VIRTUAL UNIVERSITY OF PAKISTAN

Business & Labor Law

MGT611

Course Handouts

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LESSON 1

INTRODUCTION TO BUSINESS AND LABOUR LAWS & LEGAL SYSTEM OF PAKISTAN

Objectives of the Course

This course has been designed with the objective of developing clear perception and understanding of the students about the different laws concerning business and labour. This course would enable the students to apply these laws in real life situations.

The course is comprised of the following modules containing different laws confronting the businesses and labour force.

Course Management

MODULE 1

Scope of Law and Legal System of Pakistan

Topics /contents to be covered in this module:

1) Concept of law
2) Significance of law
3) Meaning and importance of jurisprudence
4) Kinds of jurisprudence including the following:
    i) Analytical jurisprudence
    ii) Historical jurisprudence
    iii) Ethical jurisprudence
5) Definitions of law according to point of view of different jurists
6) Classification of law
7) Essentials of imperative law
8) Legal sources of law including the following:
    i) Legislation
    ii) Precedents
    iii) Customs
    iv) Agreements

MODULE 2

Law of Contract (Contract Act, 1872)

We shall start with the law of contract, which is a very important branch of law and is of great significance for everyone whether an individual or a corporate entity or a government. Every one of us enters into different contracts and these contracts do affect in our every day transaction and dealing. The influence of the contract can be judged from the following:

- Every purchase we make
- Loan to a friend
- Admission in the school / college
- Ride one takes on a bus
- Opening a bank account or taking a bank loan so on and so forth

Hence studying the general principles is of great importance for every one of us.

The contract is a binding force that holds the fabrics of any economic system. If there is no contracts and there is no law at the back of these contracts, there will be chaos in the business world rather society at large. The contracts give rise to rights and obligations amongst the contracting parties and law of contract

provides the mechanism through which It can be determined weather the promises or agreements between the parties have legal binding and enforceable at course of law. Similarly the law regarding partnerships, companies, negotiable instruments and other statutes outline in the modules or equally important for individuals and business and shall be discussed at length.

Topics / contents to be covered in this module:

1) Definitions and concept of agreement, promise, promiser, promisee, consideration, void agreements and proposal.
2) Concept and scope of consideration
3) Essentials of a valid contract including the following:
    (i) Offer and acceptance
    (ii) Legal relationship
    (iii) Legal consideration
    (iv) Competent parties
    (v) Free consent of the parties
4) Concept of the legal capacity of contracting parties
5) Importance and scope of free consent
6) Kinds of contracts including the following:
    (i) Valid contract
    (ii) Voidable contract
    (iii) Void contract
    (iv) Unenforceable contract
    (v) Express contract
    (vi) Implied contract
    (vii) Executed contract
    viii) Executory contract
7) Contingent contracts
8) Performance of contracts
9) Performance of reciprocal promises
10) Discharge of contract
11) Different modes in which a contract is stands discharge including the following:
    - By performance
    - By impossibility of performance
    - By agreement of parties
    - By operation of law
    - By breach of contract
12) Essentials of valid tender including the following:
    - Unconditional--There is no obligation on the counter party to accept a conditional tender.
    - Tender to be made at proper time and proper place.
    - Tender should be in entirety as per stipulations of the agreement.
    - In case of tender relating delivery of goods, the Promisee should be provided opportunity to examine the goods according to the stipulations of the contract
    - Tender must be offered to a person who is able to perform the promise under the contract
    - Tender to be made to the Promisee or his agent
    - In case of joint Promisee, tender can be made to any of the joint promises.
    - In case tender of money, the exact amount should be mentioned.
13) Breach of contract
14) Remedies for breach of contract including the following:
    - Suit for damages: Sec. 73
    - Suit for compensation-- Party rightfully rescinding contract entitled to compensation: Sec. 75
    - Suit for specific performance
    - Suit for Injunction
15) Contracts of indemnity and guarantee

17) Contracts of agency
- Scope of contract of agency

MODULE 3

Law of Partnership (Partnership Act, 1932)

Topics / contents to be covered in this module:
a) Concept of partnership
b) Essentials and kinds of partnership
c) General duties of partners
d) Mutual rights and liabilities of partners

MODULE 4

Law relating to companies (Companies Ordinance, 1984)

Topics / contents to be covered in this module:
- Objects of Company's Ordinance, 1984
- Scope of the company
- Different legal definitions
- Advantages of incorporation
- Formation of company
- Memorandum of association
- Article of association
- Prospectus of a company
- Effect of registration
- Kinds of shares
- Winding up of a companies
- Securities and Exchange Commission of Pakistan
- Concept of corporate governance

MODULE 5

Law of negotiable instruments

Topics / contents to be covered in this module:
- Concept, object and purpose of this Act
- Types of negotiable instruments
- Essentials of promissory note
- Essentials of bill of exchange
- Essentials of a cheque
- Types of cheques
- Concept of crossed cheque
- Distinguishing features between these instruments
- Endorsement
- Parties to negotiable instrument
- Negotiation of the instruments
- Discharge from liability

MODULE 6

Topics / contents to be covered in this module:

- Concept of transfer of property
- Sale of immovable property
- Concept of sale and agreement to sell
- Mortgages of immovable property, scope of mortgages and types of mortgages
- Lease of immovable property
- Essentials of lease
- Transfer of property through exchange
- Transfer of property through gifts
- Transfer of actionable claims

MODULE 7

- **Law relating to sales of goods**
- **Carriage of goods by different modes**

Topics / contents to be covered in this module:

- Scope of the Sales of Goods Act, 1932
- Concept and essentials of sales of goods
- Classification of goods
- Concept of condition and warrantee
- Performance of contract of sales of goods
- Carriage of goods
- Carriage by land
- Carriage by sea
- Carriage by air

MODULE 8

Law of trust

Topics / contents to be covered in this module:

- Law of trust
- Concept of trust
- Purpose of trust
- Duties and liabilities of trustees
- Rights of trustees
- Extinction of trust
- Revocation of trust.

MODULE 9

Law of insurance

Topics / contents to be covered in this module:

- Concept of insurance
- Essentials of a contract of insurance
- Classification of insurance business
- Life insurance
- Fire insurance
- Marine Insurance

MODULE 10

Labour laws

Topics/ contents to be covered in this module:

1) Industrial Relations Ordinance, 2002
    a) definitions
    b) trade unions
    c) worker's participation and dispute resolution
    d) Labour courts:
        i) Procedure and powers
        ii) Awards and decisions
        iii) Appeal to the High Court
2) National Industrial Relations Commission
3) Law Relating to Compensation to Workmen
4) Definitions
5) Workmen compensation
6) Commission
7) Law Relating to Factories
        i) definitions
        ii) health and safety standards for factories
8) Penalties
9) Law relating to payment of wages
10) Employees social security ordinance, 1965
        i) definitions
11) Employees social security institutions
12) Contribution for social security
13) Benefits for workers
14) Determination of claims
15) Social security courts
16) Offences and prosecutions

What is Law?

Everyone around us talks about law according to one's own perception. Before studying the statutory provisions of law, interpretation and significance of law, it is important to know what law is all about. Law in general sense defined as under:

"The law consists of rules that regulate the conduct of individuals, businesses, and other organizations within society"

Significance of Law

Law is to maintain rights, uphold justice and redress wrongs. Law ensures public order, balance, harmony, peace among the persons within the state and inter-states. The legal experts term signs the civil law as jurisprudence. Some other concepts of jurisprudence are given below:

"Jurisprudence means the knowledge of law, or knowledge of just and unjust. It deals with laws that are enforceable by the courts".

Kinds of Jurisprudence

The jurisprudence has been divided into following branches:

- Analytical Jurisprudence
- Historical Jurisprudence
- Ethical Jurisprudence

Analytical jurisprudence

It studies the principles of law as it exists now.

Scope of Analytical jurisprudence

Its scope is enumerated below:

- Analysis of the law as it exists
- Treatment of a concept in its elementary sub-divisions
- Study of the legal source of law

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LESSON 2

CONCEPTS AND DEFINITIONS OF LAW

Kinds of Jurisprudence

The jurisprudence has been classified as under:

- Analytical Jurisprudence
- Historical Jurisprudence
- Ethical Jurisprudence

Analytical jurisprudence

It analyses the prevalent law, that is, the principles of law as these exist now. It also studies theory of legislation, precedent and customs and study of different legal concepts such as property, possession, trust, contract, negligence etc.

Scope of Analytical jurisprudence

It analysis the basic principles of civil law, it does not pay any attention to the evolutionary process and there Ethical aspects that is weather they are good piece of law or bad one. We can say that analytical jurisprudence does not consider the historical and ethical aspects.

Its scope can be underlined as given below:

a) An analysis of the law
b) Treatment of a complex idea or concept in its elementary sub-divisions
c) Examination of the relations between civil law and other forms of law
d) A study of the legal source of law
e) An investigation of the theory of legislation, precedent and custom
f) Classification of the different sub-divisions of corpus jurist or the entire body of law with reason therefore
g) A treatment of rights, their kinds and classes, their creation, transfer and extinction
h) Dealing with legal liability, its kinds, extent and incidence
i) To investigate such legal concepts as property, possession, trust, contracts, persons, acts, intention, motive, negligence. etc.

Historical jurisprudence

It studies history of law and evolution of law over a period of time and also amendments, introduction of new principles of law.

Scope of Historical Jurisprudence

It studies the principles of law in their origin and developments that take place over a period of time. We can say that it gives the past history of important existing legal conception and principles of a particular system. For instance, the origin and development of the nature of private property, of individual ownership, of contract, etc. The object of historical jurisprudence is to vindicate the earliest of mankind as they are reflected in ancient law and to point out their relation to the modern thought. This branch is not the same thing as legal history.

Ethical jurisprudence

It deals with the law that should be in an ideal state. It lays down the different purposes which should be fulfilled in an ideal state. It studies the modifications in the existing law in order to achieve these purposes and objects. The main object of ethical jurisprudence is the attainment of justice.

Scope of Ethical Jurisprudence

Ethical jurisprudence deals with the law in the ideal state as it should be. Law exists to fulfill certain purposes. It is for this branch of jurisprudence to lay down what those purposes are and whether these are fulfilled by the law existing at any given time. It considers the modifications necessary in the existing law so that it may fulfill the objects for which it exists. The other two branches are concerned with an analysis of the law as it is or as has been without being concerned with its adequacy or in-adequacy. Ethical

jurisprudence has as its object the attainment of justice. It strives to bring the principles of the law to such a form that they serve best that end.

Difference between Analytical Jurisprudence and Historical Jurisprudence

Historical jurisprudence is a scientific study of the origin and development of the principles of law—it treats the law as it has been in the past; whereas analytical jurisprudence is a scientific study of the first or fundamental principles of law as now extended—it treats the principles of law as it exists today.

Historical jurisprudence tells us what the source of a particular principle of law was, where from it was derived, what was its shape and scope in ancient times, how and under what influences it came to develop and through what states it passed to assume finally the shape in which we find it existing today.

Analytical jurisprudence studies the basic principles of law as they exist today without being concerned with the history of those principles. The modern tendency is to make a comparative study of the two, and while dealing with analytical jurisprudence not to ignore entirely the historical jurisprudence.

Difference with respect of state

The state according to the concept of historical jurisprudence was an association of human beings having the two primary functions of war and administration of justice. The modern tendency is to end war. All states normally exercise their functions within a defined territory.

Difference with respect to law

From the historical point of view, justice was administered by the early kings under divine inspiration without there being any law in the modern sense. Law according to Austin is a command emanating from a definite superior given to others who are habitually obedient to obliging them to a course of conduct with a threat of sanction in the event of disobedience. It involves the idea of prescribing not a single act but a series of acts.

Difference with respect of Custom

According to writers like Sir Henry Maine, the repeated judgments in similar cases established certain principles, which in course of time cam to be recognized as binding and to be accepted as governing general course of conduct. Thus customs took roots in the societies. and these customs were followed by people in the belief that following them was obligatory and not optional or voluntary. Customs were treated as law.
In analytical jurisprudence custom occupies a much less important place. All customs are not law, only such customs as satisfy certain conditions are recognized as having the force of law.

Salmond's versions about jurisprudence

Salmond gives two meanings to the term, one in its wide sense, and another in its narrow sense:

(a) In its primary sense, jurisprudence means 'the science of civil law' it is a science as distinguished from art –a systematized knowledge as distinguished from mere knowledge of the provisions of existing law. Secondly, it is the science of civil law or the law of the land –the law of the lawyers and the law of courts –not of all the different systems of law, or even of all the rules contained in a particular system. It is confined to law proper –those laws which are enforced by the courts.

In this sense, it is divisible into three branches:

(i) Legal exposition, i.e., the actual content of a particular legal system as it exists now or has existed at any time in the past:
(ii) Legal history, i.e., the stages by which the laws came to evolve in their present or past shape; and
(iii) Science of legislation i.e. study of the law as it ought to be in an ideal state in the future (not law as it is or has been in the past)

(b) In a more restricted and particular sense, Salmond defines jurisprudence as the science of the first principles of civil law.

In this sense, jurisprudence is concerned with the first, basic or fundamental principles of civil law. In other words, if we take away from the entire science of civil law the concrete provisions of the law, the abstract principles that would be left behind, will be jurisprudence.

Advantages of study of jurisprudence

The following are the advantages of studying this science:

1. Jurisprudence is the "grammar of law" and teaches the lawyer and the legislator proper use of legal terms. It ensures homogeneity and accuracy in legal phraseology.
2. It trains the mind and enables us to discover and a void legal fallacies which would otherwise escape notice.
3. a person who has studies jurisprudence will be able to study foreign laws intelligently if need be,

Definitions of Law

According to Blackstone

"Law signifies a rule of action, and is applied indiscriminately to all kinds of action."

According to Holland

"Law refers to a general rule of action, taking cognizance only of external acts enforced by a determinate authority, which authority is human, and among human authorities is that which is permanent in a political society."

According to Hobbs

"The commands of him and them that have coercive power.."

According to Austin

"A law is a rule of conduct imposed and enforced by the sovereign."

According to Salmond

"Law is the body of principles recognized and applied by the State in the administration of justice."

According to John Erskine

"Law is the command of a sovereign, containing a common rule of life for his subjects and obliging them to obedience."

According to De Montmorency

"Coercion is a weapon of law which law has forged, but it is not the basis of law."

According to Pound

"Law is the body of principles recognized or enforced by public and regular tribunals in the administration of justice."

According to Wilson

"Law is that portion of the established thought and habit which has gained distinct and formal recognition in the shape of uniform rules backed by the authority and power of Government."

According to Green

"Law is the system of rights and obligations which the state enforces."

According to Lord Radcliff

"You will not mistake my meaning or suppose that I depreciate one of the great human studies if I say that we cannot learn Law by learning Law. If it is to be anything more than just a technique it is to be so much more than itself; a part of history and sociology, a part of ethics and a philosophy of life."

LESSON 3

CLASSIFICATION & SOURCES OF LAW

Classification of Law

- Imperative Law
- Physical or Scientific Law
- Natural or Moral Law
- Conventional Law
- Customary Law
- Practical or Technical Law
- International Law
- Civil Law

Imperative Law

The three ingredients of imperative law are explained in detail:

(a) Imperative law is a general rule

It is a rule of general application as distinguished from particular application. A rule which applies only to one individual or one set of circumstances at a given time but never afterwards will not be a rule of imperative law. The rules of conduct laid down by a father for the guidance of his son; or by a master for his servant, though laid down by a superior and enforced by physical force, are not imperative law, because they are not of general application.

On the other hand, 'general' does not mean absolutely general, or applicable to all. Thus traffic rules, though applicable to drivers of vehicles only, are imperative law, for they apply generally to all drivers. The rules requiring ministers or the President to take an oath on entering upon office, though applicable to a few or even one individual form part of imperative law for the oath is to be taken by President after President, Minister after Minister, etc. thus "General" here signifies the fact that wherever a particular set of circumstances comes into existence, the rule should be invariably applicable, with exception–though the one affected may be an individual (the Minister) or to class of persons (the drivers of vehicles).

(b) Imperative law has some authority behind it

It is given by some superior, may be human or divine. Every rule of imperative law is given by some authority–whether divine or religious or political.

(c) Imperative law is enforced by superior power:

There must be some punishment on breach of imperative law. Rules of imperative law are enforced by some superior power, and the punishment takes such form as bodily or mental suffering. The superior enforces it by either physical force or any other form of compulsion, such as ridicule, contempt or censure. Those subject to imperative law are bound to follow it; thus compulsion is necessary. A rule which people may or may not observe cannot form a part of imperative law.

Illustrations:

1. Divine law is imperative law on the following basis:
   (i) It is laid down by a superior authority (God);
   (ii) It is followed compulsorily;
   (iii) Its breach constitutes a sin and is punished with divine wrath.

2. Civil law (the law of the land) is also a form of imperative law on the following basis;
   - The superior power is the sovereign
   - The compulsion is fear of punishment by the state.
   - It is enforced by the physical force of the state. Civil law decides whether an act is innocent or criminal.
3. Positive morality is the rules of the society regarding courses which are moral or immoral.
   (i) The superior authority is the society;
   (ii) The compulsion is the fear of falling in the eyes of one's fellowmen;
   (iii)The punishment takes the form of ridicule, contempt or social censure or boycott.

One follows a moral rule because the society has laid it down and because of fear to fall in the eyes of the companions. If a person fails to follow moral law, that person would become a target of contempt, ridicule and censure and if his conduct is very immoral he may even be boycotted by the society / fellowmen. The rules of morality, church, trade unions, clubs, etc., are regarded as rules of imperative law.

4. International law may be regarded as a form of imperative law. The rules of international intercourse are laid down by the civilized states, body or group (now there is a regular international body which partly does so: the United Nations Organization). The rules are to be followed compulsory and their breach is followed by punishment, censure of the other states, discontinuation of diplomatic relations, economic sanctions, blockade and lastly, the most formidable one that is war.

What is sanction? What is the form of sanction?

Sanction in Roman law denoted the portion of statute relating to penalties. Sanction is the instrument of coercion by which a rule of imperative law is enforced. It is the means by which obedience to the rule is ensured by the instrument of coercion by which any system of imperative law is enforced. Austin says that sanction is a conditional evil –the evil or pain to be incurred by a wrong-doer if the law is broken. It is the force of coercion or penalty which ensures that rules of imperative law will be observed.

Illustrations:

1. In divine law, sanction takes the form of evils to flow from divine wrath ---the punishment for sins to be inflicted here or hereafter.
2. In civil law the sanction is the sword of the state –its physical force which punishes a breach of the law. It may take the form of loss of some right, non-recognition of a deed or instrument (e.g. on breach of some rule of stamp or registration law), compulsory re-imbursement or payment of compensation (contract); damages; restitution of property (e.g. in theft or receiving stolen property) fine; forfeiture or property or imprisonment (crimes).
3. Moral or social rules have the sanction of loss of public opinion, or of inviting public contempt, censure or ridicule, or social boycott.
4. The sanction in case of international law is censure of other state, withdrawal of trade concessions and facilities, economic blockade, war-like blockade, war etc.

Sanction always operates upon desire

If X is about to break a rule of imperative law e.g. X thinks of stealing Y's purse) X shall have a choice between two pains: (1) either X should keep within the law and thus suffer the pain of not getting the illegal advantage: (2) or X should break the law the sanction affords a choice between two pains. It operates upon the desire to gain illegally. If the pain to follow the breach of law is greater than the pain suffered by keeping within the law or in other words, the fear of punishment is strong enough to care the illegal desire, the intending evil doer will be restrained.

Physical or Scientific Law

The rules relating to uniformity of behavior of inanimate or animate things: or beings under particular circumstances are intended in the term "physical or scientific law to be discussed". Instances of such laws are the rules of chemistry and physics, such as the law of diffusion of gases, of chemical reactions, or rectilinear propagation of light, the law of motion, and gravitation, the law of astronomy, such as the rules governing planetary motion, the biological laws of propagation of species, the law of evolution and growth of all beings and of human psychology, etc. where there is a uniformity in conduct of living beings or lifeless things, there is a corresponding physical law governing the same. One noteworthy characteristic of such law is that if any law is one shown to be broken it ceases to be law (for instance if at any instance light should be shown to travel in curves, the law of rectilinear propagation of light will no longer be a law) : while rules of civil law are constantly being broken and yet they remain law (e.g., a thief steals, he is punished, but the law against theft yet continues to be in force).

In other words, physical laws are absolute; they are physical compulsion. There is no choice left with the being or thing subject to a scientific law to follow it or not to follow their observance depends on his volition, and incase of breach, there only arises a penalty or punishment. The name Natural law has sometimes been given to this kind of law. The Hebrew Scriptures preach that god as the supreme creature

all creation as homage to God, and thus result in uniformities of conduct under the given conditions. The rules applied by God to living beings (men and animals) were called "Natural" or "Rational" law; while rules applicable to lifeless things were given the name of "physical" law. In modern conception, uniformities of behavior of all things, animate or inanimate, under specific conditions, are given the name of scientific or physical law.

Natural or Moral Law

The term Natural or Moral law denotes another very important conception, as explained below:

In its primary sense as referring to physical universe external nature, a law of nature represents a rule governing a set of natural phenomena and set by the guiding principle pervading in the universe, e.g., the law of gravity. Natural law in this sense is used by physical scientists and expresses the statement that a particular phenomenon always occurs if certain conditions are present.

When it is applied to the moral as distinct from the physical world, the moral law of nature means a law which nature herself sets to mankind. The law is natural which issues out of the mental and moral constitution of man as a man, e.g., as a moral and intellectual being. We will here discuss the natural law in this sense.

This kind of law has been given various other names

i. Divine Law, for the principles are supposed to have been ordained by God for the guidance of mankind.
ii. Rational Law, for it is based on reason and the rules are addressed to intelligent human beings who have the power to reason.
iii. Unwritten Law, for its rules are not to be found in any Code Jus non-scriptum as distinguished from Jus scriptum the written law.
iv. Universal or common Law, i.e., that law which applies to all states in common or is universal in its application to distinguish if from the various civil laws of different states.

Conventional Law

This name is given to the body of rules agreed to be followed by the parties which are subject to them in order to regulate their conduct towards one another. This kind of law acquires its force or validity from the agreement. The sanction behind it may be the displeasure of the parties offended and in some cases, the physical force of the state.

Conventional law may be divided into two kinds

1. Rules that are recognized and enforced by the state e.g., contracts, the memorandum and articles of association of a limited company (these contain the rules by which the share-holders agree to be bound.
2. Rules enforced by the parties themselves i.e., rules of games and sports.

Conventional law is a law in the general sense because its rules ensure a uniformity of conduct. The rules of cricket make it certain that the game will be played in the same way and where, and between teams of any nationality.

Customary Law

In this kind of law are included rules which are habitually followed by a majority of person subject to them in the belief of their binding nature. Such rules have been followed for a long time in the past and are expected to be followed in future as well. Customary law derives its force from the long course of past conduct resulting in the same uniformity of action in given set of circumstances. Some rules of customary law (like conventional law) may come to be recognized and enforced by the state, in which case they will form a part of imperative law.

Practical or technical Law

In this category fall rules which are to be followed to achieve uniformity of result in practical or technical matters, e.g., manufacture. Those who want to make pens of a particular type will have to follow certain rules of procedure. These rules when followed repeatedly will yield uniformly similar pens. Rules of

manufacture, engineering, architecture, photography, attainment of skill in games by practice of exercises to be carried out in order to develop particular limb, will fall under this head.

International Law

International law has been differently defined by different jurist.

Salmond takes it as "those rules which govern sovereign states in their relations and conduct towards each other". Other definitions are: " the body of rules which by custom or treaty civilized states regard as binding upon themselves in their relations with one another, and whose violation gives the injured party a legal right to redress"(Wheaton); "The aggregate of rules to which nations have agreed to conform in their conduct towards one another" (Lord Russel). "The collection of usages which civilized states have agreed to observe in their dealings with each other" (Coleridge L.C.J.).

Kinds of International Law

Depending upon whether the consent is express or implied international law is divided into:

1. Conventional international law: in this case the consent is express e.g., Geneva Convention
2. Customary international law: in this case the consent is implied from long course of uniform conduct of states, from which rules are evolved, e.g., the rules as to treatment of prisoners of war.

Salmond divided international law independently of consent, express or implied, as follow:

(a) Common law of Nations, i.e., that portion of law which is common to all states—a portion universally or generally followed among the states, and

(b) Particular law of Nations, i.e., that portion which applies solely between two or more states by virtue of an agreement between them.

Civil Law

Salmond defines civil law as the "law of the state, the law of the land, the law of the lawyers and the law of Courts."

Civil law has the following meanings

1. Civil law means Roman Civil Law— as distinguished from the law of the church— these were the two distinct legal systems which influenced the development of the law of European countries after the dark ages.
2. It also means the entire body of Roman law as distinguished from English Law.
3. Civil law is also used for a particular branch of the law of the land. It means the residue of the law of the state after certain special branches, such as criminal law and marshal law, have been taken away from it.

Certain substitute has been employed to convey the sense of the law of land on account of the ambiguity which riddled the whole discussion. These are:

1. Municipal law, but this is also unsatisfactory law, —the law relating to local bodies, such as municipal corporations.
2. Positive law, (the laws set by human agency as distinguished from uncreated law). But this is too wide term to be suitable. It contains other law besides the law of land, for example, international law.

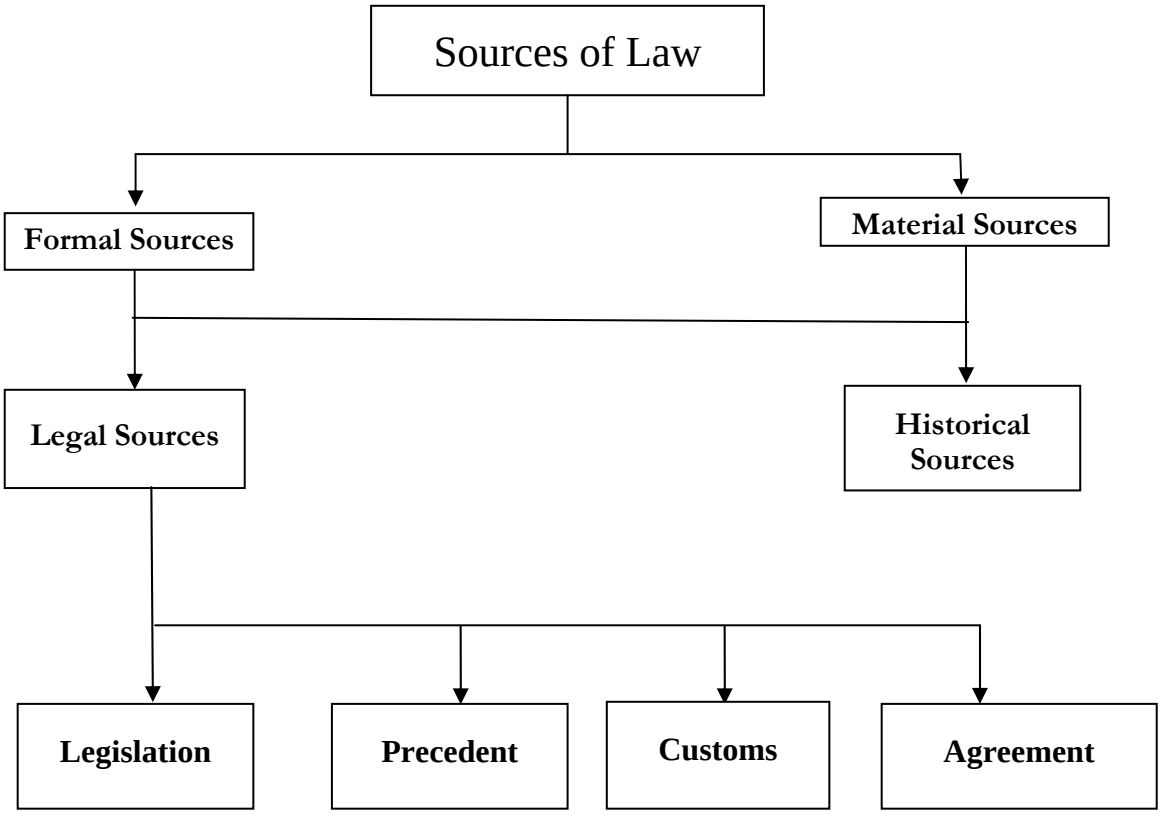
Sources of law

According to Salmond, following are the main sources:

1. Formal sources
2. Material sources

Formal Sources

Formal sources are comprised of statutes and decision of the courts.



Material sources

Material sources are comprised of legal sources and historical sources. Legal sources are comprised of the following:

a) Legislation
b) Precedent
c) Customs
d) Agreement

The main instruments under the legal sources are legislation and precedent.

Precedent or Case Law

The decisions made by superior judiciary contain interpretation of law are called case law or precedents. The decisions can be relied upon/cited as precedents in future at the time of adjudication of the cases.

Principles of binding precedent are underlined below

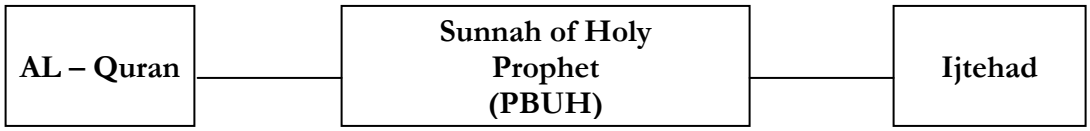
The decision relied upon must be based upon the interpretation of law.
The precedent must have nexus to the central point of the case.
The facts of the precedent being cited and the case being adjudicated upon must be the same.

Sources of law in Sharia

The sources of law in sharia are:

1. Al-Quran
2. Sunnah of The Holy Prophet (pbuh)
3. Ijtehad

These are presented in figure on the next page.



