Nature of agreement and contract:

The terms contract and agreement are used interchangeably in day to day language and are treated as synonymous. However, under the Contract Act they are defined to mean different.

An agreement, in common sense, is a situation where something suggested or proposed by one person is consented to or is approved by another to whom such suggestion is given or proposal is made. In our daily life, we enter into innumerable such agreements with various persons. For example, when you suggest to your friend that you two should have a cup of tea in the canteen, you are putting forward a proposal to him. It may be accepted or rejected by him. If accepted, it becomes an agreement. However, when one trader makes a proposal to another to buy any goods at a certain price, the suggestion he is putting forth is different. If his proposal is accepted by the trader to whom the proposal is made, the result is an agreement between the two as in the previous example, but with a difference. The difference between the two types of agreements is that the former is an agreement while the latter is a contract.

The difference essentially lies in the fact that in the former agreement there is no intention of the parties to the agreement to create legal relations and it is purely social in nature while such intention is there in the case of the latter agreement. Failure to honour the social agreement may bring disrepute to the failing party, but not the legal consequences. In both the cases, there is an element of meeting of minds or concurrence between the two individuals, but in the first case the agreement is not backed by law. In the second example, we notice that the concurrence between the parties is not merely a social interaction, but something more than that. The second example is the case of contract which is also an agreement with a difference and the difference is that it is enforceable by law.

An agreement is defined as – 'every promise and every set of promises forming consideration for each other is an agreement.' Therefore, a promise is an agreement. An offer, when accepted, becomes a promise. So we can say that an agreement is the result of an offer by one person being accepted by the other (to whom the offer is made). Every such agreement may not be a contract. It depends on whether such agreement is legally enforceable or not.

The definition of the term contract under the Contract Act is therefore –

"Contract is agreement enforceable by law."

It can be thus noticed that a proposal by one party and its acceptance by the other give birth to an agreement between the two. When such agreement is legally enforceable, it is called a contract. We can therefore say that –

Offer + Acceptance = Agreement

Agreement + Legal enforceability = contract

From the above equations we can conclude that **every contract is an agreement but every agreement is not necessarily a contract.** This is so because in order to be a contract, the agreement needs legal enforceability. The question now arises as to what is it that confers upon an agreement the legal enforceability? In other words, under what conditions an agreement becomes a contract?

An agreement becomes contract only when it possesses certain characteristics or features. These features are known as **essential elements** or ingredients of contract. If all these essential elements are present in an agreement, then it acquires the status of contract. If any of these essential elements is absent, the agreement remains unenforceable by law and hence does not become contract.

These essential elements are briefly discussed below and those requiring elaboration are separately discussed in the ensuing sections.

Essential elements of contract

1) Offer

The terms offer and proposal mean the same thing. The Contract Act uses the term proposal. Any agreement between two or more parties has to begin with one party putting forth a suggestion to other so that the other person or persons can consider the same and decide whether to agree with the same or not. For example, A may say to B that he wants to sell his car for Rs, 60000/- and whether B is interested in buying the same. Here, A is making an offer to B. Therefore, communication of a lawful offer by one party is the first step towards the formation of every agreement. It is obvious that without any offer there cannot be any agreement.

(The law relating to lawful offer is discussed in chapter 2)

2) Acceptance

The person to whom the offer is made has now to consider the offer and examine it from the view-point of his benefits and decide whether to reject the offer made or accept the same. Communication of lawful acceptance by the offeree is the next step in the formation of contract. The moment a valid offer is accepted by the offeree in a valid manner, an agreement is born. (if other essential elements of contract are also present, then a contract is born.) Acceptance, in a way, makes the agreement in its complete form. In the words of Sir Anson – "Acceptance is to an offer what a lighted match is to a train of gun powder. It produces something which cannot be recalled or undone." It means that the gunpowder which is lying idle or dormant explodes immediately the moment it comes in contract with a lighted match. Similarly, an offer by itself is inactive. The moment it is accepted it becomes active i.e. it produces an agreement giving rise to mutual rights and obligations. Acceptance converts an offer into a promise.

(The law relating to Acceptance is discussed in chapter 2)

3) Intention to create legal relations

The parties to the agreement must intend to create legal relations among them. Agreements which are social or friendly in nature, for example going for a picnic together or agreement to lunch together etc. are the agreements where there is no intention of the parties to create legal relationship between them. As such, these agreements are not contracts.

The test to determine whether the parties have or do not have any such intention is to ask a simple question. Do the parties intend that legal consequences should follow if any party breaks the agreement? If the answer is positive, it shows that the agreement is intended to be a contract. On the other hand, if the answer is negative, the agreement is not a contract.

To illustrate, take a case where one person invites his friend at his home for lunch. On failure of the friend to turn up for the lunch, the person giving invitation cannot prosecute him for compensation for the loss of unconsumed food. Similarly, if the person giving invitation fails to arrange for the lunch on arrival of the friend, the invitee cannot prosecute him for the inconvenience caused.

In an interesting case (Balfour vs. Balfour), the husband agreed to pay a monthly amount to his wife to meet the maintenance expenses. On his failure the wife prosecuted him. The court held that such agreement is not a contract and hence not legally enforceable, because no legal relations resulted from the agreement

It is always presumed that the intention to create legal relationship is absent in social or domestic agreement, whereas such intention is presumed to exist in the agreements which are commercial in nature or which are trading agreements. Thus, in an agreement to buy and sell certain property, there is an intention to create legal relations and therefore such agreement is a contract.

4) Consideration

In simple terms, Consideration means the benefit that each party stands to receive out of the contract. When one person buys any property from another, it is either because he wants to put the property to use in a manner beneficial to him or he may want to sell it at a higher price in future. In either case, he receives or stands to receive some benefit from the purchase of property. This benefit is his consideration. Similarly, the person who sells the property receives the price of the property and this payment of price is his benefit through the agreement of sale. It is consideration for the seller.

Consideration is the price paid by one party for the promise of the other.

If any party to the agreement stands to gain nothing from the agreement, such agreement is not enforceable by law as it is not a contract. Consideration being as essential element of contract, both the parties must benefit from the agreement.

When 'A' agrees to give a gift to 'B' on his birthday, the agreement between them is not a contract because there is no gain for A. Therefore, no legal consequences will follow if 'A' later fails or refuses to give the gift to 'B'. Gratuitous promises are not enforceable at law.

Consideration has to be lawful and may be in the form of doing something for the benefit of the other or refraining from doing something for the benefit of the other.

5) Capacity of parties or competence of parties

The parties entering into agreement must be competent to contract or must have legal capacity to enter into contract, otherwise such agreement is not a contract and therefore not enforceable by law. The term capacity should not be confused with the term ability. Any person may have the ability to enter into an agreement, but he may not be competent to contract. For example, a minor person i.e. one who has not completed his age of 18 years may enter into an agreement. But the Contract Act

declares a minor to be not competent to enter into contract, except under certain circumstances. Therefore, the agreement entered into by or with a minor cannot be a contract and therefore not enforceable by law.

A person who is minor or a person suffering from insanity or madness is not competent to contract. Additionally, there are other categories of persons who are declared to be incompetent to contract.

Competence of parties is an essential element of contract and hence if any of the parties to an agreement is not competent, such agreement is not a contract.

(The law relating to competence to contract is discussed in chapter 4)

6) Free consent

Free consent of all the parties to an agreement is another essential element of contract. Mere consent of the parties is not sufficient. Such consent has to be a free consent, in the absence of which the agreement may not be contract. There are certain elements such as coercion, undue influence etc. which vitiate free consent.

Two or more persons are said to consent when they agree upon the same thing in the same sense. The consent is said to be free when it is not obtained by undue influence, coercion, fraud, misrepresentation or mistake. If the contract is induced by any party by obtaining the consent of the other using any of the first four factors, the contract becomes avoidable at the discretion of the party whose consent is so obtained. In other words, such party has a choice whether to reject the contract or accept it and insist on performance.

(The law relating to free consent is discussed in chapter 5)

7) Lawful object

In order to be a contract, the purpose of the agreement or its object must be lawful. If the object with which an agreement is entered into is unlawful, it is a case of illegal agreement, and obviously such agreement cannot be a contract.

The object of an agreement is unlawful when –

- It is forbidden by law; or
- If permitted, it would defeat the provisions of any law; or
- It is fraudulent or involves injury to another
- It is immoral or opposed to public policy

An agreement where one person lends money to another on interest is enforceable by law as it is a contract. However, if the person lending money knows that the money so lent is to be utilised for production of illegal liquour, then it is a case of illegal agreement and therefore it is not a contract.

8) Writing and registration

According to Contract Act, an oral contract is as good as written contract. There is no general requirement that a contract has to be in a written form. However, in the case of certain agreements it is the requirement of law that they shall be reduced to writing, if they are to be legally enforceable. Further, in some cases it is also required that the agreement shall not only be in writing but it must also be registered as per the law of registration of contracts.

For example, an oral agreement to buy or sell movable goods is perfectly enforceable by law as it is a contract. However, an agreement to buy or sell immovable property such as land or building, has to be in writing and also it has to be registered with the competent authorities. If it is not written and registered, such agreement will not be a contract and therefore cannot be enforced in the court of law.

9) Certainty

The Contract Act provides that if the meaning of any agreement is not certain or the meaning is not capable of being made certain, it is not enforceable by law. In other words, if the terms of agreement are such that they cannot be precisely interpreted or if they are vague and ambiguous, such agreement does not acquire the status of contract and remains unenforceable at law.

The reason for this is simple. In the event of any subsequent dispute between the parties over the agreement, the court is expected to decide the dispute on the basis of what was actually agreed between the parties. However, if the agreement itself is so vague that no certain meaning can be derived from it, no court can adjudicate the dispute.

For example, A agrees with B to sell his house for a good price. The term 'good price' may mean any price, because it is left to subjective interpretation of different individuals. It is impossible for any court to ascertain the intention of the parties. It is also not possible for the courts to declare the price in view of the prevailing market rates because the intention of the parties at the time of entering into agreement is more important and the sole conclusive factor, and not the market rates.

10) Possibility of performance

Agreements must be capable of performance. An agreement to do an act impossible in itself is void, i.e. not enforceable at law.

For example, A agrees with B to make his dead relative alive by magic in consideration of Rs. 50,000/-. The agreement is not enforceable by law and therefore not a contract.

Two points must be noted in this context.

It must be remembered that impossibility of performance is not the same thing as difficulty in performance. A person may undertake to do something under an agreement which may require no special effort. However, subsequent to formation of agreement, he may realize that his perception was wrong and the performance is more demanding or exacting or it is more expensive. Under such circumstances, the party has to discharge his obligation under the agreement, howsoever costly the performance is.

For example, 'A' agrees to supply certain steel products manufactured in his factory to 'B' for certain price. Later, 'A' realizes that he has quoted a price which is quite below the market rate. Here, 'A' has to perform his obligation even though it may mean a loss to him. He cannot claim impossibility of performance.

The second point to be noted is that the impossibility discussed here is the impossibility existing at the time of formation of the agreement and not the subsequent one. For example, 'A' agrees to sell his house to 'B' for a certain price. Subsequent to the agreement, the house is destroyed in earthquake. Now the performance has become impossible. However, it is a case of void contract. In other words, the agreement is a contract at the time when it is entered into, but subsequently becomes impossible. (Void contracts are separately discussed under discharge of contract.)

11. Not expressly declared as void

Certain agreements are expressly declared to be void (i.e. not enforceable by law and therefore not contracts) under the Contract Act. Agreement in restraint of marriage, or agreement in restraint of trade, or a gambling agreement are some of the examples of agreements which can never attain the status of contract. They are declared to be void and not enforceable at law.

Now we shall discuss the above essential elements of contract in detail one by one. However, before doing so, it would be more pertinent and suitable to understand various 'kinds of contracts' first.

Kinds of contracts

1. Void contract

In general sense, the term 'void' means completely lacking something or empty. In legal sense, the term means 'having no legal force.' Void contract, therefore, means a contract which has no legal value or effect at all. According to the Contract Act – 'A contract which ceases to be enforceable by law becomes void, when it ceases to be enforceable.'

The term 'ceases to be enforceable' means a contract which *was* enforceable at law, but at some subsequent point of time and due to some reasons, it has lost the legal value and is no longer enforceable by law. Thus, a void contract is not void from the time of its birth. It was binding on the parties when it was entered into, however, subsequent to its formation, it has become devoid of legal value due to some reasons.

The reasons why a contract becomes a void are as follows:

a. Supervening impossibility

After the formation of contract, its performance may become impossible. This is known as supervening impossibility. In such case, the contract becomes void. For example, 'A' contracts to marry 'B'. After this contract, 'B' goes mad. The contract of marriage becomes void.

b. Subsequent illegality

'A', a merchant from Maharashtra contracts to sell 100 quintals of sugar to 'B', another merchant from Gujarat. After the contract has been entered into, the

Maharashtra Government prohibits sale of sugar outside the state of Maharashtra due to scarcity of sugar. The contract now becomes void, because the performance of the contract would now be an illegality.

c. contingent future event becoming impossible

In a contract, where one party undertakes to do or not to do something on the happening of an uncertain future event, the contract becomes void when the event becomes impossible. For example, 'A' contracts to sell to 'B' certain raw material which is arriving by ship, on the condition that the ship reaches safely. The ship sinks at the sea during its journey. Thus, the contract becomes void.

2. Voidable contract

The contract, where one party (and that party alone) has a choice whether to go ahead with the contract or avoid or cancel it, is a voidable contract. According to Contract Act, 'an agreement which is enforceable by law at the option of one party, but not at the option of the other, is a voidable contract.' Such agreement is enforceable by law or it is a perfect contract until avoided by the party at whose option the contract was voidable.

A contract becomes voidable when the consent of one party has been obtained by fraud, undue influence, coercion or misrepresentation. Such contract is voidable at the option of the party whose consent was so obtained. However, the option to cancel the contract should be exercised by the aggrieved party within a reasonable time and before any third party interest is created.

For example, 'A' threatens to shoot 'B' if he does not sell his house to 'A' for Rs. 10 lacs. 'B' agrees. This contract has come into existence without free consent of 'B' i.e. by using coercion and therefore such contract is voidable at the option of 'B'.

Similarly, when a party to the contract promises to do a certain thing within a specified time, but fails to do so, the contract becomes voidable at the option of the other party, if the time is the essence of the contract. For example, 'A' agreed to sell

and deliver to ‘B’ 100 quintals of sugar within 10 days. If ‘A’ does not supply the sugar within the specified time, the contract is voidable at the option of ‘B’.

Consequences of rescission of contract

If a party to a contract has a choice either to avoid/cancel the contract or to go ahead with the contract, and if such party chooses to cancel the contract, then it is but necessary for such party to return the benefits, if any, received from the other party, under the contract. Further, the other party obviously is under no obligation now to perform his promise under the contract.

The Contract Act provides for the same thing. It states that when a person at whose option a contract is voidable rescinds it, the other party need not perform any promise made by him under the contract. If the party rescinding a voidable contract has received any benefit from another party under the contract, he shall restore such benefit to the person from whom the benefit was received.

For example, ‘A’ contracts to sell his house to ‘B’ for a certain price. Later, ‘A’ rescinds the contract on the ground that his consent was obtained under undue influence. If ‘A’ has received any money from ‘B’ as part payment of the price, he must refund the same to ‘B’.

3. Illegal or unlawful contract

Such contract does not exist. The term illegal contract is self-contradictory. If it is illegal, it cannot be a contract. We have already seen above that contract is agreement enforceable by law. Thus, illegal contract would mean an illegal agreement which is enforceable by law. Obviously, such cannot be the case since no illegal agreement can be enforced at law.

Therefore, it must be noted that there is no contract as illegal contract or unlawful contract. Unless it is lawful or legal, it cannot be a contract. (There can, however, be an illegal agreement.)

Void agreements

Another important term which is often confused with the term void contract is void agreement. There is marked difference between void agreement and void contract. Void contract is already discussed above.

Void agreement is an agreement which is never enforceable at law. It is called void ***ab-initio*** i.e. void (not enforceable by law) right from its birth or inception.

For example, an agreement with a minor is a void agreement, because a minor is not competent to enter into contract. It is never enforceable at law. On the other hand, void contract is an agreement which is also a contract (enforceable by law) when it is entered into, but has subsequently become not enforceable due to certain reasons. These reasons are already discussed above.

It may be noted that there no contract can be void ***ab-initio***, but an agreement can be void ***ab-initio*** (right from inception)

At this point, it shall be relevant also to see the difference between **void agreement and illegal agreement.**

Illegal agreement and void agreement are both void *ab-initio* or not enforceable by law right from the beginning. Except this similarity, there are following differences between the two:

All illegal agreements are void but all void agreements are not necessarily illegal. For example, if the terms of the agreement are not certain, it is a void agreement, but not an illegal agreement. An agreement where one person agrees to pay certain money to another for killing a third person is a case of illegal agreement and obviously it is void also.

Further, all the other agreements which are connected with an illegal agreement or are incidental to it are also illegal if the parties to other agreements are aware of the illegality. So the original illegal agreement is capable of passing the stigma of

illegality to other incidental agreements also. Therefore, in the above example, any agreement between a financer and the person who wants a third person killed is also an illegal agreement, provided the person who lends money is aware of the purpose for which the money is going to be used.

On the other hand, if an agreement is merely void, the incidental agreements are not void. For example, 'A' borrows money from 'B' under an agreement for buying some goods from 'C', who is a minor. The agreement between B and C is void, because it lacks the essential element of contract i.e. competence of parties. However, the collateral agreement between A and B is not affected and it remains a contract.

Express contracts are those contracts where the offer and acceptance constituting the contract are made in words, spoken or written. So an agreement made over telephone or through correspondence is an example of express contract.

Implied contract is one which is entered into by the parties not through the words, but through their conduct or behaviour. Thus, when a porter in uniform approaches you at a railway platform and takes up your luggage, and you show him the way to your compartment, there is an implied contract between you and the coolie, under which you are required to pay for his services. Both offer and its acceptance have been communicated not by the words, but by the conduct. Implied contracts have the same force of law as the express contracts.

Quasi contract is a term used for such contractual relations between the parties which exist as if the parties have entered into a contract, without there being any contract between the two in the usual sense. Unlike other contracts, there is no offer or acceptance. The parties may not have met each other ever before and yet the relations that emerge between them are such as if they have entered into contract. In fact, the term quasi contract is not used under the Contract Act. It provides for the '**certain relations resembling those created by contract.'**

For example**,** when one finds the goods lost by another, he is under obligation to return the goods to the owner. Similarly, when one makes an overpayment to another by mistake, the person receiving the excess money is under obligation to refund the same. The Contract Act treats these obligations as if they are contractual obligations and therefore the term 'quasi contract' is used.

The Latin term quasi means – ‘as if or ‘almost’ and therefore quasi contract means – seemingly or apparently a contract but not really a contract.

Offer and Acceptance

During our discussion in the last chapter on essential elements of contract, we have seen that a lawful offer is the first step in the formation of contract. The second step is its acceptance by the person to whom the offer is made. Once a lawful offer is made and it is lawfully accepted, the contract comes into existence. (Provided, of course, the other essential elements are present.)

We shall now discuss the rules of lawful offer and its lawful acceptance in detail.

The Offer or Proposal

The terms Offer and Proposal are synonymous and they mean one and the same thing. We shall use both the terms in our discussion. The Contract Act uses the term Proposal. It defines proposal as – “**when one person signifies to another his willingness to do or abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal.”**

From the bare perusal of the above definition, the following points can be easily noticed.

a. There must be *expression or communication of willingness* to do or refrain from doing something;

b. Such expression must be made to *another person*;

c. It must be made with the object of *getting the assent* of that other person.

It follows that a general enquiry or a casual declaration of intention is not an offer. For example, 'I may sell my house for Rs. 5 lacs' or 'I am thinking of selling my house if I get Rs. 5 lacs' is not a proposal.
On the other hand, 'Will you buy my house for Rs. 5 lacs?' or 'I am willing to sell my house to you for Rs. 5 lacs' are the examples of proposal.

The person making the proposal is called the **promisor** and the person accepting the proposal is called the **promisee**.

Legal rules as to Offer

1. Offer may be express or implied. An offer can be in words, spoken or written, or by conduct. An offer which is made in words is called express offer and the offer that is gathered from the conduct of the person is call implied offer. When 'A' says to 'B' that he wants to sell his house to him for Rs. 5 lacs, it is an express offer. When a coolie approaches you at the railway platform and picks up your bags, he is making an implied offer.

2. Offer must be capable of giving rise to legal consequences and creating legal relation. An offer by one person to his friend to take him to a movie is not a valid offer in the eyes of law. Ordinary social agreements do not involve legal intentions and therefore are not binding. It is presumed by law that offers made during the course of business are intended to create legal relations between the parties. Parties expect that legal consequences shall follow if there is breach of contract by any of the parties. It may be noted that even in commercial transactions, if the offer is made and accepted with clear understanding that there shall be no legal binding and that if the agreement

is broken by either party no legal consequences shall follow, then such agreement shall not be a contract.

3. The terms of offer must be certain and definite; the terms must not be vague or loose.

In order to create a binding obligation, it is necessary that the terms on which the parties agree are certain. Therefore, the terms of offer must be certain. In other words, the terms must not be so worded that different interpretations are possible for different persons.
For example, 'A' buys a horse from 'B' and promises to buy another if the first one proves to be lucky. In this case, there is no binding obligation on 'A' to buy the second horse because what is a lucky horse is not certain.

