect environment are:

Public Nuisance (Section 268): When a person is guilty of an act or is guilty of an illegal omission causing any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which necessarily causes injury, obstruction, danger or annoyance to persons who has occasion to use public right.

Negligent act likely to spread infection of disease dangerous to life (Section 269): Whoever unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Malignant act likely to spread infection of disease dangerous to life (Section 270): Whoever maliciously does any act which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Fouling water of public spring or reservoir (Section 277): Whoever voluntarily corrupts or fouls the water of any public spring or reservoir, so as to render it less fit for the purpose for which it is ordinarily used, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

Making atmosphere noxious to health (Section 278): Whoever voluntarily vitiates the atmosphere in any place so as to make it noxious to the health of persons in general dwelling or carrying on business in the neighborhood or passing along a public way, shall be punished with fine which may extend to five hundred rupees.

Negligent conduct with respect to poisonous substance (Section 284): Whoever does, with any poisonous substance, any act in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any person, or knowingly or negligently omits to take such order with any poisonous substance in

his possession as is sufficient to guard against any probable danger to human life from such poisonous substance, shall be punished with imprisonment of either description for a term which may extend to six months or with fine which may extend to one thousand rupees, or with both.

Negligent conduct with respect to fire or combustible matter (Section 285):

Whoever does, with fire or any combustible matter, any act so rashly or negligently as to endanger human life or to be likely to cause hurt or injury to any other person, or knowingly or negligently omits to take such order with any fire or any combustible matter in his possession as is sufficient to guard against any probable danger to human life from such fire or combustible matter, shall be punished with imprisonment of either description for a term which may extend to six months or with fine which may extend to one thousand rupees, or with both.

Negligent conduct with respect to explosive substance (Section 286):

Whoever does, with any explosive substance, any act so rashly or negligently as to endanger human life, or to be likely to cause hurt or injury to any other person, or knowingly or negligently omits to take such order with any explosive substance in his possession as is sufficient to guard against any probable danger to human life from that substance, shall be punished with imprisonment, of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

141. a. The Indian Constitution contains specific provisions for the environmental protection. The chapters on Directive Principles of State Policy and Fundamental Duties explicitly enunciate the national commitment to protect and improve the environment. Judicial interpretation has strengthened this constitutional mandate. The Constitution of India reflects the humanitarian approach to environment protection through various constitutional mandates. The Constitution of India obligates the State as well citizens to protect and improve the environment. Some of the Articles dealing with environmental protection are:

Article 19(1)(g): Right to practice any profession, or to carry on any occupation, trade or business.

Article 21: Right to life and personal liberty, which includes – right to live from pollution free water and air. Right to live and personal liberty includes right to live with dignity in a clean environment.

Article 47: Imposes duty on the state to raise the level of nutrition and standard of living and to improve public health. The state and the instrumentalities are duty bound to protect and improve the environment including forests, lakes and rivers.

Article 48A: Protection and improvement of the environment and the safeguard of forests and wildlife.

Article 51A(g): To protect and improve the natural environment including forests, lakes, rivers, and wildlife, and to have compassion for living creatures.

Apart from this, the Constitution of India has provided certain remedies under Article 32 (Right to move Supreme Court) and Article 226 (Right to move High Court) by appropriate proceedings for the enforcement of the rights conferred.

- b. Environmental problems are complex, not only in their causes and effects, but also in how they relate to each other. There has been a growing awareness of environmental issues and the need to preserve and protect the environment from the scourge of pollution both at the national and international level. The environmental protection legislations dates back to 1970's, when the Government of India drew immense inspiration from the proclamation adopted by the United Nation's Conference on the Human Environment (Stockholm), 1972 and enacted various constitutional and legislative provisions to prevent and control the pollution of various kinds. Some of the special legislations are:

The Water (Prevention and Control of Pollution) Act, 1974: The Water (Prevention and Control of Pollution) Act, 1974 was enacted for the purpose of prevention and control of the pollution of water and for the maintenance or restoration of wholesomeness of water through the establishment of water boards.

The Air (Prevention and Control of Pollution) Act, 1981: The Air (Prevention and Control of Pollution) Act, 1981, was enacted with a view to implement the decisions of the United Nations Conference on Human Environment, Stockholm, 1972, under Article 253 of the Constitution of India. Hence, through the Act it was decided to take appropriate steps for the preservation of the natural resources of the earth, which among other things, include the preservation of the quality of the air.

Forest Conservation Act, 1980: In 1980, with the passage of the Forest Conservation Act, the central government reasserted its partial control over forest-based resources.

The Wild Life (Protection) Act, 1972: The Wild Life (Protection) Act, 1972 provides the statutory framework for protecting wild animals, plants and their habitats. The Act adopts a two-pronged conservation strategy: specified endangered species are protected regardless of location, and all species are protected in designated areas, called sanctuaries and national parks. The Act provides for the establishment of wildlife advisory boards and the appointment of wildlife wardens and other staff to implement the Act.

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Alternative Dispute Resolution

142. a. In the given problem A is a contractor. B is a public undertaking company, which issued an advertisement inviting tenders for the construction of the servants' quarters. Both of them want to resolve their future disputes by non-judicial determination. Both the parties can resolve their future disputes by adopting "alternative dispute resolution."

The term "alternative dispute resolution" is defined as a "collective description of methods of resolving disputes otherwise than through the normal trial process." In practice, however, references to ADR are usually understood as being references to some form of mediation by a third party."

There is a large number of tribunals under different statutes working in India for settling various types of disputes such as labor disputes, service matters, consumer protection, taxation, excise, motor accidents etc. In addition, there are also Lok Adalats functioning under the Legal Services Authorities Act, 1987. The proceedings of all these tribunals would fall within the description ADR.

Divergent to the dispensation of justice through the state sponsored courts, some judicial systems in the world facilitate litigants to negotiate, conciliate, mediate, or arbitrate. Internationally, the ADR movement has made rapid strides in legal arena of both developed and developing countries.

The most commonly known dispute resolution methods are:

- Arbitration
- Conciliation
- Mediation
- Negotiation.

b. **Advantages of ADR**

Dispute resolution through ADR mechanism is generally faster and less expensive. The disputants, rather than being run by lawyers, judges, and the state base it on more direct participation. In most ADR processes, the disputants outline the process they will use and define the substance of the agreements. This type of involvement is believed to increase people's satisfaction with the outcomes, as well as their compliance with the agreements reached. Most ADR processes are based on an integrative approach. They are more cooperative and less competitive than adversarial court-based methods like litigation. For this reason, ADR tends to generate less ill will between parties.

In fact, participating in an ADR process will often ultimately improve, rather than worsen, the relationship between the disputing parties. This is a key advantage in situations where the parties must continue to interact after the settlement is reached.

Disadvantages of ADR

Critics of ADR mechanism have concerns about the legitimacy of ADR outcomes, charging that ADR provides "second-class justice."

Some critics believe that ADR encourages compromise. Compromise can be a good way to settle some disputes, but it is not appropriate for others. In serious justice conflicts and cases of intolerable moral difference, compromise is simply not an option because the issues mean too much to the disputants.

ADR settlements are private and are not in the public record or exposed to public scrutiny. This could be a cause for concern in some cases.

143. a. **Definition of Arbitration**

As per Section 2(1) (a) of the Act, "arbitration" means any arbitration whether or not administered by the permanent arbitral institution.

Arbitration tends to be less formal and quicker than going to the courts. The arbitrator makes the decision based on the facts of the case, contractual obligations between the people, and the applicable law. There is transparency in the award of the arbitrator because the arbitrator will explain as to how and why he arrived at such a decision. The award of arbitrators may or may not be final too. If the parties are not happy then the award can be subjected to review by a court on some limited grounds.

Arbitration, like litigation, views the dispute as a legal analysis and seeks a solution based on entitlement and rights. By its very nature, arbitration may ignore the interests and needs of an individual party. The benefits of arbitration include its confidentiality, flexibility, speed and the expertise of many arbitrators. It is usually, but not always, cheaper than court.

'Arbitrate', 'Arbitrator' and 'Arbitration' etymologically or literally mean 'to decide', 'decision-maker or judge' and 'decision-making process' respectively. Arbitration has a statutory basis, which is not a common feature of all ADR methods. (Others include Family mediation and tribunals). Nevertheless, the Civil Procedure Code promotes ADR.

Types of Arbitration

- Domestic Arbitration,
- International Arbitration,
- Ad hoc Arbitration,
- Institutional Arbitration,
- Statutory Arbitration,
- Expedited Arbitration,

- Hybrid Arbitrations,
 - Flip-flop Arbitration.
- b. Broadly, all disputes involving Civil Rights, which fall within the jurisdiction of Civil Courts, are referable to Arbitration. There are, however, certain exceptions. Disputes involving the question of morality, public policy, status and religious rights are beyond the Arbitration proceedings. Hence, no Arbitration agreement can validly be executed which calls for adjudication of the following matters:
- (a) Matrimonial matters and matters connected with conjugal rights.
 - (b) Industrial Disputes and Revenue matters.
 - (c) Testamentary matters under Succession Act.
 - (d) Insolvency, Dissolution and Winding up Proceedings under Companies Act.
 - (e) Criminal proceedings.
 - (f) Matters under Indian Trust Act, Trusteeship of Charitable Institutions, Public charity, matters falling within the purview of Monopolies and Restrictive Trade Practices Act.
 - (g) Determination of guardianship or Wards.

The above examples are not exhaustive and a reference to Section 24 of Indian Contract Act, 1872 would be necessary.

In the given problem, Sarita and Rakesh were wife and husband. Within few months of their marriage, their relation got strained. Hence they decided to submit their dispute to arbitration. Basing on the above explanation though the dispute between them is of civil nature, they cannot refer their dispute to arbitration, as the matrimonial matters are one of those matters, which cannot be adjudicated by arbitration proceedings.

144. a. Arbitration Agreement

Arbitration agreement has been defined in Section 7 of the Arbitration and Conciliation Act, 1996 as an agreement by the parties (two disputants) to submit to arbitration all or certain of the disputes which have arisen or which may arise in future between them with regard to a defined legal relationship, whether contractual or not. The nature of such an agreement would be voluntary and, however, it does not matter whether such dispute is a present one or pertaining to a future dispute. However it is expected that an arbitration agreement is to be made with specific clauses, but no particular form of arbitration agreement is prescribed under the Act. Thus, an arbitration agreement may be in the form of an arbitration clause in a contract, or in the form of a separate agreement.

The terms of an arbitration agreement, which must be very clear and specific, may be, in the form of clauses and expression used in an arbitration agreement: such as “arbitrator”, “arbitration” and “arbitral tribunal” should be incorporated or be definitive. (Section 7 (2-5)).

- b. In the given problem Kailash & Co. was a manufacturer of toys and Mohit & Co. were distributors. Mohit & Co. entered into an agreement for the distribution of Kailash & Co. products. In their agreement they incorporated arbitration clause, to submit their future dispute to arbitration. The Arbitration and Conciliation Act, 1996 allows the parties to incorporate arbitration clause in their formal agreement instead of entering into separate arbitration agreement. Therefore it is valid if they have agreed upon in their agreement, though not in a separate agreement.

Arbitration Clauses

The parties to a contract may either enter into a separate arbitration agreement or may agree upon an arbitration clause, in the main contract/agreement itself. Generally, the latter course is adopted by most of the parties. Arbitration clause in an

agreement between the parties and is the starting point for an arbitration. An arbitration agreement may be contained in the document evidencing the legal relationship or in the form of a separate agreement. The agreement to submit a matter to the decision of a person will amount to an arbitration agreement when the parties so submitting intend, that a third person should decide it after hearing them and considering the evidence led and submitted by them. No particular form is necessary for an agreement to constitute an arbitration agreement. It is sufficient that the terms are reduced in writing. Such an agreement need not be a formal document. However, it is necessary to establish that the parties had an intention to resort to arbitration for the settlement of their disputes. Every arbitration agreement must be liberally constructed so as to give effect to the intention of the parties.

145. a. In the given set of facts, 'A', a producer of a film and B a distributor entered into a contract for the distribution of the company. A wants to resolve their future disputes to arbitration, whereas B expressed his willingness but did not sign this agreement. According to the Arbitration and Conciliation Act, 1996 it is not necessary that both the parties to the agreement should sign for arbitration agreement. If the parties do not object about the content then it can be held valid.

Arbitration Agreement – Not necessarily to be signed by Both the Parties

Section 2 (a) of the Arbitration and Conciliation Act, 1996 provides that an agreement in writing means that the terms of an agreement should be expressed in writing and the agreement should be such that it binds both the parties and that the actual signatures of both the parties on the arbitration agreement are not essential.

As per Section 7(4) of the Arbitration and Conciliation Act, 1996 a document, namely an arbitration agreement should be signed by the parties. However, after the plain reading of Section 7(4) (b) to (c), it is clear that it is not necessary that both the parties should in all cases sign the arbitration agreement between the parties. It is not a condition of an effective arbitration agreement that it must be incorporated in a formal agreement executed by both the parties thereto, nor is it required to be signed by the parties. A document signed by one party and accepted by the other is enough for the purpose of forming an agreement.

- b. **Legal Attributes of the Arbitration Agreement**

Agreement: The arbitration can be only by an agreement in writing between the parties. Arbitration can be by a sole arbitrator or by three or more persons. But if it is not by a sole arbitrator, it shall be by an uneven number of members, such as three, five, seven etc. Arbitrators can be named in the agreement itself or nominated in accordance with the provisions of the contract after the disputes have arisen.

Legal Validity: An arbitration agreement as mentioned above, being an agreement, must be legally valid in accordance with Section 10 of the Contract Act. The said section reads thus: "All the agreements are contracts, if they are made by the free consent of parties competent to contract, for a lawful consideration and a lawful object, and are not expressly declared to be void."

Evincing Interest to Refer Disputes: The arbitration agreement must have an agreement to refer the dispute to arbitration. An agreement is not a mental state but an act and as an act it is a matter of inference from the contract. The parties are to be judged not by what is in their mind but what they have said, written or done behind all forms of contracts, wherein no doubt lies behind the basic idea of assent. Assent, again involves the question of intention which again, is not purely subjective but objective.

Law and Place Applicable: In the case of international arbitration, the arbitration clause should provide the place of arbitration and substantive law applicable to the contract. When they are not provided in the clause, the parties to the contract may agree to a place of arbitration failing which it shall be decided by the arbitrator(s).

146. a. “Conciliation” means bringing the opposing parties or individuals into an undisputed territory of harmony. The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role.

The conciliator may:

- advise or determine the process of conciliation whereby resolution is attempted,
- make suggestions for terms of settlement,
- give expert advice on likely settlement terms, and
- actively encourage the participants to reach an agreement.

Halsbury’s Laws of England defined the term ‘conciliation’ as “Conciliation is a process of persuading parties to reach an agreement, and is plainly not arbitration, nor is the Chairman of a Conciliation Board an arbitrator.”

Conciliation proceedings shall have to commence before any steps are taken for the appointment of arbitrators. After the appointment of arbitrators there is no question of appointing conciliators.

Though, Sections 61 to 81 of the Arbitration and Conciliation Act, 1996 (Part – III) deals with the provisions pertaining to conciliation, the term ‘Conciliation’ under the Arbitration and Conciliation Act, 1996 is not specifically defined. The word conciliation which is widely applicable in the law of arbitration connotes that conciliation is one of the mechanisms that has to be adopted in reaching early settlements.

Conciliation is one of the mechanisms of ADR. Characteristics of conciliation are manifold such as the following:

- Conciliation need not be contractual or based on or controlled by any prior agreements between parties,
- Two willing parties can at any stage resolve a dispute in the presence of a conciliator,
- Conciliation can be resorted to, at any stage i.e. even after the parties resort to litigation, and
- It is most useful to persons whose cases have been pending in courts for years together.

b. **Procedure to be adopted by the conciliator**

- (i) The Conciliator, when appointed may request each party to submit a statement, setting out the general nature of the dispute and the points at issue. Copy to be given to the other party. If necessary the parties may be asked to submit further written statement and other evidence.
- (ii) The Conciliator shall assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement.
- (iii) The Conciliator is to be guided by the principles of objectivity, fairness and justice. He is to give consideration to the following matters –
 - (a) rights and obligations of the parties;
 - (b) trade usage; and
 - (c) circumstances surrounding the dispute, including previous business practice between the parties.
- (iv) He may, at any stage, propose a settlement even orally, and without stating the reasons for the proposal.

- (v) He may invite the parties for discussion or communicate with them jointly or separately.
- (vi) Parties themselves must, in good faith, co-operate with the conciliator and supply the needed written material provide evidence and attend meetings.
- (vii) If the conciliator finds that there exist elements of a settlement, which may be acceptable to the parties, then he shall formulate the terms of possible settlement and submit the same to the parties for their observation.
- (viii) On receipt of the observations of the parties, the conciliator may re-formulate the terms of a possible settlement in the light of such observation.
- (ix) If ultimately a settlement is reached, then the parties may draw and sign a written settlement agreement. At their request the conciliator can help them in drawing up the same.

147. a. In the given situation, M/s Kawalji Enterprises and M/s Sunil Enterprises submit their dispute to conciliation and accept the terms of settlement proposed by the conciliator. The settlement agreement through the conciliation has same effect of arbitration agreement under the Arbitration and Conciliation Act, 1996.

Legal Effect

- (a) The settlement signed by the parties shall be final and binding on the parties. (Section 73 (3))
- (b) The agreement is to be authenticated by the Conciliator. (Section 73 (4))
- (c) The Settlement agreement has the same status and effect, as if it were an arbitral award rendered by the arbitral tribunal on the agreed terms (Section 74 read with Section 30).

b. **Conciliator not to act as Arbitrator or Counsel**

Unless otherwise agreed by the parties, the conciliator cannot act as an arbitrator representative or counsel in any arbitral or judicial proceedings in respect of conciliated dispute. Nor can he be presented by any party as a witness in such proceedings. [Section 80 (a) and (b)]

c. **Commencement of conciliation and the procedure for appointment of a conciliator:**

A party initiating conciliation, can under section 62 of the Act of 1996 sends to the other party a written invitation to conciliation. Conciliation commences when the other party accepts in writing this invitation. If it does not accept it, then there will be no conciliation.

Number of conciliators can be appointed

As per Sections 63 to 64(1) of the Act of 1996,

- (a) There will be only one conciliator, unless the parties agree to two or more persons to be conciliators.
- (b) Where there are two or three conciliators, then as a rule they ought to act jointly.
- (c) Where there is only one conciliator the parties may agree on his name.
- (d) Where there are two conciliators, each party may appoint one conciliator.
- (e) Where there are three conciliators, each party may appoint one, and the parties may agree on the name of the third conciliator who shall act as the presiding conciliator.
- (f) But in each of the above cases, the parties may enlist the assistance of a suitable institution or person.

Institutional Assistance in Securing the Conciliator

- (a) The parties may enlist the assistance of a suitable institution of person regarding the appointment of conciliator. The institution may be requested to recommend or to directly appoint the conciliator of conciliators.
 - (b) In recommending such appointment, the institutions shall have due regard to the considerations likely to secure an independent and impartial conciliator.
 - (c) In the case of a sole conciliator, the appointing institution shall take into account the advisability of appointing a conciliator other than the one having the nationality of the parties in international agreements.
148. a. Kisan and Aditya referred their business disputes to conciliation. However, during the pendency of the conciliation proceedings, both the parties felt that their dispute could not be solved by conciliation; hence they decided to get their matter settled in the court. Usually parties, during pendency of conciliation proceedings cannot refer the matter to the other adjudicating proceedings but in exceptional cases they can do for preserving their rights and interests. Such proceedings are known as parallel proceedings.

Parallel Proceedings

During the pendency of conciliation proceedings, a party is debarred from initiating arbitral or judicial proceedings on the same dispute, except such proceedings as are necessary for preserving his rights. By implication, there is no bar for continuing any judicial or arbitral proceedings, which were initiated already pending settlement in the conciliation proceedings.

- b. **Disclosure and Confidentiality**
 - (a) Factual information received by the conciliator from one party should be disclosed to the other party, so that the other party can present his explanation, if he so desires. But information given on the conditions of confidentiality cannot be so disclosed.
 - (b) Notwithstanding anything contained in any other law for the time being in force, the conciliator and a party shall keep confidential all matters relating to the conciliation proceedings. This obligation extends also to the settlement agreement, except where disclosure is necessary for its implementation and enforcement. (Section 75)
- c. **Cost and Deposit**

The conciliator may direct each party to deposit an equal amount as an advance to meet the costs of conciliation proceedings including additional deposit during the course of conciliation proceedings. However, the conciliator shall render full account for the advance received at the conclusion of the conciliation proceedings and refund any unspent amount to the parties equally.

Part III: Applied Theory (Questions)

1. Explain the meaning and purpose of Law. Write about the sources of Law.
2. Distinguish a Tort from both a Contract and a Crime.
3. What are the general conditions of liability in a Tort? Explain the maxims *Injuria Sine Damnum* and *Damnum sine injuria*.
4. What do you mean by National Law? Bring out the nature and importance of International Law.
5. Discuss the factors influencing the rules and regulations formulated by different nations on International Trade. Mention the instruments of trade policies.
6. Discuss the role of World Trade Organization (WTO) in international trade and emphasize its principles and objectives.
7. Discuss briefly the classification of the Courts in India.
8. What are the legal rules that need to be followed to constitute a valid offer? Explain the grounds on which there can be the termination of an offer.
9. Discuss the law relating to contracts by persons of unsound mind.
10. Define consideration. Discuss the general rules of consideration and their exceptions as applicable under the Indian Contract Act, 1872.
11. Under the Indian Contract Act, the parties are said to agree upon the same thing in the same sense. Discuss the concept of free consent as an essential ingredient to a contract.
12. What do you mean by a suit for specific performance of contract and a suit for Quantum Meruit?
13. Discuss the different kinds of damages that can be granted by the Court for a breach of contract.
14. What are the essentials for the creation of a Contract of Agency? Elucidate the different kinds of Implied Agency.
15. Discuss the rights and duties of a Principal in a Contract of Agency.
16. Define a contract of guarantee. What are the different types of guarantee? How can the contract of guarantee be revoked?
17. Explain the liability of surety. How is a surety discharged from his liability in a contract of guarantee?
18. What is a Bank Guarantee? Distinguish a Bank Guarantee from an Ordinary Guarantee.
19. What are the features of a Letter of Credit? How do the parties to a letter of credit use these letters of credit during the conduct of business?
20. What is the meaning of the word 'lien'? What are the different kinds of lien?
21. Discuss the clauses relating to data privacy, confidentiality, non-disclosure and indemnification in an employment contract.
22. Discuss the meaning and features of Sole Proprietorship. What are the merits and limitations of a Sole Proprietorship concern?

23. Explain in detail the law relating to the formation and membership of a Cooperative Society. What are the requirements that need to be fulfilled to register a Cooperative Society?
24. Briefly explain the characteristic features of a Partnership firm. How is a Partnership Firm different from a Company?
25. Discuss the salient features of a Limited Liability Partnership (LLP)
26. Enunciate the meaning and features of Hindu Undivided Family. Distinguish between a Hindu Undivided Family and a Company.
27. Write a detailed note on the Non-Governmental Organization as a Society and as a Trust.
28. Elucidate the concept and features of Non-Profit Company and describe the registration formalities of a Non-Profit Company.
29. Define the term 'Insolvent' and discuss the acts and consequences of insolvency.
30. Elucidate the law relating to insolvency proceedings and its implications.
31. Discuss the meaning and nature of Corporate Entity and the characteristic features of a Company.
32. What do you mean by 'Lifting the Corporate Veil'? Explain the statutory provisions pertaining to the lifting of the corporate veil.
33. Define a Company. What are the different types of Companies?
34. How can a Private Company be formed? Discuss the features of a Private Company.
35. Explain the modes of converting a Private Company into a Public Company.
36. 'Prospectus is a tool for raising the capital from the Public'. Discuss.
37. Explain the duties and liabilities of a director under the Companies Act, 1956.
38. Write a note on the criminal liability of a director under the Companies Act, 1956.
39. Explain the different kinds of meetings that a company can conduct under the Companies Act, 1956.
40. When can a company be wound up as per the provisions of the Companies Act, 1956?
41. Differentiate between a sale and an agreement to sell under the Sale of Goods Act, 1930.
42. Discuss the rights and duties of a buyer under the Sale of Goods Act, 1930.
43. What are the rights of an unpaid seller against the goods under the Sale of Goods Act, 1930?
44. Define mortgage. Explain the essential elements of a mortgage.
45. Explain the different kinds of mortgage.
46. Explain the nature, ingredients and contents of a hire-purchase agreement.
47. Explain the essential elements of a lease.
48. Explain the meaning, definition and essentials of a valid exchange.
49. Elucidate the essentials of a gift under the Transfer of Property Act, 1882.
50. Explain the concept of Gift. How can the transfer of property by way of gift be revoked?
51. Discuss the classification of Intellectual Property Rights.

Legal Environment of Business

52. Discuss the nature of Copyrights. What are the offences and civil remedies that are provided under the Copyright Act, 1957?
53. What are the various heads of Incomes under the Income Tax Act, 1961? Discuss in detail the law relating to Income from Salary and House Property.
54. What is Net Wealth? Which assets are considered as 'Deemed Assets' and 'Exempted Assets' for calculation of Net Wealth?
55. 'CENVAT is a new concept of imposing tax'. Discuss the method of its practice.
56. Bring out the meaning of goods under the Central Excise Act, 1994. What are the various duties that are levied under the Act?
57. Describe the meaning and nature of Customs Duty. In what cases the payment of customs duty is exempted?
58. When can Sales Tax be levied under the Central Sales Tax Act, 1956? Explain the different rates that are prescribed by the Central Government under the Act and the mode of calculation of the turnover.
59. Explain the nature of an Insurance contract. Who are the parties to a contract of Insurance?
60. Explain the fundamental principles of a contract of Insurance.
61. Discuss the standard clauses in Life Insurance policies and General Insurance policies.
62. Elucidate the essentials of a Fire Insurance policy. What are the different types of Fire Insurance policies?
63. Elucidate the essential elements of a Marine Insurance policy. Write about the loss assessment and the claims settlement procedure under the Marine Insurance Act, 1963.
64. Discuss the constitution of the regulatory authority under the Insurance Regulatory and Development Authority Act, 1999.
65. Elucidate the powers and functions of the regulatory authority under the Insurance Regulatory and Development Authority Act, 1999.
66. Explain the importance and method of forming online contracts under the Information Technology Act, 2000.
67. Discuss the different kinds of online agreements.
68. Explain the term 'Electronic Record'. Identify the relevant provisions regarding the authentication and transactions through electronic records and the recognition for the same under the Information Technology Act, 2000.
69. Bring out the amendments to substantial laws made subsequent to the enactment of the Information Technology Act, 2000.
70. Give an overview of the major offences and penalties enlisted under the Information Technology Act, 2000.
71. Discuss the scope of the term 'Consumer'. What are the basic rights and remedies available to a consumer under the Consumer Protection Act, 1986?
72. On what matter can a consumer file a complaint before a consumer redressal forum. Describe the procedure for filing a consumer complaint under the Consumer Protection Act, 1986.
73. Highlight the need and scope of Competition Law in India.

74. Analyze the meaning and definition of Restrictive Trade Practices. What are the indicators of a Restrictive Trade Practice? How to determine whether a trade practice is restrictive or not under the Competition Act, 2000?
75. Enunciate the meaning of Product Liability. What are the various theories that govern the Product Liability claims?
76. What is the basis for filing a Product Liability claim? Discuss with special reference to Consumer Protection Act, 1986. Write about defences to product liability suits.
77. Explain the nature and scope of a Public Interest Litigation. Who can file a PIL?
78. Explain the procedural aspects of Class Action Suits.
79. What is the need for a study on environment? Bring out the various segments of environment and the causes of environmental pollution.
80. Explain air and water pollution.
81. Discuss the 'Rule of Strict Liability' and its exceptions.
82. Discuss the application of Criminal Law in Environmental Jurisprudence.
83. Elucidate the provisions of the Constitution of India with reference to environmental protection. Write a brief note on various environmental legislations in India.
84. What do you understand by the term 'Alternative Dispute Resolution'? Discuss the advantages and disadvantages of Alternative Dispute Resolution Mechanisms.
85. Define Arbitration and Arbitration Agreement. Discuss the legal attributes of an Arbitration Agreement.
86. What are the matters that cannot be referred to the arbitration proceedings? When can the court intervene in an arbitration proceeding?
87. What is Mediation? Differentiate Mediation from Arbitration, Litigation and Conciliation?
88. Enunciate the procedure to be adopted by the Conciliators in a Conciliation Proceedings.

Part III: Applied Theory (Answers)

1. **Meaning:** According to Blackstone “Law in its most general and comprehensive sense signifies – a rule of action and it applies indiscriminately to all kinds of action, animate or inanimate; rational or irrational.” This definition is a very wide general one encompassing physical, biological, scientific and technical and human laws that are inherently governed by the nature. The analysis of this definition will indicate that any human action that is carried on in a uniform way or style can be described as law.

Holland defines: “Law is a general rule of external human action, enforced by the Sovereign Political Authority”. From this definition of Holland it follows that there are three essential characteristics of law:

- Law is a rule relating to the actions of human beings.
- Law attempts to regulate the external actions of human beings, not their minds.
- Law is enforced by the State.

This definition of Holland has practical value in understanding what law is, what for it is meant, and how it is enforced. Woodrow Wilson also seemed to have held the same opinion when he defined Law is that “portion of the established habit and thought of mankind – which has gained distinct and formal recognition in the form of universal rules backed by the authority and power of the Government.”

The word Law has been defined in Indian Constitution to include “any Ordinance, order, by-law, rule, regulation, notification, custom or usage having in the territory of India the force of Law. And Law in force includes Laws passed or made by legislature or other competent authority in the territory of India and that is in operation and not repealed.”

Justice Subba Rao Koka, Chief Justice of Supreme Court of India says “A law to be valid must not only be one passed by the legislature in exercise of a power conferred on it but must also be one that does not infringe the fundamental rights declared by the constitution.”

Justice Bhagwati in Passport case *Maneka Gandhi vs. Union of India* observes Law means valid law, procedure established by law means only that procedure which is established by valid law and the procedure so established by that valid law must be just, fair and reasonable.

Purpose of Law:

The Purpose of Law is to:

- maintain law and order within a given society;
- maintain *statusquo* in society ensuring stability and security of social order;
- enable individuals, maximum of freedom to assert themselves; and
- determine the sphere within which the existence and activity of each individual will be secure and free play.

The main goal of law is justice. Law is an instrument to secure justice and it is an effective instrument for securing justice because it has the sanction of state power behind it. An important function of law is to ensure rule of law.

Sources of Law:

According to Holland the expression “sources of law” is sometimes employed to denote the quarter from where we obtain our knowledge of law, e.g. whether from statute book, the reports or esteemed treatises. Sometimes it is used to denote the ultimate authority which gives them the force of law, i.e., the State. John Austin refers to three meanings of the term ‘sources of law’:

- the first term refers to the immediate or direct author of the law which means the sovereign in the country,

- the second term refers to the historical document from which the body of law can be known, and the third term refers to the causes which have brought into existence the rules which later on acquire the force of law.

According to Salmond the two main sources of law were formal and material. Material sources could be sub-divided into legal sources and historical sources. Legal sources were legislation, precedent, custom, agreement and professional opinion.

Formal Sources: These are the sources from which the law derives its force and validity.

Material Sources: The word material is used here in the sense of the elements of constituents of which something is composed. This refers to source from which law derives matter or the materials of which it is composed of (i) legal sources (ii) historical sources.

Legal Sources: These are the sources which are recognized by the law itself as authoritative e.g., Statute law, having its source in legislation; case law, having its source in precedents; customary law, having its source in customs. All these are inherent sources of law and have a binding force.

Historical Sources: The sources which have no binding force and which are not recognized by the law are referred to as historical sources e.g., juristic writings, literary works, foreign decisions. These are of a great persuasive force but they are not binding law in themselves.

Legislation

Etymologically, legislation means the making or the setting of law. In a wide sense, it includes all methods of law-making and, therefore, would include laws made by judges also. In the strict sense, it may be defined as the promulgation of legal rules by an authority which has the power to do so. In modern times, legislation is the most important source of law in all countries.

According to Salmond, Legislation is that source of law which consists in the declaration of legal rules by a competent authority. It is either supreme or subordinate. It is said to be supreme when it proceeds from the supreme or sovereign power in the State and is incapable of being repealed, annulled or controlled by any other legislative authority. On the other hand subordinate legislation is that which proceeds from any authority other than the sovereign power. It is dependent for its continued existence and validity on some superior authority. The Parliament of India possesses the power of supreme legislation.

2. Tort distinguished from both a Contract and a Crime:

Tort vis-à-vis Contract

There are a few clear-cut distinctions between Tort and Contract.

- A contract is based upon consent and a tort is inflicted against somebody and without his consent.
- A contract demands a privity between the parties to it; whereas in torts no such privity is needed.
- A breach of contract is an infringement of a right in *personam*, i.e., of a right available only against some determinate person or body, in which the community at large has no concern; whereas torts are a violation of a right in *rem*, i.e., a right placed in some determinate person, either personally or as a member of the community, and available against the world at large.
- For a breach of gratuitous undertaking of any service, there lies no action under the Contract Act, but insofar as tort is concerned, any negligent performance of it does invite an action.
- In the case of a contract, the duty is fixed by the will and consent of the parties. It is owed to definite persons; whereas in the case of a tort, the duty is one imposed by the law and is owed to the community at large.
- In breach of contract, the mental element for the breach is immaterial; in a tort it is sometimes taken into consideration.

- In a breach of contract, damages are only for the purpose of compensating for the breach but in tort, compensation, is the only remedy. In cases of injury to the person, character, or feelings, and if the facts disclose improper conduct like fraud, malice, violence, cruelty, etc., which increase the plaintiff's injury, different kinds of damages are awarded like exemplary damages.
- In a contract, the damages are liquidated and fixed according to the terms and conditions of the parties; but in tort the damages are generally unliquidated and are determined by the Court on the facts and circumstances of the case.
- In a contract, time of limitation begins from the breach, in tort from the occurrence of the damage.

Tort vis-à-vis Crime

In *P. Rathinam Nagbhusan Patnaik vs. Union of India* the Supreme Court differentiated a tort from a crime. In brief, the following are the points of distinction between a crime and a tort:

- Crime is a wrong against the society. Tort is a wrong against an individual.
- As crime is a wrong against the society, the State initiates action against the accused. In tort, the individual who is the victim initiates action.
- In crime, the State action is called prosecution. In tort the individual action is called a suit.
- As a rule, the object of criminal justice is punishment of the accused. In tort, the object is compensation to the victim.
- Thus, Criminal Law looks to the accused and Law of Torts looks to the victim. Restoration of the status of the victim is the purpose of tortious action.
- Crime, as a rule, is non-compoundable. Tort is compoundable.
- Though fine by way of money is imposed in crime, it goes to the State and not to the victim. Whereas in tort compensation amount must be paid to the victim.

3. General Conditions of Liability in Tort:

To constitute torts, the following three conditions must be fulfilled:

There must be a Wrong Committed by a Person: The first requirement for a tort is that the act complained of should be legally wrongful or that there must be the violation of the legal right. A person who invades the legal right of another person is said to commit a legal wrong or wrongful act. The wrongful act may take any one of the three forms namely, malfeasance, misfeasance or non-feasance.

Wrongful Act must Result in a Legal Damage: Legal damage is also called 'injury'. Salmon says "In general, a tort consists in some act done by the defendant whereby he has, without cause or excuse, done some harm to the plaintiff." Thus causing of harm without just cause or excuse is predominantly the basis of tortious liability. But every damage cannot be the foundation for an action in tort. The damage must be recognized by law. When the damage is recognized by law, it is called the legal damage. The three ingredients of legal damage are:

- Infringement of a legal right i.e., Right in *rem*
- Presumption of damage or injury in law, in case an absolute right is violated;
- Proof of actual damage suffered, in case the right infringed is not of absolute nature; but of a qualified right.

It may be understood that a right is said to be an absolute right when it is *actionable per se* and it requires proof of wrong done but not proof of loss incurred. For instance, the act of trespassing on another's land is actionable even though the plaintiff has suffered nothing.

The wrongful act complained of must result in legal damage to another. Every infringement of the plaintiff's right or unauthorized interference with his property imposes a legal damage. A person may not suffer pecuniary loss, yet, if it is shown that there was a violation of some right, the law presumes damage.

A Legal Remedy in the form of an Action for Damages

The third essential condition to constitute a tort is that the wrongful act complained of must be of such a nature that it must give rise to legal remedy in the form of action for damages. The wrongful act must come under the category of wrongs for which the remedy is civil action for damages. Although there are other remedies, it is primarily the right to damages that brings such wrongful acts within the category of torts.

Where the remedy of damages is not available or is only a secondary remedy, then the wrong, though it is a civil wrong, is not a tort. For Example, in Public Nuisance, the remedy is injunction but not damages.

UBI jus ibi remedium

It is the cardinal principle of law that law will provide remedy for every injury. Literally *ubi jus ibi remedium* means 'where there is a right, there is a remedy' meaning thereby that if there is a right, there shall be a remedy for its breach. In other words, there is no legal wrong without remedy. *Jus* signifies the 'legal authority to do or demand something' and *remedium* is the 'right of action or the means afforded by law to assert the right or to cover something under it'. The Law of Torts has accepted this principle and consequently advanced remedy for each and every legal wrong. In fact, the law of torts owes its origin and development to this maxim. In essence, it implies that if all remedies to enforce a right are gone, the right in point of law ceases to exist. In fact, earlier it was *ubi remedium ibi jus*.

The real significance of legal damage is illustrated by two maxims namely *Injuria sine damno* and *Damnum sine injuria*.

Injuria Sine Damno

Injuria means injury, *sine* means without and *damno* means damage. Thus, it means injury without damage. In other words it means violation of a legal right without causing harm, loss or damage to the plaintiff. This is a tort which is *actionable per se*, i.e., actionable without proof of any damage or loss. For example, trespass on land is *actionable per se* even though no damage might have been caused by the act of trespass. For a successful redressal, the plaintiff has to prove only that he suffered legal injury even though there was no physical harm or damage.

- *Ashby vs. White* is a landmark case explaining the maxim *Injuria Sine Damno*. The plaintiff succeeded in his action even though the defendant did not cause any damage. In this case, the plaintiff was a qualified voter at a Parliamentary election, but the defendant, a returning officer wrongfully did not allow the plaintiff to cast his vote. No harm or loss was suffered by this refusal because the candidate for whom the plaintiff wanted to vote won the election with a resounding majority. But the legal right of the plaintiff was violated. It was held that the defendant was liable.

In *Marzetti vs. Williams* a banker was held liable for refusing to honour the customer's cheque when sufficient funds were available in the customer's account. Even though, the customer did not sustain any actual loss or damage he suffered legal injury. Hence the above maxim is applicable.

Damnum sine Injuria

Damnum means damage, *sine* means without and *Injuria* means injury. Thus, it means damage without injury. In other words, it means the damage has occurred without a legal injury. No action lies, even when actual and substantial loss occurs if there is no infringement of any legal right.

- In *Gloucester Grammar School Case* a schoolmaster (defendant) set up a rival school against the plaintiff. Because of the defendant's school, the plaintiff had to reduce the fees from 40 pence to 12 pence per scholar per quarter. Thus, the plaintiff suffered financial loss. But there was no injury to his legal rights. Hence, the above maxim is applicable here. The plaintiff could not get any compensation from the defendant. Hankford J. said "*Damnum may be abseque injuria*, as if I have a mill and my neighbor builds another mill whereby the profit of my mill is diminished, I shall have no action against him, although I am damaged... but if a miller disturbs the water from going to my mill, or does any nuisance of the like sort, I shall have such action as the law gives".
- In *Ushaben vs. Bhagyalaxmi Chitra Mandir*, the plaintiff filed a case to get permanent injunction against the defendant to restrain him from exhibiting the film named "Jai Santoshi Maa". The contention of the plaintiff was that the film hurts his religious feelings. Goddesses Sarawati, Laxmi and Parvati were picturized and depicted as being jealous of each other and were ridiculed. The Court observed that the movie did not hurt religious feelings. Hence, it was not recognized as a legal wrong. Further, no person has a legal right to enforce his religious feelings on another. No person could restrain another from doing a lawful act, merely because it did not suit his feelings of religion. As there was no violation of a legal right, the plea of the plaintiff for injunction was rejected.

4. National Law:

National Law is the 'law of the land' obtaining in the Republic of India. Following India's independence in 1947, the country adopted its own written Constitution formally adopted by the Constituent Assembly of India in 1949-50. Thus, the Constitution of India is the supreme law of the nation, laying down the structure, organization and defining the duties, powers and functions of the organs of the State. Besides, the Constitution, being the organic document of the Indian Polity, provides for the rights, duties and the liberties of the citizens. All these form the sum and substance of the Constitutional law.

The "National Law" also is so broad a term as to include in its ambit the various laws made by the State and its instrumentalities, in its general sense. The inter-relationship of the laws of the Constitution and the general laws is governed by the constitutional principles in this regard. The implication of this rule is that while the Constitutional Law is the superior law, the laws made by the State exercising their legislative powers under the Constitution have to be in consonance with those of the supreme law. If the latter go against the former, they are declared as being void and unconstitutional.

The Constitution of India is a written Constitution. The implications of a written Constitution are that it establishes a "limited government". It means that the organs of the State, the Legislature, the Executive and the Judiciary are limited by the Constitution itself. The Constitution is supreme and the organs of the State are subordinate to it. As part of the scheme of "limited government", the Constitution assigns the Judiciary a special role of functioning as the final authority to interpret the constitutional provisions, and also to oversee the constitutional scheme of things. As a corollary of this, the Supreme Court, as the Apex Court, can exercise the power of judicial review of the acts of these organs and adjudge their constitutional validity or otherwise. Further, the Constitution places an important limitation to the effect that the laws made by the State shall not take away or abridge the Fundamental Rights conferred by Part III of the Constitution; and any law made by in contravention of these rights shall, to the extent of contravention, be void.

International Law

While the National Law is the law of a nation-state (also known as the 'municipal law') International Law is the law of Nations. The terms 'International Law' and 'Law of Nations' are synonymous and are equivalent terms, having the same meaning. Bentham introduced the term in the year 1789. Generally speaking, International Law is the body of customary rules and principles regulating the conduct and relations of the sovereign civilized nations.

Oppenheim's New Meaning of International Law

An authority on the subject of International Law, Oppenheim's new definition in his famous work wonderfully emphasizes the different aspects of it thus:

"International law is the body of rules which are legally binding on States in their intercourse with each other. These rules are primarily those, which govern the relations of States, but States are not the only subjects of International law. International organizations and, to some extent, also individual may be subjects of rights conferred and duties imposed by International Law."

Nature of International Law

As seen from the meaning and definition of International Law, it is the law of the sovereign nations. While, the National Law of a nation-state is the fundamental law of that State and is founded on the sovereign authority, International Law is not based on any such authority. For this reason, International Law is considered to be a weak law. In fact, this is one of the most controversial subjects that has long been debated and discussed among the jurists. They are sharply divided on this issue since the beginning of the science of law the general concern of the international community is the status of International Law. Despite the fact that the rules of International Law are in vogue for more than 200 years, most of the jurists, including those who use the expression 'International law', have expressed doubt on the question: "Is International Law really a law?" One of the views is that International Law is not a true law. It is a code of rules of conduct of moral force only. Another view suggests that International Law is a true law, and it is to be regarded as law in the same way as that of ordinary laws of a State, which is binding upon the individuals.

The Practice

Despite the reservations expressed in this regard, in practice, the International Law is growing in its stature. This is evident from the fact that a growing majority of the Member States, big or small, developed or developing, is relying on the principles of it for their mutual benefit and advantage. The factors behind this could be:

- National or domestic policies of the State,
- Self-interest of the State,
- Foreign policy decisions, and
- Power politics in the international arena.

The developments in the post-War era are a testimony to this. Through the tedious and tortuous journey of International Law, the practices and usages and customs have acquired the strength of statutory law, though in a limited way. In the process, the States have struck a nice balance between the national interests and the international interests.

Present Day Status of International Law

Whether one regards International Law as 'rules the restrain' or as a common language or as a normative guidance in the making of decisions, it is clear that International Law has a significant role to play in contemporary problems.

The need for and development of International Law has witnessed a great impetus in the present scenario than ever before. The following illustrations focus on the contemporary functions of International Law:

- When the Governments and delegations of Governments are involved in negotiations ranging from areas such as trade, conventions, curbing terrorism, mechanism for peaceful settlement of disputes, extradition treaties, debates with regard to international Institutions such as United Nations, UNESCO, ILO, Amnesty International etc., to arriving at consensus at WTO.
- Negotiating on Conventions, standpoints on issues like nuclear weapons, poverty, facilitating trade, maritime air and space law, refugees problem, border disputes, immigration laws, citizenship issues, international peace missions, Memorandum of Understanding entered into between nations on various issues etc.

- Contracts entered into by Transnational Companies, the legal formalities to be fulfilled by the Multinational Companies, Banking, Intellectual Property Rights, Settlement of disputes, conflict in law etc.
- Another major area where International Law plays a very important role is Human Rights and violation of human rights.
- Filing of pleadings, adducing evidence, oral arguments before international tribunals such as ICC etc.

5. International Trade Policies and Trade Relations:

International trade relations are regulated by the policies of the government based on the social, technological, economic and political factors of the particular country. The foreign economic policies formulated by the government greatly influence the international trade dimensions. International economic relations are the result of the nations trade transactions since times immemorial. The nations have been extending their mutual cooperation among themselves by establishing various financial organizations like banks, industries, and business firms in various countries. To enable the global trade, countries have formulated various policies to suit to their interests. Some of such strategic trade policies handled by the nations are narrated below.

The rules and regulations formulated by the governments on international trade depend upon the following factors:

- **The Monetary policy of the host country:** For any country the monetary system is very significant as the countries generally control the prices, the surge of money, production levels and many other things with the help of their monetary systems. The monetary or fiscal method is implemented through certain means like the bank rate, statutory liquidity ratio, the cash reserve ratio etc. Even the foreign exchange rates are controlled by these monetary system and the governments take charge of the responsibility for transfer of funds or the benefits gained by the business organizations to other countries. The international companies are bound to comply with these laws introduced by the government. In order to facilitate free trade and industry as well as liberal economic activity, many governments started applying complete convertibility on Current Account and the Indian government also followed suit in this direction.
- **Defense policies of the host countries:** Sometimes it is observed that being too liberal in trade may cause certain adverse effects on the country as a whole. To protect the interests of the country for its defense purpose each country plans out certain strategies in this direction. All the multinational companies are bound to follow these national security policies. An example can be taken in this regard of USA, which is the most liberal economy as it transacts trade in a liberal manner but it's not the same with many other countries. They have to follow certain rules and regulations formed by the government of a country while practicing free trade. Even USA implements some constraints on those business transactions that may prove harmful to the country's interest.
- **Customs and Cultural factors:** Every country is proud of its own rich culture and heritage and each country differs from the other in its culture. The eating, dressing, religious and other habits practiced by the people are construed as culture of that country. The multinational companies operating in a foreign country should be aware of the customs and culture followed by the people of that country as this is a very sensitive issue.

Instruments of Trade Policies:

Tariffs: A tariff is a tax on imported products. Tariffs are considered as a protectionist measure, as they increase the price of imported goods in the domestic market. The lowering of tariff barriers has been a central element of successive rounds of GATT (now WTO) negotiations but they remain in place across all industries in both developed and developing countries.

Tariffs are of two kinds, specific and advalorem. Specific tariffs are levied as fixed charge for each unit of imported goods whereas advalorem tariff is levied as a portion of the value of the imported goods. *Advalorem is a Latin word, which means "based on value"*. The basic purpose of tariffs is to protect the domestic industry by increasing the cost of imported goods.

Charging the tariffs on imported goods would benefit the government and the industry of importing country. The ancillary industry, servicing, market intermediation etc. are also protected, whereas the consumers and the industry of the exporting country would be adversely affected. The tariffs may some times enhance the efficiency and on some occasions curtail the growth of the most efficient countries. The Tariff escalation hinders the efforts to move up the value added chain for economic development of developing countries.

Industrial Tariffs: A tariff is a tax or levy on an imported product. It may take the form of either a specific or an advalorem duty. In the case of a specific duty, the tariff is a fixed amount per unit of the product imported. An advalorem duty is a tariff, which is a certain percentage of the unit value. Generally, advalorem tariffs are more popular than specific tariffs mainly because they keep pace with inflation. There are five different effects for imposition of tariffs:

- It leads to reduction in consumption in the importing country – The consumption effect.
- It increases the domestic production of products- the protective effect.
- It improves the balance of trade position of that country- the balance of trade effect.
- It generates the revenue for the importing country – the revenue effect.
- It reduces the economic welfare in the importing country – the welfare effect.

The imposition of tariff on one hand increases the incomes of domestic producers and the government and on the other hand it reduces the real incomes of consumers by raising the price of the imported product. The welfare loss to consumers in the importing country exceeds the gains to be reaped by the domestic producers and its government. As a result, the importing country suffers a net welfare loss. It is the last effect, which makes tariffs harmful when viewed from a purely economic point of view.

6. World Trade Organization (WTO) and International Trade:

World Trade Organization (WTO) is the only global international organization dealing with the rules of trade between nations. It is guided by a cluster of agreements, negotiated and signed by the bulk of the world's trading nations and endorsed in their parliaments. WTO facilitates the free flow of international trade and establishes a ground to settle the disputes impartially. The WTO is charged with administering the World Trade Agreement (WTA), being a forum for future liberalization negotiations and adjudicating over trade disputes among the member countries. It has a much larger membership, with 145 participant countries.

The WTO assists in the implementation, administration and operation of the WTO Agreement and the Multilateral Trade Agreements, and foster their objectives. It also provides the framework, for the implementation, administration and operation of the Plurilateral Trade Agreements. The WTO is also a forum for negotiations on multilateral trade relations in matters covered by its various agreements. On the recommendations of its Ministerial Conference, it provides a forum for further negotiations, and a framework for the implementation of their results, on other issues arising in the multilateral trade relations among its Members. It administers the integrated dispute settlement system, which is a vital element in providing security and predictability to the multilateral trading system, serving to preserve the rights and obligations of the Members of the WTO. The WTO administers the Trade Policy Review Mechanism, which is designed to contribute to greater transparency and understanding of the trade policies and practices of WTO Members. This enhances their improved adherence to the rules, disciplines and commitments of the multilateral trading system, leading to the smoother functioning of the system. A Ministerial Declaration adopted at the Marrakesh Ministerial Meeting recognizes the role of trade liberalization in achieving greater coherence in global economic policy-making.

Principles and Objectives of WTO

The key objective of WTO is to facilitate and promote world trade among its member states. Objectives are set out in the preamble to the Marrakesh Agreement. These include:

- Raising standards of living;
- Ensuring full employment
- Ensuring large and steadily growing real incomes and demand; and
- Expanding the production of and trade in goods and services.

These objectives are to be achieved while allowing for the most advantageous use of the world's resources in accordance with the objective of achieving sustainable development, and while seeking to protect and preserve the environment. The preamble also specifically mentions the need to assist developing countries.

The WTO aims to achieve its objectives by reducing existing barriers to trade and by preventing new ones from developing. It seeks to ensure fair and equal competitive conditions for market access, and predictability of access to all traded goods and services by employing certain well-laid principles. The basic principles of the WTO are:

- Trade without Discrimination.
- No Most Favored Nation (MFN) Treatment - no special deals to trading partners, all members of WTO must be treated with the same status.
- No National Special Treatment - locals and foreigners are treated equally.
- Freer Trade.
- Predictability through Binding - promising not to raise tariffs is called binding a tariff and binding leads to greater certainty for businesses.
- Promoting Fair Competition.
- Encouraging Development and Economic Reform.

These principles are the foundation of the multilateral trading system.

At the time of formation of World Trade Organization, the GATT provisions were included as a part of WTO with the name "GATT-1994".

- *Import Restrictions, Quotas and Licenses* – GATT provides for the elimination of quantitative trade restrictions existing in many countries. These restrictions include import quotas and exclusionary and costly licensing requirements.
- *Duties and Tariffs* – All member nations of the WTO are entitled to Most Favored Nation status under GATT, which entitles exporters and importers to the lowest possible preferential duties. In some situations products can be imported duty-free.
- *Non-Tariff Trade Barriers* – GATT also seeks to control or eliminate numerous nontariff barriers to trade, including onerous health and safety regulations, environmental standards, product standards, procurement requirements and customs procedures. Limitations and restrictions against foreign investment in local businesses and properties by a host government are now inconsistent with TRIMS requirements of nondiscrimination and "national treatment" for foreign investors.
- *GATT and the WTO have created an unprecedented environment* in which goods, services and foreign investment can be transacted throughout most of the world freely, with minimal restrictions.

7. Classification of the Courts in India:

The Indian judiciary owes its origin to the judicial system that existed in the British India. The Constitution of India provides the three-tier judiciary, which is independent of the other two organs of the State i.e., the Executive and the Legislature. Based upon the above distinction between laws, the courts have been classified to interpret law.

The Indian Constitution provides a unified court system. The objective of the unified court system is to render justice to those who come to the court seeking it. It plays an important role in providing remedies in all matters arising out of Constitutional, Civil, Criminal law, etc.

The unique feature of the Indian Constitution is that it distributes powers between the center and the states. This feature helps in classifying the courts into district and state level courts. The reason behind the classification is to expedite the court proceedings to meet the needs of the rising population and the offence rate and also to ensure that justice is not delayed. Previously it used to take 5 to 15 years to dispose off a suit. Thus, it is rightly said that 'Justice delayed is justice denied'. The courts are classified at Center, State, and District and even in Village levels and are established for the speedy disposal of the disputes.

Supreme Court

In the hierarchy of courts, the Supreme Court stands at the top. It is the apex court in the Indian Judicial System. As the central court of the country, it deals with all types of cases i.e., civil, criminal, administrative service matters etc. The Supreme Court is an appellate court and a court of record. The Chief Justice of India heads the Supreme Court. The Supreme Court acts as the head of all other courts in India. The President on the advice of the Prime Minister will appoint the Chief Justice and other Judges.

High Court

The High Court occupies second place in the hierarchy of courts. Every state has a High Court and in some cases two or more states are governed under one High Court. All the subordinate courts will be under the control of the High Court. For all the subordinate courts in India, High Courts act as courts of records and as appellate court. The High Court entertains all kinds of cases. It is independent of the state legislature and executive. After consulting the Chief Justice of Supreme Court and State Governor, the President of India will appoint the Chief Justice of the High Court.

Subordinate Courts

Subordinate courts come last in the hierarchy. Their number will be fixed according to the state population. Judges of the subordinate courts are appointed by the Governor of the State concerned after consulting the High Court. The High Court has control over the subordinate courts in matters like, posting, promotion, granting leave and a variety of other matters.

Civil Courts

To administer civil law disputes, every state has a hierarchy of civil courts; both at city and district levels subordinate to their respective High Courts. The civil courts are assigned a particular territory in a city or a district of the state to entertain the cases of a particular pecuniary limit i.e., the limit of the monetary value. The hierarchy and the classification of the civil courts vary from state to state.

Criminal Courts

Every state has subordinate criminal courts to administer criminal disputes both at the city and district level. Every state consists of many sessions divisions at city level and every sessions division in turn consists of many district level courts. These in turn may further be divided into sub-divisions. The criminal courts are assigned to award punishments to the convicted. The courts impose both fines and imprisonment. The machinery for prevention and punishment of crimes is administered through the criminal courts.

Tribunals

These are the courts under a special statute. In these tribunals, a board of officials is appointed to settle the issues and to pronounce judgment in special cases. These courts deal with problems related to taxation, foreign exchange, labor disputes, land reforms, consumer disputes, elections, administrative litigations etc. Each of the above fields has an independent tribunal.

Any appeal from this tribunal is made directly to the High Court. Each State and Union Territory has tribunals pertaining to various fields. The main purpose for establishing these tribunals is – speedy disposal of matters and more concentration on the cases of same nature. All tribunals enjoy equal status with the Civil or High Court. The procedures followed in settling the issues may slightly vary with that of other courts. The tribunals are based on natural justice.

Central Administrative Tribunal

These tribunals are established to adjudicate disputes, or complaints relating to recruitment and conditions of services of public servant, under the control of the union government. The decisions of administrative tribunal can be challenged before the Supreme Court. The jurisdiction of the courts shall fall, with regard to state public service. The administrative tribunal can declare a statute as unconstitutional. It may decide matters relating to question of law. For example, resjudicate. The tribunals are guided solely by the principles of natural justice and have power of judicial review. Punishment is imposed based upon the discretion of the disciplinary authority. There are State Administrative Tribunals at state level also.

Industrial Tribunal

These tribunals are constituted to adjudicate the matters relating to industrial disputes such as – wages, hours of work, leave, shift work, retrenchment, etc. These tribunals are established by the central government, one or more for each state. They are concerned with matters of national importance. The decisions of the industrial tribunal are subject to appeal in the general court system. For promotion of settlement of industrial disputes, the central and the state governments may establish a Board of conciliation and where the number of employees is more than 50 they must provide a grievance authority for the settlement of the industrial dispute. This grievance settlement authority consists of a body comprising representatives of workers and employers.

Labor Tribunal

The main aim in establishing the labor tribunal is to provide quick, easy and inexpensive means to settle monetary disputes between employer and employee. The tribunal hears the cases, such as failure to comply with the provisions of the employment ordinance and the apprenticeship ordinance. The labor tribunal looks into the claims like, wages due for work done, severance pay, long service payment, orders for reinstatement or re-engagement, award of terminal payment, award of compensation etc., and other claims which will change or emerge from time to time as specified by law. Any appeal in this regard may be made before the High Court. If High Court feels that there is a question of law of general public importance, it will either consider the appeal, or refuse it and its decision is final.