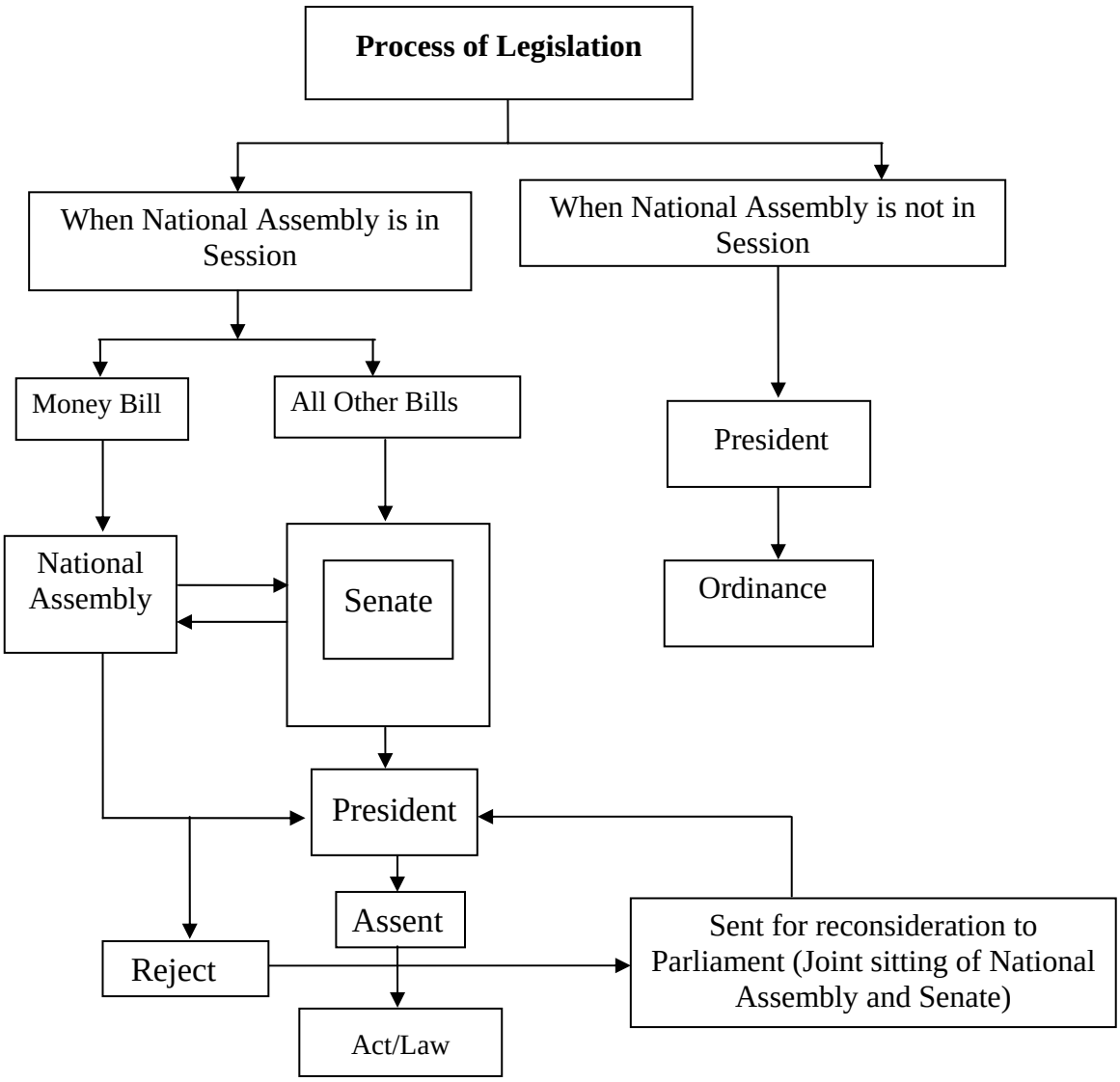
Process of Legislation

Parliament
It consists of President of Pakistan, National Assembly and Senate.

Process
Parliament / federal legislature has been given powers by the constitution of Pakistan (1973) 4th schedule in two lists, that is:

a) Federal legislative list
b) Concurrent list

The process of legislation can be understood with the help of following diagram.



A bill can be presented in either house whether national assembly or senate and after being passed by simple majority shall be transmitted to other house. When the bill is passed by both houses of the parliament, it is then presented to the president for assent. If the bill presented to President is not given assent or sent back to the parliament for any amendments, it will be considered in the joint sitting of the both houses of the parliament and if passed shall be again presented to the President for his assent. Now the bill will become the act of parliament and president does not have powers to withhold assent. The bill when passed by the parliament is called an **Act**.

Money Bills

Money bill shall originate in the national assembly and after being passed shall be presented to the president for assent. Money bill shall not be presented to the senate. The rest of the procedure is the same as explained above.

Ordinance

Under the constitution of Pakistan, the President can promulgate an ordinance, if any house of parliament is not in session. The ordinance shall stand repealed after one hundred twenty days, if it is not presented or passed by the parliament.

LESSON 4

CONTRACT ACT – SCOPE & SIGNIFICANCE

Contract Act, 1872

The law relating to contracts in Pakistan is governed by Contract Act, 1872. It extends to the whole of Pakistan; and it came into force on 1st September, 1872.

Scope and Significance

The law of contract is at the root of any business transaction. We have already discussed that it affects every person in one way or the other. We enter into different kinds of contracts in our day today affairs. The law of contracts is applicable not only to the business community but also to others. When a person rides a public transport or gets admission in an educational institution or avails loan from a bank or delivers cloth to a tailor for stitching, he is in fact entering into a contract, knowingly or unknowingly. By virtue of a contract legal rights and obligations are created between the contracting parties. The law of contracts is concerned with self-imposed obligations. The parties to a contract do enjoy freedom of contract and the rights and duties created by them can be enforced even though the terms of the contract are harsh or unfair to one party. When people enter into a contract they make private law binding on each other. The parties to a contract, in a sense, make the law for themselves. It consists of a number of limiting principles, subject to which the parties may create rights and duties for themselves which the law will uphold. Thus we can say that the parties to a contract, in a sense, make the law for themselves. When contracts were entered into freely and voluntarily they would be enforceable by courts of law. The law of contract determines the circumstances under which a promise or an agreement shall be legally binding on the persons making it. It also provides the remedies which are available in a court of law against a person who fails to fulfill his contract and other conditions. The object and function of law of contract is to see that promises made by the contracting parties are fulfilled.

Scheme of the Act

At the time of promulgation, this Act comprised of 266 sections. Due to promulgation of new laws some sections of the Act stand repealed.

- Sections 1 to 75 contain general principles for all types of contract.
- Sections 76 to 123 were related to contracts of sale of goods, these sections stand repealed by introduction of new law i.e. Sale of Goods Act, 1930.
- Sections 124 to 147 are comprised of contracts of indemnity and guarantee.
- Sections 148 to 181 are comprised of Contracts of bailment and pledge.
- Sections 182 to 238 are comprised of Contract of Agency.
- Sections 239 to 266 pertained to the contracts of partnership, these sections stand repealed due to introduction of new law that is Partnership Act, 1932

Applicability of Law of Contract

Law applicable where Parties to a contract belong to different countries

Where a contract is entered into in one country and is to be performed in another country, the question of applicability of law shall be decided on the following premises:

First approach is that the law of the country where contract is made shall be applicable.

Second approach is that in cases where contract is entered into one country and is to be performed in another country then the law of the country where the performance is to take place shall be applicable. However if such a situation arises, the intention of the parties shall be looked into to decide the question of applicability of the law.

In international contracts, it is up to the contracting parties to choose the law of the country applicable in respect of such contracts. (At the time of making the contract, it will be settled between the parties whether the law of the country, where contract is made shall be applicable or where contract is to be performed).

In cases where arbitration clause is incorporated in a contract and in that clause, place of arbitration has also been mentioned, then the law applicable in such instances shall be the law of the country where arbitration is to take place.

As a rule the question whether the law of the country where the contract was made or whether the law of the country where it is to be executed will govern the case, would be usually decided according to the intension of the parties. The parties to an international contact are at liberty to choose the law which they intend to apply to their agreements on which the parties' substantive rights depend. Where the parties have expressed their intention that the contract was to be governed by Pakistan law, it is not possible to accept that the law of the place of performance of the contract is to be deemed to be the proper law of the contract governing the substance of the obligation, i.e., the currency and the quantum of the money of account or measurement. In the absence of an agreement to the contrary, the same law applies to all the obligations under the contract and the Courts will not readily split the contract.

Law applicable where different Laws in different Provinces

In such situations the law applicable shall be the law of province in which the contract was made**.**

Law applicable regarding Hindu Joint Family

The rights and liabilities arising out of a joint ownership created by Hindu law between the members of undivided family shall be determined according to Contract Act and at the same time, general rules of Hindu law shall be taken into consideration.

Law applicable regarding Negotiable Instruments

The general provisions of Contract Act as to the rights and liabilities of respective parties shall not override rules regarding negotiable instruments. It means that provisions contained in Negotiable Instruments Act, 1881 shall be effective, however the general provisions of a Contract Act are applicable only in situations where no specific provisions are contained in Negotiable Instrument Act 1881.

Trade Usage

It is for the parties to decide on what terms contracts would be entered into and if they choose to enter into contracts with knowledge of the commercial usage governing them, they are bound by them. In a commercial contract, a term may be implied in accordance with the usage of the trade or business to which the contract pertains. Where there is a conflict between the usage of trade and the Contract Act the former must prevail inasmuch as S.1., Contract Act, provides that nothing therein contained shall affect any usage or custom of trade. In such cases, the incidents and detail of the trade or usage ought to be indicated with clearance and precision.

While interpreting the terms of the contract, Courts do not employ any consideration or term which is not expressly provided therein. It is only when any usage, custom of trade or incident of contract comes on record or where both the parties either concede to existence of any such usage custom of trade or incident of any contract or otherwise same is established, then such incidents, contract, custom of trade or usage as may be reasonable and necessary in order to effectively determine right and obligation of the contracting parties are read as term and conditions of the contract. Where a contract is silent in respect of some incidental terms or conditions which according to the course of business established in a particular trade, it is customary to find included in such a contract, evidence of usage is admissible to prove that such terms and conditions formed part of the contract; unless the incorporation of the terms or conditions will have the effect of introducing something repugnant to or inconsistent with the tenor of the written agreement. Oral evidence is admissible to explain or supply terms in commercial transactions on the presumption that the parties did not intend to put into writing the whole agreement.

Mercantile usage

Significant features of **mercantile usage** are given below:

1. The trade usage/ practice are a universal usage of trade or business.

2. It should be precise, certain and uniform in application to particular trade and business.
3. It must be just, fair and reasonable
4. It is such a practice that everybody in the particular trade knows it or might know if he took pains to acquire.
5. The usage must be continuous one.
6. The trade usage must not be illegal or immoral or opposed to public policy of the State.

Construction of contract

Construction of deed of contract is to be made in consonance with the intention of parties and language of contract, rights shall be governed according to terms laid down in agreement and not beyond its scope at all. Ordinarily terms and conditions of agreement are to be construed strictly to avoid likelihood of ambiguity resulting in prejudice to the parties to transaction. Where terms of agreement empowered petitioner to charge specified charges at a specified rate, language of such clause of agreement does not admit of any other interpretation. Where contract between parties indicated that plaintiff was required to pay the prices and local charges prevailing at the time of shipment and delivery. Such prices and local charges were payable in accordance with terms of the contract.

The Contract Act provides a number of limiting principles which create mutual rights and obligations in a codified form, but so long as the parties do not violate some legal prohibition, they can agree on whatever terms they like in respect of the subject-matter of their contract, and the law, which includes principles, trade practices and customs having the force of law, will give effect to them. A contract is to be construed in harmonious manner and each part is to be construed in harmony with other parts so that a rational meaning is given to al the parts of the contract. A contract must be strictly and literally construed and no deviation there from should be permitted. Where there is an ambiguity in the language of a contract, it must be interpreted against the party who used the expression and in favour of the opposite party. No one can be allowed to go beyond the terms and conditions contained in an agreement executed between the parties. No party can add to the terms of a contract. No obligation can be implied in a contract inconsistently with its expressed terms.

It is the duty of the Courts to give effect to the meaning of a contract or an offer. Contracting parties could agree to abide by any rule or regulation by incorporating the same in the contract specifically or by reference to it. Once such incorporation was made that became a part of the contract. Such incorporation had to be clear and unambiguous.

Intention of parties—the purpose of construction of terms of written agreement being to find out the intention of the parties to the agreement, by looking to the words used, on has to construe the intention which had persuaded he parties to enter into the agreement. For this purpose the Court should look at the document as a whole and all parts of the deed should be examined and read together. The intention of the parties has to be gathered not only from the words used in the contract by the parties but also from the circumstances, their belief, knowledge and intention as expressed in their correspondence.

Implied terms—deed of contract has to be construed strictly and literally without deviating or implying anything which was not supported by the intention of the parties and the language of the document. Nothing can be implied in a contract which was inconsistent with its expressed terms. In interpreting the terms of a contract, the Court ought not to imply a term unless there is evidence that both parties must have intended that it should be a term of the contract, and the power of the Court of implying terms which the parties have not expressed should be exercised very sparingly and only in cases of necessity.

Lesson 5

CONTRACT ACT—DEFINITION & SCOPE

Law of contract is one of the important branches relating to business transaction. Law regarding contracts is governed by the Contract Act 1872. In order to understand a contract, the entire cycle that leads to a contract is required to be understood. It is essential to look into the legal definitions and provisions as contain in the Contract Act but understanding and interpretation of the same is equally important, this aspect shall remain the focal point during the course of studying this Act.

Contract as defined in Sec. 2(h) is reproduced below:

"An agreement enforceable by law is a contract"

To understand a contract, we need to know what an agreement is. The agreement has been defined in section 2 (e) of the Act which is given below.

Agreement

Every promise or every set of promises, forming the consideration for each other is an agreement.

To understand an agreement, we must know what a promise is. The promise has been defined in section 2 (b) of the Act which is reproduced below:

Promise

When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A

when accepted becomes a promise.

Proposal and Promise- the word "proposal" is synonymous in English use with "offer". But the language of these definitions appears to confine "proposal" to an offer to be bound by a promise. Thus a man who offers to sell and deliver, then and there, existing portable goods in his immediate control, such as a book or a jewel, does not offer a promise but an act, and if the other party takes the goods on the spot and becomes liable to pay for them, he (the buyer) is the Promisor. In such a case the seller would seem not to make a proposal within the terms of the Contract Act. A quotation of prices is not an offer, but an invitation for offer; the same is true of many common forms of advertisement. A statement of the lowest price at which a landowner is prepared to sell is not an offer. A term in a partition deed that any of the parties wishing to sell his share will sell to the others at the market value is not an offer but an undertaking to make an offer.

The Act does not say, but it seems to imply, that every promise is an accepted proposal. In the Common Law this is not so, for a binding promise may be made by deed, that is, by writing under seal without any communication between the parties at all. This is because the deed, as an ancient formal method of proof, was conclusive against its maker.

Promisor and Promisee —defined sec. 2 (c)

- The person making the proposal is called **"the Promisor"** and
- The person accepting the proposal is called **"the Promisee"**

To transform a promise into an agreement consideration is also an important ingredient. Consideration has been defined in section 2 (d) of the Act which is reproduced below:

Consideration

When at the desire of the Promisor, the Promisee or any other person who has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise.

All agreements are not contracts, meaning thereby that all agreements are not enforceable at law. Such agreements are called void agreements. The same has been defined in section 2 (g) of the Act which is reproduced below:

Void Agreement
An agreement not enforceable by law is said to be void agreement.

Scope

The words "not enforceable by law" appearing in the definition do not refer to disability to sue arising under any procedural regulations such as Limitation Act. The enforceability which is contemplated in section 2 (g) has its roots in substantive law.

Void contract

Such a contract is void ab-initio meaning thereby, that contract is void at the moment it is made. These contracts have been explained in detail in latter discussions.

Parties not competent to make agreement:

An agreement made by the parties which are not legally competent to enter into contract is not enforceable at law that is void.

Agreement must be in proper form

Agreement must be in the form as required by any statute. For example if deed must be drafted or agreement is required to be in writing or the agreement must be registered according to the provisions of the law, these conditions must be fulfilled.

Proposal—defined Sec. 2 (a)
When one person signifies to another his willingness to do or to abstain from doing any thing, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal.

Scope of Contract under sec. 2(h)

To understand the definition of contract we need to understand the following definitions on which a contract is based.

Proposal or Offer: Following are the essentials for a valid proposal/offer.

- The offer must be communicated to the other party. According to section 4 of the Act, the communication of a proposal is complete when it comes in the knowledge of the person to whom it is made.
- The terms of the offer must be definite and clear
- The offer must be capable of creating legal relationships.
- The offer must be made with a view to obtain acceptance. An invitation to receive offer is not an offer.
- Following are invitation to receive offer hence shall not be treated as offer.
    - Catalog or price list displayed by a shopkeeper
    - Inviting tenders through an advertisement
    - Inviting applications for employment

Acceptance

Acceptance must be absolute. In order to convert a proposal into a promise, the acceptance must be: (1) absolute and unqualified;

(2) expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but if he fails to do so, he accepts the acceptance.

Certainty of acceptance: --- words of acceptance which do not correspond to the proposal actually made arc not really an acceptance of anything, and, therefore, can amount to nothing more than a new proposal or, as it is frequently called, a counter-offer. The difficulties which occur under this head are difficulties not of principle but of construction. the question being in every case whether a particular communication is to be understood as a real and absolute acceptance, or as introducing a condition or qualification which makes it only a stage in a course of negotiation capable of leading, but not necessarily leading, to a concluded contract.

Although there can be no contract without a complete acceptance of the proposal, it is not universally true that complete acceptance of the proposal makes a binding contract; for one may agree to all the terms of a proposal, and yet decline to be bound until a formal agreement is signed, or some other act is done. This is really a case of acceptance with an added condition, but of such special importance as to call for separate mention. There may be an express reservation in such words as these: "This agreement is made subject to the preparation and execution of a formal contract". Or a proposal for insurance may be accepted in all its terms, but with the statement that there shall be no assurance till the first premium is paid. Here again there is no contract, but only a counter-offer, and the intending insurer may refuse a tender of the premium if there has meanwhile been any material change in the facts constituting the risk to be insured against. Where there is no precise clause of reservation, but the acceptance is not obviously unqualified, it becomes a question of construction whether the parties intended that the terms agreed on should merely be put into form, or whether they should be subject to a new agreement the terms of which are not expressed in detail, and this must be determined by examination of the whole of a continuous correspondence or negotiation. It will not do to pick out this or that portion which, if it stood alone, might be sufficient evidence of a contract. But where it appears that a complete contract was formed by unqualified acceptance of an offer at a certain date, subsequent negotiations will have no effect unless they amount to a new agreement.

Manner of acceptance

A proposal must be accepted according to its terms. Therefore, if the proposer chooses to require that the goods shall be delivered at a particular place, he is not bound to accept delivery tendered at any other place. It is not for the acceptor to say that some other mode of acceptance which is not according to the terms of the proposal will do as well. The burden of notifying to the acceptor is on the proposer that an acceptance not in the prescribed manner and form is insufficient, and he remains bound if he fails to insist on an acceptance such as he required.

At all events, one party to a negotiation cannot impose on the other the burden of expressly refusing, either an original offer or a counter-offer by saying that he will assume acceptance unless he hears to the contrary. Assent to his terms is a positive act within the other party's discretion, and he has no right to presume it. Neglect to answer a business offer is certainly not, as a rule, prudent or laudable; still there is no legal duty to answer at all.

Essentials of a valid acceptance: These are enumerated below:

- Acceptance must be absolute and unconditional
- Acceptance must be communicated to the offeror
- Acceptance must be in prescribed manner
- Acceptance must be in response to an offer.
- Acceptance must be by the offeree or authorised person.

Promises, express and implied: In so far as the proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.

Express and tacit promises: --- The proposals and acceptances may take place without express words. An implied promise, in the sense of the Act, is a real promise, though not conveyed in words. If the plaintiff desired to sue for a liquidated sum in the general form of assumption instead of in the less convenient form of debt, the law conclusively "implied" a promise to pay the debt, though there might not have been any promise in fact. The actual promise "made otherwise than in words" is a matter of fact which in common law practice would be established by the verdict of a jury; whereas in the case of the fictitious promise a jury

might have to find the facts on which the law proceeded, but would not have been allowed to find that there was no real promise.
A tacit promise may be implied from a continuing course of conduct as well as from particular acts. Thus an agreement between partners to vary the terms of the partnership contract may "either be express or be implied from a uniform course of dealing" (s. 11 (1) of the Partnership Act, 1932, which reproduces well-settled law). Where parties have acted on the terms of an informal document which has passed between them, but has never been executed as a written agreement or expressly assented to by both, it is a question of fact whether their conduct establishes an implied agreement to be bound by those terms, questions may arise whether all the terms of another document are incorporated in a contract, when the contract refers to that document. The terms of a document can be incorporated by reference, when they are not inconsistent with the express terms of the incorporating document, and are not repugnant to the transaction which that document represents.

A contract may exist by reason of mercantile usage. The ground on which usages of this kind are enforced is not that they have any intrinsic authority, but that the parties are deemed to have contracted with reference to them. They need not, accordingly, be ancient or universal. It is enough that they are in fact generally observed by persons in the circumstances and condition of the parties.

Scope of Promise –Sec. 2 (b)

- **Promise** under the Act stands for accepted proposal
- **Acceptance** of a conditional offer leads to acceptance of the proposal.
- **Communication** of offer is necessary leading to acceptance or otherwise.
- If **accepted offer** requires that terms of the contract are to be reduced into writing, in such circumstances writing of a contract would only constitute the completion of the formalities and shall not have any effect on the validity of acceptance.

What is communication? ---As the words of this section stand it would seem that some sort of communication of a proposal, etc., is made by an act which is intended to communicate it, but in fact has not that effect, and that such an inchoate communication fails to have legal effect only because the specific provisions of S. 4 prevent it from being complete. It would seem both simpler and more rational to say that an act intended to communicate a proposal, etc., but failing to do so, is not a communication at all. To get this sense from the section before us we should have to read "and" for "or" in the last clause. There are not any corresponding words in the Commissioners' draft.

It is matter of the commonest experience that the communication of intentions may be effectually made in many other ways besides written, spoken, or signaled words. For example, delivery of goods by their owner to a man who has offered to buy them for a certain price will be understood by every one, unless there be some indication to the contrary, to signify acceptance of that offer. No words are needed, again, to explain the intent with which a man steps into a ferryboat or a tramcar, or drops a coin into an automatic machine. It is also possible for parties to hold communication by means of prearranged signs not being any form of cipher or secret writing, and not having in themselves any commonly understood meaning. This does not often occur in matters of business. Means of communication which a man has prescribed or authorized are generally taken as against him to be sufficient. Otherwise an unexecuted intention to communicate something, or even an unsuccessful attempt, cannot be treated as amounting to a communication; much less can a mere mental act of assent have such an effect in any case.

Communication of special conditions

In recent times there has been a series of cases in which the first question is whether the proposal of special terms has been effectually communicated. This arises where a contract for the conveyance of a passenger, or for the carriage or custody of goods, for reward, is made by the delivery to the passenger or owner of a ticket containing or referring to special conditions limiting the undertaker's liability, and nothing more is done to call attention to those conditions.

If the defendant has established that the document was contractual, he must further prove that he did what was reasonably sufficient to give the plaintiff notice of the conditions. This is a question of fact. It has been held that there is sufficient notice if the face of railway ticket refers to conditions on the back, which are not expressly reproduced, but incorporated by a reference to the time-tables of the railway company; But the passenger is not bound by a purported exemption from liability, if the ticket is printed in such a way, or delivered to him in such a state, as not to give reasonable notice on the face of it that it does embody some special conditions.

In determining these questions the class of persons to whom the special conditions are offered, and the degree of intelligence to be expected of them, may properly be taken into account.

Communication when complete: The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made. The Communication of an acceptance is complete, as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor; as against the acceptor, when it comes to the knowledge of the proposer.

The communication of a revocation is complete, as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it; as against the person to whom it is made, when it comes to his knowledge.

Illustrations:

(a) A. proposes, by letter, to sell a house to B. at a certain price. The communication of the proposal is complete when B. receives the letter.

(b) B. accepts A.'s proposal by a letter sent by post. The communication of the acceptance is complete; as against A., when the letter is posted; as against B., when the letter is received by A.

(c) 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.

Acceptance of tender not communicated to promisor---Acceptance subsequently revoked---Contract cannot be enforced---Negligence of promisee or his employees in not communicating acceptance is immaterial. A Municipal Committee invited tenders for leasing out certain premises. The Chairman allegedly accepted the offer of the plaintiff being the highest offer and passed orders on the file for delivery of possession to him. Such acceptance, however, was not communicated by the Municipal Committee to the plaintiff and was subsequently revoked. Held: There is no legal basis for the proposition that communication of acceptance is not communicated due to the negligence of the promisee, or his employee or agents.
Proposal made on basis of certain representations---Facts changing before acceptance of proposal---Such facts suppressed--Party accepting proposal not bound by contract. If a person makes a representation by which he induces another to take a particular course and the circumstances are afterwards altered to the knowledge of the party making the representation, but not to the knowledge of the party to whom the representation is made, and are so altered that the alteration of the circumstances may affect the course of conduct which may be pursued by the party to whom the representation is made, it is the imperative duty of the party who had made the representation to communicate to the party to whom the representation has been made, the alternation of those circumstances and the Court will not hold the party to whom the representation has been made, bound, unless such communication has been made.
Insurance policy accepted by Company on representation that assured has not suffered any injury---Injury suffered by assured after proposal but before its acceptance not disclosed to insurance company---Insurance

Company not bound by contract of insurance. An insurance company issued a letter of acceptance and a risk receipt accepting the proposed insurance policy covering the life of a person. The Insurance Company in the said letter specifically stated in accepting the proposal that it retained the right of declining the proposal and any policy which may be issued on the premium being paid would be invalid if the person insured in the meantime had suffered from any illness or injury unless the Company was informed of the same. The person insured had in the meantime, in fact, suffered an accident and injured one of the toes of his left foot which subsequently became gangrenous. He, however, failed to inform the Company about the injury suffered and died soon afterwards. In these circumstances, it was held that the contract of insurance concluded had become void and ineffective and no amount could be recovered from the insurance company.

Contract by correspondence

The entire correspondence exchanged between parties shall be looked into for the purpose of ascertaining the completion of a contract.

Scope of Promisor and Promisee –Sec. 2 (c)

- Promisor and Promisee cannot be the same party.
- A person cannot be under obligation to himself.
- In case of partnership, there must at least be two parties.
- Mortgagee cannot sell the mortgaged property to himself.

Consideration

Scope of Consideration is outlined below:

- Consideration must have nexus to the contract.
- A promise without consideration is not a contract.
- Consideration need not to be to the benefit of the Promisor.
- Third party can also initiate consideration.
- Essential of consideration should be **good or valuable.**
- Each contract must have some consideration. A consideration for one contract cannot be applied to subsequent contract or series of contract.
- Illegal consideration shall not be valid consideration.

Agreement

Every promise that has some valuable consideration would lead to an agreement. Consideration shall be covered in detail in the later discussions.

LESSON 6

CONSIDERATION & ESSENTIALS OF CONTRACT

Consideration

Consideration is one of the essentials of a valid contract. Consideration has been defined in section 2 (d) of the Act which is reproduced below:

"When at the desire of the Promisor, the Promisee or any other person who has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise".

The following points emerge from the above definition:

- The Consideration is an act or abstinence.
- Such act or abstinence should be done at the desire of the Promisor.
- Such act or abstinence may be done by the promisee or any other person.
- Such act or abstinence has already been executed or it is still to be executed, i.e., executory.

Examples:

1. Mr. Yasir agrees to sell his car to Mr. Fahad for Rs 600,000. Here for Mr. Yasir's promise to sell the car, the consideration is Rs 600,000 and for Mr. Fahad's promise to buy the car, the consideration is the car which he shall receive on performance of this contract.

2. Mr. Usman hires the services of Mr. Umer as an accountant at a monthly salary of Rs. 20,000. In this illustration, the monthly salary of Rs 20,000 is the consideration for Mr. Umer and the services which have been promised to be rendered by Mr. Umer is consideration for Mr. Usman.

Scope and essentials of Consideration:

The scope and essentials of consideration are wide ranging which are outlined below:

- Consideration must be conducive to contract.
- Consideration at the desire of third party
- Consideration may proceed from third party.
- Concept of inadequate consideration
- Absence of consideration
- Proof of consideration
- Future promise as legal consideration
- Past consideration

Consideration must be conducive to contract

Opening of an account leads to a contract between the customer and the bank. If bank pays a cheque by its own mistake of an amount more than the credit balance in customers account, the payment shall be treated without consideration as terms of contract didn't stipulate payment of any cheque of an amount more than the balance available in the account.

Consideration at the desire of third party

Consideration may move from third party but third party is not entitled to file a suit under the contract.

Concept of inadequate consideration

Inadequate consideration remains the consideration for all legal purposes. Acceptance of a liability by the debtor of an amount more than the amount of money advanced by the creditor shall be treated as a good consideration.

Absence of consideration

A meritorious and gratuitous consideration for example natural love and affection or showing obedience as a gesture of respect cannot be treated as good consideration or valuable consideration and as such may lead to absence of consideration.

Proof of consideration

In case of a contract in writing, recitals/stipulations regarding consideration shall be treated as good proof of consideration.

Future promise as legal consideration

Future promise shall be good consideration if it gives rise to a legal obligation which the Promisor could be compelled to perform

Past consideration

Past consideration is legal consideration. Services rendered in past by an employee against a promise to pay him bonus etc. in future is a good consideration in the eye of law.

When agreements lead to contracts:
All agreements are contracts if they fulfill the requirements as contained in section 10 of the Contract Act, 1872 which are outlined below:

1. Free consent of parties
2. Parties competent to contract,
3. Lawful consideration
4. Lawful object, and
5. Agreements not expressly declared to be void

The terms of the definition of consideration are explained hereunder:
"At the desire of the Promisor"---The act of constituting the consideration must have been at the desire or request of the promisor, as when a person contracts a marriage in consideration of a promise of a settlement. As act done at the desire of a third party is not a consideration. Thus a promise by the defendants to pay to the plaintiff a commission on articles sold through their agency in a market constructed by the plaintiff, not at the desire of the defendants, but of the Collector of the place, is void under S. 25, being without consideration. Nor can it be supported under clause 2 of that section, which enacts that an agreement without consideration is void, unless it is a promise to compensate a person who has already voluntarily done something for the Promisor.