4. An invitation to place offer is not an offer.

An offer must be distinguished from mere quotation or invitation to offer. Certain communications, either by way of advertisements or otherwise, are such that they are meant to only pass on the information to the people who may be interested in the same. Such communication by itself is not an offer. The person who is making such communication is in fact inviting the others to place their offers based on the information so communicated, if they so wish.
For example, when you notice any garments displayed at the window of a garment shop with a price tag attached, indicating that a particular garment is for the price mentioned, it is not an offer. It is only an invitation to you to enter the shop and place your offer saying you would like to buy that particular garment for the price. Now it is for the shopkeeper either to accept your offer or reject it. Display of garments with price tags is merely circulation of information to others that the shopkeeper would be interested in dealing with any one who is willing to buy the garment roughly for the stated price.
When you enter the shop to buy the garment, it is you who is making an offer. When the shopkeeper takes the money from you, he accepts the offer, and the contract is formed. If the display of garments or goods with prices marked on them is considered to be an offer, then tender of money by any person would be acceptance of the offer

and the contract is formed. It would be a binding obligation on the shopkeeper to sell the item to you, which is not the case.

Quotations, price-lists or display of goods with prices marked etc. do not constitute offer. Similarly, an advertisement of sale of goods by action is not an offer. It is an invitation to others to attend the action and place their offers by making highest bids at the auction. Furthermore, it is not even obligatory on the auctioneer to conduct the auction sale as per the advertisement and he may withdraw the auction any time. The prospective buyers or bidders cannot complain for the loss of time and money in coming to the place of auction.

5. An offer may be general or specific

An offer is either general or specific depending on to whom the offer is made. When 'A' makes an offer to 'B' to sell his scooter for Rs. 10,000/-, we call it a specific offer since the person to whom it is made is a specific person. When 'A' says to all his friends in his class that anyone can buy his scooter by paying him Rs. 10,000/-, it is called a general offer.

When the offer is made to a certain person, it is obvious that only he can accept the offer, whereas in the case of a general offer, any person from the world at large, (or any person from the group if the offer is made to a group) can accept the offer. Such offer is accepted by complying with the condition prescribed in the offer. (In the above case, by paying Rs. 10,000/-)

If 'A' has lost his book and says to 'B' – "if you find and return my book, I shall pay you Rs. 100/-." This is specific offer since the offeree is ascertained and specific. On the other hand, if 'A' declares in the class or puts up a Notice on the Notice Board saying – "anyone who finds and returns my book shall be paid a reward of Rs. 100/-", it is a case of general offer.

Any person who finds the book and returns it to 'A' accepts the offer by fulfilling the requirement mentioned in the offer. Consequently, there is a contractual obligation on 'A' to pay the reward to that person.

It is worth noting here that **offer must have been communicated to the offeree i.e. offer must have come to the knowledge of the offeree.**

In other words, a person complying with the requirement under the offer without the knowledge of the offer cannot claim to have accepted the same. In the above example, if a student from the class of 'A' who is not aware of any Notice of reward, finds and returns the book to 'A', cannot be said to have accepted the offer because he did not know about the offer. As such, there is no obligation on "A' to pay the reward to such person.

Another point worth noting is that **special terms which are intended to be part of the offer must be specially communicated at the time of acceptance or before the acceptance.** Subsequent communication of special terms will not be binding on the acceptor. Take the above example where one student returns the lost book to 'A' with its cover page torn or spoiled. 'A' cannot refuse to pay the reward on the ground that the cover page of the book is torn or spoiled. Such special term ought to have been communicated before the contract came into existence.

6. Offer must not contain a term the non-compliance of which would amount to acceptance.

If a person making an offer to other states that if the offeree does not respond or does not reject the offer within a stipulated period, it shall be presumed that the offer has been accepted by him. Such offer is not a valid offer. The reason is obvious. There cannot be any obligation on any person to respond to every communication made to him. No contractual obligation can arise if he does not reply.

7. Two identical cross-offers do not make a contract.

When two persons make identical offers to each other without being aware of each other's offer, one offer cannot be treated as acceptance of the other. For example, 'A' writes a letter to 'B' offering to sell his house for Rs. 5 lac. At the same time, 'B' writes a letter to 'A' offering to buy his house for the same price. These are cross offers and none of them is acceptance, because there cannot be any acceptance without the knowledge of offer. As a result, there is no agreement.

Lapse and Revocation of Offer

Having discussed the rules of valid offer, let us now understand the circumstances under which an offer lapses or becomes invalid. Once an offer has lapsed or has become invalid, there cannot be any acceptance of the same and consequently there cannot be any resultant agreement.
An offer comes to end under the following circumstances:

1. An offer lapses by rejection by the offeree

The most obvious mode by which an offer lapses is its rejection. When 'A' offers to sell his scooter to 'B' for Rs. 10,000 and if 'B' declines or refuses to buy the scooter, the offer is rejected and thus lapses.

It may be noted that such rejection of offer may be either an outright rejection or by any amendments suggested by the offeree. Thus, if 'A' offers to sell his scooter to 'B' for Rs. 10000/-, 'B' may either reject the offer or may agree to buy the same at Rs. 8000/-. In either case, it is rejection of the original offer. This is so because when 'B' suggests any change in the terms of the offer, he is, by implication, rejecting the terms of the offer as originally proposed to him. Conditional acceptance is nothing but rejection of offer. It may also be treated as **counter-offer.** In both the situations, the offer lapses.

1	A says to B	Will you buy my scooter for Rs. 10000/-	This is offer by A to B
2	B says to A	I will buy it, but for Rs. 8000/-	This is rejection of offer by B and also a counter offer by B to A
3	A says to B	No, I do not want to sell it for Rs. 8000/-	This is rejection by A of the counter

			offer made by B
4	B says to A	Okay, if you insist, I will buy it for Rs. 10000/-	**This is not an acceptance of the offer made at point No. 1., because no offer survives which can be accepted. Original offer has expired with its rejection at point No. 2. Hence this is altogether a fresh offer by B to A. As such, no agreement takes place**
5	A says to B	1) Here then, take the scooter. OR 2) No, I have changed my mind. I do not want to sell the scooter.	1) This is acceptance by A of the offer of B made at point No. 4 OR 2) This is rejection by A of the offer of B made at point No. 4

2. An offer lapses after the time stipulated or after reasonable time.

An offer does not remain open for acceptance for ever. It lapses when the time mentioned in the offer for its acceptance has expired. If no such time is specified in the offer, then the offer lapses after the expiry of reasonable time. What is reasonable time depends on the facts of the case.

For example, an employer posts his offer of employment to a candidate after he has been selected in the interview. If it is mentioned in the appointment letter that the candidate has to communicate his acceptance within a period of one week, then the offer of employment lapses after the week has expired. However, if no such time is mentioned in the appointment letter, the offer lapses after a reasonable period. In this case, what is reasonable period would depend on the understanding between the employer and the candidate as regards the urgency in filling the vacancy and other factors prevailing at the time of interview.

3. An Offer lapses if not accepted in the prescribed mode, or in the usual or reasonable mode.

As the offeror is entitled to receive the acceptance within the prescribed time, (if at all the offeree chooses to accept the offer) he is also entitled to receive the acceptance in the mode prescribed by him in the offer itself. If no such mode is prescribed by him, the acceptor is bound to communicate his acceptance in some usual or reasonable mode.

Let us take the same example given above. The employer posts his offer of employment to the selected candidate stating that if the offer is acceptable, the candidate should sign the copy of appointment letter and return the same to the employer's office. If the candidate, instead, telephones the employer to communicate his acceptance, the employer is entitled to insist that the offer be accepted in the mode prescribed, failing which he can treat the offer as rejected.
However, if the employer does not so insist, he is deemed to have accepted the acceptance.

4. An offer lapses by the death or insanity of the offeror before acceptance.

If the offeror dies or becomes insane before acceptance, the offer lapses provided that this fact comes to the knowledge of the acceptor before acceptance. The Contract Act provides that a proposal is revoked by the death or insanity of the proposer, if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance.

It is clear from the language of the provision that if the acceptance is given by the offeree in ignorance of the death or insanity of the offeror, it is valid acceptance since the offer does not lapse.

Similarly, if the offeree dies or if he becomes insane before acceptance, the offer lapses.

5. An offer lapses by revocation

An offer is revoked by the communication of notice of revocation by the proposer to the other party. A person may change his mind after having made an offer and may thus withdraw or revoke his offer. In such situation, there remains nothing to be accepted. It must, however, be noted that such revocation is possible only till the moment the offer is not accepted. For example, 'A' offers to sell his scooter to 'B' for Rs. 5000/-. He may subsequently change his mind and communicate to 'B' that he is revoking the offer and that he does not want to sell the scooter.

In the above example, if 'A' asks 'B' to communicate within a week, it is not necessary for 'A' to keep the offer open for the week and then revoke it. 'A' may revoke the offer on the next day itself, provided it has not been accepted by 'B' by that time.

The Acceptance

Agreement comes into existence when an offer made is accepted. It is the acceptance which gives rise to contractual obligations. The term Acceptance is defined under the Contract Act as –"**When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise."**

Thus, ‘acceptance’ is the expression by the offeree giving assent to the terms of the offer. It is the acceptance which converts the offer into a promise and gives rise to contractual obligations.

In order that acceptance is valid, it has to be in compliance of certain rules. Let us discuss these rules one by one.

Legal rules regarding Valid Acceptance

1. Acceptance must be given only by the person to whom the offer is made.

The definition of acceptance begins with the words – ‘when the person to whom the offer is made’ -, meaning thereby that only the person or persons to whom the offer has been made are competent to accept the offer. Thus, when ‘A’ makes an offer to ‘B’, it is only ‘B’ who can accept the offer and no one else.
When an offer is made to a specified class of persons (e.g. students of a particular class) a student from that class can accept the offer. When an offer is made to the world at large (e.g. reward for finder of lost goods) it can be accepted by the person having knowledge of the offer.
Let us take an example of ‘A’ who is running a motor driving school under the title ‘Mr. A’s driving school’. He sells the business to ‘B’ of which ‘C’ is not aware. He sends an offer letter to ‘A’ enrolling his name for specialized driving classes which is now accepted by ‘B’. Later, ‘C’ cancels the idea of joining the driving classes. ‘B’ cannot proceed against ‘C’ because there is no contractual relationship between ‘B’ and ‘C’.
The logic here is that if you intend to enter into contract with ‘A’, then ‘B’ cannot put himself in the place of ‘A’ without your consent.

2. Acceptance must be absolute and unqualified

In order to convert a proposal into a promise, the acceptance must be absolute and unqualified i.e. unconditional. In other words, if the offeree decides to accept the offer, he has to accept the whole of the offer as it stands and without making any changes in the same. If the offeree suggests any change in the terms of the offer, it

would amount to counter-offer or the rejection of the original offer. But it is not a valid acceptance.

For example, If ‘A’ offers to sell his scooter to ‘B’ for Rs. 5000/-, ‘B’ has to either reject the offer or accept it. If he decides to accept the offer, he has to merely give an affirmative response. If ‘B’ adds any conditions, there is no acceptance in the eyes of law. Thus, if ‘B’ accepts the offer willing to pay Rs. 4000/- immediately and Rs. 1000/- in the next month along with interest, it is a conditional or qualified acceptance and therefore not a valid acceptance.

3. Acceptance must be communicated in some usual or reasonable manner, unless the manner is prescribed in the offer itself.

As already seen under our discussion on lapse of offer, the acceptance must be communicated in the manner prescribed in the offer. If the offer of employment directs the candidate to sign his acceptance on the copy of the appointment letter and return the same to the employer, the candidate has to exactly do the same. Telephonic communication by the candidate that he is accepting the employment is not a valid acceptance in the eyes of law.

When the mode of acceptance is not prescribed in the offer, the acceptance must be communicated in some usual or reasonable mode. What is reasonable depends on the facts of the case. In the above example, if the appointment letter issued to the candidate does not mention about the mode of acceptance, but two copies of the offer-letters are posted to him, it is reasonable to expect the candidate to sign the duplicate and return the same. Alternatively, telephonic confirmation of receipt of the appointment letter along with acceptance would be reasonable mode of acceptance.

Express Acceptance is one where it is communicated through words, spoken or written. **Implied Acceptance**, on the other hand, is communicated by the conduct of the acceptor. Implied acceptance of an implied offer also gives rise to legally enforceable agreement. If a shoe polisher approaches you at the railway platform and starts polishing your shoes, it is an implied offer. If you allow him, it is your implied or tacit acceptance, giving rise to contractual obligation under which you are required to pay for his services.

The Contract Act provides that if the acceptance is not communicated in the mode prescribed by the offeror, the offeror or 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.

It may further be noted that **mental acceptance is not effective.** In other words, the offeree having a mind or desire to accept the offer is not sufficient. Communication of acceptance must reach the knowledge of the offeror. In the above example, if the candidate signs the copy of the offer of employment, but does not post it, it cannot be called valid acceptance.

4. Acceptance must be made within reasonable time or before the offer is terminated.

As the offeror can prescribe the mode of acceptance, he may also specify the time during which the offer may be accepted. Acceptance made after the expiry of the said time period is ineffective and not valid. If the time limit is not prescribed, then the offer must be accepted within a reasonable time. Again, what is reasonable is a question of fact. If the offer of employment received by the selected candidate mentions the time limit within which its acceptance has to be communicated, the candidate has to abide by the same, if he wants to accept the offer. However, if no time limit is specified in the offer letter, the offer has to be accepted within a reasonable period. In this case, if the candidate conveys his acceptance after one year, it is not a valid acceptance.

Communication of offer, Acceptance and their Revocation

So far as the contracts which are entered into by the parties in person, i.e. when they are face to face there is no question of withdrawing the offer or acceptance. An offer is made, acceptance is given and the contract is born. In many cases, the contract is immediately discharged where both the parties perform their respective obligations

under the contract. For example, when you buy a pen from a shopkeeper, every step is taken almost at the same point of time. The offer is made, acceptance given, (or rejected and counter offer made and accepted) price paid, pen delivered and the contract discharged.

However, when the parties are not face to face and not dealing in person, and instead when they are transacting with each other through correspondence or by post, it is necessary to determine at what point of time the contract has come into existence. The moment a valid acceptance is made, a contract is born. And once a contract is born, both the parties are bound to each other under the terms of the contract. No one can now retract. The primary purpose of Contract Act is to assure the parties that promises once given shall be fulfilled. Hence, it is crucially important to ascertain from plethora of correspondence at what point of time the contract has come into being.

In this behalf, the Contract Act lays down the following rules:

1. Communication of offer.
Communication of offer is complete when it comes to the knowledge of the person to whom it is made. Thus, when an offer is made by post, the communication of offer is complete when the letter of offer reaches the offeree.

2. Communication of acceptance.
Communication of acceptance is complete –

a. 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;
b. as against the acceptor, when it comes to the knowledge of the proposer

The Contract Act gives the following illustration to simplify the rule.

(a) ‘A’ proposes, by his letter, to sell a house to ‘B’ at a certain price.

The communication of proposal is complete when ‘B’ receives the letter.

(b) ‘B’ accepts ‘A’s proposal by a letter sent by post.

The communication of acceptance is complete –

as against ‘A’, when the letter is posted;

as against ‘B’, when the letter is received by A

Communication of Revocation.

The communication of 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.

(In the illustration give above -)

A revokes his proposal by telegram.
The revocation is complete as against A when the telegram is dispatched. It is complete as against B when B receives it.

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

Revocation of proposal and acceptance

The Contract Act provides that –

A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards.

An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards.

In order to better understand the above rules, let us take an example.

A makes an offer to sell his house to B by post and he sends the letter on 1st January. The communication of offer is complete when this letter reaches B. Now B writes back to A accepting the offer by his letter which is posted on 4th January. The communication of acceptance is complete as against A on 4th January when the letter is dispatched by B so as to be out of his power. The communication of acceptance is complete as against B when the letter reaches A.

It may be remembered that once the communication of acceptance is complete as against the proposer (i.e. 4th January), he cannot revoke the proposal. The contract has now come into existence giving rise to legal obligations. A could have revoked his offer before the letter of acceptance was dispatched by B, but not afterwards.

Having sent the letter of acceptance, if B now desires to revoke his acceptance, he has to communicate his revocation to A, before the communication of acceptance is complete as against B. In other words, B has to dispatch his revocation of acceptance in such a way that it reaches A before the acceptance comes to the knowledge of A. In the above example, if B (having dispatched his acceptance on 4th January, now wants to revoke his acceptance, then he has to send his revocation so that A receives the revocation before he receives the acceptance.

To sum up the points discussed above, it can be stated that –

1. The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.

2. The communication of an acceptance is complete, as against the proposer, when it is put in the course of transmission to him, so as to be out of the power of the acceptor, and as against the acceptor, when it comes to the knowledge of the proposer.

3. 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, , and as against

the person to whom it is made, when it comes to his knowledge.

4. A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards. An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards.

Consideration

Consideration is an essential element of contract. When two persons enter into an agreement, both expect some benefit out of the agreement. This benefit is called consideration under the Contract Act. It is this benefit which distinguishes an agreement from a contract. In other words, if the parties to the agreement do not promise some benefit to each other reciprocally, the agreement is not a contract. Therefore, social agreements or friendly agreements, where one person promises another some benefit without any gain in return, there is no intention to create serious business relations between the parties. Parties to such agreement do not intend that legal consequences should follow, if the agreement is not honoured by any one of them.

In the words of Pollock – "an act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable."

Thus, consideration is the term used in the sense of a ***quid pro quo*** (i.e. something in return) and must be either a benefit to the promisor or a detriment to the promisee or both.

A promises B to deliver a letter to C personally in Mumbai if B would pay him Rs. 500/-. The consideration for A's promise is the payment of Rs. 500/- which is a benefit to A and detriment to B. Looking at the contract the other way round, the consideration for B's promise is A's taking the pains of going to Mumbai and delivering the letter which is a detriment to A and the benefit to B. **It must be remembered that the element of detriment is essential for consideration.** Therefore, a promise to keep an offer open is not an enforceable promise. (It is not a contract.) For example, A makes an offer to B and says: "I will keep the offer open for a week." B replies: "I thank you for keeping the offer open for a week." Here, there is an agreement between A and B under which A has promised something to B, but it is not a contract. This is so because no consideration has passed from B to A for A's keeping the offer open for a week. However, if B promises to pay some amount to A for keeping his offer open and A accepts it, there would be binding contract on A's part to keep the offer open for the week.

The point can be further explained by another example. A promises to pay B Rs. 100 if B can swim 2 miles at a stretch. It is a valid contract. Swimming two miles at a stretch by B is consideration for A because it involves some detriment to B at the desire of A, even though there may not be any benefit to A out of such exercise. (See also 'contribution to charity' at the end of this chapter.)

Consideration is the foundation of contract because it is the very purpose for which the parties enter into contract with each other. In the common example of sale and purchase of an article, the seller enters into contract because his purpose is to get the money or price from the sale of the article and the buyer enters into contract because his purpose is to obtain the article. The 'payment of price' and 'ownership of article'

are the consideration for the seller and the buyer respectively. If one merely promises to give an article to another without getting anything in return, it is a promise of gift and without any consideration. Hence, such agreement of gift is not enforceable i.e. it is not a contract.

The Contract Act defines consideration as: "**When at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or abstain from doing, something, such act or abstinence or promise is called consideration for the promise."**

The following points can be noted from the analysis of the definition.

a. It is an act or abstinence or a promise,
b. It is done at the desire of the promisor,
c. It is done by the promisee or any other person, and
d. It may be something already done (past), something being done (present) or something to be done (future or executory)

Rules of valid Consideration

Having understood the concept of consideration, let us discuss the rules of valid consideration in detail.

1. Consideration must move at the desire of the promisor.

The definition of consideration begins with the words 'at the desire of the promisor' which means the consideration must be given at the desire or request of the promisor. Thus, anything done or given voluntarily will not amount to consideration. This is so because otherwise a person receiving goods or services without any desire shall be unnecessarily burdened with a contractual obligation to pay for the same. If you are searching for your valuable pen lost on the road and a passer-by comes to your help voluntarily to trace the pen, the services rendered by him cannot be called consideration even though such services may be useful in finding the pen. The services are not rendered at your requirement. If they are to be treated as

consideration, you would be obliged to pay him for the services because then you have a contractual duty to pay.

2. Consideration may move from the promisee or any other person.

Consideration may be furnished by anyone. It need not be from the promisee alone, but may proceed from a third person also. A, by a deed of gift, made over certain property to her daughter with a direction that the daughter should pay an annuity to A's brother, as was done by A earlier. The daughter agreed, by giving a written assurance, to pay the annuity. Afterwards the daughter refused to pay the annuity claiming that the agreement between her and the uncle (A's brother) was not enforceable since there was no consideration to her moving from her uncle. It was held by the court that the agreement was enforceable and that the consideration had moved from A to the daughter. It was not necessary that the consideration ought to move from the uncle alone.

It therefore follows that **a person who is stranger to the consideration can sue for the performance of the contract, because the consideration moves on his behalf from some other person**. This is known as '**Doctrine of constructive consideration**' which enables ***a stranger to the consideration to sue on the contract,*** provided he is party to the contract.

However, if a person is stranger to the contract, he cannot sue on the contract. For example, A, who is indebted to B, sells his property to C, and C, i.e. the purchaser of the property promises to pay the debt of B. If C fails to pay the debt of B, B has no right to file a suit against C because there is no contract between B and C. Thus, the rule is that a stranger to contract cannot sue on the contract.

(Trust, family settlements and agency are some of the exceptions to this rule. A transfers property to the trustee B for the benefit of C. C can sue on the contract, though he was not a party. At the time of partition of family property, a settlement may be made for the benefit of other members of the family. Such members can sue on the settlement though they are not party to the settlement. Where a contract is entered into by an agent, the principal can sue on it.)