Consumer Dispute Redressal Tribunal

The word ‘consumer’ has a wide range of definitions. A consumer is a recipient of a goods or product or service. These tribunals are established to protect a consumer’s rights. The complainant has a right to claim for damages from unfair supplier/manufacturer. The cost of the suit or claim is very low and they are within the reach of the ordinary man. The complaint will be disposed very soon, thus saving the time of the complainant.

The jurisdiction, powers and authority here are same as those of a civil court, such as, issue of summons, examination of witness, order of production of documents, etc.

All the above said tribunals are established to serve the consumers. The tribunals are statutory bodies intended to conduct enquires into the matters. The tribunals are considered the best form for purposes of fact-finding in the field of investigation and disposal of cases.

Other than these courts, in recent times, Fast Track Courts, Lok Adalats etc., are established to reduce the burden of the existing courts disposing off the cases in short period. At the village level, there are courts viz. Nyaya Panchayaths etc. All these courts aim at giving justice to the sufferer in the minimum time possible.

8. An agreement presupposes an offer by one party, which is accepted by another party. Therefore one without the other does not bring an agreement into existence, which can be legally enforced. Mere offer does not conclude a contract unless the other party to the contract accepts it. There must be a ‘lawful offer’ and a ‘lawful acceptance’ for a valid contract.

Rules for a Valid Offer

Proposal has been used as a synonym for the term 'offer' as used under the English Law. Thus, the offer or proposal must be made with a view to obtain the acceptance of the person to whom it is made. If a statement is made without this intention then it remains a mere statement and not a valid offer. The person who makes the offer is called the 'offeror or promisor' and the person to whom the offer is made is called the 'offeree or promisee'. From the definition of a proposal as mentioned in Section 2(a) of the Indian Contract Act, the propositions must follow are it must be an expression of the willingness to do or abstain from doing a particular act. The willingness must be communicated to another person. It must be communicated with an intention to receive the assent of the other person for such an act or abstinence. Therefore, a mere enquiry or statement of intention does not amount to an offer.

Termination of an Offer

An offer may be terminated under any of the following circumstances:

When the Offer is not accepted in the prescribed mode: Section 7(2) of the Act lays down that "In order to convert a proposal into a promise, the acceptance must be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposer prescribes a manner in which it is to be accepted and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner and not otherwise, but if he fails to do so, he accepts the acceptance." Thus, it is the responsibility of the offeror to intimate to the offeree/acceptor, the mode of acceptance to be made. In case the acceptor/offeree deviates from the prescribed mode and makes acceptance in an alternative way, and the offeror does not protest the deviation, he is deemed to have accepted the new method of acceptance.

When it is not accepted within the prescribed time: An acceptance communicated after the time prescribed by the offeror has lapsed cannot revive the offer and hence cannot result in a valid contract. However, if no time is prescribed, the acceptance has to be communicated within a reasonable time. If an offer is not accepted within the specified period, it lapses at the end of that particular specified period. In case of perishable goods such as food, a "reasonable time" would likely be in terms of days. The term "reasonable time" would be longer, where the subject matter of the contract is a building.

By Rejection or Counter-Offer

If the offeree has rejected the offer, the offer terminates. The offeree cannot subsequently accept an offer so rejected. When the offeree makes a counter-offer or gives a conditional acceptance, it amounts to implied rejection, thereby resulting in lapse of the offer.

By Death or Insanity of Either Party to the Contract

An offer lapses if the offeror dies or becomes insane before its acceptance and such a fact comes to the knowledge of the offeree. Thus, an acceptance made in ignorance of the death or insanity of the offeror, shall be a valid acceptance. In *Reynolds vs. Atherton* it was observed that an offer is in any event determined by the death (or insanity) of the offeree. The personal representatives of the offeree cannot accept it on behalf of the offeree's estate. In *Kennedy vs. Thomassen*, it was observed that an offer lapses if one of the parties dies before acceptance. In *Bradbury vs. Morgan*, it was decided that the death of the offeror might not validate a subsequent acceptance provided: the offeree did not know of the death when he accepted, and the personality of the offeror, was not vital to the contract.

By Revocation

The offer may be terminated by the offeror, if he informs the offeree that he is withdrawing or revoking it. An offer may be withdrawn by the offeror at any point of time before it is accepted, even though such offer is specified for a particular period. This is known as 'revocation of offer'.

By Subsequent Illegality or Destruction of Subject Matter

An offer lapses if the subject matter is destroyed or becomes illegal, subsequent to making the offer but before its acceptance.

On Failure to Fulfill a Condition Precedent to Acceptance

In *State of Madhya Pradesh vs. Gobardhan Dass* the acceptance of a tender was to be accompanied by payment of 25% of the amount. An omission by the successful tenderer to make the requisite payment did not give rise to a binding contract between the parties.

9. According to Section 12 of the Indian Contract Act, 1872, “A person is said to be of sound mind for the purpose of making a contract if at the time when he makes it, he is capable of understanding it and forming a rational judgment as to its effects upon his interest.”

Persons of Unsound Mind

Unsoundness of mind may be classified into two types which are permanent unsoundness of mind; and temporary unsoundness of mind. A person of unsound mind is incompetent to contract. Mere weakness of mind is not sufficient. Party must prove total incapacity to understand business and forming rational judgment. Mere loss of vigour and infirmity on account of old age is not sufficient to invalidate a contract. In order to avoid a contract on the ground of one of the parties being of unsound mind, the question to be decided is whether that person was of unsound mind when the contract was made. Unsoundness of mind depends largely upon the inference to be drawn from the evidence and not on belief or skepticism of witnesses. The burden of proof lies on the person who affirms it. In *Jyotirindra Bhattacharjee vs. Sona Bala Bora* oral evidence showed that the vendor was suffering from mental imbalance and no effort was made to prove that the vendor at the time of execution of the deed was mentally sound and capable of executing the sale deed.

Idiots

An idiot is a person who is devoid of the ability to think. An agreement with an idiot is absolutely void. The property of an idiot can be made liable for the necessities supplied to him or to persons dependant upon him. An idiot can also be a beneficiary.

Lunatics

Lunatic is a person whose mental power has been damaged. Such a person is sometimes sane and sometimes an insane. Such a person may enter into a contract when he is of sound mind. All the agreements made by lunatics during lucid intervals are valid. In this context, Section 12(2) of the Indian Contract Act provides that “A person who is usually of unsound mind but occasionally of sound mind may make contract when he is of sound mind.” However, agreements for necessities of life are valid. The property of the lunatic is liable for such contracts and a lunatic cannot be held personally liable. In *Johri vs. Mahila Draupati alias Dropadi*, the owner of the property was a lunatic. It was well known to the defendant/purchaser. In view of the facts and the knowledge which the defendant admitted in his deposition that the owner of property was a lunatic, the appellant cannot get any relief by applying the principle laid down under Section 43 of the Transfer of Property Act, 1882. A contract by a lunatic is void and he cannot be compelled to refund the consideration (money). A person, who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind. A person, who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind. For example, a patient in a lunatic asylum, who is at intervals of sound mind, may enter into a contract during those intervals.

Idiots and lunatics come under the category of permanent unsoundness of mind. Drunkards are categorized as temporary unsoundness of mind. The incompetent person has to make restoration except if there are special circumstances. Special circumstances include other party knowing or having reason to know of mental defect. If contracts made on fair terms and other party has no reason to know of incompetency, contract ceases to be voidable where parties cannot be restored to pre-contracting positions.

Drunkards

A person who is under the influence of intoxicating liquors or drugs is equal to that of a lunatic. A drunkard cannot form a rational opinion as to the effect of a contract on his interest. For example, a sane man, who is delirious from fever, or who is so drunk that he cannot understand the terms of a contract, or from a rational judgment as to its effect on his interests, cannot contract whilst such delirium or drunkenness lasts. In order to make a drunkard's contract void, there must be a high level of intoxication. In *Gore vs. Gibson*, it was held that a contract made by a person so intoxicated as not to know the consequences of his act is not binding on him if his condition is known to the other party. It appears, however, that such a contract is not void but merely voidable. In *Matthews vs. Baxter*, B, while drunk, agreed at an auction sale to purchase from M certain houses and land. Afterwards, when sober, B affirmed the contract, and then repented of his bargain. When sued on the contract, he pleaded that he was drunk at the time he made it, and to M's knowledge. The Court held that although B had once an option in the matter and might have avoided the contract, he was now bound by his affirmation.

A totally drunk person also lacks the ability to consent to a contract and has the option of avoiding a contract signed while intoxicated, provided it is done at the earliest opportunity upon abstinence. "Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property; except that where necessaries are sold and delivered to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price for them. Necessaries ... means goods suitable to the condition in life of the person, and to his actual requirements at the time of the sale and delivery."

10. Consideration

Section 25 of the Contract Act, 1872 declares that, an agreement made without consideration is void. No right of action arises out of an agreement not supported by consideration. *Ex nudo pacto non oritur actio*, which means nobody would part with anything unless he gets a proper price. Hence, a contract without consideration raises a doubt as to its genuineness.

General Rules of Consideration

The general rules regarding a valid consideration are consideration must move at the behest of the promisor, consideration may move from the promisee or on the desire of the promisor, from any other person (even a stranger), consideration need not be adequate for the validity of a contract, consideration in question must be real and not illusory, and performance of an existing legal duty will not constitute consideration

Exceptions to the Rules of Consideration

Consideration is a must for a valid contract to ensue. However, the rule of *ex nudo pacto non oritur actio* (an agreement made without consideration is void) has the exceptions which are love and affection, voluntary services, time-barred debt, gift, agency and charitable subscription.

Love and Affection [Section 25(1)]

An agreement made out of love and affection and keeping in view the nearness of relationship, expressed in writing and registered under law, is enforceable even if there is no consideration. The essential conditions required under the Section are the agreement should be in writing, it should be registered, it is between parties who are closely related, and it is on account of natural love and affection.

It is to be noted that nearness in relationship does not always indicate that love and affection exist. In case of *Rajlukhy vs. Bhoomath*, it was held that as there did not exist any love and affection between the parties, the agreement to pay maintenance allowance by a husband to his wife was held to be void for want of consideration on part of the wife.

Voluntary Services [Section 25(2)]

A promise to compensate wholly or in part, a person for an act voluntarily done is enforceable without consideration. In other words, a promise to pay for a past voluntary service is binding. For example, if A does a favor to B, which he acknowledges and promises to do something in return, then the promise to A is enforceable. It is essential that:

- The service should be rendered voluntarily;
- The service is rendered to the promisor and nobody else. Hence, the act done should be for a person who is in existence at the time of doing the act;
- The promisor should have been capable of entering into a contract at the time of rendering the service,
- The promisor must have intended to compensate the promisee, and
- The services rendered should not be immoral.

Time-Barred Debt [Section 25(3)]

A time-barred debt agreed upon by a written agreement, signed by the debtor or his duly authorized agent, is enforceable even without consideration. This debt must be one which would have otherwise been enforceable but for the law of limitation. Therefore, debts unenforceable due to some other reason will not come under Section 25(3). Thus if an insolvent debtor has been discharged under the insolvency law, a subsequent promise by him to pay the debt cannot be enforced unless there is a fresh consideration for the same.

Section 25(3), requires an express promise to pay the time-barred debt rather than a mere acknowledgement of the debt. In *Tulsi Ram vs. Same Singh*, after the expiry of three years from the execution of the promissory note, the defendant made an endorsement on the back of the note stating 'I accept this pronote and it is valid for the next three years'. It was held that these words were only an acknowledgement of the existence of the note and did not indicate whether the defendant intended to pay the debt. Hence, the defendant could not be made liable on the basis of this endorsement. The validity of a time-barred debt rests on the conditions being fulfilled are the promise should be in writing, it should be signed by the promisor or his agent, the debt must be a time-barred one, and there must be an express promise to pay, either the whole or a part of the debt.

11. One of the most essential elements in the making of a contract is that the promisor and the promisee must agree about the same thing in the same sense. There should be a meeting of minds. The identity of minds is called *consensus ad idem*.

Free Consent of the Parties

The parties must have entered into the contract out of their own free will. Consent implies agreeing upon the same thing in the same sense. According to Section 14 of the Act, the consent is said to be free when it is not caused by coercion, as defined in Section 15, or undue influence, as defined in Section 16, or fraud, as defined in Section 17, or misrepresentation, as defined in Section 18, or mistake, subject to the provisions of Section 20-22.

Coercion

Coercion (known as Duress under English Law) is to induce a person forcibly to enter into a contract. Coercion must be so extreme that the person is left with no other option but to give his assent against his will. Coercion may be by use of physical force or a threat involving imminent danger to life or health of a person.

Illustration: A, on board an English ship on the high seas, causes B to enter into an agreement by an act amounting to criminal intimidation.

Undue Influence

It is the use of a relationship of trust and confidence to exploit the other party to derive some contractual advantage. This kind of relationship is also called as a fiduciary relationship. The domination of one person's will over the other person is quintessential to the element of undue influence.

Fraud

To constitute fraud there must exist a fact and the fact must be misstated and the materiality of the fact must be proved, and the main factor that determines the essence of fraud is the defendant's knowledge of the falsity of his or her statement. The intention of the defendant to deceive must also exist. In short, it is a false statement made with an intention to deceive another person.

Misrepresentation

Misrepresentation and fraud are similar except the fact that misrepresentation lacks *scienter* and intention to deceive. Professor G. Fridman states that four conditions must be met before a court will accept that there has been fraudulent misrepresentation. The four conditions are: that the representations complained of were made by the wrongdoer to the victim (before the contract); That these representations were false in fact; That the wrongdoer, made them recklessly without knowing whether they were false or true; and That the victim was thereby induced to enter into the contract in question (a legal presumption exists in this regard).

Mistake

Mistake takes place when the parties to the contract are ignorant about the existing fact pertaining to the transaction. A mistake may be unilateral or bilateral. Where mistake is made by one party to the contract, it is called a unilateral mistake. Similarly, where there is mistake on both sides of the parties there is a bilateral mistake. In *Smith v. Hughes*, there was a contract for supply of oats between the plaintiff and the defendant. The defendant has refused to accept the shipment on the grounds that the contract was for "old oats." The words old oats were not used at any point of time in the contract. The court held that the contract be performed as it appeared that the words "old oats" were never used at the moment of "meeting of minds."

The presence of fraud, undue influence etc., in the formation of the contract does not negate the consent. There is consent but it is not freely given. The result of the consent given under fraud, coercion etc. is that the contract becomes voidable at the option of the other party. The party can either reject the contract or accept it. Consent must be voluntary, and if there is any force or deception by either party to obtain agreement of the other party and the contract may be voided by the injured party. If the agreement is induced by bilateral mistake, the agreement is void and not voidable.

12. A condition to perform the obligation by the parties is a major term of the contract. When a breach of contract occurs, the injured party has some remedies: Suit for Rescission, Suit for injunction, Suit for specific performance, Suit for damages, and Suit for *Quantum Meruit*.

Suit for Specific Performance

"Specific performance" means doing exactly what had been intended to be done by the parties in the contract. The specific performance is the remedy granted by the courts to the aggrieved party in equity only in cases where it is absolutely essential to grant it. Specific performance is a rare remedy at law, but sometimes available where the subject of the breached contract is special and irreplaceable. The courts order the guilty party to actually perform his obligation only when monetary compensation (by way of damages) will not be an adequate remedy. Specific remedies direct the party in default to do or to forbear the very thing, which he is bound to do or forbear or make a declaration of rights which the nature of the case may require.

Illustration: If A agrees to sell a house to B, B can enforce the contract specifically. So A will be required to convey the house to B. This remedy is granted because the court finds that the remedy of damages is not an adequate remedy in such a case.

In Indian law, the various modes of specific relief are mentioned in the Specific Relief Act, 1963, which came into force from 1.3.1964. They are:

Restoration of possession: The court orders that the disputed property is be delivered to the rightful claimant.

Specific performance of contracts: The court can order the defendant to perform the very act, which he has contracted to do.

Injunction: An injunction is granted to the plaintiff to prevent the breach of an obligation existing in his favour by a mandatory injunction. The court directs the defendant to do the requisite acts to prevent the breach of his obligation.

Declaratory relief: The court may grant a declaration as to the rights of the parties.

Other forms of specific relief are – Rectification of documents, Rescission of contracts and Cancellation of instruments.

Quantum Meruit

Quantum meruit means, simply, “for what it’s worth.” *Quantum meruit* also means “as much as he deserves.” Even where there is no contract, *per se*, there may be a cause of action where a person gives value to another under circumstances that would cause the first person (if reasonable) to believe the second person will give fair market value for what he received. *Quantum meruit* offers recovery of “whatever the thing was worth.” It is a beautiful invention of wise judges in the past that recognized that very often there is not a written or even a verbal contract between two persons yet an understanding exists upon the passing of some value that is monetary in nature, from one to the other. The law recognizes the right of one to recover from the other for sums delivered for which no return value is given. This right gives rise to the cause of action known as ‘*quantum meruit*’.

The term “*quantum meruit*” actually describes the measure of damages for recovery on a contract that is said to be “implied in fact.” The law imputes the existence of a contract based upon the situation where the service rendered by one party must have been understood and intended to pay the compensation for it. Therefore, recovery in *quantum meruit* is said to be based upon the “assent” of the parties and, being contractual in nature, to recover under quantum meruit one must show that the recipient: (1) acquiesced in the provision of services; (2) was aware that the provider expected to be compensated; and (3) was unjustly enriched thereby.

Quantum meruit recovery is appropriate where the parties, by their conduct, have formed a relationship which is contractual in nature, even though an enforceable contract may never have been created. For illustration, where a written agreement between an owner and a contractor is deemed unenforceable as a result of a technical deficiency or because it violates public policy, the contractor may still recover in *quantum meruit*. As a general rule, one should not look to recover in *quantum meruit* unless there have been direct dealings between the parties that create the basis for the contract to be “implied in fact.”

Since specific terms in an implied contract are absent, the law supplies the missing contract price by asking what one would have to pay in the open market for the same work. Thus the measure of damages under *quantum meruit* is defined as “the reasonable value of the labor performed and the market value of the materials furnished” to the project.

13. Damages are a monetary compensation allowed to the injured party by the court for the loss of injury suffered by him by the breach of a contract. The object of awarding damages for the breach of a contract is to put the injured party in the same position, so far as money can do it, as if he had not been injured i.e., place him in the position in which he would have been had there been performance and not breach. This is called as “*the doctrine of restitution (restitution in integrum)*”. The fundamental basis of awarding damages is compensation for the pecuniary loss which naturally arises from the breach.

Damages can be classified four types based on the courts’ judgments and the provisions of Section 73 of the Indian Contract Act, 1872 and also depending upon the circumstances of the case. Those are general damages, special damages, exemplary or vindictive or punitive damages, and nominal damages.

General or Ordinary damages

The losses that naturally and directly arise out of the breach of the contract in the usual course of the things are called as general damages. They would be the unavoidable and logical consequence of the breach. The damages for such losses are called as general damages or ordinary damages.

The general measure of damages is such sum as will put the aggrieved party as nearly as possible into the position in which he would have been if the contract had been duly performed. Such damages cover the loss which the aggrieved party has suffered and the gain of which he has been deprived.

Special Damages

Special damage is what arises in the peculiar circumstances of a particular case, quite apart from the usual course of things. While making the contract, one party to the contract may bring to the notice of the other party about the particular type of losses that he would suffer under certain special circumstances. In case the contract is not performed properly and if the other party still proceeds to make the contract, it is construed that the other party has expressly agreed to be responsible for the special losses that may be caused by improper performance of his obligation. Compensation for such special losses is called as “special damages.”

In accordance with the provisions of Section 73 of the Act, when a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, the compensation for any loss or damage caused to him thereby or which the parties knew, when they made the contract, to be likely to result from the breach of it. These damages are called as special damages.

The important factor in the event of breach of contract is that each party has a responsibility to mitigate its losses at a minimum possible level. For example, if A enters into a contract to deliver apples to B and B refuses to take delivery (in so doing, B is in breach of contract), A would be well advised to try to sell the fruit elsewhere to minimize any damages that he may suffer by the breach. The law does not require a party to do cartwheels to minimize losses, just what can be reasonably done without incurring substantial costs. The general rule is: “in a case where there is a breach of contract, the plaintiff if he can minimize his loss by a reasonable course of conduct, he should do so, though the onus is on the defaulting defendant to show that it could be, or could have been, done and is not being, and has not been done.”

Indirect Damages (Loss of Profits)

The following illustration shows the nature of the indirect damages:

“A delivers to B, a courier company, a machine to be delivered overnight to A’s factory. B does not deliver the machine on time, and A, in consequence, loses a profitable contract with the Government. A is entitled to receive from B, by way of compensation, the average amount of profit which would have been made by the working of the factory during the time that delivery of it was delayed, but not the loss sustained through the loss of the Government contract.”

The leading case on this subject is that of *Hadley vs. Baxendale*. Section 73 and various cases clearly provide that knowledge of circumstances leading to loss of profits to the plaintiff imposes liability on the defendant.

Exemplary or Vindictive Damages

The principle underlying the award of damages is compensation to the aggrieved party. But, law generally would find it difficult to heal the mental pain or suffering or sense of humiliation that may be caused to the aggrieved party by the breach. In two exceptional cases, the courts award damages that can be punitive. i.e., by way of punishment. These are: (1) Breach of promise to marry, (2) Bank dishonouring a customer’s cheque, though customer has sufficient funds in his account. Damages awarded in these two exceptional cases are called exemplary damages or vindictive damages.

Breach of Promise to Marry

An agreement to marry a person is like any other contract. If the obligation is broken even before the marriage takes place, it would cause enormous amount of mental agony, emotional hurt and loss of reputation in the society to the aggrieved person. It may be very difficult for the courts to measure exactly such losses in terms of money. Under such circumstances, the courts would award a large amount as damages to the aggrieved party which could cause a certain degree of discomfort to the guilty party.

Unjustified Dishonour of Cheques by Banks

Section 31 of the Negotiable Instruments Act, 1881 stipulates the liability to the drawee of a cheque as, “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 to do so, and, in default of such payment, must compensate the drawer for any loss or damage caused by such default.” If a bank wrongfully dishonours a cheque that is drawn by its customer on his account when there is sufficient money in that account to meet that cheque at the time the cheque is presented for payment, it results in loss of reputation in the business (market) as well as a lot of mental agony to that customer. This loss is very difficult to be measured in terms of money or otherwise. Under such situations, the aggrieved customer shall be allowed punitive damages by the courts.

Nominal Damages

Sometimes the breach of a contract does not cause any loss. If the market is rising, i.e. prices are going up, a breach by the buyer does not entail loss to the seller for the seller can easily sell even for a higher price. Still the breach of a contract being a wrong, the seller can recover damages in a technical sense. The damages awarded in such a case are called nominal damages (for example, one rupee or even one pie).

Liquidated Damages

Such an amount that is specifically mentioned in the contract by the parties themselves to be payable to the aggrieved party in case towards the breach is also called as liquidated damages.

Usually it is for the court to determine the quantum of damages. It is always contemplated whether the courts would award the same amount towards the damages that the parties themselves have specified in the contract towards the damages for breach of contract. If this is done, the stipulated damages would be known as ‘liquidated damages.’ Liquidated damages are in the nature of ascertained damages.

14. The Indian Contract Act 1872 is the relevant statute, which regulates the contract of agency. The provisions of Sections 183 to Section 238 of the Act regulate the contract of agency.

Section 182 of the Indian Contract Act, 1872 defines Agent and Principal as: “Agent” means a person employed to do any act for another or to represent another in dealing with the third persons and the “Principal” means a person for whom such act is done or who is so represented.

Mere designation of a person as an ‘Agent’ in an agreement does not by itself make him an agent, and his position depends on the nature of legal relationship.

In a contract of agency, it is the agent who brings about a legal relationship between two persons. It should be noted that an agent is not merely a connecting link between the principal and a third person. The agent is also capable of binding the principal by acts done within the scope of his authority.

An agent does not act on his own behalf but acts on behalf of his principal. He either represents his principal in transactions with third parties or performs an act for the principal. The question as to whether a particular person is an agent can be verified by finding out if his acts bind the principal or not.

Creation of Agency

Any person who is of the age of majority and is of sound mind may employ an agent. [Section 183]

Between the principal and the third persons, any person may become an agent. But no person who is a minor and of unsound mind can become an agent. [Section 184]

No consideration is necessary to create an agency. [Section 185]

It is not essential that a contract of agency be entered into. It is sufficient if a person acts on behalf of another and is accepted by the latter.

An agency can be created either in writing or orally. An oral appointment is a valid appointment even though the contract of agency by which the agent is authorized has to be in writing.

Express Agreement

An agency may be created either by Express agreement, i.e., an agreement is said to be express when it is given by words spoken or written. (Section 187)

Under normal circumstances, an agency is created by an express agreement, specifying the scope of the authority of agent. The agent may, in such a case, be appointed either by word of mouth or by an agreement in writing. However, in certain cases, e.g. to execute a deed for sale or purchase of land, the agent must be appointed by executing a formal power of attorney on a stamped paper.

Implied agreement

Implied agreement is, by inference from the circumstances of the case and things spoken or written, or the ordinary course of dealing. (Section 187)

Implied agency comes into existence where there is no express agreement appointing a person as agent. It arises from the conduct, situation or relationship of parties. This means the authority to act as an agent may be inferred from the nature of business, the circumstances of the case, the conduct of the principal or the course of dealing between the parties.

Illustration: X who, resides in Ahmedabad, owns a shop in Hyderabad. He visits his shop occasionally. The shop is managed by Y who orders goods from Z in the name of X for and pays the amount out of X's funds with X's knowledge. This means Y has an implied authority from X to order goods from Z in the name of X.

Implied Agency includes the following:

Agency by Estoppel or Holding out: When a person, by his conduct or by statement, leads willfully another person to believe that a certain person is his agent, he is estopped from denying subsequently that such person is not his agent.

Agency by Necessity: Where there is no opportunity of communicating to the concerned parties about any urgency and a person in such a situation acts as the agent for the benefit of the other, agency by necessity is said to have arisen.

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

As per Section 189 of the Indian Contract Act, 1872, an agent has authority, in an emergency, to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence, in his own case, under similar circumstances.

Illustration: 'A' consigns provision to 'B' at Kolkata, with directions to send them immediately to 'C', at Cuttack. 'B' may sell the provisions at Kolkata, if they cannot bear the journey to Cuttack without spoiling.

Agency by Ratification: Where acts are done by one person on behalf of another but without his knowledge or authority, he may elect to ratify or to disown such acts. If he ratifies them, the same effects will follow as if they had been performed by his authority. The ratification may be express or implied.

15. The Indian Contract Act, 1872 is the relevant statute, which regulates the contract of agency. The provisions of Sections 183 to Section 238 of the Act regulate the contract of agency. Section 182 of the Indian Contract Act, 1872 defines Agent and Principal as: "Agent" means a person employed to do any act for another or to represent another in dealing with the third persons and the "Principal" means a person for whom such act is done or who is so represented.

Rights of Principal

Right to Repudiate the Transaction

An agent in a fiduciary position, is duty bound to transact the agency work in the interest of his principal business and not otherwise. That means he is not entitled to do anything for his personal benefit out of his principal business. The principal may repudiate such agent's transaction if he can prove that a material fact has been dishonestly concealed from him; or the dealing of the agent has been disadvantageous to him.

Illustration: X appoints Y to sell her estate at Ahmedabad. Subsequently, Y discovered a mine in her principal's estate. Without disclosing this fact to her she buys the estate for herself. The principal may repudiate the transaction.

To Claim any resulted benefit from Agency

If an agent, without the knowledge of his principal, deals in the business of the agency on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction, (Section 216).

The agent's relationship with the principal is fiduciary in nature. That means he shall perform his agency work in absolute good faith and thereby shall not make any secret profit out of his agency business. Secret profit means any advantage obtained by the agent over and above his agreed remuneration in the course of his agency business.

Knowledge acquired by an agent in the course of his agency business and applied for his own benefit does not result into any secret profit unless he uses the principal's property or makes any diversions of his principal's business opportunities to obtain such benefit.

Thus, the principal has every right to obtain an account of secret profits and recover them and resist a claim for remuneration.

Right to Recover Damages

If the principal suffers any loss due to disregard by the agent of the directions by the principal, or by not following the custom of trade in the absence of directions by the principal, or where the principal suffers due to lack of requisite skill, care, or diligence on the part of the agent, he can recover damages accruing as a result from the agent.

To Resist Agent's Claim for Indemnity

Where the principal can show that the agent has acted on his own behalf and not on the behalf of the principal, he can resist the agent's claim for indemnity against liability incurred.

Duties of Principal

To indemnify against consequences of all lawful acts of agent: The principal is bound to indemnify the agent against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him. (Section 222)

Illustration: X employs Y to enter into contract with Z for purchase of 100 rice bags for her. Subsequent to the contract entered with Z by Y, X refuses to take the delivery of such rice bags from him. Z sues Y against such refusal. Y is made liable to pay Z and X is made liable to pay Y towards damages, costs and expenses incurred on such refusal.

However, where a person (principal) appoints an agent to do a criminal act then the principal is not liable to the agent, either upon an express or an implied promise, to indemnify him against the consequences of that act (Section 224). The liability here refers only to the liability existing between the principal and agent i.e., the liability to indemnify. This does not preclude the principal from liability under other Acts.

To indemnify the agent against consequences of acts done in good faith: The principal is required to indemnify the agent against the consequences of acts done in good faith. According to Section 223 of the Contract Act, where one person employs another to do an act and the agent does the act in good faith, the employer is liable to indemnify the agent against the consequences of that act though it causes an injury to the rights of third persons. Thus, Section 223 entitles the agent to claim compensation in respect of acts done in good faith though they cause injury to the rights of third persons.

To pay compensation against agent's injury: The principal must make compensation to his agent in respect of injury caused to such agent by the principal's neglect or want of skill (Section 225). Every principal owes to his agent the duty of care not to expose him to unreasonable risks and to pay the agent the commission or other remuneration agreed.

16. **Contract of Guarantee:** Section 126 deals with Contract of Guarantee. As per this Section 'contract of guarantee' is a contract to perform the promise, or discharge the liability of a third person in case of his default. The person who gives the guarantee is called the 'surety', the person in respect of whose default the guarantee is given is called the 'principal debtor', and the person to whom the guarantee is given is called the 'creditor'. A guarantee may be either oral or written.

The purpose of a contract of guarantee is to provide additional security to the creditor in the event of default by the principal debtor. In a contract of guarantee, there are three parties i.e., the creditor, the debtor and the surety. Also, there are three contracts in a contract of guarantee (i.e., between the creditor and the debtor, between the creditor and the surety and between the debtor and the surety).

It should also be noted that a contract of guarantee presupposes the existence of a debt. If there is no existing liability, there cannot be a guarantee. Therefore, if the debt to be guaranteed is already time barred, guarantee given will not be valid and the surety will be discharged from his liability.

Types of Guarantees

Specific Guarantee: A specific guarantee covers only one transaction or objective, is limited to a certain sum of money and is limited as to time. Any amount paid towards the advance by the borrower in his debt account with the creditor will go to reduce the guarantor's liability.

Continuing Guarantee: A continuing guarantee is defined in Section 129 of the Indian Contract Act. It covers a series of transactions, subject to the limit as mutually agree upon, irrespective of the payments towards the advance and irrespective of the fluctuations of the balance in the debtor's account between debit and credit. Whether a guarantee is a continuing guarantee or not depends upon the construction of the document. If there are several documents covering a debt and guarantee, all the documents must be read as whole. In case of ambiguity in the contract, the nature of the contract is to be determined basing upon the surrounding circumstances.

In *Nottingham Hide Co. vs. Bottrill* it was held that the following words used in a guarantee made the guarantee a continuing one: "Having every confidence in him, he as but to call on us for a cheque and have it with pleasure for any account he may have with you and when to the contrary we will write to you."

Methods of Revocation of Continuing Guarantee

A continuing guarantee may be revoked in two ways i.e. by the surety giving notice oral or in writing to the creditor as to future transactions (Section 130), and in the absence of a contract to the contrary, by the death of the surety as to future transactions, (Section 131).

It should be noted that the notice of revocation must be given according to the terms of the contract. If the contract of guarantee requires three month's notice, the surety must give a three month's notice. In *Wali Muhammed vs. Ganpat*, it was held that a notice revoking a guarantee given just a day before the performance of the contract is not illegal. If there are more than one surety, the notice must be given by or on behalf of all the co-sureties. Notices by one co-surety do not determine the guarantee.

The death of the surety terminates his guarantee as to future transaction in the absence of a contract to the contrary. His estate is, however bound to all transactions entered into before the death of the surety. In several court decisions it has been held that if the consideration for the continuing guarantee is one and whole, in that case the guarantee does not come to an end by the death of a surety, and the estate of the deceased surety continues to be liable for future transaction as well (*Ma Moo Zim vs. Ma pwa; Kandhaya vs. Manki*). Where two sureties give joint and several continuing guarantee, the death of one of them does not terminate the liability of the survivor *Beeket vs. Addyman*. The lunacy of the surety terminates the guarantee as to future advances *Bradford Old Bank vs. Sutcliffe*.

17. Liability of Surety

According to Section 128, the liability of the surety is co-extensive with that of the principle debtor, unless otherwise provided by the contract.

The liability of the surety is normally to the same extent as that of the principal debtor. The surety cannot however, be made liable beyond what he had earlier contracted to. The surety may however, limit his liability to a part of the entire debt. The extent of liability of a surety assumes importance when the principal debtor is declared insolvent.

A reduction in the liability of the principal debtor (for example, after the creditor has recovered a part of the sum due from him out of his property) will result in a proportionate scaling down of the surety's liability.

It has been specifically provided in the contract that the surety's liability arises only when the principal debtor is made liable, the surety continues to be liable in the given instances: death of the principal debtor; discharge of the principal debtor's liability by operation of law; creditor's failure to sue the principal debtor within the period of limitation; and release of one of the co-sureties by the creditor.

Discharge of Surety's liability can be in the following ways:

By Revocation: The surety can revoke a continuing guarantee any time by giving notice to the creditor. A notice given, discharges the liability of the surety with respect to all future transactions. However, the surety will remain liable for those transactions prior to the revocation.

By death of the surety so far as future transactions are concerned. However, the surety's liability will not be discharged even on his death, in case there is a contract to that effect.

By Novation: Where a new contract substitutes the old contract by which the liability under the old contract stands canceled.

By Conduct of the Creditor

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

The validity of a contract of guarantee will not be affected in case there is a written contract of guarantee and there is no variance of the same in writing. Where the creditor enters into an agreement with the principal debtor releasing him from his liability, the surety stands discharged.

The following illustration aptly discusses this.

'A' gives guarantee to 'C' for goods to be supplied by 'C' to 'B'. 'C' supplies goods to 'B', and afterwards 'B' becomes embarrassed and contracts with his creditors (including C's) to assign to them his property in consideration of their releasing him from their demands. Here, 'B' is released from his debt by the contract with 'C', and 'A' is discharged from his suretyship.

It has already been discussed that as per Section 128 the liability of a surety is co-extensive with that of the principal debtor. Hence, if the principal debtor is discharged from his liability by virtue of an agreement between him and the creditor, then the surety also will stand discharged.

Another explanation for the discharge of the surety is as follows:

As per Section 140, the surety can claim reimbursement from the principal debtor after making payment to the creditor. If the principal debtor is no more liable, then the remedy of the surety will be affected. This would result in a discharge of his liability. When the creditor compounds with principal debtor giving him time to pay his debt the surety stands discharged.

According to Section 135, the following circumstances will lead to a discharge of surety's liability. When the creditor compounds with the principal debtor. When the creditor agrees not to sue the principal debtor: A contract between the creditor and the debtor, wherein the creditor agrees not to sue the debtor will discharge the surety from his liability.

Where the creditor, by his act or failure to perform his duty to the surety impairs the remedy available to the surety against the principal debtor, the surety is discharged. Also, any act of the creditor which by implication releases the principal debtor from liability, will discharge the surety from his liability. In *Hewison vs. Rickets*, goods were given on hire purchase basis. The payment of the installments was guaranteed by a third person. When the debtor failed to make payment, the creditor determined the agreement, seized the goods and sued the surety on his guarantee. It was held that as the creditor had determined the agreement, the surety cannot be held liable.

Where the creditor loses or disposes off, without the consent of the surety any security pledged with him, the surety stands discharged to the extent of value of the security so lost or disposed.

By Invalidation of Contract

A guarantee obtained by means of either misrepresentation or concealment of material fact which the creditor was aware of, at the time of entering into the contract, invalidates the guarantee and discharges the surety.

Where there is no consideration between the creditor and the principal debtor, the surety is discharged. And where a person gives guarantee on the condition that the creditor shall not act upon it until another person joins in as co-surety, the guarantee is not valid if that other person does not join.

18. Bank Guarantee

A bank guarantee is a guarantee given by a bank to a third person, usually a creditor, to pay him a certain sum of money on behalf of the bank's customer, when the customer fails to fulfill any contractual or legal obligations towards the third person.

For example, A bank enters into an undertaking on behalf of X, who is the customer of the bank, to pay Y, the seller/creditor from whom X has purchased goods. The Bank issues this bank guarantee document to the seller who can produce the same before the bank and receive payment of the goods sold to X, where X has committed a breach of contract.

A bank guarantee has much commercial significance. It is considered as an important financial instrument. Where a creditor feels that the debtor has committed a breach of contract, he can invoke the bank guarantee and encash the amount immediately without indulging in legal dispute.

A bank guarantee is independent and in no way related to the main contract between the customer/debtor and the creditor. It is a contract involving two parties i.e. the bank and the creditor/beneficiary.

Examples of bank guarantee: A buyer may give a bank guarantee to a seller as a guarantee for the future payment. A bank guarantee may be given by the contractor as a guarantee for any amount advanced.

Types of bank guarantees: Financial Guarantee, Performance Guarantee, Deferred Payment Guarantee and Statutory Guarantee.

The creditor in whose favor the guarantee is issued can be prevented from invoking the same, by an injunction under the Civil Procedure Code, 1908, or the Specific Relief Act, 1963. The creditor can be restrained from invoking the guarantee by the debtor when he proves fraud committed by the creditor/beneficiary, or irreparable harm or injustice to himself.

Ordinary Guarantee vs. Bank Guarantee

An ordinary guarantee is governed by Section 126 of the Indian Contract Act, 1872. Whereas, a bank guarantee is not directly governed by Section 126 of the Indian Contract Act, 1872.

An ordinary guarantee consists of three (3) parties and three agreements involving the surety, the debtor and the creditor. On the other hand, a bank guarantee is a contract involving two parties i.e. the bank and the creditor.

In an ordinary guarantee, the contract between the surety and the creditor arises as a addition to the contract between the creditor and the principal debtor. The bank guarantee is independent of the main contract.

In an ordinary guarantee, the inter se disputes between the debtor and the creditor affect the surety's liability. However, the bank guarantee is independent of the disputes, arising out of the contract.

An ordinary guarantee does not mention any time limit before which the debt has to be claimed. Bank guarantees generally specify a specific time within which they can be enforced.

19. Letters of credit are generally used in international transactions to ensure payment. Due to the nature of international dealings that include factors such as distance, differing legal systems of each country and difficulty in knowing each party personally, the use of letters of credit has become a very important aspect of international trade. The device used by the Bankers to effect payment is called the 'Banker's Commercial Credit' or 'Letter of Credit'.

Features of a Letter of Credit

It is generally used in long-distance and international commercial transactions.

A letter of credit is a document issued by a bank to a customer allowing him to draw up to a predetermined amount of money, from the issuing bank, its branches, or other associated banks or agencies on complying with specific requirements.

It is a legal document issued by the buyer's bank, requesting that any person or any specifically named person, usually the seller/exporter, to advance money or goods on credit to a person holding the document or to a person whose name appears therein.

Where the Letter of Credit is used, in the sense that credit is given to the bearer of the instrument, and the buyer defaults his payment or is unable to pay, the repayment of such debt is confirmed by the (seller's bank) issuing bank that it will make payment to the seller/exporter/beneficiary. However, the bank will pay only when the seller/beneficiary presents/submits the documents as mentioned in the Letter of Credit.

It is an assurance to the seller/beneficiary that he will receive payment on time and for the correct amount for any goods, which he sells to the buyer/customer. It is not a negotiable instrument and hence cannot be transferred or exchanged.

A bank issues a Letter of Credit on the request of the buyer/customer and on the basis of one's financial position and reputation in the society. It is often abbreviated as 'LOC' or 'L/C', and is also referred to as a 'documentary credit'.

The seller need not worry about the import regulations of the buyer's country nor about the currency fluctuations. The buyer or the issuing bank need not pay money in advance to the seller.

Parties to a Letter of Credit

Applicant-Buyer-Importer-Opener: is a person who intends to purchase goods or avail services for which payment is to be made and hence applies to a bank to open a Letter of Credit.

Issuing Bank: The bank, which opens a Letter of Credit on the request of the applicant/Buyer, is referred to as an Issuing/operating/Importers Bank.

Beneficiary-Exporter-Seller: A person who has the right to receive payment or to draw bills and receive payment as per the terms of the Letter of credit is known as the Beneficiary/Exporter/Seller.

Advising Bank: It is a bank, which forwards the Letter of Credit to the beneficiary. It is located in the Beneficiary's/Exporter's country. It may also be termed as a Notifying Bank.

Negotiating Bank: A bank in the beneficiary/Exporter country, which makes payment on the bills drawn by the seller and accepts the documents, is called as a Negotiating bank. The name of the Nominated/Paying Bank may be specified in the Letter of Credit.

Confirming Bank: Where the advising bank in addition to advising credit to the beneficiary confirms such credit, such an Advising Bank shall be deemed as a Confirming Bank.

Reimbursing Bank: It is a bank appointed by the issuing bank to reimburse the Negotiating, Paying or Confirming Bank.

Types of Letter of Credit: Acceptance Credit, Revocable Credit, Irrevocable Credit, Confirmed Credit, With Recourse and without Recourse Credits, Transferable Credits, Back-to-Back Credits, Anticipatory Letter of Credit: i) Red Clause Letter of Credit, ii) Green Clause Letter of Credit and Revolving Letter of Credit.

Documents under a Letter of Credit

The issuing bank is bound to certify that the documents submitted by the seller/beneficiary are as per the instructions of the applicant/buyer. The documents that generally accompany a Letter of Credit are: Bill of Exchange, Invoice, Transport Documents – Bill of Lading, Airway bill, Post parcel receipts and courier receipts, Insurance documents, and Other documents.

Uniform Customs and Practice for Documentary Credits – UCPDC 500

The Uniform Customs and Practice for Documentary Credits are the conditions according to which banker's issue or act on commercial credits. Being first formulated in 1933 by the International Chamber of Commerce (ICC), they underwent several revisions with the latest, which came into force on January 1st 1994. They are called the UCP 500. The UCP 500 are incorporated in the Letter of Credit as one of the terms of Letter of Credit hence they are contractually binding on all the parties to the Letter of Credit. They generally govern all Letter of Credit transactions.

20. Lien is the right of a person (usually the creditor) to retain the possession of the goods and securities belonging to another person (the debtor) till the amounts due to him from such owner are fully realized. The lien can be defined as “the right to retain the lawful possession of the property of another until the owner fulfills a legal duty to the person holding the property, such as the payment of lawful charges for work done on the property. A mortgage is a common lien.”

A lien has judicially been defined as “a right in one man to retain that which is in his possession belonging to another until certain demands of the person in possession are satisfied.”

Illustration: The transporter of goods retains the possession of the goods that he has carried to the destination till the amount of freight is paid to him.

The right of exercising Lien may arise in three ways: By express contract in between the parties; from implied contract in accordance with the general or particular usage of trade; and by legal relation between the parties.

In order to create a valid lien, the following factors are essential.

The party who acquired the property should have the absolute title of ownership over that property.

That the party claiming the lien should have an actual or constructive possession of property or goods with the assent of the party against whom the claim is made.

The lien should arise upon an agreement, express or implied and not be for a limited or specific purpose inconsistent with the express terms or the clear, intent of the contract; e.g., when goods are deposited to be delivered to a third person or to be transported to another place.

In general, the right of the holder of the lien is confined to the mere right of retainer. But when the creditor has made advances on the goods of a factor, he is generally invested with the right to sell. In the absence of express contract a lien does not of itself carry (subject to a few exceptions) a right of sale of goods/property on the part of the lienee (the person who exercises the right). However, when such right of sale is incorporated as a matter of special

contract in between the owner and the lienee, the lienee will have to closely observe the contractual rights given to him and should be careful to serve any notices of his intention to sell the goods/property according to the terms of the contract and he should follow the necessary procedures stipulated by the contract meticulously.

There are two kinds of lien; particular lien and general lien.

Particular Lien

A person claims the right to retain property in respect of money or labor expended on such particular property. This right is known as particular lien. In Indian law, particular lien is available to all the classes of people other than those mentioned in Section 171 of the Indian Contract Act.

The creditor with a particular lien can retain the possession of the goods only till the dues from the debtor for a particular debt for which the securities were handed over have been satisfied. He can not retain them for any dues from the debtor on other accounts.

Example: A, the goldsmith is given the gold by B, the owner to convert it in the form of golden ornaments. He can retain the possession of the ornaments only till the service charges for making those ornaments are paid by the owner, but not for any other liability to be discharged by the owner of the golden ornaments.

General Lien

“A general lien is one which the holder thereof is entitled to enforce as a security for the performance of all the obligations, or all of a particular class of obligations, which exist in his favor against the owner of the property.”

A general lien is a lien in respect of all monies owed to the lienee. A particular lien is limited to monies owed to the lienee in respect of the goods over which the lien is sought to be exercised.

Illustration: ‘X’ has borrowed from the bank in the form of two types of loans, one is the agricultural loan for cultivation of crop and the other is a personal loan against the security of his gold ornaments to meet his personal expenditure. The agricultural loan has become due for repayment. If there is no specific agreement in between the bank and the borrower in consistent with the lien, when the personal loans is repaid, the bank can exercise the right of general lien by retaining the possession of golden ornaments after the borrower repays the entire liability in his personal loan till the dues accrued in the agricultural loan are repaid. But, the bank cannot exercise the right of lien when the agricultural loan is not due for repayment at the time when the personal loan is closed.

21. Employer-employee relationship has acquired a new meaning and significance with the phenomenal rise of globalization, market economy and free trade. Employers can no longer dictate terms to employees. Employees have become the equal partners and players in the economic sector. In fact, the positive role being played by both the employer and the employee in all sectors of activity – Public and Private, is immensely contributing towards achieving peace, prosperity and happiness of the humankind. Efficient corporate governance is recognized as the key to progress. In the present employment contracts all the following clauses play a vital role in the contract, breach of which may lead to litigation to claim for damages. The important clauses are:

Data Privacy

Data privacy refers to the evolving relationship between technology and the legal right to, or public expectation of privacy in the collection and sharing of data. Privacy problems exist wherever uniquely identifiable data relating to a person or persons are collected and stored, in digital form or otherwise. Improper or non-existent disclosure control can be the root cause for privacy issues. The most common sources of data that are affected by data privacy issues are: Health information, Criminal justice, Financial information, and Genetic information.

The challenge in data privacy is to share data while protecting the personally identifiable information. Consider the example of health data which are collected from hospitals in a district; it is standard practice to share this only in the aggregate. The idea of sharing the

data in the aggregate is to ensure that only non-identifiable data are shared. The legal protection of the right to privacy in general and of data privacy in particular varies greatly around the world.

Anyone processing personal data must comply with the eight enforceable principles of good practice, hence the data must be: fairly and lawfully processed; processed for limited purposes; adequate, relevant and not excessive; accurate; not kept longer than necessary; processed in accordance with the data subject's rights; secure; and not transferred to countries without adequate protection.

Confidentiality

Under contract law, there are confidentiality agreements and restrictive covenants.

Confidentiality Agreements

Two restrictions are non-use and non-disclosure and an agreement should have both. An example of confidentiality breach might be disclosing the identity of the former employer's customers to the new employer. There are three levels of confidentiality. The lowest level is public domain information, followed by confidential information, and finally by trade secrets, the highest of the three.

Restrictive Covenants: There are four types of restrictive covenants, which are non-competition; non-disparagement; non-interference; and non-solicitation.

"Reasonable notice" is an implied term of the contract and is either written by an express notice provision, if there is an express notice provision in the employment contract, then that clause is binding unless it is expressly or implicitly no longer in effect, or it is unlawful, in which case the contract may be terminated upon a reasonable notice.

The law of employment establishes minimum statutory requirement for compensation for individual terminations. For periods of employment greater than 3 months, the employer must pay severance to the employee, or satisfy that obligation by giving a written notice of termination. Group terminations (those of 50 or more) have additional requirement under the law. First, the employer must give written notice to the Minister, to the employee being terminated and to the Union. This notice must specify the number of employees being terminated and dates of terminations and the reason for termination.

Non-Disclosure of Information Concerning Business

Employee will not at any time, in any fashion, form, or manner, either directly or indirectly divulge, disclose, or communicate to any person, firm, or corporation in any manner whatsoever any information of any kind, nature, or description concerning any matters affecting or relating to the business of employer – including, without limitation, or the names of any of its customers, or the prices at which it obtains or has obtained goods, or prices at which it sells or has sold its products, or information concerning the business of employer, or manner of operation of business, or its plans, processes, or other data of any kind, nature.

The parties hereby stipulate that, as between them, the foregoing matters are important, material, and confidential, and gravely affect the effective and successful conduct of the business of employer, and its goodwill, and that any breach of the terms of this section is a material breach of this agreement.

Indemnification

Indemnity is a legal exemption from the penalties or liabilities incurred by any course of action.

Indemnification is a promise, usually as a contract provision, protecting one party from financial loss by the other. By way of indemnification it protects one party at the expense of the other. Indemnification can either by direct payment or reimbursement for the loss, however indemnification clauses cannot usually be enforced for intentional tortious conduct of the protected party.

Corporate officers, board members and public officials often require an indemnity clause in their contracts before they perform any work. In addition, indemnification provisions are common in intellectual property licenses in which the licensor does not want to be liable for misdeeds of the licensee. Such a license would protect the licensor against product liability and patent infringement.

22. Sole Proprietary Centre

It is run by a single owner. It has unlimited personal liability for the obligations of the business. The entity is not taxed, as the profits and losses are passed through to the sole proprietor. The sole proprietor manages the business and contributes whatever capital is required, the profit and losses are not shared by anyone.

Features of Sole Proprietorship

- A sole proprietorship is an unincorporated business owned by one person. It is the most simplest form of business and is very easy to maintain. The business is owned and represented legally by an individual.
- The ownership of the business by a sole person is the distinct feature of the sole proprietorship business. The life of a sole proprietorship is limited to the owner's life span and hence does not enjoy perpetual existence.
- A sole proprietorship need not be registered.
- All the liabilities that arise from a sole proprietorship are the personal liabilities of the owner.
- The sole proprietorship has no existence apart from its owner. If the business owned by a person is carried through a company, it ceases to be a sole proprietorship. Likewise, if the individual shares the ownership of the business even with his/her spouse, it will not be a sole proprietorship.
- The owner of the sole proprietorship is known as the 'sole proprietor'.
- The sole proprietorship business can be carried out in the name of the sole proprietor or under a trade name.
- A sole proprietorship can engage any number of employees or independent contractors for the carrying on of business.
- All the incomes and expenses of the business are included in the sole proprietor's income tax returns.
- Examples of sole proprietorships are part-time businesses, direct sellers, some are not sole proprietorships, Contractors and Consultants.

The Merits and Limitations of Sole Proprietorship Concern are:

- A sole proprietorship has the advantage of low start-up costs and ease of formation. This is beneficial for persons who do not have enough capital but aim at doing business.
- Better control and effective business administration can be retained.
- Quick decisions can be taken by the sole proprietor.
- The reporting requirements are minimal.
- Filing of tax returns is much easier when compared to that of a corporation. The sole proprietor's individual and business losses or profits are considered the same and have to be included in the tax returns on the basis of self-employed taxes.

Limitations

- Personal liability or unlimited liability of the sole proprietor is the major disadvantage of a sole proprietorship business. All the personal wealth and assets are at stake in the event of failed business.

- Unlike a corporation, a sole proprietorship does not necessitate the maintenance of books of accounts and does not lay the strict standards of financial control. This leads to unwarranted expenses, thus harming the business structure.
 - All the decisions, activities and results rest on the sole proprietor, thus affecting the productivity and creativity of the business.
 - Raising capital for the business is difficult when compared to that for a corporation.
23. The law relating to formation and membership of a Cooperative Society and the requirements that need to be fulfilled to register a Cooperative Society.

Requirements for forming a Cooperative Society

- Minimum membership of a State Cooperative Society is 10 in case all the applicants are individuals and a minimum of 50 members in case of a Multi-State Cooperative Society.
- The object of the formation of society must be the promotion of the economic interests of its members.
- The proposed society should be economically sound and is expected to be so in the long run.
- The registration of the proposed society should not cause an impression that it adversely affects the cooperative movement.
- The prospective members should be willing to contribute a minimum amount of the share capital as prescribed by the Registrar of the Cooperative Societies for the particular type of society.

Membership

The membership of a co-operative society at the State level in accordance with the State Act, can be acquired by,

- an individual competent to enter into contract, who has attained majority and is of sound mind and belongs to a class of persons, if any, for whom the society is formed as per its bye-laws,
- a society registered or deemed to be registered under the Cooperative Societies Act,
- the Government.

The membership of a multi-state cooperative society as per the Multi-state Cooperative Societies Act, 2002, can be acquired by,

- an individual, competent to contract under section 11 of the Indian Contract Act, 1972,
- any multi-state cooperative society or any cooperative society,
- the Central Government,
- a State Government,
- National Cooperative Development Corporation (NCDC),
- any other corporation formed or controlled by the Government.

No individual person shall be eligible for admission as a member of a national cooperative society or a federal cooperative society.

Registration of a Cooperative Society

Cooperative Society Under The State Act: A cooperative society formed under a State Act has to comply with the following requirements:

- i. Prescribed application duly filled-in shall be submitted to the Registrar of Cooperative Societies.

- ii. The application shall be accompanied by four copies of the proposed bye-laws of the society.
- iii. Where all the applicants are individuals, the number of applicants shall not be less than ten.
- iv. The application shall be duly signed by each applicant, if the applicants are individuals.
- v. If the applicant is a society, it shall be signed by a member duly authorized by such society.

A Multi-State Cooperative Society: A multi-state cooperative society has to undergo the following registration procedure:

- i. The application forms can be obtained from the Office of Registrar of Cooperatives situated nearby.
- ii. An application in the prescribed form shall be signed,
 - a. in the case of a multi-state cooperative society of which all the members are individuals, by at least fifty persons from each of the states concerned.
 - b. in case the members are cooperative societies, by duly authorized representatives on behalf of at least five such societies as are not registered in the same state.
 - c. in case the members are other multi-state cooperative societies and other cooperative societies, by duly authorized representatives of each of such societies.
 - d. if the members are cooperative societies or multi-state cooperative societies and individuals, by at least (i) fifty persons, being individuals from each of the two states or more and, (ii) one cooperative society each from two states or more or one multi-state cooperative society.
- iii. The application shall be accompanied by copies of the proposed bye-laws.
- iv. The application shall specify the following:
 - name of the proposed multi-state cooperative society,
 - head quarters and address to be registered,
 - the area of operation,
 - the main objectives of formation,
 - a certificate from the bank stating the credit balance of the proposed multi-state cooperative society.

24. Characteristic features of a partnership firm and the difference between a partnership firm and a company.

Partnership Firm: A partnership firm is governed by the provisions of the Indian Partnership Act, 1932. Section 4 of the Indian Partnership Act, 1932, defines partnership as “a relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all”.

At least two members are required to start a partnership business. But the number of members should not exceed 10 in case of banking business and 20 in case of other business.

The above definition of partnership identifies the characteristics of a partnership which are as follows:

- An association of two or more persons.
- An agreement between two or more persons.

An agreement between two or more persons is the basis of a partnership contract. Such a partnership agreement may be either express (i.e. oral or written) or implied which can be ascertained from the conduct of the parties. Thus, a partnership arises from contract and not from the status of the parties as in the case of Hindu Undivided Family [Section 5].

Business: The parties to a partnership agreement must agree to carry on some business. The carrying on of business may include any type of business. However, a single transaction of business does not mean the carrying on of business. Business here means a series of business transactions.

Sharing of Profits of Business: The purpose of a partnership must be to make profit. The profit must be distributed among the partners in the agreed ratio. Every partner is entitled to a share in profits. However, the sharing of losses is not the essential criteria, only some partners may share the loss. As a general rule all partners are entitled for a share in the profits.

The partnership business must be carried on by all or any one of them acting for all. Every partner has a two fold character. He can act as an agent (as he can bind the other partners by his acts) and a principal (by being bound by the acts done by other partners. Thus, the type of relationship among the partners for the purpose of carrying on the business is termed as “mutual agency”. Whether a partnership exists between two or more persons can be determined by the test of mutual agency, i.e. whether the business is carried on by all the partners or by any one acting for all.

Membership in a Partnership Firm

The Partnership Act, 1932 has laid down that the partnership firm may have a minimum of two partners.

As regards the maximum number of partners, no restriction has been laid in the Partnership Act, 1932, whereas under the Companies Act, 1956 the maximum number of members for a Banking Business is ten (10) and for any other type of business is twenty (20).