"Or any other person"--- It is well settled law that consideration must move from the promisee. Under the Act, however, consideration may proceed from the promisee or any other person.
Past consideration ----In the same clause the words "has done or abstained from doing" call for special attention. They declare the law to be that an act done by A. at B's request, without any promise from B., may be a consideration for a subsequent promise from B. to A. Now, the general principle of the common law is that in the formation of a contract the consideration is given and accepted in exchange for the promise. Hence the acceptance of the consideration and the giving of the promise must be simultaneous, and, in order to have the effect of binding the party making it, a request must be the offer of a promise in return for some consideration, which offer will become a promise (if not meanwhile revoked) if and when

making the promise, and there is no such thing as a past consideration. If a service is rendered without any immediate promise or understanding that it is to be recompensed, it is a merely gratuitous act having no legal effect except such transfer of property of the like as may be contained in the act itself. If there be such a promise, express by words or tacit by understanding, to be inferred from the circumstances, there is at once an agreement, in which, if the recompense be not specified, the promise is to give such reward as may be found reasonable. A subsequent promise specifying the reward will not make an obligation where there was none before, but will show what the parties thought reasonable, and there is generally no reason why the parties' own estimate, in a matter which concerns only themselves, should not be accepted. Such a promise "may be treated either as an admission which evidences, or as a positive bargain which fixes, the amount of that reasonable remuneration on the faith of which the service was originally rendered". In many common circumstances the fact of service being rendered on request is ample evidence of an understanding that it was to be paid for according to the usual course.

"Or does or abstains from doing": Forbearance as Consideration:--- The essence of consideration is that the promisee takes on himself some kind of burden, or "detriment,". Where the consideration is a present performance and not a promise, the detriment may consist either in actually parting with something of value, or in undertaking a legal responsibility, or in foregoing the exercise of a legal right. It is not common experience that the exercise of one's legal rights is always profitable; nevertheless that which the law deems worthy of its protection must be presumed to be of some value. Thus the performance which constitutes a consideration may be negative as well as positive, provided that the promisee's abstinence from exercising a right was undertaken at the request of the promisor. There need not be a total abandonment of the right, or an undertaking to suspend it for a definite time. Such an undertaking, if it exists, is of course not a performance, but a promise, and then the contract is formed by mutual or reciprocal promises. Where it was agreed at the time of partition that a particular co-sharer should realise arrears of rent due before partition, and distribute the amounts to the other co-sharers in proportion, and the particular co-sharer failed to realise the amounts, it was held that the other co-sharers could claim their share of the rent from him as there was consideration for the agreement. There is an element of fiction in some of the cases on forbearance. The consideration in such cases may be executed or executory. If the debtor promises to pay or to give security, and the creditor promises to forbear, there is a bilateral contract and the consideration is executory. If there is a request for forbearance, coupled with a promise to pay or give security, and followed by forbearance, there is a unilateral contract and the consideration is executed. In the cases, however, there is often neither an express request for forbearance nor an express promise to forbear, and if there is to be consideration one or other must be implied. The difficulty of implying a promise to forbear is that such an implication is often at variance with the facts, and the element of fiction is therefore more apparent.

Compromise
The most usual and important kind of forbearance occurring in practice is that which is exercised or undertaken by way of compromise of a doubtful claim. It is a question of some importance within what limits the abandonment or compromise of a disputed claim is a good consideration.

Apparent forbearance when really an act: Actual performance is sometimes apparently passive. A trader exposes his goods for sale, the price being marked or otherwise well known. A customer comes in, takes the object he wants, and gives his name to the trader. The case is common enough. Here a captiously literal person might say that the consideration on the trader's part is forbearing to interfere with the customer's action. But what we do say, both in law and in common sense, is that the seller, by authorising the buyer to take the goods within his reach, in fact sells and delivers them by the buyer's own hand, and the act, though mechanically the buyer's, is in substance the seller's. This remark is needed only when the sale is on credit. If ready money is expected and given, there is no promise at all in the transaction, and therefore no contract; see the commentary on the next following words.

"Or promises to do or to abstain from doing something": Mutual Promises:--- These words, supplemented by sub sections (e) and (f), convey in a somewhat indirect and inconspicuous manner the extremely important proposition that a contract may be formed by the exchange of mutual promises, each promise being the consideration for the other. In this case neither promise is of any value by itself, but each

promises is not a logical deduction from the general notion of consideration, but a positive institution of law required by the convenience of business in civilized life. In many archaic systems of law there is no obligation to perform a promise until there has been performance or at least some act done towards performance on the other side. The widespread custom of giving something by way of earnest "to bind the bargain" is a relic of this view.

A consideration which consists in performance (or so far as it consists in performance) is said to be executed. If and so far as it consists in promise, it is said to be executory. Some writers, speak of a contract in which the consideration on one side is executed as unilateral, and of a contract in which it is executory on both sides as bilateral. This terminology is concise and convenient. It is obvious that the consideration cannot be wholly executed on both sides. For where performances, and performances only, are exchanged, of which a sale of goods over the counter for ready money is a familiar example, nothing remains to be done by either party, and there is no promise at all and nothing for the law to enforce.

The proposal to give a promise for a promise is accepted by giving the promise asked for, and thereupon, if there be no special ground of invalidity, the two parties are both bound, each being both promisor and promisee. It does not seem necessary or useful or indeed true to say that the promise of the party who accepts has ever been a proposal, though the language of sub-section (b) does not seem to recognize the existence of promises which have not passed through that stage. Still it is true that, but for the counter promise or "reciprocal promise" as the Act has it, neither party's "signification of willingness" could become a promise within the definition of the Act; and in this sense we may say, if we please, that the acceptance of an offered promise, by giving the reciprocal undertaking asked for, has itself the nature of a proposal, though it becomes a promise in the act of utterance, and there is no moment at which it exists merely as a proposal. But it does not appear that anything of practical importance can turn on this.

Promises of forbearance: --- An actual forbearance to exercise a right may be a good executed consideration, provided it is at the promisor's request. So a promise of forbearance may be a good executory consideration. The validity of such considerations, as distinct from their formal definition, is discussed in section 25.

"Such act or abstinence or promise is called a consideration for the promise":---Further requirements.--. It will be observed that, according to the terms of the definition, it is only required that something, no matter what, should have been done, forborne, or promised at the request of the promisor. We shall find, however, that in some cases expressly provided for by the Act, and in others apparently not so provided for are recognized in practice, the legal effect of consideration in making promises binding is withheld from acts, forbearances, and promises which arc within the terms of the definition. One would expect the Act to say somewhere that, in order to have legal effect, a consideration must not only be something which the promisor asked for and got, but must be "good" or "valuable"; that is to say, something which not only the parties regard, but the law can regard, as having some value. This is a fundamental rule of law.

Agreement and Contract

The distinction between "agreement" and "contract" made by sub-section (h) is apparently original. The conditions required for an agreement being enforceable by law are contained in the Act, where it will also be seen that the absence of any such condition makes an agreement void, and certain defects will make a contract voidable.

Suit for recovery of contract amount---Where defendant failed to prove that any breach of agreement was committed by plaintiff justifying stoppage of payment to him, while admitting liability to pay claimed amount, plaintiff held, was entitled to decree of his suit.

Agreement to sell--- Agreement to sell does not create title in property.

Interpretations of documents---Arbitration agreement---Contract---Arbitration agreement essentially a contract and to be governed by same rules in matter of interpretation as apply to construction of contract. Contract to be construed in harmonious manner and each part to be construed in harmony with other parts so that a rational meaning may be given to all parts of contract.

Essentials of valid Contract:

These are outlined below:

- Offer and acceptance
- Legal relationship
- Legal consideration
- Competent parties
- Free consent of the parties
- Lawful Object
- Terms of agreement to be complete and certain
- Possibility of performance
- Contract to be got registered & in writing, wherever required
- Contract not declared void under the Act.

Now we shall discuss each of these in detail.

Offer and Acceptance

For an agreement, it is essential that there should be offer by one party and acceptance of that offer by the other party. The acceptance must be absolute and unqualified.

Legal Relationship

The agreement must lead to a legal relationship between the parties. The parties must have intention to create legal relationship. Social agreement does not create any legal relationship, hence not contract enforceable by law.

Legal Consideration

According to sec 23 the consideration or object of an agreement is lawful if it is not forbidden by any law or not fraudulent or does not cause injury to a person or property or not immoral.

Competent Parties

The parties to an agreement must be competent in the eyes of law otherwise the agreement cannot be enforced by the court of law.
According to section 11, following persons are competent to enter into a contract:

- having attained the age of majority
- of sound mind
- not disqualified from contracting by any law to which he is subject

Lawful Object

The purpose of the agreement should not be against the law. For example, the contract in restraint of trade shall not be valid contract since it is against the provisions of the Constitution of Pakistan.

LESSON 7

CONTRACTS—ESSENTIALS AND KINDS

Competent Parties

Another important essential of a valid contract is the legal capacity of the parties to enter into a contract; this has been provided in **section 11** of the Act which is reproduced below:

"Every person is competent to contract who is of the age of majority according to law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject".

Who are competent to contract?

Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject. This section deals with personal capacity in three distinct branches:

- Disqualification by infancy;
- Disqualification by insanity;
- Other special disqualifications by personal law.

"To Contract"---means, to bind himself by promise. A minor who gives value, without promising any further performance, to a person competent to contract is entitled to sue him for the promised equivalent. This may be properly not in contract but on a quasi-contract under section 70.
Minor's agreement: ---If the first branch of the rule laid down in the section be converted into a negative proposition, it reads thus: No person is competent to contract who is of the age of majority according to the law to which he is subject: in other words, a minor is not competent to contract. This proposition is capable of two constructions · either that a minor is absolutely incompetent to contract, in which case his agreement is void, or that he is incompetent to contract only in the sense that he is not liable on the contract though the other party is, in which case there is a voidable contract. If the agreement is void, the minor can neither sue nor be sued upon it, and the contract is not capable of ratification in any manner; if it is voidable, he can sue upon it, though he cannot be sued by the other party, and the contract be ratified by the minor on his attaining majority.
Where, an infant retains property obtained under the contract from the other party, the equitable remedy of restitution has been applied, even though the infant made no false representation as to his age.
Ratification: --- It is settled principle of law that a minor's agreement is void, it follows that there can be no question of ratifying it. Upon the same principle a promissory note given by a person on attaining majority in settlement of an earlier one signed by him while a minor in consideration of money then received from the obligee cannot be enforced in law.
Payment of debt incurred during minority: Where a person on attaining majority pays of debt incurred by him during minority, no question of ratification of a contract arises, since an agreement with a minor is merely void and not unlawful, the sum paid cannot be sued for subsequently, and in law it must be regarded on the same footing as a gift.
It is within the competence of a certificated guardian appointed by statute, such as the Guardian and Wards Act, 1890, or the various Courts of Wards Acts to enter into a contract for the purchase or sale of immovable property on behalf of the minor with the sanction of the Court.
Persons otherwise "disqualified from contracting."---The capacity of a woman to contract is not affected by her marriage under the law.

According to above definition the following parameters would determine the legal capacities of parties to a contract:

- Parties to contract are required to be of the age of majority.

- Of sound mind
- Not barred from entering into contracts by the operation of law.

Free Consent of the parties

This is an important essential of a valid contract. It requires that contract should be entered into with free consent of parties. This topic has been explained in detail in later discussion.

Consent shall be treated as free if not obtained by:

- Coercion
- Undue influence
- Fraud
- Misrepresentation
- Mistake

Kinds of Contract:

The contracts are classified as outlined below:

(a) Valid contract

(b) Voidable contract

(c) Void contract

(d) Unenforceable contract

(e) Express contract

(f) Implied contract

(g) Executed contract

(h) Executory contract

Valid Contract

Valid contract is an agreement enforceable by law. In such contract all essentials of a contract as mentioned in section 10 are required to be fulfilled. In case breach of contract by one party, the other party has a right to file a suit for this breach.

Illustration:

A contract for the sale of a car between Mr. Yasir and Mr. Waqas has been concluded and all necessary formalities have been completed. The said contract meets all essentials of a valid contract. If either of the two that is Mr. Yasir or Mr. Waqas fails to perform his part of contract, the counter party can sue the other party for the breach of contract.

Voidable Contract

A voidable contract is the one which is enforceable by law at the option of one or more of the parties to the contract, but not at the option of the other or others. As long as the contract is not avoided or cancelled by the party who is entitled to do so, the contract shall remain a valid contract. Such contracts are voidable at the option of aggrieved party.

Voidable contract has been defined in **section 2 (i)** of the Contract Act which is reproduced below:

"An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract"

A contract becomes voidable in the following situations:

- Where consent of a contracting party is not free
- Where Promisor prevented from performance of the contract

An agreement on account of misrepresentation shall be voidable at the option of the person who is misled by such misrepresentation.

In case a voidable contract is acted upon by a party as valid, that party cannot subsequently deny the validity thereof.

According to section 14, consent is said to be free when it is not caused by:

(a) Coercion or

(b) Undue influence or

(c) Fraud or

(d) Misrepresentation or

(e) Mistake

Example:

Mr. Yasir entered into an agreement to sell his house to Mr. Umer for Rs 1 Million. The consent of Mr. Umer was obtained by use of coercion by Mr. Yasir. This agreement is voidable at the option of Mr. Umer since his consent was not free.

Scope of voidable contracts

The section states the legal effect of coercion, fraud, and misrepresentation, in rendering contracts procured by them voidable; the foregoing sections have only laid down their respective definitions. Perhaps the most important parts of the section, certainly those which need the most careful attention are the exception and the explanation. These mark, though hardly with practical completeness, the limits within which the rule is applied. Before considering them we have to pause on the second paragraph of the body of the section. It reads plainly enough at first sight, but the thought does not seem to be really clear. The party entitled to set aside a voidable contract may affirm it if he thinks fit. That is involved in the conception of a contract being voidable. And if he affirms it, he may require the performance of the whole and every part of it (subject to the performance in due order of whatever may have to be performed on his own part) or, in default thereof, damages for non-performance (subject to special causes of excuse, if any, which we are not now considering). If, as may well be the case, the default is wholly or partly due to the non-existence of facts which the defaulting party represented as existing, this party can obviously not set up the untruth of his own statement by way of defence or mitigation; and, if the case is a proper one for specific performance, and if it is in his power to perform the contract fully, though with much greater cost and trouble than if his statement had been originally true, he will have to perform it accordingly. Is anything more than this meant by the declaration of the affirming party's right to "be put in the position in which he would have been if

the representations made had been true"? There are obviously many cases in which such restitution is not literally possible. Thus, if the owner of an estate subject to a lease for an unexpired term contracts to sell it to a purchaser who requires immediate possession, and conceals the existence of the lease. The purchaser cannot be put in the same position as if the representation that there was no tenancy, or only such a tenancy as could be determined at will, had been true. Cases may occur, on the other hand, where a seller of land has held out, though not in express terms or willfully, an element of attractiveness or security in the property offered for sale which it is in his power to realise by some act or undertaking on or with regard to adjoining property of his own. But it is dangerous to formulate general propositions in the law of contract from decisions in suits for the specific performance of contracts relating to land, and it is not clear that the facts of the decision in question are not reducible to misrepresentation or an ambiguous offer. Nor is it certain that the present enactment can always be literally relied on. A sells a house to B, and by some blunder of A's agent the annual value is represented as being Rs. 2,000 when it is in truth only Rs. 1,000. According to the letter of the present paragraph, B, may insist on completing the contract and on having the difference between the actual and the stated value paid to him and his successors in title by A and A's successors in title for all time. Nothing short of that will put him "in the position in which he would have been if the representations made had been true." This is obviously not the intention of the enactment.
There is an important class of cases in which, although there is no such misrepresentation as to make the contract voidable, complete performance is, by reason of misdescription or otherwise, unattainable, and specific performance will be decreed subject to compensation for the defect. It was originally proposed to deal with such cases in the Contract Act. The enactment governing them is now to be found in the Specific Relief Act, S. 14.

Gift under Muslim Law---Fraud in procuring gift---Principle of section applicable:
A gift is not contract (though in Muslim Law it is called a contract) but the principle of section 19 may be applicable even to a gift. Therefore a gift tainted with fraud would be voidable and not void.

Contract by statutory body:
Consent to contract given by Board under mistake of fact---Contract invalid.
Held by the court: The Karachi Port Trust is a statutory body and is governed by the statute and its bye-laws. Before a contract of high valuation could have been validly awarded, it would have to be with the consent not only of the Chief Engineer but also of the Board. In the present case, the Chief Engineer and the Board gave their consent upon a mistake of fact. Therefore there was no valid contract in existence.

Promise to do an act in future not performed---Not a misrepresentation:
A promise to perform an act in future, if not fulfilled would not amount to misrepresentation. It may be a breach of promise or an agreement, but it is not a misrepresentation as to existing facts within the meaning of section 19.

Voidable contract acted upon---Cannot be challenged subsequently.
S. 19 read with S. 13 (2) Sale of Goods Act---Misrepresentation regarding the model of the car by the seller--if contract can be rescinded after the car had been used by the buyer.
The plaintiff purchased a car from the defendant which he was wrongly told was 1949 model. He used the car for sometime and then found that it was 1948 model car. He therefore gave notice to the defendant that he rescinded the contract on ground of fraud and asked them to pay back the price of the car paid by him.
Held by Rehman C.J. on reference from D.B. There is no provision in the Sale of Goods Act, 1930, bearing on the effect of fraud, misrepresentation, coercion and undue influence, on a contract of sale. I would be, therefore, disposed to hold that the relevant provisions of the Contract Act on these questions continue to be applicable to contracts of sale despite the provisions of section 13 of the Sale of Goods Act. This section also does not contain any reference to cases of fraud etc, and apparently contemplates such cases as involve a breach of a condition without fraud, misrepresentation and the like affecting the formation of the contract itself, at its inception, if thus interpreted, there would be no difficulty in holding that section 19 of the Contract Act can stand with section 13 of the Sale of Goods Act, 1930. The result would be that in case of fraud and misrepresentation etc. vitiating the contract unless there was a waiver on the part of the party affected, the right of rescission would not be lost.

Fraud---Limitation

Person in possession of land but a deed ownership of such land got executed by misrepresentation and fraud---Reason getting ownership of land by execution of such lead if suing for possession on basis of such deed and claiming deed to be genuine, executant of deed, held, within her right to plead deed being void on account of fraud and other party having no title or right to posses land and no impediment of limitation could arise to raise such plea.

Applicability

It is an essential requirement that when executing sale deed a person (pardanashin lady) should be in know that deed in question was of sale---S. 19 would not apply if her awareness was only that deed she was executing was a power of attorney.

Registered sale deeds on basis of agreement

Suit for declaration and cancellation of deeds on plea that documents were procured from plaintiffs by deceased through fraud and misrepresentation---requires ad valorem court-fee.

LESSON 8

KINDS & LEGAL CAPACITY OF PARTIES TO A CONTRACT

Kinds of Contract:

We have discussed different kinds of contracts; same are reproduced here under for ready reference.

(a) Valid contract
(b) Voidable contract
(c) Void contract
(d) Unenforceable contract
(e) Express contract
(f) Implied contract
(g) Executed contract
(h) Executory contract

We have already discussed valid and voidable contract have already been discussed, rest of the kinds of contract are discussed hereunder.

Void Agreements

This is a very wide topic and we shall explain the scope of respective sections in later discussion.
Agreements void, if considerations and objects unlawful in part. If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void.

Illustration

A promises to superintend, on behalf of B, a legal manufacture of indigo, and an illegal traffic in other articles. B promises to pay to A, a salary of 10,000 rupees a year. The agreement is void, the object of A's promise and the consideration for B's promise being in part unlawful.

Transfer of property: ---When a document transferring immovable property has been once executed and registered, the transaction "passes out of the domain of a mere contract into one of conveyance". It then becomes governed by the Transfer of Property Act, and S. 24 of the Contract Act has no application.

Trusts Act, 1882: ---S. 4 of the Act provides that where a trust is created for two purposes of which one is lawful, and the other unlawful, and the two purposes cannot be separated, the whole trust is void.

Agreement without consideration is void, unless it is in writing and registered:

An agreement made without consideration is void, unless: ---

(1) It is expressed in writing and registered under the law for the time being in force for the registration of documents, and is made on account of natural love and affection between parties standing in a near relation to each other; or unless;
(2) or is a promise to compensate for something done; it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do, or unless.
(3) or is a promise to pay a debt barred by limitation law; it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorised in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.

In any of these cases, such an agreement is a contract.

Explanation 1: ---Nothing in this section shall affect the validity, as between the donor and donee, of any gift actually made.

Explanation 2: --- An agreement to which the consent of the promisor is freely even is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given.

Illustrations

(a) A promises for no consideration, to give to B Rs. 1,000. This is a void agreement.
(b) A, for natural love and affection, promises to give his son, B, Rs. 1,000. A puts his promise to B into writing and registers it. This is a contract.
(c) A find B's purse and gives it to him. B promise to give A Rs. 50. This is a contract.
(d) A supports B's infant son. B promises to pay A's expenses in so doing. This is a contract.
(e) A ownes B Rs. 1,000 but the debt is barred by the Limitation Act. A signs a written promise to pay B Rs. 500 on account of the debt. This is a contract.
(f) A agrees to sell a horse worth Rs. 1,000 for Rs. 10. A's consent to the agreement was freely given. The agreement is a contract notwithstanding the inadequacy of the consideration.
(g) A agrees to sell a horse worth Rs. 1,000 for Rs. 10. A denies that his consent to the agreement was freely given.
(h) The inadequacy of the consideration is a fact which the Court should take into account in considering whether or not A's consent was freely given.

Consideration: --- It is necessary element of a binding contract. This has already been assumed in S. 10. The present section goes on to state the exceptional cases in which consideration may be dispensed with. It is curious that the Act nowhere explicitly states that mutual promises are sufficient consideration for one another, though it is assumed throughout the, Act, and seems to be involved in the definitions of "agreement" and "reciprocal promises" in S. 2, sub-sections (e) and (f)

Forbearance and compromise as consideration: ---Compromise is a very common transaction, and so is agreement to forbear prosecuting a claim, or actual forbearance at the other party's request, for a definite or for a reasonable time. It may seem at first sight that in all these cases the validity of the promise is doubtful. For the giving up, or forbearing to exercise, an actually existing and enforceable right is certainly a good consideration; but what if the claim is not well founded? Can a cause of action to which there is a complete defence be of any value in the eye of the law? If a man bargains for reward in consideration of his abandonment of such a cause of action, does he not really get something for nothing, even if he believes he has a good case? The answer is that abstaining or promising to abstain from doing anything which one would otherwise be lawfully free to do or not to do is a good consideration, and every man who honestly thinks he has a claim deserving to be examined is free to bring it before the proper Court, and have the judgement of the Court on its merits, without which judgment it cannot be certainly known whether the claim is well founded or not.

In the case of family arrangements, the Court will not look too closely into the quantum of consideration, and an arrangement designed to promote peace and good will among members of a family has been held to be based on good consideration, even in the absence of a dispute or of a claim to property.

A compromise relating to title to land, at a time when it was doubtful, is valid, although subsequently it may be found by judicial decision in another case, that one of the parties to the corn. promise had a wholly valid title, and the other had not title at all. An agreement by client to pay to his vakil after the latter had accepted the vakalatnama certain sum in addition to his fee if the suit was successful is without consideration.

But if a man, being already under a legal duty to do something, undertakes to do something more than is contained therein, or to perform the duty in some one of several admissible ways, in other words, to forgo the choice Which the law allows him, this is a good consideration for a promise of special reward.

Negotiable Instruments: ---The law merchant has almost---but, as it is held by something very near a fiction, not quite---made an exception to the rule of consideration in the case of negotiable instruments, or rather established another and independent rule. The Negotiable Instruments Act, 1881, S. 118, affirming the well-settled general law, enacts that until the contrary is proved the presumption shall be made that every negotiable instrument was made or drawn for consideration; and that every such instrument, when it has been accepted, endorsed, negotiated, or transferred, was accepted, endorsed, negotiated, or transferred for consideration.

The distinction between an acknowledgment under S. 19 of the Limitation Act and a "promise" within the meaning of this section is of great importance. Both an acknowledgment and a promise are required to be in writing signed by the party or his agent authorised in that behalf; and both have the effect of creating a fresh starting point of limitation. But while an acknowledgment under the Limitation Act is required to be made before the expiration of the period of limitation, a promise under this section to pay a debt may be made after the limitation period. After the period of limitation expires, nothing short of an express promise will provide a fresh period of limitation; an implied promise is not sufficient.

An agreement between a creditor and a debtor entered into before the expiry of the period of limitation, whereby the date of payment is extended beyond the period of limitation, is valid, though verbal, if there is a consideration for the agreement, e.g. payment of interest up to the extended date. Such an agreement is not an acknowledgment within the meaning of S. 19 of the Limitation Act, nor is it a promise to pay a barred debt; it may be enforced at any time within three years from the date on which it was made. "A promise to pay may be absolute or conditional. If it is absolute, if there is no 'but' or 'if', it will support a suit without anything else; if it is conditional, the condition must be performed before a suit upon it can be decreed.

Similarly, if the promise be to pay a barred debt "within a month," the promisee must wait for a month before he can sue on the promise. If the debtor promises to pay a barred debt out of his share of the profits of the business started by him in partnership with his creditor, the latter cannot recover the debt except in the manner provided in the agreement.

Agent generally or specially authorised in that behalf. A Collector, as agent to the Court of Wards, is not an agent "generally or specially authorised in that behalf" so as to bind a ward of the Court of Wards by a promise to pay a barred debt. A pleader cannot bind his client unless he is specially authorised in that behalf; nor a minor's guardian the minor.

Debt: ---The expression "debt" here means an ascertained sum of money. A promise, therefore, to pay the amount that may be found due by an arbitrator on taking accounts between the parties is not a promise to pay a "debt" within this section. The expression "debt" in this clause includes a judgment debt. A promise, therefore, to pay the amount of a decree barred by limitation does not require any consideration to support it.

It is not necessary to the operation of this clause that the promise should in terms refer to the barred debt. Thus where A passed a promissory note for Rs. 50,000 to B, and after the debt was time-barred, passed another note promising "to pay Rs. 50,000 for value received in cash," it was held that it was open to B to show that the amount, though not paid in cash, referred to the debt due under the first note.

An insolvent who has obtained his final discharge is under no legal obligation to pay any debt included therein, and any promise to pay it is accordingly without consideration. Such a debt is said to be barred by insolvency, and the Contract Act contains no exception in favor of a promise to pay it.

Agreement to pay time-barred debt cannot be avoided u/s. 25.

Inadequacy of Consideration: Agreement to which consent of Promisor freely given to be not void merely because of consideration being inadequate---Inadequacy of consideration, however, to be competently taken into account in determining question whether consent of Promisor was freely given.

Transaction to pay a time-barred debt: Gives rise to inference that it was without consideration---Such transaction would be void under section 25 (3).

Inadequacy of consideration---Effect on agreement---Agreement to which consent of promiser was freely given, held, would not be void merely because of inadequacy of consideration---Such inadequacy of consideration, could be taken into account by the Court in determining question whether consent of promiser was freely given---Circumstances in which sale-deed was executed and fact that same was not given effect in revenue record in the life-time of vendor and till a further period of four years after death of vendor, held, would lead to irresistible conclusion that sale-deed was not a genuine transaction and consent of seller was not freely given.

Time barred debt---Promise to pay under duress---Promise invalid. Promise in writing to pay a debt which was already time barred was extracted from the defendant under policy pressure.

Promise to pay should not be conditional but absolute.

An agreement for payment of a debt should be an absolute promise. If it is a conditional promise dependent on the happening or the success of certain events. It is the duly of the plaintiff to prove that these events have happened and the defendant was to perform the promise. Failure to prove it is fatal to the success of a suit based on such a document.

Agreement without consideration---Void: An agreement without consideration is void unless it comes under any of the exceptions set out in Sub-clauses (1) to (3) of section 25 of the Contract Act.

Gift made without consideration---Void---Conditions for such a gift: When a gift was made for services rendered although they could not be measured in money:

Explanation I to section 25 of the Contract Act is fully applicable and the gift is perfectly valid even if there was no consideration for it. For such a gift to be valid the three essential conditions are;

(1) clear and unambiguous declaration of the intention of the donor to give immediately a property to the donee;
(2) acceptance of the gift by the donee and;
(3) delivery of possession of the subject of gift to the donee

If these three conditions are fulfilled, the gift is complete and valid.

Agreement in restraint of legal proceedings.---"This section applies to agreements which wholly or partially prohibit the parties from having recourse to a court of law. If, for instance, a contract were to contain a stipulation that no action should be brought upon it, that stipulation would, under the first part of S. 28, be void, because it would restrict both parties from enforcing their rights under the contract in the ordinary legal tribunals, and so if a contract were to contain a double stipulation that any dispute between the parties should be settled by arbitration, and that neither party should enforce his rights under it in a court of law; that would be a valid stipulation so far as regards its first branch, viz., that all disputes between the parties should be referred to arbitration, because that of itself would not have the effect of ousting the jurisdiction of the Courts, but the latter branch of the stipulation would be void because by that the jurisdiction of the Court would be necessarily excluded."

Agreements void for uncertainty. Agreements, the meaning of which is not certain, or capable of being made certain, are void.

Illustration

(a) A agrees to sell to B "a hundred tons of oil." There is nothing whatever to show what kind of oil was intended. The agreement is void for uncertainty.
(b) (b) A agrees to sell to B one hundred tons of oil of a specified description, known as an article of commerce. There is no uncertainty here to make the agreement void.
(c) (c) A, who is a dealer in coconut-oil only, agrees to sell to B "one hundred tons of oil." The nature of A's trade affords an indication of the meaning of the words, and A has entered into a contract for the sale of one hundred tons of coconut-oil
(d) (d) A agrees to sell to B "all the grain at Rahimyar Khan. "There is no uncertainty here to make the agreement void.
(e) (e) A agrees to sell to B "one thousand maunds of rice at a price to be fixed by C." As the price is capable of being made certain, there is no uncertainty here to make the agreement void.
(f) (f) A agrees to sell to B "my white horse for rupees five hundred or rupees one thousand." There is nothing to show which of the two prices was to be given. The agreement is void.