3. Consideration may be past, present or future

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

At the desire of B, A renders to him services for a month. After the month, B promises to pay Rs. 5000/- to A for his services. The consideration for B when he makes such promise is **past consideration**, because he has received the services in the past.
Where A sells and delivers a pen to B and B pays Rs. 10/- being the price of the pen, it is a case of **Present consideration.** It may be noted that in this transaction, if B promises to pay the price in future, it is yet a case of present consideration. Here, the consideration for B is the pen and consideration for A is the **promise** of B to pay. It can also be said that for B it is executed consideration while for A it is executory consideration.
A promises to supply 5 tons of steel to B every month and B promises to pay the agreed price at the time of each delivery. This is an example of **Future consideration** where a promise is exchanged for promise and the promise is to do something in future. It is also known as executory consideration because the liability of both the parties is outstanding.

4. Consideration must be 'something of value' in the eyes of law.

The fourth essential element of consideration is that it must be something of value in the eyes of law. **It should be noted that consideration need not be adequate, because what is adequate is to be decided by the parties and not by the law.** The law of contract insists on presence of consideration and not its adequacy. For example, if A promises to sell his car to B for Rs. 500/- (which price is much below the market rate), the promise is enforceable at law.

However, it may be noted that shockingly inadequate consideration may be a good evidence to support a claim of any party that his consent to the agreement was not a free consent.

Consideration must be real and not illusory. Similarly, it must not be physically and legally impossible. It must also not be uncertain. Promise to make a dead man alive is not valid consideration because it is not physically possible. A promise to do something which is prohibited by law is illegal consideration. A promise to pay a good price for goods is vague and uncertain and hence not valid consideration, because what is good price is not certain.

When no consideration is necessary

Although as a general rule there cannot be any contract without consideration, there are some exceptions where an agreement is a contract even without consideration. These are the exceptions to the rule – 'No consideration – no contract.'
These exceptions are as follows.

a. Agreement made on account of natural love and affection

An agreement made without consideration is enforceable as contract, if it is, a) Expressed in writing,
b) Registered under the law of registration of documents
c) Made on account of natural love and affection, and
d) Between the parties standing in near relation to each other

If the above four conditions are satisfied, an agreement is a contract even when there is no consideration.

Thus, where A promises in writing to his son that he would transfer certain property to him and registers the document, it is a contract. It must be remembered that all the four conditions have to be independently satisfied. Where a husband, due to frequent quarrels and disputes, signs and registers a promise to his wife that he would pay a certain sum to her per month provided she stays away from him, is not a contract. Here, though the three conditions of near relations, writing and registration are satisfied, the agreement is obviously not entered into out of natural love and affection.

b. Agreement to compensate for past voluntary services.

If a promise is made to a person who has already voluntarily done something for the promisor in the past, such promise is contract and enforceable at law, though at the time of making the promise there is no consideration moving from that person to the promisor.
For example, A finds B's purse and returns it to him. B promises to give him Rs. 100/-. This is a contract.
It can be noticed from the above example, that –

- A has rendered services to B in the past and such services were rendered voluntarily without expecting anything in return or without being required by B,
- B is under no obligation to make any promise to A, and
- Yet B, subsequent to enjoying services of A, makes a promise to compensate for the services

When B is making a promise to A, there is no consideration moving from A to B, and as such in the absence of consideration there is no contract. This is as good as a promise of gift. However, such promise is a contract even without consideration. This exception is not limited to the promisor receiving services himself. For example, A supports B's minor and infant son which is the duty of B. Subsequently, B promises to pay A's expenses in so doing. This is a contract.
It may also be noted that the promisor need not be competent to contract when he receives the services. Thus a promise made after attaining majority to pay for the foods supplied voluntarily to the promisor during his minority is a contract.
Past consideration and **compensating past voluntary services** must not be confused. In past consideration, the services are *not rendered voluntarily* and there is an obligation on the part of the person receiving services to pay for the same. On the other hand, under this exception, the services are *rendered voluntarily* and there is no obligation on the part of the promisor to make any promise.

c. Agreement to pay a time-barred debt.

In every country including India there is law of limitation which prescribes the period within which legal action can be taken against defaulting person. This law is based on

the principle that Law comes to the help of those who are diligent about their rights and not to the help of those who are sleeping over their rights. Different periods of limitation are prescribed under the Limitation Act for initiating different types of proceedings. This period is three years for money recovery suits. Hence, on default by the debtor in repayment of money-dues, the creditor must proceed against him within a period of three years from the date of default, otherwise the right of the creditor to proceed against the debtor is lost and the debt becomes a time-barred debt. It cannot be now recovered. Here, as the creditor no longer has any right to recover the debt, similarly the debtor has no obligation to pay the debt. There fore, when the debtor or his agent makes any promise to the creditor to pay the time-barred debt, such promise is without any consideration. However, such promise or agreement is a contract even without consideration.

For example, A owes B a sum of Rs. 1000/- but the debt is barred by the Limitation Act. A signs a written promise to pay B Rs. 500/- (or Rs. 1000) on account of the debt. This is a contract.

It means that now if A fails to pay the debt, B can recover the amount from B. In other words, a fresh period of limitation would start from the date of the promise. For this exception to apply, the following conditions must be satisfied.

- The debt must be such that the creditor cannot recover on account of law for the limitation of suits;
- There must be an express promise to pay the time-barred debt. Mere acknowledgement of indebtedness is not enough; and
- The promise must be in writing and signed by the debtor or his agent.

d. Completed gift

Simply stated, a gift (and not a promise or agreement to give a gift) is a contract and requires no consideration.

We have seen that a promise of gift is not a contract because there is no consideration moving from the promisee to the promisor. However, if such gift is actually given it is binding on the parties. In other words, it cannot be recovered by the donor on the ground that there was no contractual obligation to give the gift. For example, A promises to give Rs. 100 to B on his birthday. Such promise or agreement is not a

contract because there is no consideration for A. However, when A actually gives the gift to B, such completed gift is binding on them.

e. Contract of agency

Section 185 of the Contract Act provides that no consideration is required to create agency. This is to estop the principal from denying the contractual obligations incurred through his agent on the ground that there was no contract between the agent and the principal as there was no consideration.

f. contribution to charity

A promise, though gratuitous, would be enforceable, if on the faith of the promise, the promisee has suffered some detriment or undertaken any liability. In our discussion on concept of consideration at the beginning of this chapter, we have seen that consideration consists of some detriment to the promisee, though it may not be of any benefit to the promisor.

Thus, if A makes a promise to a hospital to donate certain sum, and based on the promise the hospital management undertakes construction of an operation theatre, thereby incurring liability towards the construction-contractors, the hospital management can recover the amount from the promisor, if he later refuses to pay the promised amount.

In a decided case of Kedar Nath V/s Gori Mohammad, the defendant had agreed to subscribe Rs. 100 towards the construction of a Town Hall at Howrah. The secretary of the Town Hall on the faith of the promise called for plans and entrusted the work to contractors and had undertaken liability to pay them. It was held that, though the promise was to subscribe to a charitable institution and there was no benefit to the promisor, yet, it was supported by consideration because the secretary suffered a detriment in having undertaken a liability to the contractor on the faith of the promise made by the defendant.

Two points need to be noted in this behalf. The first is that the promisee must have incurred some liability on the basis of the promise, in order to make the promise legally enforceable. The second point is that such promise can be enforced only to the

extent of detriment suffered or the liability undertaken. If no liability is undertaken on the basis of such gratuitous promise, it is not legally enforceable.

g. Remission of performance

If the promisee agrees to accept a lesser performance of the promisor in lieu of what was agreed under the existing contract, such subsequent agreement is a valid contract, even though without consideration.

For example, a bank may enter into agreement with a defaulting borrower whereby the bank may permit the borrower to pay a lesser amount than what is due and finally settle the loan account. Such agreement by which the bank agrees to accept a lesser performance than what it is entitled to (i.e. may agree to accept a lesser amount giving up part of its claim) is an agreement without consideration. However, it is a valid contract.
This exception is also applicable to contracts where the promisee extends the time of performance by the promisor. Such contracts need not be supported by consideration.

Chapter 4

Capacity of Parties

The next essential element of a valid contract is ‘capacity of parties’ or ‘competence of parties’ to enter into contract. The Contract Act provides that **“every person is competent to contract who is of the age of majority according to the law to which is subject, and who is of sound mind, and who is not disqualified from contracting by any law to which is subject.”**

Therefore, a person in order to be competent to enter into a valid contract must satisfy the following conditions:

a. He must be a major, according to the law to which he is subject;

b. He must be of sound mind; and
c. He must not be disqualified from contracting by any law to which he is subject.

We shall now discuss these conditions one by one.

a. Minor

According to the Indian Majority Act, a person who is under 18 years of age is a minor and a person who has completed the age of 18 years is a major. There is one exception to this general rule. The minors whose property is under the control of a guardian appointed by the court, attain majority at the age of 21 years.

An agreement with a minor is absolutely void and not enforceable by law against the minor. The law relating to agreements by or with a minor can be stated as follows.

1. Minor's agreement is absolutely void and minor cannot bind himself by a contract.

The law relating to minor is with a view to protecting their interests rather than to debilitating them from contracting. Therefore, there is nothing in the Contract Act which prevents a minor from becoming a promisee. The term *incapacity* means the incapacity to bind oneself by any contract, and not the incapacity to derive benefits under any contract. An agreement entered into by or with a minor is void ***as against him***.

An agreement with a minor is void *ab-initio* i.e. right from the beginning and the other party to the agreement cannot enforce the agreement against the minor. Even if a minor has received any benefit under the agreement, he cannot be asked to return the benefit or make compensation. Thus, if a minor person has obtained a loan and makes a default in its repayment, the creditor cannot sue the minor for the recovery of loan.

2. Agreements which are beneficial to minor are valid contracts.

As we have noted earlier, the law relating to agreements with minor is for protection of the rights of minors. It does not prohibit the minor from receiving any benefits through agreements. Accordingly, any agreement under which a minor has to merely receive certain benefits without there being any obligation imposed on him is a valid contract. Thus, if a minor lends money to another, he can recover the money by filing a suit if there is a default in its repayment.

Hence, a minor **can be admitted in a partnership firm,** but only for sharing the profits of the firm and he cannot be held liable for the losses. A minor cannot take part in the management of the firm. His liability to third parties is limited to the extent of his share in the assets of the firm. He cannot be held personally liable for any obligation of the firm, as is the case with other partners.

Similarly, **the Apprentices Act 1961** provides for **apprenticeship contract** under which a minor can be engaged as an apprentice in factories and commercial establishments. The Apprentices Act was passed with a view to providing opportunity to young persons to learn various trade skills. Under the apprenticeship contract the minor is required to pay the compensation amount if he discontinues the training before the apprenticeship period.

Under **The Trade Unions Act, 1926** a minor is competent to become a member of a registered trade union and though he cannot become an office bearer of the trade union, he can enjoy all the rights of a member, can execute instruments and give aquittances as are necessary.

3. No ratification of agreement on attaining majority.

Ratification is subsequent approval or authorization of any act or agreement. An agreement entered into by or with a minor cannot be ratified on attainment of majority by the minor. For example, if a minor of 15 years of age agrees to sell his property after 5 years, he would have to execute the sale at the age of 20 years, when he is major. However, the earlier agreement being a nullity and having no existence in the eyes of law, there is in fact nothing to be ratified. In such a situation the minor will have to enter into a fresh contract of sale of property on attainment of majority. Ratification relates back to the time when the agreement was made and it is essential for valid ratification that the original agreement was valid i.e. enforceable by law. Further, if a minor borrows money during his minority and executes a promissory note

in relation to the same debt on attaining majority, the promissory note is null and void, because at the time when the promissory note is made, it is without consideration.

4. Non-applicability of principle of estoppel.

What would be the consequence if a minor **has falsely represented** himself as major and induced another person to enter into agreement? How does the law deal with, especially, the benefits received by the minor on account of such wilful misrepresentation?

The principle of law of evidence which is applicable to such representation under other cases is known as 'principle of estoppel.' This principle states that, 'where one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he or his representatives shall be allowed, in any suit or proceedings between himself and such person or his representative, to deny the truth of that thing.'

The principle of estoppel is based on the rule that no one shall be allowed to take the benefit of his own wrong. For example, A represents himself to B as agent of C and this representation is made by A in the presence and within the hearing of C who does not deny. The fact is that the agency of A has been terminated by C few days ago. Here, C, by his silence (omission) induced B to believe that A is the agent of C. If now B transacts with A on the belief of agency and incurs loss due to negligence of A, C is liable to compensate B, as if he is the principal of A.

The principle of estoppel is not applicable to minors. Thus, a minor falsely claiming himself to be major and obtaining a loan from a banker, cannot be compelled to repay the loan and such minor can always plead minority in defence of non-payment of loan. In other words, a minor is not estopped from pleading minority to avoid the contractual liability.

The rule of estoppel does not apply to a minor on the ground that if it applied it would give a handle to dishonest traders to obtain false declaration in writing from the minor that he was a major at the time of entering into the agreement. At the same time, it must be noted that 'minors cannot have a privilege to cheat people.' Therefore, a minor may be ordered by court to return the benefit which he has received under such false representation. For example, if a minor fraudulently overstates his age and takes delivery of a motor car after executing a promissory note in favour of the trader for its price, the minor is not estopped from pleading minority and can escape liability under

the promissory note. But the court on equitable considerations may order restitution i.e. compel the minor to return to the trader the car, if it is still with the minor or can be traced.

5. Minor's liability for necessaries of life.

The Contract Act provides that if the necessaries of life are provided to a minor by any person, such minor is liable to pay for the same out of his property, if any. Thus, if any person provides the necessaries of life to a minor who is incapable to entering into contract, he can recover the price of such necessaries from the property of the minor. It should be remembered that it is only the property of the minor that is liable, and not the minor himself. If the minor who does not pay and also has no property, then the price of the necessaries cannot be recovered from the minor. What can be called the necessaries of life for a particular minor is a question of fact. Normally such necessaries include food, medical treatment, shelter and education. It may also include the cost of defending the minor's interests in any civil and criminal proceedings. But it does not include the items of luxury.

6. Position of minor's parents

An agreement with a minor does not give the creditor any rights against the minor's parents, whether the agreement is for necessaries or not. The moral obligation of a father to provide for his child does not impose on him any liability to pay the debts incurred by the child. The only case where a parent may be liable is when the child is contracting as an agent for the parent.

7. Other points to be noted

- Minor can be an **agent**, but he cannot appoint an agent. In other words, a minor cannot be a principal.
- Minor cannot be adjudged **insolvent,** because he is incapable of incurring any liability.
- In the case of **joint contract** with minor along with an adult, it is the adult who is solely liable for the contractual obligations. If a minor and an adult jointly

contract to purchase any property, the seller could enforce the contract against the adult.

- A minor cannot be a **shareholder** of any Company. However, fully paid up shares can be transmitted to him.
- If an adult is **surety** for the loan taken by a minor, the adult is liable under the contract though the minor is not, because the contract between the surety and creditor is an independent contract. Of course, a minor can never be a surety for the loan of another.

b. Persons of unsound mind

In order to enter into a valid contract, it is also necessary that each party must be of sound mind. What do we mean by 'sound mind'? Truly speaking, no definition can be given of sound mind, or for that matter of unsound mind. However, the Contract Act gives us the definition of a person of sound mind, **but only for the limited purpose of entering into a contract.** In other words, a person who is considered to be of sound mind for the purpose of contracting may not necessarily be of sound mind for other purposes.

The Contract Act provides: 'A person is said to be sound mind for the purpose of making a contract, if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effects upon his interests.'

Accordingly, the requirement of the Contract Act is that the person entering into contract must understand the nature of the contract as a whole and must be in a position to determine whether it is beneficial or detrimental to his interests. It must be however remembered that what the law contemplates is the ordinary prudence of an average person. Shrewd and calculating business mind is not the requirement. Hence, a contract which eventually turns out to be detrimental to a party cannot be avoided by him on the ground of unsoundness of mind. What needs to be seen is whether the contracting party stood a reasonable chance of benefiting from the contract or not. It must be noted that burden of proving unsoundness of mind is on the person who wishes to deny the contract on the ground of his unsound mind.

A person, who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind. Similarly, a person who is usually of sound

mind, but occasionally of unsound mind may not make a contract when he is of unsound mind.

Unsoundness of mind may be due to Idiocy, lunacy or insanity. It may be on account of drunkenness or extreme old age. When any party to a contract seeks to set aside the contract on any of these grounds, he has to prove his disability.

An agreement entered into by a person of unsound mind stands on the footing as that of minor's and hence it is absolutely void and not enforceable by law. If such person has derived any benefit out of the agreement, he cannot be compelled to restore the same to the other party. However, the property of a person of unsound mind is liable for the necessaries supplied to him, as in the case of minor.

d. Persons disqualified to contract

The third category of persons who are not competent to contract are those who are disqualified from contracting by any law to which they are subject.

The following persons are disqualified to enter into contract under certain circumstances as explained below:

1. Alien enemies.

Alien is a person who is a citizen of a foreign country living in India. He is an alien enemy when his country is at war with India. (Alien friend is a foreigner whose country is at peace with India.) An alien living in India usually has full contractual capacity. On the declaration of war between his country and the Union of India he becomes an alien enemy, and cannot enter into contracts during the subsistence of the war, except by licence from Central Government. Contracts made before the war between an alien enemy and an India citizen are suspended for the duration of war and are revived after the war is over, provided they have not already become time-barred.

2. Foreign Sovereigns and Ambassadors.

Foreign sovereigns and ambassadors **are not** disqualified from contracting. Such persons are fully competent to contract, however they enjoy certain privileges and therefore one has to be vary careful while entering into contracts with them. While they cannot be prosecuted in our Courts except with the prior permission of the Central Government, they can prosecute and enforce contracts in our Courts.

3. Convicts

He is a person who has been found guilty by a competent court in India and sentenced to imprisonment. During the imprisonment, convicts are not competent to contract. They cannot even file suits on contracts made before imprisonment, when they are imprisoned. When such person gains freedom after being released, he becomes competent to contract and also to institute suits on earlier contracts. The period of limitation stops running against him during the period when he is in prison.

4. Companies and other Legal or artificial persons.

A Company or a Corporation is a legal or artificial person which has no physical existence. Such legal persons exist only in the eyes of law as they are created by law. They cannot enter into contracts the subject matter of which is beyond the scope of their constitution. For example, the constitution of a Company is its Memorandum of Association, which lays the scope of its activities. A Company cannot undertake any activity beyond its Memorandum of Association and therefore cannot enter into contracts relating to such activities. For example, a Company incorporated for manufacture of automobiles cannot enter into contract for purchasing sugarcanes from cane-producers. Trusts or Societies are other examples legal persons. Similarly, a Trade union cannot enter into contract beyond its Rules under the Trade unions Act.

Further, a legal person cannot enter into those personal contracts which can be entered into only by natural persons, such as contract of personal service, contract of marriage etc.

5. Insolvent.

Insolvent is a person whose total liabilities are more than his assents and who cannot satisfy all his creditors fully. Unless such person is discharged by the court, he cannot enter into contracts for sale of his property which is vested in the hands of the Official Receiver appointed by the Court. Barring contracts of sale of property, such persons are competent to contract.

Free Consent

We have already seen that free consent of all the parties to agreement is essential to the idea of contract.

The term '**Consent'** is defined under the Contract Act as –'**two or more persons are said to consent when they agree on the same thing in the same sense.'** In fact, when such consent is not there, there is no agreement at all. Agreement involves meeting of minds which is called '***consensus ad-idem.'***
For a valid contract what is necessary is free consent. The term free consent is defined under the Contract Act as under:
"Consent is said to be free when it is **not caused** by –

1. coercion, or
2. undue influence, or
3. misrepresentation, or
4. fraud, or
5. mistake (subject to other provisions of the Contract Act)

Consent is said to be caused when it would not have been given but for the existence of such coercion, undue influence, misrepresentation, fraud or mistake."

It means that if the consent of any of the parties to the contract has been obtained by employing any of the above means, it is not a free consent and therefore there is no contract. The party who alleges that his consent has been caused by any of the above means must establish that he would not have given his consent if he had known the truth or if he had not been forced to agree.
What is the consequence if the consent of one party is not free would depend on the nature of vitiating element involved. If the consent to agreement is brought about by coercion, undue influence, misrepresentation or fraud, it is not a free consent and the contract is voidable at the option of the party whose consent was so obtained. On the other hand, if the consent is caused by 'bilateral mistake' as to matter essential to the agreement, the agreement is void. In fact there is no agreement at all.
Let us discuss these vitiating elements one by one in detail.

Coercion

The term coercion is defined under the Contract Act to mean –"**the committing or threatening to commit any act forbidden by the Indian Penal Code or the unlawful detaining or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement."**

Coercion thus implies unlawful application of force or pressure in order to induce a person to give his concurrence or give his consent against his will. The person who is unwilling to enter into an agreement is forced and pressurized to agree.

For example, during the annual internal audit of a Bank, the auditor notices that the accountant has used the credit-documents of the Bank in favour of local traders wrongfully to gain fraudulent benefits from the traders. Though there is no monetary loss caused to the Bank, it is a serious act of misconduct on the part of Accountant. The Auditor agrees not to report the misconduct to the superiors only if the accountant sells his 2 acres of land to him at half the market price. Here, the consent of the accountant is obtained by coercion because the auditor is **committing an offence of "criminal breach trust" forbidden under the Indian Penal Code.** In this case, after entering into contract with the auditor, the accountant may set aside the contract on the ground that his consent was not free and that it was induced by coercion.
Similarly, where A threatens to shoot B unless he sells his house to C and B agrees, the consent of B is obtained by coercion. Here, **A is threatening to commit an act forbidden by the Indian Penal Code.**

The following points may be noted in this context:

- Indian Penal Code may not be applicable at the place where coercion takes place, yet the consent is vitiated by coercion.
- Coercion need not necessarily proceed from a party to the contract. It may proceed from any person. Similarly, it may be directed against any person and not necessarily against a party to the contract. What is important is that the consent of one party is obtained by use of coercion.