Who May be the Partners

Every person who is competent to enter into a contract may become a partner in a partnership firm. A minor, who is not competent to enter into contracts, cannot become a partner, but may be admitted to the profits of the partnership with the consent of all the partners.

Distinction Between a Company and a Partnership: The principal points of distinction between a company and a partnership firm, are:

Table

Partnership	Company
A partnership firm is not distinct from the several persons who compose it.	A company is a distinct legal person.
In a partnership, the property of the firm is the property of the individuals comprising it.	In a company, the property belongs to the company and not to the individuals comprising it.
Creditors of a partnership firm are creditors of individual partners and a decree against the firm can be executed against the partners jointly and severally.	The creditors of a company can proceed only against the company and not against its members.
Partners are the agents of the firm. A partner can dispose the property and incur liabilities as long as he acts in the course of the firm's business.	Members of a company are not its agents to dispose the properties and incur the liabilities of a company.
A partner cannot contract with his firm.	A member of a company may contact with his firm.
A partner cannot transfer his share and make the transferee a member of the firm without the consent of the other partners.	Transferability of shares is one of the key characteristics of a company.
Restrictions on a partner's authority contained in the partnership contract do not bind outsiders.	Restrictions incorporated in the articles are effective, as the public are bound to augment themselves with them.

Partnership	Company
A partner's liability is always unlimited.	Shareholder may be limited either by shares or by guarantee.
The death or insolvency of a partner dissolves the firm, unless otherwise provided in the partnership deed.	A company has perpetual succession, i.e., the death or insolvency of a shareholder or all of them does not affect the life of the company.
A partnership firm cannot have more than 20 members in any business other than banking and cannot have more than 10 in the case of banking business.	A company may have any number of members except in the case of a private company which cannot have more than fifty members (excluding the past and present employee members). The minimum number of members in a public company must not be less than seven persons and, in a private company, not less than two.
The accounts of a firm are audited at the discretion of the partners.	A company is legally required to have its accounts audited annually by a chartered accountant.
A partnership firm is the result of an agreement and can be dissolved at any time by agreement.	A company, being a creation of law, can only be dissolved as laid down by law.

25. Salient Features of the LLP

- The proposed LLP is a corporate body as defined in Section 3 of the Companies Act, 1956 which includes a LLP registered under the proposed LLP Act, a LLP incorporated outside India, except for a corporation sole, a co-operative society and any other corporate body not being a company with a perpetual succession. It is a legal entity.
- Every LLP must have either the words “limited liability partnership” or the acronym “LLP” as the last words of its name. The name should not be undesirable, identical or closely resembling the name of some existing LLPs or body corporate or to a registered Trade mark. The Central Government may direct the LLP violating the norms to change its name within 3 months or within the extended period.
- It can sue and be sued. It can in its name hold, acquire, or dispose of property and shall have a common seal.
- The LLP shall not be regulated by the law relating to partnerships.
- Its formation requires a minimum of two partners whereas there is no limit on the maximum number of partners. Any person shall be eligible to become its partner by either subscribing to the incorporation document or with regard to an agreement between the existing partners. An agreement between the partners or an agreement between the LLP and partners shall govern the relations [i.e. the rights and duties] of the partners *inter se*.
- A person ceases to be a partner of a LLP,
 - as per the terms of the agreements, or,
 - by giving a 30 days notice to the other partners, or,
 - upon his/her death, or,
 - upon the dissolution of the LLP.

On ceasing to be a partner, the representatives of the partner are entitled to compensation amounting to his capital contribution and his share in the accumulated profits. The Registrar of Companies (hereinafter referred as ROC) should be intimated with a prior notice of 30 days when a person becomes or ceases to be a partner or about any changes in the name and address of the partners.

- A manager accountable for the regulatory and legal compliance is to be necessarily appointed by an LLP. The particulars of appointment of the manager should be submitted to the ROC.
- It shall be registered with the ROC under the Companies Act, 1956 with an incorporation document subscribed in the prescribed form, by at least two partners. The photographs of the partners and the manager must be submitted to the ROC.
- It shall have a registered office and the change of its address if any, may be notified to the ROC.
- The liability of the partners is limited except in case of unauthorized acts, fraud and negligence. There is no personal liability for the wrongful acts of other partners and the loss due to such acts shall be borne by the LLP property.
- A partner has fiduciary duties towards his co-partners and the LLP.
- It shall maintain proper books of accounts and annual accounts for a duration as per the Rules.
- An annual “Declaration of Solvency” is to be filed by the manager with the ROC.
- Inspectors may be appointed by the Central Government to investigate the affairs of a LLP. The appointment may be with regard to a report of the ROC or by an application of not less than 1/5th of the total number of partners or by a resolution to the effect that the affairs ought to be investigated or if the Central Government/Tribunal thinks so.
- For tax purposes, the property of the LLP shall be treated as the property of the partners. The partners shall be individually liable to tax on their share of profit or capital gains on the disposal of LLP assets.
- A partner of a LLP can freely transfer his economic interests either in whole or in part to a third person. Such transfer, however, shall neither cause the dissociation of the partner with the LLP, nor the dissolution, or the winding up of the LLP. However, such a transferee shall be disabled from participating in the conduct of the LLP business and from accessing information of the LLP activities.
- A firm, an unlisted public company and a private company can be converted into an LLP.
- It may be wound up either voluntarily or by the Company Law Tribunal.
- Defunct LLPs may be struck off by the ROC.
- LLPs can now electronically file their returns.

26. Hindu Undivided Family

- The joint Hindu family system is a unique feature of the ancient Indian social life.
- The joint family business carried out by the members of a Hindu family, is legally called as the ‘Hindu Undivided Family’ and is governed by the Hindu law.
- A Hindu Undivided Family consists of people who have lineally descended from a common ancestor, and includes the wives and unmarried daughters.
- A Hindu Undivided Family arises from the status, i.e. the persons acquire by birth an interest in the Joint Family property. It is not a creation of a contract.
- All the members of a Hindu Undivided Family carry on business which is funded out of the joint funds of such members, under the control and supervision of the head of the family.
- It has a separate legal entity and cannot enter into a partnership with other persons, as a partnership is not a legal person, but the karta of a HUF can. However, two kartas of two different Hindu Undivided Families can form a partnership, but the individual members of the two HUFs do not, automatically, become partners.

Legal Environment of Business

- The business in HUF is administered by the senior most person of the family, known as the 'karta' or 'Manager'.
- The karta is bestowed with full control over the affairs of the family business and is not questioned on the acts done for the benefit and in the name of the family. He is a deemed caretaker of the firm's assets.
- The male members of the joint family business are called as coparceners and the female members are referred as 'members'. The coparceners are entitled for the partition of HUF property, whereas the members receive only the maintenance from the HUF.
- The family business is considered as a part of ancestral property and is a subject matter of co-parcenary interest.
- Registration is not compulsory for the carrying on of HUF business.
- A coparcener can demand the partition of the joint family business.
- A HUF being a separate legal entity is assessed to tax as a separate person. It is eligible for all the deductions and exemptions, including the benefit of basic limit chargeable to tax and wealth tax available to an individual.
- The income earned on the utilization of the HUF's assets and on the investment of its funds is regarded as the HUF's income which is assessed separately and is taxed. However, the income should have been earned on using the HUF property or funds only.

The following are some of the distinction between a Hindu Undivided Family Business and Company.

Table

Hindu Undivided Family	Company
A Hindu undivided family business consists of homogenous members since it consists of members of the joint family itself.	A company consists of heterogeneous members.
The Karta (manager) has the sole authority to contract debts for the purpose of the business, other co-parceners cannot do so.	There is no such system in the company.
A person becomes a member of Joint Hindu Family business by virtue of birth.	There is no provision to that effect in the company.
Registration is compulsory for carrying on business even if the number of members exceeds twenty.	Registration of a company is compulsory.

27. Non-Governmental Organizations

NGOs are non-profit organizations that work for social, cultural, economic, educational or religious cause. The NGOs have been constantly working for the upbringing of the needy sections of the Indian society in the everchanging socio-economic climate of our country.

An NGO can be identified under the following legal heads:

- As a Society registered under the Societies Registration Act, 1860.
- As a Trust (constituted under the Trust deed and registered with the Income Tax Authority).
- As a Limited company incorporated under Section 25 of the Companies Act, 1956.

NGO as a Society

An NGO society is formed when people come together for achieving a common purpose which is both legal and useful for others. It generally does not indulge into profit making activities. NGO societies are registered under the Societies Registration Act, 1860.

Registration Formalities: Registration of an NGO society can be done either,

- at the state level (i.e. in the office of the Registrar of Societies), or
- at the district level (in the office of the District Magistrate or the local office of the Registrar of Societies).

The procedure for registration is different for each state. Generally the application for registration should be submitted along with:

- A memorandum of association and rules and regulations/bye-laws,
- Consent letters of all the members of the managing committee,
- Authority letter duly signed by all the members of the managing committee,
- An affidavit sworn by the president or secretary of the society on a non-judicial stamp paper together with a court fee stamp and
- A declaration by the members of the managing committee that the funds of the society will be used only for the purpose of furthering the aims and objects of the society.

All the documents should be submitted in duplicate, together with the required registration fee. The memorandum of association and rules and regulations need not be executed on a stamp paper.

NGO as a Trust

An NGO trust is a legal entity set up by the people who decide to commit themselves to setting aside some of their income or assets for some charitable cause. Such trusts are independent of any governmental or external control. The only criteria is that they should work for charitable purposes and in accordance with the powers embodied in the Trust Deed.

Registration Formalities: The application for registration should be made to the officer having jurisdiction over the region in which the trust is sought to be registered.

After providing details (in the prescribed form) regarding the name by which the public trust shall be known, names of trustees, mode of succession, etc., the applicant has to affix the required court fee stamp to the form and pay a nominal registration fee, depending on the value of the trust property.

The application form should be signed by the applicant before the regional officer or superintendent of the regional office of the charity commissioner or a notary. The application form should be submitted, together with a copy of the trust deed. An affidavit and consent letter should also be submitted.

28. Non-Profit Company

A non-profit company is similar to an ordinary company in all respects except that it is not established for making profit or for commercial gains. It is also known as a Section 25 Company. It is a voluntary association of the people registered under the Companies Act, 1956.

Non-profit companies are registered under Section 25 of the Indian Companies Act, 1956. It is formed by a minimum of three trustees, and there is no upper limit to the number of trustees. The management is in the form of a board of directors or managing committee.

Features of a Non-profit Company

- The objectives of a non-profit company can include the promotion of commerce, art, science, religion, charity or any other useful object.
- The profits of such company are applied for promoting only the objects of the company and no dividend is paid to its members [Section 25 (1) (a) and (b) of the Companies Act, 1956].

- A non-profit company may be public or private. If the non-profit company is a private company a minimum of two members are required to form it.
- If the non-profit company is for a public purpose, then a minimum of seven members are needed. A 'Section 25 company' is eligible for certain exemptions from the provisions of law and for a concessional rate of fees etc.

Registration Formalities

- The main documents for a non-profit company is the Memorandum of Association and the Articles of Association.
- An application has to be made for the availability of a particular name to the registrar of companies, in the prescribed form. A choice of three other names by which the company will be called should be suggested, in case the first name which is proposed is not found acceptable by the registrar.
- After the name is confirmed, an application should be made in writing to the regional director of the Company Law Board.
- The application should be accompanied by the following documents:
 - Three printed or typewritten copies of the memorandum and articles of association of the proposed company, duly signed by all the promoters with full name, address and occupation.
 - A declaration by an advocate or a chartered accountant that the memorandum and articles of association have been drawn up in conformity with the provisions of the Act and that all the requirements of the Act and the rules made thereunder have been duly complied with, in respect of registration or matters incidental or supplementary thereto.
 - Three copies of a list of the names, addresses and occupations of the promoters (and where a firm is a promoter, of each partner in the firm), as well as of the members of the proposed board of directors, together with the names of companies, associations and other institutions in which such promoters, partners and members of the proposed board of directors hold responsible positions, if any, with description of the positions so held.
 - A statement showing in detail the assets (with the estimated values thereof) and the liabilities of the association, as on the date of the application or within seven days of that date.
 - An estimate of the future annual income and expenditure of the proposed company, specifying the sources of the income and the objects of the expenditure.

A statement giving a brief description of the work, if any, already done by the association and of the work proposed to be done by it after registration, in pursuance of Section 25.
 - A statement specifying briefly the grounds on which the application is made.
 - A declaration by each of the persons making the application that he/she is of sound mind, not an undischarged insolvent, not convicted by a court for any offence and does not stand disqualified under Section 203 of the Companies Act 1956, for appointment as a director.
- The applicants must also furnish to the registrar of companies (of the State in which the registered office of the proposed company is to be, or is situated) a copy of the application and each of the other documents that had been filed before the regional director of the company law board.
- The applicants should also, within a week from the date of making the application to the regional director of the company law board, publish a notice in the prescribed manner at least once in a newspaper in a principal language of the district in which

the registered office of the proposed company is to be situated or is situated and circulating in that district, and at least once in an English newspaper circulating in that district.

- The regional director may, after considering the objections, if any, received within 30 days from the date of publication of the notice in the newspapers, and after consulting any authority, department or ministry, as he may, in his discretion, decide, determine whether the licence should or should not be granted.
- The regional director may also direct the company to insert in its memorandum, or in its articles, or in both, such conditions of the licence as may be specified by him in this behalf.

29. Definition of an Insolvent

The term 'insolvent' has not been defined by the Acts but refers to a person who cannot or does not pay his debts in full or has committed an 'act of insolvency', and has been adjudged insolvent by an Insolvency Court.

Any person who is competent to enter into a contract can be adjudged an insolvent. A minor, who is not competent to enter into contract, can in no circumstances be adjudged an insolvent, not even for the expenses incurred for the supply of necessaries to him.

A person in order to be adjudged as an insolvent,

- must be competent to enter into a contract,
- must be a 'debtor', and
- must have committed an 'act of insolvency'.

Acts of Insolvency

An act of insolvency refers to an act or default committed by the debtor consequent to which an insolvency petition may be filed. The acts of insolvency by the debtor confer jurisdiction to the insolvency court to adjudge him an insolvent.

The following are considered as the acts of insolvency:

- Where a debtor makes a transfer either in India or elsewhere, of all or substantially all his property to a third person, for the benefit of his creditors generally, he is said to have committed an act of insolvency. To constitute an act of insolvency it is necessary that the transfer of property must be for the benefit of the creditors wherein they get certain rights pursuant to such transfer and can enforce such rights against the transferee.
- If the debtor in India or elsewhere, makes any transfer of his property or any of its part, with the intention to defraud or delay his creditors. Here, it is the dishonest and fraudulent intention of the debtor that must be proved. The dishonest intention of the debtor towards the creditors can be gathered from the surrounding circumstances and from the debtor's acts. If, in India or elsewhere, a debtor makes any transfer of his property or any part thereof, which would be void as a 'fraudulent preference' if he were adjudged an insolvent. Fraudulent preference means deliberately favoring one creditor as against the others, while transferring some property or making payment. Such a transfer shall be void if the debtor is adjudged insolvent within three months of the transfer by fraudulent preference. If the debtor himself requests before a court to be adjudged insolvent, and even if the insolvency petition filed by the debtor is dismissed, a creditor can file for the debtor's insolvency on this ground.
- If he has given notice to any of his creditors that he has suspended, or is likely to suspend the payment of any of his debts.
- If the debtor is imprisoned in the execution of any decree of a court for the payment of money.
- If the debtor fails to comply with an insolvency notice served on him by one or more creditors with regard to a decree or an order for the payment of money, within the period specified in the notice which shall not be less than one month.

- If, the debtor's property is sold or is attached (under the Presidency Towns Act) for a period of not less than 21 days, in the execution of a decree of any court, for the payment of money.
- If, with the intent to defraud or delay his creditors, the debtor:
 - leaves or stays out of India, or
 - leaves his dwelling house or usual place of business or otherwise absents himself, or
 - hides himself so as to deprive his creditors of the means of communicating him.

Consequences of Insolvency

The consequences that follow on the debtor becoming insolvent :

- The debtor gets protection against legal proceedings initiated by his creditors,
- On the basis of order of adjudication, his properties are assigned to the Court or the Official Assignee or Receiver of the court.
- On being discharged, the debtor is at liberty to start a new life afresh.
- An insolvent is disqualified of his civil rights. The disqualifications suffered as to the extent that he cannot be appointed as a magistrate, or be elected a member of any body, nor can he vote.

30. The law relating to Insolvency and its implications

The adjudication of a debtor as an insolvent and his subsequent discharge, involves the following stages:

- Insolvency Petition – An insolvency petition must be presented either by the debtor himself or by a creditor, in the court on the fulfillment of certain conditions.
- Admission of Petition – On the prima facie satisfaction of the court, it admits the petition, fixes a date for hearing and issues notice to the other party, for submitting the evidence and counter-evidence.
- Interim Receiver – The court shall where it deems necessary appoint an interim receiver of the debtor's property for the protection of the debtor's estate and to take the possession of the same, during the pendency of the petition and before the order of adjudication.
- Hearing of Petition – On the date of hearing, the court shall ask the petitioner to produce the necessary proof and evidence. The conduct, dealings and property of the debtor shall also be duly examined by the court. Where the court is not satisfied with the evidence produced, it shall dismiss the petition. Where the petition is instituted by the creditor, the court may award a compensation of Rs.1000 to the debtor.
- Adjudication of Debtor – Where the evidence produced is satisfactory and the court is satisfied as to the acts of insolvency of the debtor, it shall make an order of adjudication and shall mention the period within which the debtor can apply for his discharge.
- Vesting of Insolvent's property – On being adjudicated insolvent, the whole property of the debtor (except properties held in trust, and tools of trade, wearing apparels, etc.) vests in the court, or in the official receiver appointed by the court. The insolvent cannot deal with his property except with the prior permission of the official receiver.
- Realization and Distribution of property – The Official Receiver or the Assignee realizes the property of the insolvent and distributes dividends amongst his creditors. The realization of property may include the sale, mortgage or pledge of all or any of the property of the insolvent, the carrying on of business of the insolvent so far as beneficial for the winding up of the same, the institution or defence of any suit or other legal proceedings, reference of any dispute to arbitration, compromise of any debts, etc.

The Official Assignee or Receiver shall then distribute dividends among the creditors. The following debts have a priority payment when compared to others:

- debts due to the Government or any local authority,
- salary or wages of any clerk, servant or laborer in respect of the services rendered to the insolvent during four months before the date of the presentation of the petition, subject to certain limits, and,
- rent due to a landlord for one month in the Presidency towns.

After paying the above debts in full, the other debts shall be paid ratably as per the schedule. Where any surplus is left, it shall be utilized in the payment of interest from the date of order of adjudication @6 % p.a. Any surplus left thereafter, shall be assigned or disposed of by will to any other person.

- **Discharge of Insolvent** – For his discharge, an insolvent must apply to the court for discharge, at the time after the order of adjudication. Thereon, the court shall fix a date of hearing and serve a notice of the same to all the creditors. After considering the report of the Official Receiver regarding the conduct and affairs of the insolvent and on hearing the creditors, if any, the court may grant, or refuse to grant, or conditionally grant, the discharge of the insolvent.

Where the insolvent fails to apply for his discharge within the specified time (if any), or fails to appear on the date of hearing for discharge, the court may annul the order of adjudication or may make such other order as it may think fit.

An order of discharge releases the insolvent from all debts, except,

- any debt due to the Government,
- any debt incurred by fraud or fraudulent breach of trust,
- any debt in respect of which he has obtained forbearance by any fraud,
- any liability to provide maintenance for his wife or children.

31. **Company- Voluntary Association:** “A company is a voluntary association of persons formed for the purpose of doing business, having a distinct name and limited liability. It is a juristic person having a separate legal entity distinct from the members who constitute it, capable of rights and duties of its own and endowed with the potential of perpetual succession.”

Meaning and Nature of a Company: Section 3(1) of the Companies Act, 1956 defines a company as a company formed and registered under this Act, or an existing company as defined under Section 3(1)(ii) which lays down that an existing company means company formed and registered under any previous Company Law.

Company as a Business Entity: The company is an independent entity that is required to operate with defined bodies. These are:

- The general assembly
- The board
- The managing director

The following are the characteristic features of a company:

- **Independent Corporate Entity:** One of the important features of a company is its separate legal entity once it is incorporated or registered under the Companies Act.

The case of *Salomon vs. Salomon & Co. Ltd.*, is noteworthy in the light of this discussion. Salomon was a prosperous leather merchant who converted his company into a limited company named as Salomon & Co. Ltd. The company so formed consisted of Solomon, his wife and five of his children as members. The company purchased the business of Salomon for £39,000, and the purchase consideration was paid in terms of debentures worth £10,000 conferring a charge over the company's

assets, and 20,000 shares of £1 each fully paid-up. The balance was contributed in cash. The company in less than one year ran into difficulties and liquidation proceedings commenced.

It was held by the House of Lords that the business belonged to the company and not to Salomon.

- **Limited Liability:** The case of *Salomon vs. Salomon & Co Ltd.* also recognized the principle of 'limited liability'. No member can be called upon to pay anything more than the unpaid value of the shares held by him or the amount guaranteed by him.

But, in the case of companies formed with unlimited liability of members, the liability of the members in such cases is not limited only to the extent of the face value of their shares and the premium, if any, unpaid thereon but members will also be required to contribute further to meet the debts of the company in the event of winding-up.

- **Separate Property:** The wealth of the shareholders and the wealth of the company are separate. A member does not even have an insurable interest in the property of the company. An incorporated company's wealth is clearly distinguished from that of its members.

The income received by the shareholders in the form of dividends from the company is not similar to the income of the company itself.

- **Perpetual Succession:** A company once incorporated will never die. Being an artificial person it cannot be incapacitated by illness and it does not have an allotted span of life. Also, as the company is distinct from its members, the death, insolvency or retirement of its members leaves the company unaffected and will continue to be the same entity with the same privileges and immunities, estates, and possessions.
- **Transferable Shares:** The Companies Act provides that the shares or other interests of any member in a company shall be movable property, transferable in the manner provided by the articles of the company. A member may sell his share in the market without having to withdraw the capital from the company.

32. Lifting the Corporate Veil

As it can be seen from the case of *Salomon vs. Salomon & Co Ltd.*, a company is given a distinct legal entity in comparison to the individuals who are managing the affairs of the company. This provides a 'veil' for the persons who run the incorporated company as its 'arms' and 'heads'. The courts generally consider themselves bound by the principle of separate legal entity and adopt a cautious approach while piercing a corporate veil.

However, there have been instances where the courts lift the corporate veil of an incorporated company either to expose the ingenuous persons behind the company or to find out the real purpose of incorporating it. The corporate veil is said to be lifted or pierced when the court ignores the company and concerns itself directly with the members or management.

The circumstances under which the court may lift the corporate veil can be broadly grouped under two heads: Statutory provisions and Judicial interpretations.

Statutory Provisions pertaining to the lifting of the Corporate Veil

The Companies Act, 1956 expressly provides for the following provisions pertaining to the lifting of the corporate veil:

- **Reduction of Membership:** Section 45 specifies that "If any time the number of members of a company is reduced, (i) in the case of a public company, below seven, (ii) or in the case of a private company, below two and (iii) the company carries on business for more than six months while the number is so reduced, every person who is a member of the company... and is cognizant of the fact... shall be severally liable for the payment of the whole debts of the company contracted during that period". In this case, the privilege of limited liability of shareholders is lost and the law pierces the corporate veil making persons behind the company personally liable

despite their limited liability. It must be noted that Section 45 provides for a grace period of six months for bringing back the number of members to the required number.

- ii. **Failure to Refund Application Money (Section 69 (5)):** If the directors of the company fail to comply with the deadline for refunding the application money with interest to unsuccessful applicants, then they are severally and jointly liable. This is provided by the SEBI guidelines also. The deadline is of 130 days from the day of opening of the issue.
- iii. **Mis-description of Company Name (Section 147):** The person(s) signing a contract on behalf of the company would be held liable if the company's name is not fully and properly indicated as required. The contract may be any contract, bill of exchange, hundi, promissory note, cheque or order for money.
- iv. **Misrepresentation in the Prospectus (Section 62):** In case of misrepresentation in a prospectus, every director, promoter and every other person, who authorizes the issue of such a prospectus incurs liability towards those who subscribe for shares on the faith of the untrue statement.
- v. **Fraudulent Conduct [Section 542(1)]:** If it appears in the course of winding-up of the company that some business of the company has been carried on with intent to defraud creditors, then the courts may declare that any persons who were knowingly parties to the carrying-on of the business in this way are 'personally responsible without any limitation of liability'.
- vi. **Holding and Subsidiary Companies:** A subsidiary company is considered as a separate legal entity in the eyes of law without any affiliation to the parent company; except under certain circumstances. This view point is reaffirmed by the decision in the case of *Freewheel (India) Ltd vs. Dr. Veda Mitra (1969)*. A company with a 52% stake of the parent company, offered to issue further capital to the existing holder of equity shares. The holding company objected and sought for subsidiary to be restrained from going ahead with the issue, as it would deprive the holding company of its controlling interests and would also result in depreciation in the value of shares. The Court refused to issue the injunction following the principle of corporate veil.

However, a holding company is required to disclose to its members the accounts of its subsidiaries. Sections 212 and 214 provide that every holding company shall attach to its balance sheet, the balance sheet, profit and loss account, director's reports and cash flow statement and auditors report, etc., in respect of each of subsidiary companies.

33. Definition of Company

"A company is a voluntary association of persons formed for the purpose of doing business, having a distinct name and limited liability. It is a juristic person having a separate legal entity distinct from the members who constitute it, capable of rights and duties of its own and endowed with the potential of perpetual succession."

There are different various types of companies such as the following:

Limited Company: A company can limit its liability either by shares or by guarantee.

Companies Limited by Shares [Section 12(2) (a)]: In this type of company, the liability of the members is limited to the amount remaining unpaid on the shares. Hence, holders of shares that are fully paid-up, cannot be called upon for any further contribution. The liability of the members holding partly paid-up shares exists even if the company is in the process of winding up.

Companies Limited by Guarantee not having Share Capital: In this type of company, the memorandum limits the member's liability. It is limited to such amount as he may have undertaken by the memorandum of association to contribute in case of winding up.

The form of memorandum and articles of a company limited by guarantee and not having a share capital is contained in Table C of Schedule I of the Companies Act, 1956. This form may be adopted either in toto or as near thereto as circumstances warrant. The proviso to

Section 29 states that a company is permitted to include additional matters in its articles provided it is not inconsistent with the provisions contained in Table 'C'. In *P C Arvindhan vs. M A Kesavan*, it was held that a provision in the articles of a guarantee company that prevented its members from participating in the annual general meeting was illegal and void.

Companies Limited by Guarantee having Share Capital: If the company is limited by guarantee while having its own share capital, the liability of members would be towards guarantee as specified in the memorandum of association and in addition any sums remaining unpaid on the shares held by him.

The form of memorandum and articles of a guarantee company having share capital can be found in Table D of Schedule I of the Companies Act. The memorandum of such a company should also specify the amount of share capital with which the company is to be registered and the amount of each share.

Unlimited Company: Unlimited Companies do not have any limit on the extent of liability of its members. The liability of each member extends to the whole amount of the company's debts and liabilities. However, the members cannot be sued upon directly by the company's creditors. This is in contrast to the liability of the partners in a partnership firm where partners can be sued directly. In case of winding up, the official liquidator may call upon the members to discharge the debts and liabilities without limit.

The articles of association of a company must state the number of members with which the company is registered and the amount of share capital (if any) [Section 27].

Government Company: Section 617 defines a government company as any company which has at least 51% of the paid-up share capital held either by the Central Government, or by any State Government or Governments or partly by the Central Government and partly by one or more State Governments. As the concept of Government Company has been introduced in the Companies Act, 1956, it follows that a Government company will mean a company registered and incorporated under the Companies Act, 1956.

The legal status of a company does not change by virtue of majority holding by the government. Hence no special privileges or exemptions are granted to Government Companies.

Foreign Company on the basis of Origin of the Company: As per Section 591, a foreign company means a company incorporated outside India but having a place of business in India. Thus, if a company is incorporated outside India, but employs agents in India without establishing a place of business here, it cannot be considered as a foreign company. In *Deverall vs. Grand Advertisement Inc.*, it was held that a company shall be said to have a place of business in India if it has a specified or identifiable place at which it carries on business such as an office, storehouse, godown or other premises having some concrete connection between the locality and its business.

34. A private company should have at least two persons (Section 12) to subscribe their names to Memorandum and Articles of Association. Section 26 provides that a private limited company must have articles of its own.

As per Section 3(1)(iii), a private company means a company which has a minimum paid-up capital of one lakh rupees or such higher paid-up capital as may be prescribed, and by its articles,

- a. Restricts the right to transfer its shares, if any;
- b. Limits the number of its members to fifty not including
 - i. Persons who are in the employment of the company; and
 - ii. Persons who having been formerly in the employment of the company, were members of the company while in that employment and have continued to be members after the employment ceased;

- c. Prohibits any invitation to the public to subscribe for any shares in, or debentures of the company.
- d. Prohibits any invitation or acceptance of deposits from persons other than its members, directors or their relatives.

However, where two or more persons hold one or more shares in a company jointly, they shall, for the purposes of this definition, be treated as a single member.

Every private company, existing on the commencement of the Companies (Amendment) Act, 2000, with a paid-up capital of less than one lakh rupees, shall within a period of two years from such commencement, enhance its paid-up capital to one lakh rupees.

Section 3(6) indicates that where a private company fails to enhance its paid-up capital in the manner as stated above, such company shall be deemed to be defunct company within the meaning of Section 560 and its name shall be struck off from the register by the Registrar.

- a. **Restriction on transfer of shares:** A private company is normally a closely knit company with a very few members. Hence free transferability of shares is restricted. It should be noted that it is a restriction imposed and not prohibition. The articles usually provide that directors may in their absolute discretion and without assigning any reason thereof decline to register a transfer of any share whether fully paid or partly paid. The articles may also provide that a member wanting to dispose of his holding should first offer them to the existing shareholders at a price determined according to the articles. Only when no existing member agrees to buy his holding, can the member sell them to an outsider. This restriction is not applicable in case of a company incorporated as a pure guarantee company.

- b. **Limitation on the number of members:** The number of members of a private company is to be compulsorily limited by its articles to fifty. The membership will be arrived at by considering joint holders as single member.

Also, present employees who are members and former employees who had become members during their employment and continued to be members even after they have ceased to be employees will be excluded.

Regarding the question as to whether directors can be considered as employees for the purpose of arriving at the maximum limit, it has been held in *Normandy vs Ind Coope & Co. Limited.*, (1908) that for the purposes of counting the membership of a private company, directors will not be considered as employees.

In *Lee vs. Lee's Air Farming Limited (1960)*, it was held that though a managing director may be treated as an employee for purposes connected with labor, employment and taxation, legislation, etc, he will not be considered as an employee for counting the membership of a private company.

It is worthnoting that in case of a private company, it is only the number of members that is required to be limited to fifty. This rule does not apply to debentures. Hence, a private company may issue debentures to any number of persons. However, the only restriction would be that an invitation to the public to subscribe to debentures is disallowed.

- c. **Restriction upon issue of prospectus**

As per Section 3(1)(iii)(c), a private company cannot issue a prospectus inviting the public to subscribe for shares in or debentures of, the company. However, there is nothing to prevent a private company from soliciting investment in its shares or debentures by private means. 'Investment by private approach' would mean giving opportunity of investment to the person approached and not to others through him if those others are likely to be members of the general public rather than a restricted circle of known persons such as his relatives.

Privileges enjoyed by private companies: As there are restrictions on raising money and maximum number of members in a private company, there is not much public accountability. Therefore a private company need not be subjected to such a rigorous surveillance as in the case of a public company. The exemptions enjoyed by a private company are mentioned below.

35. Modes of Converting a Private Company into a Public Company

A private company is converted into a public company in either of the circumstances mentioned below. Whatever may be the circumstances under which a private company is converted into a public company, it will cease to enjoy all the privileges that are allowed to a private company.

Conversion by Default (Section 43)

Any private company making a default in compliance with the statutory requirements as laid down in Section 3(1)(iii) of the Act will be automatically converted into a public company. The Central Government, under specific circumstances, may grant relief from any of the consequences that may arise in case of conversion by default. A departure from the conditions of Section 3(1)(iii) attracts penalty applicable to a public company for contravention of the provisions of the Companies Act. This section does not specify any fixed time limit or impose any special penalty.

In case a company contravenes or does not comply with the conditions laid down by Section 3(1)(iii), a petition for relief may be filed in case such contravention was accidental or due to inadvertence. Such a petition should be made to the Central Government and accompanied by the following documents:

1. Copy of memorandum and articles of association.
2. Copy of document showing that the default has been committed in complying with the conditions laid down in clause (iii) of Subsection (1) of Section 3.
3. Affidavit verifying the petition.
4. Bank draft evidencing payment of application fee.
5. Memorandum of appearance, shall be filed in Form 5 of Annexure-I.

Inapplicability of Section 43A

The Companies (Amendment) Act, 2000 has inserted Sub-sections (2A) and (11) in Section 43A. According to Sub-section 2A, a public company (referred to in Sub-section (2) of Section 43A) becomes a private company on or after the commencement of the Companies (Amendment) Act, 2000 and shall inform the Registrar, who has to substitute the word 'private company' for 'public company' and shall make the required changes in the certificate of incorporation issued to the company and in its memorandum of association within 4 weeks from the date of application of the company. However, the Companies (Amendment) Act, 2000 does not specify the time period within which the company shall inform the Registrar that it has become private company.

The Sub-section (11) of 43A specifies that nothing contained in this section, except Sub-section (2A), shall apply on and after the commencement of the Companies (Amendment) Act, 2000. This implies that a private company can no longer automatically become a public company on account of shareholdings or turnover. With the insertion of the Sub-section (11), the provisions of Section 43A will become inapplicable after the commencement of the Companies (Amendments) Act, 2000.

Conversion by Choice (Section 44)

Finally, there is always a choice for the company to convert itself into a public company. Conversion of a private limited company into a public limited company by choice will necessarily involve a change in the name of the company. Any change in the name will require the passing of a special resolution as provided by Section 21.

In addition to the passing of a special resolution, the following requirements will have to be fulfilled.

- a. The company will have to alter its articles so as to delete the provisions of clause (iii) of Subsection (1) of Section 3. On the date of such alteration, the company will cease to be a private company.
- b. The company shall within thirty days from the passing of the resolution, file a prospectus or a statement in lieu of prospectus with the Registrar.
- c. If the number of members is less than seven, such number should be raised to at least seven.
- d. The number of directors should be raised to not less than three in case it is less than three.

Conversion of a Public Limited Company into a Private Limited Company:

Proviso to Section 31(1) and (2A) provides that “no alteration made in the articles which has the effect of converting a public company into a private company shall have effect unless such alteration has been approved by the Central Government”. Every such company after obtaining the approval of the Central Government has to file a printed copy of the altered articles with the Registrar within 30 days of receipt of the approval.

Approval of the Central Government must be obtained through an application within three months from the date when the special resolution altering the articles was passed. The application should be in Form IA or in any other form as near thereto as circumstances warrant.

36. As companies grow, they may move from being privately owned to publicly owned. To fund expansion and development, private companies can raise money by offering securities for sale to the public. When the companies invite the public to participate in their affairs by means of shares, it is known as public issues.

Prospectus

Section 2(36) defines a prospectus as any document described or issued as a prospectus and includes any notice, circular, advertisement or other document inviting deposits from the public or inviting offers from the public for the subscription or purchase of any shares in, or debentures of a body corporate.

A prospectus is an invitation issued to the public to purchase/subscribe shares or debentures of the company. The provisions of the Act relating to prospectus apply only if it is issued to the general public. A single private communication will not be taken as an ‘issue’ of prospectus. In *Pramatha Nath Sanyal vs. Kali Kumar Dutt*, a newspaper advertisement stating that some shares were still available for sale according to the terms of the prospectus of the company which could be obtained on application was held to be a prospectus.

Where a company sends a circular to its agents and dealers inviting subscription to its share capital, such a circular amounts to an invitation to the public and will require a registration of the prospectus.

Prospectus to be Dated: Section 55 specifies that every prospectus has to be dated. The date of publication of prospectus should be differentiated from the date of its issue. While the date which appears on the prospectus is the date of publication, the date of issue is the date on which the prospectus first appears as an advertisement.

Matters to be Stated in the Prospectus: Section 56 of the Act lays down that every prospectus issued by the company shall conform to the requirements of Schedule II of the Companies Act. As per the schedule, Part I shall disclose matters specified therein and Part II shall set out certain reports. Explanatory statement shall be given in Part III. The matters that have to be stated in the prospectus are summarized below:

- General information
- Capital structure

- Terms of present issue
- Management and Project
- Management perception of risk factors.

No prospectus can be issued unless it is registered with the Registrar.

Deemed Prospectus

As per Section 64, the document issued by the Issue House will be treated as a prospectus issued by the company. Section 64(1) provides that where a company allots or agrees to allot any shares or debentures with a view to these being offered for sale to the public, any document by which the offer of sale to the public is made shall, for all purposes, be deemed to be prospectus issued by the company. This Section applies if the offer of the shares or debentures for sale to the public was made within six months after the allotment or agreement to allot such shares to the Issuing House. This Section applies also if the whole consideration to be received by the company in respect of shares or debentures had not been received by it from the Issue House.

Golden Rule for Framing of Prospectus

The Golden Rule of prospectus was laid down in the case of *New Brunswick and Canada Rly. Land & Co. vs. Muggeridge*. It states that those who issue prospectus will be bestowing great advantages to the public who take shares in the proposed undertaking as per the prospectus. Every fact must be stated with strict and scrupulous accuracy. The promoter should also disclose all other information within knowledge which might in any way affect the decision of the prospective investors to invest in the company. That is, it is the primary assumption of the public that the material facts that are stated in the prospectus are true. Nothing should be stated as fact which is not so, and no fact should be omitted the existence of which might in any degree affect the nature or quality of the principles and advantages which the prospectus holds out as inducement to take shares.

37. The duties of a director may be classified into four categories, viz., (a) fiduciary duties, (b) duties of care, (c) statutory duties and (d) other duties. These duties are in addition to the specific duties as specified by the Companies Act, 1956.

Fiduciary Duties: The first duty or obligation of directors is not to exceed their authority and powers and to act with honesty and in good faith. They should not engage in any activity which is *ultra vires* the company or illegal.

The obligation of Directors is to act honestly and with utmost good faith: Directors should not use unpublished and confidential information belonging to the company for their own purpose. Any knowledge or information that is generated by the company is its own property and cannot be put to unauthorized use. Any gain by use of such inside information has to be accounted for to the company.

Duties of Care: A director of a company, like any other agent, is duty bound to exercise reasonable care in the management of its affairs as is expected from the person occupying such position.

Statutory Duties: According to Section 297, a director of a company or his relative, a firm in which the director or his relative is a partner, or any other partner of a firm in which such director is a member or director should not enter into contracts with the company for sale, purchase or supply of any goods, materials or services unless with the consent of the Board of Directors [(Subsection (1))].

Section 297(1) further provides that in case of a company having a paid-up share capital of rupees one crore or more, no such contract shall be entered without the prior approval of the Central Government.

According to Section 299, every director who is interested directly or indirectly in any contract, whether present or future should reveal his interest at a meeting of the Board of Directors.

Disclosure of his interest may be made by giving a general notice to the Board which shall be treated as adequate disclosure of interest in relation to any contract so made.

Other Duties

Duty not to Delegate

Shareholders appoint a director because of their faith in his skill, integrity and competence. Hence, the same faith cannot be delegated by the director to another person on his own judgement. Delegation by director is permitted to an extent under section 292 by the Companies Act.

Duty to Attend Board Meetings

Directors are appointed by the shareholders to manage the company. It is their duty to attend board meetings and review periodically the progress of the company. Section 283(g) states that the office of a director will be vacated if the Director absents himself from three consecutive meetings of the board or from all meetings of the board for a period of three consecutive months whichever is longer, without obtaining the leave or absence of the board. Though it is not mandatory for a director to attend all board meetings yet it is expected of the director to attend whenever it is possible. Provisions of Section 283(g) attempt to negate habitual absence by a director by stipulating stringent action viz., vacation of office.

Duty to Convene General Meetings

Calling of Annual General Body Meeting (AGM), statutory and extraordinary meeting is the duty and responsibility of the directors (sections 165, 166 and 169).

Liabilities of Directors

The directors who do not act diligently and honestly are subjected to the following liabilities:

- Unlimited Liability (Sections 322 & 323): In a limited company, the liability of all or any of the directors or managers may be made unlimited if so provided by the memorandum of association. If the memorandum does not contain such provision, it may be altered by passing a special resolution.
- Liability for breach of fiduciary duty: A director, being in the fiduciary position of a trustee for the company, may incur liability for breach of his fiduciary duty to the company.
- Directors are personally liable for the following Acts:
 - **For *ultra vires* acts:** The act on part of the directors *ultra vires* the company may render the directors liable to indemnify the company in respect of any consequent loss or damages sustained. If the directors apply the company's money for purposes which the company cannot sanction, they become personally liable to replace it, however honestly they may have acted.
 - **For *mala fide* acts:** If the directors act dishonestly and in breach of trust or misfeasance in that capacity, the directors would be liable to account for and surrender profits to their company. Also, they should make good the loss sustained by the company by reason of the *mala fide* exercise of any of the powers vested in them, such as the power to allot shares or accept surrender of shares, or remit any due by a director to the company.
 - **For negligence:** As long as the directors act within their powers with reasonable skill and care as expected of them as prudent businessmen, they discharge their duty to the company.
 - **Liability to the third parties:** In certain circumstances, directors may incur personal liability to third parties either under the Act or apart from it. For example, if a prospectus of the company does not contain all the items that have to be specified as laid down in the Act or contains material misrepresentations in it, then the Directors incur a liability to the third parties (investors). They are also liable to third parties in case of irregular allotment of shares.

38. Criminal Liability of Directors under the Companies Act, 1956:

- Section 44(4) – Filing of prospectus containing untrue statements – two years imprisonment and/or fine up to Rs.50,000.
- Section 58A(6)(b) – Inviting deposits in contravention of the Rules, or manner or conditions – imprisonment for a term which may extend up to five years and fine.
- Section 58B – Issuing false advertisement inviting deposits – imprisonment which may extend to two years and Rs.50,000 fine.
- Section 63 – Criminal liability for mis-statement in prospectus imprisonment up to two years or fine up to Rs.50,000 or both.
- Section 68 – Fraudulently inducing persons to invest money – imprisonment up to five years, or fine up to Rs.1,00,000 or both.
- Section 73 – Failure to repay excess application money – imprisonment up to one year and fine up to Rs.50,000.
- Section 105 – Concealing name of creditor – imprisonment up to one year or fine or both.
- Section 202(1) – Undischarged insolvent acting as Director – imprisonment up to two years or fine up to Rs.50,000 or both.
- Section 207 – Default in distributing dividends – simple imprisonment which may extend to 3 years and shall also be liable to pay a fine of 1,000 rupees for every day during which default continues and fine.
- Section 209A – Failure to assist the Registrar or any officer so authorized by the Central Government in inspection of books of account, etc. – imprisonment up to one year and fine not less than Rs.50,000.
- Section 210(5) – Failure to lay balance sheet, etc., at annual general meeting – imprisonment up to six months or fine up to Rs.10,000 or both.
- Section 211(8) – Failure to comply with Section 211 regarding form of balance sheet and matters to be stated – imprisonment up to six months or fine up to Rs.10,000 or both.
- Section 217(5) – Failure to attach to balance sheet a report of the Board – imprisonment up to six months for each offense or fine up to Rs.20,000 or both.
- Section 221(4) – Failure to supply information to auditor and the company – imprisonment up to six months, or fine up to Rs 50,000 or both.
- Section 250(9) – Improper issue of shares – imprisonment up to six months or fine up to Rs.50,000 or both.
- Section 293(A) – Contribution to political parties in contravention of the said section – three years imprisonment and fine.
- Section 295(4) – Grant of loan to directors without obtaining the approval of the Central Government – simple imprisonment up to six months or fine up to Rs.50,000.
- Section 308(3) – Failure to disclose shareholdings in the company – imprisonment up to two years or fine up to Rs.50,000 or both.
- Section 371 – Giving loans to other corporate bodies in excess of the limits prescribed under Section 370 – simple imprisonment up to six months or fine up to Rs.50,000.
- Section 407(2) – Acting as director after removal by court – imprisonment up to one year, or fine up to Rs.50,000 or both.

- Section 488(3) – False declaration of company’s solvency – imprisonment up to six months or fine up to Rs.50,000 or both.
- Sections 538 to 542 and 550 – Offenses antecedent to or in course of winding up – imprisonment ranges between two years and five years and fine from Rs.10,000 to Rs.1,00,000.

39. Different Kinds of Meetings

Meetings under Companies Act, 1956 may be classified as follows:

- Shareholders’ meetings:
 - Statutory meeting as per Section 165 of the Act;
 - Annual General Meeting (AGM) as per Section 166 of the Act;
 - Extraordinary General Meeting (EGM): Those convened by the Board of Directors to transact business of special importance that arises in between the two annual general meetings and justifies the convening and holding a meeting of the shareholders; and
 - Class Meetings of Shareholders
- Board Meetings
- Meetings of the Committees of Board
- Meetings with the Debentureholders
- Meetings of Creditors

Statutory Meeting

Section 165 of the Companies Act, 1956 lays down the following:

Every company limited by shares, and every company limited by guarantee and having a share capital, shall, within a period of not less than one month nor more than six months from the date at which the company is entitled to commence business hold a general meeting of the members of the company, which shall be called ‘statutory meeting’. This is the first meeting of the shareholders of a public company and there would be only one such meeting in the lifetime of the company.

Annual General Meeting (AGM): According to Section 166(2)(a), a public or a private company which is a subsidiary of a public company may fix the time for its annual general meeting either through its articles, or it may also by passing a resolution in one annual general meeting fix the time for the subsequent annual general meeting.

A private company which is not a subsidiary of a public company, may in like manner and also by a resolution agreed to by all the members thereof, fix the time as well as the place for its annual general meeting.

Where an annual general meeting is adjourned, the board has the power to hold the adjourned meeting at any place other than the place where the annual general meeting was held. However, so far as possible, it should be ensured that the meeting is held at the same place as the original meeting and if that is not possible, the meeting should be held either at the registered office of the company or at a place within the city in which the registered office is located.

A public company or a private company may fix the time for holding its AGMs. The private company can also with the consent of all its members thereof fix the place of its annual general meetings.

Extraordinary General Meetings (EGM): All the general meetings of the company with the exception of the Statutory Meeting and Annual General Meeting are Extraordinary General Meetings (EGM).

Object: The purpose of EGM is to transact special business defined in the previous meeting which arises in between two annual general meetings. The special business

transacted at the EGM has to be urgent, which cannot be deferred to the next annual general meeting. For instance, a change in the objects or shift of registered office or alteration of capital or removal of a director/auditors require immediate attention which cannot be deferred till the next annual general meeting.

An extraordinary general meeting may be called by

- The board of directors on its own or on the requisition of a specified number of members entitled to vote.
- By the requisitionists themselves in case of failure by the board to call for a meeting.
- By the NCLT.

Board Meetings

The meetings of the Board of the Directors for the purpose of collectively taking decisions for smooth functioning of the company are referred as 'Board Meetings'.

Object: To formulate management policies, take decisions of importance pertaining to running of the company, review of progress made by the company among other matters related to the company.

The power delegated to the Board of Directors will have to be exercised at the properly convened board meeting unless the articles provide otherwise.

Powers: Section 292 lays down that the following decisions have to be taken only at the meeting of the board of directors:

- make calls on shareholders in respect of unpaid money on their shares;
- to issue debentures;
- to borrow moneys otherwise than on debentures;
- to invest the funds of the company; and
- to make loans.

It has to be noted that the meeting does not require any agenda for the meeting of the directors. Any business whatsoever, thus can be transacted at a board meeting.

40. Section 433 of the Act empowers the court to order winding up of a company under specified circumstances. These circumstances are the following:

Special Resolution (Section 433 (a))

The court may order winding up of a company, if the company has, by special resolution resolved that it be wound up. The court can exercise this power discretionarily and may not order the company's winding up if in its opinion such winding up is opposed to the interests of the company or the public.

Default in Holding Statutory Meeting (Section 433 (b))

If a public company defaults in delivering the statutory report to the Registrar or in holding the statutory meeting, the court may order winding-up of the company. The petition for winding up may be presented either by the Registrar or a contributory.

Failure to Commence Business (Section 433 (c))

If the company does not commence its business within a year from its incorporation, or suspends its business for a whole year, the court may order winding up of the company. Before deciding on the issue of winding up of a company, the court examines the circumstances due to which the company has been unable to commence business or has suspended it and the possibilities or intention of starting or continuing the business.

The court may make an order for winding up of companies for the following reasons:

Reduction in Membership (Section 433 (d))

If the number of members is reduced, in case of a public company, below seven, and in case of a private company, below two, the court may order winding-up of the company.

Inability to Pay Debts (Section 433 (e))

The court may order winding up of a company if it is unable to pay its debts.

Section 434 lays down the circumstances where a company will be deemed to be unable to pay its debts.

- A company will be construed as being unable to pay its debts, if a creditor of the company, to whom the company by assignment or otherwise owes a sum exceeding five hundred rupees has demanded the said amount in writing and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor. [Section 434(1)(a)]

The presumption of inability to pay debts will be legitimate only where the company has failed to pay without any reasonable excuse, inspite of the statutory notice being served on it.

- Other grounds for winding up by courts
 - Just and equitable grounds
 - Deadlock
 - Loss of substratum
 - Oppression of minority
 - Incorporation for fraudulent purpose
 - Extension of a Partnership
 - Public interest.
- Who can file a petition for winding up
 - Shareholders
 - Creditors
 - Contributories
 - Registrar
 - Central government
 - Official liquidator.

Voluntary Winding Up

Sections 484 to 520 deal with voluntary winding up of a company. A company may be voluntarily wound up either by passing an ordinary resolution or a special resolution.

- A company may pass an ordinary resolution in a general meeting requiring the company to be wound up voluntarily when the period, if any, fixed for the duration of the company by its Articles, has expired, or the event if any, has occurred, on the occurrence of which the articles provide that the company should be dissolved [Section 484(1)(a)].
- Under Section 484(1)(b), the company may also be wound up voluntarily by passing a special resolution. This is when the members want to wind up the company voluntarily, inspite of the company being solvent.

Winding Up subject to the Supervision of Court (Section 522)

According to Section 522, at any time after a company has passed a resolution for voluntary winding up, the court may make an order that the voluntary winding up should continue subject to the supervision of the court and with such liberty for creditors, contributories or others to apply to the court and generally on such terms and conditions as the court thinks just.

The winding up will commence from the date of the resolution passed by the company for the said purpose.

Where an order is made for a winding up subject to supervision, the court may, by that or any subsequent order, appoint an additional liquidator or liquidators [Section 524(1)].

The court is empowered to remove any liquidator so appointed or any liquidators continued under the supervision order, and fill any vacancy occasioned by the removal or by death or resignation [Section 524(2)].

A liquidator appointed by the court under Section 524 shall have the same powers, subject to the same obligation, and in all respects stand in the same position, as if he had been duly appointed in accordance with the provisions of this Act with respect to the appointment of liquidators in a voluntary winding up [Section 525].

41. The distinction between a sale and an agreement to sell is presented in the following table:

	Sale	Agreement to Sell
Transfer of property	Sale is an executed contract. In a sale, the property in the goods passes from the seller to the buyer immediately so that the seller is no more the owner of the goods sold.	An agreement to sell is executory contract. In an agreement to sell, transfer of property in the goods is to take place at a future time or subject to certain conditions to be fulfilled.
Type of goods	A sale can only be in case of existing and specific goods.	An agreement to sell is mostly in case of future and contingent goods although in some cases it may refer to unascertained existing goods.
Risk of loss	In sale, if the goods are destroyed, the loss falls on the buyer even though the goods are in possession of the seller.	In an agreement to sell, if the goods are destroyed, the loss falls on the seller, even though the goods are in the possession of the buyer.
Consequences of breach	In sale, if the buyer fails to pay the price of the goods or if there is a breach of contract by the buyer, the seller can sue for the price even though the goods are still in possession.	In an agreement to sell, if there is a breach of contract by the buyer, the seller can only sue for the damages and not for the price even though the goods are in the possession of the buyer.
Right to re-sell	In a sale, the seller cannot re-sell the goods. If he does so the consequent buyer does not acquire title to the goods.	In an agreement to sell, in case of re-sale, the buyer, who takes the goods for consideration and without notice of the prior agreement, gets a good title. In such a case, the original buyer can only sue the seller for damages.
General and particular property	A sale is a contract plus conveyance, and creates ' <i>jus in rem</i> ', i.e., gives right to the buyer to enjoy the goods as against the world at large including the seller.	An agreement to sell is merely a contract, pure and simple, and creates ' <i>jus in personam</i> ' i.e., gives a right to the buyer against the seller to sue for damages.
Insolvency of buyer	In a sale, if the buyer becomes insolvent before he pays for the goods, the seller, in the absence of a lien over the goods, must return them to the official receiver or assignee. He can only claim a rateable dividend for the price of the goods.	In an agreement to sell, if the buyer becomes insolvent and has not yet paid the price, the seller is not bound to part with the goods, until he is paid for.

Insolvency of seller	In a sale if the seller becomes insolvent, the buyer, being the owner, is entitled to recover the goods from the official receiver, or assignee.	In an agreement to sell, if the buyer, who has paid the price, finds that the seller has become insolvent, he can only claim rateable dividend and not the goods because property in them has not yet passed to him.
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42. Rights and Duties of Buyer:

- **Buyer's Right of Examining the Goods:** Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.
- **Acceptance of Delivery:** The buyer is deemed to have accepted the goods in the following circumstances:
 - When he intimates to the seller that he has accepted them, or
 - When the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or
 - When, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them

The act of the purchaser in selling and delivering a part of the goods to sub-purchasers indicates that he has accepted the goods. The fact that this act was done before the expiration of the time of examination of goods or after the expiration of the time of examination of goods will be of no relevance.

Where there has been a defective delivery, and where the person entitled to rescind the contract, accepts the defective performance, such acceptance does not discharge the seller from his liability. The buyer can still claim damages for insufficient performance.

- **Buyer not bound to return rejected goods:** According to Section 43, where goods are sent to the buyer and where it is discovered that the goods do not answer to the description given, the buyer has the right to reject the goods. However, the buyer is not bound to return the goods to the seller. While the goods are in his possession, he occupies the position of a bailee and is required to take care of them. The responsibility of removing the goods from the buyer's possession lies with the seller. Also, while the goods are in the possession of the buyer, all risks attached to such goods will lie with the seller.
- **Re-sale of rejected goods:** The buyer has the right to sell the rejected goods in case the seller does not remove them in spite of a notice of rejection. In such a case, the buyer may sell the goods immediately, while the question as to whether the goods conformed to the contract or not may be decided subsequently. Re-sale of rejected goods may also be resorted to, where the goods are of a perishable nature or are expensive to keep or of fluctuating value.
- **Burden of expense:** Where a buyer incurs expenses as a bailee, he can recover the same from the seller.
- **Liability of Buyer for Neglecting or Refusing Delivery of Goods:** The liability of the buyer will arise on fulfillment of the following conditions:
 - The seller should have been willing to deliver the goods.
 - He should have asked the buyer to take delivery.
 - The buyer should have neglected to take delivery within a reasonable time after the request by the seller.

When the buyer fails to take delivery of the goods, he will be liable to the seller:

- For any loss or damage incurred on failure to take delivery.
- For any reasonable charge incurred by the seller for taking care of the goods.

The rights and duties of the buyer can be summed up as follows:

- Right to have delivery of the goods as per the terms and conditions of the contract.
- Where the goods delivered to the buyer are in excess or less than the quantity contracted for, the buyer can (a) accept the whole (b) reject the whole (c) accept the quantity ordered and reject the rest.
- Unless there is a contract to the contrary, the buyer is not required to accept delivery by installments.
- Where goods are sent to the buyer by a route involving sea transit, the buyer has a right to be informed of the same so as to enable him to insure the goods.
- The buyer has the right to examine the goods before he accepts them.

Duties of the Buyer:

- The buyer is required to take delivery of the goods and make payment according to the terms and conditions of the contract.
- Apart from any express contract, it is the duty of the buyer to apply for delivery.
- The buyer's duty includes a demand to make delivery at a reasonable hour.
- Where the seller agrees to deliver the goods at his own risk at a place other than where they are sold, the buyer shall take any risk of deterioration in the goods necessarily incident to the course of transit.
- It is the duty of the buyer to give notice of rejection of goods to the seller.
- The buyer should take delivery of the goods within a reasonable time after the tender of delivery.
- Where the property in the goods passes to the buyer, it is his duty to pay the price according to the terms of the contract.
- Where the buyer wrongfully neglects or refuses to accept and pay for the goods, he will have to compensate the seller, in a suit by him, for damages for non-acceptance (Section 56).

43. Rights of an Unpaid Seller against the Goods under the Sale of Goods Act, 1930: The term 'unpaid seller' is defined by Section 45 of the Sale of Goods Act, 1930. As per this Section, the seller of goods is deemed to be an 'unpaid seller' within the meaning of the Act –

- When the whole of the price has not been paid or tendered.

The payment of price should be absolute and may be made either in cash, or by a transfer of property or by execution of a negotiable instrument. As long as some portion of the price remains unpaid, the seller will be considered as an unpaid seller.