Agreement is void only when it is uncertain and unascertainable---Agreement capable of being ascertained---Not void. Under section 29 of the Contract Act, it is only when the meaning of an agreement is not certain or capable of being made certain that the agreement becomes void.

When, therefore, the sellers told the buyers that each shipment shall be treated as if separate contracts were made for it and they shall be bound to accept it even if this shipment was only in respect of a part of the goods and the buyers agreed to this condition, the agreement is not void as it is capable of being ascertained.

Agreement by way of wager void: Agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to be won on any Wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made.

Section 294-A of the Pakistan Penal Code not affected: Nothing in this section shall be deemed to legalise any transaction connected with horse racing, to which the provisions of section 294-A of the Pakistan Penal Code apply.

Wagering contract: ---This section represents the whole law of wagering entracts now in force.---There is no technical objection to the validity of a wagering contract. It is an agreement by mutual promises, each of them conditional on the happening or not happening of an unknown event. So far as that goes, promises of this form will support each other as well as any other reciprocal promises. It would have been better if the Courts in England had refused, on broad grounds of public policy, to admit actions on wagers; but this did not occur to the Judges until such actions had become common; and, until a remedy was provided by statute, they could only find reasons of special public policy in special cases, which they did with almost ludicrous ingenuity.

What is a wager? A wager has been defined as a contract by A to pay money to B, on the happening of a given event, in consideration of B paying [this should be "promising to pay" to him money on the event not happening.

"By way of wager"---There is no distinction between the expression "gaming and wagering," and the expression "by way of wager," used in this section. The cases therefore bearing on the expression used are still useful in construing the expression "by way of wager.'

Void Contract:

A void contract is the one which is not enforceable by law. It has been provided in **section 2(j)** of the Contract Act.

"A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable". A voidable contract is a good contract as long as it is not avoided by the person who has the option to avoid whereas a void contract is not a contract at all from the very beginning in the eye of law.

Example:

Mr. Aslam resident of Lahore entered into an agreement with Mr. Kamal, a rice dealer at Gujranwala for the purchase of 100 tons of rice. District Coordination Officer (DCO) Lahore had imposed restriction on entry of rice in the territorial jurisdiction of District Lahore well before the date of the above agreement. The said agreement is not enforceable at law, hence void.

Situations of void contract;

- Impossibility of performance: It has been discussed in section 56
- Legal contract may become void due to some illegality afterwards.
- Revocation of a voidable contract by the party at whose option, the contract is avoidable becomes void contract

Unenforceable Contract

Such contracts are unenforceable before a court of law due to some technical defects such as non-deposit of court fee, submission of unsigned documents, absence of writing, wherever writing required, absence of registration, wherever required under law. On removal of these discrepancies, the contract becomes enforceable.

Express contract

An express promise shall lead to an express contract. Such a contract may be expressed by words spoken or written. Express contracts are contained in the provisions of section 9 of the Act.

Implied contract

Such contracts are inferred from the acts and conduct of the contracting parties.

Example:

Mr. Aslam was engaged by a business man as a helper at his shop. He has been performing the job assigned to him, however no appointment letter was issued by the shopkeeper. Although there is no express agreement as to the employment of Mr. Aslam but the acts and the conducts of the respective parties shall lead to a conclusion regarding the nature of contract between them. Since the conclusions shall be inferred from the acts and conduct of the respective parties, such contract would be called an implied contract.

The provisions regarding **express and implied contract** as contained in **section 9** are given below:

> "In so far as the proposal or acceptance of any promise is made in words, the promises is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied."

Promises express and implied—Explanation:

In so far as the proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.

Express and Implied promises: --- An implied promise, in the sense of the Act, is a real promise, though not conveyed in words. A tacit promise may be implied from a continuing course of conduct as well as from particular acts. Thus an agreement between partners to vary the terms of the partnership contract may "either be express or be implied from a uniform course of dealing" (section 11 (1) of the Partnership Act, 1932. Where parties have acted on the terms of an informal document which has passed between them, but

has never been executed as a written agreement or expressly assented to by both, it is a question of fact whether their conduct establishes an implied agreement to be bound by those terms. Questions may arise whether all the terms of another document are incorporated in a contract, when the contract refers to that document. The terms of a document can be incorporated by reference, when they are not inconsistent with the express terms of the incorporating document, and are not repugnant to the transaction which that document represents.

Sale of immovable property---No price specified---Not enforceable contract. As a general rule, in the case of immovable properties price is of the essence of a contract of sale and unless the price is fixed there is no enforceable contract, because if no price is named the law does not imply, as in case of a sale of goods, a contract at a reasonable price.

Executed contract

Such contracts are those where interactive parties have completely performed their respective obligations under the contract.

Example:

Mr. Ali entered into an agreement with Mr. Aslam to sell his car for Rs 800,000. Mr. Ali delivers the car to Mr. Aslam and he paid the promised amount i.e. Rs 800,000 to Mr. Ali. Such a contract is called an executed contract since both parties have performed their part of promises.

Executory contract:

In such contracts both parties are yet to perform their obligations under the contract.

Example:

We take the same example as quoted above but with some difference.

Mr. Ali entered into an agreement with Mr. Aslam to sell his car for Rs 800,000. Mr. Ali has not yet delivered the car to Mr. Aslam and Mr. Aslam has not yet paid the promised price that is Rs 800,000 to Mr. Ali. Such a contract is executory contract since both parties are yet to perform their part of promises.

Legal capacity of parties to a contract

We have already discussed that contracting parties must be competent under law to enter into a contract. The scope of the legal capacity is provided in **section11** which we have already discussed and same is reproduced here under for ready reference.

"Every person is competent to contract who is **of the age of majority** according to law to which he is subject, and who is **of sound mind,** and is **not disqualified from contracting by any law** to which he is subject."

Scope of definition:

According to above definition, the question of legal capacity of contracting party shall be determined on the following parameters:

1. Contracting parties should have attained the age of majority.
2. Contracting parties should be of sound mind
3. Contracting parties not disqualified from contracting by any law.

Concept of age of majority:

For the purpose of entering into contract, a person must have attained age of 18 years. Contract by a minor is void ab-initio. In a transaction where minor is only a beneficiary and not a contracting party, the transaction shall be treated as valid transaction. Under Majority Act 1875, age of 18 years or more is the age of majority. If guardian is appointed by court then minority continues till the age of 21 years.

A mortgage **executed by a minor is void.**

A contract for personal service by a minor is void, in case of breach of such an agreement on the part of a minor, he can not be sued.

A minor entering into a service contract can leave the job at any time and by doing so that person (minor) shall not be committing any actionable wrong. It means that minor if under a service agreement cannot be sued.

However there are some exceptions with respect to agreement with the minor or on account of minor which have been provided in section 68:
"Claim for necessaries supplied to a person incapable of contracting, or on his account**: ---** If a person incapable of entering into a contract or any one whom he is legally bound to support, is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person". Necessaries shall include goods, food, education, health care etc.

"Law to which he is subject": ---The age of majority as well as the disqualification from contracting is to be determined by the law to which the contracting party is subject.

LESSON 9

LEGAL CAPACITY AND FREE CONSENT

Legal capacity of Parties to a contract

We have discussed the factors that determine the question of legal capacity of the contracting parties; the same are reproduced here under for reference.

1. Contracting parties should have attained the age of majority.
2. Contracting parties should be of sound mind.
3. Contracting parties not disqualified from contracting by any law.

The first factor has already been discussed, rest of the factors are discussed in the following paragraphs.

'Of sound mind'-- Explained:

For the purpose of the legal capacity of contracting parties, it is required under the provisions of section11 that respective parties should be of sound mind. The person of sound mind has been defined in section 12 which is reproduced below:

"A person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding and of forming a rational judgment as to its effect upon his interests."
A person, who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind.

Effect of a contract by a person of unsound mind:

A contract by a person of unsound mind is void ab-initio. Proof of insanity or otherwise can be contested by leading sufficient evidence by respective parties.

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

Illustrations:

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

Burden of proof: ---The difficulty of understanding what is really the effect of this section, in conjunction with S. 11, has already been pointed out. The presence or absence of the capacity mentioned in this section at the time of making the contract is in all cases a question of fact. Where a person is usually of unsound mind, the burden of proving that at the time he was of sound mind lies on the person who affirms it. In cases, however, of drunkenness or delirium from fever or other causes, the onus lies on the party who sets up that disability to prove that it existed at the time of the contract. Questions of undue influence and of incapacity by reason of unsoundness of mind must not be mixed up, involving as they are totally different issues.

Contract in lucid interval: ---The second paragraph of the section provides that a person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind. Thus even a patient in a lunatic asylum may contract during lucid intervals (refer illustration (a)). The question may arise whether a lunatic adjudged to be so under the Lunacy Act, 1912, and of whose property a committee or manager is appointed, can contract during intervals of sound mind. Where, however, a committee or a

manager of the estate of a lunatic adjudged to be so is appointed under either of the Acts; no contract can be entered into by a lunatic in respect of his estate, even though at the time of the contract he may be in a lucid interval.

Insanity at the time of entering into agreement,--Party alleging must prove: Where it is alleged that an agreement is void as it was entered into by a party which was incompetent to do so on account of his insanity. It was held that there is a presumption that every one is sane till otherwise proved. Therefore a party who alleges insanity must prove the same.

It has also been provided in section 12 that a person who is usually of sound mind but occasionally of unsound mind may not enter into a contract when he is of unsound mind.

Test of soundness of mind shall be determined on the following parameters:

- Capacity to understand the nature and terms of the contract.
- Ability to form a rational judgment as to effects of the contract on his interests.

Order in lunacy by court
Order of lunacy by court is binding upon the contracting parties and also on the parties who are the claimant in this regard.

Evidence and proof
Evidence with regard to unsoundness shall be deduced from the circumstances of insanity on case to case basis.

Unsoundness of mind at the time of contract
The question of unsoundness of mind at the time of contract shall be decided beside other factors on the basis that the effect of drunkenness etc. influenced the decision making power of that person at the time of making the contract or not.

Contracting parties not disqualified from contracting by any law
The disqualifications for entering into contract include minority, insanity and personal law. A person suffered by any of these disqualifications is not competent in the eyes of law to enter into a contract.

Free Consent

"Consent" defined Sec. 13: Two or more persons are said to consent when they agree upon the same thing in the same sense.

Apparent and real contract: ---The language of this section is, on the face of it, more of a judicial or expository than of legislative kind. As an authoritative definition it does not seem to define very much. It would need some courage to maintain that persons can be said to consent when they do not agree upon the same thing, or that if they do not agree in the same sense they can be side to agree in any sense at all.

If the section is to cover all kinds of contracts, as presumably it does, the word "thing" must obviously be taken as widely as possible, though it seems most appropriate where the contract has to do with corporeal property. We must understand by "the same thing" the whole content of the agreement, whether it consists, wholly or in part, of delivery of material objects, or payment, or other executed acts or promises.

Ambiguity: ---Sometimes an apparent agreement can be avoided by showing that some term (such as a name applying equally to two different ships) is ambiguous, and there has been a misunderstanding without fault on either side. Such cases, however, are in fact extremely rare. It usually turns out either that the terms have an ascertained sense by which both parties are bound, and there is a contract which neither can dispute, whatever either of them may profess to have thought, or that, when the facts are established, there was really never a proposal accepted according to its terms, and therefore the conditions of a binding

contract were not satisfied. Many of the cases cited in the books under the head of mistake belong to the latter class.

Fundamental error: ---In certain classes of cases there may be all the usual external evidence of consent, but the apparent consent may have been given under a mistake, which the party is not precluded from showing, and which is so complete as to prevent the formation of any real agreement "upon the same thing". Such fundamental error may relate to the nature of the transaction, to the person dealt with, or to the subject matter of the agreement.

As to the nature of the transaction: ---A man who has put his name to an instrument of one kind understanding it to be an instrument of a wholly different kind may be entitled, not only to set it aside against the other party on the ground of any fraud or misrepresentation which caused his error, but to treat it as an absolute nullity, under which no right can be acquired against him by any one. There are much older authorities showing that if a deed is falsely read over to an illiterate man, and he executes the deed relying on the false reading as being the true substance of the transaction, his act is wholly void.

We may expect to find fraud as an element in cases of this class. But it is not the decisive element. A signature attached to a document supposed to be of a wholly different kind, or not to contain a clause so important as substantially to alter its character, is invalid unless the signor is estopped by negligence from denying that he understood what he was signing, and this "not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signor did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended.

Error as to the subject-matter of the agreement: ---It is quite possible for the parties in contract to be under a common mistake of this kind. If the mistake is not common, it may happen, in very exceptional cases, that by reason of an ambiguous name, or the like, each party is mistaken as to the other's intention, and neither is estopped from showing his own intention. Otherwise a contract (assuming the other conditions for the formation of a contract to be satisfied) can be affected by such a mistake, not common to both parties, only where it is induced by fraud or misrepresentation. In section 18 of the Act, it has been laid down that willful acquiescence in the other party's mistake is equivalent to misrepresentation under certain circumstances. If the mistake is common, it can seldom, if ever, be said that there was no consent. A simpler and more correct explanation is to say that there was an agreement subject to a condition understood or implied in the nature of the agreement itself, though not expressed, and that condition has not been fulfilled. It may be that at the date of the agreement the condition is already incapable of fulfillment by reason of some fact unknown to the parties, as in the case of an agreement for the sale of a horse which in fact is dead, or a specific cargo which in fact is lost. In that case no operative obligation ever arises under the agreement.

"Free consent defined": Consent is said to be free when it is not caused by: ---

(1) coercion, as defined in section 15, or
(2) undue influence, as defined in section 16, or
(3) fraud, as defined in section 17, or
(4) misrepresentation, as defined in section 18, or
(5) mistake subject to the provisions of sections 20, 21, and 22.

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

Concept of "Consent not free":

Not only consent but free consent is declared by S. 10 to be necessary to the complete validity of a contract. The Act now proceeds to declare the meaning of this addition. According to section 29 of the Act,

where there is no consent or no real and certain object of consent there can be no contract at all. Where there is consent, but not free consent, there is generally a contract voidable at the option of the party whose consent was not free. This section declares in general the causes which may exclude freedom of consent, leaving them to be more fully explained by the later sections referred to in the text. In one respect the language is open to objection. It seems, when read together with that of other relevant sections, to assume that there are cases in which a contract is voidable on the ground of mistake

Free consent is one of the important essential of a valid contract. The consent of parties signifies perfect identity of mind between the contracting parties with regard to the subject matter of the contract. An agreement is enforceable when the contracting parties have given their consent and at the same time that consent should be free that is it should be free from any influence.

Effects of consent that is not free

- A contract in which there is no consent at all, shall be a void contract.
- A contract in which consent is not free shall be a voidable contract.
- Contract shall be voidable at the option of the party whose consent is not free.

Coercion

Coercion" defined. "Coercion" is the committing, or threatening to commit, any act forbidden by the Pakistan Penal Code, or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

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

Illustrations

A, on board an English ship on the high seas, causes B, to enter into an agreement by an act amounting to criminal intimidation under the Pakistan Penal Code. A afterwards sues B for breach of contract at Karachi. A has employed coercion, although his act is not an offence by the law of England, and although section 506 of the Pakistan Penal Code was not in force at the time when or place where the act was done.

Extent of "Coercion" under the Act: ---The words of this section are far wider than anything in the English authorities; it must be assumed that this was intended. In the original draft the word "coercion" is used but not defined. As the definition stands the coercion invalidating a contract need not proceed from a party to the contract, or be immediately directed against a person whom it is intended to cause to enter into the contract or any member of his household, or affect his property, or be specifically to his prejudice. In England the topic of "duress" at common law has been almost rendered absolete partly by the general improvement in manners and morals, and partly by the development of equitable jurisdiction under the head of Undue Influence. Detaining property is not duress.

Act forbidden by the Penal Code: ---The words "act forbidden by the Pakistan Penal Code" make it necessary for the Court to decide in a civil action, if that branch of the section is relied on, whether the alleged act of coercion is such as to amount to an offence. The mere fact that an agreement to refer matters in dispute to arbitration was entered into during the pendency and in fear of criminal proceedings is not sufficient to avoid the agreement on the ground of "coercion", though the agreement may be void as opposed to public policy within the meaning of S. 23. It must further be shown that the complainant or some other person on his behalf took advantage of the state of mind of the accused to apply pressure upon him to procure his consent. So far as we are aware, there is no case decided with express reference to the branch of the section now under consideration. The High Court of Allahabad refused to enforce a bond executed by a judgment debtor in favour of the decree holder to procure his release from custody in execution of a decree of a Court which had no jurisdiction to entertain the suit. The Court held that the

certainty that the decision proceeded on the ground (though no reasons are stated) that the alleged act of coercion amounted to an offence within the meaning of the Penal Code.

Unlawful detaining of property: --- A refusal on the part of a mortgagee to convey the equity of redemption except on certain terms is not an unlawful detaining or threatening to detain any property within the meaning of this section.

Claim based on original agreement may be decreed. Where the original agreement is valid and enforceable, the fact that the petitioner has relied on a subsequent agreement in support of it and the latter is found illegal does not affect the validity of the claim based on the original agreement. That claim may be decreed.

Coercion---Mere fear of Criminal proceedings---Not sufficient to be called coercion---Contract not avoided. In order to prove coercion it must be shown that the creditor applied pressure upon the debtor to procure his consent. The mere "act that an agreement was entered into under fear of criminal proceedings is not sufficient to avoid the agreement on the ground of coercion. I am of the opinion that simply because a creditor threatens his debtor to involve him in a criminal case, it will not be coercion if there be some basis for such a prosecution.

Coercion---Concept---Plaintiff alleged to have been defrauded by. defendant's husband, informed the defendant that her husband was likely to be arrested and his name was likely to appear in local newspaper, as he had defrauded the plaintiff of a substantial sum of money---Defendant was not made to sign for tin amount which was in excess of what her husband owned to file plaintiff nor plaintiff threatened to commit any offence against her husband or herself or her property---Threat of criminal prosecution against husband of defendant, held, would not amount to coercion in circumstances.

Promissory note-execution of---Issue involving determination whether same executed by Defendant under coercion or of her own free will---Held: It was no coercion if plaintiff defrauded by Defendants husband had informed that her husband was likely to be arrested and his name in that context to appear in newspapers---Further it was not the case of the Defendant that she was made to sign for an amount in excess of what her husband owed to the plaintiff---Or that the plaintiff threatened to commit any offence against the Defendant's husband or herself or her property---Such a threat of criminal prosecution did not amount to coercion---Held further: Promissory note not signed under coercion.

Coercion signifies to compel a person to enter into a contract by use of force. Coercion includes a threat of force as well as use of force and that should be for the purpose of compelling a person to enter into a contract.

Effect of Coercion

The effect of coercion is that it makes the contract voidable at the option of the party whose consent is obtained by coercion.

LESSON 10

FREE CONSENT

We have already discussed the concept of legal capacity of parties to a contract and are in the process of understanding the concept and scope of free consent.

Consent is said to be free if not caused by:

- Coercion or
- Undue influence or
- Fraud or
- Misrepresentation or
- Mistake

We have already discussed the concept and effects of coercion and shall discuss other factors in the following paragraphs:

Undue influence
It means the exercise of the power or influence by a person who has some control or influence on the other person, it is not just the existence of the influence or position of dominance but to prove undue influence, it is required that influence of the power/ dominance vested in a person has been exercised to derive undue advantage from the other party. In certain situations a party is in a position of dominance over other party.

Undue Influence has been defined in section 16 of the Act, same is reproduced below:
A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

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

Undue influence shall be considered to have been exercised if the following conditions appear:

Position of dominance / ability to dominate the other person
As we have discussed, a person must be enjoying a position of dominance or ability to dominate the other person. Exercising undue influence due to the presence of fiduciary relation between the parties. This relationship signifies a relationship of trust and confidence, such as relation between a doctor and his patient. There must be actual use of the influence or exercise of that influence and deriving undue advantage / benefit by virtue of that position of dominance / influence.

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

(a) A, a man enfeebled by disease or age, is induced, by B's influence over him as his medical attendant, to agree to pay B an unreasonable sum for his professional services. B employs undue influence.
(b) A, being in debt to B, the money-lender of his village, contracts a fresh loan on terms which appear to be unconscionable. It lies on B to prove that the contract was not induced by undue influence.
(c) A applies to a banker for a loan at a time when there is stringency in the money market. The banker declines to make the loan except at an unusually high rate of interest. A accepts the loan on these terms. This is a transaction in the ordinary course of business, and the contract is not induced by undue influence.

Explanation:

The above factors have been discussed in greater detail in the following paragraphs.

It will be sufficient for the present purpose to refer to a few of the leading authorities on the various points dealt with by the text of the Act. The first paragraph of the section lays down the principle in general terms; the second and third define the presumptions by which the Court is enabled to apply the principle. It is obvious that the same power which can "dominate the will" of a weaker party is often also in a position to suppress the evidence which would be required to prove more constraint in a specific instance. Modification of the ordinary rules of evidence is accordingly necessary to prevent a failure of justice in such cases. Where the special presumptions do not apply, proof of undue influence on the particular occasion remains admissible, though strong evidence is required to show that, in the absence of any of the relations which are generally accompanied by more or' less control on one side and submission on the other, the consent of a contracting party was not free. In the case of a pure voluntary gift (though there is no general presumption against the validity of gifts) the proof is less difficult; but this is not within our subject.

General meanings of Undue influence: The first paragraph gives the elements of undue influence; a dominant position and the use of it to obtain an unfair advantage. The words "unfair advantage" must be taken with the context. They do not limit the jurisdiction to cases where the transaction would be obviously unfair as between persons dealing on an equal footing.

It is an essential condition for the application of the section that one of the parties should be in a position to dominate the will of the other. No further question arises until this is proved. A plea of undue influence can only be raised by a party to the contract and not by a third party.

Different forms of influence: ---The second paragraph of the present section makes a division of the subject-matter on a different principle, according to the origin of the relation of dependence, continuing or transitory, which makes undue influence possible. Such a relation may arise from a special authority or confidence committed to the donee, or from the feebleness in body or mind of the donor. However, it is impossible to find plain and clear-cut categories for transactions which are often obscure and complicated, and sometimes purposely made so. Practically the most important thing to bear in mind is that persons in authority, or holding confidential employments such as that of spiritual, medical, or legal adviser, are called on the act with good faith and more than good faith in the matter of accepting any benefit (beyond ordinary professional remuneration for professional work done) from those who are under their authority or guidance. In fact, their honourable and prudent course is to insist on the other party taking independent advice.

Mental distress: --- "A state of fear by itself does not constitute undue influence. Assuming a state of fear amounting to mental distress which enfeebles the mind, there must further be action of some kind, the employment of pressure or influence by or on behalf of the other party to the agreement." The mere fact, therefore, that a submission was executed by the defendant during the pendency and under fear of a criminal prosecution instituted against him by the plaintiff will not avoid the transaction on the ground of "undue influence."

An aged father executed deeds of gift and a wakfnama at a time when he was in a weak state of mind as the result of a long drawn out illness. These transactions were brought at the instance of his son and had the effect of depriving the other members of the family of their just share of the inheritance. As it was proved that the son was in a position to dominate the will of the father and that he used that position to his own advantage, the deeds of gift and the wakfnama were set aside.

Proof of undue influence.---In dealing with cases of undue influence there are four important questions which the Court should consider, namely, (1) whether the transaction is a righteous transaction, that is, whether it is a thing which a right-minded person might be expected to do; (2) whether it was improvident, that is to say, whether it shows so much improvidence as to suggest the idea that the donor was not master of himself and not in a state of mind to weigh what he was doing; (3)whether it was a matter requiring a legal adviser; and (4) whether the intention of making the gift originated with the donor.

Lapse of time and limitation: ---Delay and acquiescence do not bar a party's right to equitable relief on the ground of undue influence; unless he knew that he had the right, or, being a free agent at the time, deliberately determined not to inquire what his rights were or to act upon them. Lapse of time is not a bar in itself to such a relief. There must be conduct amounting to confirmation of ratification of the transaction.

Consent of a party to transaction induced by suggestion of a fraudulent fact---Person so deceived having means of discovering truth with ordinary diligence.

Effect---Where consent of a party was induced by the suggestion of a fact which was not true, and was fraudulent, exchange deed so effected, held, would nevertheless be not voidable where person deceived had means of discovering truth with ordinary diligence.

Question about exercise of undue influence---Pre-eminently a question of fact--Concurrent finding on question of soundness of mind of vendor and absence of undue influence over him---Not open to challenge, when these findings arc fully sustainable on record---Constitution of Pakistan, 1973, Article 188.

Transfer of Property Act (IV of 1882), S. 54---Qanun-e-Shahadat Order (X of 1984), Articles. 70 & 71---**Sale transaction---Undue influence**---Proof---Oral depositions of witnesses produced by plaintiff to prove mental incapacity of vendor and undue influence of vendees on such vendor in respect of disputed sale transaction, being not based on personal observations or knowledge of witnesses, held, could not be relied upon---Important facts like exercise of undue influence on vendor by vendees and mental incapacity of vendor which could affect sale transactions, could, hardly be established by such unreliable oral evidence.

Defendant alleging execution under undue influence---Onus of proof of allegations---Mere advantageous position not sufficient to prove undue influence.

The onus of providing that plaintiff was in a position to dominate the will of the defendant is entirely on the defendant. Defendant is further called upon to prove that plaintiff has used that position to obtain in unfair advantage for himself. Merely showing that the plaintiff was in a more advantageous position as compared to that of the defendant so as to be able to drive a benefit by dominating the will of defendant is not enough.

What is 'Undue influence'--Facts to be proved to avoid contract for undue influence.

To prove that a contract was entered into under undue influence it must be established,

- that the relations subsisting between the parties should be such that one of them is in a position to dominate the will of the other;
- that the dominant party obtains an unfair advantage over the other; and
- that the dominant party uses his dominant position to obtain that unfair advantage.

Raising merely an atmosphere of suspicion is not sufficient in a case of undue influence but there must be clear and definite evidence of the case propounded. It must be established that but for the undue influence which was practiced upon him, he would not have entered into the transaction. In order that a contract may be had on this ground it is further to be established that the contract was unfair and unconscionable.

Undue influence---Contract induced by person in a position to dominate will of another---Burden of proof. Sub-section (3) of section 16 lays down that where a person who is in a position to dominate the will of another enters into a contract with him, and the transaction appears on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

Coercion---Mental capacity of person affected temporarily by action of another---Other person may be guilty of coercion. If a person's mental capacity is temporarily affected by reason of mental or bodily distress by the action of another person, that person would be deemed to be in a position to dominate his will, and as such the latter may be said to have coerced the other into the doing of certain acts at that time.

Execution of receipt admitted but receipt of consideration denied---Allegation of undue influence---Burden of proof is on person denying consideration or alleging undue influence. Where the defendant admits that he signed the receipt, the presumption would be that he had received the consideration. It was for the defendant to prove that he had not received the consideration mentioned in the receipt or that he had executed the receipt under undue influence.

Party denying execution of document and alleging her signatures were obtained on blank paper---Onus of proof that signatures were properly obtained lies on the other party. Ordinarily in cases where a document is admitted to have been signed by a party and the payment of consideration is denied, the onus to prove that the consideration was not paid or the document was obtained by misrepresentation or fraud is on the party who admits his signature but contends that his signature was taken upon a blank paper. Such statement is taken as a denial and not execution of the document. In such cases the onus to prove the execution of the document lies heavily on the respondent.

Onus---Undue influence---How proved and by whom. In order to determine the question of onus in a case attracted by section 16 (b) the first thing to be considered is the relationship between the parties that is to say whether one party was in a position to dominate over the other and then it must be proved that position was used to obtain an unfair advantage and even though the transaction may be unconscionable relief cannot be granted until the initial fact of the position to dominate the will is established. If such a position is proved and the transaction also appears to be unconscionable, the burden of proof that the contract was not induced by undue influence lies on the person in a position to dominate the will of the other.

When there is evidence of overpowering influence and the transaction is immoderate and irrational, proof of undue influence is complete. It is not necessary that such overpowering influence should be by threat or by committing any act forbidden by law or by unlawful detention etc. If a person has some influence over the other and by means of that influence reduces the will of the other to his subjection, whatever may be the nature of the influence spiritual moral, social or any other influence, then it is such coercion as is sufficient to constitute undue influence.

Relationship of tile parties---If sufficient to prove undue influence---How proved. "Undue influence is not established by proof of the relations of the parties having been such that the one naturally relied upon the other for advice and the other was in a position to dominate the will of the first in giving it."

Up to the point "influence" alone has been made out. Such influence may be used wisely, judicially and helpfully. It must be established that the person in a position of domination has used that position to obtain unfair advantage for himself and so to cause injury to the person relying upon his authority or aid.

made clear viz. that the bargain is with the influencer and in itself unconscionable then the person in a position to use his dominating power has the burden thrown upon him, and it is a heavy burden of establishing affirmatively that no domination was practiced so as to bring about the transaction but grantor of the deed was scrupulously advised in the independence of a free agent.

Undue influence---How proved---Mere relationship or position from which One's will can be dominated not sufficient---Urgent need of party, a criterion. For avoiding a contract on the ground of undue influence existence of a particular relationship is not necessary. The only difference in the kinds of cases is, that where no such relationship exists the burden of proving the exercise of undue influence rests on the party who seeks to avoid the contract whereas in the case of existence of such relationship it is for the party who is in a position to influence the other to show that the transaction was fair.

After having determined as to whether one party was in a position to dominate the will of another, there still remains another question and that is whether an unfair advantage was taken. That again depends upon the circumstances of each case and the criterion would be whether the Court considering all the attendant circumstances regards the transaction as unconscionable.