- The term ‘forbidden under Indian Penal Code’ is a wider term than ‘punishable under Indian Penal Code.’ Therefore, where the consent of a party is obtained by ‘threat of committing suicide’, the consent is vitiated by coercion. The acts of committing suicide or threatening to commit suicide are not **punishable** under the Indian Penal Code for obvious reasons, but such acts are **forbidden** under the Code.

A litigant decided to replace his advocate engaged in a very important trial. The advocate refused to return the original documents in his custody pertaining to the case unless 50% extra fees were paid. Any such agreement between the litigant and his advocate in this case is hit by coercion and the litigant can later set aside the contract, as **it involves unlawful detaining of any property.**

Effect of coercion.

When consent to an agreement is obtained by coercion, the agreement is a contract voidable at the option of the party whose consent was so caused. (For the nature of voidable contract, refer to chapter 1) In other words, the party whose consent is induced by coercion may either set aside the contract or may affirm the agreement and insist on the performance. Obviously, the second option will be chosen by the party only when the contract is beneficial to him in spite of coercion. If, however, the party chooses to rescind the contract, he must restore the benefits which he may have received under the contract. The burden of proof to establish coercion lies on the party who wants to set aside the contract on the ground of coercion.

Undue Influence

The definition of undue influence under the Contract Act is reproduced below:

(1) A contract is said to be induced by ‘undue influence’ where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain unfair advantage

over the other.

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another –
   a. where he holds a real or apparent authority over the other or where he stands in fiduciary relation to the other; or
   b. where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

(3) Where a person, who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it, or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in the position to dominate the will of the other.

In order to set aside a contract on the ground of undue influence, the following two points need to be independently established:

1) One party ***is*** in a position to dominate the will of another; and
2) He ***actually used*** that position to obtain an unfair advantage over the other

Generally, a person is considered to be in a position to dominate the will of another when –

- *Where he holds a real or apparent authority over the other* – for example the relationship between master and servant, police officer and accused;

- *Where he stands in a fiduciary relation to the other* – for example advocate and client, doctor and patient, trustee and beneficiary etc. (Fiduciary relation means a relation of trust and confidence in each other)

- *Where he makes a contract with a person whose mental capacity is temporarily or permanently affected* – owing to extreme old age, illness or mental or bodily distress

Thus, undue influence is a kind of *moral coercion*. It negatively affects the free will of one and compels him to do what is against his desire, which he would not have done if left to his own judgment. The following examples may be noted:

1. A needy borrower executed a mortgage deed in favour of a moneylender to sell the mortgaged property to the moneylender at a shockingly low price, if he made a default in repayment. This contract may be set aside by the borrower on the ground of undue influence.
2. A's son has forged B's name to a promissory note. B, under threat of prosecuting A's son, obtains a bond from A for the amount of the forged note. If B sues on this bond, the court may set aside the bond.

Unconscionable Transactions

When a person, without being fraudulent, forces another to enter into an agreement by making an unconscientions use of his superior power he is said to have made an 'unconscionable bargain.' Obviously, such a bargain is voidable. These are the transactions where one of the contracting parties is in a dominant position and makes an exorbitant profit of the other's distress.

However, it must be noted that the burden of proving undue influence is on the party who alleges the same. There cannot be any presumption of undue influence in every contract where one party gains unusually high profits.

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

Effect of undue influence

When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused. Any such

contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as the court may deem just and equitable.

Misrepresentation

When any statement is made regarding any fact or state of affairs, it is a representation. When such representation is false, or is not correct, it is mis-statement or misrepresentation. Such misrepresentation may be either innocent or deliberate. In the ordinary sense, therefore, the term misrepresentation refers to both *innocent misrepresentation as well as dishonest misrepresentation.*
In law of contract, when any mis-statement made innocently it is called **'Misrepresentation'** and when it is made deliberately or with the intention to deceive, it is called **'Fraud'.**

According to Contract Act, Misrepresentation means and includes –

a) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true; or

b) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice or to the prejudice of any one claiming under him; or

c) causing, however innocently, a party to an agreement, to make a mistake as to the substance of the thing which is the subject of the agreement.

Thus, misrepresentation takes place in the following three cases:

a) There must be assertion and it must be false. When a person makes any statement without having sufficient grounds to support the truthfulness of the statement, though he may himself believe that it is true, it is a misrepresentation.

For example, where B intends to purchase land of A and A says to B that his land produces 50 quintals of wheat per acre. Based on the statement of A, B purchases the land and later realizes that the land produced only 30 quintals of wheat per acre. This is misrepresentation.

It may be noted that mere expression of opinion or salesmanship talk cannot be tantamount to misrepresentation. For example, where a person selling his horse claims that his horse is the best in the world, it is obvious that he does not have any grounds to substantiate his statement. These are mere words of praise and no prospective buyer with average prudence shall ever make a decision to purchase the horse solely on the basis of such claim. Therefore, the buyer of the horse cannot set aside the contract on the ground of misrepresentation, claiming that the horse was not the best in the world.

b) Breach of duty which brings an advantage to the person committing it by misleading the other. When a true statement made by a person subsequently becomes false due to change in circumstances, it is the duty of the person making such statement to bring the change to the notice of the person to whom the statement was made, before he acts on such statement. If he does not discharge this obligation, he shall be guilty of misrepresentation.

For example, A has been issued a licence to run a college canteen for a period 5 years which business he desires to sell to B. During the negotiations A informs B about the period of licence and his daily sale in the canteen which is about Rs. 30,000/-. Both the statements are true. While the negotiations are going on, the college terminates certain courses reducing the number of students as a result of which the daily sale is reduced to

Rs. 10000/-. However, A fails to inform B about this development. B is entitled to rescind the contract on the ground of misrepresentation.

c) Causing other party to make mistake about the subject-matter of the agreement. In a contract of cooking and selling huge quantity of pure vegetarian food for a function organised by vegetarian families, the caterer makes a representation that no meat is ever cooked in his restaurant. However, on certain occasions meat is cooked there.

The organisers would not have ordered food from the restaurant but for the representation. This is a misrepresentation.

From the above discussion, we notice that in order to avoid a contract on the ground misrepresentation, it is necessary to prove that –

a. there was a representation or assertion;
b. such assertion induced the aggrieved party to enter into contract; and
c. the assertion is not true.

Effects of misrepresentation

The Contract Act provides two options to the party whose consent has been obtained by misrepresentation. Such aggrieved party may –

a) either rescind/avoid the contract; or
b) accept and affirm the contract and insist that he shall be placed in the position in which he would have been, if the representation made to him had been true.

Fraud

The term ‘Fraud’ includes all acts committed by a person with the intention to deceive another person. The definition of fraud given under the Contract Act is reproduced below.

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 thereto or his agent, or to induce him to enter into the contract:

1. the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
2. the active concealment of a fact by one having knowledge or belief of the fact;
3. a promise made without any intention of performing it;
4. an other act fitted to deceive;

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

Explanation:

1) When a person makes a suggestion or representation to another regarding something and at the time of making such suggestion he himself does not believe it to be true, it is fraud. For example, when a coaching class for accountancy expressly states to the students desirous of taking admission that all its teachers are chartered accountants, while none of them, in fact, is, it is fraud.

2) When the students inform the management of the coaching class that they are taking admission on the assumption that all its teachers are chartered accountants and the management observes silence, it is a case of fraud, if the faculties are not chartered accountants. Here, the management of the class has not made any claim about the qualifications of the teachers, yet they are guilty of fraud because they have not spoken when it was their duty to speak. It is thus fraudulent silence. The students can avoid the contract.

3) A promise made without any intention of performing it is fraud. Whether a person intends to perform his promise or not is a question of fact. Therefore, such intention (or its absence) is to be gathered from the prevailing circumstances. For example, when a person makes a purchase of goods on credit, without disclosing the fact that insolvency proceedings are pending and that he has no source of income are the circumstances sufficient to infer that he is making a promise without any intention of performing it.

4) “Any other act fitted to deceive” is a clause which makes the list of fraudulent acts complete and exhaustive. The other clauses refer the acts of fraud with some specificity and hence their extent is, in a way, limited. This clause refers to an unlimited range of acts, not referred to in other clauses, but which have a fraudulent purpose behind them. Since it is impossible to list all the fraudulent acts, this clause covers all those left uncovered by other clauses.

5) While Contract Act speaks about the fraudulent acts generally, some other laws declare certain acts of be fraudulent in nature. The last clause deals with such acts. For example, law of insurance requires full and absolute disclosure by the person who proposes to be insured. Any non-disclosure, whether accidental or otherwise, is considered fraudulent.

Effect of Fraud

The party who has been induced to enter into a contract by fraud has the following remedies against the party guilty of fraud:

1. He can rescind/avoid the contract;
2. He can affirm the contract and insist on the performance on the condition that he shall be put in the position in which he would have been, if the presentation made had been true;
3. He can sue the guilty party for damages, if any. For example, if an unsound horse is sold by fraud, the buyer can sue for damages for any injury suffered by him due to horse-riding.

Distinction between fraud and misrepresentation

We have seen earlier that the difference between fraud and misrepresentation is rather subtle. Wilful misrepresentation is fraud. The distinction between the two is as follows:

1. Misrepresentation is innocent and without any intention to deceive the other party, while fraud implies such intention. Fraud is deliberate and wilful.

2. The party whose consent has been obtained by misrepresentation has a right to rescind or avoid the contract, whereas in fraud, in addition to the right to rescind the contract, the aggrieved party has a right to claim damages, if any.

3. If the party alleging misrepresentation had the means to discover the truth by ordinary diligence, he cannot avoid the contract. But in fraud in spite of

availability of such means, the contract is voidable at the option of the defrauded party.

Mistake

A mistake is a belief based on or resulting from a misunderstanding or faulty judgment. It is an action or judgment that misguided or wrong. In other words, it is an erroneous belief about something. When a person has specific design or purpose in mind for entering into any agreement, but the purpose stipulated in the agreement is contrary, there is no will of the party entering into agreement. It is an error in consensus and hence there is no true agreement. The parties may formally enter into an agreement but there is no meeting of minds. Law therefore treats such agreements as void i.e. not enforceable by law.

Mistake can be of two kinds:

1. Mistake of law
2. Mistake of fact

Mistake of law

Mistake of law again can be of two kinds; **a) mistake of law of the land, or 2) mistake of foreign law.** Every one is required to know the law of the land and therefore it is said that ignorance of law in no excuse. Thus, if a person makes a written promise to his creditor to pay a time-barred debt being ignorant about the law of limitation, he cannot later seek to avoid the contract on the ground that he did not know the law. He has to pay the time-bared debt now that he has promised to pay. (though he was under no obligation to pay before making the promise.) As for the mistake of foreign law, it stands on the same footing as mistake of fact. Mistake of fact is explained in the ensuing discussion.

Mistake of fact

Mistake of fact can again be of two kinds:

1. Bilateral mistake
2. Unilateral mistake

Bilateral mistake

Bilateral means on the part of both the parties. When both the parties to an agreement are under a mistake as to a matter of fact, essential to agreement, **the agreement is void**. It must be noted that to make the agreement void on the ground of mistake of fact, the mistake must be on the part of both the parties and it must as to a matter of fact essential to the agreement. It must be a mutual mistake so as to negate *consensus ad idem.*

For example, A, who has two cars x and y, offers to sell car x, and B not aware that A has two cars and under the impression that car y is being offered, accepts the offer. Here there is no real consent and therefore the agreement is void.

The Contract Act further lays down that in order to make the agreement void the mistake must relate *to some fact and not to judgment or opinion*. Which types of bilateral mistakes affect the validity of agreements is a question of fact. Based on judicial rulings, some of them can be stated as follows.

a. Mistake as to identity of the subject-matter; where the seller has different goods in mind and the buyer has assumed otherwise.

b. Mistake as to existence of the subject-matter; where the goods are destroyed (no longer in existence) at the time of agreement without the knowledge of both parties.
For example, in an agreement for sale of a house, both parties are ignorant that the house is destroyed in fire at the time of agreement.

c. Mistake as to the quantity of the subject-matter; if both the parties are working under a mistake as to the quantity of the subject-matter, the agreement is void.

d. Mistake as to quality of the subject-matter; if there is a mutual mistake of both the parties as to the quality of the subject-matter, that is, if the subject-matter is

something essentially different from what the parties believed it to be, the agreement is void.

Unilateral Mistake

A unilateral mistake is one where only one of the parties to the agreement is under misstate as to a matter of fact. As regards the effect of unilateral mistake, the Contract Act provides that – 'a contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact.'

A contracts to rent a house from B for a monthly rent of Rs. 10,000/- while the going rate of rent in the same locality for a similar house is only Rs. 5000/- p.m. Here, A cannot avoid the contract on the ground of mistake as it was for him to exercise due diligence and care before entering into contract. It is a unilateral mistake on the part of A and he has to only blame himself for his own negligence.

Thus, a contract remains valid even if it is founded on unilateral mistake unless such mistake is caused by the other party by fraud or misrepresentation. If the mistake is so caused, the contract is voidable at the option of the aggrieved party.

As a general rule, a unilateral mistake cannot affect the validity of contract. However, there are certain exceptional circumstances where even a unilateral mistake can make an agreement void. Some of them are discussed below.

Mistake as to the identity of person contracted with, where such identity is the purpose of the agreement. For example, A, who is a regular customer of certain food articles from B who runs his business as "B and sons", places his order without the knowledge of the fact that the business has been sold by B to C. B is a person trusted by A for supply of wholesome food items and known for his hygienic practices in preparation of food. Without disclosing the fact of change over of business, C accepts the order. Subsequently, on coming to know that the goods would now be supplied by C, and not by B, A seeks to cancel the agreement. C claims that it is unilateral mistake on the part A. Here, A can cancel the agreement as it is based on mistake as to identity of person contracted with and such identity is important for the contract.

Mistake as to the nature and character of a written document. The second exceptional circumstance where even a unilateral mistake may make an agreement void is when a

party puts his signature on a formal written agreement under a mistake as to the nature and character of the document.

For example, a Guarantor signs a suretyship-bond with banker in relation to loan taken by his friend. The bond contains a clause that the guarantor, within a month, shall keep a term-deposit with the bank for Rs. 1 lac, and on failure, shall pay to the bank a monthly charge of Rs. 500/-. If the guarantor does not intend to keep such term-deposit with the bank, it is a unilateral mistake on his part in signing the bond and as a rule he cannot now avoid the obligation. However, it is a unilateral mistake as to the nature and character of the document and the mind of the signature- maker did not go with the signature, and hence the agreement (as far as it relates to term-deposit) is void.

Legality of Object

We have seen in the first chapter that one of the essential elements of contract is lawful object and consideration. An agreement may have been made with perfect compliance of all the legal formalities and yet it may not be a contract, if the object of the agreement is unlawful. As a result, such agreement is void and not enforceable by law.
The term ‘unlawful’ does not necessarily mean ‘punishable’ under the criminal law.

What considerations and objects are Unlawful?

The Contract Act provides that the consideration or object of an agreement is lawful, unless –

1. It is forbidden by law; or
2. is of such nature that, if permitted, it would defeat the provisions of any law; or
3. is fraudulent; or

4. involves or implies injury to the person or property of another; or
5. the Court regards it as immoral, or opposed to public policy.

Let us discuss these clauses one by one with examples.

1) If it is forbidden by law. A promise to do an act which is punishable under the criminal law of the country is obviously forbidden by law. Further, certain legislations may prohibit certain kinds of transactions, with or without prescribing any punishment for the same. An agreement which contemplates such promise is forbidden by law and therefore void.

Example:

- A promises to pay to B Rs. 50,000/- if B gets him employment in public service though A is not otherwise qualified for the post. The agreement is void as it is for unlawful consideration.
- A, a drunken driver through negligent driving, causes injury to B's son. A promises B all the medical expenses in addition to compensation and B promises not to inform the police. The agreement is void as the object is unlawful.

2. If it is of such a nature that, if permitted, it would defeat the provisions of any law. This clause refers to cases where the object or consideration of an agreement is of such a nature that, though not directly forbidden by law, it would indirectly result in violation of any law in force.

Example

- An agreement between husband and wife to live separately is void because if permitted such agreement would defeat the provisions of law on marriage.
- An agreement between an employee who suffers from night-blindness and his employer under which the employee accepts lesser wages than what is prescribed under law on minimum wages, to compensate for his disability is void.

3. If it is fraudulent. An agreement whose object or consideration is to defraud others is unlawful and therefore it is void agreement.

Example

A, a manager of an establishment, agrees to issue a service certificate to B for its submission to another establishment so as to help B get employment there. B promises to pay Rs. 5000/- in return. The purpose of the agreement is to commit fraud and therefore the agreement is void.

4. If it involves injury to the person or property of another. If the object or consideration of an agreement is injury to the person or property of another, it is an unlawful agreement and hence void.

Example

A agrees to pay B a sum of money for writing and publishing a defamatory article against C. A also agrees to pay the compensation which B may have to pay to C in a suit for defamation brought by C. The object of the agreement is unlawful as it involves injury to the person of C and therefore it is a void agreement.

5. If the court regards it as immoral or opposed to public policy.

The terms ‘immoral’ or ‘opposed to public policy’ will always escape every attempt to define them. No precise definition can ever be presented of these terms. At the most one can give illustrations of immorality or acts which are opposed to public policy, that too only in a given context. This is so because what is immoral (or moral) and what is opposed to public policy would always depend on the value system of a society at a given point of time. These values change with the passage of time and so do the concepts of morality and immorality. Therefore one has to be very careful in ascertaining the validity or invalidity of an agreement on the touchstone of immorality or its being opposed to public policy. Sending a girl-child to school was considered immoral few hundred years ago in many parts of India. Today, not sending a girl-child to school solely for her being a girl would be considered immoral.

It is for this reason that the Contract Act gives discretion to judicial authorities (when it provides: 'if the court regards…) to decide what is moral or immoral rather than providing any definition of the terms. Such definition would straitjacket the Courts making them helpless in discharging their role effectively. The courts are thus expected to apply the yardstick of the prevailing social values and adjudicate on the issues.

Again, the terms 'opposed to public policy' and 'immoral' are not mutually exclusive of each other. What is immoral is bound to be opposed to public policy and the reverse is also true. It must be remembered that public policy is not government policy. Government policy is always well-documented and expressed in precise terms, which is impossible in the case of public policy. Another point worth noting is that morality (or immorality) is a term broader than legality (or illegality). What is illegal is also immoral in most cases but the reverse may not be true. For example, smoking in the presence of parents may be considered immoral, but it is not illegal.

With the help of decided cases, the following agreements can be stated to be immoral or opposed to public policy.

a. An agreement between client and his advocate, by which the client agrees to pay certain percentage of recovery in a recovery of suit filed by the client, is a void agreement being against the professional code of conduct and hence opposed to public policy.

b. An agreement between the *Mukhia* of a village and the management of a nearby hospital by which the *Mukhia* is to get commission on the basis of number of patients admitted in the hospital through him, is opposed to public policy and hence void.

c. Marriage brokerage agreements whereby the pundit or purohit is promised money for procuring wife are opposed to public policy and hence void.

d. An agreement between an employer and his employee whereby the employee on joining his duties, agrees to serve for a minimum number of years, failing which he would compensate the employer is opposed to public policy and

hence not enforceable at law.

Effect of the object, which is unlawful in part

When the consideration or object of an agreement is unlawful, the agreement is void and it is not a contract at all. However, what is the consequence if the object or consideration is partly lawful and partly unlawful?
The Contract Act provides an answer to this question which is stated below.

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

  Example: A and B agree that A shall sell B a house for Rs. 10,000/-, but that if B uses it as a gambling house, he shall pay A Rs. 50,000/-. The first set of reciprocal promises, namely, to sell the house and to pay Rs. 10,000/- for it, is a contract.
  The second set is for an unlawful object, namely, that B may use the house as gambling house, and is a void agreement.

- 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. (i.e. when the illegal part cannot be separated from the legal part)

  Example: A agrees to serve B as his housekeeper and also to live in adultery with him at a fixed salary. The whole agreement is void. The part of the agreement which relates rendering services as housekeeper and getting salary cannot be contract because it cannot be ascertained as to what was due on account of adultery and what was due on account of housekeeping.

Effect of illegal agreements on collateral transactions

In the first chapter of the book we have discussed various kinds of contracts and agreement wherein we have seen the difference between illegal agreements and unlawful agreements. To repeat briefly, it may be said that all the transactions which are incidental or collateral to illegal agreement also carry the stigma of illegality and therefore cannot be contracts. However, in the case of void agreements, the incidental or collateral transaction do not become void and may be valid contracts.

Void agreements are those which are not enforceable by law. We have already discussed certain types of void agreements such as agreement with minors, agreement without consideration, agreement made under a bilateral mistake of fact essential to the agreement etc. In addition to these, the Contract Act expressly declares certain agreements to be void.

One of the essential elements of valid contract is that it must not be expressly declared void under the Contract Act.

The Contract Act expressly declares the following agreement to be void.

1. **Agreement in restraint of marriage**

An agreement, by which one party undertakes not to marry at all or not to marry a particular person, for consideration is a void agreement. However, an agreement to marry a particular person and no one else is a valid contract.

2. Agreement in restraint of trade

It is the constitutional right of every citizen of India to practice any trade or profession of his choice and therefore Contract Act declares that every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.

It must be however noted certain such restrictions have been recognised under other statutes and hence such restrains are valid. For example, **Partners' agreement,** by which restraint is put on the partners not to carry on similar business either during the period when they are partners or after retirement, or within a specified locality are valid contracts. Similarly, a trader, who sells **'Goodwill'** along with his business, can be restrained from carrying on a similar business either for a specified period or for specified local limits.