- When a bill of exchange or other negotiable instrument has been received as conditional payment and the condition on which it was received has not been fulfilled by reason of the dishonor of the instrument or otherwise.

The term 'seller' includes any person who is in the position of a seller as, for instance, an agent of the seller to whom the bill of lading has been indorsed, or a consignee or agent who has paid him, or is directly responsible for the price.

Where the buyer becomes insolvent before the maturity of the negotiable instrument, he is regarded as not having fulfilled the condition upon which the seller received the instrument.

Rights of an Unpaid Seller

Notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law,

- Lien on the goods for the price while he is in possession of them.

Unpaid Seller's Lien (Section 47):

The unpaid seller of goods who is in possession of them is entitled to retain such possession until payment or tender of the price in the following cases:

- 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.

The seller may exercise his right of lien notwithstanding that he is in possession of the goods as an agent or bailee for the buyer.

The seller's lien on the goods is applicable only when the goods are in his possession or in the possession of his agent. Where he loses possession of the goods, his right of lien also ceases. In some cases, the seller will be deemed to be in possession of the goods, even when the buyer is entrusted with some degree of control over the goods, as where the buyer is given the inner key while the seller retains the outer key. An unpaid seller can exercise lien on the goods in his possession, irrespective of the fact that the documents transferring the title to the goods have been parted with.

- In case of the insolvency of the buyer a right of stopping the goods in transit after he has parted with their possession.
- A right of re-sale as limited by this Act.

Where the property in goods has not passed to the buyer the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transit where the property has passed to the buyer. The plaintiff has to prove that:

- He is an unpaid seller
- The buyer is insolvent
- The goods were in transit
- The property in the goods has passed to the buyer.

Also, it is essential that the rights of the unpaid seller are consistent with other provisions of the Sale of Goods Act as well as provisions under any other law for the time being in force.

The unpaid seller has the right to detain the goods till the price is paid. The lien discussed in this Section is different from the Common Law lien. In a Common Law lien, the person in possession of the goods can only detain the goods, but cannot deal with them.

The following two conditions need to be fulfilled for the accrual of the right of stoppage of goods in transit:

- the goods should be in transit, and
- the buyer should have become insolvent.

The fact that the buyer fails to pay debts in the ordinary course of his business or pays debts as they become due, gives the unpaid seller the right of stoppage of goods. However, this right should be exercised with caution.

The right of stoppage of transit accrues and continues so long as the goods are in the hands of middlemen (i.e., when they pass out from the custody of the seller until they reach the buyer).

When goods are delivered to a carrier or a wharf, the goods are supposed to be in transit until the carrier or the wharf atones for the buyer, or consents to hold the goods on the buyer's behalf.

44. Mortgages:

Meaning

The expression 'mortgage' literally means transfer of an interest by pledging (delivering) a property as security against an advance as loan; or an existing or future debt; or for performance of an act or engagement, which gives rise to liability. It is a transfer of limited interest of an immovable property as security against a loan, to another.

Chapter IV containing Sections 58 to 98 (Section 99 repealed) of the Transfer of Property Act, 1882 lays down the provisions relating to Mortgages of Immovable Property.

Section 58 (a) provides for the definition of 'Mortgage'. The associated terms are: 'Mortgagor', 'Mortgagee', 'Mortgage Money', and 'Mortgage Deed'.

Definition

"A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability."

Elements of Mortgage: A mortgage comprises the following elements:

- i. **Transfer of interest:** In mortgage, only an interest in property is transferred. The term 'transfer of interest' signifies that the interest, which passes to the mortgagee, is not ownership or dominion. The right of mortgagee is only an accessory right, which is intended merely to secure the due payment of a debt. Any right that is transferable without infringing Section 6 can be the subject of a mortgage.
- ii. **Specific Immovable Property:** The subject matter of mortgage must be a specific immovable property. It must be distinctly specified. The property described in the mortgage deed should be properly identified, that is, the property should be described by boundaries, location, area, etc., and identified by the mortgagor. Further the word 'specific' is to be distinguished from the word 'general.' For instance, 'my house and land' are said to be vague and general.
- iii. **Security:** The purpose of pledging the property is to provide the security of payment or performance of work or repayment of a debt.
- iv. **Consideration:** A mortgage like every other contract requires 'consideration' which means something in return. Hence, the purpose referred to in the Section is the consideration for the mortgage. The consideration may be of some advance or an existing or future debt or in performance of an engagement-giving rise to a pecuniary liability. It may take any one or more of the several types mentioned in the definition. On a partial failure of consideration, the effect is given to the extent of the consideration that is valuable.

'Pecuniary liability' means a legal obligation to pay damages. Suppose the parties enter into an engagement to do something and if one of them does not do what he agreed to do, an obligation to pay damages may arise. That is, there may be a pecuniary liability. In a mortgage there could be a transfer of interest to secure the performance of such an obligation, that is, if

The words 'money advanced' mean an existing debt and a debt, which has become barred by limitation. It is also to be noted that an existing debt means a debt, which is not so barred. A mortgage may be obtained not only for an existing debt or money advanced, but also as a security against advances to be made in future.

- v. **Competence of Parties:** The parties namely, mortgagor and mortgagee must be competent to contract, within the meaning of Section 11 of the Indian Contract Act, 1872. Further, the mortgagor must have a title or authority to transfer.
- vi. **Registration (Section 59):** Registration is necessary if the value of the property is Rs.100 and above. It is optional, if the value is below Rs.100. The registered instrument (if any) is to be signed by the transferor and attested by two witnesses.

It is only after first determining that a transaction is a mortgage under clause (a) that one should turn to other clauses in order to find out what kind of mortgage it is. It is necessary to know the kind of mortgage, because, different rights and liabilities arise in the mortgagor and mortgagee. The nature of the right transferred depends upon the form of the mortgage. It, therefore, becomes necessary to consider the kinds of mortgage, which are set out in Section 58. Mortgage by deposit of title deeds does not require registration.

45. Section 58 of the Transfer of Property Act envisages the following six kinds of mortgages:
- i. Simple Mortgage [Section 58(b)];
 - ii. Mortgage by Conditional Sale [Section 58(c)];
 - iii. Usufructuary Mortgage [Section 58(d)];
 - iv. English Mortgage [Section 58(e)];
 - v. Mortgage by deposit of title deeds [Section 58(f)]; and
 - vi. Anomalous Mortgage [Section 58(g)].

Simple Mortgage [Section 58 (b)]

Section 58(b) of the Transfer of Property Act speaks about Simple Mortgage. It runs as follows:

Where –

- a. without delivering possession of the mortgaged property;
- b. the mortgagor binds himself personally to pay the mortgage money; and
- c. agree that in the event of his failing to pay, the mortgagee shall have right to cause the mortgaged property to be sold, and the proceeds of sale to be applied, so far as may be necessary in payment of the mortgage money,
- d. the transaction is called a ‘simple mortgage’, and the mortgagee a ‘simple mortgagee.’

Usufructuary Mortgage [Section 58(d)]

The literary meaning of ‘Usufructuary Mortgage’ denotes that ‘the legal right to use and enjoy the benefits and profits of something belonging to another’.

Section 58(d) of the Transfer of Property Act provides for ‘Usufructuary Mortgage’. It runs as follows –

Where the mortgagor –

- i. delivers possession, or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee; and
- ii. authorises him –
 - a. to retain such possession until payment of the mortgage money;
 - b. to receive the rents and profits accruing from the property or any part of such rents and profits; and
 - c. to appropriate them in lieu of interest, or in payment of the mortgage money, or partly in lieu of interest and partly in payment of the mortgage money.
 - d. the transaction is called a ‘usufructuary mortgage’ and the mortgagee as ‘usufructuary mortgagee.’

English Mortgage [Section 58(e)]

Section 58(e) of the Transfer of Property Act makes a provision for English Mortgage. It runs as follows:

Where the mortgagor binds himself –

- i. to repay the mortgage money on a certain date; and
- ii. transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that, he (mortgagee) will retransfer it to the mortgagor upon payment of the mortgage money as agreed,
- iii. the transaction is called an ‘English Mortgage.’

Mortgage by Deposit of Title Deeds or Equitable Mortgage

Section 58(f) of the Transfer of Property Act provides for the Mortgage by Deposit of Title Deeds. It runs as follows:

Where a person –

in any of the following towns, namely, the towns of Calcutta, Madras, Bombay, and in any other town, which the State Government concerned may by Notification in the Official Gazette, specify in this behalf, for example, Ajmeer, Allahabad, Delhi, Jaipur, Mysore etc; delivers to a creditor or his agent documents of title to immovable property;

iii. with intent to create a security thereon –

iv. such transaction is called a ‘Mortgage by Deposit of Title Deeds.’

This is a common type of mortgage in commercial borrowings. In view of the following merits –

- Creation of mortgage is simple and there is no public notice regarding the transaction.
- Transaction requires no registration.
- It has some legal validity as that of other mortgage.

46. Nature of Hire-Purchase Agreement:

According to the Hire-Purchase Act, 1972 (since repealed) an agreement that fulfills the following conditions is termed as a Hire-Purchase Agreement:

- The goods are delivered by the owner to a person on a condition that the person receiving such goods should pay the agreed amount in some timely installments.
- The property in such goods is to pass completely to the person who hires the goods on the payment of the last installment only.
- The person has the right to terminate the agreement at any time before the property passes on.

A hire-purchase transaction can be compared to a cancelable lease contract with a call (purchase) option. In installment sale and conditional sale the buyer is compelled to pay the entire price, but in a hire-purchase agreement it is not essential to pay the entire price. But there should be no default in paying the installments either. Another major difference is that in installment sale, the ownership of the asset is transferred to the buyer once the first installment is paid. However, in a hire-purchase agreement the ownership is transferred to the hirer only when he exercises an option to buy or on payment of the last installment. The British concept of hire-purchase has been in existence in India for over 6 decades. The first hire-purchase company is considered to be Commercial Credit Corporation, which was a descendant of the Auto Supply Company. It was believed to exist in the 1920s and the 1930s. There was tremendous development in the area of hire-purchasing and the development gave rise to two offshoots – consumer durables and automobiles. The consumer durables hire-purchase was encouraged by the dealers in the respective equipment. The dealers in commercial vehicles and pure financing companies increased and developed in a very fast pace.

Ingredients of the Hire-Purchase Agreements

The ingredients of the hire-purchase agreement are –

- **Hirer:** A person who acquires the possession of goods from the owner under a hire-purchase agreement is known as a hirer.
- **Owner:** A person who delivers the possession of goods to a hirer under a hire-purchase agreement is called an owner.
- **Hire:** Hire means the sum that is payable periodically by the hirer according to the hire-purchase agreement.

- Hire-Purchase Price: The hire-purchase price means the total sum payable by the hirer under a hire-purchase agreement to complete the purchase of or the possession of property in the goods to which the agreement relates to.

Contents of Hire-Purchase Agreement

- The hire-purchase price of the goods.
- The cash price of the goods at which the hirer may buy the goods for cash.
- The date of the commencement of the number of installments by means of which the hire-purchase price is to be paid.
- The amount that is paid in these installments.
- The date when the installment is to be paid should be mentioned and also the mode of calculation of the date.
- The name of the person to whom the payment of the installment is to be made with the place where the payment is to be made.

If there is any agreement between the parties that the mode of payment of a part of hire-purchase price is to be paid in any other form than in cash or by the means of cheque. The hire-purchase agreement must contain a detailed and apt depiction of that part of the hire-purchase price.

47. Essential elements of a Lease: The following factors are essential for a valid lease:

Parties: The lessor and lessee are the two parties to the lease. The transferor or landlord is known as 'lessor' and the transferee is called as 'lessee'. A person cannot grant a lease to himself.

According to Viscount Simonds, Lord Reid and Lord Denning, a lease cannot be granted to himself and the TP Act also clearly mentions that a transfer by a person to himself is not a lease. The parties to the lease should be competent to contract and a minor or a person of unsound mind cannot have the legal capacity to enter into a contract. The contract entered with an incompetent party is non-enforceable in the Court of law. A minor can be a transferor or transferee if enters into a contract under the lawful guardian.

Subject Matter: To constitute a lease, the subject matter should be an immovable property and the same is governed under the provisions of the TP Act. The definition of immovable property as mentioned under the General Clauses Act is used in Section 3 of the TP Act. It is negative and non-exhaustive, as it states that the immovable property does not include standing timber, growing crops and grass. For instance, land, house and buildings, minerals, mines, and benefits arising from the land, right to enter upon the land, lease, right of way, a fishery, etc are examples of the immovable property. In *Dan Singh vs. Janki Saran*, the court held that if the transferee is entitled to appropriate the produce or benefit out of the trees during a certain period of time amounts to the lease of an immovable property. If such trees are sold for being cut and has to be removed within a specified time, that amounts to the sale of a movable property but not the lease within the meaning of the TP Act.

Demise or Partial Transfer of Immovable Property: The term 'demise' is derived from the Latin word '*demitto*' that means a transfer or conveyance and it is also used in the English Law. Such term is not used in the Indian enactment. It is commonly used by conveyancers in India in the context of partial transfer by way of lease. Lease is a partial transfer of property, i.e., right to enjoy the land for a period or in perpetuity for a consideration but not the transfer of ownership. The lease creates a right in rem as it is a transfer of an interest in the land and lessee has the possession and peaceful enjoyment of the land for the period of lease. Hence, the transfer of ownership amounts to the sale, whereas the partial transfer is the lease.

In *Byramjee Jeejeebhoy (P) Ltd., vs. State of Maharashtra*, Shah J, held that a lease contemplates, 'a demise or a transfer of a right to enjoy land for a term or in perpetuity in consideration of a price paid or promised or services or other things of value to be rendered periodically or on specified occasions to the transferor'.

Term or Period of Lease: The dates of commencement and termination and the terms of a lease must be definite, certain and fixed. The commencement of the lease can be in the present or on a future date or on the happening of a particular event which is bound to happen, as per the terms of the lease agreement. According to Section 110 of the Act, if the lease deed does not mention the date of commencement of the lease, then the date of execution of the instrument will be considered as the day of commencement. The lease can be in perpetuity in India, but without the mentioning of the duration or term, it is void. A renewal or extension of a lease is possible by incorporating the terms to that extent in the lease deed. A new lease is required for the renewal, whereas the same lease continues in case of the extension of the lease. The term of lease can be in perpetuity, or yearly, quarterly, monthly or even weekly.

Consideration or Rent: The consideration for a lease is either premium or rent. It can be premium plus rent, or only premium or only rent and is considered as an outstanding debt.

In *Commissioner of Income Tax vs. Panbari Tea Co.*, the Supreme Court distinguished the concepts of premium and rent. The payment even though paid in installments as a consideration for being let in possession such as salami is premium and the lease is 'Zuripeshgi lease', which in literal sense means 'a lease for premium'. Any payment made by the lessee, being part of the consideration of the lease, amounts to rent under the Indian law. If such consideration is not for the lease, then it is not a rent. Rent must be certain and can be paid in terms of money or partly in money and partly in kind, or delivery of chattels, corn or the share of crop, or rendering of any services. The rent is paid periodically such as yearly, quarterly or monthly.

The court in *Bandhu vs. Balaram*, held that if a servant occupying a rent-free land in consideration of his services as a tenant such services rendered by him are deemed to be the rent.

48. The concept of 'exchange' is dealt with under sections 118 to 120 of the Transfer of Property (TP) Act, 1882.

The word 'exchange' means the transfer of a thing for another thing. According to Law Commission Report of 1879, 'exchange is not an agreement itself, but as fulfillment of an agreement by mutual transfer of dominion'.

An exchange involves the transfer of a property, but the transfer must be in consideration of another property movable or immovable, as exchange does not confine to immovable property alone, but also includes movable property, for instance, barter of goods. Also, the property exchanged need not be of similar kind. Thus, X can exchange his car for Y's Jeep or X can transfer a bus belonging to him in exchange for a piece of land owned by Y.

Definition: Section 118 of the TP Act 1882, defines exchange as —

"When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing nor both things being money only, the transaction is called an exchange."

The exchange should be made in the form of transfer of property by sale in accordance with the provisions of Transfer of Property Act. The above definition has been founded on the provisions contained in the New York Civil Code and includes the exchange of movable property also, i.e., goods.

Nomenclature of the document is not conclusive as to the nature of the document, if in substance it amounts to an exchange. For instance, two parties enter into an agreement to sell a house in consideration of some money and execute a sale deed. Pursuant to the agreement, the vendor received consideration as a transfer of shares held by the vendee, of a company in which the vendor had a stake. Here, the transaction amounts to an exchange and not a sale though it has been executed as a 'sale deed'. The Supreme Court in *Commissioner of I-Tax vs. Motor and General Stores (P) Ltd*, held that, "transaction in which the consideration for transfer of certain properties are shares in a limited company amounts to an exchange."

Essentials of a Valid Exchange: The definition makes it clear, that it is a transfer of one specific property for another property, neither property being money only. The following are the essential elements of a valid exchange:

- Presence of two parties: Transfer of Property Act recognizes the transfer of property inter vivos, i.e., between living persons. At least, two parties are required for a transfer of exchange under the Act. Hence, transfer by testament, 'will' is outside the purview of the Act.
- Ownership of property must be exclusive ownership: The parties to the exchange should hold properties in their name exclusively. For instance, interest in the ancestral property or family settlement by partition will not amount to exchange. In *Raj Narain vs. Khobdari Rai*, the plaintiff and the defendants 4 to 6 were joint owners of a property at Rudrapur and the plaintiff alone was the owner of another property at Rangoon. The plaintiff obtained Rudrapur in entirety and gave the Rangoon property to defendants 4 to 6. The transaction was held to be an exchange. In *Peddu Reddiar vs. Kothanda Reddi*, where the parties to the transfer of lands were co-owners, the Court held that the mutual transfer of lands held by them did not amount to exchange.
- Mutual transfer of reciprocal estate to each other: The parties to the exchange should transfer the property mutually. One should exchange the ownership of a property for the ownership of another in the exchange. Exchange is a transfer of ownership and therefore, where the owner of the thing given has some interest in the thing taken, it is not an exchange.
- Transfer of a property includes movable and immovable but not intangible: The transfer includes exchange of movable as well as immovable properties. However, intangible properties such as intellectual property rights cannot be exchanged under the Act.
- Consideration for transfer is not price: Any transfer of property for a price amounts to sale under the Act. The exchange of ownership to ownership of another is considered as 'exchange' under the Act.
- Formalities of sale under section 54 of the Transfer of Property Act shall be followed to complete the transaction of exchange: The mode of transfer of property by exchange is same as the sale under the Act. Thus, if the value of the property is more than Rs.100, the exchange deed needs registration and the requisite stamp duty is payable, followed by delivery of the possession. Two separate deeds are not necessary for exchange.

49. Essentials of Gift: The following are the essential elements of a gift:

Two Parties – Donor and Donee: Donor and donee are the parties to the gift. The donor is a person who intends to gift the property and the donee is one to whom the gift is made. The donor must be a competent person to gift. He should be a major, of sound mind, and not disqualified under law. Infants and insane are incompetent, as they lack the legal capacity to contract, hence the donor cannot be an infant or insane. A minor can be a donee and his natural guardian on his behalf can accept any onerous gift, as the obligation cannot be enforced against the minor under the law. According to Hindu Law, an idol is considered as a legal person, and as such can be a donee. The similar view was held in *Jagadindra vs. Hemanta Kumari*, that the idol being a juridical person has the capacity to hold the property and hence could be a donee. A person or an intended donee do not have any right to compel the donor to execute a gift deed in his favor, because the gift should be given with free will and gratuitously.

Intention to Donate: The donor should have an intention at the time of making a gift. A gift can be made to an ascertained person and any gift to a wrong person is invalid, because there is no intention to benefit any other person except an ascertained person. The donor will have a motive, an objective or a reason to gift in favor of the donee, such as love and affection in case of relations or friends and a spiritual benefit, but these do not constitute the pecuniary considerations and hence the gift is valid.

Subject Matter: The subject matter of the gift should be tangible, which includes movable or immovable property and should be in existence at the time of making a gift. The Transfer of Property Act does not deal with the intangible properties such as intellectual property rights. A gift in future property is also not recognized under the law. It must be transferable and may include land, goods or actionable claims. Any gift of property, which is not in existence, is void as per Section 124 of the Act.

Absence of Consideration: The transfer of property must be made without any consideration for a valid gift. The court in *Kusonia Bhatia vs. State of UP*, held that the absence of consideration in any form is an essential element of gift. According to Blackstone, 'gifts are always gratuitous, grants are upon some consideration or equivalent'. As per Section 2(d) of the Indian Contract Act, the consideration is 'pecuniary consideration' and love and affection is outside its purview. A transfer of property in consideration of natural love and affection, spiritual benefit is a valid gift. In *Munni Devi vs. Chhoti*, the mother executed a gift deed in favor of her only daughter who promised to look after her during her lifetime. The court held that the gift is on account of natural love and affection towards the daughter, but not in consideration of an assurance given by the daughter, as the gift is a gratuitous transfer.

Voluntary: The gift must be voluntary and the provisions relating to the free consent under the Indian Contract Act, 1872 are applicable. The consent should be free and should not be obtained by coercion, undue influence, duress, misrepresentation, fraud and mistake. 'Undue influence, is the most common ground in case of disputes pertaining to the gifts. It is a settled law, that the concept of 'undue influence' is same in case of gift inter vivos as of a contract.

Transfer of Ownership: The ownership must relate to a property in existence and the transfer of ownership by way of gift must be made voluntarily. The transfer of all rights in the property of the donor to the donee is essential. Even conditional gifts known as onerous gifts are valid. The transfer by a registered deed, which is to be signed by or on behalf of the donor and must be attested by at least two witnesses, will be effective as per section 123 of the Act. In case of the gift of moveable properties, transfer is either by a registered deed or by mere delivery. The delivery will be the same as in the case of the sale of goods.

Acceptance: The transferee, i.e., donee must accept the gift unconditionally. The acceptance can be express, implied or constructive and can be inferred from the possession by the donee. An offer without acceptance does not constitute an agreement; as such there is no gift if not accepted by the donee. A gift is complete only when accepted by the donee. A gift to a minor, accepted by his guardian on his behalf is valid. Like wise, a gift in favor of a deity or idol is valid and its agent may make the acceptance. A minor after attaining the age of majority may accept, avoid or revoke the gift. Before acceptance of the gift, it can be revoked at any time. The acceptance should be made during the lifetime of the donor and any acceptance of gift after the demise of donor is void.

Delivery: The gift of a property is complete only on registration and followed by the delivery of possession. However, the actual delivery of possession of the property is not an essential requirement under the Mohammedan law of gifts. The deed of gift attracts stamp duty and if not stamped, it is inadmissible in evidence, but will not affect its validity. Non-registration of a gift will not affect its validity, as the gift is complete when accepted by the donee and registration is only a procedure of law, where consent of the donor for it is not required.

50. A gift is the transfer of ownership of an existing movable or immovable property voluntarily and gratuitously, i.e., without any consideration by the donor to the donee.
- To be a valid gift, acceptance of the donee is an essential element. The acceptance should be given during the lifetime of the donor.
 - The Act recognizes the gift inter vivos ('between living persons' or 'from one living person to another living person') and hence the testamentary gift is outside its purview. Testamentary gifts by way of 'will' are discussed under the Succession Act.

- Any transfer of a movable property by way of gift will be effective either by a registered instrument or by mere delivery of the possession. But, the gift of an immovable property can be done only through a registered deed, signed by or on behalf of the donor and must be attested by at least two witnesses.
- The gift cannot be revoked in general, but in case of fraud, misrepresentation, undue influence or mistake, or by an agreement of revocation by the parties, it can be revoked.

The law relating to 'gift' is explained under sections 122 to 129 of the Transfer of Property Act, 1882.

Revocation of a Gift: In general, a gift is irrevocable. It is a settled principle of law that the gift cannot be revoked when accepted by the donee. Any agreement to the effect that at the will of the donor a gift can be revoked is void as per Section 126 of the Act. But, a gift can be suspended or revoked, if the donor and the donee make an agreement to that effect on the happening of any specified event, which does not depend on the will of the donor, provided the agreement is a valid one.

In *Subramanian vs. Kanni Ammal*, the court held that the following essential conditions are to be fulfilled for the revocation of the gift:

- Donor and donee must agree for the suspension or revocation of the gift on the happening of a specified event.
- Such event should not depend on the will of the donor.
- The condition must be accepted at the time of the gift by the donor and the donee.
- Such condition should neither be illegal nor immoral and should not be repugnant to the estate created under the gift.

The right to revoke the gift being a personal right cannot be transferred, as right to sue, which is not a transferable right under section 6 of the Act. The right to revoke the gift will not be extinguished by mere laches or delay in filing the suit unless it is barred by limitation. In *Allcard vs. Skinner*, Lord Lindley held that the right to revoke a gift survives even to the legal heirs, representatives or executors of the donors, if they have a claim to set aside the gift on the grounds of fraud or undue influence.

The donor does not have any right to revoke the gift once he delivers the property to the donee even though it has not been registered, as his duty is complete towards the donee by donation and when accepted by the donee. In *Kalyan Sundaram vs. Koruppa*, the court made it very clear that the gift cannot be revoked once it is accepted by the donee. Lord Selvesen, in the case stated that to validate the gift, it must be registered, but registration is only an act of the officer appointed by the law for the purpose and does not require the consent of the donor. Donor can revoke the gift on the grounds of coercion, undue influence, fraud, mistake or misrepresentation, but not on the mistake of law. The donor can revoke the incomplete gift before it is accepted by the donee. Once the donee accepts, the gift is complete and the donor does not have any right to claim back the property gifted.

The gift once made cannot be revoked as it is binding on the parties. Donor cannot take a plea that the property gifted is non-transferable. In *Seetharamaraju vs. Bayanna*, the court held that the donor could not accuse later when the gift is made under undue influence and subsequently he agrees to it. The burden of proof shifts on to the donee, in case of a gift by an old, infirm and weak person. Donee has to prove that the gift is voluntary and made in the absence of undue influence, and the donor was fully conscious and aware when executing a gift deed.

The gift can be revoked on the ground of undue influence, when it is made between persons in the fiduciary relationships such as solicitor and client, principal and agent, parent and child, spiritual adviser and disciple, etc. The period of limitation for the revocation of a gift is 3 years as per the provisions of the Limitation Act.

The Section 126 of the Act is not at all applicable to the Mohammedans. A Mohammedan has the right to revoke a gift even after the delivery of possession except in the following cases:

- When a gift is made by the husband to his wife or vice-versa.
- When the donee is related to the donor within prohibited degrees.
- When the gift is made to charity or for any religious purpose.
- Death of the donee.
- When the gift has been passed out from the donee to others by way of sale, gift, etc.
- When the subject matter of the gift is destroyed or lost.
- When the donor received some other property in exchange of the gift, etc.

51. Intellectual property rights are basically private rights. By means of intellectual property rights, law confers an interest that is akin to a monopoly, with the sole purpose of stimulating innovations and creativity. Protection is granted to the rights holders not merely to convey an exclusive title for the creations but also includes the right to reproduce, distribute and gain commercial returns for their creations. States provide territorial protection to innovations and objects of art. However, now that these rights have become commercial commodities and form the core of trading activities across the globe, intellectual property has entered the global markets and cannot remain territorial in nature any longer. Intellectual property rights are now protected at the global level as well as within regional and local frameworks of law.

Classification of Intellectual Property Rights: Intellectual property is traditionally divided into two branches, “Industrial property” and “Copyright.” According to The Convention Establishing the World Intellectual Property Organization (WIPO) provides under Article 2 (viii) that intellectual property shall include rights relating to:

- Literary, artistic and scientific works,
 - Performances of performing artists, phonograms, and broadcasts,
 - Inventions in all fields of human endeavor,
- Scientific discoveries,
- Industrial designs,
- Trademarks, service marks, and commercial names and designations,
- Protection against unfair competition, and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.

TRIPS Agreement through Section I to Section VII lists out the following categories of intellectual property:

- Copyright and Related Works
 - Rights of artists, painters, musicians, sculptors, photographers and authors for copyright in their works;
 - Rights of computer programs whether in source or object code for a copyright in their programs and compilation of data;
 - Rights of performers, producers of phonograms (sound recordings) and broadcasting organizations for a copyright in their work;
- Rights of traders in their Trademarks
- Rights of manufacturers and producers for Geographical Indications in relation to such products and produce
- Rights of designers for their distinctive Industrial Designs
- Right of inventors to be granted Patents for their inventions

- Rights of computer technologists for their Layout Designs of Integrated Circuits
- Rights of businessmen for protection of their Undisclosed Information of Technology and Management i.e., trade secrets/confidential information or simply 'know-how'.

Definitions of Various Classes of Intellectual Property

Industrial Property: The expression “industrial property” covers inventions and industrial designs. To distinguish between the two, inventions are new solutions to technical problems, and industrial designs are aesthetic creations determining the appearance of industrial products. Industrial property includes patents, trademarks, service marks, commercial names and designations, including indications of source and appellations of origin, and protection against unfair competition.

Patents: A patent is a document, issued, upon application, by a government office, or a regional office acting for several countries, which describes an invention and creates a legal situation in which the patented invention can normally only be exploited i.e., manufactured, used, sold, imported with the authorization of the owner of the patent. A patent may relate to a product or a process. Patents are meant to protect technical innovation and require a formal application process.

Copyright: The rights of authors of literary and artistic works (such as books and other writings, musical compositions, paintings, sculpture, computer programs and films) are protected by copyright.

Trademarks: ‘A trademark is any sign that individualizes the goods of a given enterprise and distinguishes them from the goods of its competitors.’ For practical purposes a trademark may be defined simply as, ‘A sign which serves to distinguish the goods of one enterprise from those of other enterprises’ as defined in the WIPO Model Law for Developing Countries on Marks, Trade Names and Acts of Unfair Competition of 1967.

Geographical Indications: ‘Geographical Indications’ is a category of IP that has made its foray into the legal realms only recently. The term ‘geographical indication’ refers to the protection as a category of IP, names and symbols, which indicate a certain geographical origin of a given product. Geographical indications acquire commercial value when a reputation is made and a standard set such that a product gets associated with its place of origin. Well-known examples would be Champagne and Darjeeling, the former more likely to bring to mind white wine and the latter, tea, than the places themselves.

Industrial Designs: Industrial design refers to the creative activity of achieving a formal or ornamental appearance for mass-produced items that, within the available cost constraints, satisfies both the need for the item to appeal visually to potential consumers, and the need for the item to perform its intended function efficiently.

Lay-Out Designs of Integrated Circuits: Lay-out designs or topographies of ‘Integrated Circuits’ are the subject matter of the Treaty on Intellectual Property in Respect of Integrated Circuits that provides the following definitions:

- “Integrated circuit” means a product, in its final form or an intermediate form, in which the elements, at least one of which is an active element, and some or all of the inter-connections are integrally formed in and/or on a piece of material and which is intended to perform an electronic function,
- “Layout-design (topography)” means the three-dimensional disposition, however expressed, of the elements, at least one of which is an active element, and of some or all of the interconnections of an integrated circuit, or such a three-dimensional disposition prepared for an integrated circuit intended for manufacture ...”

52. Copyright is a property right, which exists in certain specified types of works. It protects original/creative works. It protects any literary, dramatic, musical, artistic, and certain other intellectual works. Copyright protects works such as poetry, video games, videos, plays, paintings, sculpture, recorded music performances, novels, photographs, choreography and architectural designs. It is the exclusive right to do and to authorize others to do certain acts in relation to that work or other subject matter.

Infringement: The Act grants certain exclusive rights to the copyright owner. A person who does something, with a protected work, that only the copyright owner is entitled to do, and does so without the permission of the copyright owner of that work, infringes the copyright of the owner and can be held liable. If any one without the authorization of the owner does the following act it amounts to an infringement. Infringement includes the unauthorized or unlicensed copying of a work subject to copyright.

Offences: Section 63 of the Act lays down that an offence is committed if any person who knowingly infringes or abets the infringement of:

- the copyright in a work, or
- any other right conferred by this Act.

The offences are punishable under the Act with an imprisonment for a term, which is not less than six months and may extend to three years and with fine which is not to be less than sixty thousand rupees but which may extend to two lakh rupees. But if these infringements were not made for gain on the course of trade or business the court is at liberty to impose a sentence of imprisonment for a term of less than six months or a fine of less than sixty thousand rupees.

Section 63 A provides that if anyone has already been convicted of an offence under the Copyright Act and is convicted again of such offence he is punishable with imprisonment for a term which shall not be less than one year but which may extend to three years. A fine of not less than one lakh rupees to two lakh rupees may also be imposed. The gravity of penalties differs from offences to offences.

The Act specifically provides that where any offence under this Act has been committed by a company, every person who at the time the offence was committed was in charge of, and was responsible to the company for, the conduct of the business of the company, as well as the company shall be deemed to be guilty of such offence and shall be liable to be proceeded against and punished accordingly.

Civil Remedies: The owner of copyright can sue in the District Court having jurisdiction and shall be entitled to all such remedies by way of injunction damages, accounts and otherwise as are conferred by law for the infringement of a right. The owner of copyright for this purpose shall include an exclusive licensee and in the case of an anonymous literary, dramatic, musical or artistic work, the publisher of the work. It is, however, provided that if the defendant proves that at the date of infringement he was not aware or had no reasonable grounds for believing that copyright subsisted in the work, then the plaintiff shall only be entitled to an injunction and account for profit and shall not get damages.

The Act provides for the appropriate authority that can be approached in case an appeal is preferred. If an appeal is to be preferred against certain orders of the magistrate the aggrieved person can within thirty days of the date of such order approach the court to which appeals from the court generally lie. If it is an appeal against the orders of the Registrar of Copyrights or Copyright Board any aggrieved person can make an appeal within three months from the date of such decision or order, to the High Court within whose jurisdiction the appellant actually and voluntarily resides or carries on business or personally works for gain.

53. According to the Income Tax Act, 1961 the income of any person shall be considered under any one of the following five heads of incomes:
- i. Income from Salaries;
 - ii. Income from House Property;
 - iii. Profits and Gains of Business or Profession;
 - iv. Capital Gains; and
 - v. Other Incomes.

Income from Salaries: For the income to be taxable under this head, the relationship of employer and employee must exist between the payer and payee. The person employed may be on a full-time or part-time basis.

The remuneration received by an individual is taxable under the head “Salaries” irrespective of whether the remuneration is termed as salary or wages as both are compensation for work done or services rendered.

The salary payable must be real and not fictitious and there must be an intention to pay on the part of employer and receive on the part of employee.

Under Section 17(1), salary includes:

- wages,
- any annuity or pension,
- any gratuity,
- any fees, commission, perquisite or profits in lieu of or in addition to any salary or wages,
- any advance of salary,
- any payment received in respect of any period of leave not availed by the employee,
- portion of the annual accretion in any previous year to the balance at the credit of an employee participating in recognized provident fund to the extent it is taxable and transferred balance in a recognized provident fund to the extent it is taxable.

Income from House Property: The annual value of property consisting of any buildings or lands appurtenant thereto, of which the assessee is owner, is chargeable to tax under the head, “Income from House Property”. Any house property occupied by the assessee for the purpose of business or profession carried on by him, the profits of which are chargeable to tax, annual value of such property is not chargeable to tax under this head.

According to Sec 22 of the Income Tax Act, 1961, tax is charged only if (a) the property consists of any building or land appurtenant thereto; (b) the assessee is the *owner* of house property; and (c) the property should not be used by the owner for purpose of his business or profession, the profits of which are chargeable to tax. If the house property is sublet, it is not taxable under this head but it is taxed under the head “Income from Other Sources”.

Tax on house property is levied only if the assessee is the owner of the property. Owner includes legal as well as deemed owners. Under this Section owner may be an individual, firm, company, co-operative society, or association of persons.

Under Section 27 of the Act the following persons will be treated as deemed owners – an individual, who transfers house property otherwise than for adequate consideration to his or her spouse or to minor child, the holder of impartible estate, a member of co-operative society, company or association of persons to whom a building or a part thereof is allotted or leased under a house building scheme of the society, company or association, a person who is allowed to take or retain possession of any building in part performance of a contract entered into under Section 53A of the Transfer of Property Act.

Tax is levied on the annual value of the property and not on rent.

54. Net Wealth [Section 2(m)]

The term “net wealth” means taxable wealth. It represents the excess of assets over debts. Assets include deemed assets but do not include assets exempted under Section 5. The net wealth is calculated on the consideration of certain assets. For the purpose of calculation of net wealth, the term assets includes:

- i. Any building or land appurtenant thereto hereinafter referred to as “house”, whether used for residential or commercial purposes or for the purpose of maintaining a guest house or otherwise including a farm house situated within twenty five kilometers from local limits of any municipality whether known as Municipality, Municipal Corporation or by any other name or a Cantonment Board, but does not include.

- a. a house meant exclusively for residential purposes and which is allotted by a company to an employee or an officer or a director who is in whole-time employment, having a gross annual salary of less than five lakh rupees;
 - b. any house for residential or commercial purposes which forms part of stock-in-trade;
 - c. any house which the assessee may occupy for the purposes of any business or profession carried on by him;
 - d. any residential property that has been let-out for a minimum period of three hundred days in the previous year; and
 - e. any property in the nature of commercial establishments or complexes;
- ii. Motor cars (other than those used by the assessee in the business of running them on hire or as stock-in-trade);
 - iii. Jewelry, bullion, furniture, utensils or any other article made wholly or partly of gold, silver, platinum or any other precious metal or any alloy containing one or more of such precious metals, provided if the above said are forming part of any stock-in-trade they are not considered as assets. If above jewelry or ornaments made of gold, silver, platinum or any other precious metal and contain any precious stones are also included for this purpose.
 - iv. Yachts, boats and aircrafts (other than those used by the assessee for commercial purposes);
 - v. Urban land (which is comprised within the jurisdiction of a municipality or a cantonment board and which has a population of not less than ten thousand. If the same land is held as stock-in-trade by the assessee is not considered as asset); and

Cash-in-hand, in excess of fifty thousand rupees, of individuals and Hindu undivided families and in the case of other persons any amount not recorded in the books of account.

Deemed Assets [Section 4]

- Assets transferred by one spouse to another – Section 4(1)(a)(i): The assets which have been transferred after March 31, 1956 by an individual, directly or indirectly, to his or her spouse otherwise than for adequate consideration or in connection with an agreement to live apart are included in the net wealth of the transferor.
- Assets held by minor child – Section 4(1)(a)(ii): All the assets held by a minor child are included in the net wealth of the individual. However, if such a minor is (i) suffering from any disability of the nature specified in Section 80U of the Income Tax Act or (ii) a married daughter of such individual, there will be no such clubbing of wealth. The clubbing provision will not apply in respect of assets acquired by the minor child out of his income earned from any manual work done by him or activity involving application of his skill, talent or specialized knowledge and experience.

The net wealth of a minor will be included in the net wealth of that parent whose net wealth excluding the assets of minor child so includible under Section 4(1) is greater. However, where the marriage of his parents does not subsist, it will be clubbed in net wealth of the parent who maintained the minor child in the previous year. Where any asset is included in the net wealth of either parent, such asset shall not be included in the net wealth of other parent unless the Assessing Officer is satisfied after giving that parent an opportunity of being heard that it is necessary to do so.

Assets that are Exempted: To arrive the figure of net wealth, the “assets” includes property of every description, movable or immovable, but does not include,

- i. Agricultural land and growing crops, grass or standing trees on such land;
- ii. Any building owned or occupied by a cultivator of, or receiver of rent or revenue out of, agricultural land;
- iii. Animals;

- iv. A right to any annuity in any case where the terms and conditions relating thereto preclude the commutation of any portion thereof into a lump sum grant; and
- v. Any interest in property where the interest is available to an assessee for a period not exceeding six years from the date the interest vests in the assessee.

55. The term 'CENVAT' stands for Central Value Added Tax. Till March 2000, MODVAT was in practice, and that was modified into CENVAT. These are the provisions used in Central Excise to implement the concept of VAT at the manufacturing stage by giving the credit of duty paid on inputs.

The CENVAT scheme is principally based on the system of granting credit of duty paid on inputs. Under CENVAT, a manufacturer has to pay duty as per normal procedure on the basis of 'Assessable Value' (which is mainly based on selling price). However, he gets credit of duty paid on inputs.

Credit will be available for duty paid on:

- Raw materials (not all),
- Material used in relation to manufacture,
- Packaging material, and
- Paints.

Inputs should be Used in or in Relation to Manufacture: CENVAT credit is available only on inputs used in or in relation to the manufacture of a final product.

Input may be Used Directly or Indirectly: The input may be used directly or indirectly in or in relation to manufacture. The input need not be present in the final product.

No Credit on Hsd and Petrol: Duty paid on high speed diesel and motor spirit (petrol) is not available as CENVAT credit, even if these are used as raw materials.

No Credit if Final Product is Exempt from Duty: No credit is available if the final product is exempt from duty – Rule 6(1) of CENVAT Credit Rules, 2002 [earlier, rule 57AD(1)]. If a manufacturer manufactures more than one product, it may happen that some of the products are exempt from duty. In such cases, duty paid on inputs used for manufacture of exempted products cannot be used for payment of duty on other products which are not exempt from duty. However, if the manufacturer uses common inputs for both exempted as well as un-exempted goods, he has to pay an 'amount' of 8% of the price of exempted goods.

Credit on the Basis of Specified Documents: Credit is to be availed only on the basis of specified documents as proof of payment of duty on inputs.

Credit available Instantly: Credit of duty on inputs can be taken up instantly, i.e. as soon as inputs reach the factory. In case of capital goods, 50% credit is available in the current year and balance 50% in the subsequent financial year.

No Cash Refund: In some cases, it may happen that duty paid on inputs may be more than duty payable on final products. In such cases, though the CENVAT credit will be available to the manufacturer, he cannot use the same and the same will lapse. There is no provision for refund of the excess CENVAT credit. *However, the only exception is in case of exports where duty paid on input material used for exported goods is refundable.* Other exception is that Tribunal can order, when CENVAT credit cannot be availed due to fault/wrong action of the department.

One to One Correlation not Required: CENVAT rules do not require input-output correlation to be established.

CENVAT on Capital Goods: Credit of duty paid on machinery, plant, spare parts of machinery, tools, dyes, etc., is available. 50% credit is available in the current year and the balance 50% in the subsequent financial year.

CENVAT available only if there is 'Manufacture': CENVAT on inputs is available only if the process amounts to 'manufacture'. Otherwise, CENVAT is not available. [In fact, in such cases, no duty is payable on the final product and the question of CENVAT does not arise at all].

56. Central Excise is the duty that is collected on a product, that manufactured or produced in India. It comes under indirect taxes as it is collected from the manufacturers or producers of the goods. It is levied on every product that is manufactured or produced, irrespective of its sale/realization of value. It is governed by the Central Excise Act, 1944.

Classification of Goods

Goods: The Central Excise Act does not define the term “goods”. However, we shall look into the meaning of goods as defined in the constitution and the Sale of Goods Act. The Constitution defines goods in Article 366(12) as “goods includes all materials, commodities and articles”. Under the Sale of Goods Act, goods have been defined as meaning “every kind of movable property (other than actionable claims and money) including 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.”

The term ‘goods’ is not defined by the Central Excise Act, 1944. Hence, the appropriate meaning can be taken from other sources. Basically, goods are classified in to ‘excisable goods’ and ‘exempted goods’ for the purpose of considering for levying excise duty.

Depending upon the case laws and judicial interpretations, “goods” for the purposes of levy of excise duty must satisfy two preconditions – their movability and marketability.

- **Movability:** The goods must be movable. Thus, immovable property or property attached to earth is not ‘goods’ and hence duty cannot be levied on it. Various case laws have reiterated that the word ‘manufacture’ or ‘production’ is associated with being movable. On the other hand, immovable property like a ‘building’ is constructed and not manufactured or produced. For levying the Excise duty the goods must fulfill the following conditions:
 - i. there should be goods;
 - ii. such goods should be excisable goods; and
 - iii. such goods should have been produced or manufactured in India.
- **Marketability:** The item must be such that it is capable of being bought or sold. This is the test of ‘Marketability’. The goods must be known in the market. Unless this test of *marketability* is satisfied, duty cannot be levied as these will not be *goods*. This is also termed as ‘Vendibility Test’. In a famous case, it was held that to become ‘goods’ an article must be something which can ordinarily come to market to be bought and sold.

Kinds of Duties

Basic excise duty is primary duty levied, on the goods produced/manufactured, by the Excise Department. In addition to this, the other duties that are levied are:

- Special excise duty under the Finance Acts;
- Additional duties of excise in lieu of sales tax under the Additional Duties (Goods of Special Importance) Act, 1957; and
- Additional duties on specified items under other Acts.

Applicability of Duties

The power to levy Central Excise duties lies with the Central Government. Excise duties are levied uniformly throughout the country and the duty rates/structure are governed through the Tariff/Budget notifications.

The Central Government is vested with the power to levy excise duty by virtue of Entry 84, List I, Schedule VII of the Constitution of India. However, the Central Government has no power to impose duty on:

- Alcoholic liquors for human consumption; and
- Opium, Indian hemp and other narcotic drugs.

As alcoholic liquors, opium and other narcotic drugs found place in the State’s list, they are eliminated from the Central Government’s list.

57. Customs duty is another part of the indirect taxes. This duty is collected by the Central Government on every product that is exported or imported from India. This duty is governed by the Customs Act, 1962. This duty is levied as a percentage on the assessed value of the product that is exported or imported from India.

Applicability of Duties

Customs duty is applicable equally to all over India at the time of importing or exporting the goods in India. Customs duty is applicable on transporting of goods by land, air and water, including the Indian Territorial Waters. Indian Territorial Waters spread around 12 nautical miles from the sea coast of India. The jurisdiction of the Customs authorities extends up to border of Indian waters. If they found any illegal transit is going on, the authorities have powers to search, confiscate, arrest and even shoot out the vessel if it is not stopped.

Nature of Duty

It is a complete code that provides machinery for dealing effectively with the problems relating to levy and collection of duties. The rapid development of science and technology and the consequent industrial development and expansion of manufacturing as well as trading activities necessitated further reform and legislation. Thus the Customs Tariff Act, 1975 passed the recommendations of the Tariff Revision Committee in favor of adoption of Harmonized System of Nomenclature (HSN) to keep pace with the changing pattern of international trade. It contains two Schedules. Schedule I gives classification of goods and rates of duty as to imports, while Schedule II is concerned with classification of goods and rates of duty in case of exports.

The objective of levying customs duty is:

- To restrict imports to preserve foreign exchange.
- To protect Indian Industry from undue competition.
- To prohibit imports and exports of goods for achieving the policy objectives of the Government.
- To regulate exports.
- To co-ordinate legal provisions with other laws dealing with foreign exchange such as Foreign trade (Development & Regulation) Act, Foreign Exchange Management Act, Conservation of Foreign Exchange Prevention of Smuggling Act, etc.

Exemption from Customs Duty (Section 25)

Payment of customs duty may be exempted in the following cases:

- **Goods Derelict, Wreck, etc. (Section 21):** All goods, derelict, jetsam, flotsam and wreck brought or coming into India, shall be dealt with as if they were imported into India, unless it be shown to the satisfaction of the proper officer that they are entitled to be admitted duty free under this Act.
- **Remission of Duty on Lost, Destroyed or Abandoned Goods (Section 23):**
 - Without prejudice to the provisions of Section 13, where it is shown to the satisfaction of the Assistant Collector of Customs that any imported goods have been lost otherwise than as a result of pilferage or destroyed at any time before clearance for home consumption, the Assistant Collector shall remit the duty on such goods.
 - The owner of any imported goods may, at any time before an order for clearance of goods for home consumption under Section 17 or an order for permitting the deposit of goods in a warehouse under Section 60 has been made, relinquish his title to the goods and thereupon he shall not be liable to pay the duty thereon.

- **Denaturing or Mutilation of Goods (Section 24):** There are instances where goods when imported in the condition they are in, attract a higher rate of duty. However, the same goods could be charged with a lower rate of duty in case their nature is different (i.e. if they are either denatured or mutilated). Section 24 permits change in the form of such goods to the other form and charging of lower rate of duty on such goods. This process may be carried out only on a request by the owner.

The Central Government has been granted emergency powers to increase import or export duties if the need so arises. Such increase in duty must be by way of notification which is to be placed in the Parliament within the session and if it is not in session, it should be placed within seven days when the next session starts. Notification should be approved within 15 days.

Even though the power to levy and collect tax vests with the Parliament, there are certain powers which have been delegated to the Central Government.

As per Subsection (1) of Section 25, the Central Government can provide a general exemption to all imports of specified goods subject to the following norms:

- The exemption, if granted, should be in public interest;
- Exemption from duty may be granted wholly or partially;
- Exemption may either be conditional or unconditional;
- Exemption should be in respect of goods of specified description; and
- Exemption should be granted by issue of a notification in the Official Gazette.

Apart from the power to grant a general exemption, the Central Government also has power to grant ad hoc exemption in each individual case. While granting this exemption, the following conditions should be fulfilled:

- Circumstances should be of an exceptional nature.
- The circumstances should be stated in the exemption order. Also, the Central Government can not only reduce the rate of duty, but can also modify the form and method of duty. For example, an ad valorem rate may be changed to a specific rate.

58. The Government of India Act, 1935 by virtue of entry 48 of the Provincial List permitted tax to be levied on sale of goods and on advertisement. The expression 'tax on sale' was construed to include purchase as well. As a result of the power given under the list, sales tax was being levied by States even if one of the following ingredients was present.

- The goods are present or in existence in the State at the time of sale.
- The manufacture has taken place in the State.
- The property in the goods is transferred in the state for a price.
- There has been a payment of price and title in the goods has been passed.

Applicability of Central Sales Tax

Basically the applicability of Central Sales Tax (CST) is as follows:

- Tax is levied on interstate sales.
- Sales tax thus collected is retained by the collecting state.
- Sales tax under this scheme is payable in the state from where movement of goods begin.

The CST Act, formulates principles for determining whether a sale or purchase of goods has taken place:

- In the course of interstate trade or commerce; or
- Outside a state; or
- In the course of import into or export from India.

It provides for collection, levy, distribution of tax on sale of goods in the course of interstate trade or commerce. It may declare specific goods to be of special importance in interstate trade or commerce and stipulate the restrictions and conditions in respect of the state laws which seek to impose tax on the sale or purchase of goods which have been declared to be of special importance.

Rate of Central Sales Tax

For the purpose of prescribing the rate of tax, different rates are prescribed for:

- a. Sale to Government.
- b. Sale to registered dealers of goods included in their registration certificates.
- c. Sale of declared goods to un-registered dealers.
- d. Sale of goods other than declared goods to un-registered dealers.
- e. Sale of goods of whose tax rate is Nil or less than 4% for sale inside a State.

Rates to various categories are as follows:

- a. **Sale to Government:** The Sales tax on Sale to Government is charged at 4% general sales tax rate for sale within the State, whichever is lower. The Government department that purchases the goods has to issue certificate in 'D' form.
- b. **Sale to Registered Dealer:** The sale to a registered dealer is taxed @ 4% or sales tax rate for sale within the State whichever is lower, provided that the goods are 'eligible' as per section 8(3) and these are specified in the Registration Certificate issued to Purchasing Dealer. Purchasing Dealer has to submit a declaration in 'C' form.
- c. **Sale to Un-registered Dealers:** The rate of Sales tax on:
 - **Declared Goods:** It is twice the rate applicable to sale or purchase of such goods within the State.
 - **Other than Declared Goods:** As applicable for sale inside the State or 10% whichever is higher.

If local sales tax rate is Nil, CST will also be Nil, if sale is to unregistered dealer.

Calculation of Sales Turnover

Sales Tax is payable on Sales Turnover of a period. Rate of Tax is determined as per Section 8, and Turnover is determined as per Section 2(j).

Turnover: The Sales Turnover (also known as 'Taxable turnover') is the aggregate of the sale price received and receivable by the dealer in respect of sales of any goods in the course of inter state trade or commerce made during any prescribed period. It is determined as per the provisions of the Central Sales Tax Act Rules.

Section 8A(1) states that for determining turnover, deduction of sales tax should be made from the aggregate of sale price.

Prescribed period means the period that stipulated by the local sales tax law, for filing the sales tax returns. It is usually a Quarter and in some states it is monthly.

59. Nature of Insurance Contract:

The insurance mechanism has two fundamental characteristics; shifting or transferring of a risk of loss or damage, from owners and thereby sharing of losses by all the members of the group. Thus a contract of insurance is a contract by which one party undertakes to make good the loss of another, in consideration of a sum of money, on the happening of a specified event. For example, fire accident or death.

The offer, acceptance, communication and consideration are very important elements of a contract. Apart from these the other important elements are: The intention of the parties to create the legal relationship, the capacity of the parties to enter into a contract, free consent of the parties who enter into such legally binding contract ('consensus ad idem'), its

certainty and possibility of performance and lastly the said contractual agreement entered into by both the parties should not be declared void under the Act and also should not have been forbidden by any law of the land.

- i. **The Proposal (or) Offer:** In an insurance contract, the proposal or offer is made by the insured, expressing his willingness to create a contract of insurance on the subject matter mentioned therein. In insurance contract the proposal originally originates from the insured and not from the insurer. It is called the 'invitation to offer'.
- ii. **Acceptance:** In the insurance contract, the proposal forms received by the insurers are processed and verified to find out what risks are to be covered and to assess the intensity of the insurance claims and other related matters. After verification and satisfying themselves, the proposals are accepted provided they are otherwise in order. After accepting the proposal, the insurer informs the promisor that the proposal has been accepted. The acceptance is communicated to the party either by giving a notice or through any of its agent or intermediary. The acceptance may be absolute or conditional.
- iii. **Communication:** The communication of proposal and acceptance is one of the important elements of insurance contract. The insured, in the first instance, communicates offer by submitting the filled standard form of proposal, by signing. The submission of proposal form to the other party the insurance company, expressing the willingness to pay the premium when a proposal is accepted is treated as communication of proposal. The insurance company has to intimate the insured about his willingness to accept the proposal. A valid contract of insurance comes into force as soon as the communication of acceptance is completed and the conditions are fulfilled.
- iv. **Consideration:** Consideration in the contract of insurance is the payment or the consent to pay the premium by the proposer and a promise to pay or compensate or indemnify by the insurer in accordance with the terms and conditions incorporated in the policy. Thus, there are two promises by the proposer and promisee. These are reciprocal promises undertaken and agreed by the parties. A premium is the price for the risk insured. A premium is the price for the risk undertaken by the insurer. It is the consideration receivable by the insurer from the insured in exchange for their volunteering to pay the sum insured in case of happening of the event.

Parties to the Insurance Contract:

The parties to the contracts of insurance are the 'insurer' and the 'insured'. The person who undertakes the risk under the contract is called the 'insurer' and the person to whom the undertaking is given is the 'insured'. Section 2(a) of the Insurance Act defines insurer and it gives a list of persons who can be qualified an insurer. As per the provisions of the section the insurer means:

- a. An individual,
- b. An unincorporated body of individual,
- c. Body corporate incorporated under the laws of the country other than in India carrying on insurance business,
- d. Body corporate incorporated under any law in force in India or under the Indian Companies Act, 1913 and carrying on the business of insurance in India,
- e. Any subsidiary company incorporated under the provisions of Companies Act and carrying on business of insurance in India,
- f. Any person, who in India having a contract under writers with the 'society of Lloyds' authorized to undertake the insurance business in India till the expiry of the contract,
- g. An Indian Insurance Company, which is termed and registered with a provision to wind up the business as per the provisions of the Companies Act, 1956,

- h. An association of partnership firm registered and eligible to be governed by the provisions of Indian Partnership Act, or
- i. Any agency permitted or sanctioned to undertake the insurance business either under Section 30 of Life Insurance Act of India, or Sections 18 and 19 of General Insurance Act.

But does not include a Principal Agent, Chief Agent, Special Agent or an Insurance agent either appointed under any Act or recognized by the Act undertaking the insurance business, and includes a Government Company and a provident society as defined in Section 65 of Insurance Act.

60. The fundamental principles of insurance contract are mentioned below:

- Good Faith (*Uberrimae Fide*)
- Insurable Interest
- Law of Indemnity
- Proximity of Cause
- Risk
- Mitigation of loss
- Subrogation
- Contribution.

Good Faith (*Uberrimae Fide*): The *Uberrimae Fide* is the foundation on which the insurance policy is constituted and the insurance contracts are exceptions to a cardinal rule of commercial principle that, he who buys should be aware (*caveat emptor*). The product and subject matter, i.e. risks are intangible assets in the hands of the insured and the insurer. The insured, by knowing the quality and quantity of the risk, proposes for a contract and the insurer by knowing the facts and conditions laid down in the standard form of proposal and after considering the proposal of the insured sells the insurance product to him.

Thus, the duty of disclosure forms an important part of the contract and disclosure of facts is presumed with good faith.

Insurable Interest: Consideration is one of the essential elements to make the contract a valid one. Insurance contract, being a contract with uncertainty, is often treated as a wagering contract. Where the object of contract is wagering in nature it is not a lawful contract. On the other hand in existence of insurable interest, an insurance contract has made the insurance contract as valid contract. The Insurance Act does not define the insurable interest. Presence of property right, interest, life or potential liability as a subject matter of the contract and is essential feature of insurable interest. There should be recognized relation under the law between the insured and subject matter of the contract. The insurable interest may be created by the operation of common law by a contract or by a statute.

Principle of Indemnity: In general, the contract of insurance is the contract of indemnity in which the insurer promises to indemnify the insured from the loss or damage of asset due to risk attributed to it. It is the payment of money or the pecuniary interest that is compensated due to happening of a certain event to the insured subject. This principle, in India, is applicable to all the policies other than life policies, because the valuation of life cannot be made. Marine insurance, fire insurance and property insurance stand in relation to the principle of indemnity. Payment of insurance amount, i.e., pecuniary benefit depends upon various factors. In England and also in USA, it is a very much-recognized principle.