Urgent need and helplessness, however have both of them reference to the effect of the failure of the borrower to secure the money and obviously the difference between the two is only a matter of degree. How is this degree of the need of the borrower to be determined? It is not possible to lay down any hard and fast rule. Each case must be decided on its own facts.

Undue influence---What is? In order to determine the question of onus in a case attracted by section 16 (b) the first thing to be considered is the relationship between the parties, that is to say, whether one party is in a position to dominate over the other and then it must be proved that position was used to obtain an unfair advantage and even though the transaction may be unconscionable, relief cannot be granted until the initial fact of the position to dominate the will is established, If such position is proved and the transaction also appears to be unconscionable, the burden of proof that the contract was not induced by undue influence lies on the person in position to dominate the will of the other.

When there is evidence of the overpowering influence and the transaction is immoderate and irrational, proof of undue influence is complete. It is not necessary that such overpowering influence should be by threat or by committing any act forbidden by law or by unlawful detention, etc. If a person has some influence over another and by means of that influence reduces the will of the other to his subjection whatever may be the nature of the influence, spiritual, moral, social or any other influence, then it is such coercion as is sufficient to constitute undue influence.

S. 16 (2) read with Constitution of Pakistan (1973), Art. 185 (3)---**Contract---Undue influence**---Both Courts below recording concurrent findings of fact on question of soundness of mind of vendor and absence of undue influence over him and such finding sustainable on record---Question being pre-eminently one of fact, interference by Supreme Court, held, not justified.

An influence by a physician over his patient who is in critical condition, demanding and receiving unreasonable and extraordinary amount on account of his professional charges would tent amount to undue influence.

Undue influence may also be exercised in the following situations:

Undue influence—Master and Servant

If an employer exercises his influence over his employee so as to enter into a contract or agreement by compelling him to accept the terms and conditions which are not otherwise in his favor would lead to an agreement caused by use of undue influence. It would be voidable at the option of the aggrieved party that is the employee since his consent is not free.

Undue influence---Counsel and Client

A counsel and client are in fiduciary relationship and if counsel exercises his influence and demands unreasonable professional fee that would tantamount to exercising undue influence.

Undue influence—Creditor and Debtor

If a creditor exploiting the financial difficulties of a debtor, charges extra ordinary markup on the amount of finance disbursed to the debtor, it would amount to the exercise of undue influence by the creditor.

Burden of Proof

Burden of proof is on the person who claims that undue influence has been exercised upon him by the other party.

LESSON 11

FREE CONSENT—Fraud & Misrepresentation

Free Consent- Definition of free consent as contained in section 14 of the Act is given below for ready reference.
Consent is said to be free when it is not caused by

(1) coercion, as defined in section 15, or
(2) undue influence, as defined in section 16, or
(3) fraud, as defined in section 17, or
(4) misrepresentation, as defined in section 18, or
(5) mistake subject to the provisions of sections 20, 21, and 22.

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

We have already covered coercion and undue influence, now we shall look into other factors.

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

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

Explanation .---Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself equivalent to speech.

In a contract where consent caused/obtained by fraud etc is voidable at the option of party whose consent is not free.

Illustration:
Mr. Aslam sells a car to Mr. Yasir. On inquiry by the purchaser, the seller / Mr. Aslam informed that this car has completed the mileage of 15000Km. Later on it came to the knowledge of purchaser that the car had actually completed the mileage of 40,000 Km. in this case the agreement is voidable at the option of purchaser.

Mere silence is not always a fraud but when it is the duty to speak than silence would lead to fraud.
For example, when a surgeon is going to perform a surgery, it shall be his duty to inform the patient about the post surgery effects, if so enquired.

When a person is applying for insurance, it is his duty to provide all the information which is required in the application form.

Promise made without intention of performing
Where purchases made with no intention of paying the price, it is a fraud.

Illustrations

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

(b) B is A's daughter and has just come of age. Here, the relation between the parties would make it A's duty to tell B if the horse is unsound.
(c) B says to A---"If you do not deny it, I shall assume that the horse is sound. A says nothing. Here A's silence is equivalent to speech.
(d) A and B, being traders, enter upon a contract. A has private information of a change in prices which would effect B's willingness to proceed with the contract. A is not bound to inform B.

Detailed explanation of Fraud as contained in section 17

Fraud in general ---Fraud is committed wherever one man causes another to act on a false belief by a representation which he does not himself believe to be true. He need not have definite knowledge or belief that it is not true. When fraud products damage it is generally a wrong entitling the person defrauded to bring a civil action. Under the Contract Act we are concerned with the effects of fraud only so far as consent to a contract is procured by it. We have already pointed out that the result of fraudulent practice may sometimes be a complete misunderstanding on the part of the person deceived as to the nature of the transaction undertaken, or the person of the other party. Such cases are exceptional. Where they occur, there is not a contract voidable on the ground of fraud, but the apparent agreement is wholly void for want of consent, and the party misled may treat it as a nullity even as against innocent third persons. But the fraudulent party is of Course estopped from denying that there is a contract if the party deceived finds it to be to his interest to affirm the transaction, which is a conceivable though not probable case. In the same way the party deceived must be at liberty to treat the transaction as a voidable contract if he thinks fit. No doubt many transactions have in fact been so treated notwithstanding that under the law they might have been declared wholly void.

The language of the Act throws no light on the relation of fraud to misrepresentation. It might even be said to obscure it. That relation, however, may be very simply stated. Fraud, as a cause for the rescission of contracts, is generally reducible to fraudulent misrepresentation. Accordingly we say that misrepresentation is either fraudulent or not fraudulent. If fraudulent it is always a cause for rescinding a contract induced by it; if not, it is a cause of rescission only under certain conditions, which the definition of S. 18 are intended to express. There are, however, forms of fraud which do not at first sight appear to include any misrepresentation of fact, and sub-ss. 3, 4, and 5 are intended to cover these. With regard to a promise made without any intention of performing it (subs. 3) it may fairly be said that a promise, though it is not merely a representation of the promiser's intention to perform it, includes a representation to that effect. Some promises are given more readily and willingly than others; but we accept promises only because we believe them to be made in good faith, and no one would be content with a promise which he believed the promiser to have no intention of keeping. Similarly it is fraud to obtain properly, or the use of it, under a contract by professing an intention to use it for some lawful purpose when the real intention is to use it for an unlawful purpose. Our modern authorities have removed the difficulty which used to be felt in treating the statement of a man's intention as a representation of fact. "There must be a misstatement of an existing fact, but the state of a man's mind is as much a fact as the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else." Accordingly it is fraud to obtain a loan of money by misrepresenting the purpose for which the money is wanted, even if there is nothing unlawful in the object for which the money is actually wanted and used. In particular, it is well settled that buying goods with the intention of not paying the price is a fraud which entitles the seller to rescind the contract. On the whole, then, sub-s. (3) of the present section did not introduce any novelty. Borrowing money with no intention of repaying it is cheating under the Penal Code, S. 415.

The mention of "any other act fitted to deceive" in sub-s. (4) appears to be inserted merely for the sake of abundant caution.

Acts and omissions specially declared to be fraudulent: ---Sub-s. (5) applies to cases in which the disclosure of certain kinds of facts is expressly required by law, and non-compliance with the law is expressly declared to be fraud. Thus by S. 55 of the Transfer of Property Act, 1882, the seller of immovable property is required to disclose to the buyer "any material effect in the property or in the seller's title thereto of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care

discover," and the buyer to disclose to the seller "any fact as to the nature or extent of the seller's interest in the property of which the buyer is aware, but of which he has reason to believe that the seller is not aware and which materially increases the value of such interest," and "omission to make such disclosures...is fraudulent," and this, it seems, even if the omission be due merely to oversight. Various dealings with property are made voidable as being fraudulent, or declared to be fraudulent as against the transferor's creditors or assignees, by other enactment. But as these transfers of property cannot well be employed as inducements to any other party to enter into any contract beyond such agreement as is involved in the fraudulent transfer itself, they do not come within the scope of the Contract Act, and we have no occasion to dwell upon them here.

Mere non-disclosure: ---There are special duties of disclosure (of which we have just seen an instance) in particular classes of contracts, but there is no general duty to disclose facts which are or might be equally within the means of knowledge of both parties. Silence as to such facts, as the Explanation to the present section lays down, is not fraudulent. There is a well-known American case on this point arising out of the conclusion of peace between Great Britain and the United States after the war commonly known as the war of 1812. The contract was for the gale of tobacco: the buyer knew, but the seller did not, that peace had been made; and on the seller asking if there was any news affecting the market price, the buyer gave no answer. The Supreme Court of the United States held that there was nothing fraudulent in his silence. But there are at least two practical qualifications of this rule. First, the suppression of part of the known facts may make the statement of the rest, though literally true so far as it goes, as misleading as an actual falsehood. In such a case the statement is really false in substance, and the willful suppression which makes it so is fraudulent. Secondly, a duty to disclose particular defects in goods sold, or the like, may be imposed by trade usage. In such a case omission to mention a defect of that kind is equivalent to express assertion that it does not exist. The illustrations will now be easily understood.

Fraud---Transaction induced by fraud---Effect---Exchange deed wherein · defendants showed themselves as full owners of property were guilty of suggesting a fact which was not true---Defendants, by such representation having deceived or induced plaintiff to enter into exchange with them were guilty of fraud within meaning S. 17---Exchange deed entered into by plaintiffs was a deed voidable at their option as their consent was secured through fraud.

Contract vitiated by fraud and misrepresentation---Defendant may repudiate. The plaintiff entered into a contract with the defendant company and the contract, as found from the evidence and circumstances, of the case, was brought about as a result of a secret deal between the plaintiff on the one hand and the defendant's officer on the other hand and the defendant was persuaded to agree to the contract on the misrepresentation of the officer of the defendant.

Held by the court: The defendant in the circumstances of the case is entitled to repudiate the contract on the ground of its being , vitiated by fraud.

Fraud---Burden of proof: Fraud involves firstly a finding in regard to facts. The burden of proof in such a case is on the party who alleges fraud. The Courts have to be careful in coming to a finding of fraud and should normally satisfy themselves that the finding is based on reliable evidence. The Court or authority competent to re-open a case should therefore satisfy itself from the material before it that the necessary situation as discussed above prima facie prevails, before it decides to proceed with a complaint for fraud

What is Fraud: No fraud constituted where misrepresentation has been scrutinized before acting on it. There must be an intention to deceive or to induce a person by misrepresentation or active concealment of an existing fact, to do or omit to do anything which he would not have done but for the inducement. It is, therefore, necessary to prove that the act or omission was because of the inducement on account of the misrepresentation or concealment of fact and of not independent motives. There would be no cheating if the inducement had been subjected to scrutiny before the act or omission took place.

According to section 17, an order obtained by fraud only voidable not void.

Agent selling goods getting secret commission from other party---Fraud---Contract void: When a bribe or secret commission is given or a promise to pay it is made to an agent of an employer by a person who has entered into a contract for sale or purchase of property in order to induce the agent to act otherwise than with loyalty and fidelity to his employer, such a contract being based on fraud is void and not enforceable in law.

When a contract is found to be based on fraud, it becomes a voidable transaction and the affected party can repudiate it. The result of repudiation is that the aggrieved party will be restored to its original position and the party at fault can be compelled either to return the property or to compensate the aggrieved party.

Fraud---Transaction induced by fraud: Effect---Exchange deed wherein defendants showed themselves as full owners of property were guilty of suggesting a fact which was not true---Defendants, by such representation having deceived or induced plaintiff to enter into exchange with them were guilty of fraud within meaning of S. 17---Exchange deed entered into by plaintiffs was a deed voidable at their option as their consent was secured through fraud. Consent is not free if caused by fraud and misrepresentation including other factors which we have already discussed.

Misrepresentation

"Misrepresentation" has been defined in section 18 of the Act which is reproduced below: "Misrepresentation" means and includes: ---

- 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;
- any breach of duty which, without an intent to deceive, gains and 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;
- causing, however innocently, a party to an agreement to make a mistake as to the substances of the thing which is the subject of the agreement.

A contract entered into by any representation which is not correct, although it may be unintentional or innocent and believed to be correct shall be treated as misrepresentation under section 18. A representation with respect to the title of property shall amount to fraudulent misrepresentation. In a contract by A regarding chartering a ship, on inquiry by A, the charter party informed that the registered capacity of ship is 5000 tons, it turned out to be 8000 tons. A shall be entitled to avoid the contract on getting this information. Misrepresentation should be of facts material to the contract.

Illustration
Contract for sale of land for sheep farming with the capacity for 5000 sheep, land turnout to be unsuitable for sheep farming. Purchaser shall be entitled to avoid the contract.

Agreement without free consent are voidable Section 19
When consent to an agreement is caused by coercion, undue influence, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused,

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

Exception: if such consent was caused by misrepresentation, or by silence, fraudulent within the meaning of section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence
Explanation: a fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practiced, or to whom such misrepresentation was made, does not render a contract voidable

Power to set aside contract induced by undue influence section 19-A
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.

Voidability of agreements without free consent: When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

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

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

Explanation: ---A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.

Illustrations

(a) A, intending to deceive B, falsely represents that 500 maunds of indigo are made annually at A's factory, and thereby induces B to buy the factory. The contract is voidable at the option of B.

(b) A, by a misrepresentation, leads B erroneously to believe that 500 maunds of indigo are made annually at A's factory. B examines the accounts of the factory, which shows that only 400 maunds of indigo have been made. After this, B buys the factory. The contract is not voidable on account of A's misrepresentation.

(c) A fraudulently informs B that A's estate is free from encumbrance. B thereupon buys the estate. The estate is subject to a mortgage. B may either avoid fire contract, or may insist on its being carried out, and the mortgage-debt redeemed.

(d) B, having discovered a vein of ore on the estate of A, adopts means to conceal, and does conceal the existence of the ore from A. Through A's ignorance B is enabled to buy the estate at an under-value. The contract is voidable at the option of A.

(e) A is entitled to succeed to an estate at the death of B; B dies; C, having received intelligence of B's death, prevents the intelligence reaching A, and thus induces A to sell him his interest in the estate. The sale is voidable at the option of A.

Explanation

Scope of the section: ---The section states the legal effect of coercion, fraud, and misrepresentation, in rendering contracts procured by them voidable; the foregoing sections have only laid down their respective definitions. Perhaps the most important parts of the section, certainly those which need the most careful attention, are the exception and the explanation. These mark, though hardly with practical completeness, the limits within which the rule is applied. Before considering them we have to pause on the second paragraph of the body of the section. It reads plainly enough at first sight, but the thought does not seem to be really clear. The party entitled to set aside a voidable contract may affirm it if he thinks fit. That is involved in the conception of a contract being voidable. And if he affirms it, he may require the performance of the whole and every part of it (subject to the performance in due order of whatever may have to be performed on his own part) or, in default thereof, damages for non-performance (subject to

special causes of excuse, if any, which we are not now considering). If, as may well be the case, the default is wholly or partly due to the non-existence of facts which the defaulting party represented as existing, this party can obviously not set up the untruth of his own statement by way of defence or mitigation; and, if the case is a proper one for specific performance, and if it is in his power to perform the contract fully, though with much greater cost and trouble than if his statement had been originally true, he will have to perform it accordingly. Is anything more than this meant by the declaration of the affirming party's right to "be put in the position in which he would have been if the representations made had been true"? There are obviously many cases in which such restitution is not literally possible. Thus, if the owner of an estate subject to a lease for an unexpired term contracts to sell it to a purchaser who requires immediate possession, and conceals the existence of the lease. The purchaser cannot be put in the same position as if the representation that there was no tenancy, or only such a tenancy as could be determined at will, had been there. Cases may occur, on the other hand, where a seller of land has held out, though not in express terms or willfully, an element of attractiveness or security in the property offered for sale which it is in his power to realise by some act or undertaking on or with regard to adjoining property of his own. But it is dangerous to formulate general propositions in the law of contract from decisions in suits for the specific performance of contracts relating to land, and it is not clear that the facts of the decision in question are not reducible to misrepresentation or an ambiguous offer. Nor is it certain that the present enactment can always be literally relied on. A sells a house to B, and by some blunder of A's agent the annual value is represented as being Rs. 2,000 when it is in truth only Rs. 1,000. According to the letter of the present paragraph, B, may insist on completing the contract and on having the difference between the actual and the stated value paid to him and his successors in title by A and A's successors in title for all time. Nothing short of that will put him "in the position in which he would have been if the representations made had been true." This is obviously not the intention of the enactment.

There is an important class of cases in which, although there is no such misrepresentation as to make the contract voidable, complete performance is, by reason of misdescription or otherwise, unattainable, and specific performance will be decreed subject to compensation for the defect. It was originally proposed to deal with such cases in the Contract Act. The enactment governing them is now to be found in the Specific Relief Act, S. 14.

Suit by representatives.---The option of avoiding a contract procured in any of the ways mentioned in Ss. 19, 10A, is exercisable by the party's representatives unless at the date of his death he had lost it by acquiescence or otherwise.

Gift under Muslim Law---Fraud in procuring gift---Principle of section applicable: A gift is not contract (in Muslim Law it is called a contract) but the principle of section 19 may be applicable even to a gift. Therefore a gift tainted with fraud would be voidable and not void.

Contract by statutory body---Consent to contract given by Board under mistake of fact---Contract invalid: Held: The Karachi Port Trust is a statutory body and is governed by the statute and its bye-laws. Before a contract of high valuation could have been validly awarded, it would have to be with the consent not only of the Chief Engineer but also of the Board. In the present case, the Chief Engineer and the Board gave their consent upon a mistake of fact. Therefore there was no valid contract in existence.

Promise to do an act in future not performed---Not a misrepresentation: A promise to perform an act in future, if not fulfilled would not amount to misrepresentation. It may be a breach of promise or an agreement, but it is not a misrepresentation as to existing facts within the meaning of section 19. Voidable contract acted upon---Cannot be challenged subsequently.

S. 19 read with S. 13 (2) Sale of Goods Act---Misrepresentation regarding the model of the car by the seller---if contract can be rescinded after the car had been used by the buyer. The plaintiff purchased a car from the defendant which he was wrongly told was 1949 model. He used the car for sometime and then found that it was 1948 model car. He therefore gave notice to the defendant that he rescinded the contract on ground of fraud and asked them to pay back the price of the car paid by him.

Held by Rehman C.J. on reference from D.B: There is no provision in the Sale of Goods Act, 1930, bearing on the effect of fraud, misrepresentation, coercion and undue influence, on a contract of sale. I would be, therefore, disposed to hold that the relevant provisions of the Contract Act on these questions continue to be applicable to contracts of sale despite the provisions of section 13 of the Sale of Goods Act. This section also does not contain any reference to cases of fraud etc, and apparently contemplates such cases as involve a breach of a condition without fraud, misrepresentation and the like affecting the formation of the contract itself, at its inception, if thus interpreted, there would be no difficulty in holding that section 19 of the Contract Act can stand with section 13 of the Sale of Goods Act, 1930. The result would be that in case of fraud and misrepresentation etc. vitiating the contract unless there was a waiver on the part of the party affected, the right of recision would not be lost.

Fraud---Limitation---Person in possession of land but a deed ownership of such land got executed by misrepresentation and fraud---Reason getting ownership of land by execution of such deed if suing for possession on basis of such deed and claiming deed to be genuine, executant of deed, held, within her right to plead deed being void on account of fraud and other party having no title or right to posses land and no impediment of limitation could arise to raise such plea.

Applicability---It is an essential requirement that when executing sale deed a person (pardanashin lady) should be in know that deed in question was of sale---S. 19 would not apply if her awareness was only that deed she was executing was a power of attorney.

Registered sale deeds on basis of agreement---Suit for declaration and cancellation of deeds on plea that documents were procured from plaintiffs by deceased through fraud and misrepresentation---Requires ad valorem court-fee---Court Fees Act (VIII of 1870), Ss. 3, 12.

LESSON 12

VOID AGREEMENTS

Void Agreement

It has been defined in Sec. 2 (g) of the Contract Act which is reproduced below:
"An agreement not enforceable by law is said to be void".
What agreements are contracts' has been provided in section 10 of the Contract Act which is reproduced below:

Agreements expressly declared void (section 10)

What agreements are contracts? All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void. .Nothing herein contained shall affect any law in force in India, and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents. The first paragraph of this section is developed and applied by the more specific provisions of several following sections, which will be considered as they occur.

Agreements in restraint of marriage (sec. 26)

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

Agreements in restraint of trade (sec. 27)

Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.

Exception 1: Saving of agreement not to carry on business of which good-will is sold. --- One who sells the good-will of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein; Provided that such limits appear to the Court reasonable, regard being had to the nature of the business.

Restraint during term of service ---An agreement of service by which an employee binds himself, during the term of his agreement, not to compete with his employer directly or indirectly is not in restraint of trade. If it were otherwise, "all agreements for personal service for a fixed period would be void. An agreement to serve exclusively for a week, a day, or even for an hour, necessarily prevents the person so agreeing to serve from exercising his calling during that period for any one else than file person with whom he so agrees. It can hardly be contended that such an agreement is void. In truth, a mall who agrees to exercise his calling for a particular wage and for a certain period agrees to exercise his calling and such an agreement does not restrain him from doing so. To hold otherwise would, I think, be a contradiction in terms." Such an agreement may be enforced by injunction where it contains a negative clause, express of implied, providing that the employee should not carry on business on his own account during the term of his engagement. An employee contracted to serve as a weaving master for three years, and agreed not to serve anyone else in India during the period. He left the service after one year, and joined another mill as a weaving master. In terms the prohibition in the agreement was not restricted to serving anyone else as weaving master, but was absolute. The Court, however, in the light of the intention of the parties, construed the prohibition as confined to the profession of weaving master, held the agreement reasonable, and issued an injunction against the employee.

Earnest money---When may be recovered by purchaser. If the respondent who was the seller is held guilty of breach of contract, obviously, the appellant who was the buyer would be entitled to recover the money paid to the seller as purchase price, on account of the failure of consideration. Thus, the buyer has a quasi-contractual right of claim the recovery of the price, which is paid to the seller, for the seller, in breach of his

obligation, failed to pass good title to the good sold. The buyer in such case has a right to sue in restitution to recover the price on the ground of total failure of consideration. Similarly, if the seller failed to deliver the goods the buyer may recover the deposit he paid to the seller. But in that case the buyer must terminate the contract. On the other hand, even if the buyer was in default he can in certain circumstances, claim restitution of the advance payment made to the seller, even if the seller justifiably terminates the contract.

Scope of Section 27:

Section 27, prohibits all agreements in restraint of trade.

Agreements in restraint of legal proceedings void.(sec 28) Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by tile usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

Exception I: Saving of contract to refer to arbitration dispute that may arise: --- This section shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

Suits barred by such contracts. When such a contract has been made, a suit may be brought for its specific performance, and if a suit, other than for such specific performance, or for the recovery of the amount so awarded, is brought by one party to such contract against any other such party in respect of any subject which they have so agreed to refer, the existence of such contract shall be a bar to the suit.

Exception 2: Saving of contract to refer questions that have already arisen.---Nor shall this section render illegal any contract in writing by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.

Agreement in restraint of legal proceedings: ---"This section applies to agreements which wholly or partially prohibit the parties from having recourse to a court of law. If, for instance, a contract were to contain a stipulation that no action should be brought upon it, that stipulation would, under the first part of S. 28, be void, because it would restrict both parties from enforcing their rights under the contract in the ordinary legal tribunals, and so if a contract were to contain a double stipulation that any dispute between the parties should be settled by arbitration, and that neither party should enforce his rights under it in a court of law; that would be a valid stipulation so far as regards its first branch, viz., that all disputes between the parties should be referred to arbitration.

"Rights under or in respect of any contract"--- This section applies only to cases where a party is restricted from enforcing his rights under or in respect of any contract. It therefore presumably does not apply if the Court holds that the parties did not intend that their agreement should give rise to any legal relations. It does not apply to cases of wrongs or torts. Nor does it apply to decrees. The expression "contract" does not include rights under a decree. The Code of Civil Procedure contains express provisions as to adjustment of a decree and postponement of rights under a decree by mutual agreement of parties of a suit.

Limitation of time to enforce rights under a contract ---Under the provisions of this section, an agreement which provides that a suit should be brought for the breach of any terms of the agreements within a time shorter than the period of limitation prescribed by law is void to that extent. The effect of such an agreement is absolutely to restrict the parties from enforcing their rights after the expiration of the stipulated period, though it may be within the period of limitation.

Uncertain agreements (sec. 29)

Agreements, the meaning of which is not certain, or capable of being made certain, are void.

Illustrations

(a) A agrees to sell to B "a hundred tons of oil." There is nothing whatever to show what kind of oil was intended. The agreement is void for uncertainty.
(b) A agrees to sell to B one hundred tons of oil of a specified description, known as an article of commerce. There is no uncertainty here to make the agreement void.
(c) A, who is a dealer in coconut-oil only, agrees to sell to B "one hundred tons of oil." The nature of A's trade affords an indication of the meaning of the words, and A has entered into a contract for the sale of one hundred tons of coconut-oil.
(d) A agrees to sell to B "all the grain at Rahimyar Khan." There is no uncertainty here to make the agreement void.
(e) A agrees to sell to B "one thousand maunds of rice at a price to be fixed by C." As the price is capable of being made certain, there is no uncertainty here to make the agreement void.
(f) A agrees to sell to B "my white horse for rupees five hundred or rupees one thousand." There is nothing to show which of the two prices was to be given. The agreement is void.

Explanation

S. 93 of the Evidence Act provides that when the language of a document is ambiguous or defective no evidence can be given to explain or amend the document. Neither will the Court undertake to supply defects or remove ambiguities according to its own notions of what is reasonable; for this would be not to enforce a contract made by the parties, but to make a new contract for them. The only apparent exception to this principle is that when goods are sold without naming a price, the bargain is understood to be for a reasonable price.
Where the defendants, describing themselves as residents of a certain place, executed a bond and hypothecated as security for the amount "our property, with all the rights and interest", it was held that the hypothecation was too indefinite to be acted upon. The mere fact that the defendants describe themselves in the bond as residents of a certain place is not enough to indicate their property in that place as the property hypothecated. If they had described themselves as the owners of certain property it would then have been reasonable to refer the indefinite expression to the description. And where the defendant passed a document to the Savings Bank whereby he promised to pay to the manager of the bank the sum of Rs. 10 on or before a certain date "and a similar sum monthly every succeeding month," it was held that the instrument could not be regarded as a promissory note, as it was impossible from its language to say for what period it was to subsist and what amount was to be paid under it.
Similarly, where in an agreement for the sale of goods, the seller reserves the right to vary the price at will, there is no contract. A compromise stating: "The following five gentlemen shall decide all matters relating to our movable and immovable property" was held to be too ambiguous to be enforced. An agreement to grant a lease when no date of commencement is expressly or impliedly fixed cannot be enforced. But when the commencement of a lease is dependent upon a contingency, which has occurred, the agreement can be enforced. An agreement to pay a certain amount after deductions as would be agreed upon between the parties is void for uncertainty. It has also been held that an agreement to refer arbitration to a person, who has been described in uncertain terms, is void. But where the proprietor of an indigo factory mortgaged to B all the indigo cakes that might be manufactured by the factory from crops to be grown on lands of the factory from the date of the mortgage up to the date of payment of tile mortgage debt, it was held that the terms of the mortgage were not vague, and that the mortgage was not void in law. It has been suggested that an agreement is too uncertain to be enforced if no limit to the time of performance is expressed or can be inferred from the nature of the case. This does not appear acceptable as a general proposition. Void agreement, connotation of---Agreements meaning whereof is not certain or capable of being made certain, held, would be void---Where both contracting parties are at consensus ad idem with regard to essential terms of contract, any uncertainty or vagueness which is incapable of being ascertained, would have effect of vitiating contract---In letter of guarantee there was no vagueness or uncertainty, which could vitiate contract.

Lease---Agreement that rent will be fixed by Chief Officer of Corporation and will be paid from date of possession---Not valid. The terms of the allotment of a shop by the Karachi Municipal Corporation provided that the lease would commence from the date from which possession will be handed over to the respondent.
Held; the agreement was not void under section 29 of the Contract Act, because the terms of the agreement it was agreed between the parties that the respondent will pay such rent as will be fixed by the Chief Officer and the lease will commence on delivery of possession of the shop. These two terms were quite plain and simple.
Applicability---Agreement is void only when it is uncertain and unascertainable---Agreement capable of being ascertained---Not void. Under section 29 of the Contract Act, it is only when the meaning of an agreement is not certain or capable of being made certain that the agreement becomes void.
When, therefore, the sellers told the buyers that each shipment shall be treated as if separate contracts were made for it and they shall be bound to accept it even if this shipment was only in respect of a part of the goods and the buyers agreed to this condition, the agreement is not void as it is capable of being ascertained.
Vague contract---When not enforceable: Section 29 is based upon the principle that the contracting parties must be shown to be at ad idem with reference to the essential terms of the contract and, therefore, if there is any vagueness or uncertainty incapable of being made certain the contract fails for vagueness. For, in that case the parties cannot be said to agree to the same thing in the same sense. Therefore merely because the terms of the arbitration agreement are capable of different and various interpretations it cannot ipso facto be liable to be struck down as void. It can only be regarded as void for uncertainty if its meaning is not certain or capable of being made certain as provided by section 29.
Terms of contract not ascertainable---Contract void and enforceable. Held: The document being incomplete, as its terms are not ascertainable with reasonable certainty, it comes within the mischief of section 29 and is void and by virtue of the provisions of S. 21 (a) of the Specific Relief Act cannot be enforced specifically.

Wagering agreements (sec. 30)

Agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wage is made

Agreement by way of wager void: (Sec. 30) Agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to be won on any Wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made.

Exception in favour of certain prizes for horse-racing: This section shall not be deemed to render unlawful a subscription or contribution, or agreement to subscribe or contribute, made or entered into for or toward any plate, prize or sum of money, of the value or amount of five hundred rupees or upwards to be awarded to the winner or winners of any horse-race.

Section 294-A of the Pakistan Penal Code not affected: Nothing in this section shall be deemed to legalise any transaction connected with horse racing, to which the provisions of section 294-A of the Pakistan Penal Code apply.