3. Agreement is restraint of legal proceedings

An agreement by which a person is restricted absolutely from enforcing his rights under any contract by usual legal proceedings, or an agreement, by which the time available to a person to initiate legal proceedings under Limitation Act is shortened, is a void agreement. However, an arbitration agreement between two or more persons to refer their disputes to arbitration is valid.

4. Agreement the meaning of which is not certain

Agreement the meaning of which is not certain, or capable of being made certain, is void. An agreement to sell a house for a good price is void because what is a good price is not certain.

5. Agreement by way of wager

The term wager means a bet and wagering agreements are nothing but betting agreements. Where a person stands to win or lose depending on happening or non-happening of an uncertain event and where none of the parties are interested in the event itself, but only in the stake put in the agreement, it is a wagering agreement and it is void. However, the Lottery and horse races authorized by Government are exceptions.

6. Agreement contingent on impossible events

Contingent agreements to do or not to do anything, if an impossible event happens, are void whether the impossibility of the event is known to the parties at the time of the agreement or not. A agrees to pay Rs. 100/- to B if two parallel lines meet. It is a void agreement.

7. Agreement to do impossible acts

An agreement to do an act impossible in itself is void. A agrees for money to make alive the wife of B who is dead is a void agreement.

Performance and Discharge of Contract

Having discussed how a contract comes into existence, we shall now see how a contract is discharged. Every contract on coming into being imposes certain obligations and confers certain rights on the contracting parties. When these rights and obligation come to end or when these rights and obligations are extinguished, the contract is discharged. A contract may be terminated or discharged in any of the following ways:

1. By performance – actual or attempted
2. By mutual consent or agreement
3. By subsequent or supervening impossibility or illegality
4. By lapse of time
5. By operation of law
6. By breach of contract

Let us now discuss these modes of discharge of contract one by one in detail.

1. Discharge by performance

The most obvious and normal way of discharge of contract is by performance. When a contract is duly performed by both the parties to the contract, the contract comes to an end in the most desirable and happy manner. Nothing more remains to be done by either party or their rights against each other as also obligations towards each other under the contract are over and terminated.

Performance may be (a) actual performance, or (b) attempted performance or Tender.

Actual Performance

When each party does what it undertook to do under the contract within the time and in the manner prescribed, it is called actual performance of the contract. For example, A agrees to purchase a car from B for Rs. 50000/- and promises to pay on delivery of the car. B delivers the car to A at the specified time and A makes the payment. The contract is discharged as both A and B have discharged their respective obligations under the contract.

The obligation may be discharged by the promisor himself, or his agent, or legal representative (unless personal skill of the promisor is involved) or even by a third party on behalf of the promisor. So far as the performance by a third party is concerned, once such performance is accepted by the promisee, the promisee has no right against the promisor and the contract stands discharged as regards the promisor. It must be remembered that the contract must be performed in the manner and within the time prescribed under the contract. If the time and/or manner of performance is not stipulated in the contract, then it has to be performed within a reasonable time and in a reasonable manner. What is reasonable depends on the facts of each case.

Attempted Performance

Sometimes it so happens that a person who is bound to perform a promise is willing and actually offers to perform his promise as per the contract, but the other party does not accept the performance. Such attempt on the part of one party to the contract is called 'attempted performance or Tender'. A valid tender of performance is equal to actual performance and therefore it has the effect of discharge of contract.
For example, A agrees to paint the house of B on 15th August and B agrees to pay him for the work. It is also agrees that A should reach B's house in the morning with his team of workers and necessary equipments, paints etc. and complete the paining work by the end of the day. A visits B's house in the morning of 15th August but finds the house locked all the day. Here, A has attempted to perform his promise but B has failed to accept the performance. Therefore, the contract is discharged by attempted performance by A. Now B has to pay A, though A has not painted the house.

Valid tender or offer of performance must satisfy the following conditions:

1. *Offer to perform must be unconditional*. The offer to perform must not be made subject to any conditions. In the above example, if A offers to perform provided B arranges lunch for the workers, it is not a valid tender.

2. *Offer to perform must be at proper time and place.* An attempt to perform either before or after the due time for performance (or at other place) is not a valid tender. In the above example, if A goes to B's house immediately after midnight of 14th August

and offers to paint the house, it is not the proper time and therefore it is not a valid tender.

3. *Offer to perform the whole of the obligation*. Thus, if A decides to paint only two rooms on 15th August and rest of the rooms on other day, it is not an offer to discharge the whole of the obligation and as such it is not a valid tender.

2. Discharge by Mutual consent or Agreement

Contract is the result of an agreement between the parties. As one agreement gives rise to a contract binding the parties, a subsequent agreement between the same parties can free them from their obligations and the contract stands discharged. It must be remembered that such subsequent agreement between the parties by which they agree to free each other from the obligations arising out of earlier contract, is also a contract in the legal sense of the term. Such discharge of contract by mutual consent or agreement can take place in the following forms:

a. Novation. It occurs when a new contract is substituted for an existing contract. For example, A has to pay Rs. 500/- to B and B has to pay Rs.500/- to C. By agreement, C accepts A as his debtor thus discharging B. This is novation and now under the new contract A has to pay Rs. 500 to C.

b. Alteration. When a significant and materially important term of an existing contract is changed by the parties, it may have the effect of giving birth to an altogether new contract. When the quantum of liability is changed or when the rate of interest is changed, it is alteration.
In novation, there may be a change of parties also while in alteration only the terms of contract are changed and the parties remain the same.

c. Rescission. To rescind means to cancel. The parties who have agreed to do something for each other may subsequently decide to cancel the idea. In other words they agree not to bind each other any longer on the basis of earlier contract. They consent to the non-performance of obligations of each other. A agrees to sell his house to B by certain date. Before the date, both agree not to go ahead with the sale and

cancel the deal. By virtue of subsequent agreement, earlier contract is discharged.

d. Remission. Remission is accepting lesser performance than what was contracted. A person, who has been promised something under a contract, may remit or give up either wholly or in part the performance of the promise made to him and for this purpose, no consideration is required. For example, A is indebted to B for Rs. 5000/-, but agrees to accept Rs. 4000/- as full and final settlement of his claim, giving up the balance amount. The promise of B to accept a lesser amount does not require consideration and such promise a valid contract. Once a party remits or gives up what is due to him under contract, naturally the contract is discharged.

3. Discharge by Subsequent or supervening impossibility or illegality

If the agreement is to do something which is impossible at the time of agreement itself, then such agreement is void and can never attain the status of contract. However, in certain cases the performance may be possible at the time of formation of agreement making it a valid contract, but later it may become impossible for some reasons. This is known as subsequent or supervening impossibility. In such case the contract becomes void and hence is discharged.

A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

For example, A agrees to sell his house to B for a certain price. Before the sale is executed, the house is destroyed in fire. The contract is discharged. Note that the subsequent impossibility is beyond the control of the promisor and it is not self-induced. Similarly, A, a merchant in Maharashtra agrees to supply a specified quantity of wheat to B, a trader in Gujarat. Subsequent to such contract, the Maharashtra Government bans the sale of wheat outside Maharashtra due to its scarcity. This subsequent change of law has rendered the contract impossible to be performed and hence it becomes void and is discharged. It should be remembered that mere difficulty in performance which was not known to the promisor at the time of making the contract is not to be equated with impossibility. For example, a sudden price rise in the raw material or a strike by the workers etc, are not the reasons for which a party can treat the contract as discharged and free himself from the obligation of performance.

Further, personal incapacity or death of the promisor would also discharge the contract, provided the performance of the contract depends on the personal skill or qualifications of the person. For example, a contract to marry is discharged when one party dies or becomes insane; or a contract by a painter to paint a picture is discharged when the painter, subsequent to making the contract, loses his hand in an accident.

4. Discharge of by lapse of time

If one party to a contract does not discharge its obligation (or breaks the contract), the other party gets a right to initiate proceedings against him for appropriate relief. Such action has to be taken against the guilty party within the time prescribed under the Limitation Act. Different periods of limitation are prescribed under the Limitation Act for different types of proceedings. For simple money recovery suits, the period of limitation prescribed is three years from the date of default in repayment. Thus, for example, where A advances money to B repayable by 31st December, on the non-repayment by B, A must initiate proceeding against B within a period of three years from 31st December. If he does not do so, he loses his remedy against B and the money becomes irrecoverable. A has now no right to recover the money and B has no obligation to repay. As such the contract is discharged. (Note that discharge of contract is a situation where the rights and obligations of the parties towards and against each other come to an end.)

5. Discharge by Operation of law

A contract is discharged by operation of law when one of the parties to the contract becomes ***insolvent.*** A contract is also discharged when there is ***any material alteration made in a written document of contract*** by one party without the consent of the other. Similarly, when the corresponding rights and obligations under the contract ***get consolidated or merged in the same person,*** the contract is discharged. For example, where a person issues a bearer cheque to another, he has a contractual liability to arrange for the payment of money mentioned on the cheque. The payee may transfer the said cheque in favour of another person and such transferee may further transfer the cheque to yet another person. During the course of circulation, the cheque may come back in the hands of the original drawer. In such event, the

obligation to pay and right to receive vest in the same person and as such, the contract is discharged.

6. Discharge by breach of contract

When one party to the contract refuses or neglects to discharge its obligation under the contract or conveys its unwillingness to discharge the obligation, by words or conduct, he commits breach of contract. Breach of contract brings an end to the obligations created under the contract and the contract as such is discharged. Of course, the other party now has the right to take action against the party at default, but the contract is discharged.

Breach of contract may be of two kinds: a) Actual breach; and b) Anticipatory breach.

Actual Breach of Contract

Actual breach occurs when a party fails to perform his obligation at the time fixed for performance. For example, if the contract provides for delivery of goods by a particular day and the goods are not delivered by that day, actual breach of contract takes place. Thus, there cannot be any 'actual breach of contract' by non-performance, so long as the time for performance has not arrived. It is only when the time for performance has arrived and the party required to perform does not perform that 'actual breach of contract' occurs.

Anticipatory Breach of Contract

The Contract Act provides that –'when a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.'

Thus, as the title itself suggests, anticipatory breach of contract is an anticipation that breach of contract will invariably occur and this anticipation is made obviously before the time for performance has arrived. When one party to the contract communicates to the other party, before the time for performance has arrived, that he shall not perform his obligation at the appointed time; or when one party has placed itself in such a

position that it shall be impossible to perform its obligation when it becomes due, anticipatory breach of contract takes place.

It can be in the ***express form*** where a party communicates to the other party, before the due date of performance, his intention not to perform it. For example, A contracts to sell 100 quintals of wheat to B on 31st December. On 1st December A informs B that he will not supply the wheat as agreed. ***Implied form*** is by conduct of one of the parties. Here a party by his own voluntary act disables himself from performing the contract. For example, A agrees to sell house to B on 31st December, but sells the same to house to C on 1st December.

Effect of Anticipatory Breach of Contract

When there is an anticipatory breach of contract by one party, the other party is excused from performance. The other party has now an option by which:

a. He may either treat the contract as rescinded and sue the other party for damages for breach of contract **immediately without waiting till the due date of performance, or**

b. He may treat the contract as still operative and binding and wait for the time of performance and then hold the other party responsible for the consequences of his non-performance. In other words, he keeps the contract alive so that if the other party, on second thought, wishes to perform the promise, the opportunity is still available.

For example, A agrees to sell 100 quintals of wheat to B who is a trader from another state, on 31st December. On 1st December, he informs B that that he will not be able to sell the wheat. This is an anticipatory breach of contract. Two courses are now open to B: (i) he may treat the contract as rescinded and at once sue A for damages, or (ii) he may wait till 31st December and if by then wheat is not sold and delivered, sue A for damages. (If B takes the second course, A has the advantage of subsequent impossibility, if at all any taking place. Thus, if the Government bans the sale of wheat on 15th December, A can take advantage of supervening impossibility and B cannot recover any damages from A.)

Remedies for Breach of Contract

When a contract is broken, the injured party is entitled to any one or more of the following reliefs:

1. Rescission of contract
2. Suit for damages
3. Suit upon quantum meruit
4. Suit for specific performance of the contract
5. Suit for injunction.

Let us now discuss these remedies available to injured poarty one by one in detail.

1. Rescission of contract

To rescind means to cancel. Rescission of contract, therefore, means cancellation of the contract. It is a remedy available to the injured party against the other party who is guilty for breach of contract. Rescission of contract absolves the injured party from all its obligations under the contract. As it takes two to form a contract, similarly it takes two to cancel the contract. When there is breach of contract, the guilty party may choose to do nothing and be quiet taking no action against the guilty party. If, however, the injured party wishes to sue the guilty party for compensation for breach, he has to first file a suit for rescission of contract.

When the contract is rescinded at the hands of the court, the aggrieved party is free from all its obligations under the contract; and he becomes entitled to compensation from the other party for any loss sustained by him out of such breach of contract.

Thus, rescission of contract is a relief to the aggrieved party in the form of freedom from his own obligation under the contract and obtaining to himself the right to claim compensation from the guilty party for the loss suffered by him on account of breach of contract.

For example, A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and B agrees to pay her Rs. 100 for each night's performance. On the sixth night, A wilfully remains absent from the theatre, and B, in consequence, rescinds the contract. B is entitled to claim compensation for the damage which he has sustained through the non-fulfilment of the contract.

2. Suit for Damages

The term 'damages' is not the plural of the term 'damage'. To damage means to harm or to cause injury or to cause loss; and the term 'damages' means monetary compensation for the damage or loss. Thus, suit for damages means suit for compensation for the loss sustained by the injured party on account of breach of contract. It should be remembered that such compensation is not in the nature of penalty. It is not a punishment awarded to the guilty party of breach of contract. The Contract Act is a civil law and the object of civil law is to enforce the right, unlike criminal law whose object is to punish the wrong. Therefore, the object of awarding compensation to the injured party is not to punish the party at default, but to put the injured party in that position in which he would have been if the breach had not been committed.

As a general rule, therefore, compensation must be commensurate with the injury or loss sustained, arising naturally from the breach; if actual loss is not there, no damages would be awarded.

There are different kinds of damages that can be awarded by the Court to the injured party. They are discussed below one by one.

Ordinary or General Damages

When a contract is broken, the aggrieved party can always recover ordinary or general damages from the guilty party. It is the estimated loss directly and naturally arising from the breach of contract in the ordinary course of events. They are restricted to the proximate consequences of the breach of contract. Remote or indirect consequences of breach are not considered.

A leading case of *Hadley vs. Baxendale* is very relevant here. *The owner of a mill delivered a broken shaft to the defendant, a common carrier to take to a manufacturer, copy it and make a new one. The carrier delayed delivery of the shaft beyond a reasonable time, as a result of which the mill was idle for a longer period than necessary. However, the plaintiff, the owner of the mill had not made it known to the carrier that any delay would result in a loss of profits. In a suit filed by the plaintiff for compensation, it was held by the Court that the carrier was not liable for loss of profits during the period of delay. "when two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach should be either such as may fairly be considered as 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 the contract was entered into as a probable result of the breach."*

Let us take another example. A contract to sell and deliver 500 bales of cotton to B on a fixed day. A knows nothing of B's mode of conducting his business. A breaks his promise, and B, having no cotton, is obliged to close his mill. A is not responsible to B for the loss caused to B by the closing of the mill. B can however claim ordinary damages for the breach of contract.

A contracts to buy B's ship for Rs. 60,000/-, but breaks his promise. As a consequence of breach, B sold the ship in the open market and he could only get Rs. 52,000/- for the ship. B can recover by way of compensation Rs. 8000/- (60000 – 52000), the excess of the contract price over the actual sale price.

Special Damages

Special damages are those resulting from a breach of contract under some peculiar circumstances. They arise out of a special situation. When a contract is broken, the injured party may suffer losses which are indirect or remote in nature as compared to those which arise in the ordinary course of events.
When a person knows, at the time of entering into a contract, about the existence of a special situation; and that if he breaks the contract it would lead to special loss for the

other party, he is bound to make good such special loss. This is called special damages.

For example, A, a builder, contracts to erect and finish a house by the first of January in order that B may give possession of it at that time to C, to whom B has contracted to let it. ***A is informed of the contract between B and C.*** A builds the house so badly that, before the first of January, it falls down, and has to be rebuilt by B, who in consequence loses the rent which he was to have received from C, and is obliged to make compensation for breach of that contract. A must pay to B by way of compensation, (a) for the cost of rebuilding the house, (b) for the rent lost, and (c) for the compensation made to C.

It can be noticed from the above discussion that two conditions must be satisfied before the injured party can claim special damages from the guilty party. The first is that there must be a *special loss* caused to the injured party as a result of breach of contract and secondly, the *existence* of such special circumstance must be within the knowledge of the parties *at the time of entering into contract.*

Exemplary or Vindictive Damages

The object of awarding compensation is not to punish the party who is responsible for breach of contract. However, exemplary or vindictive damages are awarded with a view to punishing the guilty party and they are not granted as a rule. In two cases, however, the court may award such damages, namely, a) Breach of promise to marry, and b) Dishonour of cheque of a trader customer by his banker when there are sufficient funds to the credit of customer to honour the cheque.

In a breach of contract to marry, the amount of damages will depend upon the extent of injury to the party's feelings, such as mental agony etc. and in a breach of contract by banker, the amount of damages will depend on the extent of disrepute caused to the trader customer which in turn depends upon the status of the party. Interestingly, the norm of measure is – 'the smaller the cheque, the greater the damage.'

Nominal Damages

As the name suggests, these damages are nominal in nature. They are awarded only for namesake. When, in a breach of contract by one party, the other party has not suffered any actual damage and yet the other party wishes to place on record the fact of such breach, such damages are awarded. These damages are a very small amount of

money, say a rupee or two, claimed and awarded only for the purpose of establishing the right of the injured party.

Liquidated Damages and Penalty

Sometimes, the parties may fix, at the time of entering into contract with each other, the amount of compensation that would be payable in case of breach. This is known as liquidated damages. It is the requirement of law that such sum, determined by the parties in advance, must be fair and reasonable, because the law cannot support any penal provision in a contract. In such cases, the question that often arises is whether the amount of compensation so fixed by the parties in advance is 'liquidated damages' or 'Penalty'?

The Contract Act very clearly provides on the issue. It states that regardless of what is stipulated by the parties as amount of compensation payable in case of breach, the Courts shall award **only reasonable compensation,** but not exceeding the amount fixed by the parties.

For example, A contracts to well certain goods worth Rs. 100/- to B on a specified day and also agrees to pay Rs. 500/- by way of compensation if he fails to supply the goods by that day. If A commits breach of contract, the Court is not bound by the stipulation of the parties and shall award only those damages which the Court thinks fair and reasonable to cover the real loss suffered by the injured party. The courts have to only ensure that such damages do not exceed the amount already fixed by the parties. In the above example, therefore, the court shall award reasonable damages, but not exceeding Rs. 500/-.

Rules regarding amount of damages

The rules applicable to the awarding of damages may be summarized as follows:

1. The damages are awarded to compensate the injured party for the loss suffered due to breach of contract, and not to punish the guilty party.
2. The object is to place the injured party in the same position as if the contract had been performed.

3. Ordinarily, the injured party can recover by way of compensation only the actual loss suffered by him.
4. In calculating actual loss, the court will take into account only such loss as may be fairly and reasonably considered as arising naturally and in usual course of things from breach of contract.
5. Special or remote damages, i.e. damages not arising naturally from the breach would be awarded only if they were in contemplation of both the parties at the time of entering into contract.
6. The fact that damages are difficult to assess cannot be the ground to prevent the injured party to recover them.
7. Nominal damages may be awarded when there is no actual or real loss arising out of breach.
8. If the parties fix up in advance the sum payable as damages in case of breach of contract, the court will allow only reasonable compensation so as to cover the actual loss suffered, not exceeding the amount so stipulated under the contract.
9. Vindictive damages cannot be awarded for breach of contract, except for breach of promise to marry or against a banker for wrongful dishonour of a cheque.
10. It is the duty of the injured party to minimize the loss as much as possible.

3. Suit upon Quantum Meruit

The expression ‘quantum meruit’ literally means ‘as much as earned’ or ‘in proportion to the work done.’ This third remedy is available where a contract, partly performed by one party, has been discharged by breach of contract by the other party, or when the contract becomes void (or is discovered to be void).

A party has a right to claim on quantum meruit either without or in addition to claiming damages for breach of contract. The aggrieved party may claim upon quantum meruit and may claim remuneration in proportion to work done or goods supplied in the following circumstances:

1. Where the work has been done in furtherance of a contract which is wrongfully terminated by the other party.

For example, A engages B, a contractor, to construct a building. After a part of the building is constructed, A terminates the contract and prevents B from constructing further. B is entitled to get reasonable compensation on quantum meruit in addition to the damages for breach of contract.

2. Where the contract 'becomes void' or 'is discovered void' after some work has been done or some goods or services have been supplied.
For example, A contract to carry out some repairs in the house of B and B agrees to pay A per repair work so carried out. After some work has been done, the house is destroyed in fire and thus the contract becomes void and is discharged. A is entitled to compensation on quantum meruit for the repairs carried out till the destruction of the house.

Let us take another example where a person has been appointed as an employee in a Company by the Director of the Company. After the employee worked in the Company for some days, it is discovered that the director had no authority to engage an employee and the appointment was invalid. His employment was therefore terminated. The employee is now entitled to claim compensation on quantum meruit for the days worked. This may be in addition to the damages for breach of contract.

It may be noted that a party who is guilty of breach of contract may also recover compensation on quantum meruit. For example, a transporter of goods fails to take the goods at the agreed destination due to breakdown of the vehicle. Thus, it is he who has committed the breach of contract; yet he can recover compensation on quantum meruit for the distance traveled. However, it is necessary that the part of distance traveled can be considered as part performance of the contract. In other words, the contract should be divisible.