Proximity of Cause: The proximity of cause is the other important element of insurance contract. The payment of compensation depends upon the nature and proximity of the cause resulting in the loss to the asset. Proximate cause is the immediate cause that resulted in the loss of the asset. It is that cause without which the loss would not have occurred. It is the cause which is most closely and directly connected with the loss not necessarily in time but

in efficiency and effectiveness. This doctrine is applicable when the insured peril need not be the initial cause and it is not direct result of the operation of an external peril, but then risk insured against must actively take place. An insurer is liable for any loss proximately caused by a peril insured against.

Risk: The insurer undertakes to protect the insured from a specified loss. The insurer, after taking the factors influencing risk, calculates the risk and a notice for payment of the premium is issued to the insured. The risk in a contract can be assumed only from the date on which the premium has been paid.

Mitigation of Loss: In the event of some mishap to the insured property, the insured must take all necessary steps to mitigate or minimize the loss, just as any prudent person would do in those circumstances. If he does not do so, the insurer can avoid the payment of loss attributable to his negligence. But it must be remembered that though the insured is bound to do his best for his insurer, he is not bound to do so at the risk of his life.

Subrogation: It is defined as the transfer of rights and remedies from the insured to the insurer who has indemnified the insured in respect of the loss. This doctrine is applicable to fire and marine insurances. In such cases, the insured has the right to subrogation when the insurer pays for a total loss. In case of partial losses, the insurer is not eligible for the title of the subject, but he is subrogated to all rights and remedies of the assured in and in respect of the subject matter insured as from the time of the loss or to an extent of the amount paid.

Contribution: It is the principle of insurance by which the insured is prevented from recovering more than his loss, despite having several insurance policies. It states that where the assured is over insured by different policies, each insured is to contribute ratably to the loss in proportion to the amount for which he is liable under his contract. If any insurer has already paid the loss to the assured irrespective of his share, the said insurer is entitled to receive the contribution from other co-insurers or joint insurers.

61. The following are the standard clauses in Life Insurance and General Insurance Policies.

Life Insurance Policy: The life insurance of a person is a contract by which the insurer in consideration at a certain premium, either in a gross sum or periodical payments, undertakes to pay the person for whose benefit the insurance is made, a stipulated sum, or annuity equivalent, upon the death of the person whose life is insured. The common life insurance policy contains the following information:

- a. The name of the plan governing the policy;
- b. Whether it is participating in profits or not;
- c. The basis of participation in profits such as cash bonus, deferred bonus, simple or compound reversionary bonus;
- d. The benefits payable and the contingencies upon which they are payable and the other terms and conditions of the insurance contract;
- e. The details of the riders attached to the main policy;
- f. The date of commencement of insurance and the date of maturity or dates on which the benefits are payable;
- g. The premia payable, periodicity of payment, the date the last installment of premium will be due, the implication of discontinuing the payment of installment(s) of premium and also the provisions of a guaranteed surrender value;
- h. The age at entry and whether the same has been admitted;
- i. The policy requirements for (a) conversion of the policy into paid-up policy (b) surrender (c) non-forfeiture and (d) revival of lapsed policies;
- j. Contingencies excluded from the scope of the cover, both in respect of the main policy and the riders;
- k. The provisions for nomination, assignment, and loans on security of the policy and a statement that the rate of interest payable on such loan amount shall be as prescribed by the insurance company at the time of taking the loan;

- l. Any special clauses or conditions such as first pregnancy clause, suicide clause etc.;
- m. The existence of an Insurance Ombudsman, other grievance redressal mechanism for resolution of disputes like claims review committee with Zonal/Regional/Head Offices/Central Office; and
- n. The address of the insurer to which all communications in respect of the policy shall be sent.

General Insurance Policy

The policy document that is issued generally contains the following information and procedure. A general insurance policy shall clearly state:

- a. The name and address of the insured and of any bank or any other person having financial interest in the subject matter of insurance;
- b. Full description of the property or interest insured;
- c. The location or locations of the property or interest insured with respective insured values where appropriate;
- d. Period of insurance;
- e. Sums insured;
- f. Perils covered;
- g. Excluded perils;
- h. Any franchise or deductible applicable;
- i. Premium payable and where the premium is provisional subject to adjustment state the basis of adjustment of premium;
- j. Policy terms, conditions and warranties;
- k. Action to be taken by the insured upon occurrence of a contingency likely to give rise to a claim under the policy;
- l. The obligations of the insured in relation to the subject matter of insurance upon occurrence of an event giving rise to a claim and the rights of the insurer in the circumstances;
- m. Any special conditions attached to the policy;
- n. Provision for cancellation of the policy and the basis for a refund of the premium;
- o. The existence of an Ombudsman and other forums for resolution of disputes; and
- p. The address of the insurer to which all communications in respect of the insurance contract should be sent.

62. Fire insurance contracts are the contracts covering the risks of fire. They insure the risk of loss caused either by fire or incidental to fire. Thus fire insurance policies cover the insurance business in which the risk to the asset is from fire or incidental to fire.

Essentials of Fire Insurance contract:

The fire insurance contract, being a part of typical insurance contracts, is a contract of *uberrima fides*. Fire Insurance is covered by the provisions of Insurance Act, 1938. Fire Insurance policy covers the risk from fire and incidental to fire. All the essential elements of the Contract Act are applicable to a fire insurance contract. The fire insurance policies are of short duration.

Essential principles of fire insurance are – insurable interest and principle of indemnity. Ignition and combustion are important ingredients of fire, without which the fire policy is not operative. The fire policy also covers the damage due to explosion and implosion of boiler, damage to aircraft or property dropped from aircrafts, damage from missile testing operations. The fire policy covers the property of a person both tangible movable and immovable.

Coverage of risk:

The fire policy covers the following risks that are incidental to fire and directly attached to fire:

- Damage caused due to explosion or implosion other than the destruction or damage caused to boilers, machinery or apparatus that are used in specialized industries.
- The damage to aircraft or to the property dropped from the air crafts.
- The damage caused from missile testing operations.
- Damage of bush fire excluding the forest fire.
- It will not cover the loss, destruction or damage caused by war and kindred perils.
- Loss, destruction or damage caused to the insured property by pollution or contamination, nuclear peril, loss or destruction caused to the stocks that are placed in cold store units is not covered by the fire policy.

The fire policy covers the property of a person such as buildings may be of residential or commercial nature, furniture or machinery or other property that are movable and tangible.

Warranties: The warranties and important conditions of the fire policy concerning to principle of good faith should be followed; the assured should inform the insurer of any alteration which affect the risk levels. Insurers can take custody of the property of insured or happening of event and sell or dispose of the property and apply rule of subrogation. The conditions and warranties can be implied or express.

Types of Fire Insurance policies:

The following are some of the fire insurance policies:

- Valued policies,
- Unvalued or open policies,
- Long-term, mid-term and short-term policies,
- All risk policies, and
- Limited risk policies.

Assignment of Policy: Under the Transfer of Property Act, 1882, a fire policy can be assigned either by endorsement on the policy itself or by a separate deed of assignment. This can be done unless the insurer has been given notice of assignment. In case of transfer of insured immovable property, the transferee may require to be paid to him any money, which the transferor actually receives under the policy in case of damage or loss of the property from fire.

Loss Assessment: The policy document contains the procedure to be adopted for the loss assessment and claim settlements of fire insurance business on happening of the event of risk. The insurer is having the right to reject the claim if the claim is not filed within a period of limitation mentioned in the policy or otherwise in accordance with the custom prevailing in the particular class of the business. The insurer is having the right to replace the property that is insured and has suffered the loss.

Claims Settlement: The insurer settles the claim after assessing the damage. The insurer has also a right to reject the claim if it is not filed within the period of limitation mentioned in the policy. The loss assessment and payment of damages depends upon the type of policy taken.

63. Essential elements of marine insurance:

The Law of Marine Insurance was enacted in the year 1963, in India. The Act is based on the English Marine Insurance Act of 1906. The Indian Marine Insurance Act became operative on August 1st, 1963. The Marine Insurance Law developed in its full form from that date and removed some of the difficulties faced by the courts while defining insurable interest, good faith and other important concepts of the insurance business.

A contract of marine insurance is an agreement whereby the insurer undertakes to indemnify the assured, in the manner and to the extent thereby agreed, against marine losses, that is to say, the losses incidental to marine adventure (Section 3). It also includes liability to a third party incurred by the owner of the ship or other person interested in the property assured on happening of the maritime event. This maritime peril or event of risk is consequent on, or incidental to, the navigation of the sea, that is to say, perils of the seas, fire, war perils, pirates, rovers, thieves, captures, seizures, restraints and detentions of princes and peoples, jettisons, barratry and any other perils which are either of the like kind or may be designated by the policy.

Elements of Marine Insurance : Important elements of each and every valid contract are the offer, acceptance, communication and the consideration for the promises made by the parties. In marine insurance contracts, the owner of the ship proposes to the insurance company to insure the vessel, crew and other cargo on board to secure the same from the marine perils. The insurance company accepts the offer for a payment of consideration called the premium. Thereafter, the insurance company agrees to compensate the proposer for the losses suffered by him due to risks or perils covered.

The other important element of the insurance contract is the consideration. The consideration in a marine insurance is the promise made by the offeror for payment of premium for a promise made by the insurance company to compensate him for the losses and sufferings experienced by the assured on the happening of the event insured. The marine insurance contract, being a part of the general insurance contract, is a short-term contract, for a maximum period of one year or for a period of voyage or for such period till such act or purpose is completed. As such, the premium is paid in one lump sum and for one time.

The premium is the consideration paid by a policyholder to keep an insurance policy in force. It is the amount paid to secure an insurance policy. It is the consideration paid by the promisor for the promise made by the insurance company to cover the loss.

The presence of insurable interest in the Marine Insurance contract makes the contract valid. The Act defines the insurable interest that 'a person has an insurable interest if he is interested in the marine adventure'. It further says that the person should have legal or equitable relation to the adventure or of the insurable property. Insurable interest need not be present at the time of conclusion of a contract, but it must present at the time of happening of event.

The insured and the insurer are under obligations to deal with the contracts of insurance with good faith and good intention.

Indemnity arises when 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.

Loss Assessment: Sections 55 to 79 of the Marine Insurance Act, 1963 discuss the definition of loss, measurement of loss and payment of losses and other related matters. The insurer is responsible for the payment of damages only when the loss occurs. The general rule is – 'no loss, no compensation'. The onus of proving the loss rests upon the person making allegations. Section 55 of the Act contains the provisions relating to proximate or remote cause in the payment of losses to the insured on happening of the insured peril. The loss suffered by the assured may be a total loss, partial loss, actual loss, and constructive loss.

Claims Settlement: The important doctrines applicable to the payment of claims under the marine insurance are:

- Subrogation.
- Contribution.
- General average.

1. **Subrogation:** In marine insurance contracts, the insured has the right to subrogation when the insurer pays for a total loss. In case of partial loss, the insurer is not eligible for the title of the subject, but he is subrogated to all rights and remedies of the assured in and

in respect of the subject matter insured as from the time of the loss or to an extent of the amount paid. All the elements concerned with the doctrine of subrogation will pass to the insurer at the time of subrogating the rights under the policy.

2. **Contribution:** In case the assured is over insured by double insurance, each insurer is bound to contribute ratably to the loss. If any insurer pays more than his contribution of the loss, he is entitled to maintain a suit for contribution against the other insurers.

3. **General Average:** In case the assured is insured for an amount less than the insurable value, or in case of a valued policy, for less than the policy valuation, he is deemed to be his own insurer in respect of the uninsured balance and the loss shall be averaged.

The Voyage and Insurance: Voyage is the route of the sea through which the vessel or the ship undertakes the journey. The route of the voyage of the ship is also an important factor in the marine insurance. The assured may arrange the insurance of entire voyage. The policy may be as 'at and from' or 'from'. For the contract of such insurances there is a warranty that the voyage adventure will be commenced within a reasonable time.

64. **Constitution of the regulatory authority under the Insurance Regulatory and Development Authority:**

Section 2(b) defines the Authority as the Insurance Regulatory and Development Authority established under Section 3 of the Act. The Section 3 lays down the procedure for establishing the Authority. It is established by a notification by the Central Government in the Official Gazette. The date of operation of the Authority is also notified by the Central Government by a notification. The other important characteristics of the Authority are as follows:

- It is a body corporate with perpetual succession and common seal.
- It has the powers to acquire, hold and dispose of the property in its name. The property may be movable or immovable.
- It has the powers to enter into contract in its name.
- It can sue the parties and it can be sued by the parties.
- The Central Government by notification decides the principal place of office of the Authority and the Authority has the powers to open branches or other offices as required by it.
- It consists of a Chairperson, not more than five wholetime members, and not more than four part-time members (Section 4).
- All the members are appointed by the Central Government by a notification.
- The Chairperson and members are appointed from the persons of ability, integrity having the standing and experience or knowledge in life insurance or general insurance, actuarial science, finance, economics, law, accountancy, administration or any other discipline which is useful for the Authority. And preferably, the Chairperson and any one of the whole time members should be experienced persons or have the knowledge in the life insurance or the general insurance or actuarial science (Section 4).
- The term of the office of the Chairperson and the wholetime members is five years and the part-time members will hold office for a period not more than the five years from the date of joining the office.
- The Chairperson will be in the office till he attains the age of sixty five years and the wholetime member will be in the office till he attains the age of sixty two years (Section 5).
- The Chairperson or the whole-time member or part-time member can relinquish the office by giving a notice of three months to the Central Government.
- The Central Government can remove the Chairperson, whole time member or the part-time member for the reasons of they becoming insolvent, physically or mentally incapable of performing duties, convicted for the moral turpitude, has acquired the

financial or other interest in the insurance business, or the position of the member or the Chairperson is detrimental to the interest of the insurance or public or the policyholders (Section 6).

- The Central Government, before removing a person from the office, has to give an opportunity to the member to explain the reasons and after hearing him, if not satisfied can remove a member from service explaining clearly the reasons for such removal.
- Any defect or irregularity found in the process of appointment of members cannot vitiate the appointment of the member. The existence of vacancy in the body of the Authority does not affect the proceedings of the meetings of the Authority.
- The Chairperson or the members should not take any employment at least for a period of two years after they leave their positions. Under special circumstances, they can hold any office with the previous approval of the Central Government (Section 8).
- The salaries, allowance and other remunerations will be paid to the Chairperson and members as per the provisions laid down by the Central Government. The allowances and other service conditions will be prescribed by a notification.

65. The Regulatory Authority has the following duties to be performed under the provisions of IRDA Act, 1999:

- The important duty of the Authority is to regulate, promote and ensure orderly growth of the insurance business and reinsurance business (Section 14).
- The Authority has to maintain proper accounts and other relevant records, prepare annual statements of accounts in such form as may be prescribed by the Central Government in consultation with the Comptroller and Auditor General of India.
- The Authority, as per the directions of the Central Government and Comptroller General will arrange the audit of the accounts and rectify any defects pointed by the audit.
- The Authority will submit the audited balance sheet and other financial statements to the Central Government and the Government will lay the reports before the houses of the Parliament.
- The Authority will submit all the financial statements to the Central Government within nine months from the completion of financial year.
- It is also under duty to submit the reports on existing program of insurance business for the promotion of the development of insurance industry.
- The authority is under a duty to follow the directions issued by the Central Government and report the outcome of the directions.
- It has the duty to protect the interest of policyholders in matters concerning assignment of policy, nomination of policy, settlement of insurance claim, surrender value of policy and other terms and conditions of contract of insurance.

Powers and Functions of the Authority:

The IRDA Act, 1999, has provided following the powers and functions to be enjoyed and performed by the Authority:

- The Authority has the general supervisory power of insurance industry and it has the administrative powers.
- It has the powers to appoint the staff and officers required to conduct the business of the Authority smoothly.
- It can delegate some general or special powers by an order in writing to the Chairperson or the Members of the Authority along with conditions if it feels as necessity.

- It has the power to constitute committees of the members and delegate the powers to the committee as required by the insurance industry or as per the regulations of the Authority.
- It has the power to hold the property, acquire the property. The property may be movable or immovable.
- It has a power to issue a certificate of registration, renew, modify, withdraw, suspend or cancel such registration to the applicant, i.e., insurance company.
- It has the power to prepare a code of conduct to the agents. Chief agents, principal agents, surveyors and loss assessors or to the intermediaries who take part in the development of insurance business and in the settlement of the claims.
- Promoting and regulating professional organizations connected with the insurance and reinsurance business.
- Promoting efficiency in the conduct of insurance business.
- It has the power to levy fees and other charges for carrying out the purposes of this Act.
- It has the power to call information from insurances undertakings, inspection of, conducting enquiries and investigations including audit of the insurers, intermediaries' and other organizations connected with the insurance business.
- It has the power to regulate the investment of funds by insurance companies.
- It has the power to regulate the margin of solvency.
- It acts as adjudicator in the settlement of disputes between the insurers, intermediaries of the insurers.
- It acts as supervisory authority and checks the functioning of Tariff Advisory Committee.
- It controls and regulates the rates, advantages, terms and conditions that may be offered by insurers in respect of general insurances, which are not controlled by the Tariff Advisory Committee.
- It formulates the regulations and fixes the targets to be achieved in the field of rural and social sectors by the insurers.
- It has the power to exercise the powers sanctioned by other insurance laws or by other notifications issued by the Central Government from time to time.
- It has the powers to make regulations with the consultancy of Insurance Advisory Committee in the field of finalizing the service conditions of the members and staff of the Advisory Committee and provisions regarding the meeting and transactions to be carried out by the Advisory committee in promoting the insurance business.

The Central Government is having the powers to direct the Authority and grant funds to it with sanction of the Parliament. The fund so constituted is called the Insurance Regulatory and Development Fund which can be used to meet the expenses of the salaries, allowances and other remuneration of the members, officers and other employees of the Authority and to meet all other expenses required to discharge the duties and functions of the Authority. This fund also gets credit from the insurance premiums, application fee from insurers, agents, and intermediaries for registration. It get funds from the share of the insurance premium as required to be paid under Section 7 of the Insurance Act, 1938.

- 66.** The law governing the business transactions is the Indian Contract Act, 1872. Under the Indian Contract Act, 1872, the acceptance of a valid offer results in a valid contract. It is crucial to know when a contract is concluded online and whether any difference exists between contracts concluded by traditional modes, such as via post. Section 4 deals with the rule regarding completion of communication of acceptance. The communication of acceptance is complete as against the offeree, when it reaches the knowledge of offeror. But the Supreme Court has held that in the case of communication by oral means, by telex or by

telephone an acceptance is communicated only when it is actually received by the offeror. The question that would arise is when has the acceptance been conveyed, i.e. (a) when the e-mail was sent; or (b) when it was received by addressee; or (c) When it reaches the 'host computer', which provides the e-mail facility to the addressee.

Determinants of the liability arising out of a contract are:

- Time and place of contract.
- Time and place of communication of acceptance by the offeree.
- Time and place of communication of acceptance received by the offeror.

Section 4 of the Indian Contract Act, 1872 deals with the rule regarding completion of communication of acceptance. As per this Section, the communication of acceptance is complete *as against the offeree*, when it is put in a course of transmission to him so as to be the out of power of the acceptor. The Supreme Court in *Bhagwandas vs. Girdharilal* held that Section 4 of Contract Act is only applicable in cases of non-instantaneous forms of communication and would not apply when instantaneous forms of communication are used. The contract is complete only at the end of the offeror when he received the acceptance to offer. The place of offeror where acceptance is received shall have jurisdiction for enforcement.

In the case of e-commerce acceptance is made via e-mail or by pressing the 'Accept' or 'Buy' icons. A contract through Internet is complete only when an acceptance is received at the end of the originator.

E-mail contracts may be categorized under the non-instantaneous forms of communication. Though the sender receives an acknowledgement, it does not indicate whether the other party has the knowledge of the receipt. Thus the above rule enunciated in *Bhagwandas vs. Girdharilal*, would be applicable to e-mail contracts. In the case of web-click contracts, a contract is completed when the offeror receives the acceptance. Further, communication of an offer or acceptance in the web-click mode is complete when the addressee receives the electronic record as defined in Section 13 (2) of the IT Act (Time and Place of Contract). Receipt occurs at the time when the electronic record enters the designated computer resource. Contract through Internet being instantaneous the contract is complete at the end of the offeror where acceptance is received.

Validity of Online Contracts

The validity and the formation of contracts forms the kernel of e-commerce law. The Indian Contract Act, 1872 gives a statutory effect to the basic common law contractual rule that a valid contract may be formed if it is made by free consent of the parties, competent to contract, for a lawful consideration and for a lawful object and which is not *void ab initio*. The contract Act does not prescribe or favour any particular way of communicating offer and acceptance. It may be done by word of mouth, writing or even by conduct. Thus, there is no requisite of writing for the validity of contracts except for cases, which are specifically required by law to be in writing. It would appear that even in the absence of any specific legislation validating online contracts cannot be challenged solely on such technical grounds. Therefore, the IT Act avoids incorporating any specific provision giving validity to online contracts.

Time of Formation of Contract

The importance of time of formation of contract is well known viz., to decide priorities between competing claims, to determine the law applicable to the contract etc. The time aspect of contract formation is also important in ascertaining the place aspect of contract formation.

Coming back to the Indian Information Technology Act, 2000 section 13 provides the framework for understanding the principles of contract formation in the cases of electronic contracts. It lays down *inter alia*, that unless otherwise agreed:

- The dispatch of an electronic record occurs when it enters a computer resource outside the control of the originator.

- The time of receipt of an electronic record is the time when record enters the designated computer resource (if the addressee has a designated computer resource).
- If the electronic record is sent to a computer resource of the addressee that is not the designated computer resource, receipt occurs at the time when the electronic record is retrieved by the addressee.
- If the addressee has not designated a computer resource along with specified timings, if any, receipt occurs when the electronic record enters the computer resource of the addressee.

However, the above rules do not tell us anything more than when dispatch and receipt of electronic records takes place. Therefore, in order to understand the rules relating to electronic contract formation, the principles of the Indian Contract Act will have to be applied in this context. Section 4 of the Contract Act lays down the following rules regarding communications of offers and acceptances:

- The communication of a proposal is complete when it comes to the knowledge of a person to whom it is made.
- The communication of an acceptance is complete – as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor; as against the acceptor, when it comes to the knowledge of the proposer.
- The communication of a revocation is complete as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it; as against the person to whom it is made, when it comes to his knowledge.

A combined application of section 4 of the Contract Act and section 13 of the IT Act would reveal the following law for contract formation in the case of electronic contracts in the event that nothing contrary has been agreed to between the parties in their contract:

- a. The communication of an offer becomes complete at the time when the electronic offer enters any information system designated by the offeree for the purpose, or, if no system is designated for the purpose, when the electronic offer enters the information system of the offeree, or if any information system has been designated, but the electronic offer is sent to some other information system, when the offeree retrieves such electronic record.
- b. The communication of an acceptance is complete – as against the offeror when the electronic acceptance is dispatched such that it enters a computer resource outside the control of the acceptor.

- 67.** In the electronic context, the following two situations are known as online agreements: (a) E-mail Contracts. (b) Web-click Contracts.

Click-wrap or web-wrap agreements are commonly used in connection with e-commerce transactions. These agreements are typically used to specify the terms and conditions applicable to the use of the website as well as to the products and services purchased over the Internet. With these agreements the buyer or user usually explicitly assents to these terms by clicking on a button stating “I agree” or “I accept” after having had an opportunity to review the terms. An act by the buyer affirmatively assenting to the terms of the click-wrap agreement significantly enhances its enforceability. Some sites, for instance, indicate that continuing use of the site by the user or buyer manifests assent to be bound by the terms and conditions applicable to using the site. It is critical that the users have an opportunity to review the terms of use applicable to the site. If they are buried or otherwise inconspicuous, they will be more difficult to enforce.

Click-wrap agreements are considered to be more enforceable than “shrink-wrap” which are entered into based on the licensee opening the software products’ packaging or failing to return the product within a specified period, typically 7 to 30 days. Click-wrap agreements are entered into by an affirmative assent as opposed to the failure to act. However, if the agreements are too overbearing or contain unusually harsh terms it is

possible, especially in a consumer law context that the click-wrap agreement, even if assented to, may be found unconscionable and unenforceable. To mitigate that possibility, click-wrap agreements should provide a clear and simple mechanism allowing the consumer to return the products for a refund within a reasonable period of time. It is also recommended that the terms and conditions of the agreement be available for inspection in booklet form at physical locations.

In order to establish that effective disclaimers must be provided to the users and entered into enforceable agreements with purchasers. A policy of maintaining records of the disclaimers and contract terms contained on the website, including any changes made to them through time must be established. On the first page of the website there must be a prominent notice instructing the users to review the terms and conditions of usage and alerting users to changes in the terms as they occur.

To make sure the contract is binding, i.e., that the person has the legal competence and capacity to enter into an agreement. One particular problem area is children who are not old enough to enter into a contract. Where children are potential purchasers, parental consent should be sought. In specific applications additional representations may be sought from the customer.

The new Uniform Electronic Transactions Act, which is likely to be enacted soon by most states, provides a framework giving legal validity to electronic signatures and online contracts. This Act will also allow contracts formed by electronic agents without any human negotiation or intervention. The Act defines an electronic signature as “a sound, symbol or process attached to or logically associated with an electronic record and executed or adopted with the intent to sign the record.” Click-wrap agreements have received widespread support in the United States.

By posting “NO TRESPASSING” click-wrap terms of service on your site you can allocate many of the legal risks to your visitors and customers and otherwise limit many of the legal risks you have. These agreements are generally enforceable. One court, for example, suggests using a click-wrap agreement to limit the jurisdictional exposure of e-commerce merchants who would otherwise be subject to being hauled into court wherever they sell products. Click-wrap agreements should include venue-selection provisions and otherwise be used to limit legal exposure and minimize legal risks.

E-mail contracts may be categorized under the non-instantaneous forms of communication. Though the sender receives an acknowledgement, it does not indicate whether the other party has the knowledge of the receipt. Thus the above rule enunciated in *Bhagwandas vs. Girdharilal*, would be applicable to e-mail contracts. In the case of web-click contracts, a contract is completed when the offeror receives the acceptance. Further, communication of an offer or acceptance in the web-click mode is complete when the addressee receives the electronic record as defined in Section 13 (2) of the IT Act (Time and Place of Contract). Receipt occurs at the time when the electronic record enters the designated computer resource. Contract through Internet being instantaneous the contract is complete at the end of the offeror where acceptance is received.

- 68.** The meaning of electronic record has to be understood in the light of the context it is used. Electronic record as a mere document might not be much relevant or significant whereas electronic record as a document of evidence needs a judicious explanation and legal recognition. In general an “electronic record” is simply a record, which is...communicated and maintained by means of electronic equipment.”

Electronic Documents are recognized as equivalent to written documents. Digital Signature is recognized as equivalent to written signature. Use of Electronic Documents and Payments in Government transactions is enabled.

The importance of legal recognition of digital signatures in the facilitation of e-commerce needs little mention. The Act provides legal recognition to digital signatures and also envisages a scheme of digital Signature Certificates to be issued by the third parties. The Model Law offers a broad definition of digital signatures and is technologically neutral. However, the Information Technology Act in Section 3 while trying to define digital

signature seeks to circumscribe it within certain technological limits. It provides that authentication of electronic record can only be affected by the asymmetric crypto system and hash function.

In the virtual world where rapid change and progress is the norm, it is absurd to restrictively legalize the use of a particular technology in the form of asymmetric crypto system.

Authentication of Transactions and Records – Digital Signatures

- Section 3 of Chapter II of the Information Technology Act, 2000 deals with authentication of electronic records and transactions:
 - Subject to the provisions, any subscriber may authenticate an electronic record by affixing his digital signature.
 - The authentication shall be effected by the use of asymmetric crypto system and hash function that envelops and transforms the initial electronic record into another electronic record.
- Digital signature is evolved under two steps. First, the electronic record is converted into a message digest by hash function. This ensures integrity of the content of communication.

Secondly, the identity of the person affixing the digital signature is authenticated through the use of a private key which attaches itself to the message digest and which can be verified by any person who has the public key corresponding to such private key. The private and public keys are unique to the subscriber and constitute a functional key pair. Any person can verify the electronic record by using the public key of the subscriber.

Recognition for Transactions and Records

- Section 4 of the Act confers recognition for electronic records rendered or made available/accessible so as to be usable for subsequent references.
- Section 5 recognizes the digital signature as equal to affixing signature.
- Section 6 enables electronic governance by permitting the filing of any form, application or other documents, creation, retention or preservation of records, issue or grant of any license or permit or receipt or payment in government offices and its agencies through the means of electronic form.
- Section 7 deals with retention of electronic records that represent accurately the information originally generated, sent or received.
- Section 8 confers recognition for electronic gazette. The date of publication is deemed to be the date of gazette.
- Section 10 states that the public does not have the right to insist that documents should be accepted in electronic form by Government by virtue of Sections 6, 7, 8 referred above. Powers are vested with Central Government to make rules in respect of digital signatures also.

69. The following are the amendments brought about to the substantial laws with effect to the enactment of the Information Technology Act, 2000.

Amendments to Negotiable Instruments Act, 1881: The definition of Cheques in Section 6 of the Negotiable Instrument Act and Section 13 of the Information Technology Act is amended to include truncated and electronic clearance of cheques. As per Explanation I (a) to Section 6, 'A cheque in the electronic form' means a cheque which contains the exact mirror image of a paper cheque, and is generated, written and signed by a secure system ensuring the minimum safety standards with the use of digital signature (with or without biometrics signature) and asymmetric crypto system.

As per Explanation I (b) to Section 6, 'A truncated cheque' means a cheque which is truncated during the clearing cycle, either by the clearing house during the course of a clearing cycle, either by the clearing house or by the bank whether paying or receiving payment, immediately on generation of an electronic image for transmission, substituting the further physical movement of the cheque in writing.

According to Section 5, “A bill of exchange is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument”. Section (1)(4)(a) of Information Technology Act provides that the Act will not apply to Bill of Exchange. Thus, a bill of exchange cannot be made by electronic means.

With regard to the amendments that are made to NI Act, 1881, even in IT Act, also certain amendments are being made. Section 81-A was added after Section 81. Section 81- A of the Act applies to electronic cheque and truncated cheque. According to Sec 81-A, the provisions of this Act, for the time being in force, shall apply to, or in relation to, electronic cheques and the truncated cheques subject to such modifications and amendments as may be necessary for carrying out the purposes of the Negotiable Instruments Act, 1881 (26 of 1881) by the Central Government, in consultation with the Reserve Bank of India, by notification in the Official Gazette.

Amendment to RBI Act, 1934

Section 94 of 4th Schedule of Information Technology Act, 2000 enables the following amendment vesting the statutory power with RBI to regulate Electronic Funds Transfer.

Section 58 of the RBI Act, 1934 Subsection (2) after Clause (P) – (PP).

“The regulation of funds transfer through electronic means between banks or between banks and other financial institutions shall participate in such fund transfers, the manner of such fund transfers and rights and obligations of participants in such transfers”.

Amendment to Banker’s Books Evidence Act, 1891 – Inclusion of Electronic Data/Records as Evidence.

Third Schedule (Section 93) of Information Technology Act, 2000 substitutes as follows:

Section (2) Clause (3) Bankers books include “ledgers and books, day books, cash books, account books, and all other books used in ordinary business of a bank whether kept in written form or as printouts of data stored in a floppy, disc, tape or any other form of electro-magnetic data storage device.

Section 2(8) refers to certified copies through mechanical or other processes which in itself assume the accuracy of a copy.

Section 2(8)(b) consists of printouts of data stored in a floppy, disc, tape or any other electro-magnetic data, storage device, a printout of such entry or a copy of such printout together with such certificate as per provisions of Section 2-A.

70. Offences and Penalties under I.T. Act, 2000

The Act provides for stringent punishment for Cyber crimes like theft of data, hacking and tampering with the confidentiality of the data. The Act also creates a legal framework for electronic transactions and usage of the digital signatures. The following table summarizes the nature of various cyber crimes and penalties imposed under IT Act, 2000:

Offence	Penalty	Section
<p><i>Damaging Computer/System/Data/Network</i></p> <ul style="list-style-type: none"> • Without the permission of the owner or person in charge of a computer system <ul style="list-style-type: none"> – Securing access to the system – Downloading data or copying them – Computer contamination/injecting virus – Denial of access to other authorized persons 	Compensation up to rupees one crore to the person affected.	43

Offence	Penalty	Section
– Changing the series availed by the person to the account of another person by tampering or manipulating computer/system or network.		
<i>Non-compliance with Reporting System</i>		
<ul style="list-style-type: none"> • Failure to furnish any document/return or report to controller of certifying authority. 	Not exceeding Rs.1.50 lakh for each failure.	44(a)
<ul style="list-style-type: none"> • Failure to file any returns or furnish any information, books or other documents within the time stipulated. 	Not, exceeding Rs.5,000 per day during the period of non-compliance.	44(b)
<ul style="list-style-type: none"> • Failure to maintain books of account or record. 	Up to Rs.10, 000 per day.	44(c)
<ul style="list-style-type: none"> • Contravention of any rules or regulations for which no specific penalty is provided elsewhere in the Act. 	Compensation up to Rs.25, 000 to the affected person or a penalty up to Rs.25, 000.	45
<i>Tampering</i>		
Tampering with computer source document – Concealing, destroying, altering.	Imprisonment up to 3 years or fine upto Rs.2 lakh or with both.	65
<i>Hacking</i>		
Hacking with computer system causing wrongful loss or damage to public or any person.	Imprisonment up to 3 years or fine up to Rs.2 lakh or both.	66(02)
<ul style="list-style-type: none"> • deleting, altering, destroying any information residing in the computer. 		
<i>Transmission of Obscene Material</i>		
Publishing or transmitting obscene material in electronic form.	Imprisonment upto 5 years and fine upto Rs.1 lakh for first conviction. Imprisonment upto 10 years and fine upto Rs.2 lakh for second and subsequent convictions.	67
<i>Misrepresentation to Controller of Certifying Authority</i>		
Misrepresentation or suppression of material facts to controller of certifying authority to obtain Digital Signature Certificate.	Imprisonment upto 2 years or fine upto Rs.1 lakh or both.	71
<i>False Information in Digital Signature Certificate</i>		
Publishing Digital Signature Certificate with false particulars.	Imprisonment upto 2 years or fine upto Rs.1 lakh or both.	73

Offence	Penalty	Section
<i>Breach of Confidentiality</i> Securing access to electronic record disclosing electronic record/information documents.	Imprisonment upto 2 years or fine upto Rs.1 lakh or both.	72
<i>Misuse of Digital Signature Certificate</i> Creating, publishing or making available a Digital Signature Certificate for any fraudulent or unlawful purpose	Imprisonment upto 2 years or fine upto Rs.1 lakh or both.	74

71. A consumer under the Consumer protection Act, 1986 is:

- Any person who buys any goods for a consideration, but does not include a person who obtains such goods for resale or for any commercial purpose (“commercial purpose” does not include use by a consumer of goods bought and used by him exclusively for the purpose of earning his livelihood by means of self-employment.); or
- Any person who hires or avails of any services for a consideration and includes any beneficiary of such services when such services are availed of with the approval of the person who hires or purchases.

Here, ‘service’ means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, finance, insurance, transport, processing, supply of electrical or other energy, boarding or lodging or both, housing construction, entertainment, amusement, medical care or the purveying of news or other information but does not include the rendering of any service free of charge or under a contract of personal service.

The basic rights of consumers as per the Consumer Protection Act (CPA) are:

- The right to be protected against marketing of goods and services which are hazardous to life and property;
- The right to be informed about the quality, quantity, potency, purity, standard and price of goods, or services so as to protect the consumer against unfair trade practices;
- The right to be assured, wherever possible, access to variety of goods and services at competitive prices;
- The right to be heard and be assured that consumers’ interests will receive due consideration at appropriate forums;
- The right to seek redressal against unfair trade practices or restrictive trade practices or unscrupulous exploitation of consumers; and
- The right to consumer education.

Section 14 of the Act provides various kinds of relief which can be given to the complainant who has suffered loss or injury. Relief can be provided to the aggrieved by way of ordering the opposite party (wrong doer) to do one or more of the following things, viz.:

- to remove the defect pointed out by the appropriate laboratory from the goods in question;
- to replace the goods with new goods of similar description which shall be free from any defect;
- to return to the complainant the price, or as the case may be, the charges paid by the complainant;
- to pay such amount as may be awarded by it as compensation to the consumer for any loss or injury suffered by him due to the negligence of the opposite party;

- to remove the defects or deficiencies in the services in question;
- to discontinue the unfair trade practice or the restrictive trade practice or not to repeat them;
- not to offer the hazardous goods for sale;
- to withdraw the hazardous goods from being offered for sale; and
- to provide for adequate costs to parties.

72. Consumer Complaints can be made regarding the following matters:

- That an unfair trade practice or a restrictive trade practice has been adopted by any trader or service provider.
- That the goods bought by him or agreed to be bought by him suffer from one or more defects.
- That the services hired or availed of or agreed to be hired or availed of by him suffer from deficiency in any respect.
- That the trader has charged for the goods mentioned in the complaint for a price excess of the price fixed by or under any law for the time being in force or displayed on the goods or any package containing such goods.
- That the goods which will be hazardous to life and safety when used, are being offered for sale to the public in contravention of the provisions of any law for the time being in force.
- That traders should display information in regard to the contents, manner and effect of use of such goods.

Here, consumer complaints can be made by a complainant' which means a consumer or any voluntary consumer association registered under the Companies Act, 1956 or under any other law for the time being in force; or the Central Government or any State Government or one or more consumers where there are numerous consumers having the same interest.

Procedure for filing Consumer disputes.

Procedures for filing complaints and seeking redressal are simple. No fee is payable for filing a complaint before the District Forum, the State Commission or the National Commission. (A stamp paper is not required) There should be 3 to 5 copies of the complaint on plain paper.

- The complainant or his authorized agent can present the complaint in person.
- The complaint can be sent by post to the appropriate Forum/Commission.
- A complaint should contain the following information:
 - The name, description and the address of the complainant.
 - The name, description and address of the opposite party or parties, as the case may be, as far as they can be ascertained.
 - The facts relating to complaint and when and where it arose.
 - Documents, if any, in support of the allegations contained in the complaint.
 - The relief which the complainant is seeking.
- The complaint should be signed by the complainant or his authorized agent.
- The complaint is to be filed within two years from the date on which cause of action has arisen.
- On receipt of the complaint made by a consumer the District, State or National Forum refers a copy of the complaint within a period of 21 days to the opposite party mentioned in the complaint directing him to give his version of the case within a period of thirty days. An extension of 15 days may be granted by the court. If the

opposite party on receipt of a complaint denies or disputes the allegations contained in the complaint, or omits or fails to take any action to represent his case within the time given by the District, State or National Forum, the District, State or National Forum proceeds to settle the consumer dispute. It may either dismiss the complaint or decide it on merits.

- If the complaint alleges a defect in the goods which cannot be determined without proper analysis or test of the goods, the District, State or National Forum will obtain a sample of the goods from the complainant, seal it and authenticate it and refer the sample so sealed to the appropriate laboratory to make an analysis to find out whether such goods suffer from any defect alleged in the complaint or suffer from any other defect and to report its findings within a period of fifty-five days of the receipt of the reference or within such extended period as may be granted by the respective Forums.
- If the complaint relates to services, the procedure of laboratory analysis is not necessary. Except for that the forums proceed in the same manner as in the case of complaint relating to goods. The District, State or National Forum have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908) while trying a suit in respect of the following matters, namely, –
 - the summoning and enforcing attendance of any defendant or witness and examining the witness on oath;
 - the discovery and production of any document or other material object producible as evidence;
 - the reception of evidence on affidavits;
 - the requisitioning of the report of the concerned analysis or test from the appropriate laboratory or from any other relevant source;
 - issuing of any commission for the examination of any witness; and
 - any other matter which may be prescribed.

73. Need of the Competition Law

- Globalization of trade has unleashed greater competition among the business enterprises of the developing countries due to the free access to the global markets. As a result of which, the countries are confronted with the task of formulating the norms and rules to regulate the unethical competition in the international trade arena.
- In the absence of equitable competition rules, there is every possibility that the large business enterprises may take good advantage of exercising the dominant market power, to control the market place activities by nefarious means like the establishment of cartels, which ultimately affect the interests of the business organizations in the developing countries.
- The globalization results in de-regulation, free access to the markets, liberalization of prices, privatization of business, elimination of trade barriers and liberalization of trade and investment too. As such, any comprehensive economic reforms undertaken by the countries due to the effect of globalization have to necessarily include the competition law and policy that are suitable to the nature and extent of the economic liberalization of that country.
- The enactment of powerful competition law is felt inevitable and dire need arose to curtail the monopoly of big business enterprises that are created due to the free and liberalized access to the markets in the international business.

Scope of the Competition Law

The regulatory objectives of the Competition Law are intended to serve the

- Safety and stability of domestic markets.
- Transparency of business practices.

- Prevention of abusive practices.
- Institutionalization of supervision over barriers to fair competition.
- Sustained benefits to consumers.

Framework of Competition Act, 2002

The object of Competition Act, 2002 is to position the competition policy with pragmatic options to promote the spirit of competition and harmonize the conflicts caused by the volatility of globalized markets. The Act provides for a regulatory framework of rules covering the critical areas of competition namely:

- Anti-competitive agreements among enterprises.
- Abuse of dominant position in the market.
- Combinations/Mergers between enterprises.

Competition Act, 2002 aims at promoting free and fair competition in India and to protect the interests of consumers. The act provides for the establishment of a regulatory body called "Competition Commission of India" with the following basic functions:

- Administration and enforcement of law.
- Competition advocacy.

Competition Act-2002 is a comprehensive enactment addressing contemporary concerns of competition and future possibilities that impact the sustainable economic development.

The Act consists of 66 sections dealt under nine chapters covering the following areas:

- prohibition of anti-competitive agreements.
- prohibition of abuse of dominant position.
- regulation of combinations.
- establishment of Competition Commission of India.
- penalties for contravention of orders of Commission and non-compliance with directions.
- competition advocacy.
- constitution of competition fund.

74. A restrictive trade practice is defined to mean a trade practice which has or may have the effect of preventing, distorting or restricting competition in any manner and particular.
- i. which tends to obstruct the flow of capital or resources into the stream of production, or
 - ii. this tends to bring about manipulation of prices or conditions of delivery or to affect the flow of supplies in the market relating to goods or services in such manner as to impose on the consumers unjustified costs of restrictions.

Thus, the trade practice which tends to obstruct the flow of capital or resources into the stream of production or to bring about manipulation of prices, or conditions of delivery or to affect flow of supplies of goods or services so as to impose unjustified cost or restrictions on consumers, is a restrictive trade practice.

Indicators of Restrictive Trade Practices: Any trade practice which is prejudicial to the public interest is restrictive. The following are the indicators where an agreement practice can be considered as a Restrictive Trade Practice.

- a. any agreement which restricts or is likely to restrict by any method the persons or classes of persons to whom goods are sold or from whom goods are brought;
- b. any agreement requiring a purchaser of goods as a condition of such purchase, to purchase some other goods;

- c. any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person;
- d. any agreement to purchase or sell goods or to tender for sale or purchase of goods only at prices or on terms or conditions agreed upon between the sellers or purchasers;
- e. any agreement to grant or allow concessions or benefits, including allowances, discount, rebates or credit in connection with, or by reason or dealings;
- f. any agreement to sell goods on condition that the prices to be charged on re-sale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged;
- g. any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal of the goods;
- h. any agreement not to employ or restrict the employment of any methods, machinery or process in the manufacture of goods;
- i. any agreement for the exclusion from any trade association of any person carrying on or intending to carry on, in good faith the trade in relation to which the trade association is formed;
- j. any agreement to sell goods at such prices as would have the effect of eliminating competition or a competitor;
- k. any agreement restricting in any manner, the class or number of wholesalers, producers or suppliers from whom any goods may be brought;
- l. any agreement as to the bids which any of the parties thereto may offer at an auction for the sale of goods or any agreement by which any party thereto agrees to abstain from bidding at any auction for the sale of goods.

Determine of restrictive trade practices: Every trade agreement restrains or binds persons or places or prices, but it doesn't mean that the agreement restricts the competition. An agreement is lawful when it regulates and thereby promotes competition or it suppresses or destroys competition. So to determine whether the agreement is restrictive or not, the rule of reason is to be applied on three aspects of the agreement. The first one is what facts are peculiar to the business to which the restraint is applied. Second, what is the condition before and after the restraint is imposed. Third, what is the nature of the restraint and what is its actual or probable effect. The agreements containing restrictive practices of the erstwhile MRTP Act, 1969 are now known as anti-competitive agreements under the Competition Act, 2002.

75. According to Article 2(a) of the Hague Convention On The Law Applicable to Products Liability, concluded on Oct 2nd, 1973 (Hague Conference on Private International Law) a "product" is defined to include natural and industrial products, whether raw or manufactured and whether movable or immovable.

The convention determines the law applicable to the liability of the manufacturers and other persons specified in Article 3 for the damage caused by a product, including damage in consequence of a misdescription of the product or failure to give adequate notice of its qualities, its characteristics or its method of use.

The definition of the word 'product' has been included within section 2(i) of the Sale of Goods Act, 1930 (India). Goods under the Act have been defined exhaustively and inclusively and therefore it covers products manufactured, processed or mined, which are capable of being passed on from hand to hand as a commercial commodity.

The Supreme Court in *Union of India vs. Delhi Cloth and General Mills Co. Ltd* (AIR 1963 SC 791) held that in order to become 'goods' an article must be something which can ordinarily come to the markets to be bought and sold. The Apex Court in many cases has reiterated the same meaning, so as to give a wider interpretation to the word, 'goods'.

The term 'liability' in general is already an accepted term and it means that "any legal responsibility, duty or obligation, the state of one who is bound in law and justice to do something, which may be enforced by action. This liability may arise from contracts either express or implied or in consequence of torts committed".

Article 2 (b) of the Hague Convention defines "damage" as to mean injury to the person or damage to property as well as economic loss: however, damage to the product itself and the consequential economic loss shall be excluded unless associated with other damage

Therefore, any liability of the manufacturer, wholesalers, distributors or vendors for the injury or damage caused by the use of the product due to it being dangerous or defective in nature is known as product liability. The main purpose of the law of product liability is to protect the consumer from such dangerous or defective products. The product liability law can be extended to protect for the dangerous and defective products, which may be sold either by the manufacture or the retailer, i.e., the liability may be imposed on all the persons, involved in the supply-chain management. The main goal of the product liability law is to protect the consumers from the manufacturers, distributors etc, for putting the product to the market, which is dangerous and defective without proper protections and precautions and for not warning the consumers properly as to its uses or consequences.

Product liability claims can be brought under various theories, as per the local laws. The claims can be made on:

- a. *Design defects*: Where due to the mistake or oversight in designing the product, there is danger while using the product for specific purpose or when it is used for any other foreseeable purpose.
- b. *Manufacturing defects*: Other than the designing defects, there may be some flaws during the manufacturing processes.
- c. *Marketing defects*: After the process of designing and manufacturing the product, the product will be put in the market. If the product is put in the market, without appropriate warning labels or instructions, which may prevent the consumer or the plaintiff from recognizing the defects in the product or to make them know the safety methods of use and application of the product, then the manufacturer may give a opportunity for the consumer to claim for the injury.
- d. *Negligence*: Another important claim for the consumer or the plaintiff may be through an action for negligence under torts. But while making a claim under this law of negligence, the plaintiff has to prove that the parties who placed the product were responsible for placing the product in the market and they owed a duty towards the goods manufactured by them. The goods so provided were fit to be used by the plaintiff, for their foreseeable uses. Beyond this the plaintiff also has to demonstrate that there was a chance of detecting the defects of the design, manufacturing, or inspection process, and the manufacturers failed to meet these obligations. And it was due to this failure of reasonable care that the plaintiff was injured by the product or while using it.
- e. *Strict Liability*- In case of strict liability claims, the only thing the plaintiff has to establish is that, the product is defective. The liability will result from such facts alone, even if the manufacture pleads that there was enough care taken while the product was designed, manufactured, marketed, distributed and sold.
- f. *Breach of warranty*: Here the plaintiff can allege that the manufacturer or the vendor has breached the express or implied warranty that runs with the product. A warranty, in a contract essentially proves that there is a promise of fitness of the product between manufacturer or vendor and customer. The fitness of the product can be attached to both kinds of warranties, i.e., express warranty and the implied warranty.

76. Legal Issues pertaining to Product Liability

The filing of suits under consumer protection Act is mainly based on the following factors:

- Manufacturing defect,
- Design defect and
- Insufficient Instructions or warnings.

In case the consumer or the plaintiff has to recover the expenses for the injury under negligence, the plaintiff has to prove to the court that the goods manufactured were dangerous, defective or that there was no proper instructions given for the use of the product or that the warning was not enough to take proper care while using the product.

In India there is no specific law with respect to product liability. But the consumer or the plaintiff can recover the expenses under the Tort law, Sale of Goods, 1930 or Consumer Protection Act, 1986 (as amended till date).

Consumer Protection Act, 1986 and Product Liability

The Consumer Protection Act (CPA) is one of the landmark legislations in India, which mainly intends to protect the consumers. The Act was enacted with the purpose of educating and protecting the consumers from unfair and undesirable practices of the business community. It extends to protect the consumer from defective and hazardous goods sold in the market. The CPA has changed the perspective of imposing the liability, which can be understood with the sea change that has taken place in regard to the liability of the seller. The concept of 'caveat emptor' (let the buyer beware) has changed to 'caveat venditor' (let the seller beware).

Although CPA does not specify that it intends to extensively cover even the product liability claims, it has given a passing view that it can be extended to cover the product liability claims. This is because the Act is a benevolent legislation, which favours and warrants for the construction to be made in favour of the consumers. The definition of 'consumer', and the word 'complaint' read together, complements the meaning to include a good, which can widely be interpreted to be inclusive of 'products'. The CPA is not a strong enactment to cover all kinds of liabilities, as it was intended to be compensatory in nature and not punitive. It can only compensate the consumer losses and not penalize the manufacturer or concerned people for lack of due or reasonable care. If a comparison of the US product liability law with that of the CPA, is made, the deficiency of punitive nature is evident in the Indian law.

Defences to Product Liability Suits: Every injury or damage will have some act or omission as reasons. Sometimes, when the seller has sold the product to the buyer or the consumer, there are chances that the buyer has altered it substantially after it passes from the manufacturer's control and if such alteration has become the proximate cause of the injury to the plaintiff, then the manufacturer can plead such alteration as a defence to surface his liability. In the same way if the plaintiff makes some modifications, which were not known to the manufacturer, and such modifications have changed the product to a superseding extent, and has become the cause of the injury, then also the manufacturer cannot be made liable, as he can plead the defence of remote cause. The above instances of alteration and modifications provide an opportunity for the manufacturer to plead the defence, that the safe product sold by him was made unsafe by the buyer, due to the subsequent changes brought by the injured party, i.e. plaintiff or the consumer.

77. "Public Interest Litigation means a legal action initiated in a Court of law for the enforcement of public interest or general interest in which the public or class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected."

Under PIL, Courts take up cases that concern not the rights of the petitioner but of the public at large. In the last two decades, PIL has emerged as one of the most powerful tools for promoting social justice and the rights of the poor.

Though India's higher Courts and, in particular, the Supreme Court have often been sensitive to the grim social realities, and have on occasion given relief to the oppressed, the poor do not have the capacity to represent themselves, or take advantage of progressive legislation. In the year 1982, the Supreme Court conceded that unusual measures were warranted to enable people the full realization of not merely their civil and political rights, but the enjoyment of economic, social, and cultural rights. In its far-reaching decision in the case of *People's Union for Democratic Rights vs. Union of India*, it recognized that a third party could directly petition, whether through a letter or other means, the Court and seek its

intervention in a matter where another party's fundamental rights were being violated. In this case, advertent to the Constitutional prohibition on "begar", or forced labor trafficking of human beings, PUDR (People's Union for Democratic Rights) submitted that workers contracted to build the large sports complex at the Asian Games Village in Delhi were being exploited. PUDR asked the Court to recognize that "beggary" was far more than compelling someone to work against his or her will, and that work under exploitative and grotesquely humiliating conditions, or work that was not even compensated by prescribed minimum wages, was violative of fundamental rights. As the Supreme Court noted: "The rule of law does not mean that the protection of the law must be available only to a fortunate few or that the law should be allowed to be exploited by the vested interests for protecting and upholding the *status quo* under the guise of enforcement of their civil and political rights. The poor too have civil and political rights and the rule of law is equally applicable to them also, though today it may exist only on paper and not in total."

Public Interest Litigation's explicit purpose is to alienate the suffering of all those who have borne the brunt of insensitive treatment at the hands of fellow human beings. Transparency in public life and fair judicial action could check the menace of increasing violation of legal rights. Traditionally the right to move the Supreme Court was only available to those whose fundamental rights were infringed. But this traditional rule was considerably relaxed by the Supreme Court in a catena of cases namely: *Peoples Union for Democratic Rights vs. Union of India*. The court now permits Public Interest Litigation or Social Action Litigation at the instance of "public spirited citizens" for the enforcement of constitutional and legal rights of any person or group of persons who because of their social or economically disadvantaged position are unable to approach the court for relief. Public interest litigation is thus a part of the process of participative justice.

Locus Standi

The general rule is that only those people whose fundamental rights have been infringed can go to the Supreme Court. It has been clearly provided in the Indian Constitution that the power vested in the Supreme Court can only be exercised for the enforcement of fundamental rights. It is very essential that the writ under which the remedy is asked under Article 32 must be correlated to one of the fundamental rights sought to be enforced. The remedy must be sought by following all the procedures prescribed. But this traditional rule has been now relaxed by the Supreme Court as evident in its recent rulings.

78. Just like Public Interest Litigation in India, Class Action Suits are prevalent in the United States of America. When there exists some kind of perceived fraud or misconduct that affects many people in a similar way, then those people tend to look for a law firm to represent them all. The damages may not be sufficient to justify paying lawyers for many separate individual cases. Sometimes a law firm will take on a class action "on contingency," meaning that the attorneys risk their time and efforts and only get paid if they win.

Procedural Aspects

- An individual or several individuals on behalf of the class bring the suit. Once a case is filed, and it's a federal case, the plaintiffs file a motion for "class certification" under Federal Rule No. 23. State cases are similar but have their own numbering systems.
- In order to be certified as a class action, these requirements must be satisfied:
 - Reasonable class size
There have to be enough people to justify bringing the suit as a class. Class actions have been brought with as few as 20 or 30 people and as many as millions.
 - Common facts of the case
There must be a demonstration before the court exhibiting that there are questions of law or facts common to the class – meaning similar misconduct has occurred, such as misrepresentation of vanishing premiums.

- Claims or defenses are typical
Each person in the class is making allegations which is typical to the others class members.
- Representatives will fairly and adequately protect the interests of the class
The legal counsel representing the case must be adequate, and there can be no conflicts of interest in representing class members.

The plaintiffs also have to show that it makes sense to proceed as a class. The most common way to demonstrate that a class action is the superior avenue is to show that common questions predominate over individual questions. If there are a lot of individualized issues among disgruntled policyholders, a class action may not be the best way to proceed.

If the court certifies the class, class members will be “defined” and the class will be everybody who fits in that definition. An example of a definition would be: Everyone in the US who bought a life insurance policy from a certain company between 1986 and 1991. In effect, if a person fits in the definition, then he automatically becomes a member of the class. Depending on the case, such person is given notice that he should choose to “opt out” (which is what he should do in case he prefers to bring an individual lawsuit) or to stay in the class (and be bound to the ultimate settlement).

79. Life consists of five elements i.e., earth, water, air, ether and fire. These five elements also constitute environment. Thus ‘environment’ and ‘life’ are synonymous and are intermingled homogenously. Scientific and technological advancements and mismanagement of natural resources have given rise to various environmental problems such as pollution of air, water and noise with consequent adverse effects on flora, fauna and human health. In today’s world, man is concerned with the environment, as he spends most of his time in it. Hence, environmental pollution is a grave problem all over the world; making the study of environment mandatory.

The Environment may be defined as “our physical and biological system in which man and organisms live as a whole and these systems have many interacting capacities. These capacities of the environment generally include rocks, minerals, soil and water, its land and their forests and potential vegetation, its animal life and potentiality of livestock, husbandry, and its climate.” According to Section 2(a) of the Environment (Protection) Act, 1986, “environment” includes water, air and land and the inter-relationship, which exists among and between water, air and land, and human beings, other living creatures, plants, micro-organisms and property. Keeping these in view, it can rightly be said that our environment consists of plants, animals, micro-organisms and non-living objects as water, air, light, soil and temperature present in the nature etc. Therefore, damage to any one of them damages the environment.

However, in recent years, air, water and soil are getting polluted due to human activity and are posing a threat to the very existence of life on the earth. The earth is the only planet in the solar system having a special condition conducive for the survival of living organisms. In view of this, it is not only necessary but also essential for various living organisms to live in harmony with nature. A kind of mutual co-existence on the earth is the need of the hour, but this mutual coexistence has been disturbed by the human activity, and the whole world is now trying hard to protect the environment. It has therefore, become necessary to educate people with regard to the environment, the damage caused to it due to human activities, and the consequences arising therefrom. The environment can be better understood by dividing it into four segments:

Atmosphere: The layer of the air present around the earth is called the atmosphere. It absorbs a portion of electromagnetic radiations coming from the Sun and transmits Ultra Violet (UV) rays. It plays an important role in maintaining the heat balance on the earth.