Agreements contingent on impossible events void (sec 36): ---Contingent agreements to do or not to do anything, if an impossible event happens, are void, whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made.

Illustrations

(a) A agrees to pay B 1,000 rupees if two straight lines should enclose a space. The agreement is void.
(b) b) A agrees to pay B 1,000 rupees if B will marry A's daughter C. C was dead at the time of the agreement. The agreement is void.

(c) The two last foregoing sections explain themselves. We note that somewhat similar provisions as to transfers of property made subject to conditions occur in the Transfer of Property Act, 1882, see especially Ss. 25-34. A conditional transfer of property, though it may be, and often is, made in pursuance of a contract, is not, of course, itself a contract. It was therefore necessary to lay down distinct and independent, though more or less analogous, rules for such transactions.

Agreements to do impossible acts (sec. 56)
An agreement to do an act impossible in itself is void.

Contingent Contract (Sec. 31)
Contingent contract shall be explained in detail in later discussion on the topic.
A contingent contract is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen.

Illustrations:

M/S ABC insurance company contracts with Mr. Z to pay Rupees 500,000 if his car is lifted by thieves.

Contract between the client and his counsel regarding payment of agreed professional fee if the suit turns out to be successful would also come under the ambit contingent contract.

LESSON 13

CONTINGENT CONTRACTS & PERFORMANCE OF CONTRACTS

"Contingent contract" has been defined in section 31 of the Contract Act which is reproduced below:

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

Illustrations:

- M/S ABC insurance company contracts with Mr. Z to pay Rupees 500,000 if his car is lifted by thieves.
- Contract between the client and his counsel regarding payment of agreed professional fee if the suit turns out to be successful
- Contracts to pay B Rs. 10,000 if B's house is burnt.

Scope of Contingent contract

1. Contingency to be collateral to the contract
2. Contingency to be condition precedent
3. Contingent contract leads to absolute obligations and enforceable in the following circumstances:

On happening of the event; or

On fulfillment of condition stipulated.

Condition must be fulfilled completely and absolutely.
If the condition in a contingent contract is not fulfilled the contract is not enforceable.

Contingency dependent on act of party

Words (if promise amount to no promise at all) if their operation is expressed to be dependent, in terms of effect, on the mere will and pleasure of the promiser, as if a man says that for a certain service he will pay whatever he himself thinks right or reasonable. But the operation of a promise may well be dependent on a voluntary act other than a mere declaration of the promiser's will to be bound. The act may be that of a third person; thus a promise to pay what A shall determine is perfectly good. The act may also be that of the promiser himself, so long as it is not an act of more arbitrary choice whether he will be bound or not, as in the common case of goods being sold on approval, where the sale is not completed until the buyer has either approved the goods or kept them beyond the time allowed for trial.

On the same principle, if a clause in a contract provides that a party's disability to perform his promise shall be a cause for annulling the contract but shall give no remedy in damages; this does not apply to a disability brought about by the promiser's own conduct. A builder's right to recover for his work is often made conditional on the architect certifying that the work has in fact been done and properly done, and such a condition is good.

Conversely the operation of penal clauses in a contract may be made to depend not only on some default of one party, but on the decision of a person appointed by the other party that a default contemplated by the contract has taken place.

In some kinds of contracts, especially for the sale or letting of immovable property, clauses are commonly inserted expressly giving one or both of the parties an option to rescind the contract in specified events. In such cases, and in other cases where there is a complete anti active obligation from the first, though subject to be defeated by matter subsequent, it does not seem that the contract can properly be called contingent. A purchased B's land, and leased the same to him for a period of six years, there being a forfeiture clause on failure to pay rent on the due dates. It was also agreed that if B paid rent regularly, A would reconvey the land to B at the end of the six years. B failed to pay the rent regularly, and A., while waiving the right of re-entry, gave notice cancelling the agreement to recovery. In a suit lay B, for reconveyance, it was held that waiver of the right of re-entry, did not affect the contract of reconveyance, and that B, not having performed the condition precedent to his right to reconveyance, was not entitled to specific performance.

Requisites of contingent contract explained. Enforcement of contingent contract---Contended that contingent contracts cannot be enforced unless contingent event happens and that since appellants did not agree to execute a sale deed, contract of sale which was contingent upon such execution, could not be enforced---Contention repelled as being without any force---Held, agreement also provided that respondent shall have a right to obtain a sale deed through specific performance of contract and as such suit for specific performance did lie.

Enforcement of contracts contingent on an event happening: Sec 32 Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened. If the event becomes impossible such contracts become void.

Illustrations

(a) A makes a contract with B to buy B's horse if A survives C. This contract cannot be enforced by law unless and until C dies in A's lifetime.
(b) A makes a contract with B to sell a horse to B, at a specified price, if C., to whom the horse had been offered, refuses to buy him. The contract cannot be enforced by law unless and until C refuses to by the horse.
(c) A contracts to pay B a sum of money when B marries C. C dies without being married to B. The contract becomes void.
(d) Yasir makes a contract with Mr. Aslam to sell his car for Rs 600,000. If Mr. Akmal to whom he has already made the offer doesn't buy the said car. This contract cannot be enforced by law unless Mr. Akmal refuses to buy the car.

Explanation

There are some cases which may be dealt with either under this section or Section 56, for it may be equally true to say that performance of a material part of the contract has become impossible and that the contract was made on the contingency of an event which has become impossible; or it may be hard at first sight, at any rate to say which section is the more applicable.

Whether a contract is of the kind specified in this section may be a question of fact or construction. In one case where this section was relied upon, the Privy Council held, on the construction of the document, that it operated as an unconditional undertaking on the defendant's part to procure a loan and out of the loan to repay the money due to the plaintiff.

Performance of contracts

Obligation of the parties to a Contract--sec. 37
The parties to a contract must either perform, or offer to perform, their respective promises, unless such promises are dispensed with or excused under the provision of this Act, or of any other law.
Promises bind the **representatives** of the Promisor in case of death of such promisors before performance, unless a contrary intention appears from the contract.

Illustrations

(a) A promises to deliver goods to B, on a certain day on payment of Rs. 1,000. A dies before that day. A's representatives are bound to deliver the goods to B, and B is bound to pity the Rs. 1,000 to A's representatives.

(b) A promises to paint a picture for B by a certain day, at a certain price. A dies before the day. The contract cannot be enforced either by A's representatives or by B.

(c) Mr. X promises to deliver goods to Mr. Z on a given date against payment of specified amount. The Promisor, Mr. X dies before the specified date for delivery of goods. The representatives of Mr. X shall be bound to deliver the goods to Mr. Z and Mr. Z shall be bound to pay the agreed amount to the representatives of Mr. X

Enforceability dispensed with –A contract of payment of Rs. one million by B to A on arrival of ship. The ship was sunk before arrival, enforceability dispensed with.

Explanation

Performance and discharge:

A contract, being an agreement enforceable by law (Section. 2) creates a legal obligation, which subsists until discharged. Performance of the promise or promises remaining to be performed is the principal and most usual mode of discharge.

Succession to benefit of contract: ---Neither the present section nor anything else in the Act lays down any rule as to the manner in which or the extent to which persons other than the original promisee may become entitled to enforce a promise. Generally to representatives of a deceased promisee may enforce subsisting contracts with him for the benefit of his estate An architect's executor, for example, cannot insist on completing an unfinished design, even if he is a skilled architect himself; and accordingly he cannot fulfill the conditions on which payment, or further payment, as the case may be, would have become due. But a builder's executors may be entitled and bound to perform his contracts for ordinary building work, for they have only to procure workmen of ordinary competence, and similarly in other cases. It is to be remembered that all rules of this kind are in aid of the presumed intention of the parties, and if the parties have expressed a special intention it must prevail.

Payments actually earned and due to a man before his death, though for services of a confidential or personal kind, is a portion of his estate as much as any other debts, and accordingly his representatives succeed to his right of action for them, and may recover them. This is indeed, as a general proposition, elementary, though doubts may be raised on particular facts as to what were exactly the rights required by an original contracting party in his lifetime. The same rule applies to rights of action for conventional damages or penalties. But a cause of action for damages of injuries of a merely personal nature, though arising out of a breach of contract, cannot be sued upon by or against executors. A contract to pay a certain sum of money to a near relative during his life, the consideration being natural love and affection and the document being registered, is enforceable against the heirs of the deceased promisor, by virtue of Section 25 (1) read with Section 37, unless a contrary intention appears.

The rights of an insolvent debtor's assignees to sue on his contracts depend, of course, on statute; but in the absence of more specific provisions they are governed by the same principles as an executor's.

A covenant in a deed of sale giving on option of pre-emption without any limit of time to the vendor and his heirs from the purchaser and his heirs is void as offending the rule against perpetuities.

Assignment of contracts:

The, benefit of a contract can be assigned, but not the burden, subject to the same exception of strictly personal contracts that has been mentioned as affecting the powers and duties of executors. "Neither at law nor in equity could the burden of a contract be shifted off the shoulders of a contractor on to those of another without the consent of the contractee. A debtor cannot relieve himself of his liability to his creditor by assigning the burden of the obligation to some one else; this can only be brought about by the consent of all three, and involves the release of the original debtor... On the other hand, it is equally clear that the benefit of a contract can be. assigned, and wherever the consideration has been executed, and nothing more remains but to enforce the obligation against the party who has received the consideration, the right to

enforce it can be assigned, and can be put in suit by the assignee in his own name after notice....There is, however, another class of contracts where there are mutual obligations still to be enforced, and where it is impossible to say that the whole consideration has been executed. Not that the burden of a contract can ever really be assigned, but sometimes it may be discharged by a delegated performance (in which case it does not matter to the promisee what are the exact relations of agency or otherwise between the promisor and his delegate), and sometimes not.

The Contract Act has no section dealing generally with assignability of contracts. A contract which, under section 40, is such that the promisor must perform it in person has been held not to be assignable. "When considerations connected with the person with whom a contract is made form a material element of the contract, it may well be that such a contract on that ground alone is one which could not be assigned without the promisor's consent, so as to entitle the assignee to sue him on it"

A contract for the future delivery of goods can be assigned under the law; that is, if A agrees to sell, say, rapeseed, cotton or gunny bags to B, deliverable at a future day, whether either party can assign the contract Without the consent of the other, while the contract is still executory, so as to enable the assignee to maintain an action in his own right and in his own name.

An actionable claim is defined in Section 3 of the Act as a claim to any debt (except secured debts), or to any beneficial interest in movable property not in the possession, either actual or constructive, of the claimant, whether such debt or beneficial interest be existent, accruing, conditional or contingent. An actionable claim can always be assigned, but the assignment, to be complete and effectual, must be effected by an instrument in writing; and upon the execution of such instrument all the rights and remedies of the assignor vest in the assignee, who may thereupon sue in his own name without making the assignor a party to the suit.

An option to repurchase property sold in prima facie assignable, but the contract may be so worded as to show that it was to be personal to the grantee and not assignable.

Purchaser not fulfilling his obligation---Contract of sale terminated by seller---Seller can retain earnest money to the extent of damages suffered by him---No evidence of such damages produced---Earnest money must be refunded.

Condition attached to the contract part of consideration for contract---Contract is not contingent contract. Where the term in the contract of sale is to the effect that on registration of the document after taking permission, the defendants would take the balance of Rs. 1,300 from the plaintiffs and that plaintiffs would pay this amount at that time. The condition to take permission is not collateral to the contract, but forms part of the consideration of the contract. Therefore the contract cannot be regarded as contingent.

Rule of law regarding---Held: Contract to be brought into existence at least by two parties---Held further: Termination of contract being converse of its creation, principle demands that it should not be recognised unless this is what both parties intend.

Performance of contract---Plaintiff not only failing to prove that he was prepared to perform his part of contract but in fact not performing his part of contract at all-Held: He was not entitled to any relief and three Courts below were right in non-suiting him.

Mutual obligations in contract---Contract is considered performed only when respective obligations have been fulfilled. A contract which places mutual obligations on the contracting parties cannot be treated as wholly executed until the respective obligations have been discharged. Thus, in a contract for the supply of goods the contractor has to make the supplies and the other contracting party has to make payments for the said supplies and until the payments have been made the contract is not at an end and the liability arising under the said contract is still subsisting. If the contract has been wholly performed,

that is to say, the supplies made and payments received, then there is nothing outstanding and no question of any liability occurring thereunder arises.

Contract, performance of---Insurance---Fire policy---Appellant an insurance Company undertaking to compensate respondents a transport Company in event of goods stored in respondent's godown being destroyed by fire---Fire breaking out in respondent's godown and goods stored burnt down---Respondents examining consigness of goods, such persons producing vouchers and receipts showing goods and value of goods transported by them to respondents, delivery of which not taken when fire broke out---Respondents examining all available evidence to show goods having been transported to respondent's godown and same having been gutted by fire---Such versions as well as value given by witnesses not challenged by appellants---Respondents also examining a Surveyor, appointed by appellants and such person deposing to have been appointed by appellants, that he visited site only after two days of incident of fire examined actual damage to consignment, and estimated loss caused to respondents---Appellants, due to report of such Surveyor being not favourable to them allegedly appointing another Surveyor after four months but such Surveyor not produced in Court as witness---Versions of such second Serveyor, belated, inconclusive, and hardly carrying any weight in circumstances and not preferable to report of first Surveyor---No evidence produced by appellants in rebuttal---Claim, held, proved and appellants rightly found liable to extent of insurance cover.

Consequence of refusal to accept offer for performance: Section 38:
Where a Promisor has made an offer of performance to the Promisee, and the offer has not been accepted, the Promisor is not responsible for non-performance, nor does he thereby loses his rights under the contract.
Every such offer must fulfill the following conditions:

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

If the offer is an offer to deliver anything to the Promisee, the Promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the Promisor is bound by his promise to delivery.
An offer to one of several joint promises has the same legal consequences as an offer to all of them

Illustration
X enters into a contract on 1st July 2007 to supply 1000 tons of rice to Y at his warehouse duly specified in the contract. X should ensure to make available the specified quantity of rice on due date under such circumstances that Y has reasonable opportunity to satisfy himself regarding the quantity and quality of the rice.

LESSON 14

PERFORMANCE OF RECIPROCAL PROMISES

Performance of Contract

Refusal by a party to perform under the contract –effect thereof: Section 39

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.

Illustrations

(a) A, a singer,-enters into a contract with B, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and B engages to pay her 100 rupees for each night's performance: On the sixth night A willfully absents herself from the theater. B is at liberty to put an end to the contract.

(b) A, a singer, enters into a contract with B, the manager of a theatre, to sign at his theatre two nights in every week during the next two months, and B engages to pay her at the rate of 100 rupees for each night. On the sixth night A willfully absents herself. With the assent of B, A signs on the seventh night. B has signified his acquiescence in the continuance of the contract, and cannot now put an end, to it, but is entitled to compensation for the damage sustained by him through A's failure to sing on the sixth night.

(c) Mr. X a cricket player enters into contract with cricket board to play 5 tests and 4 one day international matches as per schedule against payment of agreed amount. Mr. X willfully refuses to play in second one day international. The cricket board has a right to put an end to the contract.

Explanation

Refusal to perform contract: As to failure in performing other particular terms of a contract, no positive general rule can be laid down as to its effect. The question is in every case whether the conduct of the party in default is such as to amount to an abandonment of the contract or a refusal to perform it, or having regard to the circumstances and the nature of the transaction, to evince an intention not to be bound by the contract. It seems, however, with great submission, that the intention which is material is not that with which the contract is broken, but that with which it was made. Parties can undoubtedly make any term essential or non-essential; they can provide that failure to perform it shall discharge the other party from any further duty of performance on his party, or shall not so discharge him, but shall only entitle him to compensation in damages for the particular breach. Omission to make the intention clear in this respect is the cause of the difficulties, often considerable, which the Courts have to overcome in this class of cases.

It may be further observed, with regard to the illustrations, that it would be rash to extend them. In reading the illustrations to the Act, so far as they bear on questions of construction, it must be assumed that there are not any terms beyond those stated; the agreements tact with in practice will almost always contain special terms, which must be considered.

There is nothing in this section to confine it to anticipatory refusals; it includes refusal to perform any substantial part of the contract which remains to be performed. But a merely conditional refusal withdrawn before the time for performance cannot be treated by the other party as final. It has been held the section applies only when the contract is still executory, and the time for performance has not yet arrived. This is effect restricts, the section to cases of anticipatory breach, or cases of continuing contracts under which obligations remain to be performed, such as installment contracts.

Where two transactions are separate, the repudiation of one cannot affect the other.

A buyer who has refused to receive goods on the ground that they were not tendered within the agreed time cannot afterwards change his ground and raise the objection that in fact the goods were not according to contract; for the election to rescind, once made, is conclusive.

It may be worth while to add that an unsuccessful attempt to perform a contract which does not disable the promisor from still performing it effectually within the time limited, or a reasonable time, and does not cause any damage to the promisee, cannot be treated as a refusal. Such an attempt does not itself affect the legal rights of the parties at all.

"Disabled himself from performing"---Disability due to the party's own fault must be distinguished from inability to perform a contract. See Specific Relief Act, S. 14, as to the effect of inability of a party to perform the whole of his part of a contract. See also S. 24 of the same Act, which enacts, amongst other things, that specific performance of a contract cannot be enforced in favour of a person who has become "incapable" of performing any essential term of a contract that on his part remains to be performed.

It is very old law that if a promisor disables himself from performance, even before the time for performance has arrived; it is equivalent to a breach.

"Promisee may put an end to the contract."---The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstances which would justify him in declining to complete it.

On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss." When the promisee has so determined his choice, then, whether he sues for damages or not, it is not open to the promisor to go back on his refusal and treat the contract as subsisting. Similarly if he freely and with full knowledge elects not to accept the repudiation, he cannot go back on this election, and sue before the date of performance has arrived. If the law lays down a particular form in which repudiation must take place, it is not open to the promisee to put an end to the contract in any other way.

Arbitration clause: ---When a contract is terminated by acceptance of the repudiation, an agreement to refer all disputes to arbitration does not become void.

Measure of damages: ---The measure of damages for "anticipatory breach" is not necessarily the same as it would be for a failure or refusal occurring at the time when performance was due. The injured party is under an obligation to take, all reasonable steps to mitigate the loss flowing from the breach.

Insolvency of promisor: ---This is not of itself equivalent to a total refusal to perform the contract, though it may be accompanied by conduct which amounts to a notice of the insolvent debtor's or his representative's intention not to pay his debts or perform his contracts. A seller, however, is not bound to go on delivering goods to an, insolvent buyer.

Contract of sale---Breach---Subject of contract sold away to third party---If repudiating party can rely on arbitration clause in the contract. Where there was an agreement to sell a Textile Mill to a party but the mill was sold to another party. The party which repudiated the contract relied on the arbitration clause in the agreement and wanted the matter to be referred to arbitration. It was contended that as the

contract had been repudiated and the dispute had not arisen out of the performance of the contract the arbitration clause had ceased to be effective.

Held: The repudiating party is not prevented from invoking the arbitration clause in the contract for the purpose of setting all questions to which his repudiation has given rise to. It is not correct to say that the arbitration clause will be given effect in the agreement but not when the contracts ended by something with reference to the agreement.

Breach of condition, waiving of---An insurer can waive breach of condition in writing or orally.

Cover not---Loss of goods---Responsibility of insurer---Loss occurring during course of cover note---Insurer, held, would be responsible for such loss.

Refusal of buyer to pay contract price---Repudiation of contract---Seller may claim damages for breach of contract without doing anything further. The price in a contract is amongst other things the foundation of it and if a buyer refuses to pay the contracted price it is putile for him to say that he was not repudiating the contract. Therefore the refusal of the buyers to pay the contracted price would amount to repudiation of the, contract, entitle the sellers to put an end to it and claim damages tender the law of contract. Once a buyer repudiated the price it would not be necessary for the seller to go about doing things for the performance of the Contract and produce the required quantity of the goods. Upon such repudiation they would be entitled to treat this as an anticipatory breach and put an end to the contract and claim damages if they were so entitled.

Suit for cancellation of contract---Where may be filed. Where a contract is entered into at K but the actual work is to be performed at R, and it is at R that one of the parties is guilty of a breach of contract, it was contended that the other party could bring a suit for cancellation of contract and rendition of accounts only at K.

Rescission---Repudiation of contract, held, must be total, absolute and clear.

By whom contract to be performed (Section 40):
If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the Promisor himself, such promise must be performed by the Promisor. In other cases, the Promisor or his representatives may employ a competent person to perform it.

Illustration: A contract between **X** and **Y** for the sale/ purchase of goods. **X** being a seller is required to deliver the goods at the agreed place and according to the time fixed for delivery against payment of the agreed amount by **Y.** In case **X** dies before the fixed time, it is the duty of the representatives to perform the promise or to engage some other person for the performance of the said promise.

Illustration: Mr. Aslam enters into a contract with Mr. Zaighum, a renowned painter for painting the picture of a monument. In this case Mr. Zaighum must perform; he cannot assign this responsibility to some other person.

Person by whom promise is to be performed---If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself, such promise must be performed by the promisor. In other cases the promisor or his representatives may employ a competent person to perform it.

Additional Illustrations

(a) A promises to pay B a sum of money. A, may perform this promise either by personally paying the money to B, or by causing it to be paid to B by another; and, if A, dies before the time appointed

for payment, his representatives must perform the promise, or employ some proper person to do so.

(b) A, promises to paint a picture for B, A must perform this promise personally.

Explanation

Personal contracts: ---Contracts involving the exercise of personal skill and taste, or otherwise founded on special personal confidence between the parties, cannot be performed by deputy. But it is not always easy to say whether a particular contract is, in this sense, personal or not, or what is an adequate performance of a personal contract.

A contract for personal agency or other service entered into with partners is generally determined by the death of a partner, or it may be more accurate to say that it is not held to continue with the surviving partner unless there is something to show a distinct intention to that effect. On the other hand, a contract with a firm which has nothing really personal about it so far as regards the partners, for example, a contract to perform at a music-hall belonging to the firm, is not generally determined by the death of one member of the firm, especially if the individual members of the firm were not named in the contract and not known to the other party. Every case must really be judged on its own circumstances.

Accepting performance from third person—effect thereof (section 41)
When a Promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the Promisor.

Example: if a consignee under the contract recovers the loss from an insurance company, he does not have the right to sue the supplier of goods for the loss/ damages caused to him.

Concept of joint liabilities (section 42)
When two or more persons have made a joint promise, then unless a contrary intention appears by the contract, all such persons during their joint lives, and after the death of any of them, his **representative** jointly with the survivor or survivors, and after the death of last survivor, the **representatives** of all jointly, must fulfill the promise.

Illustrations:

1. Mr. Aslam, Mr. Yasir and Mr. Usman jointly promise to pay Rs. 100,000 to Mr. Kamal. Mr. Kamal has a right to demand the said amount either from Mr. Aslam or Mr. Yasir or Mr. Usman.

2. Mr. Aslam, Mr. Yasir and Mr. Usman jointly promise to pay Rs.150,000 to Mr.Omar. Mr. Usman is compelled to pay the entire amount of Rs 150,000. Mr. Aslam has been declared insolvent by court of law but his assets are sufficient to pay 1/3rd of the debt. Mr. Usman is entitled to receive Rs. 50,000 from the estate of Mr. Aslam and 50,000 from Mr. Yasir.

3. Mr. Aslam, Mr. Yasir and Mr. Usman have jointly promised to pay Rs. 300,000 to Mr. Omar. Mr. Aslam is unable to pay any amount and Mr. Yasir is compelled to pay the entire amount. Mr. Yasir is entitled to receive Rs 150,000 from Mr. Usman.

4. Mr. Aslam, Mr. Yasir and Mr. Usman have jointly promised to pay Rs. 900,000 to Mr. Omar. Mr. Aslam and Mr. Yasir are also the sureties for Mr. Usman. Mr. Usman fails to pay then Mr. Aslam and Mr. Yasir are compelled to pay the entire amount. Mr. Aslam and Mr. Yasir have the right to recover the amount from Mr. Usman.

Devolution of joint liabilities: (Sec. 42): ---When two or more persons have made a joint promise, then, unless a contrary intention appears by the contract, all such persons, during their joint lives, and after the death of any of them, his representative jointly with the survivor or survivors, and after the death of the last survivor, the representatives of all jointly, must fulfill the promise.

Regarding Time of performance Section 46
Where, by the contract, a Promisor is to perform his promise without application by the Promisee, and no time for performance is specified, the engagement must be performed within a reasonable time the question "what is a reasonable time" is, in each particular case, a question of fact.

Time for performance of promise where no application is to be made and no time is specified: --- Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.

Explanation: ---The question "what is a reasonable time" is, in each particular case, a question of fact.

Engagement: ---The word "engagement" in this section is a survival from the language of the Original draft, in which, for some reason not easy to understand, it is constantly used instead of "agreement" or "promise." Here it is synonymous with "promise".

Reasonable time: ---It is difficult to understand why decisions should be reported on the question of what is a reasonable time, which is declared by the Act itself to be always a question of fact; but, having been reported, they must be mentioned.

Breach of contract (sec. 46 & 73) ---Party not bound to allow other party time to perform the contract even when time is not the essence of the Contract---Damages. The maps printed by the defendant under the contract were not according to specification and were rejected by the plaintiff. The plaintiff did not allow the defendant to print fresh maps, and claimed damages.

Held; if goods are not according to specification, the buyer can reject them and that with his rejection the contract comes to an end.

The plaintiff, therefore, had a right of repudiating the contract and no question of reprint arises.

Sale of land (sec 46) ---Time is not of the essence of the contract of sale. Ordinarily time is not of the essence of the contract in an agreement for sale of land.

LESSON 15

PERFORMANCE & DISCHARGE OF CONTRACTS

Different aspects of performance and discharge of contracts have been explained in the following paragraphs.

Regarding Time and place for performance of Promise-- Section 47
When promise is to be performed on a certain day, and the Promisor has undertaken to perform it without application by the Promisee, the Promisor may perform it at any time during the usual hours of business on such day and at the place at which the promise ought to be performed

Illustration

A promises to deliver goods at B's warehouse on the 1st January. On that day A brings the goods to B's warehouse but after the usual hour for closing it, and they are not received. A has not performed his promise.

Absence of time---Mere absence of time in fulfillment of contract, does not rob contract of its basic characteristics.

Time cannot be made essence of contract by unilateral action---Whenever time made essence of contract, court, held, to look into circumstances of time proposed by one or other party reasonable one and particularly higher duty devolves where subject-matter is substantial and very valuable.

Time essence of contract--In cases of sale of land, a party can make time essence of contract but only by giving a notice it) other side, in case that other side is guilty of undue delay in performance of contract in a reasonable time.

Place for performance of promise-- Section 49
When a promise is to be performed without application by the Promisee, and no place is fixed for the performance of it, it is the duty of the Promisor to apply to the Promisee to appoint a reasonable place for the performance of the promise, and to perform it at such place.

Illustration

A undertakes to deliver a thousand maunds of jute to B on a fixed day. A must apply to B to appoint a reasonable place for the purpose of receiving it, and must deliver it to him at such place.

Place of payment of debt. It is the duty of the debtor to find out the creditor, and where the parties have not stipulated the place of the discharge of the debt it will be presumed that the amount will be paid at the place of the creditor.

Payment to creditor---Debtor must make payment where creditor is found. If the contract does not stipulate to the contrary, then it is the duty of the debtor to find out the creditor and to make payment at the place where he resides.

Reciprocal Promises: Section 51
When a contract consists of reciprocal promises to be simultaneously performed, no Promisor need to perform his promise unless the Promisee is ready and willing to perform his reciprocal promise.

Illustrations

(a) A and B contract that A shall deliver goods to B to be paid for by B on delivery.
(b) A need not deliver the goods unless B is ready and willing to pay for the goods on delivery.
(c) B need not pay for the goods unless A is ready and willing to deliver them on payment.

A and B contract that A shall deliver goods to B at a price to be paid by installments, the first installment to be paid on delivery. A need not deliver unless B, is ready and willing to pay the first installment on delivery. B need not pay the first installment unless A is ready and willing to deliver the goods on payment of the first installment.

Agreement regarding sale/Purchase of goods: Seller has to deliver goods and purchaser to pay the amount simultaneously as per agreement.

Explanation

Simultaneous performance: ---This section expresses the settled rule of Law. To understand the principle rightly,: we must remember that in a contract by mutual promises the promises on either side are the consideration, and the only consideration, for one another. But the terms of a promise may express or imply conditions of many kinds; and the other party's performance of the reciprocal promise, or at least readiness and willingness to perform it, may be a condition. It is obviously immaterial whether it is called a condition or not, if in substance it has that effect. To say "I will' pay when you deliver the goods" is more courteous than to say "If you do not deliver the goods in a reasonable time you will not be paid"; but "when" implies "if', and the result is the same. And if it appears on the whole from the terms or the nature of the contract that performance on both sides was to be simultaneous, the law will attach such a condition to each promise, with the operation laid down in the present section.

Performance of one party's promise may have to be completed or tendered before he can sue on the other's reciprocal promise. In that case it is said to be a condition precedent to the right of action on the reciprocal promise.

Where the performances are intended to be simultaneous, as supposed in this section (goods to be delivered in exchange for cash or bills, and the like), they are said to be concurrent conditions, and the promises to be dependent. Observe that concurrent conditions are only a modified form of conditions precedent.

Promises which can be enforced without showing performance of the plaintiff's own promise, or readiness or willingness to perform it, are said to be independent.

In order to apply the rule of this section we must know whether the promises are or at not "to be simultaneously performed." This is a question of construction, depending on the intention of the parties collected from the agreement as a whole.

Where goods are sold for "cash on delivery," and the vendor delivers a portion of the goods, and the purchaser offers to pay the price thereof if certain cross-claims set up by him are adjusted, it cannot be said that he is not ready and willing to perform his promise, so as to entitle the vendor to refuse delivery of the remaining goods.