4. Suit for specific performance

Instead of or in addition to awarding damages to the injured party, Court may direct the specific performance of the contract. Specific performance means the actual carrying out by the parties what they had agreed to do. Thus, where A agrees to sell an ancient painting to B for Rs. 50,000/- and later refuses to sell the same, in a suit for specific performance brought by B the court may order A to specifically discharge his obligation under the contract, namely, to sell the painting to B.
To put in other words, this remedy is granted when the contracts relate to sale of land and buildings, rare articles or certain unique goods having special value. In such cases, monetary compensation is not an adequate relief for the injured party.

This relief is not however available for breach of every kind of contract. It is at the discretion of the court and granted only when the court considers it just and equitable to do so.

The relief of specific performance ***is not granted*** in the following cases:

1. *Where monetary compensation is an adequate relief;* Thus, where a promise to sell goods is broken and similar goods can be easily be procured in the market, this relief is not granted.
2. *Where the Court cannot supervise the execution of the contract;* Where a builder refuses to carry out construction as per contract, the Court shall not grant specific performance because the Court cannot supervise the actual carrying out of the construction work. (the injured party may again approach the court with the grievance of inferior construction and so on, and this will lead to multiplicity of proceedings. Instead, monetary compensation is the most appropriate and adequate remedy.

3. *Where the contract is for personal service;* If a singer breaks his contract to sing at a theatre for a specified period, the Court shall not order the singer to carry out the performance as agreed, for obvious reasons. If a surgeon, having agreed to perform a surgical operation on a patient, later declines to do so, it shall be risky for the patient to insist for specific performance. He ought to be satisfied, instead, with monetary compensation.

4. *When one of the parties is not competent to contract;* Thus, a minor cannot succeed in an action for specific performance since he cannot himself be sued for breach of contract.

5. Suit for Injunction

Injunction is a mode of securing the specific performance of the negative terms of the contract. ‘Injunction’ is an order of a court restraining a person from doing any particular act. Thus, in a contract where a person undertakes not to do a particular thing, and breaks the contract by engaging himself in doing that thing, the other party

can get an order of injunction from the court restraining the guilty party from doing what he had agreed not to do.

For example, A, a singer, agrees to sing at the theatre of B for ten nights in a month and not to sing anywhere else during that period, B can get an order from the court restraining A from singing anywhere else during the said period. It shall be thus noticed that injunction is rather a *preventive relief.* (Specific performance is not possible here because the contract is of personal nature; and injunction is meaningless and redundant when the period is over.)

Contract of Sale of Goods

Brief introduction

The law relating to sale of goods is to be found in the Sale of Goods Act, 1930. Just like bailment and agency, sale of goods is also a special kind of contract and therefore the provisions of Contract Act are applicable to it just like any other contract, except in certain matters. In these matters, the special provisions of this Act are applicable, superceding the provisions of Contract Act.
Save and except these matters, all the rules of Contract Act, as relate to competence of parties, free consent, offer and acceptance etc. are also applicable to contract of sale of goods.

Contract of Sale of Goods

A contract of sale of goods is a contract whereby the seller –

(a) transfers or
(b) agrees to transfer the property in (i.e. ownership of) goods,

to the buyer for a price.

The term contract of sale is a generic term and it includes an actual sale as well as an agreement to sell. When the ownership of goods is transferred from seller to buyer it is called ‘Sale’, and where the ownership of goods is to be transferred from seller to buyer at some time in future it is called ‘an agreement to sell’. In other words, contract of sale includes both ‘Sale’ and ‘agreement to sell.’

Essentials of contract of sale

We have seen above that contract of sale is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. The analysis of this definition reveals the following essential features of contract of sale of goods.

1. Two parties. The contract of sale is essentially between two parties; the seller and the buyer, as a person cannot buy his own goods. However, a part-owner may sell his share to other part-owner as a partner can always sell to the other partners. Similarly, a partner can sell goods to his firm. But a club consisting of several members does not sell goods when it supplies certain items to its members for price. The transaction is akin to sale, but not a sale. Here, the members are virtually consuming their own property and the mode of payment is a matter of internal arrangement regulated by the rules of the club.

2. Transfer of property. The term 'property' here means the ownership. There must be transfer of property or ownership from the seller to the buyer. Mere transfer of possession of goods from one person to another without transferring the ownership is not a sale. Thus, when the goods are pledged as security, there is a transfer of possession but it is not a sale because the ownership continues to be with the transferor. Same is the case with the bailment of goods.

3. Goods. The subject-matter of contract of sale must be 'goods'. Goods means every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale. Accordingly, every kind movable property except money and actionable claims are goods under the Sale of goods Act. Money means current money i.e. recognised currency in circulation in the country. Obviously money cannot be sold or bought. Old and rare coins, which are not in circulation at present can be treated as goods and hence bought and sold like any other goods.
Actionable claim means a claim which can be enforced by legal action. For example, if X has borrowed money from Y, then Y has a claim against X which can be enforced by taking legal action i.e. filing a suit against X. This right or claim of Y cannot be subject matter of sale of goods because such claim is not goods.
Sale and purchase of immovable property is governed by the provisions of Transfer of Property Act, 1882.

4. Price. The consideration in a contract of sale of goods must be money consideration which is called 'price'. Thus, in order to be a sale under this Act, goods must be sold or bought for money consideration only. If the goods are sold in exchange of some

other kind of goods, it is barter and not sale of goods. However, where goods are sold partly for money and partly for goods, it is a contract of sale of goods. If A sells a table to B in return of two chairs, it is a general contract, but not contract of sale of goods. But if A sells his table to B for Rs. 500/- (or for one chair and Rs. 250/-), it is a contract of sale of goods.

5. Includes both 'Sale' and 'Agreement to sell'. 'Contract of sale' includes both 'sale' and 'agreement to sell'. As already noted above, sale implies immediate transfer of ownership from seller to buyer whereas agreement to sell implies such transfer at some time in future or subject to fulfillment of some condition. Whether the parties intend to transfer the ownership of goods immediately or at some future time has to be interpreted from the construction of the contract and the facts of the case.

6. No formalities to be observed. The Sale of goods Act does not lay down any special formalities to be followed nor does it prescribe any form to constitute a contract of sale of goods. It is a kind of general contract and therefore all the essential elements of contract, such as competence of parties, free consent etc. must be present in contract of sale of goods also. Further, contract of sale may be oral or written. It may even be implied from the conduct of the parties.

Distinction between Sale and Agreement to sell

It is necessary to understand the difference between the two as they have different legal effects. The points of distinction can be stated as follows:

1. Transfer of property (ownership). In a sale, the property in goods passes to the buyer immediately so that the seller is no longer the owner of goods. In other words, a sale implies immediate conveyance of property from the seller to the buyer.
In 'agreement to sell', there is no transfer of property to the buyer at the time of the contract. The transfer of property takes place later, so that the seller continues to be the owner of the goods until the agreement to sell is converted into a sale. This conversion takes either after the expiry of certain time or fulfillment of some condition.

For example, where a person purchases a golden ring from a shop by making payment for the same, it is a contract of sale as the ownership of the ring has passed from seller to buyer at the time of contract. On the other hand, where a buyer purchases 30 litres of oil from a shop which is to be taken out a barrel containing 100 litres of oil, it is 'an agreement to sell' because the ownership of 30 litres of oil can pass to the buyer only when 30 litres of oil is separated from the bulk, weighed and made ready for delivery. This 'agreement to sell' becomes a sale on fulfillment of certain condition i.e. separation of specified quantity from the bulk.

It must be remembered that transfer of possession has nothing to do with the transfer of ownership of goods. One who possesses the goods may not be the owner of goods and vice versa.

2. Risk of loss. It is a general rule that unless otherwise arranged and agreed, the risk of loss of or damage to goods is always with the owner of the goods. Therefore, in the case of sale, where ownership has passed from seller to buyer, if the goods are destroyed the loss falls on the buyer even if the goods have not reached him, or are still in possession of the seller. On the other hand, in the case of agreement to sell, the seller continues to be owner of goods and hence if the goods are destroyed the loss falls on the seller, even if the goods are in possession of the buyer.

3. Consequences of breach. In the case of sale, if the buyer refuses to pay the price of goods, the seller can sue him for price even if the goods are in his possession. However, in the case of agreement to sell the ownership has not passed to the buyer and hence if the buyer refuses to pay the price, the seller can only sue for damages and not the price, even if the goods are in possession of the buyer.

4. Right of resale. In sale, the seller cannot resell the goods even if they are in his possession because he is no longer the owner of the goods. If he does so, the subsequent buyer having knowledge of the previous sale cannot obtain any title to the goods. The first buyer can sue and recover the possession of goods from the second buyer. However, in case of agreement to sell, the property in goods remains with the seller and he can lawfully sell the goods to another person who will get a good title to goods irrespective of his knowledge of previous sale. The original buyer can sue the seller only for damages for breach of contract.

5. Insolvency of buyer before he pays for the goods. In a sale, if the buyer becomes insolvent before he pays the price of goods, the seller has to deliver the goods to the Official Receiver (appointed for the property of the buyer). The seller is then treated like other creditors of the buyer and is entitled only to a ratable dividend for the price of the goods. But if it is an agreement to sell, the seller may refuse to deliver the goods to the Official Receiver unless the price is paid.

6. Insolvency of seller if the buyer has already paid the price. In a sale, if the seller becomes insolvent, the buyer is entitled to recover the goods from Official Receiver, as he has become the owner of the goods. On the other hand, if it is an agreement to sell, and if the buyer has already paid the price without receiving the goods, he can only claim ratable dividend and not the goods, because he has not yet acquired ownership of the goods.

Sale and Hire-Purchase Agreement

In a hire-purchase agreement, the hirer of goods pays money to the owner of goods for using the goods, but the ownership of goods remains with the person who gives goods on hire. Here the owner of goods delivers the goods to a person who agrees to pay certain stipulated periodical payments as hire charges. Though the possession of goods is with hirer, the ownership is still with the person who allows his goods to be used by the hirer. If the payments are made without any default for a fixed period, the hirer gets an option to buy the goods. The ownership of goods passes to the hirer, now a buyer, once he exercises his option and purchases the goods. Till then, he is not owner of goods.

The distinction is important from the view-point of legal effect in the event of insolvency of the hirer of goods. In that case the owner can recover the goods let on hire, because ownership of goods has not passed to the hirer. Again, in a hire, the hirer cannot pass on any title even to innocent and bona fide third parties.

It must be noted that mere payment of price by instalments does not make the transaction a hire-purchase transaction. When the price is paid in instalments, it is contract of sale where the ownership has passed from seller to buyer; only the payment of price is deferred. In such transactions, what is paid periodically is the part-price of goods, and not the hire charges.

Goods

The subject matter of contract of sale is always Goods. The term 'Goods' has been defined under the Act to mean – 'every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale'.

As we have noted earlier, actionable claim refers to the claim of any person against other for the enforcement of which legal action can be taken. Such actionable claims are not goods; and similarly, money, which is a medium of exchange, also cannot be goods because it is for money that we buy and sell goods. For example, one cannot buy hundred rupees, but can buy something by paying hundred rupees.
Stock and shares, growing crops, grass, gas, electricity, water, goodwill, furniture, garments, books etc. are all examples of goods.

Goods may be (a) Existing, (b) Future or (c) Contingent. The existing goods may be (a) Specific, or (b) Generic; and further, (a) Ascertained or (b) unascertained.

Existing goods
Goods which are physically in existence and which are in seller's ownership and/or possession at the time of entering into contract of sale are called existing goods. Instances of goods possessed but not owned by the sellers are sale by agents and pledgees.
Existing goods may again be either specific or unascertained.

Specific goods means goods identified and agreed upon at the time of the making of contract of sale. To be specific, goods must be actually identified or individualised, and not merely identifiable. For example, where A agrees to purchase a TV set marked with particular manufacturing number, it is contract of sale of specific goods or ascertained goods. In practice, on many occasions the term specific goods is used as if it means the same thing as ascertained goods, though there is a subtle difference between the two.

Unascertained goods are not separately identified or ascertained at the time of the making of the contract. They are indicated or defined only by description. For example, A has ten cows. He promises to sell one of them to B, pointing it out to B at the time of the sale. This is an example of sale of specific goods. If, on the other hand, A merely promises to sell any one of the ten cows, the contract is of sale of unascertained goods.

Future goods. The Act makes it possible for a person to sell or offer to sell future goods i.e. goods which he does not own or possess at the time of contract, but which he will manufacture or produce or acquire after the making of the contract, Future goods are not the same as unascertained goods which form a class of existing goods. 'A' promises to sell to 'B' certain steel items after one month which he is going to manufacture in his factory. This is a valid contract of sale though 'A', at the time of contract, has no product with him for sale. It may be noted that there can be no present sale of future goods because there is no question of passing of ownership of goods from seller to buyer in such contract. The ownership will necessarily pass at some future time when the goods will come into existence. Even if the parties claim to make a contract of sale of future goods, in the eyes of law it is only 'an agreement to sell'.

Contingent goods. In a way, the contingent goods are a kind of future goods and therefore a contract for the sale of contingent goods also operates as 'an agreement to sell'. As in the case of future goods, in the case of contingent goods also the property in goods does not pass to the buyer at the time of making the contract.
For example, A agrees to sell to B a specific rare article for an agreed price, provided he can purchase the article from the present owner. This is a contract of sale of contingent goods. Here, the performance of the contract depends on the contingency which may happen or may not happen.

It may be noted that if the parties stipulate that performance is subject to any contingency, no damages shall be payable if the seller is unable to sell the goods. In fact, the performance on the part of the seller is not due unless the contingency happens. On the other hand, if the performance is not made subject to any such condition, the seller is liable to pay damages to the buyer for his inability to sell, on non-happening of the contingency.

Perishing of goods

Where specific goods are the subject-matter of a contract of sale (both sale and agreement to sell) and they, without the knowledge of the seller, perish at or before the time of the contract, the contract is void. For example, A agrees to sell to B a particular painting which he believes to be in his possession. Later, it turns out that the painting was stolen before the contract was made. There is no subsisting contract based on the rule that mutual mistake of a fact essential to the contract renders the contract void. (Refer to the discussion on void contract)

It may be noted that it is only the perishing of **specific goods** that affects the validity of contract of sale. If the sale is of unascertained goods, the contract will not become void under similar circumstances. For example, where A, a dealer of TV sets, agrees to sell to B five TV sets of a particular brand and all the TV sets in A's shop are destroyed by fire, the contract does not become void. A must supply five TV sets to B after purchasing them from the market or pay damages to for breach of contract.

What would happen where the contract of sale is of specific goods and only part of the goods are damaged or destroyed? The answer will depend on whether the contract is entire or divisible. If the contract is one (not divisible) and part of the goods are destroyed, the contract will become void. If the contract is divisible, it will not become void and the goods which are available in good condition must be accepted by the buyer. Where a contract was made for a parcel containing 700 bags of groundnuts, and only 591 bags could be delivered the remaining having been stolen, the contract was held to be void and the buyer could not be compelled to take delivery of the 591 bags. (Barrow Ltd. vs. Philips Ltd.)

It may be noted here that the contract was for the parcel containing 700 bags. If the contract was for the bags, each containing the same amount of material and of the same price, the buyer would be compelled to take the delivery of 591 bags and pay for them.

Perishing of goods before sale but after agreement to sell

Where the contract does not amount to sale, but is only agreement to sell, and the goods, without any fault of either the seller or the buyer perish or are damaged

subsequent to the agreement but before the risk passes to the buyer (by virtue of agreement to sell becoming contract of sale), the agreement to sell becomes void and both the parties are excused from performance.
Four conditions must be satisfied before the agreement to sell can be avoided:

1. The contract must be an agreement to sell and not an actual sale;
2. The loss must be specific;
3. The loss must not be caused by the wrongful act or default of either party; and
4. The goods must perish before the risk passes to the buyer. (because if the risk has passed to the buyer, he must pay for the goods, though undelivered.)

Price

There cannot be any sale without a price. If there is no valuable consideration to support a transfer of ownership of goods from the owner to another person, the transaction is a gift, and it is not governed by the provisions of the Act. To constitute a contract of sale, the transfer or agreement to transfer property in goods must be for a price. Price is defined as money consideration in contract of sale. It may be paid in cash or by cheque or by any other mode. The mode of payment of price is immaterial. What is necessary is the agreement to pay a price in money.

Modes of fixing the price

The price may be fixed in any of the following modes:

1. ***It may be expressly stated in the contract itself***. The parties are free to decide any price they like and no court can question the adequacy of the price. The price thus fixed in the contract itself must be certain and definite.
2. ***To be fixed in the manner stated in the contract***. The contract may provide for the manner in which the price is to be fixed. For example, it may be agreed that the buyer would pay the market price prevailing on a particular date or that the price would be fixed by a valuer who is appointed by the consent of the parties.
3. ***It may be fixed by the course of dealings between the parties***. If the buyer has been regularly making purchases from the seller and has been paying the

price prevailing on the date of placing the order, the course of dealings suggest that in subsequent transaction also the price which is prevailing on the date of placing the order would be paid. Further, if there is a custom to deduct discount at a particular rate, the same would also be taken into account in determining the price.

4. ***Reasonable price, in other cases***. If the price is not capable of being determined in accordance with any of the above modes, the buyer is bound to pay to the seller a 'reasonable price'. What is reasonable price is a question of fact and would depend on the circumstances of each case.

Agreement to sell at valuation

We have seen above that one of the modes of determining the price of goods is by valuation by a third party appointed by the seller and buyer. If such third party does not fix the price for any reason, the contract becomes void. In such case, if part of goods have been already delivered and accepted, the buyer has to pay the reasonable price for the goods so accepted.

The Act provides for 'escalation clause' in the contract of sale. Where, after making of the contract and fixing the price but before the delivery of the goods, a new or increased custom duty or excise duty, or sale or purchase tax is imposed and the seller has to pay it, the seller is entitled to add the same to the price. Similarly, if the rate of duty or tax is lowered, the buyer would be entitled to a reduction in price.

Earnest or Deposit

Sometimes the buyer pays part of the price in advance as security for the due performance of his part of the contract, and not as part-payment of purchase money. The money so paid as security is called Earnest or Deposit. If the purchase is carried out, the deposit goes against the purchase money and only the balance of the price is required to be paid. But if the sale is cancelled through the fault of the buyer, the deposit is forfeited to the seller. If the sale goes off by the seller's default, he must return the earnest money.

Conditions and Warranties

The parties are at liberty to enter into a contract with any terms they please. These terms or stipulations may be regarding the quality of goods, the price and mode of payment, the delivery schedule of goods and so on and so forth. Some of these stipulations are very important as they relate to the very purpose for which the buyer is purchasing the goods. If such terms are broken by the seller, the very purpose of purchase is defeated and frustrated. In such case, the buyer may claim that the seller has committed breach of contract. These vital and important terms of contract of sale are called ‘conditions’.

As against these terms, there may be other stipulations in the contract which are not so important. If any of these terms is broken by the seller, it may not result in frustration of the purpose for which the buyer is purchasing the goods, though it is a failure in compliance on the part of the seller. Such minor or not so important terms of the contract are called ‘warranties’.

Definition of Condition

A condition is a stipulation essential to the main purpose of contract, the breach of which gives the aggrieved party a right to repudiate the contract itself. In addition, he may maintain an action for damages for loss suffered, if any, on the ground that the whole contract is broken and the seller is guilty of non-delivery.

Definition of Warranty

A warranty is a stipulation collateral to the main purpose of the contract, the breach of which gives the aggrieved party a right to sue for damages only, and not to avoid the contract itself. It is thus a subsidiary promise.

It is clear from the above definitions that condition is a stipulation in a contract of sale which is so important that breach of which entitles the buyer to repudiate the contract itself and file a suit for compensation for breach of contract. Warranty is a stipulation which is not so vital to the contract and therefore if warranty is broken by the seller, the buyer can only sue the seller for damages, but he cannot avoid the contract as such.

What terms in a contract of sale are conditions and what terms are warranties is a question of fact and it depends on the particulars of each case. Further, the terminology used by the parties is not the conclusive test to determine whether a particular term is a condition or a warranty. The intention of the parties and the other relevant surrounding circumstances are to be taken into account for this purpose. If the stipulation is such that its breach would be fatal to the rights of the aggrieved party, it is a condition and where it is not so, it is a warranty.
Whether a stipulation in a contract of sale is a condition or a warranty depends in each case on the construction of the contract. A stipulation may be a condition though called a warranty in the contract.
For example, a man buys a **particular** horse which is described to be quiet. If the horse turns out to be vicious, the buyer's remedy is only to claim damages, as it is breach of warranty. But if instead of buying a particular horse, the buyer asks the dealer to supply a **quiet** horse and the horse turns out to be vicious, the buyer can reject the horse and also ask for damages, as it is a breach of condition.

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Difference between Condition and Warranty

The points of distinction between condition and warranty can be stated as follows:

1. **As to value and importance.** A condition is a stipulation which is essential to the main purpose of the contract, whereas a warranty is a stipulation which is collateral to the main purpose of the contract.

2. **As to breach.** The breach of condition gives the aggrieved party the right to repudiate the contract and also to claim damages, whereas the breach of

warranty gives the aggrieved party the right to claim damages only.

3. **As to treatment.** A breach of condition may be treated as a breach of warranty, but a breach of warranty cannot be treated as a breach of condition.