Hydrosphere: Water occupies four fifths of the earth surface and is called the hydrosphere. Out of this, 97% is present in the form of seawater and the remaining 3% is in the form of ice in the polar ice caps and only a small percentage of water is available for drinking, agriculture and other purposes. The growth and decline of the ancient civilizations were closely linked to the availability of water resources.

Lithosphere: Leaving hydrosphere the rest of the earth space, about one fifth of the total earth surface, is in the form of land. While the inner surface of the earth contains minerals, the deeper layer contains natural gas and oil. All these layers form the Lithosphere.

Biosphere: All living organisms like plants, animals and human beings constitute the biosphere. Biosphere and other segments of the environment are inter-related. For example, the levels of oxygen and carbon dioxide depend on the plants present in the biosphere.

Sources, Causes and Effects

All the above-mentioned four segments, i.e., atmosphere, hydrosphere, lithosphere and biosphere of the environment help the living organisms in various ways to survive on the earth. The increase in the population and the industrialization, are depleting the natural resources. New technologies introduced for improving the yields, though helped the mankind to lead a more comfortable life, are generating lot of waste and thus pollute the environment. This is the case not only with developed countries but also with under-developed countries, where pollution is increasing alarmingly due to the rapid industrialization, making pollution a global concern. Hence, increase in the population, urbanization, industrialization and deforestation, etc., are the main reasons for pollution. In addition, due to deforestation, many rare species of animals and birds are getting extinct. Similarly rivers, ponds, and seawater are getting polluted, endangering the marine life. Further, the fertility levels of the soil are getting decreased as some of the pollutants are entering the inner layers of the earth. Hence, the causes of environmental pollution are broadly classified into natural causes and man-made causes.

The natural causes of pollution include floods, cyclones, earthquakes, and molten lava from volcanoes. Since they are the agents of nature and the man has no control over them, they are known as the natural causes. Man-made causes of pollution include population growth and industrialization, poverty and unhygienic settlements, urbanization, deforestation, depleting natural resources and rising population.

80. Air Pollution

The density of air and pressure decrease as we go up from the earth. Atmosphere extends up to 500 km, above the earth and can be divided into four parts, as shown below:

Major Regions of Atmosphere

Name of the region	Associated Characteristic
Troposphere (0-11 km)	Maintenance of heat balance
Stratosphere (11-50 km)	Prevents the UV Radiations from falling on earth
Mesosphere (50-85 km)	Non-propagation of sound waves
Thermosphere (85-500 km)	Ionization of gases

Metals like lead, mercury, and organic substances like benzopyrene, biocides, gases like carbon monoxide and carbon dioxide, nitrous oxide and nitric oxide, sulphur dioxide, ozone, Chloro-fluoro-carbons, hydrocarbons like methane and butane, mix with air, and adversely affect human beings, animals, plants and also raise the global temperature. In big cities, automobiles are responsible for 80% of air pollution and 75% of sound pollution.

Causes and Hazards of Air Pollution and their Prevention

Acid Rains: Oxides of nitrogen, like nitric oxide and nitrogen dioxide combine with oxygen and ozone to form higher oxides of nitrogen. These oxides ultimately dissolve in water to form nitric acid. The nitric and sulphuric acids dissolve in rainwater and come down to earth as acid rain. Due to these rains the life of buildings comes down considerably, also the physical condition of the soil changes affecting its fertility.

Depletion of Ozone layer: The Ozone layer present around the earth protects the earth from the harmful UV radiation. However, due to rapid industrialization, chemical substances like Chloro-Fluoro-Carbons (CFC's), Nitric Oxide (NO) and Chlorine being released into the atmosphere, react with Ozone and destroy it.

Green House effect/Global warming: Carbondioxide and water vapor absorb infrared radiation coming to the earth and partly reflect it back to the earth's surface, due to this, the earth's surface gets heated up. This phenomenon is called green house effect. Due to global warming, the rate of evaporation of water from the seas, rivers, and ponds is increasing rapidly, leading to untimely rains, cyclones and hurricanes.

Water Pollution

With an increase in the industries and progress made in the agricultural sector many unwanted chemicals and substances are being released into the water, decreasing the water quality, called as water pollution. The water pollutants can be classified into:

- Inorganic pollutants
- Organic pollutants
- Sediments and oils
- Domestic waste
- Industrial and agricultural waste
- Fluorides.

Water Pollutants and their Effects

Class of Pollutant	Effect
A) Inorganic Pollutants:	
Salts, trace elements like copper, zinc, arsenic etc., metals coming out from chromium plating industry.	Affects humans and aquatic animals.
Metals and complex compounds.	Metals disturb the water system. Algae cannot grow properly in such surroundings. This decreases photosynthesis and increases air pollution indirectly.
Cyanides, hydrogen sulphides carbon dioxide, nitrogen dioxide and sulphites	Physical condition of the water varies and becomes toxic to aquatic animals.
Algal nutrients: Nutrients like carbon dioxide, hydrogen, oxygen, nitrogen, nitrates, phosphates, sulphates, and micro nutrients like boron, chlorine, copper, iron, manganese, vanadium, zinc, etc.	Eutrophication of the ponds cause excess growth of the algae and subsequently the ponds get dried up.
Heavy metals like lead and mercury.	Water becomes toxic.
Fluorides present in water.	Water cannot be used for drinking purposes; Bones and teeth of human beings also get affected.
B) Organic Pollutants: Waste coming from industries and agricultural fields.	Water becomes toxic.
C) Sewage, domestic and commercial food processing and industrial effluents.	Consumes dissolved oxygen.

81. Rule of Strict Liability

The rule of Strict Liability was formulated in 1868 by the House of Lords in *Rylands v. Fletcher* case. This was in accordance with the social and economic conditions prevailing at that time, and hence was subject to certain exceptions. Under this rule the defendant is liable for the harm even though the same is unintentional and also without any negligence on part of the defendant.

In *Rylands vs. Fletcher*, the defendant got a reservoir constructed, through independent contractors, over his land for providing water to his mill. There were old disused shafts under the site of the reservoir, which the contractors failed to observe and so did not block them. When the water was filled in the reservoir, it burst through the shafts and flooded the plaintiff's coal mines on the adjoining land. The defendants did not know of the shafts and had not been negligent although the independent contractors had been. Even though the defendants had not been negligent, they were held liable on the basis of the rule laid down in this case. The rule is: If a person brings on his land anything which is likely to do mischief if it escapes, he will be prima facie answerable for the damage caused by its escape though he had not been negligent. The rule is applicable not only when there has been collection of water, it applies to gas, electricity, vibration, yew trees, sewages, explosives, noxious fumes and rusty wire.

For the application of the rule, there must be:

Dangerous thing: The thing collected should be capable of doing mischief by escape. The rule has been applied to water, gas, electricity, poisonous trees, sewages, explosives, noxious fumes and rusty wire.

Escape: If the damage is caused within the premises when the defendant had collected the thing, the liability under the rule does not arise.

Non-natural use of land: Collection of water in such a big quantity in *Rylands vs. Fletcher* was held to be a non-natural use of land. Keeping water for domestic purpose is a natural use. Fire in a house in a grate is an ordinary, natural, proper, everyday use of the fireplace in the room and if this fire spreads to the adjoining premises, the liability under the rule cannot arise.

Exceptions to the Rule of Strict Liability

Plaintiff's own default: Damage caused by the escape due to the plaintiff's own default was considered to be a good defence in *Rylands vs. Fletcher* itself.

Act of God: If the escape has been unforeseen and because of supernatural forces without any human intervention and the damage due to the escape cannot be avoided inspite of the reasonable care, the defence of act of God can be pleaded. If the embankments of ornamental lakes give way due to extraordinary rainfall, the person so collecting the water would not be liable under the rule.

Consent of the plaintiff: In case of *volenti non fit injuria*, i.e., where the plaintiff has consented to the accumulation of the dangerous thing on the defendant's land, the liability under the rule does not arise. Such consent is implied where the source of danger is for the common benefit of both the plaintiff and the defendant.

Act of third party: If the harm has been caused due to the act of a stranger, who is neither the defendant's servant or agent nor the defendant has any control over him, the defendant will not be liable under the rule.

Statutory Authority: An act done under the authority of a statute is also a defence when an action under the rule in *Rylands vs. Fletcher* is brought.

82. The concept of Mensrea (guilty mind) in environmental offences and the problem of enforcement by penal sanctions have attracted the criminal law into the domain of environmental law. The process of globalization and the growth of interdependence in economic, social and environmental activities by corporate entities require greater international cooperation among countries. At the same time, the incidence of economic and white-collar crime has grown substantially. One of the most pressing global issues is the predominance of national and multinational corporations in economic transactions and their accountability resulting in the environmental pollution. In this context, the development of corporate criminal liability, which is a multi-dimensional issue, has become a problem, being handled by a growing number of prosecutors and courts. The Indian Penal Code, 1860 identifies various acts affecting the environment as offences. Relevant Provisions of the Code, which protect the environment are given below:

Public Nuisance (Section 268): When a person is guilty of an act or is guilty of an illegal omission causing any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which necessarily causes injury, obstruction, danger or annoyance to persons who has occasion to use public right.

Negligent act likely to spread infection of disease dangerous to life (Section 269): Whoever unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Malignant act likely to spread infection of disease dangerous to life (Section 270): Whoever malignantly does any act which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Fouling water of public spring or reservoir (Section 277): Whoever voluntarily corrupts or fouls the water of any public spring or reservoir, so as to render it less fit for the purpose for which it is ordinarily used, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

Making atmosphere noxious to health (Section 278): Whoever voluntarily vitiates the atmosphere in any place so as to make it noxious to the health of persons in general dwelling or carrying on business in the neighborhood or passing along a public way, shall be punished with fine which may extend to five hundred rupees.

Negligent conduct with respect to poisonous substance (Section 284): Whoever does, with any poisonous substance, any act in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any person, or knowingly or negligently omits to take such order with any poisonous substance in his possession as is sufficient to guard against any probable danger to human life from such poisonous substance, shall be punished with imprisonment of either description for a term which may extend to six months or with fine which may extend to one thousand rupees, or with both.

Negligent conduct with respect to fire or combustible matter (Section 285): Whoever does, with fire or any combustible matter, any act so rashly or negligently as to endanger human life or to be likely to cause hurt or injury to any other person, or knowingly or negligently omits to take such order with any fire or any combustible matter in his possession as is sufficient to guard against any probable danger to human life from such fire or combustible matter, shall be punished with imprisonment of either description for a term which may extend to six months or with fine which may extend to one thousand rupees, or with both.

Negligent conduct with respect to explosive substance (Section 286): Whoever does, with any explosive substance, any act so rashly or negligently as to endanger human life, or to be likely to cause hurt or injury to any other person, or knowingly or negligently omits to take such order with any explosive substance in his possession as is sufficient to guard against any probable danger to human life from that substance, shall be punished with imprisonment, of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

83. Environmental Law and Constitution of India

The Indian Constitution contains specific provisions for environmental protection. The chapters on Directive Principles of State Policy and Fundamental Duties explicitly enunciate the national commitment to protect and improve the environment. Judicial interpretation has strengthened this constitutional mandate. The Constitution of India reflects the humanitarian approach to environment protection through various constitutional mandates. The Constitution of India obligates the State as well citizens to protect and improve the environment. Some of the Articles dealing with environmental protection are:

Article 19(1)(g): Right to practice any profession, or to carry on any occupation, trade or business.

Article 21: Right to life and personal liberty, which includes – right to live from pollution free water and air. Right to live and personal liberty includes right to live with dignity in a clean environment.

Article 47: Imposes duty on the state to raise the level of nutrition and standard of living and to improve public health. The state and the instrumentalities are duty bound to protect and improve the environment including forests, lakes and rivers.

Article 48A: Protection and improvement of the environment and the safeguard of forests and wildlife.

Article 51A(g): To protect and improve the natural environment including forests, lakes, rivers, and wildlife, and to have compassion for living creatures.

Various Environmental Legislations in India

The environmental protection legislations dates back to 1970's, when the Government of India drew immense inspiration from the proclamation adopted by the United Nation's Conference on the Human Environment (Stockholm), 1972 and enacted various constitutional and legislative provisions to prevent and control the pollution of various kinds. Some of the special legislations are:

The Water (Prevention and Control of Pollution) Act, 1974: The Water (Prevention and Control of Pollution) Act, 1974 was enacted for the purpose of prevention and control of the pollution of water and for the maintenance or restoration of wholesomeness of water through the establishment of water boards.

The Air (Prevention and Control of Pollution) Act, 1981: The Air (Prevention and Control of Pollution) Act, 1981, was enacted with a view to implement the decisions of the United Nations Conference on Human Environment, Stockholm, 1972, under Article 253 of the Constitution of India. Hence, through the Act it was decided to take appropriate steps for the preservation of the natural resources of the earth, which among other things, include the preservation of the quality of the air.

Forest Conservation Act, 1980: In 1980, with the passage of the Forest Conservation Act, the central government reasserted its partial control over forest-based resources.

The Wild Life (Protection) Act, 1972: The Wild Life (Protection) Act, 1972 provides the statutory framework for protecting wild animals, plants and their habitats. The Act adopts a two-pronged conservation strategy: specified endangered species are protected regardless of location, and all species are protected in designated areas, called sanctuaries and national parks. The Act provides for the establishment of wildlife advisory boards and the appointment of wildlife wardens and other staff to implement the Act.

The Hazardous Wastes (Management and Handling) Rules, 1989: The Hazardous Waste Management Rules, 1989 provide for the control of generation, collection, treatment, transport, import, storage and disposal of wastes listed in the schedule annexed to these rules. The rules are implemented through the State Pollution Control Boards and Pollution Control Committees in the states and union territories.

Besides these rules, in 1991, the Ministry of Environment and Forests, issued Guidelines for Management and Handling of Hazardous Wastes for (a) generators of waste, (b) transport of hazardous waste, and (c) owners/operators of hazardous waste storage, treatment and disposal facilities. These guidelines also provide for the mechanisms for the development of a reporting system for the movement of hazardous waste and the procedures for the closure and post-closure requirements for landfills.

84. The term “alternative dispute resolution (ADR)” is often used to describe a wide variety of dispute resolution mechanisms that are short of, or alternative to, the full-scale court process. The very concept of Alternative Dispute Resolution (ADR) and its spirit emanates to find a better, and more wholesome collaborative method of resolving disputes. ‘ADR’ refers to the process, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them.

The term “alternative dispute resolution” is defined as a “collective description of methods of resolving disputes otherwise than through the normal trial process.” In practice, however, references to ADR are usually understood as being references to some form of mediation by a third party.”

There is a large number of tribunals under different statutes working in India for settling various types of disputes such as labour disputes, service matters, consumer protection, taxation, excise, motor accidents etc. In addition, there are also Lok Adalats functioning under the Legal Services Authorities Act, 1987. The proceedings of all these tribunals would fall within the description ADR.

Divergent to the dispensation of justice through the state sponsored courts, some judicial systems in the world facilitate litigants to negotiate, conciliate, mediate, or arbitrate. Internationally, the ADR movement has made rapid strides in legal arena of both developed and developing countries.

The most commonly known dispute resolution methods are:

- Arbitration
- Conciliation
- Mediation
- Negotiation

Advantages of Alternative Dispute Resolution (ADR)

Dispute resolution through ADR mechanism is generally faster and less expensive. The disputants, rather than being run by lawyers, judges, and the state base it on more direct participation. In most ADR processes, the disputants outline the process they will use and define the substance of the agreements. This type of involvement is believed to increase people’s satisfaction with the outcomes, as well as their compliance with the agreements reached.

Most ADR processes are based on an integrative approach. They are more cooperative and less competitive than adversarial court-based methods like litigation. For this reason, ADR tends to generate less ill will between parties.

In fact, participating in an ADR process will often ultimately improve, rather than worsen, the relationship between the disputing parties. This is a key advantage in situations where the parties must continue to interact after the settlement is reached.

Disadvantages of Alternative Dispute Resolution (ADR)

Critics of ADR mechanism have concerns about the legitimacy of ADR outcomes, charging that ADR provides “second-class justice.” Some critics believe that ADR encourages compromise. Compromise can be a good way to settle some disputes, but it is not appropriate for others. In serious justice conflicts and cases of intolerable moral difference, compromise is simply not an option because the issues mean too much to the disputants. ADR settlements are private and are not in the public record or exposed to public scrutiny. This could be a cause for concern in some cases.

85. Definition of Arbitration

As per Section 2(1) (a) of the Act, “arbitration” means any arbitration whether or not administered by the permanent arbitral institution.

Arbitration tends to be less formal and quicker than going to the courts. The arbitrator makes the decision based on the facts of the case, contractual obligations between the people, and the applicable law. There is transparency in the award of the arbitrator because the arbitrator will explain as to how and why he arrived at such a decision. The award of arbitrators may or may not be final too. If the parties are not happy then the award can be subjected to review by a court on some limited grounds.

Arbitration, like litigation, views the dispute as a legal analysis and seeks a solution based on entitlement and rights. By its very nature, arbitration may ignore the interests and needs of an individual party. The benefits of arbitration include its confidentiality, flexibility, speed and the expertise of many arbitrators. It is usually, but not always, cheaper than court.

'Arbitrate', 'Arbitrator' and 'Arbitration' etymologically or literally mean 'to decide', 'decision-maker or judge' and 'decision-making process' respectively. Arbitration has a statutory basis, which is not a common feature of all ADR methods. (Others include Family mediation and tribunals). Nevertheless, the Civil Procedure Code promotes ADR.

Arbitration Agreement

Arbitration agreement has been defined in Section 7 of the Arbitration and Conciliation Act, 1996 as an agreement by the parties (two disputants) to submit to arbitration all or certain of the disputes which have arisen or which may arise in future between them with regard to a defined legal relationship, whether contractual or not. The nature of such an agreement would be voluntary and, however, it does not matter whether such dispute is a present one or pertaining to a future dispute. However it is expected that an arbitration agreement is to be made with specific clauses, but no particular form of arbitration agreement is prescribed under the Act. Thus, an arbitration agreement may be:

- in the form of an arbitration clause in a contract, or
- in the form of a separate agreement.

The terms of an arbitration agreement, which must be very clear and specific, may be, in the form of clauses and expression used in an arbitration agreement: such as "arbitrator", "arbitration" and "arbitral tribunal" should be incorporated or be definitive. (Section 7(2-5).

Legal Attributes of the Arbitration Agreement

Agreement: The arbitration can be only by an agreement in writing between the parties. Arbitration can be by a sole arbitrator or by three or more persons. But if it is not by a sole arbitrator, it shall be by an uneven number of members, such as three, five, seven etc. Arbitrators can be named in the agreement itself or nominated in accordance with the provisions of the contract after the disputes have arisen.

Legal Validity: An arbitration agreement as mentioned above, being an agreement, must be legally valid in accordance with Section 10 of the contract Act. The said section reads thus: "All the agreements are contracts, if they are made by the free consent of parties competent to contract, for a lawful consideration and a lawful object, and are not expressly declared to be void."

Evincing Interest to Refer Disputes: The arbitration agreement must have an agreement to refer the dispute to arbitration. An agreement is not a mental state but an act and as an act it is a matter of inference from the contract. The parties are to be judged not by what is in their mind but what they have said, written or done behind all forms of contracts, wherein no doubt lies behind the basic idea of assent. Assent, again involves the question of intention which again, is not purely subjective but objective.

Law and Place Applicable: In the case of international arbitration, the arbitration clause should provide the place of arbitration and substantive law applicable to the contract. When they are not provided in the clause, the parties to the contract may agree to a place of arbitration failing which it shall be decided by the arbitrator(s).

86. Broadly, all disputes involving Civil Rights, which fall within the jurisdiction of Civil Courts, are referable to Arbitration. There are, however, certain exceptions. Disputes involving the question of morality, public policy, status and religious rights are beyond the Arbitration proceedings. Hence, no Arbitration agreement can validly be executed which calls for adjudication of the following matters:
- a. Matrimonial matters and matters connected with conjugal rights.
 - b. Industrial Disputes and Revenue matters.
 - c. Testamentary matters under Succession Act.

- d. Insolvency, Dissolution and Winding up Proceedings under Companies Act.
- e. Criminal proceedings.
- f. Matters under Indian Trust Act, Trusteeship of Charitable Institutions, Public charity, matters falling within the purview of Monopolies and Restrictive Trade Practices Act.
- g. Determination of guardianship or Wards.

The above examples are not exhaustive and a reference to Section 24 of Indian Contract Act, 1872 would be necessary.

Court's intervention in Arbitration proceedings

Section 8 of the Act, imposes a mandatory duty on the judicial authority to refer the parties to arbitration in respect of which action is brought in a matter which is the subject matter of an arbitration agreement, provided such references are sought before filing the written statement and at appropriate stages'. The most important aspect of Section 8 is, it does not postulate the request by the party for staying legal proceedings but contemplates the referring of the parties to arbitration.

The party to an arbitration agreement has the option either to apply for the stay of a suit filed against him in respect of the matters covered by the arbitration agreement or to defend the suit to get a decision on the merits by the court. The power of stay is discretionary and cannot be claimed by a party as a matter of right. Such discretion is to be exercised by the court properly and judicially. The appellate court can always interfere with the decision of the trial court, if it finds that the discretion has not been properly exercised.

The 1996 Act allows the court's intervention in nine situations:

- power to refer the parties to arbitration where there is an arbitration agreement (Section 8);
- granting of interim measures (Section 9);
- power to decide whether the arbitrator who is challenged by the parties is entitled to have any fees (Section 13);
- power to decide on the termination of the mandate of an arbitrator (Section 14);
- for assistance in taking evidence (Section 27);
- setting aside of arbitral award (Section 34);
- enforcement of arbitral award (Section 36);
- hearing appeals from original decrees of the Court passing the order (Section 37); and
- cost of arbitration (Section 39).

87. Mediation: One of the popular ADR mechanisms is mediation, which also involves the mutual selection of a neutral third party who listens to both sides attentively and helps them communicate with another. Under mediation, a mediator facilitates the parties to reach an outcome that satisfies them rather than one aimed at proving someone right or wrong. Through mediation parties can be in a position to work together to reach a solution, which can be amicable to both of them. In this process parties to the dispute with the help of the mediator identify the disputed issues, develop options, consider alternatives and endeavor to reach an agreement. A mediator is expected to be an unbiased and impartial person, working without slang and prejudice. The mediator meets with disputing parties, usually together, but sometimes separately.

Mediation can often help to ease tension and encourage discussion between parties. Everyone in mediation gets satisfied with the outcome because of its "win-win" situation. The participation in the mediation can be voluntary or involuntary. Mediation can be in the matters of family disputes, business disagreements, contract disputes, insurance claims as well as in employment and environmental issues.

Some mediators propose settlement terms and attempt to persuade parties to make concessions. Other mediators work with only party-generated proposals and try to help the parties realistically assess their options. The mediator attempts to provide an environment in which the parties can communicate constructively and will assist the parties in overcoming obstacles to settlement.

Almost all mediations are conducted privately and are confidential. In this process only the parties and those they designate can attend. While mediation confidentiality is the usual practice, it can be redefined by agreement.

Differentiation of Mediation from Arbitration, Litigation and Conciliation

Arbitration and mediation are similar in that they are alternatives to litigation, or are sometimes used in conjunction with litigation to attempt to avoid litigating a dispute to its conclusion. Both arbitration and mediation employ a neutral third party. Both can be binding; however, it is customary to employ mediation as a non-binding procedure and arbitration as a binding procedure.

Arbitrators generally act similar to a judge and make decisions about evidence and give written opinions, which can be binding or non-binding. Although arbitration is sometimes conducted with one arbitrator, the most common procedure is for each side to select an arbitrator and those two arbitrators select a third arbitrator. The dispute is then presented to the three arbitrators chosen, with majority of the arbitrators rendering a written decision.

Mediation, on the other hand, is generally conducted before a single mediator who does not judge the case but helps to facilitate a discussion and eventual resolution of the dispute. Mediation enjoys a great success rate partly because the parties are brought together in a neutral environment where they can freely and confidentially present their position in front of a neutral third party who then attempts to limit the issues and put them in perspective. Participants often feel much better after having an opportunity to get things “off their chest”, and also benefit from hearing the other party’s point of view, because as they say, “there are always two sides to a story.”

Arbitration offers definite advantages, compared to litigation. Arbitration is very informal whereas the court procedures are formal, rigid and fixed. One of the main advantages of arbitration is that depending upon the nature of the dispute; a tribunal can be selected without the intervention of expert lawyers, thus saving time and money.

Mediation Vis-à-vis Conciliation

Mediation is a purely facilitative process, where as conciliation may comprise a mixture of different processes including facilitation and advice.

Conciliation is one of the mechanisms of ADR. Characteristics of conciliation are manifold such as the following:

- Conciliation need not be contractual or based on or controlled by any prior agreements between parties.
- Two willing parties can at any stage resolve a dispute in the presence of a conciliator
- Conciliation can be resorted to, at any stage i.e. even after the parties resort to litigation. and
- It is most useful to persons whose cases have been pending in courts for years together.

The use of mediation is an attempt by society to get back to the old traditional ways of resolving disputes, where people attempt to resolve their differences between themselves rather than relying on the judicial system. Mediation is highly effective, and while it has been under-utilized for quite some time, it has now become a permanent part of the litigation landscape. The uses of pre-litigation mediation will no doubt become commonplace.

88. The Conciliator is not bound by the strict procedure adopted by the Court under the CPC, 1908 or the adherence to the Evidence Act of 1872. The Conciliator is to be guided by the principles of objectivity, fairness and justice. Subject to the above, he may conduct the proceedings in such a manner as he considers appropriate, taking into account –

- (i) the circumstances of the case;
- (ii) wishes expressed by the parties;
- (iii) need for a speedy settlement;

Procedure to be Adopted by the Conciliator(s)

- (i) The conciliator, when appointed may request each party to submit a statement, setting out the general nature of the dispute and the points at issue. Copy to be given to the other party. If necessary the parties may be asked to submit further written statement and other evidence.
- (ii) The Conciliator shall assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement.
- (iii) The conciliator is to be guided by the principles of objectivity, fairness and justice. He is to give consideration to the following matters –
 - (a) rights and obligations of the parties;
 - (b) trade usage; and
 - (c) circumstances surrounding the dispute, including previous business practice between the parties.
- (iv) He may, at any stage, propose a settlement even orally, and without stating the reasons for the proposal.
- (v) He may invite the parties for discussion or communicate with them jointly or separately.
- (vi) Parties themselves must, in good faith, co-operate with the conciliator and supply the needed written material provide evidence and attend meetings.
- (vii) If the conciliator finds that there exist elements of a settlement, which may be acceptable to the parties, then he shall formulate the terms of possible settlement and submit the same to the parties for their observation.
- (viii) On receipt of the observations of the parties, the conciliator may re-formulate the terms of a possible settlement in the light of such observation.
- (ix) If ultimately a settlement is reached, then the parties may draw and sign a written settlement agreement. At their request the conciliator can help them in drawing up the same.

Disclosure and Confidentiality

- a. Factual information received by the conciliator from one party should be disclosed to the other party, so that the other party can present his explanation, if he so desires. But information given on the conditions of confidentiality cannot be so disclosed.
- b. Notwithstanding anything contained in any other law for the time being in force, the conciliator and a party shall keep confidential all matters relating to the conciliation proceedings. This obligation extends also to the settlement agreement, except where disclosure is necessary for its implementation and enforcement. (Section 75)

Conciliator not to act as Arbitrator or Counsel

Unless otherwise agreed by the parties, the conciliator cannot act as an arbitrator representative or counsel in any arbitral or judicial proceedings in respect of conciliated dispute. Nor can he be presented by any party as a witness in such proceedings. [Section 80 (a) and (b)]

Cost and Deposit

The conciliator may direct each party to deposit an equal amount as an advance to meet the costs of conciliation proceedings including additional deposit during the course of conciliation proceedings. However, the conciliator shall render full account for the advance received at the conclusion of the conciliation proceedings and refund any unspent amount to the parties equally.

Legal Effect

- (a) The settlement signed by the parties shall be final and binding on the parties. (Section 73 (3)).
- (b) The agreement is to be authenticated by the Conciliator, (Section 73 (4))
- (c) The Settlement agreement has the same status and effect, as if it were an arbitral award rendered by the arbitral tribunal on the agreed terms (Section 74 read with Section 30).

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Part IV: Model Question Papers (with Suggested Answers)

The model question paper consists of three parts – A, B and C. Part A is intended to test the conceptual understanding of the students. It contains around 30 multiple-choice questions carrying one point each. Part B contains caselets with an aggregate weightage of 50 points. Part C consists of essay-type questions with emphasis on practical applications carrying about 20 points. Students are requested to note that this is an indicative format of the question paper in general and that ICFAI University reserves the right to change, at any time, the format and the pattern without any notice. Hence, the students are advised to use the model question papers for practice purposes only and not to develop any exam-related patterns out of these model question papers.

The suggested answers given herein do not constitute the basis of evaluation of the students' answers in the examination. These answers have been prepared by the faculty members of ICFAI University with a view to assist the students in their studies. And, they may not be taken as the only answers for the questions given.

Model Question Paper I

Time: 3 Hours

Total Points: 100

Part A: Basic Concepts (30 Points)

Answer all the questions. Each question carries one point.

1. A right becomes an absolute right when:
 - a. conferred by statutory authority
 - b. it is not actionable
 - c. it imposes a certain legal obligation on all others
 - d. it is actionable *per se*
 - e. it requires proof of loss incurred.
2. 'A' accepts 'B's telephonic invitation for dinner. This is:
 - a. A valid contract
 - b. An invalid contract
 - c. A voidable contract
 - d. A void contract
 - e. Not a contract.
3. A person induced to subscribe shares, based on a misstatement:
 - a. Can rescind the contract after the company goes into liquidation
 - b. Can rescind the contract within a reasonable time
 - c. Can rescind the contract, but can retain his shares
 - d. Cannot rescind the contract
 - e. Can only sue for damages.

Legal Environment of Business

4. X is indebted to Y, a sum of 1000 rupees, and hence X pays Y Rs.500 at the stipulated time and place in the agreement where the debt was to be discharged in full satisfaction with the consent of Y. State if the payment made by 'X' is valid:
- No, it is not valid as there is no full repayment
 - No, it is not valid as X deceived Y by fraudulent practice
 - Yes, it is a valid payment, as Y consented for it
 - No, it is immoral and opposed to public policy
 - No, it is against the principles of natural justice.
5. The contract of agency is terminated by:
- An agreement between the parties
 - Principal revoking his authority
 - The operation of law
 - On the business of agency being completed
 - All the above.
6. Identify the correct statement with regard to the non-registration of the partnership firm.
- Partner of an unregistered firm can sue the firm.
 - An unregistered firm can sue a third party for any right arising out of a contract.
 - The aggrieved partner cannot file suit against any of its partners
 - An unregistered firm or its partner can claim a set-off.
 - In outsider cannot sue an unregistered firm.
7. A company must issue prospectus within _____ after it is registered with the Registrar of Companies:
- 30 days
 - 45 days
 - 60 days
 - 90 days
 - 120 days.
8. The offer to sell automatically lapses:
- If it is revoked by the offeror at any time before its acceptance.
 - If the offeror or offeree dies or becomes insane and the other party comes to know of it before acceptance.
 - If the offer is not accepted within the specified time or within a reasonable time.
 - Upon failure to fulfill a condition precedent to acceptance.
 - All of the above.

9. A person dealing with a company having satisfied himself that the proposed transaction is not in its nature inconsistent with the memorandum and articles, is not bound to enquire into the regularity of the internal proceedings. This is known as:
- Doctrine of *Ultra vires*
 - Doctrine of Constructive Notice
 - Doctrine of Indoor Management
 - Doctrine of Fraudulent Transfer
 - Doctrine of Lispendens.
10. A public company, desirous of getting its securities listed on a recognized stock exchange, must apply to the
- Stock exchange
 - SEBI
 - NCLT
 - Central Government
 - State Government.
11. A cutting machine was given to a carrier to carry it to a repair shop by the owner. The carrier was not told that in the absence of the cutting machine would completely stop the work of owner. The carrier delays the delivery by several days. Identify the damages that can be awarded to the owner in this case.
- General damages
 - Special damages
 - Exemplary damages or vindictive damages
 - Nominal damages
 - Liquidated damages.
12. A director interested in a contract must disclose his interest in such contract at:
- The board meeting at which the contract is being first considered
 - The first board meeting held after he becomes interested in the contract
 - Any board meeting after he becomes interested in the contract
 - The general meeting of the shareholders
 - The meeting of the committee of the board of directors.
13. Liability of directors towards the company arises:
- For breach of warranty of authority
 - For misfeasance
 - For misstatements in prospectus
 - Both (a) and (b) above
 - All of (a), (b) and (c) above.

14. The minimum number of board meetings to be held by a company in a year are:
- One
 - Two
 - Three
 - Four
 - Six.
15. State Government can establish more than one District Forum in one of the following situations:
- Has no power to establish additional Forums
 - The assent of the President of India has been taken
 - Depending upon the increased number of consumer disputes in the District
 - When the population of the district exceeds 10 lakh
 - On consultation with the National Commission.
16. Voluntary winding up of a company through the court commences:
- At the time of presentation of petition
 - On acknowledgement by the court
 - From the date of resolution of the company
 - 14 days after passing the resolution
 - by an order for winding-up by the court.
17. The tax on perquisites is known as:
- Maintenance charges
 - Subsistence allowance
 - Fringe Benefit Tax
 - Tax on Perquisites
 - Sales Tax.
18. Which of the following is not the duty of the buyer?
- Demand to make delivery at a reasonable hour.
 - To give notice of rejection of goods to the seller.
 - To pay the price
 - To compensate the seller for the default of the carrier.
 - To take delivery within reasonable time after the tender of delivery.
19. An irregular allotment:
- Has no consequences
 - Is valid
 - Is void "*ab initio*"
 - Is voidable at the option of the applicant
 - Is avoidable at the option of the Board of directors.

20. To determine eligibility for exemption, the value of clearances in the preceding financial year is increased under the Central Excise Act from:
- Rs.5 crore to Rs.6 crore.
 - Rs.4 crore to Rs 5 crore
 - Rs.3 crore to Rs.4 crore
 - Rs.4 crore to Rs.6 crore
 - Rs.2 crore to Rs.4 crore.
21. Negotiation by indorsement means:
- Promissory note, bill of exchange or cheque negotiable by the holder by indorsement and delivery thereof.
 - delivery of an instrument by the holder without indorsing it, the instrument is said to have been merely assigned and not negotiated.
 - A restrictive endorsement implies further negotiation.
 - A restrictive indorsement permits further transferability
 - A special indorsement not accompanied by words of negotiability does not make it restrictive.
22. Every recognized stock exchange can make or amend any rules, by-laws subject to the approval of:
- Central Government
 - State Government
 - RBI
 - SEBI
 - NASDAQ.
23. A, B and C enter into an agreement to divide among themselves all the gains acquired or to be acquired in future by fraud. Is it a valid agreement?
- Yes, as all of them agreed to share the gains.
 - No, as the object is unlawful and fraudulent.
 - Yes, as they are using their skill to gain something.
 - Yes, as all the essentials are present in the contract.
 - None of the above.
24. The amount required to be deposited by the party, seeking an appeal against the order of the National Commission to the Supreme Court is:
- 45% of the ordered amount or Rs.75, 000/-, whichever is less
 - 60% of the ordered amount or Rs.1 lakh, whichever is less
 - 50% of the ordered amount or Rs.Rs.50,000/-, whichever is less
 - 70% of the ordered amount or Rs.5 lakh, whichever is less
 - 75% of the ordered amount or Rs.10 lakhs, whichever is less.

Legal Environment of Business

25. The year in which income is taxable is known as the _____ year.
- Assessment
 - Financial
 - Previous
 - Accounting
 - Assessment or previous year.
26. The Reserve Bank of India considers the application for registration of Asset Reconstruction Company only when it is satisfied with the following conditions except:
- The company must not have incurred losses in any of the three preceeding financial years.
 - The company has taken adequate arrangements for realization of financial assets.
 - Appointment of Directors with adequate professional experience.
 - Number of nominee directors not to exceed one third of total number of directors
 - The directors of the company have not been convicted of any offence involving moral turpitude.
27. The percentage of net wealth chargeable under the Wealth Tax Act, 1957 is _____.
- 2 percent
 - 1.5 percent
 - 2.5 percent
 - 1 percent
 - 3 percent.
28. Which of the following types of Alternate Dispute Resolution methods a neutral third party is legally employed to resolve the dispute?
- Conciliation only.
 - Arbitration only.
 - Arbitration and Mediation.
 - Mediation and Negotiation.
 - Conciliation and Negotiation.
29. Which of the following are the necessary constituents of a contract of sale?
- Three distinct parties – seller, buyer and a mediator.
 - Movable goods for a price.
 - Transfer of general property.
 - Both (b) and (c) above.
 - All of (a), (b) and (c) above.

30. Which of the following statement about Bombay Stock Exchange is false?
- The principal stock exchange accounting for 50 percent of the aggregate paid-up share capital of companies.
 - Is the oldest stock exchange in Asia.
 - It maintains and improves its operations on par with the international standards.
 - Its Board of Governors comprises of 9 elected directors.
 - The Executive Director is responsible for day-to-day administration of the stock exchange.

Part B: Caselets (50 Points)

Answer any five caselets. Points are indicated against each caselet.

- Mr. George offered Mr. Jolly to sell his house for Rs.20 lakhs. Mr. Jolly accepted to buy the house, but for Rs.18 lakhs. With reference to this situation, explain:
 - Is it a valid acceptance?
 - Explain the rules for valid acceptance.

(2 + 3 = 5 points)
 - 'B', suffering with severe headache, approaches 'A', who is the only doctor available in his village. After investigations 'A' diagnoses that 'B' has brain tumour and requires an immediate surgery. He even fixes a date for the operation. However, on the said date when the operation has to be conducted, 'B' finds that 'A' has gone to a nearby city on a personal visit and will be back only after a week. During this time, 'B' suffers from severe paralytic stroke. In view of this illustration, explain the following:
 - Is 'A' guilty of breach of his duty? Give valid reasons in support of your answer.
 - Meaning of misfeasance and its distinction from non-feasance.

(3 + 2 = 5 points)
- A is a contractor. B is a public undertaking company, which issued an advertisement inviting tenders for the construction of the servants' quarters. B entered into contract with A and both of them want to resolve their future disputes by non-judicial determination. In the light of this context, explain the following:
 - What is the procedure that can be adopted by A and B?
 - Advantages of the above said procedure.

(3 + 2 = 5 points)
 - 'A', the owner of a theatre borrowed money by hypothecating his cinema projector and the accessories with a bank. The bank allowed the property to remain with the owner, i.e. the borrower itself since it formed the equipment of a running cinema. Later on the owner of the theatre sold the machinery. In view of the above illustration, explain the following:
 - Does the above sale is subject to hypothecation? Explain the concept of sale by hypothecatee?
 - Differentiate between pledged and hypothecated goods.

(2 + 3 = 5 points)

Legal Environment of Business

3. a. Mr. Sudesh purchased a washing machine from a retailer. While using it, the washing machine got burnt and was rendered useless. Mr. Sudesh asked the retailer to replace the washing machine, but the retailer refused to do so. Mr. Sudesh filed a complaint for deficiency of service. But unfortunately the matter was not immediately taken up by the Consumer Redressal Forum and the complaint had been pending for more than 6 months.
- Discuss about the time limit for disposal of case in a Consumer forum with reference to the above cited illustration.
 - Write about the content of a complaint.
- (3 + 2 = 5 points)
- b. Ms. Sahitya purchased a second hand car from Mr. Hemanth. Due to some reasons, Mr. Hemanth could not deliver the car to Ms. Sahitya. Meanwhile, while Hemanth was driving the car, he met with an accident and the car was totally damaged. In the light of these facts, explain the following:
- Decide as to who should bear the risk, the buyer or the seller? Mention the relevant provisions of the Sale of Goods Act, 1930 that are applicable to the above situation.
 - Buyer's right to examine the goods.
- (3 + 2 = 5 points)
4. a. ABC Corporation is an advertising agency and has its registered office in Hyderabad. They want to know whether they are governed by the Central Sales Tax Act, 1956. With regard to the above facts discuss the following,
- Whether the Central Sales Tax Act, 1956 can be applicable to the ABC Corporation.
 - Meaning of CENVAT.
- (3 + 2 = 5 points)
- b. "E-mail contracts may be categorized as the non-instantaneous forms of communication". In this context, discuss the following:
- Bhagavandas vs. Giridharilal's* case.
 - Validity of online contracts.
- (3 + 2 = 5 points)
5. a. Arjun and Company manufactures spare parts of motor vehicles and it has engaged Raman Distributors to sell its products. With reference to the given situation, discuss the following:
- The relationship between Arjun Company and Raman Distributors.
- (5 points)
- b. Mr. Ekansh has taken three health insurance policies from three different insurance companies and has been prompt in paying the premiums. Now due to some health problems he has to undergo a major surgery, for which the medical expenditure may go up to Rs.3,00,000. After the surgery, he seeks to claim the amount of 3,00,000 from each one of the companies. In view of the given facts, discuss the following:
- Can Mr. Ekansh claim the amount from all the insurances companies simultaneously?
 - Concept of *subrogation*.
- (3 + 2 = 5 points)

6. Mr. Tushar Kapoor had a life insurance policy for a sum of Rs.25,00,000. He nominated his wife and his two daughters to be the beneficiaries on his death. He had taken loans to meet his extravagant habits. He died suddenly without repaying any of his debts. In this context, discuss the following:
- Can the creditors claim the amount from the insurance policy?
 - The parties to an insurance contract.
- (3 + 7 = 10 points)
7. “Dolly Limited Co” is a pharmaceutical company situated within the limits of the Greater Municipal Corporation of Hyderabad. The Rajiv Gandhi Colony is situated a few kilometers away from the factory. The people living in that colony complain of suffering from skin diseases, lung infections, migraine, etc because of the hazardous substances released by the factory. Answer the following, in the view of the above situation.
- What is the wrong committed by the pharmaceutical company? To whom should the residents complaint?
 - Various acts affecting environment as offences under IPC, 1860.

(4 + 6 = 10 points)

Part C: Applied Theory (20 Points)

Answer the following questions. Points are indicated against each question.

- Distinguish a Tort from both a Contract and a Crime.

(6 points)
- Explain the different kinds of meetings that a company can conduct under the Companies Act, 1956.

(6 points)
- Discuss the salient features of a Limited Liability Partnership (LLP).

(8 points)

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Model Question Paper I

Suggested Answers

Part A: Basic Concepts

1. (d) A right is said to be an absolute right when it is actionable *per se* and requires proof of the wrong done.
2. (e) The agreement between A and B does not give rise to any legal obligation as there is no contract between them.
3. (b) A person who has taken shares relying on a prospectus containing misstatements can rescind the contract within a reasonable time before proceeding to wind up the company have commenced and before he does anything which is inconsistent with the right to repudiate. The effect of the rescission is that the shareholder would give up the shares and get back his money with interest. The allottee can also claim damages from the company.
4. (c) It is a valid payment made to Y towards full satisfaction of his loan amount. Payment of full amount is not material, whereas the amount was accepted by 'Y' or not is important.
5. (e) The contract of agency can be terminated by
 - (a) The mutual agreement between the principal and agent at any point of time.
 - (b) Principal may revoke the authority of the agent any time before the authority has been exercised so as to bind the principal.
 - (c) The various circumstances in which an agency gets terminated by operation of law are on performance of the contract, on expiry of time, death of the principal or principal becomes one of unsound mind.
 - (d) On completion of a contract of agency which is formed to do a particular type of business.
6. (c) The aggrieved partner can institute criminal proceedings against the firm or any of its partners.
7. (d) A company issuing a prospectus to the public should issue it within 90 days after it is registered with the ROC.
8. (e) All of the above. Offer automatically lapses, in the following occasions:
 - (a) If it is revoked by the offeror at any time before its acceptance.
 - (b) If the offeror or offeree dies or becomes insane and the other party comes to know before acceptance.
 - (c) If the offer is not accepted within the specified time or within a reasonable time.
 - (d) Upon failure to fulfill a condition precedent to acceptance.
9. (c) The persons who deal with the company are not bound to enquire into the regularity of the internal proceedings and will not be affected by irregularities of which they had no notice is based on the doctrine of indoor management.
10. (a) Section 73 of the Companies Act, 1956 requires that every company intending to offer shares or debentures to the public for subscription by the issue of a prospectus shall, before such issue, make an application to one or more recognized stock exchanges for permission for the shares or debentures intended to be so offered to be dealt on the stock exchange.
11. (a) General damages can be awarded as the damages arose in the usual course of things naturally. However, loss of profit cannot be claimed as the owner did not inform the carrier about the significance of the cutting machine.

12. (b) In case of a proposed contract, the director having interest in it will have to make disclosure at the meeting of the board at which the question of entering into the contract or arrangement is first taken into consideration. Whereas, in the case of any other contract or arrangement, the disclosure shall be made at the first meeting of the Board held after the director becomes interested in the contract or arrangement.
13. (d) In case of misstatements in the prospectus, directors will be liable to third parties. However, in case of breach of warranty of authority and misfeasance (which means misconduct), the directors will be liable to the company.
14. (d) A company other than a charitable company shall hold a minimum of four Board meetings every year.
15. (c) As per Sec.9 (a) of the Consumer Protection Act, 1986, the State Government may if it deems fit, establish more than one district forum in the district depending upon the consumer disputes in the district.
16. (c) As per Section 441 of the Companies Act, where a resolution has been passed for voluntary winding-up, before presentation of the petition, then such winding-up shall be deemed to have commenced at the time of passing of the resolution.
17. (c) Perquisites are the benefits, monetary and non-monetary, provided by the employer to his employees in addition to the salary or wages and tax on these benefits is called Fringe Benefit Tax (FBT).
18. (d) As per Sec 56 of the Sale of Goods Act, in a suit by the seller for wrongfully neglecting or refusing to accept and pay for the goods by the buyer, the buyer has to compensate him for damages for non-acceptance.
19. (d) An irregular allotment is voidable at the option of the applicant.
20. (c) The value of clearances in the preceding financial year, for determining eligibility for the exemption, is increased to Rs.4 crore from Rs.3 crore.
21. (c) Where an instrument is indorsed restrictively, it implies that the instrument cannot be negotiated further.
22. (d) Every recognized stock exchange may make or amend any rules made by it relating to the restriction of voting rights to members, regulation of voting rights, restriction on the appointment of proxy and such incidental, consequential and supplementary matters as may be necessary, with the approval of SEBI.
23. (b) The agreement entered by A, B, C is fraudulent as they intended to share gains from the fraudulent business; and this defeats the provisions of Indian Contract Act.
24. (c) Under Sec.23 of the Consumer Protection Act, 1986, no appeal by a person, who is required to pay an amount in terms of an order of the National Commission to the Supreme Court unless that person has deposited in the prescribed manner fifty percent of that amount or fifty thousand rupees, whichever is less.
25. (a) According to Sec.2(9) of the Income Tax Act, 1961, assessment year means the period of 12 months starting from 1st April of every year and ending on 31st March of the next year. Income earned in a year is taxable in the next year. The year in which income is taxable is known as the assessment year.
26. (d) The number of nominee directors of the asset reconstruction company must not exceed half of total strength of directors.
27. (d) The wealth tax chargeable in respect of net wealth of an individual, in respect of every assessment year is at the rate of 1 percent of the amount.
28. (b) A neutral third party is legally employed only in arbitration proceedings as per Arbitration and Conciliation Act, 1996.

29. (d) Only two parties i.e., a buyer and a seller are required for a contract of sale. Secondly, there must be some goods which is or is to be transferred from the seller to the buyer. Consideration for the contract of sale is price, and it must be in the form of money.
30. (a) The Bombay Stock Exchange is the principal stock exchange in the country accounting for nearly 70 percent of the aggregate paid-up share capital of all listed companies and 80 percent of the aggregate market capitalization of the listed companies.

Part B: Caselets

1. a. i. In the given situation Mr. George offered Mr. Jolly to sell his house for Rs.20 lakhs. Mr. Jolly accepted to buy the house but for Rs.18 lakhs. It is not a valid acceptance by Mr. Jolly as he made counter offer. A counter offer cannot be considered as an acceptance.

An acceptance must be clear and unconditional. The acceptance becomes invalid if the terms of the offer differ from the original offer at the time of acceptance or after acceptance. An acceptance can be valid even after the difference in terms of offer, if the terms of counter-offer are acceptable to the original offeror. A counter-offer is a situation wherein the offeree attempts to change the terms of the offer initially made by the offeror. A counter-offer implies rejection of the original offer. Counter-offer terminates the original offer, if the terms of counter-offer are not acceptable to the original offeror. A counter-offer or conditional acceptance operates as a rejection of the offer and causes it to lapse.

- ii. Acceptance is the next step of an offer. Unless and until an acceptance is communicated to the offeror, it cannot be held as a valid and an effective acceptance. Acceptance takes place only when the offeree gives his consent to the terms of the offer. Just as in case of offer, acceptance may also be express or implied. An acceptance is said to be express when it is communicated by words spoken or written or by doing some required Act. It is implied when it is to be gathered from the surrounding circumstances or the conduct of the parties. In an auction sale, the highest bidder is assumed to be the buyer of the goods once the deal is struck.

In order to convert an offer into a promise, acceptance should be absolute and unqualified. It is also essential that the acceptance is given in some usual and reasonable manner. If the offer prescribes the manner in which the acceptance is to be given, then the acceptor should adhere to the prescribed mode. On failure to do so, the offeror can insist that his offer will be accepted only if it is given in the prescribed manner.

The following are the essential conditions for a valid acceptance:

- It must be made by the offeree.
- It should be absolute and unqualified.
- It shall be in a prescribed form.
- It should be within the specified time.
- Communication of acceptance.
- Acceptance during the course of negotiations.
- Acceptance must be positive.

- b. i. Yes, 'A' is guilty of non-feasance as A has not performed the surgery which he was under a legal duty to perform. Hence, B can claim damages for non-feasance.

Non-feasance means non-performance of an act, when one is under a legal duty to perform. It is the failure or omission to perform an obligatory act. Thus, where there is an obligatory duty and the failure or omission to do such duty causes injury to a person, it gives rise to a cause of action in favor of such individual towards whom such duty exists.

- ii. **Misfeasance:** Misfeasance is the improper performance of a lawful act; an act which a person has a legal right to do; it is an act that the person should have done properly. It is used with reference to improper conduct in performing an act. Even if a person has undertaken to do something gratuitously, he is liable if he commits a misfeasance.

The distinction between misfeasance and non-feasance is that misfeasance is the doing of something which a reasonable and prudent person would not do, while non-feasance is omitting to do something which a reasonable and prudent person would do.

2. a. i. In the given problem A is a contractor. B is a public undertaking company, which issued an advertisement inviting tenders for the construction of the servants' quarters. Both of them want to resolve their future disputes by non-judicial determination. Both the parties can resolve their future disputes by adopting "alternative dispute resolution."

The term "alternative dispute resolution" is defined as a "collective description of methods of resolving disputes otherwise than through the normal trial process." In practice, however, references to ADR are usually understood as being references to some form of mediation by a third party."

There is a large number of tribunals under different statutes working in India for settling various types of disputes such as labor disputes, service matters, consumer protection, taxation, excise, motor accidents etc. In addition, there are also Lok Adalats functioning under the Legal Services Authorities Act, 1987. The proceedings of all these tribunals would fall within the description ADR.

Divergent to the dispensation of justice through the state sponsored courts, some judicial systems in the world facilitate litigants to negotiate, conciliate, mediate, or arbitrate. Internationally, the ADR movement has made rapid strides in legal arena of both developed and developing countries.

The most commonly known dispute resolution methods are:

- Arbitration
- Conciliation
- Mediation
- Negotiation.

- ii. **Advantages of ADR**

Dispute resolution through ADR mechanism is generally faster and less expensive. The disputants, rather than being run by lawyers, judges, and the state base it on more direct participation. In most ADR processes, the disputants outline the process they will use and define the substance of the agreements. This type of involvement is believed to increase people's satisfaction with the outcomes, as well as their compliance with the agreements reached. Most ADR processes are based on an integrative approach. They are more cooperative and less competitive than adversarial court-based methods like litigation. For this reason, ADR tends to generate less ill will between parties.

In fact, participating in an ADR process will often ultimately improve, rather than worsen, the relationship between the disputing parties. This is a key advantage in situations where the parties must continue to interact after the settlement is reached.

- b. i. The sale in the given illustration is subject to the hypothecation of bank. The borrower is accountable to the bank, with whom the said goods are hypothecated.

ii. **Pledge and Hypothecation:**

Pledged goods are stored in the godown under the lock and key of the bank under the bank's supervision. Thus they remain under the physical possession of the bank and no withdrawals or additions of the stock in the godown are permissible without the bank's permission.

Hypothecated goods in case of bank, strictly speaking are not under the lock and key of the bank. They are allowed to be kept at the premises of the borrower without any lock and key of the bank as such but are supposed to be under the constructive possession of the bank by virtue of the deed of hypothecation under which the borrower is obliged to submit regular returns to the bank indicating the increase and decrease of the value of the said goods to enable the bank from time to time to determine the drawing of the borrower in this regard. While pledged goods are in actual possession of the bank, in hypothecation they are in actual possession of the borrower.

3. a. i. Mr Sudesh can claim for the timely disposal of his consumer case under Section 13(3)(A) of the Consumer Protection Act, 1986.

Time-limit for disposal of cases: According to Section 13(3)(A), a complaint shall be decided within a period of *three months* from the date of receipt of notice by the opposite party where the complaint does not require analysis or testing of commodities and within five months if it requires analysis or testing of commodities. Before any sample of the goods is referred to any appropriate laboratory, the District, State or National Forum will ask the complainant to deposit fees to the credit of the Forum, for payment to the appropriate laboratory for carrying out the necessary analysis or test in relation to the goods in question. The amount will be remitted to the appropriate laboratory. A copy of the report will be forwarded to the opposite party. Objections in regard to the report may be made to the appropriate laboratory. Thereafter the complainant as well as the opposite party will be given opportunity of being heard as to the correctness or otherwise of the report. The National Commission and State Commissions are required to decide the appeal as far as possible, within 90 days from the first date of hearing.

- ii. **Contents of a Complaint:** A complaint should contain the following information:

- The name, description and the address of the complainant.
- The name, description and address of the opposite party or parties, as the case may be, as far as they can be ascertained.
- The facts relating to complaint and when and where it arose.
- Documents, if any, in support of the allegations contained in the complaint.
- The relief which the complainant is seeking.

- b. i. Mr. Hemanth, the seller has to bear the risk as he still possessed the car and failed to deliver it to Ms. Sahitya though she made full payment. The time when property in the goods passes from the seller to the buyer, is of considerable importance, the same is explained under the Sale of Goods Act, 1930. Thus in the present situation Section 26 of the Sale of Goods Act, 1930 applies which states that unless otherwise agreed, the goods remain at the seller's 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's risk, whether delivery has been made or not except that 'where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party at fault as regards any loss which might not have occurred but for such fault.'
- ii. **Buyer's Rights to Examine the Goods:** Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.
4. a. i. ABC Corporation which is an advertising agency in Hyderabad will come under the purview of the Central Sales Tax Act, 1956.

Applicability of Central Sales Tax: Basically the applicability of Central Sales Tax (CST) is as follows:

- Tax is levied on interstate sales.
- Sales tax thus collected is retained by the collecting state.
- Sales tax under this scheme is payable in the state from where movement of goods begin.

The CST Act, formulates principles for determining whether a sale or purchase of goods has taken place:

- In the course of interstate trade or commerce; or
- Outside a state; or
- In the course of import into or export from India.

It provides for collection, levy, distribution of tax on sale of goods in the course of interstate trade or commerce. It may declare specific goods to be of special importance in interstate trade or commerce and stipulate the restrictions and conditions in respect of the state laws which seek to impose tax on the sale or purchase of goods which have been declared to be of special importance.

ii. **Meaning of CENVAT**

The term 'CENVAT' stands for Central Value Added Tax. Till March 2000, MODVAT was in practice, and that was modified into CENVAT. These are the provisions used in Central Excise to implement the concept of VAT at the manufacturing stage by giving the credit of duty paid on inputs.

The CENVAT scheme is principally based on the system of granting credit of duty paid on inputs. Under CENVAT, a manufacturer has to pay duty as per normal procedure on the basis of 'Assessable Value' (which is mainly based on selling price). However, he gets credit of duty paid on inputs.

Credit will be available for duty paid on:

- Raw materials (not all),
- Material used in relation to manufacture,
- Packaging material, and
- Paints.

- b. i. Section 4 of the Indian Contract Act, 1872 deals with the rule regarding completion of communication of acceptance. As per this Section, the communication of acceptance is complete *as against the offeree*, when it is put in a course of transmission to him so as to be the out of power of the acceptor. The Supreme Court in *Bhagwandas vs. Girdharilal* has held that Section 4 of Contract Act is only applicable in cases of non-instantaneous forms of communication and would not apply when instantaneous forms of communication are used. The contract is complete only at the end of the offeror when he received the acceptance to offer. The place of offeror where acceptance is received shall have jurisdiction for enforcement.

In the case of e-commerce acceptance is made via e-mail or by pressing the 'Accept' or 'Buy' icons. A contract through Internet is complete only when an acceptance is received at the end of the originator. E-mail contracts may be categorized under the non-instantaneous forms of communication. Though the sender receives an acknowledgement, it does not indicate whether the other party has the knowledge of the receipt. Thus the above rule enunciated in *Bhagwandas vs. Girdharilal*, would be applicable to e-mail contracts.