Contract to deliver goods by installments and payment of price for them: ---Price of first installment not paid---Breach of contract---Non-delivery of further installments justified. Where according to a contract goods were to be delivered, by one party in installments and they were to be paid for by the other party as per delivery. The latter did not pay for the first installment whereupon the delivery of further installments was not made and the contract was rescinded. It was held that the party who did not pay the price on the delivery of goods was guilty of the breach of contract, so that the seller was justified in rescinding the contract on the ground that there was a likelihood of the non-payment of price if any subsequent delivery is made.

Willingness to perform the contract by purchaser: ---What is intention to purchase and capacity to purchase important. Willingness to perform one's contract in respect of purchase of property implies the capacity of the purchaser to pay the requisite sale consideration within a reasonable time. In the second place even if a purchaser had the capacity to pay the requisite sale consideration, the question still remains whether he had the intention to purchase the property.

The capacity to pay the balance of sale consideration cannot be considered apart from the time when the sale consideration was payable.

Order of performance of reciprocal promises Section 52:
Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order, and, where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.

Illustration 1: Mr. Yasir enters into a contract with Mr. Faisal to construct a house according to the sight plan against the payment of the agreed amount. In this case, if not otherwise agreed, Mr. Yasir shall first perform his part of promise and then demand payment from Mr. Faisal, as per practice in such type of contracts.

Illustration 2: In the illustration above, if it is agreed that Mr. Yasir will construct the building on availability of material which is to be made available by Mr. Faisal. In this case Mr. Faisal shall have to make the material available after that Mr. Yasir shall perform his part of promise.

Illustration 3: A and B contract that A should build a house for B at a fixed price. A's promise to build the house must be performed before B's promise to pay for it.

Illustration 4: A, and B, contract that A shall make over his stock in trade to B at a fixed price; and B. promises to give security for the payment of money. A's promise need not be performed until the security is given, for the nature of the transaction requires that A should have security before he delivers up his stock.

Liability of party preventing performance: Sec. 53
When a contract contains reciprocal promises and one party to the contract prevents the other from performing his promise the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation from the other party for any loss which he may sustain in consequence of the non-performance of the contract.

Illustration

A and B contract that B shall execute certain work for A for a thousand rupees. B is ready and willing to execute the work accordingly, but A prevents him from doing so. The contract is voidable at the option of B; and, if he elects to rescind it, he is entitled to recover from A compensation for any loss which he has incurred by its non-performance.

Comments

Impossibility created by act of party: ---This is settled rule of law that no man can complain of another's failure to do something which he has himself made impossible. The principle is not confined to acts of direct or forcible prevention, which are neither frequent nor probable, but extends to default or neglect in doing or providing anything which a party ought under the contract to do or provide, and without which the other party cannot perform his part. A man agrees to sell standing wood; the seller is to cut and cord it, and the buyer to take it away and pay for it. The seller cords only a very small part of the wood, and neglects to cord the rest; the buyer may determine the contract and recover back any money he has paid on account.

If the prevention by default goes only to one particular term or condition of the contract, the party so prevented from fulfilling that term or condition is entitled to treat it as fulfilled, and insist on payment or other reciprocal performance accordingly; or if there was an agreed penalty in the contract for non-fulfillment, or an option to rescind the contract, the other party cannot take advantage of it.

Discharge of Contract

Modes of Discharge of Contract

A contract shall be treated to have been discharged in the following situations:

(a) By Performance

(b) By Impossibility of performance

(c) By Agreement of parties

(d) By Operation of law

(e) By Breach of contract

The above modes are discussed below:

Discharge by performance of contract:

Actual performance (sec. 37)

Obligation of parties to contracts (sec. 37): ---The parties to a contract must either perform or offer to perform, their respective promise, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law.

Promises bind the representatives of the promisors in case of the death of such promises before performances unless a contrary intention appears from the contract.

Illustrations

(a) A promises to deliver goods to B, on a certain day on payment of Rs. 1,000. A dies before that day. A's representatives are bound to deliver the goods to B, and B is bound to pity the Rs. 1,000 to A's representatives.
(b) A promises to paint a picture for B by a certain day, at a certain price. A dies before the day. The contract cannot be enforced either by A's representatives or by B.

Performance and discharge: ---A contract, being an agreement enforceable by law creates a legal obligation, which subsists until discharged. Performance of the promise or promises remaining to be performed is the principal and most usual mode of discharge, but there are several other modes.

Succession to benefit of contract.---Neither the present section nor anything else in the Act lays down any rule as to the manner in which or the extent to which persons other than the original promisee may become entitled to enforce a promise.

The rights of an insolvent debtor's assignees to sue on his contracts depend, of course, on statute; but in the absence of more specific provisions they are governed by the same principles as an executor's.

Tender of performance (sec. 38): -- it has been defined in section 38 of the Contract Act which is reproduced below:

Effect of refusal to accept offer of performance (section 38).---Where a promisor has made an offer of performance to the promise, and the offer has not been accepted, the promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract.

Every such offer must fulfill the following conditions: ---

(1) it must be unconditional;
(2) it must be made at a proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do;
(3) if the offer is an offer to deliver anything to the promisee, the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver.
(4) An offer to one of several joint promisees has the same legal consequences as an offer to all of them.

Essentials of valid tender

(a) The tender should be unconditional--There is no obligation on the counter party to accept a conditional tender.
(b) Tender to be made at proper time and proper place.
(c) Tender should be in entirety as per stipulations of the agreement.
(d) In case of tender relating delivery of goods, the Promisee should be provided opportunity to examine the goods according to the stipulations of the contract
(e) Tender must be offered to a person who is able to perform the promise under the contract
(f) Tender to be made to the Promisee or his agent
(g) In case of joint Promisee, tender can be made to any of the joint promisees.
(h) In case tender of money, the exact amount should be mentioned.

Illustration

A contracts to deliver to B at his werehouse, on the 1st March, 1997, 100 bales of cotton of a particular quality. In order to make an offer of performance with the effect stated in this section, A must bring the cotton to B's wherehouse, on the appointed day, under such circumstances that B may have a reasonable opportunity of satisfying himself that the thing offered is cotton of the quality contracted for, and that there are 100 bales.

Discharge by impossibility of performance of contract
Agreement to do impossible act (sec. 56)

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

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

Compensation for loss through non-performance of act known to be impossible or unlawful.---Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promiser must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.

Illustrations

(a) A agrees with B to discover treasure by magic. The agreement is void.
(b) A and B contract to marry each other. Before the time fixed for the marriage, A goes mad. The contract becomes void.
(c) A contracts to marry B, being already married to C, and being forbidden by the law to which he is subject to practise polygamy. A must make compensation to B for the loss caused to her by the non-performance of his promise.
(d) A contracts to take in cargo for B at a foreign port. A's Government afterwards declares war against the country in which the port is situated. The contract becomes void when war is declared.'
(e) A contracts to act at a theatre for six months in consideration of a sum paid in advance by B. On several occasions A is too ill to act. The contract to act on those occasions becomes void.

LESSON 16

MODES OF DISCHARGE OF CONTRACT

We have already discussed some modes of discharge of contract; the following modes are discussed in detail.

Discharge by impossibility of performance of contract
Agreement to do impossible act (sec. 56)

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

Illustration:

Yasir enters into an agreement with Mr. Faisal to discover gold mines by magic. The agreement is void.

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

Illustration regarding--Contracts to do act afterwards become impossible or unlawful:
Mr. Z an exporter enters into a contract with an importer in the foreign country for supply of certain goods at agreed price. The government in exporter's country before its performance imposes embargo on the export of the agreed product. The contract becomes void when this embargo is imposed.

Compensation for loss through non-performing of act known to be impossible or unlawful:

Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the Promisee did not know to be impossible or unlawful, such Promisor must make compensation to such Promisee for any loss which such Promisee sustains through the non- performance of the promise.

Illustration:
A international player enters into a contract with Hockey Club at an agreed package for one year and the player received an advance payment. The player was suffering from knee injury, According to doctors he could not play for two years. The player failed to play for the said club. The Promisor (player) should make compensation to the Promisee (Hockey Club) for any loss which the Promisee sustains through the non performance of the agreement..

Some more illustrations:

(a) A agrees with B to discover treasure by magic. The agreement is void
(b) A and B contract to marry each other. Before the time fixed for the marriage, A goes mad. The contract becomes void.
(c) A contracts to marry B, being already married to C, and being forbidden by the law to which he is subject to practise polygamy. A must make compensation to B for the loss caused to her by the non-performance of his promise.
(d) A contracts to take in cargo for B at a foreign port. A's Government afterwards declares war against the country in which the port is situated. The contract becomes void when war is declared.'
(e) A contracts to act at a theatre for six months in consideration of a sum paid in advance by B. On several occasions A is too ill to act. The contract to act on those occasions becomes void.

Comments:

Stoppage of work by strike: ---A strike of the workmen employed in executing work under a contract does not of itself make performance impossible for the purpose of this section.

Frustration of Adventure-War conditions: ---Subsequent authority, however, has made it clearer than ever that the literal possibility or otherwise of executing the agreement according to its terms is not an adequate test; it has to be considered whether performance according to the true governing intention of the parties remains possible. But a temporary interruption (such as requisition of a ship for transport of troops) does not necessarily determine the contract. There is no general rule (as suggested by some dicta) that it does not apply to a sale of unascertained goods.

Frustration by Total or Partial Prohibition: ---In a state of war many contracts are affected by performance or further performance becoming wholly or in part unlawful. This may be under the general rules against intercourse with the enemy, or may be the result of express executive orders issued under powers of emergency legislation. In principle the question is the same that we have noted above, whether the new state of things is such as the parties provided for or contemplated, and whether further performance, so far as the prohibition is not total, or when it is removed, would really be performance of the same contract. Compulsory suspension of an engineering contract on a large scale, in order to direct the labour to producing munitions of war, has been held to discharge the contractors. So, too a contract to deliver goods may be frustrated by emergency regulations restricting transport. Where after a contract has been made a notification regulating retail prices is passed and the notification does not make the performance of the contract impossible or unlawful, the parties are not discharged from the contract.

Without the promisor's default: ---It is clear that a party, who is himself responsible for the frustrating event, cannot maintain that the agreement is discharged under Section. 56.

Commercial impossibility: ---The impossibility referred to in the second clause of this section does not include what is called commercial impossibility. A contract, therefore, to supply freight cannot be said to become impossible within the meaning of that clause merely because the freight could not be procured except at an exorbitant price. So a contractor for bridge tolls has no legal claim for compensation against the District Board if a considerable part but not the whole of the traffic is prohibited by a Government ordinance, or if floods make it impossible to use the bridge for a substantial part of the contract period. A contracted to buy tapestry from B and stated that he intended to resell it in Australia. Imports to Australia were thereafter prohibited. A repudiated the contract. In a suit by B against A for damages, it was contended that the contract was frustrated.

"Becomes unlawful".---Where a truck owner agreed to carry bales of cotton, but both the owner's trucks were requisitioned by the military authorities and user thereafter would have been punishable, the contract was held to have been frustrated from the lime of the notice of requisition.

Illegal order of Government making contract impossible of performance---Contract does not become illegal. The unlawfulness contemplated by section 56 of the Contract Act is one which is the result of a valid law, or of a valid order made in exercise of lawful authority. Where the order which hindered the performance of the contract was illegal, the defendants could not place reliance on the District Magistrate's order to support their plea of frustration of the contracts in suit.

Prohibition of export without registration existing before contract---Goods contracted to be purchased for export---Absence of Registration No. for export not sufficient reason for avoidance of contract. Where the defendant was aware of the existence of the circular requiring Registration and in spite of it he entered into a contract, the plea that the bar came into force on and from 11th February before which their was no bar disqualifying the defendant to export for want of registration number he could not lift the goods, cannot be accepted. Further more, from the Exhibits filed in this case it is clear

the plea that the contract could not be fulfilled for the absence of the Registration Number cannot be allowed to defeat the contract; nor did the contract become void in the aforesaid circumstances.

Contract with Government for export of commodity---Delay in issue of export licence resulting in adverse market conditions in importing states---Contract not frustrated. Where a company entered into a contract with the Government for export of cotton but Government delayed the issue of export permit. In the meantime new crop came on the market in the countries to which the cotton was to be exported. The company claimed frustration of the contract by the Government. Held: These facts do not attract the doctrine of frustration. The breach of contract, if any, by the Government was waived. Extension was taken by the appellants to perform the contract. The evidence led by the appellants shows only that after extension was obtained they found that it was not possible to export these goods. This evidence is not enough to establish that the contract became void on account of frustration.

Agreement of sale---Price for sale becoming illegal after execution of contract---Contract becomes void. Where the payment of price at the contracted rate was forbidden by law after the agreement was executed and before it was performed. Such a case is clearly provided for under section 56 which renders the contract void.

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. In other words the section contemplates two kinds of impossibility namely physical impossibility and non-self-induced legal impossibility. The doctrine of frustration is founded on the theory of an implied term but in this case there being a clear provision it is not necessary for reading such an implied term into the contract. In the present case it cannot be denied that in view of the Martial Law Regulations the prices fixed under it at which the parties had agreed to supply the goods had become illegal and unlawful. Any one contravening its provisions would be guilty of a penal offence. Thus the contract for this reason was frustrated and in law it was not possible to perform it on the terms agreed upon between the parties. Since the contract had become impossible to perform no responsibility for non-performance of the contract could be placed on the respondents.

Acquisition by Government of land subject of agreement of sale---Agreement of sale is not frustrated---Price fixed by Government may be paid to vendee. ---Where there is an agreement of sale of land and subsequently before the completion of the sale, the Government compulsorily acquires the land; the contract of sale is not thereby frustrated. The vendor can enforce it. The vendee is in that case entitled to receive the compensation which the Government undertakes to pay to the owners of land.

Executory contract---No vested rights created by contract---Doctrine of frustration applies to contract on its becoming unenforceable. ---Where a contract of sale becomes unenforceable and void because of an amendment of law, and in the circumstances of the case the plaintiff's contract of lease, though lawful at the time when it was made, has been rendered impossible of performance by the operation of section 75-A of the Act over which the parties to the contract have no control. The said contract cannot be performed or specifically enforced except in violation of the absolute prohibition contained in section 75-A; the performance of that contract has, therefore, been rendered unlawful by the said section. Thus, the doctrine of frustration coming within the purview of the second paragraph of section 56 of the Contract Act comes into play in this case with the result that the plaintiff's contract of lease has become void and unenforceable.

Frustration---When doctrine is applicable. The question whether frustration of the contract occurs or not depends on the nature of the contract and on the events which have occurred. Therefore in each case the question for consideration will arise, "what was the common intention and a common purpose for entering into a contract anti whether that purpose and intention has been frustrated by supervening circumstances," and it is not permissible for a Court of law to imply a term which is not consistent with the express term of the contract merely on the ground that parties being reasonable men must be deemed to have provided for a particular event.

Discharge by agreement between the parties to a contract

An agreement between a creditor and debtor, contract shall stand discharged.

Discharge of contract by operation of law.

In case of insolvency of a party to a contract (Adjudicating a party as insolvent by a court of law.); or say by lapse of time under Limitation Act, contract shall stand discharged.

Discharge by breach of contract

"A breach of contract occurs when a party thereto renounces his liability under it, or by his own act makes it impossible that he should perform his obligations under it or totally or partially fails to perform such obligations."

The failure to perform or renunciation may take place when the time for performance has arrived or even before that, this is provided in section 39 of the Contract Act.

Section 39 is reproduced here under for reference.

"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"

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

Illustrations

(a) A, a singer,-enters into a contract with B, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and B engages to pay her 100 rupees for each night's performance: On the sixth night A willfully absents herself from the theater. B is at liberty to put an end to the contract.
(b) A, a singer, enters into a contract with B, the manager of a theatre, to sign at his theatre two nights in every week during the next two months, and B engages to pay her at the rate of 100 rupees for each night. On the sixth night A willfully absents herself. With the assent of B, A signs on the seventh night. B has signified his acquiescence in the continuance of the contract, and cannot now put an end, to it, but is entitled to compensation for the damage sustained by him through A's failure to sing on the sixth night.

Comments:

As to failure in performing other particular terms of a contract, no positive general rule can be laid down as to its effect. The question is in every case whether the conduct of the party in default is such as to amount to an abandonment of the contract or a refusal to perform it, or having regard to the circumstances and the nature of the transaction, to evince an intention not to be bound by the contract. It seems, however, with great submission, that the intention which is material is not that with which the contract is broken, but that with which it was made. Parties can undoubtedly make any term essential or non-essential; they can provide that failure to perform it shall discharge the other party from any further duty of performance on his party, or shall not so discharge him, but shall only entitle him to compensation in damages for the particular breach. Omission to make the intention clear in this respect is the cause of the difficulties, often considerable, which the Courts have to overcome in this class of cases.

There is nothing in this section to confine it to anticipatory refusals; it includes refusal to perform any substantial part of the contract which remains to be performed. But a merely conditional refusal withdrawn

before the time for performance cannot be treated by the other party as final. It has been held the section applies only when the contract is still executory, and the time for performance has not yet arrived. This is effect restricts, the section to cases of anticipatory breach, or cases of continuing contracts under which obligations remain to be performed, such as installment contracts.

Where two transactions are separate, the repudiation of one cannot affect the other.

A buyer who has refused to receive goods on the ground that they were not tendered within the agreed time cannot afterwards change his ground and raise the objection that in fact the goods were not according to contract; for the election to rescind, once made, is conclusive.

It may be worth while to add that an unsuccessful attempt to perform a contract which does not disable the promisor from still performing it effectually within the time limited, or a reasonable time, and does not cause any damage to the promisee, cannot be treated as a refusal. Such an attempt does not itself affect the legal rights of the parties at all.

"Promisee may put an end to the contract."---The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstances which would justify him in declining to complete it.

On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss." When the promisee has so determined his choice, then, whether he sues for damages or not, it is not open to the promisor to go back on his refusal and treat the contract as subsisting. Similarly if he freely and with full knowledge elects not to accept the repudiation, he cannot go back on this election, and sue before the date of performance has arrived. If the law lays down a particular form in which repudiation must take place, it is not open to the promisee to put an end to the contract in any other way.

Measure of damages: ---The measure of damages for "anticipatory breach" is not necessarily the same as it would be for a failure or refusal occurring at the time when performance was due. The injured party is under an obligation to take, all reasonable steps to mitigate the loss flowing from the breach.

Situations where a party has lawful excuse for not performing his contractual obligations:

- Performance becomes impossible
- Promisor tenders performance but rejected by the promisee
- One party has made it impossible for the other party to perform.
- The parties have by agreement permitted non performance.
- The promisee has accepted partial performance as the performance of the whole contract.

Consequences of breach of contract:
Compensation for loss or damage caused by breach of contract Sec. 73:
when a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. Such compensation is not to be given for any remote

Compensation for failure to discharge obligation resembling those created by contract:
When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

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

Illustration 1:
Mr. Z (seller) enters into a contract with Mr. Y a purchaser for sale of specified goods as per stipulations of contract. Mr. Z breaks his promise; Mr. Y is entitled to receive from Mr. Z a particular amount as compensation.

Illustration 2:
Mr. Z enters into a contract with a M/S ABC transport company to provide him transport for supply of consignment at different places. The payment to the transport company on account of freight was to be made on making the supplies at given destinations. M/S ABC fails to provide the transport. Z is entitled to recover the compensation on account of inconvenience and expenses

Illustration 3:
Mr. Umer contracts with Mr. Akram to buy his car for Rs 800,000. Mr. Umer breaks his promise. Mr. Akram is entitled to receive compensation from Mr. Umer the excess amount, if any, of the contract price which Mr. Akram can obtain for the said car at the time of breach of contract.

LESSON 17

BREACH OF CONTRACT

We have already discussed the compensation for failure to discharge obligation resembling those created by contract and explanation thereof, the same is reproduced below for reference.

Remedies for breach of contract

Following remedies are available to the aggrieved party:

- Suit for damages: Sec. 73
- Suit for compensation-- Party rightfully rescinding contract entitled to compensation: Sec 75
- Suit for specific performance
- Suit for Injunction

Suit for damages: Sec. 73

Damages are meant to restore the aggrieved party to the position he would have been if the agreement would have been performed and damage suffered is compensated by way of monetary award. In case of breach of contract the aggrieved party has a right to file suit for damages.

Damages---Principles to be followed when there is no available market to ascertain price of goods at time of breach of contract---Court would not be justified in resolving question of damages in such cases by applying rule of thumb after refusing to accept evidence of resale of goods produced by plaintiff.

Loss recoverable by aggrieved party---Defaulting party would be liable to compensate aggrieved party for imputed as against actual knowledge of loss likely to result from breach of contract.

Compensation for the breach of contract: Assessment of---Held: Compensation for loss and damage caused to aggrieved party by alleged breach naturally arising in usual course of thing or which parties knew when they made contract to be likely to result from breach to be (legally) recoverable under S. 73 of Contract Act---Remote or indirect damages, however, not to be taken into account---Held further: Amount of damages recoverable to be governed by actual damage sustained in consequences of defendant's act---In cases admitting proof of such damages amount must be established with reasonable certainty---Absolute certainty, however, not to be required nor in all cases direct evidence as to amount to be necessary.

Breach of contract, responsibility for---Determination of---Letter of resignation by plaintiff set up as a bar to breach of contract on part of defendants---Effect---Where letter of resignation was procured by defendants after violating original contract of employment of plaintiff by pressing him to do a job other than the one and inferior in status to the job for which he was employed, defendants, held, had already broken the contract and refusal of plaintiff to work whether through resignation or otherwise could not be said to be unjustified.

Breach of contract---Damages for---Claim for overtime work and leave salary whether sustainable--Claim for overtime and leave salary being too remote and anticipatory and as claim for such emolument would depend on chance and uncertain opportunities, same held, could not be entertained.

Breach of contract, proof of---Plaintiff taken abroad by defendant establishment .in the category of mechanic--.Plaintiff's category of employment changed in breach of terms of contract and his salary reduced---Plaintiff left employment and on return back to country filed suit for damages for breach of contract---None of the persons who allegedly changed the card and category of employment of plaintiff having been examined, the denial thereof by a witness who was not at the spot at the relevant time, held, was nothing but hearsay evidence which could not inspire any confidence---Plea of plaintiff that his category of employment was changed arbitrarily remained unshaken in circumstances.

Breach of contract---Default of payment of price of goods supplied---Order for supply of goods placed on plaintiff by contesting defendant, to be supplied at place of business of ex parte defendant---Plaintiff performed his part of contract and demanded payment---Defendants filling to pay price for the supplied consignment---On plaintiff's suit for recovery of amount, contesting defendant taking pica that there was no privity of contract between him and the plaintiff---Liabilities of contesting defendant---Extent---Contesting defendant neither claiming in his letters written to plaintiff for supply of goods, that he was placing such order on behalf of ex parte defendant nor placing any document on record to show that in fact ex parte defendant had placed order which was conveyed by contesting defendant to plaintiff---Use of words "our company" by contesting defendant in one letter and describing such company as "his associate" in another letter; held, would indicate that contesting defendant was not an indenting agent but was associate of ex parte defendant on his own admission---In absence of any clarification by using the word "our order", manner in which instruction regarding quality, quantity and mode of payment had been given by contesting defendant there would be no doubt left that plea of such defendant to be a mere indenting agent was an afterthought---Privity of contract between plaintiff and contesting defendant thus, was proved on record.

Damages for breach of contract against person procuring breach and declaration that contract subsists---Not alternative reliefs---Damages cannot be granted if declaration is given.---Where a party sues the Principal for a declaration that his contract of agency subsists and also another person for damages for procuring the breach of contract between him and his principal. The two reliefs are not alternative reliefs. Therefore, if the declaration asked for is given, the other relief cannot be granted.

Breach of contract of sale---Suit for damages---Limitation starts from date of breach of contract and not from date of resale of goods: In a case of breach of contract of sale, the cause of action arises from the breach of contract and this happened when the defendants failed to pay and take delivery of the goods. The ascertainment of the actual amount of damages from the re-sale does not give a fresh start of limitation. Ascertainment of damages must be distinguished from the breach of contract and it is the latter which provides the cause of action.

Damages for breach of contract---Rate of exchange of currency must be calculated as on the date of breach: ---For the purpose of calculation of damages for breach of contract by a local firm against a foreign firm, the rate of exchange, on the date of breach is to be taken into account and any subsequent changes are not to be considered for the purpose of the calculation.

Loss occasioned by breach of contract---Not proved---No damages can be awarded. Where the amount of damages awarded against the appellant had not satisfactorily been proved or established the plaintiffs are not entitled to any damages and even nominal damages cannot be allowed to them.

Following remedies are available to the aggrieved party under section 75 of the Contract Act:

Party rightfully rescinding contract entitled to compensation: Sec. 75
A person who rightfully rescinds a contract is entitled to **compensation** for any damage which he has sustained through the non-fulfillment of the contract.
we have already discussed that an aggrieved party, if so elects has the right to file a suit against the counter party.

Kinds of damages:
Liquidated damages
Section 74 stipulates that if parties to a contract have mentioned the amount of damages for the breach at the time of entering into contract, such damages shall be recoverable and these will be called as liquidated damages, liquidated damages also signifies a fair and reasonable estimate of loss which a party may suffer due to breach of contract, the section 74 is reproduced here under for reference.

Compensation for breach of contract where penalty stipulated for: sec. 74 When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract

contains any other stipulation by way of penalty, the party complaining of breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation: ---A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

Exception: ---When any person enters into any bailbond, recognizance or other instrument of the same nature, or trader the provisions of any law, or under the orders of the Central Government or any Provincial Government, gives any bond for the performance of any public duly or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Explanation: ---A person who enters into a contract with Government does not necessarily thereby undertake any public duly, or promise to do an act in which the public are interested.

Illustrations

(a) A contracts with B to pay B Rs. 1,000 if he fails to pay B Rs. 500 on a given day. A fails to pay B Rs. 500 on that day. B is entitled to recover from A such compensation, not exceedings Rs. 1,000, as the Court considers reasonable.
(b) A contracts with B that, if A practises as a surgeon within Karachi, he will pay B Rs. 5,000. A practices as a surgeon in Karachi B is entitled to such compensation, not exceeding Rs. 5,000 as the Court considers reasonable.
(c) A gives a recognizance binding him in a penalty of Rs. 500 to appear in court on a certain day. He forfeits his recognizance. He is liable to pay the whole penalty.
(d) A gives B a bond for the repayment of Rs. 1,000 with interest at 12 per cent, at the end of six months, with a stipulation that in case of default, interest shall be payable at the rate of 75 per cent from the date of default. This is a stipulation byway of penalty, and B is only entitled to recover from A such compensation as the Court considers reasonable.
(e) A undertakes to repay B a loan of Rs. 1,000 by five equal monthly installments, with a stipulation that, in default of payment of any installment, the whole shall become due. This stipulation is not by way of penalty, and the contract may be enforced according to its terms.
(f) A borrows Rs. 100,000 from B and gives him a bond for Rs. 200,000, payable by five yearly installments of Rs. 40,000, with a stipulation that in default of payment of any installment, the whole shall become due. This is a stipulation by way of penalty.

Explanation

Deposit on agreement for purchase: ---Forfeiture of earnest money by a defaulting purchaser is not a penalty, but a term that a lump sum shall be paid in addition is penal, and only actual damage can be recovered under it.

Deposits other than earnest money: --- Moneys are often deposited as security for the performance of a contract, without such moneys being earnest money. In such a case there may be a forfeiture clause or not. Where there is no forfeiture clause, the party committing a breach of the contract is liable only to pay damages and is entitled to the return of the remainder of the moneys deposited. The question is whether such a case falls within the terms of Sec. 74, so that only reasonable compensation has to be paid whether the amount deposited is by way of liquidated damages or by way of penalty. It is submitted that the words "any other stipulation by way of penalty" are sufficiently ample to cover the case of a deposit with regard to which there is a stipulation for forfeiture. There is however, a large body of case law which adopts the view that Sec. 74 does not apply to deposits. If that is so, then the common law applies, and cases bearing on

Forfeiture of salary: ---Where under the terms of a contract of employment it is agreed that the servant shall forfeit all arrears of wages that had not yet become payable though due, in default of giving his employer notice before leaving his service, the stipulation is not by way of penalty, nor is it illegal under S. 23. Thus, where a servant is engaged by the month, and the salary of each month is to be paid on the 22nd of the next month, and fifteen days' notice is to be given before leaving service, the servant leaving on 20th April without giving notice is not entitled to his salary either for March which had become due (though not payable) or the broken period of April. But a stipulation that an employee should work on holidays, including Sundays, if required by the employer to do so, and should be liable on refusal to forfeiture of fifteen days' wages, has been held to be in the nature Of a penalty and one which the Court should not enforce.

"Reasonable compensation:"---The words of the section give a wide discretion to the Court in the assessment of damages. "The only restriction is that the Court cannot decree damages exceeding the amount previously agreed upon by the parties. The discretion of the Court in the matter of reducing the amount of damages agreed upon is left unqualified by any specific limitation, though, of course, the expression 'reasonable compensation' used in the section necessarily implies that the discretion so vested must be exercised with care, caution, and on sound principles.

Damages in case of infringement, of terms of surely bond furnished by an employee to employer at time of entry into service: Employer cannot claim by way of damages entire amount of bond but would be entitled to receive only reasonable damages. Amount of penalty prescribed in surety bond may be proportionately reduced to a reasonable extent. It is not necessary, as a matter of rule, that this reduction be according to mathematical proportion. What is required is that all facts be kept in view while awarding reasonable amount of damages."

Earnest money deposited by purchaser---Breach of contract---Forfeiture of earnest money not always ordered---Compensation may be determined on facts of case. It is true that the aggrieved party was made payable in installments. The judgment-debtor failed to pay the amount as per terms of the compromise and an execution application was filed by the decree-holder praying for the attachment and sale of the immovable property of the surely. Held: The compromise decree had absolved the surety from his liability under the bond.

Penalty clause in contract---Not enforceable.---Where in an agreement of sale of a truck on installments it was provided (i) that if the plaintiff failed to make payment of installments, the defendant would be entitled to take back the possession of the truck, and (ii) to forfeit all the payments which might have been made by the plaintiff to the defendant. Under this second provision it was contended on behalf of the defendant that the whole amount of Rs. 45,000 had been forfeited by the defendant. Held: this provision is in the nature of a penalty clause and is, unenforceable.