When breach of condition may be treated as breach of warranty

In certain cases, the breach of condition is to be treated as breach of warranty, as a consequence of which the buyer loses the right to repudiate or rescind the contract and has to be satisfied with compensation only. These cases are as follows:

1. **Voluntary waiver by the buyer.** When there is breach of condition by the seller, the buyer is vested with the right to reject the goods and treat the contract as repudiated. However, he may choose not to exercise this right. He may instead waive this right and treat the breach of condition as breach of warranty, thereby not repudiating the contract, but only claiming compensation from the seller.
   For example, where the seller supplies the agreed quantity of garments of white colour when the condition was to supply the garments of red colour, it is a breach of condition and the buyer has a right to reject the goods treating the contract as broken by the seller. However, the buyer may elect to accept the delivery of garments treating the breach of condition as breach of guarantee. In such case the buyer has the right only to claim damages from the seller for breach of warranty.
2. **Acceptance of goods by buyer.** When the buyer has accepted the delivery of goods, he cannot subsequently reject them on the ground that there had been a breach of condition. The right is lost once he accepts the goods. He can now only claim damages, treating the breach of condition as breach of warranty. If only part of the goods are accepted by the buyer and if the contract is divisible, he can reject the remaining goods which he has not accepted. If the contract is indivisible, that is to say, when the goods are priced for the whole lot and not per unit or per piece etc., acceptance of goods in part amounts to acceptance of goods in the whole and the buyer is compelled to treat the breach of condition as breach of warranty.
   'Acceptance of goods' does not mean merely taking the physical delivery of

goods. The buyer shall be deemed to have accepted the goods when –a) he has communicated to the seller that he has accepted the goods, or b) when he does some act in relation to goods which is inconsistent with the ownership of the seller. (e.g. he consumes the goods, or sells them, or puts his mark on them etc.), or c) even after lapse of reasonable time, he retains the goods without communicating to the seller that he has rejected the goods for breach of condition. It is not necessary that the buyer, in such case, should physically return the goods to the seller. It is sufficient if he unequivocally intimates to the seller about his rejection of goods.

Express and Implied conditions and warranties

We have noted earlier that both conditions and warranties are the terms in contract of sale of goods. **Express conditions and warranties** are those terms which are specifically incorporated in the contract at the desire of the parties. Implied conditions and warranties are those terms which the law assumes to be included in every contract of sale, even if they are not inserted in express words. Therefore, implied conditions and warranties are those terms in every contract of sale of goods which the law assumes to be present unless they are expressly negated by the parties.

Implied conditions

Unless otherwise agreed by the parties, the following conditions are always assumed by law to be present in every contract of sale of goods:

1. **Condition as to title.** The first implied condition on the part of the seller in every contract of sale is that in the case of actual sale, the seller has the right to sell the goods, and in the case of agreement to sell, the seller will have the right to sell the goods at the time when the property in goods is to pass. Thus if the seller's title is discovered to be defective, the buyer is entitled to recover the price. Where the buyer is dispossessed of the car bought by him because the seller did not have title to it, the buyer is entitled to recover the full price even though he has used the car for several months. In the case of breach of this condition, the buyer has no option but to treat it as breach of warranty because he has to invariably return the goods to the true owner. He can claim damages

from the seller and also recover the price paid in full.

2. **Condition in a sale by description.** Where there is a contract of sale of goods by description, there is an implied condition that the goods shall correspond with the description. Where sale was made of a second-hand reaping machine which the buyer had never seen, but which the seller had stated to be almost new and used very little, this was a sale by description and, when the machine was found to be old and repaired, there was a breach of condition, and the buyer could return the machine. This condition applies to both specific and unascertained goods.
   The description may be in terms of characteristics of the goods or by mentioning their trade mark or brand name such as Basmati rice, Solapur cotton etc.

3. **Condition in a sale by sample.** Where the goods are sold as per sample, the implied conditions are, a) that the bulk shall correspond with the sample in quality, b) that the buyer shall have a reasonable opportunity of comparing the bulk with the sample, and c) that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of goods.

4. **Condition in a sale by description and sample.** When the goods are sold by sample as well as by description, there is an implied condition that the bulk of the goods shall correspond both with the sample and with the description. If the goods supplied correspond only with the sample and not with the description or vice versa, the buyer is entitled to reject the goods.

5. **Condition as to fitness or quality.** The general rule of law is '*caveat emptor',* that is, let the buyer be aware. Therefore, ordinarily, in a contract of sale, there is no implied condition or warranty as to the quality or fitness for any particular purpose of goods supplied. But where the buyer makes known to the seller the purpose for which he is purchasing the goods and the seller happens to be a person whose course of business is to sell goods of that description, then there is an implied condition that the goods shall be reasonably fit for such purpose. Thus, in order that a buyer can claim breach of condition, he must have made

known to the seller the purpose for which he is buying the goods, relying on the skill and judgment of the seller and the seller must be dealing with such goods in the ordinary course of his business.

6. **Condition as to merchantability.** This condition is implied only where the sale is by description. In such case even when the goods answer to the description, till they have to meet another condition of merchantable quality. The merchantable quality means that the goods are of such quality and are un such condition that a reasonable man, acting reasonably would accept them under the circumstances of the case in performance of his offer to buy those goods, whether he buys them for his own use or to sell again. It should be noted that merchantable quality does not mean that the goods are quickly re-salable. Again, if the buyer had an opportunity of making the examination but he avoids examining the goods, there is no implied condition as to merchantability as regards defects which such examination ought to have revealed. Therefore, this condition is applicable only when the defects in the goods are not noticeable through ordinary examination and the seller is a dealer in the goods of that description, whether he is the manufacturer or not.

7. **Condition as to wholesomeness.** This condition is implied only in a contract of sale of eatables and provisions. In such cases the goods supplied must not only answer to description and be merchantable but also must be wholesome, i.e. free from any defect which renders them unfit for human consumption.

Implied Warranties

Certain terms of contract of sale of goods which are warranties, are always assumed to be present in every such contract unless otherwise agreed by the parties and they are called implied warranties. They are as follows:

1. **Warranty of quiet possession.** The first warranty on the part of seller in every contract of sale is that the buyer shall have and enjoy quiet possession of the goods. In a way, the rights accruing to the buyer under this warranty are included in the condition as to title. Under this condition as well as the warranty as to quiet possession, if the buyer suffers on any count owing to defect in the

title of the seller, he has to return the goods to the true owner and can claim damages from the seller. This warranty differs from the condition in that even if the buyer is not compelled to return the goods, yet he can claim damages from the seller for the disturbance and inconvenience caused to him by any temporary defect in the title of the seller.
For example, where one joint owner of goods sells the goods without the consent of the other, the buyer will not get a good title to the goods. The seller may subsequently pay off the joint owner and pass on a clear title to the buyer. Here, there is no breach of condition but breach of warranty because the buyer's right of peaceful and quiet possession is violated. Hence, the buyer, though does not return the goods, yet can claim damages from the seller for the disturbance in his quiet possession.

2. **Warranty of freedom from encumbrances.** When goods have encumbrances, it means that they are charged for payment of some outstanding dues. Ownership of such goods is subject to payment of such charges. The seller of such goods may be in possession of the goods but his ownership is subject to the condition that he pays the dues for which a charge was created on the goods. When such goods are sold without making them free of encumbrances, the buyer does not get a good title to the goods.
The implied warranty on the part of the seller is that 'the goods shall be free from any charge or encumbrance in favour of any third party, not declared or not known to the buyer before or at the time when the contract is made.' If the goods are afterwards found to be subject to a charge and the buyer has to discharge the same, there is breach of this warranty and the buyer is entitled to damages.

Doctrine of Caveat Emptor

The expression 'caveat emptor' means 'let the buyer be aware'. It is the duty of the buyer to be careful while purchasing goods of his requirement and, in the absence of any enquiry from the buyer, the seller is not bound to disclose every defect in goods of which he may be cognisant. It is the duty of the buyer to thoroughly examine the goods and ensure that they are suitable for the purpose for which he is buying them. If the goods turn out to be defective or if they do not suit his requirement, the buyer

cannot hold the seller liable for the same as there is no implied undertaking by the seller that he shall supply such goods as will suit the buyer's requirement. Thus, if the buyer depends on his own skill and judgment and makes a faulty choice, he must thank himself for his loss, unless there was a misrepresentation or fraud by the seller.

For example, A wanted to purchase 50 pens for the clerks working in his office whose job was to prepare handwritten reports with two copies. Fountain-pens supplied by the seller were useless because carbon copies could not be made with such pens. A has to suffer the loss because as per this doctrine, it was his responsibility to ensure that the pens he was buying were suitable for the purpose.

Similarly, certain pigs were sold in auction 'with all faults.' The pigs were suffering from typhoid fever and all of them but one died. They also infected a few of the buyer's own pigs. It was held that the seller was not bound to disclose that the pigs were unhealthy. Caveat Emptor being the rule, the buyer could not claim damages from the seller.

The doctrine of caveat emptor is subject to certain exceptions which are as follows:

Exceptions to Caveat Emptor

1. Where the seller makes a mis-representation and the buyer relies on it, the doctrine of caveat emptor does not apply. Such contract is without the free consent of the buyer and hence it is voidable at the option of the buyer who has a right to rescind the contract.

2. When the seller obtains the consent of the buyer by fraud or where the seller actively conceals the defects in the goods so that such defects cannot be discovered on a reasonable examination, the doctrine of caveat emptor does not apply. Such a contract is also voidable at the option of the buyer, who can, in addition to rescission of contract, can claim damages from the seller.

3. Where the buyer makes known to the seller the purpose for which he requires the goods and relies upon the seller's skill and judgment but the goods supplied are unfit for the specified purpose, the principle of caveat emptor does not

protect the seller and he is liable for damages.

4. Where the custom or practice has established a norm as to quality of fitness of goods and seller does not comply with such norm, the doctrine of caveat emptor does not apply.

5. In case of sale by description by the seller who deals in such class of goods, there is an implied condition as to goods being of merchantable quality. If they are not, the rule of caveat emptor will not protect the seller. (The doctrine will apply if the buyer has examined the goods.)

Consumer Protection Act, 1986

Introduction

Unfettered exploitation of consumers by the traders and manufactures has been a regular feature our mercantile system. It is true that survival and growth of industries rest on the support of consumers as a segment, but individually every consumer is so weak that he is virtually disregarded in every sphere of business transactions. The reason for the helplessness of consumers can be attributed to the lack of ability on the part of consumers to organise themselves to protect and promote their collective interests. We notice that consumer movements in India have always failed. There is a variety of reasons for such failure. Chief among them are lack of consumer education and consumer solidarity. One more important reason for failure of consumer movement is that consumers, though large in number, are not geographically together nor do they share a common aim.

Technically speaking, it was never the case that consumers were ever truly without remedy against the malpractices of traders and manufacturers. Supply of goods of inferior quality, charging of excessive price, non-compliance of the assurances and promises by the sellers were essentially a breach of contract on the part of the sellers, for which the doors of judiciary were always open to consumers. In certain cases, albeit very few, consumers have successfully made the sellers pay for their wrongs through Courts by filing suits for damages and compensation. But such remedial measure of approaching the Courts and fighting a legal battle against the sellers required a lot of patience, and consumers needed to spend more for obtaining a decree of court for compensation than the amount of compensation itself. The amount of time, money and energy that an ordinary consumer has to expend to proceed against sellers was a major deterrent and, as such, he had to be content blaming his fate rather than resorting to judicial means of redressal. Further, the number of years the judicial system took to dispose a complaint of consumer was so dismaying that an ordinary consumer thought it wise to stay away from the Courts. In short, the remedy was worse than the disease.

The primary object of the Consumer Protection Act was to provide a cheap and speedy remedy to the consumers who are aggrieved by the malpractices of sellers.

Separate judicial forums are established under the Act, at the district, State and Central level, to exclusively entertain and try consumer disputes. These judicial authorities are empowered to give appropriate relief, including awarding compensation, to consumers. The Court fee for filing a complaint in the consumer court is very meager. Engagement of advocate is neither necessary nor permitted. The courts are under obligation to dispose the cases before them within a prescribed time limit. All this was to encourage the common consumers to come forward and seek redressal of their grievances against the traders and manufactures.

The Act extends to the whole of India and is applicable to all goods and services as defined under the Act.

Important definitions

Appropriate laboratory means a laboratory or organisation –

1. recognised by the Central Government;
2. recognised by a State Government, subject to such guidelines as may be prescribed by the Central Government in this behalf;
3. any such laboratory or organisation established by or under any law for the time being in force, which is maintained, financed or aided by the Central Government or a State Government for carrying out analysis or test of any goods with a view to determining whether such goods suffer from any defect.

Explanation

A consumer dispute is often relating to impure, inferior or defective goods sold to him. While deciding such disputes, it may become necessary to analyse, test or inspect the goods. For the purpose of carrying out this task, the Government may establish laboratories having sufficient facilities, or give sanction to any existing and well equipped laboratory or organisation. Such laboratory is called appropriate laboratory and the consumer courts under the Act, when in need of conducting any tests with respect to the goods (relating to which any complaint is being adjudicated), may refer them to such laboratory.

Complainant means –

1. a consumer;
2. any voluntary consumer-association registered under the Companies Act or under any other law for the time being in force;
3. the Central Government or any State Government;
4. one or more consumers, where there are numerous consumers having the same interest;
5. in the case of death of a consumer, his legal heir or representative.

Explanation

The definition of the term complainant is important because it tells us who can file a complaint before any of the judicial authorities under the Act. A person can file a complaint provided he is covered under this definition. Accordingly, a consumer is obviously can be a complainant and similarly, a registered consumers' association can also be a complainant. Where there are several consumers having a similar grievance, one or more of them can file a complaint on behalf of all of them and it is not necessary that all should join in contesting the dispute. It is sufficient if one or more of them appear before the court and represent the others. Additionally, the Central or any State Government can also be a complainant and hence a consumer dispute can be filed by the Central or State Government also. The cause of action to proceed against trader or seller of goods or any provider of services does not abate with the death of consumer. In the event of his death, the right to file complaint passes to his heir or legal representative.

Complaint means any allegation in writing made by a complainant that –

1. an unfair trade practice or a restrictive trade practice has been adopted by any trader or service provider;
2. the goods bought by him or agreed to be bought by him suffer from one or more defects;
3. the services hired or agreed to be hired or availed of by him suffer from deficiency in any respect;
4. a trader or the service provider has charged for the goods or for the services mentioned in the complaint, a price in excess of the price –
    a. fixed by or under any law for the time being in force,
    b. displayed on the goods or any package containing such goods,

c. displayed on the price list exhibited by him by or under any law for the time being in force,
d. agreed between the parties.

5. goods which will be hazardous to life and safety when used are being offered for sale to the public, -
    a. in contravention of any standard relating to safety of such goods as required to be complied with, by or under any law for the time being in force,
    b. in the trader could have known with due diligence that the goods so offered are unsafe to the public,

6. services which are hazardous or likely to be hazardous to life and safety of the public when used, are being offered by the service provider which such person could have known with due diligence to be injurious to life and safety.

With a view to obtaining any relief provided

Consumer dispute means a dispute where the person against whom a complaint has been made, denies or disputes the allegations contained in the complaint.

Defect means any fault, imperfection or shortcoming in the quality, quantity, potency, purity, or standard which is required to be maintained by or under any law for the time being in force or under any contract, express or implied, or as is claimed by the trader in any manner whatsoever in relation to any goods.

Deficiency means any fault, imperfection, shortcoming, or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service.

Goods means the goods as defined in the Sale of Goods Act, 1930.

Manufacturer means a person who –

1. makes or manufactures any goods or part thereof, or
2. does not make or manufacture any goods but assembles parts thereof made or manufactured by others, or
3. puts or causes to be put in own mark on any goods made or manufactured by any other manufacturer.

Restrictive Trade Practice means a trade practice which tends to bring about manipulation of price or its conditions of delivery or to affect flow of supplies in the market relating to goods or services in such a manner as to impose on the consumers unjustified costs or restrictions and shall include –

1. delay beyond the period agreed to by a trader in supply of such goods or in providing the services which has led or is likely to lead to rise in the price;
2. any trade practice which requires a consumer to buy, hire or avail of any goods or services as condition precedent to buying, hiring or availing of other goods or services.

Explanation

The provision relating to restrictive trade practices owe their origin in the Monopolies and Restrictive Trade Practices Act. These are the practices adopted by traders to artificially increase the prices of goods and services or to impose unfair conditions on the consumers. These practices are normally resorted to by the traders when there is shortage of goods or services. For example, a dealer of LPG cylinders may insist that consumer must purchase a set of burners from his shop in order to get a quick delivery of gas. It is a restrictive trade practice and is prohibited under the Act.

Service means service of any description which is made available to potential users and includes, **but is not limited to**, the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under the contract of personal service.

Explanation

The words, ‘but not limited to’ occurring in the definition are important. In the absence of these words, the list of services mentioned in the definition would be exhaustive and complete, and no other service could fall within the meaning of the

term ‘service’ under the Act. However, by using these words, the legislatures have made it clear that all kinds of services are intended to be covered, and it is only by way of illustrations that certain services are named in the definition. For example, medical services are the services covered under the Act, though they are not specifically named in the definition of ‘Services’.

Service rendered under any contract of personal service is not the ‘service’ as contemplated under the Act and hence will be outside the scope of the Act. In other words, where services are rendered under the relationship of master and servant, the master is not a consumer within the meaning of the Act.

Who is a consumer?

As we know, the primary object of the Act is protection of consumers. Therefore, the definition of the term ‘consumer’ is most important, because unless a person is a consumer within the meaning of the Act, he cannot avail himself of any remedies provided under the Act. A buyer of goods or hirer of services can approach consumer court and file his complaint only when he is a consumer, and not otherwise.
Every buyer of goods or hirer of services cannot be termed as consumer. The Act extends protection to a common citizen who, because of time and money constraint, cannot seek relief against the organised and well-placed traders and manufacturers. As such, the inexpensive and cheap remedy under the Act must not be allowed to be used by the commercial organisations whose purpose of buying and selling is not the same as that of a common man. Therefore, the legislatures intended to exclude the traders and commercial organisations from the definition of consumer.
The definition of consumer is as follows:

Consumer means any person who –

1. buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for

any commercial purpose; or

2. hires or avails of any services for a consideration which has been paid Respondent promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised , or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person but does not include a person who avails of such services for any commercial purpose.

   Explanation: For the purposes of this clause, 'commercial purpose' does not include use by a person of goods bought and used by him and services availed by him exclusively for the purposes of earning his livelihood by means of self-employment.

Explanation

The following points would make the definition easy to understand:

1. **Consideration**. Consumer is a person who buys goods or hires services for consideration. In other words, he is a person who pays the price of what he purchases. If goods are given free of charge, the receiver of good is not a consumer. Such consideration i.e. price may be paid or promised (i.e. bought on credit) or it may be partly paid and partly promised. Further, the consumer may agree to pay the price in instalments. A person who registers himself for LPG gas connection with the distributor is a consumer though at that time he pays nothing and the payment is deferred till the time of release of gas connection. Mode of payment of consideration is not important. What is important is that such person must be receiving the goods or services for some price.
   If the goods are given as gift or distributed free of charge as sample in any promotion campaign of a new product, the recipient of such goods is not a consumer and therefore cannot file any complaint in consumer courts against any defects in the goods.
   A patient who receives treatment in a private hospital and pays for the same is a

consumer within the meaning of this definition. However, if he receives medical treatment in any charitable hospital free of charge, he is not a consumer. Similarly, a patient receiving medical treatment free of charge from any government hospital is also not a consumer. During early years after the passing of this Act, this point was heavily debated. It was argued that so far as government hospitals are concerned, it cannot be said that medical treatment is given free of charge because such hospitals are run with the money collected from people by way of taxes and therefore consideration is indirectly paid by the person who receives medical treatment at government hospitals. This contention has been rejected on the ground that payment of taxes is under a statutory obligation without reference to any special benefit to the tax-payer. Liability of a person to pay tax is on the basis of his capacity to pay and not on the basis of his likelihood of using any government services. Hence, even a tax-payer who uses government services free of charge is not a consumer as payment of taxes by him cannot be treated as consideration.

2. **User of goods/services with approval.** In addition to buyer of goods or hirer of services, as discussed above, any person who actually uses the goods or services with the approval of such buyer or hirer is also a consumer under the Act and hence is entitled to all the reliefs which are available to the buyer or hirer. The fact that there is no privity of contract between the seller of goods and its user is no bar against the user of goods to claim relief against the seller under the Act. For example, if a father buys certain cosmetics which are used by his son, the son is the user of goods with approval of father and is a consumer just like his father. Hence, if the son suffers from any injury to skin by use of such cosmetics, he is entitled to proceed against the dealer of cosmetics under this Act. The fact that he has not paid the consideration or that there is no contract between the son and the dealer shall not deprive the son of any remedies which are available to the father. What is necessary is that the use of goods or services by such person must be with the approval of the buyer of goods or hirer of services. Again, the approval may be express or implied.

3. **Commercial purpose.** A person who obtains goods for resale or commercial purpose is not a consumer. Such person himself is a trader and therefore he cannot be equated with ‘consumer’ as contemplated under the Act. Thus, a

person buying a note-book for using it for himself is a consumer, but he cannot be called a consumer if he buys a large quantity of note-books in wholesale for the purpose of selling them in retail to other individual users. Such other individual buyers would, of course, be consumers.

Going by this definition, therefore, a purchaser of a telephone instrument for his residential use would be a consumer, but if he is running a telephone booth and is buying the instrument so that people can use the same by paying requisite charges for the same, he would not be a consumer, as he is making use of the instrument for commercial purpose. Similarly, a person buying a car would not be a consumer with respect to the car, if he is using it as taxi, as in such a case, he would be using the car for commercial purpose.

However, the explanation appended to the definition further clarifies what is not commercial purpose. Accordingly, commercial purpose does not include use by a person of goods bought and used by him and services availed by him exclusively for the purposes of earning his livelihood by means of self-employment.

This explanation has been subsequently added to the definition so as to bring within the purview of the definition all those persons who would not have been considered consumers by virtue of the earlier part of the definition. For example, a person who is running a business of travel agency cannot be called a consumer under the Act in respect of any car he buys for his business, because he is using the car for commercial purpose. Similarly, a person buying a car and using it as taxi also cannot be called consumer on the same principle of ‘use for commercial purpose’. Although both the cases have a common element of use of goods for commercial purpose, there is a noticeable difference between the two. A taxi driver cannot be compared with the owner of a travel agency.