- ii. **Validity of online contracts:** The validity and the formation of a contract forms the most important part of e-commerce law. The Indian Contract Act, 1872 gives a statutory effect to the basic common law contractual rule that a valid contract may be formed if it is made by free consent of the parties, competent to contract, for a lawful consideration and for a lawful object and which is not *void ab initio*. The contract Act does not prescribe or favour any particular way of communicating offer and acceptance. It may be done by word of mouth, writing or even by conduct. Thus, there is no requisite of writing for the validity of contracts except for cases, which are specifically required by law to be in writing. It would appear that even in the absence of any specific legislation validating online contracts cannot be challenged solely on such technical grounds. Therefore, the IT Act avoids incorporating any specific provision giving validity to online contracts.

5. a. i. Arjun Company manufactures spare parts of motor vehicles and it has engaged Raman as its distributors to sell its products. The relation established between them is principal and agent. Raman distributors will be called as agent acting on behalf of or representing Arjun Company and Arjun Company will be called as principal.

Contract of agency: Modern business is growing and becoming competitive day by day. To keep pace with this development it is not possible for a businessman to carry on all his business transactions on his own. This impossibility necessitates him to allow another person to work on his behalf. This means he is delegating some of his powers to another person to carry on some of his business transactions on his behalf. Here, the other person is an agent and the person who delegated the powers is the principal. The contract, which binds the principal and agent, is called an agency.

The Indian Contract Act 1872 is the relevant statute, which regulates the contract of agency. The provisions of Sections 183 to Section 238 of the Act regulate the contract of agency.

Section 182 of the Indian Contract Act, 1872 defines Agent and Principal as:

"Agent" means a person employed to do any act for another or to represent another in dealing with the third persons and the "Principal" means a person for whom such act is done or who is so represented.

Mere designation of a person as an 'Agent' in an agreement does not by itself make him an agent, and his position depends on the nature of legal relationship.

In a contract of agency, it is the agent who brings about a legal relationship between two persons. It should be noted that an agent is not merely a connecting link between the principal and a third person. The agent is also capable of binding the principal by acts done within the scope of his authority.

An agent does not act on his own behalf but acts on behalf of his principal. He either represents his principal in transactions with third parties or performs an act for the principal. The question as to whether a particular person is an agent can be verified by finding out if his acts bind the principal or not.

- b. i. No, Mr. Ekansh cannot claim the full value of his interest from all the three insurance companies simultaneously. Though he has been paying the premium amount promptly, he cannot claim the amount from each one of them independently and for full value of his interest. This is covered under the concept of double insurance. Double or multiple insurance is insurance of the same risk with more than one insurer. This happens when the insured insures the same risk with two or more independent insurers, and the total sum insured exceeds the value of the subject matter, the insured is said to be over-insured by double insurance. Both double insurance and over-insurance are perfectly lawful, unless the policy otherwise provides.

If a loss occurs, he may claim payment from the insurers in such order as he thinks fit. But in any event, he shall not be entitled to recover more than his loss, because, a contract of insurance is a contract of indemnity only. Any excess amount recovered by the insured is to be held by him in trust for the other insurers in accordance with their respective rights. The insurers as between themselves are liable to contribute to the loss in proportion to the amount for which each one is liable. The purpose served by double insurance is that it protects the insured against his loss in the event of one or more of the insurers becoming insolvent.

ii. **Subrogation:**

Subrogation is one of the essential elements of insurance contract. It is defined as the transfer of rights and remedies from the insured to the insurer who has indemnified the insured in respect of the loss. This doctrine is applicable to fire and marine insurances. In such cases, the insured has the right to subrogation when the insurer pays for a total loss. In case of partial losses, the insurer is not eligible for the title of the subject, but he is subrogated to all rights and remedies of the assured in and in respect of the subject matter insured as from the time of the loss or to an extent of the amount paid. Apart from this, the other fundamental principles of insurance contract are:

- Good Faith (*Uberrimae Fide*)
- Insurable Interest
- Law of Indemnity
- Proximity of Cause
- Risk
- Mitigation of loss
- Contribution.

6. i. No, the creditors of Mr. Tushar Kapoor cannot claim the amount from the insurance policy. The Act is of special nature for the properties of insured if he nominates the wife or children to be the beneficiaries on his death. A policy of insurance effected by any married man on his own life, and expressed on the face of it to be for the benefit of his wife or of his wife and children or any of them shall ensure and be deemed to be the trust for the benefit of his wife or of his wife and children or any of them according to the interest so expressed and shall not so long as any object of the trust remains. It is an established principle that the insurance money due under a policy settled for the benefit of the wife and children is not available for the satisfaction of the debts of the assured even if they are due to Crown. Thus, the knowledge of provisions of the Act will help the insurer to act properly while settling the claims under the insurance business.

ii. **Parties to the Insurance Contract:**

The parties to the contracts of insurance are the 'insurer' and the 'insured'. The person who undertakes the risk under the contract is called the 'insurer' and the person to whom the undertaking is given is the 'insured'. Section 2(a) of the Insurance Act defines insurer and it gives a list of persons who can be qualified an insurer. As per the provisions of the section the insurer means:

- a. An individual,
- b. An unincorporated body of individual,
- c. Body corporate incorporated under the laws of the country other than in India carrying on insurance business,
- d. Body corporate incorporated under any law in force in India or under the Indian Companies Act, 1913 and carrying on the business of insurance in India,
- e. Any subsidiary company incorporated under the provisions of Companies Act and carrying on business of insurance in India,
- f. Any person, who in India having a contract under writers with the 'society of Lloyds' authorized to undertake the insurance business in India till the expiry of the contract,
- g. An Indian Insurance Company, which is termed and registered with a provision to wind up the business as per the provisions of the Companies Act, 1956,
- h. An association of partnership firm registered and eligible to be governed by the provisions of Indian Partnership Act, or
- i. Any agency permitted or sanctioned to undertake the insurance business either under Section 30 of Life Insurance Act of India, or Sections 18 and 19 of General Insurance Act.

But does not include a Principal Agent, Chief Agent, Special Agent or an Insurance agent either appointed under any Act or recognized by the Act undertaking the insurance business, and includes a Government Company and a provident society as defined in Section 65 of Insurance Act.

7. i. In the given situation, people living in Rajiv Gandhi colony are suffering from several diseases like skin diseases, lung infections, migraine etc., because of the hazardous substances released by the Dolly Ltd. Pharmaceutical company situated in the vicinity of colony. Aggrieved colony people can complain against pharmaceutical company to state pollution control committee under the Hazardous Waste Management Rules, 1989.

The Hazardous Wastes (Management and Handling) Rules, 1989: The Hazardous Waste Management Rules, 1989 provide for the control of generation, collection, treatment, transport, import, storage and disposal of wastes listed in the schedule annexed to these rules. The rules are implemented through the State Pollution Control Boards and Pollution Control Committees in the states and union territories.

Besides these rules, in 1991, the Ministry of Environment and Forests, issued Guidelines for Management and Handling of Hazardous Wastes for (a) generators of waste, (b) transport of hazardous waste, and (c) owners/operators of hazardous waste storage, treatment and disposal facilities. These guidelines also provide for the mechanisms for the development of a reporting system for the movement of hazardous waste and the procedures for the closure and post-closure requirements for landfills.

- ii. One of the most pressing global issues is the predominance of national and multinational corporations in economic transactions and their accountability resulting in environmental pollution. In this context, the development of corporate criminal liability, which is a multi-dimensional issue, has become a problem, being handled by a growing number of prosecutors and courts. Indian Penal Code, 1860 identifies various acts affecting environment as offences. Relevant Provisions of the Code, which protect environment are:

Public Nuisance (Section 268): When a person is guilty of an act or is guilty of an illegal omission causing any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which necessarily causes injury, obstruction, danger or annoyance to persons who has occasion to use public right.

Negligent act likely to spread infection of disease dangerous to life (Section 269): Whoever unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Malignant act likely to spread infection of disease dangerous to life (Section 270): Whoever maliciously does any act which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Fouling water of public spring or reservoir (Section 277): Whoever voluntarily corrupts or fouls the water of any public spring or reservoir, so as to render it less fit for the purpose for which it is ordinarily used, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

Making atmosphere noxious to health (Section 278): Whoever voluntarily vitiates the atmosphere in any place so as to make it noxious to the health of persons in general dwelling or carrying on business in the neighborhood or passing along a public way, shall be punished with fine which may extend to five hundred rupees.

Negligent conduct with respect to poisonous substance (Section 284): Whoever does, with any poisonous substance, any act in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any person, or knowingly or negligently omits to take such order with any poisonous substance in his possession as is sufficient to guard against any probable danger to human life from such poisonous substance, shall be punished with imprisonment of either description for a term which may extend to six months or with fine which may extend to one thousand rupees, or with both.

Negligent conduct with respect to fire or combustible matter (Section 285):

Whoever does, with fire or any combustible matter, any act so rashly or negligently as to endanger human life or to be likely to cause hurt or injury to any other person, or knowingly or negligently omits to take such order with any fire or any combustible matter in his possession as is sufficient to guard against any probable danger to human life from such fire or combustible matter, shall be punished with imprisonment of either description for a term which may extend to six months or with fine which may extend to one thousand rupees, or with both.

Negligent conduct with respect to explosive substance (Section 286):

Whoever does, with any explosive substance, any act so rashly or negligently as to endanger human life, or to be likely to cause hurt or injury to any other person, or knowingly or negligently omits to take such order with any explosive substance in his possession as is sufficient to guard against any probable danger to human life from that substance, shall be punished with imprisonment, of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Part C: Applied Theory

1. Tort vis-à-vis Contract

There are a few clear-cut distinctions between Tort and Contract.

- A contract is based upon consent and a tort is inflicted against somebody and without his consent.
- A contract demands a privity between the parties to it; where as in torts no such privity is needed.
- A breach of contract is an infringement of a right in *personam*, i.e., of a right available only against some determinate person or body, in which the community at large has no concern; whereas torts are a violation of a right in *rem*, i.e., a right placed in some determinate person, either personally or as a member of the community, and available against the world at large.
- For a breach of gratuitous undertaking of any service, there lies no action under the Contract Act, but insofar as tort is concerned, any negligent performance of it does invite an action.
- In the case of a contract, the duty is fixed by the will and consent of the parties. It is owed to definite persons; whereas in the case of a tort, the duty is one imposed by the law and is owed to the community at large.
- In breach of contract, the mental element for the breach is immaterial; in a tort it is sometimes taken into consideration.
- In a breach of contract, damages are only for the purpose of compensating for the breach but in tort, compensation, is the only remedy. In cases of injury to the person, character, or feelings, and if the facts disclose improper conduct like fraud, malice, violence, cruelty, etc., which increase the plaintiff's injury, different kinds of damages are awarded like exemplary damages.
- In a contract, the damages are liquidated and fixed according to the terms and conditions of the parties; but in tort the damages are generally unliquidated and are determined by the Court on the facts and circumstances of the case.
- In a contract, time of limitation begins from the breach, in tort from the occurrence of the damage.

Tort vis-à-vis Crime

In *P. Rathinam Nagbhusan Patnaik vs. Union of India* the Supreme Court differentiated a tort from a crime. In brief, the following are the points of distinction between a crime and a tort:

- Crime is a wrong against the society. Tort is a wrong against an individual.
- As crime is a wrong against the society, the State initiates action against the accused. In tort, the individual who is the victim initiates action.
- In crime, the State action is called prosecution. In tort the individual action is called a suit.
- As a rule, the object of criminal justice is punishment of the accused. In tort, the object is compensation to the victim.
- Thus, Criminal Law looks to the accused and Law of Torts looks to the victim. Restoration of the status of the victim is the purpose of tortious action.
- Crime, as a rule, is non-compoundable. Tort is compoundable.
- Though fine by way of money is imposed in crime, it goes to the State and not to the victim. Whereas in tort compensation amount must be paid to the victim.

2. Different Kinds of Meetings

Meetings under Companies Act, 1956 may be classified as follows:

- Shareholders' meetings:
 - Statutory meeting as per Section 165 of the Act;
 - Annual General Meeting (AGM) as per Section 166 of the Act;
 - Extraordinary General Meeting (EGM): Those convened by the Board of Directors to transact business of special importance that arises in between the two annual general meetings and justifies the convening and holding a meeting of the shareholders; and
 - Class Meetings of Shareholders
- Board Meetings
- Meetings of the Committees of Board
- Meetings with the Debenture holders
- Meetings of Creditors

Statutory Meeting

Section 165 of the Companies Act, 1956 lays down the following:

Every company limited by shares, and every company limited by guarantee and having a share capital, shall, within a period of not less than one month nor more than six months from the date at which the company is entitled to commence business hold a general meeting of the members of the company, which shall be called 'statutory meeting'. This is the first meeting of the shareholders of a public company and there would be only one such meeting in the lifetime of the company.

Annual General Meeting (AGM): According to Section 166(2)(a), a public or a private company which is a subsidiary of a public company may fix the time for its annual general meeting either through its articles, or it may also by passing a resolution in one annual general meeting fix the time for the subsequent annual general meeting.

A private company which is not a subsidiary of a public company, may in like manner and also by a resolution agreed to by all the members thereof, fix the time as well as the place for its annual general meeting.

Where an annual general meeting is adjourned, the board has the power to hold the adjourned meeting at any place other than the place where the annual general meeting was held. However, so far as possible, it should be ensured that the meeting is held at the same place as the original meeting and if that is not possible, the meeting should be held either at the registered office of the company or at a place within the city in which the registered office is located.

A public company or a private company may fix the time for holding its AGMs. The private company can also with the consent of all its members thereof fix the place of its annual general meetings.

Extraordinary General Meetings (EGM): All the general meetings of the company with the exception of the Statutory Meeting and Annual General Meeting are Extraordinary General Meetings (EGM).

Object: The purpose of EGM is to transact special business defined in the previous meeting which arises in between two annual general meetings. The special business transacted at the EGM has to be urgent, which cannot be deferred to the next annual general meeting. For instance, a change in the objects or shift of registered office or alteration of capital or removal of a director/auditors require immediate attention which cannot be deferred till the next annual general meeting.

An extraordinary general meeting may be called by

- The board of directors on its own or on the requisition of a specified number of members entitled to vote.
- By the requisitionists themselves in case of failure by the board to call for a meeting.
- By the NCLT.

Board Meetings

The meetings of the Board of the Directors for the purpose of collectively taking decisions for smooth functioning of the company are referred as 'Board Meetings'.

Object: To formulate management policies, take decisions of importance pertaining to running of the company, review of progress made by the company among other matters related to the company.

The power delegated to the Board of Directors will have to be exercised at the properly convened board meeting unless the articles provide otherwise.

Powers: Section 292 lays down that the following decisions have to be taken only at the meeting of the board of directors:

- make calls on shareholders in respect of unpaid money on their shares;
- to issue debentures;
- to borrow moneys otherwise than on debentures;
- to invest the funds of the company; and
- to make loans.

It has to be noted that the meeting does not require any agenda for the meeting of the directors. Any business whatsoever, thus can be transacted at a board meeting.

3. Salient Features of the LLP

- The proposed LLP is a corporate body as defined in Section 3 of the Companies Act, 1956 which includes a LLP registered under the proposed LLP Act, a LLP incorporated outside India, except for a corporation sole, a co-operative society and any other corporate body not being a company with a perpetual succession. It is a legal entity.
- Every LLP must have either the words “limited liability partnership” or the acronym “LLP” as the last words of its name. The name should not be undesirable, identical or closely resembling the name of some existing LLPs or body corporate or to a registered Trade mark. The Central Government may direct the LLP violating the norms to change its name within 3 months or within the extended period.
- It can sue and be sued. It can in its name hold, acquire, or dispose of property and shall have a common seal.
- The LLP shall not be regulated by the law relating to partnerships.
- Its formation requires a minimum of two partners whereas there is no limit on the maximum number of partners. Any person shall be eligible to become its partner by either subscribing to the incorporation document or with regard to an agreement between the existing partners. An agreement between the partners or an agreement between the LLP and partners shall govern the relations [i.e. the rights and duties] of the partners *inter se*.
- A person ceases to be a partner of a LLP,
 - as per the terms of the agreements, or,
 - by giving a 30 days notice to the other partners, or,
 - upon his/her death, or,
 - upon the dissolution of the LLP.

On ceasing to be a partner, the representatives of the partner are entitled to compensation amounting to his capital contribution and his share in the accumulated profits. The Registrar of Companies (hereinafter referred as ROC) should be intimated with a prior notice of 30 days when a person becomes or ceases to be a partner or about any changes in the name and address of the partners.

- A manager accountable for the regulatory and legal compliance is to be necessarily appointed by an LLP. The particulars of appointment of the manager should be submitted to the ROC.
- It shall be registered with the ROC under the Companies Act, 1956 with an incorporation document subscribed in the prescribed form, by at least two partners. The photographs of the partners and the manager must be submitted to the ROC.
- It shall have a registered office and the change of its address if any, may be notified to the ROC.
- The liability of the partners is limited except in case of unauthorized acts, fraud and negligence. There is no personal liability for the wrongful acts of other partners and the loss due to such acts shall be borne by the LLP property.
- A partner has fiduciary duties towards his co-partners and the LLP.
- It shall maintain proper books of accounts and annual accounts for a duration as per the Rules.
- An annual “Declaration of Solvency” is to be filed by the manager with the ROC.

Legal Environment of Business

- Inspectors may be appointed by the Central Government to investigate the affairs of a LLP. The appointment may be with regard to a report of the ROC or by an application of not less than 1/5th of the total number of partners or by a resolution to the effect that the affairs ought to be investigated or if the Central Government/Tribunal thinks so.
- For tax purposes, the property of the LLP shall be treated as the property of the partners. The partners shall be individually liable to tax on their share of profit or capital gains on the disposal of LLP assets.
- A partner of a LLP can freely transfer his economic interests either in whole or in part to a third person. Such transfer, however, shall neither cause the dissociation of the partner with the LLP, nor the dissolution, or the winding up of the LLP. However, such a transferee shall be disabled from participating in the conduct of the LLP business and from accessing information of the LLP activities.
- A firm, an unlisted public company and a private company can be converted into an LLP.
- It may be wound up either voluntarily or by the Company Law Tribunal.
- Defunct LLPs may be struck off by the ROC.
- LLPs can now electronically file their returns.

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Model Question Paper II

Time: 3 Hours

Total Points: 100

Part A: Basic Concepts (30 Points)

Answer all the questions. Each question carries one point.

1. Which of the following is a void agreement?
 - a. An agreement collateral to a wager.
 - b. An agreement to refer all future disputes in connection with a contract to arbitration.
 - c. An agreement to refer all present disputes in connection with a contract to arbitration.
 - d. An agreement to agree in future.
 - e. A contingent contract.
2. Statutory rights of members are conferred by the:
 - a. Board of Directors
 - b. Memorandum of Association
 - c. Articles of association
 - d. Companies Act, 1956
 - e. Registrar of Companies.
3. Who among the following is competent to contract?
 - a. Prudent man
 - b. A minor
 - c. A person with unsound mind
 - d. Insolvent
 - e. An alien enemy.
4. Which of the following constitutes a promissory note?
 - a. I promise to pay Mr. John Rs.10,000 and all other sums which may become due to him.
 - b. I promise to pay Mr. John Rs.10,000 after deducting any amount which he may owe me.
 - c. I promise to pay Mr. John Rs.10,000 and all fines according to the rule.
 - d. I promise to deliver Mr. John 100 bags of wheat.
 - e. I do acknowledge myself to be indebted to Mr. John Rs.1,00,000 to be paid on demand for value received.
5. An agreement entered under coercion, renders the contract:
 - a. Valid.
 - b. Void.
 - c. Voidable at the option of the victim.
 - d. Illegal.
 - e. Unenforceable.

6. Every person dealing with a company is presumed to have read and understood the Memorandum and Articles as per the:
- Doctrine of Indoor Management
 - Doctrine of Election
 - Doctrine of Constructive notice
 - Doctrine of Lispendens
 - Doctrine of Fraudulent transfer.
7. Which of the following provisions of the Constitution of India empowers the Central Government to levy the Central Excise duties?
- Entry 82, List I, Schedule VII
 - Entry 49, List II, Schedule VII
 - Entry 44, List III, Schedule VII
 - Entry 84, List I, Schedule VII
 - Entry 92, List I, Schedule VII
8. The right of a person to retain possession of goods belonging to another until his debt or claim is satisfied is _____:
- Bailment.
 - Assignment.
 - Hypothecation.
 - Lien.
 - Mortgage.
9. The corporate veil of a company is lifted:
- When revenue of the state needs to be protected
 - To determine the character of an enemy company
 - When the company does not refund the application money
 - When the doctrine of corporate veil conflicts with public policy
 - All of the above.
10. Which of the following statements is false with regard to Mediation?
- Involves selection of a neutral third party who helps the parties communicate with each other.
 - Parties get a “win-win” situation.
 - Mediation is applied to resolve the matters connected with family disputes, business disagreements and contract disputes.
 - Mediator enables the parties to communicate constructively.
 - Mediation is conducted publicly and is transparent.
11. A director shall be liable for misstatements in prospectus if he:
- Withdraws his consent before the issue of the prospectus and the same was published without his consent
 - Had reasonable ground to believe that the statement was true
 - Relied on the basis of fair representation of a public document
 - Withdraws his consent giving a reasonable public notice on becoming aware of the untrue statement
 - Informs the company that his name was included without his knowledge or consent.

12. A contract wholly performed by one of the parties is called as:
- Unilateral contract
 - Bilateral contract
 - Executed contract
 - Executory contract
 - Quasi-contract.
13. Which of the following statements is false pertaining to the redeemable preference shares?
- The articles must provide for the issue of shares.
 - These shares are not to be redeemed out of the profits available for dividend.
 - In case of payment of premium on redemption, the same has to be provided from out of the Companies profits.
 - No shares can be redeemed unless they are paid fully.
 - The Capital Redemption Reserve Account has to be credited with equal value of shares redeemed.
14. A floating charge created prior to the commencement of winding up proceedings becomes invalid in:
- one month
 - Six months
 - Twelve months
 - Three months
 - Two months
15. A public company can commence business if:
- It has more than 100 members
 - Obtains certificate of commencement of business
 - Need not hold the statutory meeting
 - Can allot shares before the minimum subscription is subscribed
 - Must have at least 3 directors.
16. A casual vacancy of a Director:
- Cannot be filled up
 - Can be filled up at the Annual General Meeting by passing an ordinary resolution
 - Can be filled up at a meeting of the board
 - Can be filled by passing a special resolution
 - Must be filled within 10 days from the date of resulting vacancy.
17. Appointment of an alternate director takes place when the original director absents himself for a period of not less than:
- One month
 - Three months
 - Two months
 - Six months
 - Five months only.

18. An extraordinary general meeting may be called by:
- The Board of Directors on its own
 - By specified number of members entitled to vote
 - By the NCLT
 - Both (a) and (b) above
 - All of (a), (b) and (c) above.
19. The term 'tort' is derived from the _____ and its English equivalent is _____ .
- Latin term Tortum, wrong.
 - Roman term Tortum, mischievous
 - English term Tortum, crooked
 - Greek term Tortum, twisted
 - French term Tortum, delict.
20. The Information Technology Act, 2000 intends to provide all the following except:
- Provides legal recognition to transactions carried out by means of electronic data interchange.
 - Facilitates electronic filing of documents with government departments/ agencies.
 - It has no extra territorial operation and hence is applicable to India but not to Jammu and Kashmir.
 - The Act recognizes and authenticates electronic transactions, records and digital signatures.
 - A legal framework for regulating the e-commerce transactions and imposition of punishments and penalties for violating the provisions.
21. To constitute a public company there must be at least:
- Two directors
 - Seven directors.
 - Eleven Directors
 - Three directors.
 - Nine directors.
22. The chargeable limit of the net wealth under the Wealth Tax Act, 1957.
- Rs.10 lakh
 - Rs.12 lakh
 - Rs.13 lakh
 - Rs.15 lakh
 - Rs.25 lakh.
23. The position of the finder of lost goods is that of a:
- Bailor
 - Bailee
 - Creditor
 - True owner
 - Official receiver.

24. The authority empowered to frame the rules relating to governance of the Finance Act is _____.
- Taxes Regulatory Authority of India.
 - Income Tax Appellate Tribunal
 - Central Board of Direct Taxes
 - Ministry of Finance
 - Ministry of Company Affairs.
25. In which of the following situations a notice of dishonor of cheque is unnecessary?
- When it is expressly waived.
 - When the note is not negotiable.
 - When there is implied waiver of notice.
 - When the drawer countermands payment.
 - All of the above.
26. A continuing guarantee can be revoked by:
- Novation
 - Death of surety
 - Discharge of principal debtor
 - Loss of security
 - All of the above.
27. _____ approval is required for the bye-laws framed by the depositories:
- SEBI
 - Ministry of Finance
 - RBI
 - Stock Exchange
 - State Government.
28. Among the following functions of the depositories the most important function is:
- To dematerialize securities and enable their transaction in a book-entry form.
 - To govern and regulate the stock exchanges in India.
 - Granting recognition of stock exchanges.
 - Regulation and control of business dealing in spot delivery contracts.
 - To prevent undesirable transactions in securities.
29. Which of the following statements is the correct explanation about “A truncated cheque”?
- It is the exact mirror image of a paper cheque.
 - It is the cheque in the electronic form.
 - It is the cheque generated, written and signed by a secure system.
 - Cheque either by the clearing house or by the bank whether paying or receiving payment, immediately on generation of an electronic image for transmission.
 - It is a manually written, and presented to the paying banker.

30. The Consumer Protection Act, 1986 till 2002 got amended _____.
- 2 times
 - 3 times
 - 1 time
 - 5 times
 - 4 times.

Part B: Caselets (50 Points)

Answer any Five caselets. Points are indicated against each caselet.

1. a. Akash enters into a contract with Badshah to deliver 100 bales of cotton of particular quality on a fixed date at Badshah's warehouse. But Akash could deliver only 96 bales within the said date. Akash however promised to send the remaining bales to Badshah within a short time. But Badshah refused to accept 96 bales. In the light of the above circumstance, answer the following:
- Can Badshah refuse to accept 96 bales?
 - Doctrine of 'Substantial Performance'.
- (2 + 3 = 5 points)
- b. Mr. Ashish, a qualified voter at a parliamentary election, was wrongfully denied by a returning officer from casting his vote. As a result, Mr. Ashish was deprived of his right to vote. Despite this denial of the right to vote, the candidate for whom Mr. Ashish wanted to vote won the election with a resounding majority. In view of the above circumstances, examine the following:
- Whether Mr. Ashish can file a suit against the returning officer for not allowing him to exercise his right to vote?
- (5 points)
2. a. 'The doctrine of indoor management has its genesis in the case of *Royal British Bank vs. Turquand*.' With reference to this rule, describe the following:
- Discuss the facts and decision of *Royal British Bank vs. Turquand*.
 - The Doctrine of Indoor Management.
- (2 + 3 = 5 points)
- b. Mr. Amrit Singh sold trees that were to be cut and removed within a period of two weeks. With reference to this situation, explain the following:
- Identify the category of the transaction and examine as to which law such agreement to sell comes under.
 - Concept of *demise or partial transfer* of immoveable property.
- (3 + 2 = 5 points)
3. a. Under the contract of hypothecation, Mr. Rahul has taken an auto-rickshaw from the Corporation Bank of India for an amount of Rs.80,000. The terms and conditions of hypothecation states that if the hypothecator fails to pay the amount within a period of two years, the bank shall takeover the auto-rickshaw. Mr. Rahul could not pay the last five installments and so the bank took over the auto-rickshaw. With reference to this, discuss the following:
- Can Mr. Rahul file a suit against the bank for return of his auto-rickshaw?
 - Explain the rights of a hypothecatee in selling the hypothecated goods.
- (3 + 2 = 5 points)

- b. Rakesh wrote a note stating “Two months after date, I promise to pay Rahim or order the sum of rupees Twenty Five thousand only for value received”. With regard to this illustration, answer the following,
- i. Is the note given by Mr. Rakesh a Promissory Note?
 - ii. Essentials of a Promissory note.

(2 + 3 = 5 points)

4. a. Mr. Avnish secured unauthorized access to the computer system of Mr. Krishna Manohar. He thereby deleted, altered and destroyed confidential information that was present in Mr. Krishna Manohar’s computer. In this context, briefly discuss the following:
- i. The nature of offence committed by Mr. Avnish and the relevant provisions applicable to the said offence under the IT Act, 2000.
 - ii. Breach of confidentiality under the IT Act, 2000.

(2 + 3 = 5 points)

- b. Ravi Kumar purchased a scooter from Patni Automobiles. The scooter had a warranty period of two years. However, within five months of purchase, the scooter broke down. Ravi Kumar filed a complaint before the District Forum. The District Forum pronounced its judgment in favor of Ravi Kumar and awarded damages of Rs.10,000. Not satisfied with the decision of the district forum, Ravi Kumar wants to file an appeal. In view of the above facts, answer the following,
- i. Where can Ravi Kumar file an appeal? Explain the procedure for filing such an appeal?
 - ii. Can there be a further review of the above said appeal?

(3 + 2 = 5 points)

5. a. The director of a Aditya Pvt. Ltd borrowed money from an outsider exceeding his authority and misused the money without the knowledge of the other directors and shareholders. With regard to the above facts, discuss,
- i. Liability of the director of Aditya Pvt. Ltd. for having misused the money.
 - ii. Statutory duties of a director.

(2 + 3 = 5 points)

- b. A Municipal Corporation maintaining a public park fails to unearth a tree bearing poisonous berries. Ignorant about the poisonous nature of the berries, Bipin plucks and eats the berries and dies on the spot. Referring to this context, discuss the following:
- i. State whether the Corporation is liable, and explain the nature of the act.
 - ii. Distinguish a Tort from a Crime.

(3 + 2 = 5 points)

6. An industry for plastic items burnt its waste products in an area outside the city, far away from the residential areas of that region. Nevertheless, gases were released in the process and caused a noxious atmosphere in the residential areas. People living in the residential area filed a case against the owners of the industry. With reference to the above facts, answer the following:
- i. Whether the owners of industry are liable in this situation.
 - ii. Bring out the facts and decision of Oleum gas leakage case.

(5 + 5 = 10 points)

Legal Environment of Business

7. 'A' a producer of a film and 'B' a distributor entered into a contract for the distribution of A's films. In the agreement it was mentioned that a separate arbitration agreement to be signed by both 'A' and 'B' will be binding for resolution of future disputes. However, 'A' only has put his signature in the arbitration agreement, whereas 'B' has expressed his willingness but has not signed the arbitration agreement. Explain the following with reference to the above situation.
- Whether 'B' is bound by the arbitration agreement in case he does not contradict same in writing?
 - What are the legal attributes of the arbitration agreement?

(5 + 5 = 10 points)

Part C: Applied Theory (20 Points)

Answer the following questions. Points are indicated against each question.

- Discuss briefly the classification of the Courts in India.
(7 points)
- What is the meaning of the word 'lien'? What are the different kinds of lien?
(6 points)
- Elucidate the powers and functions of the regulatory authority under the Insurance Regulatory and Development Authority Act, 1999.
(7 points)

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Model Question Paper II

Suggested Answers

Part A: Basic Concepts

1. (d) If the parties have not agreed upon the terms of their contract, but have made an agreement to agree in future is void agreement.
2. (d) Statutory rights are conferred upon a member by the Companies Act, while contractual rights occur via the Memorandum and Articles of Association of a Company.
3. (a) A prudent man: As a prudent man alone can form a rational judgment as to the terms of the contract and hence is competent to contract.
4. (e) 'I do acknowledge myself to be indebted to Mr. John Rs.1,00,000 to be paid on demand for value received' is a valid promissory note.
5. (c) An agreement brought about by coercion renders the contract voidable at the option of the person whose consent was so obtained.
6. (c) Every person dealing with the company is presumed to have read the memorandum and articles and understood them in their true perspective as per the doctrine of constructive notice.
7. (d) The Central Government is vested with the power to levy excise duty by virtue of Entry 84, List I, Schedule VII of the Constitution of India.
8. (d) The right of a person to retain possession of some goods belonging to another, until debt or claim of the person in possession is satisfied is the right of Lien.
9. (e) The business of the artificial person is carried by and for the benefit of some individuals. As an artificial person is not capable of doing anything illegal or fraudulent, the facade of corporate personality might have to be removed to identify the persons who are really guilty. The corporate veil may be lifted when the state's revenue has to be protected. Thus, when the company does not refund application money on failure to make allotment the corporate veil may be pierced. Even when the doctrine is opposed to public policy it becomes necessary to pierce the corporate veil.
10. (e) Mediations are usually conducted privately and are confidential, thus only the parties and those they designate attend it.
11. (e) A director will not be held liable for misstatements in the prospectus when he withdraws his consent and gives a public notice to that effect stating that his name is included without his knowledge and consent. Thus, any action contrary to this will make him liable.
12. (a) Unilateral contract is one in which only one party has to perform his obligation.
13. (b) Redeemable preference shares may be redeemed out of profits available for dividend or out of the proceeds of a fresh issue of shares made for the purpose of redemption.
14. (c) As per Sec.534 of the Companies Act, 1956, a floating charge on the undertaking or property of the company created within twelve months immediately preceding the commencement of winding up is declared invalid if the charge is not satisfied.
15. (e) There is no restriction on the maximum number of members a public company can have. Hence, a public company can commence its business only after obtaining the certificate of commencement of business.
16. (c) According to Section 262, if the office of any director appointed by the company in a general meeting is vacated before his term of office expires in the normal course, the resulting casual vacancy may, subject to any regulations in the articles of the company, be filled by the Board of Directors at a meeting of the Board.
17. (b) As per Sec.313 of the Companies Act, the Board of directors of a company can appoint an alternate director in place of the original director when he absents himself for a period not less than three months from the State in which board meetings were held.

18. (e) An extraordinary general meeting may be called (i) by the board of directors of its own accord (ii) by the directors on requisition (iii) by the requisitionists themselves (iv) by the NCLT.
19. (a) The term 'tort' is derived from the Latin term '*tortum*' and its English equivalent is 'wrong'. In Roman Law 'tort' is equivalent to 'delict'. '*Tortum*' means 'twisted' or 'crooked' and implies conduct which is not straight forward or lawful.
20. (c) The Information Technology Act, 2000 came into force on 17.10.2000 and covers all states including Jammu and Kashmir, hence it is made applicable to cyber crimes committed in and outside India.
21. (d) As per Sec.252 (1) of the Companies Act, a public company shall have at least three directors.
22. (d) The wealth tax is chargeable in respect of every assessment year at the rate of 1 percent of the amount by which the net wealth exceeds Rs.15 lakh.
23. (b) The person to whom the goods are delivered, is called the bailee hence the position of the finder of lost goods in law is that of a bailee.
24. (c) Central Board of Direct Taxes (CBDT) is empowered to frame rules to achieve the purpose of the enactment and ensure proper governance of the Finance Act.
25. (e) Notice of dishonor may be expressly waived by the person entitled to it. In such a case notice of dishonor is not necessary. Where a note is not negotiable, failure to give notice of dishonor, is unlikely to affect the interest of any party. Notice of dishonor is said to have been waived impliedly, where the person entitled to receive notice, having full knowledge of facts, agrees, after dishonor, to unconditionally make payment of the amount due on the instrument. When the drawer countermands payment there is no need for a notice of dishonor. The reason behind this is that the drawer himself is responsible for preventing the holder from obtaining payment.
26. (e) A continuing guarantee can be revoked by:
- (a) When a new contract substitutes the old contract, then the liability under the old contract stands cancelled.
 - (b) the death of the surety so far as the future transactions are concerned.
 - (c) The liability of the surety is co-extensive with that of the principal debtor. Hence, if the principal debtor is discharged from his liability by virtue of an agreement between him and the creditor, then the surety also stands discharged.
 - (d) When the creditor loses or disposes of, without the consent of the surety any security pledged with him, the surety stands discharged to the extent of value of the security so lost or disposed.
27. (a) SEBI's approval is required for bye-laws framed by the depositories.
28. (a) The main function of this depository is to dematerialize securities and enable their transaction in a book-entry form.
29. (d) As per Explanation I (b) to Section 6 of Negotiable Instrument Act, 'A truncated cheque' means a cheque which is truncated during the clearing cycle, either by the clearing house or by the bank.
30. (b) The Consumer Protection Act, 1986 was subjected to amendments in the years 1991, 1993, 2002. Hence, it was amended three times.

Part B: Caselets

1. a. i. In the given situation 'Akash' has supplied 96 cotton bales according to the terms of contract and he was unable to supply only negligible amount, which he promised to supply without any further delay. Therefore 'Badshah' cannot refuse to take delivery of bales supplied as he is bound to accept the bales under section 38 of the Indian Contract Act, 1872. The contract has been performed substantially.

- ii. **Doctrine of 'Substantial Performance'**

Where the contract is substantially performed, there is authority that the injured party is not discharged from the obligation to pay, but is protected by a counterclaim or set-off for any loss which may have been sustained by reason of the incomplete or defective performance. A Court will hold a contract to have been substantially performed if the actual performance falls not far short of the required performance, and if the cost of remedying the defects is not too great in amount in comparison with the contract price. For instance, if the builder has acted in good faith and has completed the job in substantial compliance with the contract, he can enforce the contract and collect the contract price. Any damages that result from non-compliance can be collected by the buyer or deducted from the amount of the contract price. Perfection is not required. However this principle will not be applied where the builder has intentionally substituted inferior materials or used other production shortcuts.

- b. Yes, Mr. Ashish can file a suit against the returning officer, though no harm or loss has happened to the candidate for whom Ashish wanted to vote, as he won the election with a resounding majority. But, the returning officer is liable for violating the legal right of Mr. Ashish. This is based on the principle of *Injuria Sine Damno*.

Injuria means injury, *sine* means without and *damno* means damage. Thus, it means injury without damage. In other words it means violation of a legal right without causing harm, loss or damage to the plaintiff. This is a tort which is *actionable per se*, i.e., actionable without proof of any damage or loss. For example, trespass on land is *actionable per se* even though no damage might have been caused by the act of trespass. For a successful redressal, the plaintiff has to prove only that he suffered legal injury even though there was no physical harm or damage.

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2. a. i. In the case of *Royal British Bank vs. Turquand* the directors of *Royal British Bank* company borrowed a sum of money from the plaintiff. The company's articles provided that the directors might borrow on bonds from time to time to be authorized by a resolution passed at a general meeting of the company. The directors gave a bond to Turquand without the authority of any such resolution. It was held that Turquand could sue the company on the strength of the bond, as he was entitled to assume that the necessary resolution had been passed.

ii. **The Doctrine of Indoor Management**

This doctrine lays down that the persons dealing with the company having satisfied themselves that the proposed transaction is not in its nature inconsistent with the memorandum and articles, are not bound to inquire into the regularity of the internal proceedings. That is, while the persons contracting with a company are presumed to know the provisions or contents of the memorandum and articles, they are entitled to assume that the provisions have been observed by the officers of the company. An outsider is not bound to see that the company carries out its own internal regulations. This rule has been found to be of less rigor as compared to Doctrine of Constructive Notice.

The Doctrine of Constructive Notice says that every person who contemplates to enter into a contract with a company has the means of ascertaining the propriety of the contract being entered into, as the Memorandum and Articles of Association are public documents.

- b. i. The transaction by Mr. Amrit Singh, in the given case comes under the purview of sale of moveable property. As the subject matter of the transaction is itself moveable property, hence it is neither lease nor sale within the meaning of Transfer of property Act, 1882. The facts mentioned in the above case are similar to the case of Dan Singh vs. Janki Saran, wherein the court held that if the transferee is entitled to appropriate the produce or benefit out of the trees during a certain period of time amounts to the lease of an immovable property. If such trees are sold for being cut and has to be removed within a specified time, that amounts to the sale of a movable property but not the lease within the meaning of the TP Act. To constitute a lease, the subject matter should be an immovable property and the same is governed under the provisions of the TP Act. The definition of immovable property as mentioned under the General Clauses Act is used in Section 3 of the TP Act. It is negative and non-exhaustive, as it states that the immovable property does not include standing timber, growing crops and grass. For instance, land, house and buildings, minerals, mines, and benefits arising from the land, right to enter upon the land, lease, right of way, a fishery, etc. are examples of the immovable property.

ii. **Demise or Partial Transfer of Immovable Property:**

The term 'demise' is derived from the Latin word '*demitto*' that means a transfer or conveyance and it is also used in the English Law. Such term is not used in the Indian enactment. It is commonly used by conveyancers in India in the context of partial transfer by way of lease. Lease is a partial transfer of property, i.e., right to enjoy the land for a period or in perpetuity for a consideration but not the transfer of ownership. The lease creates a *right in rem* as it is a transfer of an interest in the land and lessee has the possession and peaceful enjoyment of the land for the period of lease. Hence, the transfer of ownership amounts to the sale, whereas the partial transfer is the lease. In *Byramjee Jeejeebhoy (P) Ltd., vs. State of Maharashtra*, Shah J, held that a lease contemplates, 'a demise or a transfer of a right to enjoy land for a term or in perpetuity in consideration of a price paid or promised or services or other things of value to be rendered periodically or on specified occasions to the transferor'.

3. a. i. Rahul cannot succeed legally to recover his auto-rickshaw. As per the terms of contract, Bank has a right to seize the vehicle. If the hypothecator refuses to return the goods to the hypothecatee, then the hypothecatee has a right to seek court help in recovering them. The decision of the Andhra Pradesh High Court in *Bank of Chittor vs. Narsimhulu* is a landmark case in this regard, wherein the Court held that the sale was subject to the pledge. "There was a constructive delivery or delivery by attornment to the bank.

- ii. **Rights of Hypothecatee:** A hypothecatee is not in actual possession of the goods. He grants the right of use to the borrower. He naturally has a right to take possession of the goods if the borrower makes default. He can then sell them in his capacity as a pledgee. Intervention of the court is not necessary. Where, however, the hypothecator is not voluntarily handing over possession, recovery of possession would have to be effected through legal process. Where the goods have been subjected only to charge within the meaning of Section 100 of the Transfer of Property Act, not amounting to pledge, intervention of the court would be necessary to bring about the sale of the property charged. The terms of the agreement would be a guiding factor to find out whether what was created was a pledge or charge.
- b. i. Yes, the note given by Mr. Rakesh is a promissory note because it is an undertaking/ promise to pay Rahim or order the sum of rupees Twenty Five Thousands only.

Promissory Notes

Section 4 defines a promissory note as 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 instrument”. However, Section (1)(4)(a) of the Information Technology Act provides that the Act will not apply to promissory notes. Thus, a promissory note cannot be made by electronic means.

- ii. **Essentials of a Promissory Note:** A promissory note should conform to certain requirements as:
- It must be in writing: The basic objective is to exclude an oral agreement from the purview of the Act. The writing on the promissory note may be either in pencil or in ink and also includes printing, lithography or any other form of depicting the words in a viewable form.
 - It must contain an express promise to pay: An implied promise is not enough to constitute a promissory note.
 - The promise or undertaking to pay must be definite and unconditional.
 - The maker must sign the negotiable instrument without which it is taken as incomplete and ineffective. The signature signifies that the person is personally authenticating and giving effect to the contract contained in the instrument.
 - The negotiable instrument must clearly point out the maker.
 - A promissory note may be made either jointly or jointly and severally. The sum payable must be certain without any scope of contingent additions or subtractions.
 - The payment must be in money and not in kind. If the instrument contains an agreement to pay in kind then it cannot be considered as a promissory note.
 - The promissory note must be properly stamped in accordance with the provisions of the Indian Stamp Act. Each stamp must be duly cancelled by the maker’s signature.
 - It may be payable on demand or after a specified period.
 - It cannot be made payable to bearer on demand.

4. a. i. Mr. Avnish is liable for Hacking under section 66 (2) of the IT Act, 2000. Having secured unauthorized access to the computer system of Mr. Krishna Manohar, he also committed the offence of deleting, altering and destroying the confidential information existing in the computer of Mr. Krishna Manohar. Hence, Mr. Avnish is liable for imprisonment upto 3 years or fine up to Rs 2 Lakhs or both as prescribed under section 66 (2) of the IT Act, 2000.

The following table explains the nature of offence, penalty and the relevant provision applicable to the offence of hacking:

Hacking	Punishment	Section
Hacking with computer system causing wrongful loss or damage to public or any person. <ul style="list-style-type: none"> deleting, altering, destroying any information residing in the computer. 	Imprisonment up to 3 years or fine up to Rs.2 lakh or both.	66(02)

- ii. Section 72 of the proposed amendments to the Information Technology Act, 2000 discusses the constituents of breach of confidentiality and privacy. It explains that if any person secures access to any electronic record, book, register, correspondence, information, document or other material without the consent of the person concerned intentionally discloses such material to any other person shall be punished with imprisonment for a term which may extend up to two years, or with fine which may extend to five lakh rupees or with both. The following table shows the relevant provision, punishment applicable to breach of confidentiality and privacy:

Breach of Confidentiality and Privacy	Punishment	Section
Securing access to electronic record disclosing electronic record/information documents.	Imprisonment upto 2 years or fine upto Rs. Five lakh or both. (as per the proposed amendments to the IT Act, 2000)	72

- b. i. Mr. Ravi can file an appeal against the decision of a District Forum before the State Commission, appeal against the decision of a State Commission can be filed before the National Commission and appeal against the orders of the National Commission can be filed before the Supreme Court. The time to file an appeal is within a period of thirty days.

No appeal by a person who is required to pay any amount in terms of an order of the District Forum, shall be entertained by the State Commission unless the appellant has deposited in the prescribed manner fifty percent of that amount or twenty five thousand rupees (thirty-five thousand in case of the National Commission and fifty thousand in case of the Supreme Court), whichever is less.

A careful reading of Section 17 allows the State Commission to entertain appeals against orders of the District Forum and the orders of the State Commission may be appealed against in the National Commission under Section 21 of the principal Act. Section 17(b) confers revision jurisdiction on the State Commissions. This is not its original jurisdiction and no appeal will lie against the orders passed under its revision jurisdiction. Section 19 only allows appeals to the National Commission from the exercise of its original jurisdiction of the State Commission. If the appeals are not filed within the prescribed time limit of 30 days from the date of the order, such order of the District Forum, State and National Commission becomes final (Section 23). There is no prescribed time limit for revision.

- ii. Yes, there can be a further review of the said appeal before the National Commission.

Judicial Review by the National Commission. The National Commission is now empowered under Section 22(2) to review its own decision/order where there is a patent error. This power is limited to review errors apparent from the records and not all errors. There is no similar power to the District Forum or the State Commission. Further, according to Section 22 A, the National Commission can set aside its own *ex-parte* orders, where the aggrieved party has filed an application to set aside the order in the interests of justice. This power is conferred exclusively on the National Commission and hence any party aggrieved by the orders of the lower forums can only file an appeal against the order.

5. a. i. The director of Aditya Pvt. Ltd. will be liable for breach of his fiduciary duties for borrowing money beyond his authority and misusing it without the knowledge of the other directors of the company.

Fiduciary Duties

The first duty or obligation of directors is not to exceed their authority and powers and to act with honesty and in good faith. They should not engage in any activity which is *ultra vires* the company or illegal.

The obligation of Directors is to act honestly and with utmost good faith.

Directors should not use unpublished and confidential information belonging to the company for their own purpose. Any knowledge or information that is generated by the company is its own property and cannot be put to unauthorized use. Any gain by use of such inside information has to be accounted for to the company.

- ii. **Statutory Duties**

According to Section 297, a director of a company or his relative, a firm in which the director or his relative is a partner, or any other partner of a firm in which such director is a member or director should not enter into contracts with the company for sale, purchase or supply of any goods, materials or services unless with the consent of the Board of Directors [(Subsection (1))].

Section 297(1) further provides that in case of a company having a paid-up share capital of rupees one crore or more, no such contract shall be entered without the prior approval of the Central Government.

According to Section 299, every director who is interested directly or indirectly in any contract, whether present or future should reveal his interest at a meeting of the Board of Directors.

Disclosure of his interest may be made by giving a general notice to the Board which shall be treated as adequate disclosure of interest in relation to any contract so made.

- b. i. Yes, the corporation would be liable for its omission to remove away the poisonous tree from the premises of the public park. The act of the corporation being a civil wrong amounts to torts. To constitute a tort there must be a wrongful act which is either positive or negative. A person is said to commit a civil wrong if he/she breaches a legal duty owed to another, the same applies here too. Hence the corporation is liable for its failure to perform its legal duty.

ii. **Tort vis-à-vis Crime:**

In *P.Rathinam Nagbhusan Patnaik vs. Union of India* the Supreme Court differentiated a tort from a crime. In brief, the following are the points of distinction between a crime and a tort:

- Crime is a wrong against the society. Tort is a wrong against an individual.
- As crime is a wrong against the society, the State initiates action against the accused. In tort, the individual who is the victim initiates action.
- In crime, the State action is called prosecution. In tort the individual action is called a suit.
- As a rule, the object of criminal justice is punishment of the accused. In tort, the object is compensation to the victim.
- Thus, Criminal Law looks to the accused and Law of Torts looks to the victim. Restoration of the status of the victim is the purpose of tortious action.
- Crime, as a rule, is non-compoundable. Tort is compoundable.
- Though fine by way of money is imposed in crime, it goes to the State and not to the victim. Whereas in tort compensation amount must be paid to the victim.

6. i. The liability of the Polluter, under the law of tort is one of the major and oldest legal remedies to abate pollution. The most important tortious liabilities for environmental pollution are Nuisance, Trespass, Negligence and Strict Liability. In addition to these categories, the Supreme Court of India has added a new class based on the principle of Absolute Liability. The principle of Absolute Liability was developed by the Supreme Court in the post Bhopal Gas Tragedy period in response to the spread of hazardous industries and was later adopted by the Legislature. Under each one of the rules the liability of the defendant is 'no-fault' liability. Such liability can arise even if the defendant is not at fault, i.e., he may not be negligent, or he does not cause the harm intentionally or even if he has taken care to see that his act does not cause any harm.

The Rule of Strict liability appeared to be failing in its application for its exceptions and hence was not considered being a fit rule to be applied in the conditions prevailing today, in India. The Supreme Court in *M.C. Mehta vs. Union of India* (1987) recognized another rule – Rule of Absolute Liability in which the liability was absolute, more stringent than that under the Strict Liability rule, and also not subject to the exceptions to the rule in *Rylands vs. Fletcher*.

In the given situation the industry, which manufactures plastic items burnt its waste products outside the city, far away from the residential area. Nevertheless the gases released in the process and caused a noxious atmosphere in the residential areas. People living in the residential area filed case against owners of the industry. Though there was no negligence on part of the owners of the industry, they are liable under the principle of absolute liability, as it has affected their health and the area where they live. This principle of liability arose through the decision of Supreme Court in *MC Mehta vs. Union of India*, where the industry cannot take any defence for their act.

- ii. *M.C. Mehta vs. Union of India*, case is also known as oleum gas leakage case. In this case there was a leakage of oleum gas from one of the units of Shriram Food Fertilizer Industries in the city of Delhi, on 4th and 6th December, 1985, resulting in the death of an advocate and all the ill effects were felt by several other persons.

There was a claim of compensation through a writ petition filed in the Supreme Court by way of public interest litigation. It was in the mind of the Court that just a year earlier, there was a disaster in Bhopal when MIC gas had leaked from one of the plants belonging to the Union Carbide, resulting in the death of at least 3,000 persons and various kinds of ailments, generally serious, to lacs of others. The Court found that such victims could not be provided relief by applying the rule of Strict Liability laid down in *Ryland vs. Fletcher*. This was so, mainly because of the various exceptions to that rule, whereby the defendant could avoid his liability. For instance, when the escape of gas was due to the act of a stranger, say, it was a case of sabotage, the defendant was not liable under that rule. In this background, the Supreme Court held that it was not bound by the rule of English law formulated in a different context in the 19th century, and evolved a new rule, the rule of 'Absolute Liability'. According to this rule, when an enterprise is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of people, it owes an absolute and non-delegable duty to ensure that no harm results to anyone from such activity. If the harm results to anyone due to such activity, the enterprise must be absolutely liable to compensate for such harm and should not be allowed to avoid liability by pleading that it was not negligent. It was further held that the rule of Absolute Liability is not subject to any of the exceptions to the rule in *Ryland vs. Fletcher*. Since the payment of compensation could be awarded by the filing of a suit in an appropriate Court rather than through a writ petition, the Supreme Court directed that those organizations, who had filed this petition, may file actions on behalf of the sufferers of the leakage of Oleum gas, in the appropriate Court within 2 months and claim compensation on their behalf.

7. i. In the given set of facts, 'A', a producer of a film and B a distributor entered into a contract for the distribution of the company. A wants to resolve their future disputes to arbitration, whereas B expressed his willingness but did not sign this agreement. According to the Arbitration and Conciliation Act, 1996 it is not necessary that both the parties to the agreement should sign for arbitration agreement. If the parties do not object about the content then it can be held valid.

Arbitration Agreement – Not necessarily to be signed by Both the Parties

Section 2 (a) of the Arbitration and Conciliation Act, 1996 provides that an agreement in writing means that the terms of an agreement should be expressed in writing and the agreement should be such that it binds both the parties and that the actual signatures of both the parties on the arbitration agreement are not essential.

As per Section 7(4) of the Arbitration and Conciliation Act, 1996 a document, namely an arbitration agreement should be signed by the parties. However, after the plain reading of Section 7(4) (b) to (c), it is clear that it is not necessary that both the parties should in all cases sign the arbitration agreement between the parties. It is not a condition of an effective arbitration agreement that it must be incorporated in a formal agreement executed by both the parties thereto, nor is it required to be signed by the parties. A document signed by one party and accepted by the other is enough for the purpose of forming an agreement.

- ii. **Legal Attributes of the Arbitration Agreement**

Agreement: The arbitration can be only by an agreement in writing between the parties. Arbitration can be by a sole arbitrator or by three or more persons. But if it is not by a sole arbitrator, it shall be by an uneven number of members, such as three, five, seven etc. Arbitrators can be named in the agreement itself or nominated in accordance with the provisions of the contract after the disputes have arisen.

Legal Validity: An arbitration agreement as mentioned above, being an agreement, must be legally valid in accordance with Section 10 of the Contract Act. The said section reads thus: "All the agreements are contracts, if they are made by the free consent of parties competent to contract, for a lawful consideration and a lawful object, and are not expressly declared to be void."

Evincing Interest to Refer Disputes: The arbitration agreement must have an agreement to refer the dispute to arbitration. An agreement is not a mental state but an act and as an act it is a matter of inference from the contract. The parties are to be judged not by what is in their mind but what they have said, written or done behind all forms of contracts, wherein no doubt lies behind the basic idea of assent. Assent, again involves the question of intention which again, is not purely subjective but objective.

Law and Place Applicable: In the case of international arbitration, the arbitration clause should provide the place of arbitration and substantive law applicable to the contract. When they are not provided in the clause, the parties to the contract may agree to a place of arbitration failing which it shall be decided by the arbitrator(s).

Part C: Applied Theory

1. Classification of the Courts in India:

The Indian judiciary owes its origin to the judicial system that existed in the British India. The Constitution of India provides the three-tier judiciary, which is independent of the other two organs of the State i.e., the Executive and the Legislature. Based upon the above distinction between laws, the courts have been classified to interpret law.

The Indian Constitution provides a unified court system. The objective of the unified court system is to render justice to those who come to the court seeking it. It plays an important role in providing remedies in all matters arising out of Constitutional, Civil, Criminal law, etc.

The unique feature of the Indian Constitution is that it distributes powers between the center and the states. This feature helps in classifying the courts into district and state level courts. The reason behind the classification is to expedite the court proceedings to meet the needs of the rising population and the offence rate and also to ensure that justice is not delayed. Previously it used to take 5 to 15 years to dispose off a suit. Thus, it is rightly said that 'Justice delayed is justice denied'. The courts are classified at Center, State, and District and even in Village levels and are established for the speedy disposal of the disputes.

Supreme Court

In the hierarchy of courts, the Supreme Court stands at the top. It is the apex court in the Indian Judicial System. As the central court of the country, it deals with all types of cases i.e., civil, criminal, administrative service matters etc. The Supreme Court is an appellate court and a court of record. The Chief Justice of India heads the Supreme Court. The Supreme Court acts as the head of all other courts in India. The President on the advice of the Prime Minister will appoint the Chief Justice and other Judges.

High Court

The High Court occupies second place in the hierarchy of courts. Every state has a High Court and in some cases two or more states are governed under one High Court. All the subordinate courts will be under the control of the High Court. For all the subordinate courts in India, High Courts act as courts of records and as appellate court. The High Court entertains all kinds of cases. It is independent of the state legislature and executive. After consulting the Chief Justice of Supreme Court and State Governor, the President of India will appoint the Chief Justice of the High Court.

Subordinate Courts

Subordinate courts come last in the hierarchy. Their number will be fixed according to the state population. Judges of the subordinate courts are appointed by the Governor of the State concerned after consulting the High Court. The High Court has control over the subordinate courts in matters like, posting, promotion, granting leave and a variety of other matters.

Civil Courts

To administer civil law disputes, every state has a hierarchy of civil courts; both at city and district levels subordinate to their respective High Courts. The civil courts are assigned a particular territory in a city or a district of the state to entertain the cases of a particular pecuniary limit i.e., the limit of the monetary value. The hierarchy and the classification of the civil courts vary from state to state.

Criminal Courts

Every state has subordinate criminal courts to administer criminal disputes both at the city and district level. Every state consists of many sessions divisions at city level and every sessions division in turn consists of many district level courts. These in turn may further be divided into sub-divisions. The criminal courts are assigned to award punishments to the convicted. The courts impose both fines and imprisonment. The machinery for prevention and punishment of crimes is administered through the criminal courts.

Tribunals

These are the courts under a special statute. In these tribunals, a board of officials is appointed to settle the issues and to pronounce judgment in special cases. These courts deal with problems related to taxation, foreign exchange, labor disputes, land reforms, consumer disputes, elections, administrative litigations etc. Each of the above fields has an independent tribunal.

Any appeal from this tribunal is made directly to the High Court. Each State and Union Territory has tribunals pertaining to various fields. The main purpose for establishing these tribunals is – speedy disposal of matters and more concentration on the cases of same nature. All tribunals enjoy equal status with the Civil or High Court. The procedures followed in settling the issues may slightly vary with that of other courts. The tribunals are based on natural justice.

Central Administrative Tribunal

These tribunals are established to adjudicate disputes, or complaints relating to recruitment and conditions of services of public servant, under the control of the union government. The decisions of administrative tribunal can be challenged before the Supreme Court. The jurisdiction of the courts shall fall, with regard to state public service. The administrative tribunal can declare a statute as unconstitutional. It may decide matters relating to question of law. For example, res judicate. The tribunals are guided solely by the principles of natural justice and have power of judicial review. Punishment is imposed based upon the discretion of the disciplinary authority. There are State Administrative Tribunals at state level also.

Industrial Tribunal

These tribunals are constituted to adjudicate the matters relating to industrial disputes such as – wages, hours of work, leave, shift work, retrenchment, etc. These tribunals are established by the central government, one or more for each state. They are concerned with matters of national importance. The decisions of the industrial tribunal are subject to appeal in the general court system. For promotion of settlement of industrial disputes, the central and the state governments may establish a Board of conciliation and where the number of employees is more than 50 they must provide a grievance authority for the settlement of the industrial dispute. This grievance settlement authority consists of a body comprising representatives of workers and employers.

Labor Tribunal

The main aim in establishing the labor tribunal is to provide quick, easy and inexpensive means to settle monetary disputes between employer and employee. The tribunal hears the cases, such as failure to comply with the provisions of the employment ordinance and the apprenticeship ordinance. The labor tribunal looks into the claims like, wages due for work done, severance pay, long service payment, orders for reinstatement or re-engagement, award of terminal payment, award of compensation etc., and other claims which will change or emerge from time to time as specified by law. Any appeal in this regard may be made before the High Court. If High Court feels that there is a question of law of general public importance, it will either consider the appeal, or refuse it and its decision is final.

Consumer Dispute Redressal Tribunal

The word 'consumer' has a wide range of definitions. A consumer is a recipient of a goods or product or service. These tribunals are established to protect a consumer's rights. The complainant has a right to claim for damages from unfair supplier/manufacturer. The cost of the suit or claim is very low and they are within the reach of the ordinary man. The complaint will be disposed very soon, thus saving the time of the complainant.

The jurisdiction, powers and authority here are same as those of a civil court, such as, issue of summons, examination of witness, order of production of documents, etc.

All the above said tribunals are established to serve the consumers. The tribunals are statutory bodies intended to conduct enquires into the matters. The tribunals are considered the best form for purposes of fact-finding in the field of investigation and disposal of cases.

Other than these courts, in recent times, Fast Track Courts, Lok Adalats etc., are established to reduce the burden of the existing courts disposing off the cases in short period. At the village level, there are courts viz. Nyaya Panchayaths etc. All these courts aim at giving justice to the sufferer in the minimum time possible.

2. Lien is the right of a person (usually the creditor) to retain the possession of the goods and securities belonging to another person (the debtor) till the amounts due to him from such owner are fully realized. The lien can be defined as "the right to retain the lawful possession of the property of another until the owner fulfills a legal duty to the person holding the property, such as the payment of lawful charges for work done on the property. A mortgage is a common lien."

A lien has judicially been defined as "a right in one man to retain that which is in his possession belonging to another until certain demands of the person in possession are satisfied."

Illustration: The transporter of goods retains the possession of the goods that he has carried to the destination till the amount of freight is paid to him.

The right of exercising Lien may arise in three ways: By express contract in between the parties; from implied contract in accordance with the general or particular usage of trade; and by legal relation between the parties.

In order to create a valid lien, the following factors are essential.

The party who acquired the property should have the absolute title of ownership over that property.

That the party claiming the lien should have an actual or constructive possession of property or goods with the assent of the party against whom the claim is made.

The lien should arise upon an agreement, express or implied and not be for a limited or specific purpose inconsistent with the express terms or the clear, intent of the contract; e.g., when goods are deposited to be delivered to a third person or to be transported to another place.

In general, the right of the holder of the lien is confined to the mere right of retainer. But when the creditor has made advances on the goods of a factor, he is generally invested with the right to sell. In the absence of express contract a lien does not of itself carry (subject to a few exceptions) a right of sale of goods/property on the part of the lienee (the person who exercises the right). However, when such right of sale is incorporated as a matter of special contract in between the owner and the lienee, the lienee will have to closely observe the contractual rights given to him and should be careful to serve any notices of his intention to sell the goods/property according to the terms of the contract and he should follow the necessary procedures stipulated by the contract meticulously.

There are two kinds of lien; particular lien and general lien.

Particular Lien

A person claims the right to retain property in respect of money or labor expended on such particular property. This right is known as particular lien. In Indian law, particular lien is available to all the classes of people other than those mentioned in Section 171 of the Indian Contract Act.

The creditor with a particular lien can retain the possession of the goods only till the dues from the debtor for a particular debt for which the securities were handed over have been satisfied. He can not retain them for any dues from the debtor on other accounts.

Example: A, the goldsmith is given the gold by B, the owner to convert it in the form of golden ornaments. He can retain the possession of the ornaments only till the service charges for making those ornaments are paid by the owner, but not for any other liability to be discharged by the owner of the golden ornaments.

General Lien

“A general lien is one which the holder thereof is entitled to enforce as a security for the performance of all the obligations, or all of a particular class of obligations, which exist in his favor against the owner of the property.”

A general lien is a lien in respect of all monies owed to the lienee. A particular lien is limited to monies owed to the lienee in respect of the goods over which the lien is sought to be exercised.

Illustration: ‘X’ has borrowed from the bank in the form of two types of loans, one is the agricultural loan for cultivation of crop and the other is a personal loan against the security of his gold ornaments to meet his personal expenditure. The agricultural loan has become due for repayment. If there is no specific agreement in between the bank and the borrower in consistent with the lien, when the personal loans is repaid, the bank can exercise the right of general lien by retaining the possession of golden ornaments after the borrower repays the entire liability in his personal loan till the dues accrued in the agricultural loan are repaid. But, the bank cannot exercise the right of lien when the agricultural loan is not due for repayment at the time when the personal loan is closed.

3. The Regulatory Authority has the following duties to be performed under the provisions of IRDA Act, 1999:
- The important duty of the Authority is to regulate, promote and ensure orderly growth of the insurance business and reinsurance business (Section 14).
 - The Authority has to maintain proper accounts and other relevant records, prepare annual statements of accounts in such form as may be prescribed by the Central Government in consultation with the Comptroller and Auditor General of India.
 - The Authority, as per the directions of the Central Government and Comptroller General will arrange the audit of the accounts and rectify any defects pointed by the audit.
 - The Authority will submit the audited balance sheet and other financial statements to the Central Government and the Government will lay the reports before the houses of the Parliament.
 - The Authority will submit all the financial statements to the Central Government within nine months from the completion of financial year.
 - It is also under duty to submit the reports on existing program of insurance business for the promotion of the development of insurance industry.
 - The authority is under a duty to follow the directions issued by the Central Government and report the outcome of the directions.
 - It has the duty to protect the interest of policyholders in matters concerning assignment of policy, nomination of policy, settlement of insurance claim, surrender value of policy and other terms and conditions of contract of insurance.

Powers and Functions of the Authority:

The IRDA Act, 1999, has provided following the powers and functions to be enjoyed and performed by the Authority:

- The Authority has the general supervisory power of insurance industry and it has the administrative powers.
- It has the powers to appoint the staff and officers required to conduct the business of the Authority smoothly.
- It can delegate some general or special powers by an order in writing to the Chairperson or the Members of the Authority along with conditions if it feels as necessity.
- It has the power to constitute committees of the members and delegate the powers to the committee as required by the insurance industry or as per the regulations of the Authority.
- It has the power to hold the property, acquire the property. The property may be movable or immovable.
- It has a power to issue a certificate of registration, renew, modify, withdraw, suspend or cancel such registration to the applicant, i.e., insurance company.
- It has the power to prepare a code of conduct to the agents. Chief agents, principal agents, surveyors and loss assessors or to the intermediaries who take part in the development of insurance business and in the settlement of the claims.
- Promoting and regulating professional organizations connected with the insurance and reinsurance business.
- Promoting efficiency in the conduct of insurance business.
- It has the power to levy fees and other charges for carrying out the purposes of this Act.
- It has the power to call information from insurances undertakings, inspection of, conducting enquiries and investigations including audit of the insurers, intermediaries' and other organizations connected with the insurance business.
- It has the power to regulate the investment of funds by insurance companies.
- It has the power to regulate the margin of solvency.
- It acts as adjudicator in the settlement of disputes between the insurers, intermediaries of the insurers.
- It acts as supervisory authority and checks the functioning of Tariff Advisory Committee.
- It controls and regulates the rates, advantages, terms and conditions that may be offered by insurers in respect of general insurances, which are not controlled by the Tariff Advisory Committee.
- It formulates the regulations and fixes the targets to be achieved in the field of rural and social sectors by the insurers.
- It has the power to exercise the powers sanctioned by other insurance laws or by other notifications issued by the Central Government from time to time.
- It has the powers to make regulations with the consultancy of Insurance Advisory Committee in the field of finalizing the service conditions of the members and staff of the Advisory Committee and provisions regarding the meeting and transactions to be carried out by the Advisory committee in promoting the insurance business.

The Central Government is having the powers to direct the Authority and grant funds to it with sanction of the Parliament. The fund so constituted is called the Insurance Regulatory and Development Fund which can be used to meet the expenses of the salaries, allowances and other remuneration of the members, officers and other employees of the Authority and to meet all other expenses required to discharge the duties and functions of the Authority. This fund also gets credit from the insurance premiums, application fee from insurers, agents, and intermediaries for registration. It get funds from the share of the insurance premium as required to be paid under Section 7 of the Insurance Act, 1938.

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Model Question Paper III

Time: 3 Hours

Total Points: 100

Part A: Basic Concepts (30 Points)

Answer all the questions. Each question carries one point.

1. The essential elements of a valid offer are:
 - a. Offerer must have an intention to be bound by his offer.
 - b. Offer must be made to a specific person/party and not to public at large.
 - c. Offer must be definite
 - d. Both (a) and (c) of the above.
 - e. All of (a), (b) and (c) above.
2. Who defined Law as the body of rules recognized and enforced by courts of law?
 - a. Savigny.
 - b. Austin.
 - c. Sir John Salmond.
 - d. Kelson.
 - e. Roscoe Pound.
3. In which of the following cases a contract stands discharged by operation of law, where one of the parties breach the contract.
 - a. By express consent.
 - b. By novation of terms of contract.
 - c. By unauthorized alteration of terms of contract.
 - d. By renunciation of obligations.
 - e. By destruction of subject matter.
4. Which of the following is a just and equitable ground to wind-up a company by court?
 - a. There is a deadlock in the management of a company.
 - b. When the membership in a public company falls below the statutory minimum of seven members.
 - c. If a company is unable to pay its debts.
 - d. If a company does not commence its business within a year of its incorporation.
 - e. All of the above.
5. General insurance is a
 - a. Voidable Contract
 - b. Wager
 - c. Contract of Guarantee
 - d. Contract of Indemnity
 - e. None of the above.

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6. The first annual general meeting of a company is to be held within _____ of its incorporation:
- 6 months
 - 12 months
 - 15 months
 - 18 months
 - 24 months.
7. The liability of members in a company:
- Is limited to the called-up value on shares
 - Is nil, if the shares are fully paid-up
 - Is limited to the guarantee given by members
 - Is unlimited
 - Is decided at the time of winding up.
8. Income is said to be accrued to a person when:
- He actually receives it.
 - He gets a fixed and unconditional right to receive it.
 - His interest is contingent.
 - His interest is vested.
 - He earns the income.
9. Memorandum of association:
- Is the Constitution of the company
 - Enables outsiders to know the powers of the company
 - Indicates delegation of powers
 - Both (a) and (b) above
 - All of (a), (b) and (c) above.
10. State the limitation period for filing a consumer complaint from the date of cause of action under the Consumer Protection Act, 1986:
- three years
 - one year
 - six months
 - two years
 - four years
11. The transferee becomes a member of the company when:
- The instrument of transfer is delivered to the company
 - When the company acknowledges receipt of the instrument of transfer
 - When the instrument of transfer along with the share certificates are delivered to the company
 - When the instrument of transfer along with the letter of allotment are delivered to the company
 - When the transfer is registered by the company.

Legal Environment of Business

12. Managing Director of a company may be appointed by virtue of:
- An agreement with the company
 - A resolution passed in the general meeting of the company
 - A resolution passed in the meeting of the board of directors of the company
 - The memorandum and articles of association of the company
 - Any of (a), (b), (c), (d) above.
13. The pawnee in case of a pledge:
- Can retain the goods pledged, until the debt is paid
 - Can retain the goods for payment of interest due on the debt
 - Cannot retain the goods for necessary expenses incurred in respect of goods pledged
 - Cannot file a suit where pawnor makes default in payment
 - Both (a) and (b) above.
14. A board meeting is called by giving _____ notice to the directors:
- 7 days
 - 14 days
 - 21 days
 - 1 month
 - No time limit fixed.
15. The main purpose of Securities Contract (Regulation) Act is to:
- To prevent undesirable transactions in securities
 - To prevent Exchanges from functioning
 - To prevent Dealers from colluding
 - To prevent desirable transactions in securities
 - All of the above.
16. The Service Tax collected is to be deposited into the Account of:
- State Government
 - Central Government
 - Local Government
 - Both State and Central Governments
 - The State in which the service is provided.
17. A contract with a minor is:
- An illegal contract
 - Voidable at the option of the party whose consent was obtained by coercion
 - Void ab initio
 - Voidable at the option of either of the parties to the contract
 - An invalid contract.

18. The chargeable limit of the net wealth under the Wealth Tax Act, 1957.
- Rs. 10 lakh
 - Rs. 12 lakh
 - Rs. 13 lakh
 - Rs. 15 lakh
 - Rs. 25 lakh.
19. Which of the following statements is false in relation to the Share Certificate:
- It is an evidence that shows that the person named therein is the holder of specified number of shares of the company.
 - It is to be issued only in pursuance of the Board resolution
 - It is a Negotiable Instrument.
 - It is issued under the common seal of the company.
 - The certificate is subject to stamp duty as per the Stamp Act of the respective State in which the registered office of the company is situated.
20. The rate of sales tax on declared goods sold to un-registered dealers under the Central Sales Tax Act, 1956 is:
- 5 percent
 - 4 percent
 - twice the rate applicable to sale or purchase of such goods within the State.
 - thrice the rate applicable to sale or purchase of such goods within the State.
 - 10 percent
21. In which of the following circumstances, the right of lien is impliedly waived:
- Where the seller takes a negotiable instrument or any other security for the price.
 - Where the seller by his conduct, dispenses with payment of the price.
 - Where the seller claims to retain the goods under some other right, instead of right of lien.
 - All of (a), (b) and (c) above.
 - None of the above.
22. Which of the following is true about a cheque?
- An ante-dated cheque is invalid.
 - A cheque is valid for 6 months.
 - A cheque is negotiable by statute.
 - A drawee of a cheque can be any one including a banker.
 - Both (b) and (c) above.
23. Which of the following is the anti-thesis to the Rule of Doctrine of Indoor Management?
- Doctrine of *Ultra Vires*.
 - Doctrine of Constructive Notice.
 - Doctrine of Lifting of the Corporate Veil.
 - Doctrine of Waiver.
 - Doctrine of Fraudulent Preference.

Legal Environment of Business

24. The Chairman of SEBI is appointed by the:
- Central Government
 - RBI
 - Joint committee consisting of the directors of IDBI, IFCI, ICICI and UTI
 - Members of SEBI
 - The RBI and State Bank of India.
25. Which of the following relationships must exist between the parties in order that a contract is enforceable?
- Social relationship.
 - Moral relationship.
 - Legal relationship.
 - Casual relationship.
 - None of the above.
26. Which of the following statements is false in relation to the Electronic Record?
- As a document of evidence it needs a judicious explanation and legal recognition.
 - Digital Signature is equivalent to written signature.
 - Legal recognition of digital signatures facilitates e-commerce.
 - The Act forbids the issue of digital Signature Certificates by third parties.
 - Electronic records are extremely good at generating and storing data.
27. Who among the following enjoys the right of subrogation in a contract of indemnity?
- Creditor.
 - Principal debtor.
 - Indemnifier.
 - Indemnified.
 - Both (a) and (b) above.
28. Which of the following matters can be referred to Arbitration?
- Matrimonial matters.
 - Testamentary matters.
 - Lunacy proceedings.
 - Matters relating to breach of contracts.
 - Criminal proceedings.
29. Which of the following is the correct explanation for the Green House effect?
- The Chloro Fluoro Carbons (CFC's), Nitric oxide (NO), Chlorine released into the atmosphere, reacts with ozone and destroys it.
 - Oxides of Nitrogen, combine with Oxygen and Ozone to form higher oxides of Nitrogen.
 - Carbondioxide and water vapor absorb infrared radiation coming to the earth and reflect it back to the earth's surface, making the earth's surface hotter.
 - It is the biological accumulation of toxins.
 - It is toxic to territorial flora and fauna.

30. A director on appointment needs:
- To take up qualification shares within 1 month.
 - Not to take up qualification shares at all unless provided by articles.
 - To take up qualification shares before his appointment.
 - To take up qualification shares within a period of 15 days of his appointment.
 - Both (b) and (c) above.

Part B: Caselets (50 Points)

Answer any Five caselets. Points are indicated against each caselet.

1. a. Babu guarantees to make payment to Krishna the price of five sacks of flour, which is to be delivered by Krishna to Chandan. The payment is to be made within a month. Krishna delivers five sacks to Chandan and Chandan pays for them. Afterwards, in another transaction, Krishna delivers four sacks to Chandan, but this time Chandan does not pay for the sacks. With reference to this situation, answer the following:
- Is Babu liable to pay the guaranteed amount to Krishna for the second transaction?
 - Define the contract of guarantee.
- (2 + 3 = 5 points)
- b. 'A' sent some samples of his goods for display in an exhibition held in Pune. After the exhibition, he handed over the samples to an agent of a courier service for carriage to another exhibition, which would commence in Delhi after 5 days. On the courier parcel he specifically mentioned a note stating that samples must reach Delhi, on the date specified. Due to the delay by the courier service, the samples arrived after the exhibition was closed. He wants to claim damages for this special circumstance under which he incurred loss. With reference to the above stated facts, answer the following:
- What is the kind of damages that 'A' can claim from the courier services?
 - Write a note on special and ordinary damages.
- (2 + 3 = 5 points)
2. a. *Commercial Finances vs. Thressia* case discusses the liability of a indorser of a cheque. With reference to the above statement, discuss the following:
- Facts and decision of the above mentioned case.
 - Liability of an indorser.
- (2 + 3 = 5 points)
- b. Seenu is an office boy in a corporate office. At the time of appointment there was an agreement between him and the employer that Seenu can be removed at any time without mentioning any cause. In the light of the given situation, discuss the following:
- Can Seenu be removed without any reason?
 - Explain the employee and employer relation.
- (2 + 3 = 5 points)
3. a. Mr. Ravi has pledged certain goods with Mr. Jitendhar, a Pawnee. According to their terms and conditions, Mr. Ravi fails to repay the loan amount within three years. In view of the given illustration, explain the following:
- Is the Pawnee empowered to sell the goods of Mr. Ravi? Give the appropriate reasoning in support of your answer?
 - Movable and immovable property.
- (2 + 3 = 5 points)

- b. X, Y and Z form a partnership firm. X and Y take an important business decision together regarding the firm without consulting Z. Z comes to know about this fact and demands for his share of profits. In the light of the above illustration, discuss the following:
- Are X and Y liable to Z? Justify your answer.
 - Sharing of profits in a business.
- (3 + 2 = 5 points)
4. a. Waste material was collected from the city of Berhampur and dumped at an open place in the outskirts of the city. Such waste was kept open and no attempts were made to clean. Upon questioning the municipal authorities stated that cleaning of such waste was a costly affair due to high labor charges. With reference to this situation, discuss the following.
- What is the pollution for which the authority can be made responsible for dumping the waste in an open place?
 - What are the four segments of environment?
- (2 + 3 = 5 points)
- b. Mr. Mohan enters into a contract with Ms. Suvarna for the purchase of machinery, through 40 monthly installments at the rate of Rs.4,000 per month. The terms of the contract state that non-payment of one installment by Mr. Mohan will lead to breach of the contract and the future installments would be treated as only damages. Mr. Mohan fails to pay the fifteenth installment. In consequence Ms. Suvarna recovered the machinery and demanded to pay the rest of the installments amounting to Rs.1,04,000 as damages. In this context, discuss:
- Can Mr. Mohan file a suit against Ms. Suvarna for the breach of contract?
 - The concept of hire purchase agreement for machinery.
- (2 + 3 = 5 points)
5. a. Mr. Lallu Ram mortgaged a property, which is worth Rs.10,000. It was a mortgage by deposit of title deeds and was not registered. In view of this, explain the following:
- Discuss the enforceability of the above mentioned mortgage. Explain the mortgage by deposit of title deeds.
 - Simple Mortgage and Usufructuary Mortgage.
- (3 + 2 = 5 points)
- b. Arjun, who holds a valid driving license drives at a speed of 50 Kmph on a road, where traffic boards instruct the drivers to maintain the speed limit at 15 Kmph, and hits Bobby a pedestrian.
- Can Bobby file a suit against Arjun for the breach of duty?
 - Distinguish between malfeasance and misfeasance.
- (3 + 2 = 5 points)
6. a. Ms. Chandrika bought a pen drive through e-shopping. The sale was according to the terms and conditions of sale as mentioned in the website. Chandrika accepted the contract by clicking on the option "I agree". She paid the amount through the electronic payment system. With reference to the given facts:
Explain the nature of contract entered by Ms. Chandrika.
- (5 points)

- b. M/s. Kawalji Enterprises and M/s. Sunil Enterprises submit their dispute to conciliation and accept the terms of settlement proposed by the conciliator. Discuss the following, with reference to the above situation.
- Whether the above said settlement through conciliation has any legal effect.
 - Can the conciliator act as an arbitrator?

(3 + 2 = 5 points)

7. In *Durga Shah Mohan Lal Bankers vs. Governor General in Council*, it was held that mere failure to prove the consideration between the payee and the drawer will not disentitle the endorsee as a holder in due course. In view of this statement, discuss the following:

- Facts of the case.
- Meaning of Holder in due course and privileges of a Holder in due course.

(3 + 7 = 10 points)

Part C: Applied Theory (20 Points)

Answer the following questions. Points are indicated against each question.

- Explain about air and water pollution.
(6 points)
- Explain the concept of Gift. How can the transfer of property by way of gift be revoked?
(8 points)
- Analyze the meaning and definition of Restrictive Trade Practices. What are the indicators of a Restrictive Trade Practice? How to determine whether a trade practice is restrictive or not under the Competition Act, 2000?
(6 points)

Model Question Paper III

Suggested Answers

Part A: Basic Concepts

1. (e) By making an offer, the offeror expresses his willingness 'to do' or 'not to do' something with a view to obtain consent of the other party to such act or abstinence. An offer can be made either to a specific person or to the public at large. Further the terms of the offer should be definite and unambiguous.
2. (c) Sir John Salmond in his work Jurisprudence defined Law as body of principles recognized and applied by the State in the administration of justice.
3. (c) Where a party to a contract makes any material alteration in the contract without the consent of the other party, the other party can avoid the contract.
4. (a) A company may be wound up by the court on 'Just and Equitable ground', when there is a deadlock in the management of a company. The court may order winding-up of a company under specified circumstances mentioned in (b), (c) and (d).
5. (d) A contract of insurance except life insurance is a contract of indemnity. In a contract of indemnity, 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.
6. (d) The first annual general meeting of a company is to be conducted within 18 months of its incorporation.
7. (b) A company whose members have their liability limited by the memorandum, to the amount if any, unpaid on the shares respectively held by them is a company limited by shares. Hence, where the shares are fully paid-up, the liability of the members will be nil.
8. (b) Income is said to have accrued if there arises a fixed and unconditional right to receive it.
9. (d) The Memorandum of Association of a company contains the fundamental conditions upon which alone the company has been incorporated. The memorandum enables shareholders, creditors and all those who deal with the company to know its powers and the range of its activities.
10. (d) Limitation for filing a complaint under Section 24-A of the Consumer Protection Act is within two years from the date on which the cause of action has arisen.
11. (e) A transfer is complete as between the transferor and the transferee when the transfer deed is executed and share certificates are handed over to the transferee. Whereas, between the company and the transferee transfer is complete only when it is registered in the Company's register.
12. (e) A Managing Director may be appointed by virtue of
 - (a) an agreement with the company.
 - (b) a resolution passed by the company in the general meeting.
 - (c) a resolution passed in the board of directors meeting.
 - (d) Memorandum/Articles of association of the company.
13. (e) The pawnee of goods is entitled to retain the goods pledged until his dues and interest on it are cleared. He can also claim necessary expenses incurred by him for maintenance of the pledged goods.
14. (e) Section 286 provides that notice of every meeting of the Board of directors of a company must be given in writing to every director for the time being in India and at their usual address. There is no time limit fixed by the Act for convening a board meeting.

15. (a) The main purpose of Securities Contracts (Regulation) Act, 1956 is to prevent undesirable transactions in securities by regulating the business of dealing therein, and by providing for certain other matters connected therewith.
16. (b) The collected service tax is to be deposited into the Central Government's account within a stipulated period.
17. (c) Indian Majority Act, Section 3 says, a person below the age of 18 years is considered as minor, and any contract entered into with a minor is *void ab initio* as minor has no capacity to contract as per sec 10 of the Indian Contract Act, 1872.
18. (d) The wealth tax is chargeable in respect of every assessment year at the rate of 1 percent of the amount by which the net wealth exceeds Rs.15 lakh.
19. (c) The share or other interest of any member in a company must be movable property, transferable in the manner provided by the articles of the company; hence a Negotiable Instrument cannot take that place. Therefore, a share certificate is not a negotiable instrument.
20. (c) It is twice the rate applicable to sale or purchase of goods within the State. Thus, if the rate applicable to sale or purchase is 4 % then the rate chargeable to the unregistered dealer is 8%.
21. (d) As per the Sale of Goods Act, the right of lien is impliedly waived, where the seller takes a negotiable instrument or any other security for the price or where the seller by his conduct dispenses with payment of the price or where the seller claims to retain the goods under some other right, instead of the right of lien.
22. (e) As per the Negotiable Instruments Act, 1881 the fact that a cheque is antedated or post-dated does not affect its validity. A cheque will be valid for 6 months from the date the cheque bears. Moreover, a cheque is a negotiable instrument, negotiable by statute. And the drawee of a cheque should be a banker alone.
23. (b) Doctrine of Constructive Notice. The doctrine assumes that the outsider has the knowledge of the memorandum and articles as these are public documents which have to be read by persons dealing with the company.
24. (a) The Chairman of SEBI is appointed by the Central Government.
25. (c) Legal Relationship: One of the essential conditions for a valid contract is that there must be legal relationship between the parties, i.e. *vinculum juris*.
26. (d) The Act provides legal recognition to digital signatures and envisages a scheme of digital signature certificates to be issued by the third parties.
27. (c) Indemnifier is a person who compensates the indemnified and gets the right of subrogation.
28. (d) Matters relating to breach of contracts can be referred to Arbitration.
29. (e) Carbondioxide and water vapor absorb infrared radiation coming to the earth and partly reflect it back to the earth's surface, and due to this, the earth's surface gets heated up. This phenomenon is called 'green house effect'.
30. (b) A director need not take up qualification shares unless provided by the articles.

Part B: Caselets

1. a. i. Babu guarantees Krishna for the payment of five sacks of flour delivered to Chandan and Chandan also paid the same. Afterwards in the next month Krishna delivers four sacks to Chandan, this time Chandan does not pay for these sacks. As the guarantee given by Babu was not intended to be a continuing guarantee, Babu is not liable for the price of four sacks that were delivered in the next transaction.

ii. **Contract of Guarantee**

Section 126 deals with Contract of Guarantee. As per this Section 'contract of guarantee' is a contract to perform the promise, or discharge the liability of a third person in case of his default. The person who gives the guarantee is called the 'surety', the person in respect of whose default the guarantee is given is called the 'principal debtor', and the person to whom the guarantee is given is called the 'creditor'. A guarantee may be either oral or written.

The purpose of a contract of guarantee is to provide additional security to the creditor in the event of default by the principal debtor. In a contract of guarantee, there are three parties i.e., the creditor, the debtor and the surety. Also, there are three contracts in a contract of guarantee (i.e., between the creditor and the debtor, between the creditor and the surety and between the debtor and the surety).

It should also be noted that a contract of guarantee presupposes the existence of a debt. If there is no existing liability, there cannot be a guarantee. Therefore, if the debt to be guaranteed is already time barred, guarantee given will not be valid and the surety will be discharged from his liability.

- b. i. In the given problem 'A' handed over sample of his goods to an agent of a courier service and specifically mentioned that the samples must reach Delhi on specific date. Due to the delay by the agent of the courier services, the samples arrived after the exhibition closed. Because of this delay, he could not exhibit his goods in the examination and he had to incur losses. For these losses 'A' can claim special damages.

ii. **Special Damages**

Special damage is what arises in the peculiar circumstances of a particular case, quite apart from the usual course of things. While making the contract, one party to the contract may bring to the notice of the other party about the particular type of losses that he would suffer under certain special circumstances. In case the contract is not performed properly and if the other party still proceeds to make the contract, it is construed that the other party has expressly agreed to be responsible for the special losses that may be caused by improper performance of his obligation. Compensation for such special losses is called as "special damages."

In accordance with the provisions of Section 73 of the Act, when a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, the compensation for any loss or damage caused to him thereby or which the parties knew, when they made the contract, to be likely to result from the breach of it. These damages are called as special damages.

General or Ordinary damages: The losses that naturally and directly arise out of the breach of the contract in the usual course of the things are called as general damages. They would be the unavoidable and logical consequence of the breach. The damages for such losses are called as general damages or ordinary damages.

2. a. i. In *Commercial Finances vs. Thressia*, it was held that where a cheque is returned unpaid by the drawee bank with the words 'refer to drawer', even then notice of dishonor should be given to the indorser of the cheque in order to make him liable.

In addition to the amount due on the instrument, the indorser is required to make good the loss suffered by the holder because of a dishonor. However, he may limit his liability by using appropriate words. For example, he may give a qualified indorsement by using the words 'sans recourse' or 'without recourse to me' or any other similar expression.

ii. **Liability of Endorser (Section 35)**

- Every indorser after dishonor is liable as upon an instrument payable on demand to every subsequent holder.

An indorser of a negotiable instrument is in the position of a new drawer and his relationship with the holder of the instrument is conditional. By endorsing a bill, the endorser undertakes that the instrument will be accepted and paid according to its tenor on presentment and in case it is dishonored, he will compensate the holder or a subsequent indorser who is compelled to pay for it, subject to due notice of dishonor being given to him.

The undertaking of an indorser of a note is similar to that of an indorser of a bill except that in case of a note there is no undertaking as to acceptance as a note is incapable of being accepted.

It should be noted that the indorser's liability under this section will not commence until the indorsed instrument is delivered to the transferee. Also due notice of dishonor of the instrument should be given to him in order to make him liable on the instrument.

- In *Commercial Finances vs Thressia*, it was held that where a cheque is returned unpaid by the drawee bank with the words 'refer to drawer', even then notice of dishonor should be given to the indorser of the cheque in order to make him liable. In addition to the amount due on the instrument, the indorser is required to make good the loss suffered by the holder because of a dishonor. However, he may limit his liability by using appropriate words. For example, he may give a qualified indorsement by using the words 'sans recourse' or 'without recourse to me' or any other similar expression.

- b. i. Seenu is an office boy in a corporate office. At the time of appointment there was an agreement between them that Seenu can be removed at any time without mentioning any cause. Therefore Seenu can be terminated without showing any cause. This kind of agreement is called, as employment at will, where the employer and the employee agree with each other to terminate the relationship just by giving a notice of fixed period of time.

Employment at Will

The doctrine of "employment at will" gives free hand to both as the employee can quit, or the employer can fire an employee at his will, at any time and for any reason and without any prior notice.

The doctrine of "employment at will" is a "default" rule of contract law, thus it applies whenever the employee and employer have not agreed on something else or an alternative.

- ii. Employer-employee relationship has acquired a new meaning and significance with the phenomenal rise of globalization, market economy and free trade. Employers can no longer dictate terms to employees. Employees have become the equal partners and players in the economic sector. In fact, the positive role being played by both the employer and the employee in all sectors of activity – Public and Private, is immensely contributing towards achieving peace, prosperity and happiness of the humankind. Efficient corporate governance is recognized as the key to progress.

The Employer-Employee Relationship

- The employer-employee relationship is primarily determined by the terms of the employment contract, which can be either oral or written.
- The contract should specify a job description, wages, employee rights and duties, and other specific terms and conditions of employment.

- A contract for employment is generally presumed to be “at will” unless otherwise specified.
 - An employer or employee can terminate an “at will” employment relationship at any time, and for any reason, unless the law provides a specific exception to this general rule.
3. a. i. Despite the general rule that a person who does not own cannot confer a better title, Mr. Jitendhar is empowered to sell the goods of Mr. Ravi. As per the terms and conditions of the contract, Mr. Ravi was supposed to repay the pledge amount within a period of three years, failing which he has to forego the right over the pledged goods. This is an exception to the general principle of ‘nemo dat quod non habet’ (no person can give a better title than he has).

ii. **Movable and Immovable Property:**

Movable property is usually referred to as goods. They are transitory in nature and generally liable to be consumed or destroyed in usage and are not the subject of perpetual or uniform enjoyment. Immovable property, on the other hand, is indestructible and is capable of perpetuity or uniform continuity of use or enjoyment. Under the English law the immovable property is termed as Real Property and the movable as Personal Property. The movable property is dealt with by the Sale of Goods Act, whereas the immovable property is dealt with under the Transfer of Property Act.

The term ‘goods’ means every kind of movable property, but the Sale of Goods Act excludes certain movables and includes others under the definition of goods. According to Section 2 (7) of the Act, ‘goods’ means *every kind of movable property other than actionable claims and money; and includes stocks 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.*

- b. i. Yes, X and Y are liable towards Z.

Duties of a Partner

- To conduct the business to the greatest common advantage of all the partners.
- To attend diligently to his duties in the conduct of the business.
- To be just and faithful to each other.
- To render true accounts and full information, relating to and, affecting the firm or any partner of the firm, or his legal representative.
- To indemnify the other partners for the fraud or willful neglect committed by him in the course of business activities.
- Unless there is an agreement to the contrary, a partner shall not ask for any remuneration for the purpose of taking part in the conduct of the business.
- A partner is under an obligation to contribute towards the losses sustained by the firm.
- A partner is prohibited to acquire any secret profits from any transactions of the firm, or from the use of the property of the firm or by using the firm name or any of its business connections, except when there is a contract to the contrary.
- A partner is not supposed to carry on a business which competes to the present business of the firm. This can be done if there is an agreement to the contrary.

ii. **Sharing of Profits of Business**

The purpose of a partnership must be to make profit. The profit must be distributed among the partners in the agreed ratio. Every partner is entitled to a share in profits. However, the sharing of losses is not the essential criteria, only some partners may share the loss. As a general rule all partners are entitled for a share in the profits.

The partnership business must be carried on by all or any one of them acting for all. Every partner has a two fold character. He can act as an agent (as he can bind the other partners by his acts) and a principal (by being bound by the acts done by other partners. Thus, the type of relationship among the partners for the purpose of carrying on the business is termed as “mutual agency”. Whether a partnership exists between two or more persons can be determined by the test of mutual agency, i.e. whether the business is carried on by all the partners or by any one acting for all.

4. a. i. In the given problem waste material was collected from the city of Berhampur and dumped at an open place in the city and is left open to air. And the municipal authorities made no attempts to clear these waste materials. The act of dumping waste material open to air amounts to solid waste pollution.

Solid waste pollution: The problem of solid waste pollution is mainly faced by developed countries where collection of waste is costly affair due to higher labor charges. In developing countries this problem is not yet so serious as old junk, newspapers, books, tins, glass bottles, etc., are collected by rag pickers. For controlling the solid waste pollution, methods employed are – recycling, burning the waste and utilization of heat and by preparing manure and bio-gas by decomposing the organic matters.

- ii. The environment can be better understood by dividing it into four segments. The environmental segments can be divided into Atmosphere, Hydrosphere, Lithosphere, and Biosphere. All these four segments of the environment help the living organisms in various ways to survive on the earth.

Atmosphere: The layer of the air present around the earth is called the atmosphere. It absorbs a portion of electromagnetic radiations coming from the Sun and transmits Ultra Violet (UV) rays. It plays an important role in maintaining the heat balance on the earth.

Hydrosphere: Water occupies four fifths of the earth surface and is called the hydrosphere. Out of this, 97% is present in the form of seawater and the remaining 3% is in the form of ice in the polar ice caps and only a small percentage of water is available for drinking, agriculture and other purposes. The growth and decline of the ancient civilizations were closely linked to the availability of water resources.

Lithosphere: Leaving hydrosphere the rest of the earth space, about one fifth of the total earth surface, is in the form of land. While the inner surface of the earth contains minerals, the deeper layer contains natural gas and oil. All these layers form the Lithosphere.

Biosphere: All living organisms like plants, animals and human beings constitute the biosphere. Biosphere and other segments of the environment are inter-related. For example, the levels of oxygen and carbon dioxide depend on the plants present in the biosphere.

- b. i. Yes, Mr. Mohan can file a suit against Ms. Suvarna for breach of contractual terms of hire purchase. As per the terms of contract Ms. Suvarna can claim the rest of the installment amount as damages and she cannot simultaneously takeover the machinery. If the terms of the agreement specify the damages to be paid in case of breach or termination, the same shall apply. In the absence of the contractual terms, damages shall be fixed depending on the loss

incurred by the aggrieved party. A contract is based upon consent of the parties and privity of contract exists between them. Breach of a contract is an infringement of a right in personam, i.e., of a right available only against some determinate person or body, in which the community at large has no concern. The duty is fixed by the will and consent of the parties and it is owed to definite persons.

- ii. The concept of hire purchase agreement actually developed in the nineteenth century and comprised of an alternative to buy as per the choice of the hirer and the terms and conditions of the agreement. This method of credit was used to finance the trader's acquisition of furniture, sewing machines and musical instruments. In the year 1890, two English cases proved helpful in developing the hire purchase law in the form of a financial creation. Hire purchase started progressing in the early decades of this century, but due to the depression in the 1930's, the agreements were slowly misused.

A major aspect of the hire purchase agreement is that the financier only acquires the ownership of the goods when the agreement is complete and the owner becomes responsible for any faults found in the goods. When statutory regulation of hire purchase dealings was practiced, snatch-back too was followed. In this practice, the financier seized the goods from the hirer, if the hirer was at fault irrespective of the worth of the goods. The payments were made by the hirer or any other similar issue. Subsequently, remedial legislation was executed in England and Australia. The Australian legislation had many shortfalls and disparities.

The implementation of hire purchase transactions among states was common. These differences made the Commonwealth and State Ministers to introduce a new method of uniform legislation for the Commonwealth States.

5. a. i. The mortgage by Mr. Lallo Ram is valid and enforceable and it requires no registration.

Mortgage by Deposit of Title Deeds or Equitable Mortgage

Section 58(f) of the Transfer of Property Act provides for the Mortgage by Deposit of Title Deeds. It runs as follows:

Where a person –

- i. in any of the following towns, namely, the towns of Calcutta, Madras, Bombay, and in any other town, which the State Government concerned may by Notification in the Official Gazette, specify in this behalf, for example, Ajmeer, Allahabad, Delhi, Jaipur, Mysore etc;
- ii. delivers to a creditor or his agent documents of title to immovable property;
- iii. with intent to create a security thereon –
- iv. such transaction is called a 'Mortgage by Deposit of Title Deeds.'

This is a common type of mortgage in commercial borrowings. In view of the following merits –

- Creation of mortgage is simple and there is no public notice regarding the transaction.
- Transaction requires no registration.
- It has some legal validity as that of other mortgage.

- ii. **Simple Mortgage [Section 58(b)]:** It is a mortgage wherein the delivery of the possession of the mortgaged property binds the mortgagor personally to pay the mortgage money; and agree that in the event of his failure to pay, the mortgagee shall have right to sell the mortgage property.

Usufructuary Mortgage [Section 58(d)]: It is a kind of mortgage wherein the mortgagor delivers possession, or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee; and thereby authorizes him to retain such possession, receive the rents and profits accruing from the property and appropriate them in lieu of interest or in payment of mortgage money until the repayment of the mortgage money.

- b. i. Yes, Bobby has a right to file a suit against Arjun for breach of legal duty. Bobby has right to safety while walking on the road and whereas a corresponding duty lies on Arjun not to expose Bobby to any such danger by driving at an excessive speed. Arjun has breached his duty towards Bobby by injuring him. Causing injury to Bobby is in consequence of an improper performance of an act which Arjun is under a legal duty to perform properly. Arjun is therefore, guilty of *misfeasance* under the law of torts.

Misfeasance is the improper performance of a lawful act; an act which a person has a legal right to do; it is an act that the person should have done properly. It is used with reference to improper conduct in performing an act.

- ii. **Malfesance:** The term 'malfesance' refers to the actual commission of an unlawful act. It consists in doing an act which one has a legal duty to refrain from doing. All the acts done in the form of malfesance are *actionable per se* and do not need the proof of malice or negligence. Trespass is an unlawful act, it is an act of malfesance and it is *actionable per se*.

Misfeasance: Misfeasance is the improper performance of a lawful act; an act which a person has a legal right to do; it is an act that the person should have done properly. It is used with reference to improper conduct in performing an act. Even if a person has undertaken to do something gratuitously, he is liable if he commits a misfeasance.

The distinction between malfesance and misfeasance is that in the former the act itself is unlawful and in the latter the act, though lawful, may become unlawful by the manner in which it is done.

6. a. The contract entered by Ms. Chandrika is a click-wrap agreement. Click-wrap or web-wrap agreements are commonly used in connection with e-commerce transactions. These agreements are typically used to specify the terms and conditions applicable to the use of the website as well as to the products and services purchased over the Internet. With these agreements the buyer or user usually explicitly assents to these terms by clicking on a button stating "I agree" or "I accept" after having had an opportunity to review the terms. An act by the buyer affirmatively assenting to the terms of the click-wrap agreement significantly enhances its enforceability. Some sites, for instance, indicate that continuing use of the site by the user or buyer manifests assent to be bound by the terms and conditions applicable to using the site. It is critical that the users have an opportunity to review the terms of use applicable to the site. If they are buried or otherwise inconspicuous, they will be more difficult to enforce.

Click-wrap agreements are considered to be more enforceable than "shrink-wrap" which are entered based on the licensee opening the software products' packaging or failing to return the product within a specified period, typically 7 to 30 days. Click-wrap agreements are entered into by an affirmative assent as opposed to the failure to act. However, if the agreements are too overbearing or contain unusually harsh terms it is possible, especially in a consumer law context that the click-wrap agreement, even if assented to, may be found unconscionable and unenforceable. To mitigate that possibility, click-wrap agreements should provide a clear and simple mechanism allowing the consumer to return the products for a refund within a reasonable period of time. It is also recommended that the terms and conditions of the agreement be available for inspection in booklet form at physical locations.

- b. i. In the given situation, M/s Kawalji Enterprises and M/s Sunil Enterprises submit their dispute to conciliation and accept the terms of settlement proposed by the conciliator. The settlement agreement through the conciliation has same effect of arbitration agreement under the Arbitration and Conciliation Act, 1996.

Legal Effect

- (a) The settlement signed by the parties shall be final and binding on the parties. (Section 73 (3))
- (b) The agreement is to be authenticated by the Conciliator. (Section 73 (4))
- (c) The Settlement agreement has the same status and effect, as if it were an arbitral award rendered by the arbitral tribunal on the agreed terms (Section 74 read with Section 30).

ii. **Conciliator not to Act as Arbitrator or Counsel**

Unless otherwise agreed by the parties, the conciliator cannot act as an arbitrator representative or counsel in any arbitral or judicial proceedings in respect of conciliated dispute. Nor can he be presented by any party as a witness in such proceedings. [Section 80 (a) and (b)]

7. i. In *Durga Shah Mohan Lal Bankers vs Governor in Council* case, a bank purchased two cheques indorsed to it by the payee. On dishonor of the cheques, the bank claimed the amount from the drawer. The drawer denied his liability on the ground that the payee had failed to fulfill the promise made by him. The bank was entitled to recover the amount from the drawer. It was held that the bank was not required to verify if the payee had fulfilled his promise or not and even if the payee had failed to deliver the goods as contracted for, there was no reason for it to have any doubt regarding the payee's title to the cheques.

ii. **Holder in Due Course**

A holder in due course can claim to be so, only if it can be proved that he acquired the instrument for valuable consideration. According to the Indian Contract Act, one of the essential requirements of a contract is the presence of consideration. It is also necessary that the consideration is not illegal, immoral, opposed to public policy or injurious to a third person. Further, Section 2(d) of the Indian Contract Act prescribes that consideration should pass at the desire of the promisor. Where consideration does not pass at the desire of the promisor, the contract is not a valid contract.

The definition of a holder in due course as given by Section 9 lays down that the holder in due course should show that for consideration he became the payee or indorsee of the instrument, if it is payable to order. In such a case, it is also important that the instrument should have been indorsed and delivered to him, as his title to the instrument will be incomplete without delivery.

Privileges of a Holder in Due Course: A holder in due course obtains title to the instrument free from equity. He also enjoys certain privileges as:

- A person who has signed and delivered to another, a stamped but otherwise inchoate instrument, is prevented from asserting, as against a holder in due course, that the instrument has not been filled in accordance with the authority given by him, the stamp being sufficient to cover the amount. (Section 20)
- Until the instrument is duly satisfied, every prior party to a negotiable instrument is liable thereon to a holder in due course.
- If a bill or note is negotiated to a holder in due course, the other parties to the bill or note cannot avoid liability on the ground that the delivery of the instrument was conditional or for special purpose only. (Section 46)
- Once the negotiable instrument passes through the hands of a holder in due course, it gets cleansed of all its defects, provided the holder is not a party to the fraud. (Section 53)

- The defenses on the part of a person liable on a negotiable instrument cannot be set-up against a holder in due course if that negotiable instrument has been lost, or obtained from such person by means of an offense or fraud or unlawful consideration.
- The law presumes every holder as a holder in due course, although the presumption could be rebutted.
- The validity of the instrument as originally made or drawn cannot be denied by the maker/drawer/acceptor for honor in a suit initiated by a holder in due course.
- The indorser of a negotiable instrument cannot, in a suit thereon by a subsequent holder, deny the signature or capacity to contract any prior party to the instrument. (Section 122)

Part C: Applied Theory

1. Air Pollution

The density of air and pressure decrease as we go up from the earth. Atmosphere extends up to 500 km, above the earth and can be divided into four parts, as shown below:

Major Regions of Atmosphere

Name of the region	Associated Characteristic
Troposphere (0-11 km)	Maintenance of heat balance
Stratosphere (11-50 km)	Prevents the UV Radiations from falling on earth
Mesosphere (50-85 km)	Non-propagation of sound waves
Thermosphere (85-500 km)	Ionization of gases

Metals like lead, mercury, and organic substances like benzopyrene, biocides, gases like carbon monoxide and carbon dioxide, nitrous oxide and nitric oxide, sulphur dioxide, ozone, Chloro-fluoro-carbons, hydrocarbons like methane and butane, mix with air, and adversely affect human beings, animals, plants and also raise the global temperature. In big cities, automobiles are responsible for 80% of air pollution and 75% of sound pollution.

Causes and Hazards of Air Pollution and their Prevention

Acid Rains: Oxides of nitrogen, like nitric oxide and nitrogen dioxide combine with oxygen and ozone to form higher oxides of nitrogen. These oxides ultimately dissolve in water to form nitric acid. The nitric and sulphuric acids dissolve in rainwater and come down to earth as acid rain. Due to these rains the life of buildings comes down considerably, also the physical condition of the soil changes affecting its fertility.

Depletion of Ozone layer: The Ozone layer present around the earth protects the earth from the harmful UV radiation. However, due to rapid industrialization, chemical substances like Chloro-Fluoro-Carbons (CFC's), Nitric Oxide (NO) and Chlorine being released into the atmosphere, react with Ozone and destroy it.

Green House effect/Global warming: Carbon dioxide and water vapor absorb infrared radiation coming to the earth and partly reflect it back to the earth's surface, due to this, the earth's surface gets heated up. This phenomenon is called green house effect. Due to global warming, the rate of evaporation of water from the seas, rivers, and ponds is increasing rapidly, leading to untimely rains, cyclones and hurricanes.

Water Pollution

With an increase in the industries and progress made in the agricultural sector many unwanted chemicals and substances are being released into the water, decreasing the water quality, called as water pollution. The water pollutants can be classified into:

- Inorganic pollutants
- Organic pollutants
- Sediments and oils

- Domestic waste
- Industrial and agricultural waste
- Fluorides.

Water Pollutants and their Effects

Class of Pollutant	Effect
A) Inorganic Pollutants:	
Salts, trace elements like copper, zinc, arsenic etc., metals coming out from chromium plating industry.	Affects humans and aquatic animals.
Metals and complex compounds.	Metals disturb the water system. Algae cannot grow properly in such surroundings. This decreases photosynthesis and increases air pollution indirectly.
Cyanides, hydrogen sulphides carbon dioxide, nitrogen dioxide and sulphites	Physical condition of the water varies and becomes toxic to aquatic animals.
Algal nutrients: Nutrients like carbon dioxide, hydrogen, oxygen, nitrogen, nitrates, phosphates, sulphates, and micro nutrients like boron, chlorine, copper, iron, manganese, vanadium, zinc, etc.	Eutrophication of the ponds cause excess growth of the algae and subsequently the ponds get dried up.
Heavy metals like lead and mercury.	Water becomes toxic.
Fluorides present in water.	Water cannot be used for drinking purposes; Bones and teeth of human beings also get affected.
B) Organic Pollutants: Waste coming from industries and agricultural fields.	Water becomes toxic.
C) Sewage, domestic and commercial food processing and industrial effluents.	Consumes dissolved oxygen.

2. A gift is the transfer of ownership of an existing movable or immovable property voluntarily and gratuitously, i.e., without any consideration by the donor to the donee.
- To be a valid gift, acceptance of the donee is an essential element. The acceptance should be given during the lifetime of the donor.
 - The Act recognizes the gift inter vivos ('between living persons' or 'from one living person to another living person') and hence the testamentary gift is outside its purview. Testamentary gifts by way of 'will' are discussed under the Succession Act.
 - Any transfer of a movable property by way of gift will be effective either by a registered instrument or by mere delivery of the possession. But, the gift of an immovable property can be done only through a registered deed, signed by or on behalf of the donor and must be attested by at least two witnesses.
 - The gift cannot be revoked in general, but in case of fraud, misrepresentation, undue influence or mistake, or by an agreement of revocation by the parties, it can be revoked.

The law relating to 'gift' is explained under sections 122 to 129 of the Transfer of Property Act, 1882.

Revocation of a Gift: In general, a gift is irrevocable. It is a settled principle of law that the gift cannot be revoked when accepted by the donee. Any agreement to the effect that at the will of the donor a gift can be revoked is void as per Section 126 of the Act. But, a gift can be suspended or revoked, if the donor and the donee make an agreement to that effect on the happening of any specified event, which does not depend on the will of the donor, provided the agreement is a valid one.

In *Subramanian vs. Kanni Ammal*, the court held that the following essential conditions are to be fulfilled for the revocation of the gift:

- Donor and donee must agree for the suspension or revocation of the gift on the happening of a specified event.
- Such event should not depend on the will of the donor.
- The condition must be accepted at the time of the gift by the donor and the donee.
- Such condition should neither be illegal nor immoral and should not be repugnant to the estate created under the gift.

The right to revoke the gift being a personal right cannot be transferred, as right to sue, which is not a transferable right under section 6 of the Act. The right to revoke the gift will not be extinguished by mere laches or delay in filing the suit unless it is barred by limitation. In *Allcard vs. Skinner*, Lord Lindley held that the right to revoke a gift survives even to the legal heirs, representatives or executors of the donors, if they have a claim to set aside the gift on the grounds of fraud or undue influence.

The donor does not have any right to revoke the gift once he delivers the property to the donee even though it has not been registered, as his duty is complete towards the donee by donation and when accepted by the donee. In *Kalyan Sundaram vs. Koruppa*, the court made it very clear that the gift cannot be revoked once it is accepted by the donee. Lord Selvesen, in the case stated that to validate the gift, it must be registered, but registration is only an act of the officer appointed by the law for the purpose and does not require the consent of the donor. Donor can revoke the gift on the grounds of coercion, undue influence, fraud, mistake or misrepresentation, but not on the mistake of law. The donor can revoke the incomplete gift before it is accepted by the donee. Once the donee accepts, the gift is complete and the donor does not have any right to claim back the property gifted.

The gift once made cannot be revoked as it is binding on the parties. Donor cannot take a plea that the property gifted is non-transferable. In *Seetharamaraju vs. Bayanna*, the court held that the donor could not accuse later when the gift is made under undue influence and subsequently he agrees to it. The burden of proof shifts on to the donee, in case of a gift by an old, infirm and weak person. Donee has to prove that the gift is voluntary and made in the absence of undue influence, and the donor was fully conscious and aware when executing a gift deed.

The gift can be revoked on the ground of undue influence, when it is made between persons in the fiduciary relationships such as solicitor and client, principal and agent, parent and child, spiritual adviser and disciple, etc. The period of limitation for the revocation of a gift is 3 years as per the provisions of the Limitation Act.

The Section 126 of the Act is not at all applicable to the Mohammedans. A Mohammedan has the right to revoke a gift even after the delivery of possession except in the following cases:

- When a gift is made by the husband to his wife or vice-versa.
- When the donee is related to the donor within prohibited degrees.
- When the gift is made to charity or for any religious purpose.
- Death of the donee.
- When the gift has been passed out from the donee to others by way of sale, gift, etc.
- When the subject matter of the gift is destroyed or lost.
- When the donor received some other property in exchange of the gift, etc.

3. A restrictive trade practice is defined to mean a trade practice which has or may have the effect of preventing, distorting or restricting competition in any manner and particular.
 - i. which tends to obstruct the flow of capital or resources into the stream of production, or
 - ii. this tends to bring about manipulation of prices or conditions of delivery or to affect the flow of supplies in the market relating to goods or services in such manner as to impose on the consumers unjustified costs of restrictions.

Thus, the trade practice which tends to obstruct the flow of capital or resources into the stream of production or to bring about manipulation of prices, or conditions of delivery or to affect flow of supplies of goods or services so as to impose unjustified cost or restrictions on consumers, is a restrictive trade practice.

Indicators of Restrictive Trade Practices: Any trade practice which is prejudicial to the public interest is restrictive. The following are the indicators where an agreement practice can be considered as a Restrictive Trade Practice.

- a. any agreement which restricts or is likely to restrict by any method the persons or classes of persons to whom goods are sold or from whom goods are brought;
- b. any agreement requiring a purchaser of goods as a condition of such purchase, to purchase some other goods;
- c. any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person;
- d. any agreement to purchase or sell goods or to tender for sale or purchase of goods only at prices or on terms or conditions agreed upon between the sellers or purchasers;
- e. any agreement to grant or allow concessions or benefits, including allowances, discount, rebates or credit in connection with, or by reason of, dealings;
- f. any agreement to sell goods on condition that the prices to be charged on re-sale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged;
- g. any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal of the goods;
- h. any agreement not to employ or restrict the employment of any methods, machinery or process in the manufacture of goods;
- i. any agreement for the exclusion from any trade association of any person carrying on or intending to carry on, in good faith the trade in relation to which the trade association is formed;
- j. any agreement to sell goods at such prices as would have the effect of eliminating competition or a competitor;
- k. any agreement restricting in any manner, the class or number of wholesalers, producers or suppliers from whom any goods may be brought;
- l. any agreement as to the bids which any of the parties thereto may offer at an auction for the sale of goods or any agreement by which any party thereto agrees to abstain from bidding at any auction for the sale of goods.

Determine of restrictive trade practices: Every trade agreement restrains or binds persons or places or prices, but it doesn't mean that the agreement restricts the competition. An agreement is lawful when it regulates and thereby promotes competition or it suppresses or destroys competition. So to determine whether the agreement is restrictive or not, the rule of reason is to be applied on three aspects of the agreement. The first one is what facts are peculiar to the business to which the restraint is applied. Second, what is the condition before and after the restraint is imposed. Third, what is the nature of the restraint and what is its actual or probable effect. The agreements containing restrictive practices of the erstwhile MRTP Act, 1969 are now known as anti-competitive agreements under the Competition Act, 2002.