Let us take another example where a tailoring firm buys a sewing machine for its business. Obviously, the firm cannot be called a ‘consumer’ within the meaning of this Act because it is making use of the sewing machine for commercial purpose. Now consider the example of a poor widow. Having no other source of income and having no skills for better employment, she buys a

sewing machine so that she can stitch clothes of people in the neighborhood, and earn some money for her survival. Going by the principle of 'use of goods for commercial purpose', she would also not be a consumer within the meaning of the Act. Placing the widow and the tailoring firm on the same footing would be unjust and contrary to the objects of the Act as the avowed purpose of the Act is to protect the interest of common consumers.

The Act therefore lays down that commercial purpose does not include use of goods for earning livelihood by means of self-employment. Thus, in our examples discussed above, the taxi driver, who drives the car himself for earning his livelihood would be a consumer with respect to the car. However, if he employs another person as driver, he would no be a consumer since he is not using the goods by means of self-employment. A tailoring firm is not a consumer with respect to the sewing machines bought by it because the machines are used by the tailors engaged by the firm. The widow stands on the difference footing since she is herself using the sewing machine, i.e. using the goods by means of self-employment. She is, therefore, consumer under the Act with respect to the sewing machine, and as such, she can approach the consumer court if the machine is defective.

Unfair Trade Practices

Let us first go through the definition of unfair trade practices as given under the Act. It is reproduced below.
'Unfair trade practice' means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or unfair or deceptive practice including any of the following practices, namely –

1. the practice of making any statement, whether orally or in writing or by visible representation which, -
    a. falsely represents that the goods are of a particular standard, quality, quantity, grade, composition, style or model;
    b. falsely represents that the services are of a particular standard, quality or grade;

c. falsely represents any re-built, second-hand, renovated, reconditioned or old goods as new goods;
d. represents that the goods or services have sponsorship, approval, performance, characteristics, accessories, uses or benefits which such goods do not have;
e. represents that the seller or the supplier has a sponsorship or approval or affiliation which such seller or supplier does not have;
f. makes a false or misleading representation concerning the need for, or the usefulness of, any goods or services;
g. gives to the public any warranty or guarantee of the performance, efficacy or length of life of a product or of any goods that is not based on an adequate or proper test thereof;
provided that where a defence is raised to the effect that such warranty or guarantee is based on adequate or proper test, the burden of proof of such defence shall lie on the person raising such defence.
h. Makes to the public a representation in a form that purports to be-
1. a warranty or guarantee of a product or of any goods or services; or
2. a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result, if such purported warranty or guarantee or promise is materially misleading or if there is no reasonable prospect that such warranty, guarantee or promise will be carried out;
i. Materially misleads the public concerning the price at which a product or like products or goods or services, have been or are, ordinarily sold or provided, and, for this purpose, a representation as to price shall be deemed to refer to the price at which the product or goods or services has or have been sold by sellers or provided by suppliers generally in the relevant market unless it is clearly specified to be the price at which the product has been sold or services have been provided by the person by whom or on whose behalf the representation is made.
j. Gives false or misleading facts disparaging the goods, services or trade of another person.
Explanation: For the purposes of this clause, a statement which is-
a. expressed on an article offered or displayed for sale, or on its wrapper or container, or

b. expressed on anything attached to, inserted in, or accompanying an article offered or displayed for sale, or on anything on which the article is mounted for display or sale, or
c. contained in or on anything that is sold, sent, delivered, transmitted or in any other manner whatsoever made available to a member of the public,

shall be deemed to be a statement made to the public by, and only by, the person who had caused the statement to be so expressed, made or contained.

2. permits the publication of any advertisement, whether in any newspaper or otherwise, for the sale or supply at a bargain price, 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.
Explanation: For the purpose of this clause, 'bargaining price' means a) a price that is stated in any advertisement to be a bargain price, by reference to an ordinary price or otherwise; or
b) a price that a person who reads, hears or sees the advertisement, would reasonably understand to be a bargain price having regard to the prices at which the product advertised or like products are ordinarily sold.

3. permits –
    a. the offering of gifts, prizes or other items with the intention of not providing them as offered or creating 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;
    b. the 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.

4. Withholding from the participants of any scheme offering gifts, prizes or other items free of charge, on its closure, the information about final results of the

scheme.

Explanation: for the purposes of this sub-clause, the participants of a scheme shall deemed to have been informed of the final results of the scheme where such results are within a reasonable time published, prominently in the same newspapers in which the scheme was originally advertised.

5. permits 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, contents, design, constructions, finishing or packaging as are necessary to prevent or reduce the risk of injury to the person using the goods;

6. permits the hoarding or destruction of goods or refuses to sell the goods or to make them available for sale or to provide any service, if such hoarding or destruction or refusal raises or tends to raise or is intended to raise the cost of those or other similar goods or services.

7. Manufacture of spurious goods or offering such goods for sale or adopting deceptive practices in the provision of services.

Explanation

Truly speaking, the term ‘unfair’ cannot ever be defined. At the most, one can give illustrations of unfair practices indicating the intention of the legislatures as to what should be included within the sweep of the term unfair practices. Again, the list of such unfair practices cannot be a complete and exhaustive list because with the passage of time, business people may invent newer and different methods of deception to defraud common consumers. Hence, the list of illustrations of unfair practices is always open to additions.

The Act however makes an attempt to define the term ‘unfair trade practices’ by bringing out the broad meaning of it and providing the illustrations of unfair trade practices. Inevitably, the definition of unfair trade practice is quite lengthy. For the purpose of convenience, we shall group these unfair trade practices in seven

categories corresponding to the seven sub-sections of section 2 (r) which defines the term unfair trade practices.
Thus, the unfair trade practices can be grouped as follows:

1. Making false statements and representations.
2. publication of bargain price
3. Gifts and prizes
4. Withholding information about results of any scheme
5. Non-conformity to standards
6. Hoarding or destruction of goods
7. Spurious goods

We shall now discuss each of them briefly.

1. Making false statements and representations.

It is unfair trade practice on the part of a trader if he makes any false representation regarding the quality, quantity or grade of goods or services or represents old or second hand goods as new goods. False representation as regards any sponsorship, approval or performance of any goods or their usefulness is also unfair trade practice. Further, making any false and baseless representation as regards the life of any product without proper test and giving any warranty or guarantee of repairs or replacement of product without intending to do so is also an unfair trade practice.

2. Publication of bargain price.

It is an unfair trade practice on the part of a trader to publish an advertisement for the sale of any goods at a bargain price when he does not intend to sell the product at that price. Similarly it is also unfair trade practice to publish any statement promising supply of goods for a period or in quantity at the bargain price without any intention to do so.

3. Gifts and prizes.

Offering any gifts, prizes or other items with the intention of not providing them is an unfair trade practice. Similarly, offering some product as free on the purchase of another product, when the price of the product purportedly given free is already included in the price of the product sold is also unfair trade practice.

Though the definition of unfair trade practice includes the practices of conducting lottery, contest or other game of chance for the purpose of promoting the sale of any product, the Supreme Court has, in many cases, ruled that such practices by themselves are not unfair trade practices. Conducting a lottery or a game of chance would be unfair trade practice if the purchasers are charged separately for their participation in the scheme. For example, where TV sets are sold along with coupons and the lucky coupon-holder is to be awarded any prize in a subsequent lucky-draw of coupons, it cannot be called lottery in the accepted sense of the word and there would be no unfair trade practice. The purchaser of a TV set would get his money's worth in the form of TV set itself. He does not have to pay any separate price for participating in the scheme of lucky-draw. Participation in the scheme and standing to gain the prize is an additional benefit given to the buyer.

4. Withholding information about results of any scheme

Many traders introduce a scheme offering gifts, prizes etc. in order to induce people to buy their products. We have already seen above that offering such gifts is not an unfair trade practice. However, it is obligatory on the traders to declare the final results of such scheme for the information of the buyers. Withholding such information is an unfair trade practice.

However, it is not necessary that the trader should inform the buyers individually about the final results of the scheme. If they are published in the same newspaper in which the original scheme was published, it shall be sufficient compliance of the requirement.

5. Non-conformity to standards

Certain statutory and competent authorities such as ISI or the ones created under standards of weights and measures Act etc. prescribe standards in relation to goods which are sold or supplied to buyers. These standards may be with respect of

performance of goods, their design, construction, packaging etc. to prevent or reduce the risk of injury to the person using the goods.
Selling or supplying the goods which do not comply with these requirements is an unfair trade practice.

6. Hoarding or destruction of goods.

In order to artificially increase the prices of goods or services, the traders sometimes resort to the practice of hoarding or even destroying the goods or refuse to provide any service. It is an unfair trade practice under the Act.

7. Spurious Goods

Spurious goods means fake or counterfeit goods or which are not genuine goods. It is an unfair trade practice to offer such goods for sale or to adopt any deceptive practice in providing any service.

Consumer Disputes Redressal Agencies

The Consumer disputes redressal agencies are the consumer courts established under the Act for the purpose of settling the disputes of consumers. There are three such agencies operating at District, State and National level. The composition and functions of these agencies are as follows:

District Forum

Establishment of District Forum

1. Every State Government shall establish a 'Consumer Disputes Redressal Forum' to be known as 'District Forum' in each district of the State.
2. The State Government may establish more than one District Forum in a district if necessary.

Composition of District Forum

a. Each District Forum shall consist of –

    a. A person who is, or has been, or is qualified to be a District Judge, who shall be its President;
    b. Two other members, one of whom shall be a woman, who shall be not less than thirty-five years of age and shall possess a bachelor's degree from a recognised university. They shall be the persons of ability, integrity and standing, and have adequate knowledge and experience of at least ten years in dealing with problems relating to economics, law, commerce, accountancy, industry, public affairs or administration.

2. A person shall be disqualified for appointment as member, if-
    c. he has been convicted and sentenced to imprisonment for an offence involving moral turpitude; or
    d. he is an undischarged insolvent; or
    e. he is of unsound mind and stands so declared by a competent Court; or
    f. he has been removed or dismissed from the service of the Government or a body corporate owned or controlled by the Government; or
    g. he has such other disqualifications as may be prescribed by the State Government.

2. Every member shall hold office for a period of five years from the date of appointment. A member can be re-appointed for another term if he is not otherwise disqualified. The age of retirement for the members is sixty-five years.

Jurisdiction of District Forum

1. The District Forum has jurisdiction to decide the complaints where the value of the goods or services and the compensation claimed does not exceed rupees twenty lakhs.

2. A complaint shall be instituted in District Forum within the local limits of whose jurisdiction-

a. the opposite party, or **each** of the opposite parties, where there are more than one, actually and voluntarily resides or carries on business or personally works for gain at the time of filing the complaint; or
b. **any** of the opposite parties, where there are more than one, actually or voluntarily resides or carries on business or personally works for gain. However, in such case either the permission of District Forum has to be obtained or the opposite parties who do not reside or carry on any business or personally work for gain, have to give their consent; or
c. the cause of action, wholly or in part, arises.

State Commission

Establishment of State Commission

Every State Government shall establish for the State a 'Consumer Disputes Redressal Commission' to be known as 'State Commission' for the State by issuing a notification in that behalf.

Composition of State Commission

1. Each State Commission shall consist of –
    a. A person who is or has been a Judge of High Court who shall be its President;
    b. Not less than two members one of whom shall be a woman who shall not be less than thirty-five years of age and shall possess a bachelor's degree from a recognised University. They shall be persons of ability, integrity and standing, and have adequate knowledge and experience of at least ten years in dealing with problems relating to economics, commerce, law, accountancy, industry, public affairs or administration. **Not more than** half of the members shall be from judicial background i.e. not having experience of more than ten years of working as presiding officer of any district level court.

2. A person shall be disqualified for appointment as a member, if-

a. he has been convicted and sentenced to imprisonment for an offence involving moral turpitude; or
b. he is an undischarged insolvent; or
c. he is of unsound mind and stands so declared by a competent Court; or
d. he has removed or dismissed from the service of the Government or a body corporate owned or controlled by the Government; or
e. he has such financial or other interest, as is likely to affect prejudicially the discharge by him of his functions as a member; or
f. he has such other disqualifications as may be prescribed by the State Government.

3. Every member shall hold office for a period of five years from the date of appointment. A member can be re-appointed for another term if he is not otherwise disqualified. The age of retirement for the members is sixty-seven years.

Jurisdiction of State Commission

1. State Commission has jurisdiction to entertain complaints where the value of the goods or services and compensation claimed exceeds rupees twenty lakhs but does not exceed rupees one crore.
2. It can entertain and decide appeals against the orders of any District Forum within the State.
3. When it appears that any District Forum has made any error of law or jurisdiction in any case pending before it, the State Commission can call for the records of the case and pass appropriate orders.
4. A complaint shall be instituted in a State Commission within the limits of whose jurisdiction.-
    a. the opposite party or **each** of the opposite parties, where there are more than one, at the time of the institution of the complaint, actually and voluntarily resides or carries on business or has branch office or personally works for gain; or
    b. **any** of the opposite parties, where there are more than one, at the time of the institution of the complaint, actually and voluntarily resides, or

carries on business or has a branch office or personally works for gain. However, in such case either the permission of the State Commission has to be obtained or the parties who do not reside or carry on business or personally work for gain have to give their consent; or

c. the cause of action, wholly or in part, arises.

National Commission

Establishment of National Commission

The Central Government shall establish a 'National Consumer Disputes Redressal Commission' to be known as 'National Commission by issuing a notification in that behalf.

Composition of the National Commission

1. The National Commission shall consist of-
    a. a person who is or has been a Judge of the Supreme Court, to be appointed by the Central Government, who shall be its President;
    b. not less than four members, one of whom shall be a woman, who shall not be less than thirty-five years of age and shall possess a bachelor's degree of any recognised University. They shall be the persons of ability, integrity and standing and have adequate knowledge and experience of at least ten years in dealing with problems relating to economics, law, commerce, accountancy, industry, public affairs or administration. **Not more than** half of the members shall be from judicial background i.e. not having more than ten years experience as Presiding Officer of any district level court.

2. A person shall be disqualified for appointment as a member, if-
    a. he has been convicted and sentenced to imprisonment for an offence involving moral turpitude; or
    b. he is an undischarged insolvent; or
    c. he is of unsound mind and stands so declared by a competent court; or

d. he has been removed or dismissed from the service of the Government or a body corporate owned or controlled by the Government; or
e. he has such financial or other interest as is likely to affect prejudicially the discharge by him of his functions as a member; or
f. he has such other disqualifications as may prescribed by the Central Government.

3. Every member shall hold office for a period of five years from the date of his appointment. A member can be re-appointed if he is not otherwise disqualified. The age of retirement for a member is seventy years.

Jurisdiction of the National Commission

1. The National Commission shall have the jurisdiction to entertain the complaints where the value of goods or services and compensation claimed exceeds rupees one crore.
2. It shall decide the appeals against the orders of any State Commission.
3. Where any State Commission has made any error of law or jurisdiction in any case, the National Commission can call for the records and pass appropriate orders.
4. The National Commission may, in the interest of justice, transfer any complaint pending before the District Forum of one State to a District Forum of another State, and similarly, from one State Commission to another State Commission.

Procedure on admission of complaint

We have already seen above that a complaint can be filed by either a consumer or any voluntary agency or even by any Government. Complaint means an allegation about defect in goods or deficiency in service, or about restrictive trade practice or unfair trade practice etc. A complaint can be filed in any of the Consumer Disputes Redressal Agencies (Consumer Courts) according to its jurisdiction.
The procedure to be followed by these agencies is the same and can be summarized as follows. For the purpose of convenience we shall refer to these Consumer Courts, i.e.

Consumer disputes redressal agencies (District forum, State commission and National commission) as Court:

1. On admission of complaint, a copy of the complaint is forwarded to the opposite party with a direction to submit his version of the case, within thirty days or within such time as may be extended.

2. The opposite party may either deny the allegations or admit the same. If the allegations are admitted there is no question of following the procedure any further and appropriate orders will be passed. If the opposite party denies the allegations or does not respond at all, the case shall be taken up for hearing.

3. If the complaint is about defect in goods which needs proper analysis or test of goods, the Court shall obtain a sample of goods from the complainant and after proper seal, shall send it to the appropriate laboratory for the analysis. The laboratory shall conduct the test as per the direction of the court in order to find out whether the goods suffer from any defect as complained. It shall submit its report and findings to the court within 45 days or within such time as extended by the court.

4. Before sending the sample of goods to the laboratory for analysis, the court may direct the complainant to deposit the necessary fees towards the cost of such analysis. The court shall remit the fees to the laboratory.

5. The Court shall remit the amount of deposited by the complainant to the credit of the Appropriate laboratory to enable it to carry out the analysis. On receiving the report from the laboratory, the court shall forward its copy to the Opposite party with its remarks.

6. If the correctness of the findings of the appropriate laboratory or the methods of analysis adopted by it are disputed by either of the parties, the court shall require the disputing party to submit its objections in writing and then shall give an opportunity of being heard to both the parties as regards the correctness or otherwise of the report of the appropriate laboratory. It shall then issue an

appropriate order.

7. Alternatively, the court shall settle the dispute on the basis of evidence brought before it by the parties. If the opponent does not present his case, the court shall *ex-parte* settle the dispute on the basis of evidence brought to its notice by the complainant. If the complainant fails to remain present on the day of hearing the dispute, the court may either dismiss the complaint for default or decide it on merits.

8. Every complaint shall be heard as expeditiously as possible and no adjournments shall be ordinarily granted unless sufficient cause is shown by the party seeking adjournment. Normally a complaint shall be settled within a period of five months from the date the opposite party receives the notice, where it requires analysis or testing the goods. In other cases, i.e. where such analysis of goods is not necessary, the complaint shall be settled within a period of three months. If any complaint cannot be settled within the time as mentioned earlier, the court has to specify the reasons in writing for such delay.

9. Where a complaint instituted before the District Forum, the State Commission or, as the case may be, the National Commission is found to be frivolous or vexatious, it shall, for reasons to e recorded in writing, dismiss the complaint and make an order that the complainant shall pay to the opposite party such cost, not exceeding ten thousand rupees, as may be specified in the order.

10. The District forum shall be deemed to be a Civil Court while deciding any complaint and shall have the same powers as are vested in a Civil Court, in respect of the following matters, namely-

    a. the summoning and enforcing the attendance of any defendant or witness and examining the witness on oath;
    b. the discovery and production of any document or other material object producible as evidence;
    c. the requisitioning of the report of the concerned analysis or test from the appropriate laboratory Respondent from any other relevant source;
    d. issuing of any commission for the examination of any witness, and

e. any other matter which may be prescribed.

It may be noted that the procedure on admission of complaint is the same for all the three forums, i.e. District Forum, State Commission and the National Commission.

Consumer Protection Councils

For the purpose of promoting the interests of consumers throughout the country and for protection of their rights, the Act provides for the establishment of Consumer Protection Councils. These councils are at three levels; Central, State and District. These councils are not judicial authorities like Consumer disputes redressal forums. They do not decide the consumer disputes. They are established rather for the purpose creating awareness among the consumers and for protecting their rights.
The objects and functions of the councils at all the three levels are the same, i.e. protection of rights of consumers. Before we discuss their constitution, let us understand the rights of consumers, as recognised under the Act, for the protection of which these councils are brought into force.

Rights of Consumers

The objects of the councils shall be to promote and protect the rights of the consumers such as –

1. the right to be protected against the marketing of goods and services which are hazardous to life and property;
2. the right to be informed about the quality, quantity, potency, purity, standard and price of goods or services, as the case may be, so as to protect the consumer against unfair trade practices;
3. the right to be assured, wherever possible, access to a variety of goods and services at competitive prices;
4. the right to be heard and to be assured that consumer's interests will receive due consideration at appropriate Forums;
5. the right to seek redressal against unfair trade practices or restrictive trade practices or unscrupulous exploitation of consumers; and
6. the right to consumer education.

Central Council

1. The central Government shall establish by issuing notification a Council to be known as Central Consumer Protection Council, referred to as Central Council.

2. The Central Council shall consist of Minister of the Consumer Affairs in the Central Government, who shall be its Chairman, and such number of other members representing such interests as may be prescribed.

3. The objects of the Central Council shall be to promote and protect the rights of the consumers. (As stated earlier)

4. The Central Council shall meet as and when necessary, but at least one meeting shall be held every year. The meetings shall be conducted at such place and time as thought fit by the Chairman and as per the procedure prescribed.

State Council

1. The State Government shall, by issuing notification, establish a Council to be known as "Consumer Protection Council for …(name of the State)....", referred to as State Council.

2. The State council shall consist of –

    a. the Minister of Consumer Affairs in the State Government who shall be its Chairman;
    b. such number of other official or non-official members representing such interests as may be prescribed by the State Government;
    c. such number of other official or non-official members, not exceeding ten, as may be nominated by the Central Government;

3. The objects of every State Council shall be to promote and protect, within the State, the rights of consumers as laid down earlier.

4. The State Council shall meet as and when necessary, but at least two meetings shall be held every year. The meetings shall be conducted at such time and place as thought fit by the Chairman and as per the procedure prescribed.

District Council

1. The State Government shall establish for every district, by notification, a council to be known as the District Consumer Protection Council, referred to as 'District Council'.

2. District Council shall consist of –

    a. The Collector of the district, by whatever name called, who shall be its Chairman;
    b. Such number of other official and non-official members representing such interests as may be prescribed by the State Government;

3. The objects of every District Council shall be to promote and protect the interests of consumers within the district, as laid down earlier.

4. The District Council shall meet as and when necessary, but at least two meeting shall be held every year. The meetings shall be conducted at the place and time as thought fit by the Chairman and shall be as per the prescribed procedure.