Penalty clause in agreement---Not enforceable---Court may grant reasonable damages.--It is not legally correct that agreement of penalty in terrorem is entirely unenforceable. It is open to Court to award reasonable compensation even in case of such agreement.

Applicability---Not applicable to void contracts: ---Section. 74 deals with cases where there is breach of valid contract and not an agreement void ab- initio.

Compensation for breach of contract---How may be calculated---Stipulated damages may or may not be awarded. ---Section 74 seeks to resolve the difficulties in the common law doctrine of damages. It dispenses with fine distinctions between the claim for damages based on the principle of liquidated damages and those imposed by way of penalty. It makes provisions for both and the principle laid down is that where a sum is named or a penalty is stipulated the party complaining of the breach is entitled to a reasonable compensation not exceeding the amount so named or the penalty so stipulated. And though it says that "Where no actual damage or loss is proved to have been caused" it lays down that the compensation to be given to the injured party should be a reasonable one within the maximum stipulated in the contract. It must, therefore, follow that merely because a sum has been named in the contract the party complaining of

the breach cannot claim that sum as a matter of course, because the court will grant only a reasonable compensation and no more, whatever may be the figure named. It must follow that where a sum has been named in the contract the party complaining of breach is entitled to some damages. In exercising the unqualified discretion granted to it by this section the Court will naturally act with care and caution and in accordance with recognized principles. Where therefore the sum named is the result of an honest anti genuine pre-estimate of damages having regard to the nature of the transaction and the circumstances of the case, the Court may not find much difficulty in awarding an amount not for different from the one named unless the contrary is proved, the Court will look to the nature of the transaction, the position of the parties at the time of the bargain and the comparative undue advantage or disadvantage which might result to the parties by the enforcement Held: that the amount stipulated was a penalty and was not recoverable.

Compensation---How calculated? ---Court should award reasonable compensation.

Earnest money---Liable to forfeiture for breach of contract by purchaser---The primary object of term "deposit money" and the "Earnest money" is to serve as security for the performance of the contract. If the contract goes forward the deposit is treated as part of the purchase price; if it falls through in consequence of the depositor's failure to perform, the deposit would stand forfeited to the seller, although there is no specific forfeiture clause in the contract.

Nominal damages:

The court may under its discretion allow nominal damages even in a case where a person has not suffered any financial losses but in recognition of his right to compel the other party for performance under the contract. Such damage is usually concerned with non-pecuniary losses which are not easy to ascertain.
For instance an injury to one's reputation in defamation, the pain and the sufferings are the damages in such cases which are difficult to be ascertained in money terms so court can award nominal or general damages to the injured party.

LESSON 18

REMEDIES FOR BREACH OF CONTRACT

We have already underlined those following remedies that are available to an aggrieved party in case of breach of contract:

Remedies for breach of contract

- Suit for damages: Sec. 73
- Suit for compensation-- Party rightfully rescinding contract entitled to compensation: Sec. 75
- Suit for specific performance
- Suit for Injunction

We have already discussed the first two remedies, rest of the remedies available for breach of contract are discussed here under.

Suit for specific performance
In certain cases where damages are not preferable option as these may not provide adequate remedy, the court may direct the party in default to fulfill the contract. The aggrieved party has the right to file a suit for specific performance.

Instances where suit for specific performance can be filed before the Court:

Where monetary compensation may not provide adequate relief to the aggrieved party,

- Determination of actual damage is difficult
- Contracts depending on the personal skills and expertise of the contracting party
- When one of the contracting party is minor.

Suit for granting injunction:
Injunction is an order of restraining a person from an act.

Illustration:--Mr. Umar, an international player of hockey enters into a contract with M/S ABC hockey club to play for one year with the stipulation that during this period he will not play for any other club. However, Mr. Umar entered into a contract with M/S XYZ club. M/S ABC hockey club has the right to file a suit for injunction and court can issue the order restraining Mr. Umar to play for M/S XYZ hockey club.

Contract of Indemnity

Contract of Indemnity has been defined in section 124 of the Contract Act which is reproduced below:

A contract, by which one party promises to save the other from loss caused to him by the conduct of the Promisor himself, or by the conduct of any other person, is called a **"contract of indemnity".**
Illustration 1:
Mr. Yasir purchased demand draft of Rs 50,000 from a bank. The draft was lost in transit. Mr. Yasir requested the concerned branch to issue a duplicate demand draft. He had to furnish an indemnity bond that in case of any claim on the bank, Mr. Yasir (indemnifier) shall be liable to make good the loss suffered by the bank (Indemnity holder/ Indemnified)
Illustration 2:

A contracts to indemnify B against the consequences of any legal proceedings which C may take against B in respect of a certain sum of Rs.200,000/=

Comments

Indemnity: --- It includes promises to save the promisee harmless from loss caused by events or accidents which do not or may not depend on the conduct of any person, or by liability arising from something done by the promisee at the request of the promisor; in the latter case a promise of indemnity may be inferred as a fact from the nature of the transaction. Where a person invested with a statutory or common law duty of a ministerial character is called upon to exercise that duty on the request, direction or demand of another and without any default on his own part acts in a manner which is apparently legal but is, in fact, illegal and a breach of the duty, and thereby incurs liability to third parties, there is implied by law a contract by the person making the request to keep indemnified the person having the duty against any liability which may result from such exercise of the supposed duty. Bankers had innocently presented to a corporation a transfer of its own stock for registration, and transferees for value from them were registered as owners. The transfer to the bank turned out to be a forgery, and the true owner, in an action against the corporation, enforced restitution.

Commencement and Extent of Indemnifier's Liability: ---The text of the Act leaves these matters undefined. In a case law the court has without citing the Contract Act at all has supposed that an indemnifier could not be called on till the indemnified had incurred actual loss, and this was at one time said to be settled rule of law but, according to the equitable principles which now prevail, to indemnify does not merely mean to reimburse in respect of moneys paid, but (in accordance with its derivation) to save from loss in respect of the liability against which the indemnity has been given, if it be held that payment is a condition precedent to recovery, the contract may be of little value to the person to be indemnified, who may be unable to meet the claim in the first instance.

Accordingly the existence of a clear enforceable claim---as under a judgment recovered---suffices to call the indemnified or those who stand in his place.

All Contracts of Insurance are contracts of indemnity except life insurance
In such contracts an insurance company (insurer) undertakes to indemnify the respective party (assured), of the losses suffered by the assured in the manner and to the extent agreed in the contract.

Parties in a contract of Indemnity: there are following parties in a contract of indemnity:

- Indemnifier (Promisor)
- Indemnity holder/Indemnified (Promisee)

Rights of Indemnity Holder When Sued:

1. Indemnity holder can recover all damages incurred /Paid by him.
2. Indemnity holder can recover costs incurred.
3. Indemnity holder can recover sums paid under compromise, if any.

Rights of indemnity-holder when sued are contained in section 125 of the Contract Act which is reproduced below:

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

(1) All damages which he, may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies;

(2) All Costs which he may be compelled to pay in any such suit if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorised him to bring or defend the suit;

(3) All sums which he may have paid-under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorised him to compromise the suit.

Comments:

Sub-section 1---As to sub-s, 1, it is obvious that when a person has....altered his position in any way on the faith of a contract of indemnity, and an action is brought against him for the matter against which he was indemnified, and a verdict of a jury obtained against him, it would be very hard indeed if when he came to claim the indemnity the person against whom he claimed it could fight the question over again, and run the chance of whether a second jury would take a different view and give an opposite verdict to the first. Therefore, by reason of that contract of indemnity, the judgment is conclusive, although the promisor was not party to it. This rule has been followed by the Courts.

Sub-section 2---As to sub-s. 2, "in the case of contracts of indemnity, the liability of the party indemnified to a third person is not only contemplated at the time of the indemnity, but is the very moving cause of that contract; and in cases of such a nature there is a series of authorities to the effect that costs reasonably incurred in resisting or reducing or ascertaining the claim may be recovered." But the costs must be such as would have been incurred by a prudent man.

Sub-section 3: ---As to sub-s. 3, if a person has [expressly] agreed to indemnify another against a particular claim or particular demand, and an action is brought on that demand, he (the defendant) may then give notice to the person who has agreed to indemnify him to come in and defend the action, and if he does not come in, and refuses to come in, he may then compromise at once on the best terms he can, and then bring an action on the contract of indemnity. Even if the promisee has not given notice to the promisor, the compromise is conclusive against the promisor if it is effected bona fide, and without collusion, and is not impeached as an imprudent bargain.

Rights of promisor: ---This section deals with the rights of a promisee in a contract of indemnity. There is no provision in the Act for the rights of a promisor in such a contract. The absence, however, of such a provision does not take away the rights which such a promisor has according to English law, and which are analogous to the rights of a surety declared in S. 141. Those rights constitute an essential part of the law of indemnity, and they are of general application, as they are based on natural equity. The promisor is not liable, if the promisee suffers damage owing to circumstances which do not-come within the scope of the contract of indemnity.

Compensation by Railway---Insurer cannot step into the shoes of the consignor in case of loss of goods---Only consignor can sue for loss, damages, etc: ---In the event of loss destruction or deterioration of the goods represented by the railway receipt, the consignor would be the only person entitled to sue the railway company for compensation. The plaintiff, who is merely an insurer, cannot step into the shoes of the consignor by obtaining letters of subrogation from the latter.

Section 125 of the Contract Act, which deals with the contract of indemnity, states only the rights of the promisee but it is silent as regards the rights of the promisor. Therefore it does not help the plaintiff.

If section exhaustive for relief which indemnity holder may get: ---Section 125 is not exhaustive and does not set out all the reliefs which an indemnity holder who has been sued may get. It leaves untouched certain equitable reliefs which he may get.

Indemnity holder---When may sue for protection from claim by third party: ---The stage at which the loss or injury may be deemed to be imminent must depend upon the particular facts of each case and no fixed rule can be laid down in this respect, it is not correct to say that the loss or injury can be said to be imminent only when a decree had been passed against the indemnity holder and not otherwise. Therefore, when the injury becomes imminent the indemnity holder can come to Court and ask that he be protected and the Court must decide whether or not the claim of the third party against the indemnity holder in respect of which protection is sought is well-founded; if it so decides it must grant relief to him and not postpone the indemnity holder until a decree has been passed against him.

'A' who was not only an indemnity holder but also a trustee held the shares in a company standing in his name in trust for B. The shares were not fully paid up and the Company brought a suit against A for the balance of the amount payable for the shares. Thereupon, A brought a suit against B for a declaration that he was entitled to be indemnified by the defendant B against all calls and liabilities in respect of the said shares and for being relieved forthwith from all such liabilities to the said company, which was the subject-matter of the suit filed by the company against him. In the alternative he prayed that B should be directed to set aside or deposit, with the Registrar of High Court a sum sufficient to meet the costs and claim of the company in the suit filed by it against him to be available to meet the decree that may be passed in that suit.

Held; that the suit for indemnity by A was not premature and was maintainable, and that he was entitled to the reliefs prayed for as the suit filed by the company against A was a good one and bound to succeed.

Rights of Indemnifier
A Settled principle of law is that after compensating the loss to indemnity holder, indemnifier is entitled to all the ways and means by which person indemnified might have protected himself for the loss.

Time of Commencement of Indemnifier's Liability
It is the time when indemnity holder incurs an absolute liability though not actual loss.

Contract of Guarantee
Contract of Guarantee has been defined in section 126 of a Contract Act which is reproduced below:
"A contract of guarantee is a contract to perform the promise or discharge the liability of a third person in case of his default". The person who gives the guarantee is called the "surety"; the person in respect of whose default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor". A guarantee may be either oral or written.

LESSON 19

CONTRACT OF GUARANTEE & INDEMNITY

Contract of Guarantee

We have already gone through the definition of the guarantee as contained in section 126 of the Contract Act. Same is reproduced hereunder for reference.

'A contract of guarantee is a contract to perform the promise or discharge the liability of a third person in case of his default'. The person who gives the guarantee is called the "surety"; the person in respect of whose default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor". A guarantee may be either oral or written.

Objects of a contract of guarantee:
There may be many objects for which a guarantee is required to be furnished; some of these are enumerated below:

1. To avail loan
2. To make credit purchases
3. To get employment

To avail loan
Mr. Aslam availed a loan of Rs 1 million from XYZ Bank. The said bank asked the loanee, Mr. Aslam to furnish a guarantee from a credit worthy party. Mr. Aslam requested Mr. Akram to furnish guarantee for the said loan in favor of XYZ bank. Mr. Akram furnished the guarantee as desired by the bank. In case of default by the loanee (Mr. Aslam), the guarantor/ surety (Mr. Akram) shall be liable to pay the amount in default.

To make credit purchases
AQ brothers make credit supplies to Hilton enterprises. Under the agreement, Hilton enterprises furnished guarantee of Mr. Suhail. Mr. Suhail shall be liable to make payments to M/S AQ brothers in case of default by Hilton enterprises.

To get employment
M/S XYZ bank hired the services of Mr. Salman as cashier and asked him to furnishing a guarantee to the employer Rs. 100,000.

Parties in a contract of guarantee are enumerated below:

Surety / Guarantor

The person who gives guarantee

Creditor

The person in whose favor guarantee is given

Principal Debtor

The person who primarily incurs liability / debt

Nature of Contracts in a contract of guarantee:

Primary Contract

Secondary Contracts:

- The Contract between surety and creditor and
- Contract between surety and principal debtor

Essentials of a Contract of Guarantee

- Consideration
- No misrepresentation
- Writing not necessary

Illustration:
M/S XYZ bank hired the services of Mr. Salman as cashier and asked him to furnish a guarantee of third party amounting Rs. 100,000 so as to recover the loss, if any suffered by the employer due to an act of the employee. Mr. Salman furnish the guarantee of Mr. Asad, this is a contract of a guarantee.

Guarantee may be in following forms:

Oral; or Written

Comments

There can be no contract of guarantee unless there is a principal debtor; the surety's obligation must be substantially dependent on a third person's default. A promise to be primarily and independently liable is not a guarantee, though it may be an indemnity.

The surety undertakes his obligation at the request express or implied of the principal debtor;" .on the true construction of S. 141 as well as s. 126. Accordingly, if A enters into a contract with B and C, without any communication with B, undertakes for a consideration moving from A to indemnify A against any damage that may arise from a breach of B's obligation, this will not make C a surety for B, or give him a right of action in his own name against B in the event of B's default.

The mere transfer by a debtor of his property to a trustee for the benefit of his creditors, the trustee not undertaking any personal liability to the creditors, does not Constitute the relation of principal and surety as between the debtor and the trustee.

A person may become a surety without the knowledge and consent of the principal debtor, but the only rights which he acquires in the case are those given by Ss. 140 and 141, and not those given by S. 145.

"Liability": ---By the word "liability" in this section is intended a liability which is enforceable at law, and if that liability does not exist, there cannot be a contract of guarantee. A surety, therefore, is not liable on a guarantee for the payment of a debt which is barred by the law of limitation.

Pakistan Penal Code (XLV of 1860), Ss. 30 & 405: Document of guarantee a valuable security and property with involvement of criminal liability wherefore essential ingredient being the manner of transfer in violation of a legal contract express or implied.

Time for repayment of loan extended within stipulation contained in agreement---Surety, held, could not take plea that lime for repayment of loan was extended without his knowledge and consent.

Deed of guarantee, executed, jointly---Letter of guarantee indicated that defendants had jointly and severally guaranteed due repayment of loan and money due from borrower defendant exclusive of interest and charges---Guarantee being always by a third person and not by borrower himself, person signing as

guarantor, held, would be deemed to be guarantor far all intent and purposes---Plea of guarantor that he had signed document of guarantee not in personal capacity but in official capacity would be of no effect where such guarantor did not testify before Court that he had not executed letter of guarantee in his personal capacity.

Surety---Liabilities of sureties and principal debtor held, distinct---Liability of surety arise immediately on failure of principal debtor and unless otherwise provided in contract creditor cannot be compelled to first exhaust his remedy against principal debtor before initiating action against surety---Even in cases where liabilities of both parties arise from same transaction or same document liabilities are distinct.

Remedy against guarantor---Contract of guarantee to be strictly construed as to point of time when liability of guarantor arises---Question, held, depends on terms of contract of guarantee by which guarantor bound himself for repayment of loan advanced to principal borrower.

Guarantee for performance of definite engagement---Held: Guarantee when given for performance of definite engagement not contingent in nature and consideration for which not to vary as result of future dealings between parties, contract, not to be that of continuing guarantee.

No principal debtor in existence---Loans granted to fictious persons--- Guarantor cannot be used for recovery of debt.---If there never was any other person who can be properly described as the principal debtor, there cannot be said to have been any guarantee either in its technical or ordinary meaning. Where overdraft which was guaranteed by joint guarantors arose out of transactions which were fictitious, it was held that no debt had been incurred and the guarantors could not be successfully sued in respect of the alleged debt which was not a debt at all.

Kinds of Guarantee:

Specific Guarantee or (Ordinary Guarantee):
This guarantee is restricted to a specific transaction on engagement, for example, availing a loan from a bank.

Continuing Guarantee:
Such guarantee covers a series of transactions. For example guarantee furnished to a supplier for making supplies to a particular person/ business during a specified period, say one year.

Illustrations

(a) A in consideration that B will employ C in collecting the rent of B's zamindari, promises B to be responsible to the amount of 5,000 rupees, for the due collection and payment by C of those rents. This is a continuing guarantee.
(b) A guarantees payment to B, a tea-dealer, to the amount of Rs. 100, for any tea he may from time to time supply to C B supplies C with tea to above the value of Rs. 100, and C pays B for it. Afterwards B supplies C with tea to the value of Rs. 200. C fails to pay. The guarantee given by A was a continuing guarantee, and he is accordingly liable to B to the extent of Rs. 100.
(c) A guarantees payment to B of the price of five sacks of flour to be delivered by B to C and to be paid for in a month. B delivers five sacks to C. C pays for them. Afterwards B delivers four sacks to C which C does not pay for. The guarantee given by A was not a continuing guarantee, and accordingly he is not liable for the price of the four sacks.

Comments

Continuing guarantee: ---Whether in a particular case a guarantee is continuing or not is a question of the intention of the parties, as expressed by the language they have employed, under-standing if fairly in the sense in which it is used; and this intention is best ascertained by looking to the relative position of the

parties at the time the instrument is written. Surrounding circumstances must be looked to see what was the subject-matter which the parties had in their contemplation when the guarantee was given?

In construing the language of the parties the whole of their expressions must be looked to, not merely the operative words. Thus the followings words were held to show that a guarantee, which otherwise might have been confined to a single transaction, was intended to be continuing: "Having every confidence in him, he has but to call upon us for a cheque and have it with pleasure for any account he may have with you; and when to the contrary we will write you."

A guarantee of the fidelity of a person appointed to a place of trust in a bank is not continuing guarantee. Nor is a guarantee for the payment by installments of a sum certain within a definite time.

Continuing guarantee--, what is---Guarantee relating to one transaction---Not a continuing guarantee: ---In law a guarantee in order to be continuing guarantee must refer to a Series of transactions, of which when the guarantee was given, some are unknown and not certain to come into existence. The question whether or not a particular transaction is a continuing guarantee, depends on the terms of the instrument. Where the guarantee related to a single transaction, the view that it is a continuing guarantee cannot be upheld and must be repelled.

Revocation of continuing guarantee: Sec. 130

A continuing guarantee may at any time be revoked by the surety, as to future transactions, by notice to the creditor.

Illustrations

(a) A, in consideration of B's discounting at A's request, bills of exchange for C, guarantees to B, for twelve months, the due payment of all such bills to the extent of 5,000 rupees. B discounts bills for C to the extent of 2,000 rupees. Afterwards, at the end of three months. A revokes the guarantee. This revocation discharges A three months. A revokes the guarantee. This revocation discharges A to B for the 2,000 rupees on default of C.
(b) A guarantees to B to the extent of 10,000 rupees, that C shall pay all the bills that B shall draw upon him. B draws upon C. C accepts the bill. A gives notice of revocation. C dishonours the bill at maturity. A is liable upon his guarantee.

Comments

Future transactions: ---The words "future transactions" must be taken to imply that the operation of this section is confined to cases where a series of distinct and separate transactions is contemplated. It is otherwise in the case of an entire consideration. "Where a continuing relationship is constituted on the faith of a guarantee the guarantee cannot be annulled during the continuance of that relationship"; and as the surety could not determine it himself by notice, so his death does not relieve his estate from liability; the nature of the transaction implies a contract to the contrary under S. 131.

Notice: ---The mere denial of liability by the surety in a previous suite instituted by the creditor against him and the principal does not operate as a notice under this section.

LESSON 20

CONTRACTS OF BAILMENT, PLEDGE & AGENCY

Bailment

The definition of bailment as contained in section 148 is given here under:

A "bailment" is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the "bailor". The person to whom they are delivered is called the "bailee"

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

Essentials of Bailment:

Contract

There is an underlying contract between the bailor and bailee, there may be an explicit contract or it may be an implied contract.

Specific purpose

The bailment of goods is always for some specific purpose.

Delivery of goods

There must be delivery of movable goods in a contract of bailment.

No change of ownership

In a contract of bailment, only the possession of goods is transferred from bailor to the bailee, whereas the bailor has all ownership rights over the goods delivered.

Return of the goods delivered on accomplishment of purpose.

When the purpose for which the goods are delivered is completed, the goods must be returned in the original form or modified form as per instructions of the bailor.

For the benefit of the bailor-- Mr. Yasir, while going out of city handed over some precious household articles to Mr. Usman for safe custody, without any obligation to pay any fee/ charges. It is a bailment for the benefit of the bailor.

For the benefit of the bailee—Mr. Umer handed over his car to Mr. Ahsan, as he was in need of conveyance for few days. Mr. Umer handed over this car without any obligation on the part of Mr. Ahsan to pay any rent / charges for the use of this car. This bailment is exclusively for the benefit of the Mr. Ahsan, the bailee.

For the benefit of bailor and bailee—Mr. Ahmad availed locker facilities from M/S XYZ bank ltd. Under the terms and conditions of the contract Mr. Ahmad was required to pay Rs.1000/ annual fee on account of availing this facility. This contract is for the benefit of parties, the bailor and the bailee.

Explanation:

Scope of bailment and its essentials are explained in detail in the following paragraphs.

Nature of the transaction: ---"Bailment" is a technical term of the Law, It involves change of possession. One who has custody without possession, like a servant, or a guest using his host's goods, is not a bailee. But constructive delivery will create the relation of bailor and bailee as well as actual, as stated in the Explanation.

The bailee's duly to deal with the goods according to the bailor's orders is incidental to the contract of bailment, and arises on the delivery of the goods, although those orders may have already been given and accepted in such a manner as to constitute a prior special contract. As a matter of pleading this is no longer material in this country, but it might still be material with regard to the period of limitation.

Bailment is necessarily dealt with by the Contract Act only so far as it is a kind of contract. It is not to be assumed that without an enforceable contract there cannot in any case be a bailment.

The words "otherwise disposed of" in the present section express the common law as now understood. "It seems clear that a bailee is not the less a bailee because he is clothed with authority to sell the thing which is bailed to him," e.g., a factor for sale. On the whole a bailment may be described as a delivery on condition, to which the law usually attaches an obligation to redeliver the goods, or otherwise deal with them as directed, when the condition is satisfied; but there may be, in particular cases, a bailment without an enforceable obligation.

Rights and duties of bailee

To take care of goods delivered by bailor
Section 151: in all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed.
Section 152: the bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in section 151.
Effects of mixture, without bailor's consent when the goods can be separated
Section 156: if the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, and the goods can be separated or divided, the property in the goods remains in the parties respectively; but the bailee is bound to bear the expense of separation or division, and any damage arising from the mixture.

Effect of mixture, without bailor's consent, when the goods cannot be separated
Section 157: if the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, in such a manner that it is impossible to separate the goods bailed from the other goods and deliver them back, the bailor is entitled to be compensated by the bailee for the loss of the goods.

- Bailee not to make un-authorized use of the goods delivered to him—(section 154)
- Bailee to return the goods delivered to him for some purpose. (Section160)
- Bailee to return an increase or profit in lieu of goods delivered. (Section163)

Explanation:

The duties of the bailee are explained in greater detail in the following paragraphs:

The bailee has no right to dispose of or sell the property unless specifically authorised to do so. He has only a right to retain the goods bailed with him until he receives due remuneration for the service rendered in

respect of the goods. He is responsible for the safe delivery of the goods bailed with him and in default is responsible to the bailor for any loss of the goods.

Goods given to a person by bank on trust receipt---Person becomes a bailee---Liable for criminal breach of trust in case of non-accounting of goods. The execution of a trust receipt is a recognised mode of making a person bailee of the goods and in such circumstances the Bank must be deemed to be in possession or control of the goods. The validity and efficacy of such instruments of trust are now generally acknowledged. If a person, who has signed such a trust receipt, fails to hand over to the Bank the sale-proceeds of the goods sold, the former would be liable for criminal breach of trust.

Intentional wrong delivery by carrier---Carrier liable for damages---Where the carrier has made intentional wrongful delivery of goods, he cannot escape liability to indemnify the plaintiff for the loss caused to him by wrongful deliveries of the consignments.

Care to be taken by bailee (section 151)

In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed

Contract by bailee exempting himself from liability for negligence---The learned authors considered that a contract by a bailee purporting to exempt himself wholly from liability for negligence was not valid. This opinion is based on the express provisions for contracting out in S. 152, and in fact throughout the Chapter on Bailments wherever a rule of law is to operate only in the absence of a contract to the contrary, it is expressly so stated in the section (refer sections 163, 165, 170, 171, and 174).

Care to be taken by bailee:

T**heft of goods pledged with Bank**---Document of pledge containing condition that during the continuance of pledge agreement the borrowers shall be responsible for all loss, damage, or deterioration of security caused by theft, fire, rain or any other cause whatsoever---There being. no discrepancy between provisions of S. 151, Contract Act, 1872 and condition of document of pledge, if loss had been caused by theft, fire, rain or any other cause, it would be the duty of the bailee to explain that he had taken care of the goods as a man of ordinary prudence would under similar circumstances take of his own goods and if in spite of that the goods pledged were lost in manner as recorded in the condition of document of pledge, liability of borrower could not be legally or equitably denied.

Injury to goods in transit by Railway---Onus of proof as to negligence by carrier---How burden is to be discharged

Where due to long delay in transit, goods carried by Railway were damaged. Held: Although the burden of establishing want of care on the part of' the Railway lies on the consignor yet it is the duty of the railway to supply the entire material from which the amount of care that is taken is ascertained. The Railway pleaded that the delay was caused due to unavoidable circumstances but no material was supplied in support of this plea; Therefore the presumption of want of due Care would arise against the Railway.

Loss to goods by negligence of ship-owner---Claim for damages against ship-owner sustainable:

The ship-owner committed a breach of the obligation contained in the bill of lading and as such the consignee was entitled to recover damages.

Damage to contents of parcel---Burden of proof is on consignor--Mere damage to containers does not prove damage to contents.

The burden of proof was on the plaintiff to show that the damage to the contents was caused by the negligence of the servants of the Carrier while the Crates were in its custody. No such evidence has been produced by the plaintiff and merely, because some of the wooden crates were externally broken and some card-board cases torn, as stated in the Survey Report, it cannot be inferred, nor is there any evidence to show, that the external damage must have resulted in damage to the contents.

Loss of goods in possession of bailee---Onus of proof as to negligence of bailee:

Where goods are lost or destroyed while in .possession of bailee the onus of placing all the materials in his possession or knowledge is on the bailee, while the onus of establishing negligence is on the plaintiff.

Carriage of goods by sea from foreign port to Pakistan---Damage to goods---Contract Act applies. ---The provisions of the rules to the Carriage of Goods by Sea Act, 1925 do not apply in relation to carriage of goods by sea in a ship carrying goods from a foreign port to a port in Pakistan, as is the present case. Therefore, the rights and liabilities of the parties have to be ascertained by reference to the proper law of the contract which in this case, is the Pakistan law.

Buyer rejecting goods---If can sell them to recover ware-house charges for storing them.---The buyer rejected the goods and then disposed them of in order to recover the ware-house charges for having stored them. He contended that he as a bailee had the right to do so.

Held: The buyer of the good is having rejected them and thereafter selling them as the goods belonging to him, stands on a different footing than the bailee contemplated under sections 151 and 170 of the Contract Act. The principle on which a bailee is entitled to dispose of the goods or has lien on the goods bailed with him are entirely different and are not applicable to the case of the sale of goods. As discussed above, the buyer of the goods after rejecting them has no lien on the goods in dispute and must place them at the disposal of the seller for dealing with them in any manner he likes.

Loss of goods during transit---Railway liable---Absence of brake---Negligence of railway: ---Where goods were lost during transit and it was found that there was no vacuum or brake in the van of the guard so that the train could not be stopped in case of theft in the running train.

Held: There ought to be a vacuum in a train in order that in case of theft while it is running it may be stopped. That a vacuum should be there in the brake of the guard is not denied and the failure to keep a vacuum against the rules would be negligence. Therefore the failure to provide brake should be considered a negligent act on the part of the Railway.

Held further: That there is no satisfactory evidence from which it could be inferred that they had taken proper care of the consignment as bailer of the goods consigned. Therefore, the railway was liable for the loss of goods.

Pledge

It has been defined in section 172 of the Contract Act which is given below:

"Pledge," "pawnor," and "pawnee" defined.

The bailment of goods as security for payment of a debt or performance of a promise is called "pledge". The bailor is in this case called the "pawnor." The bailee is called the "pawnee."

- The pledgee has actual control of pledged stocks/goods.
- Pledgee can sell pledged stocks by giving reasonable notice to the borrower.
- Before disposal pledgee should publish the notice through news papers etc.

Comments

The bailee tendering a contract of pledge does not become owner, but, as having possession and right to possess, he is said to have a special property. Any kind of goods, documents, or valuable things of a personal nature may be pledged. Delivery is necessary to complete a pledge; it may be actual or constructive. It is sufficient if the thing pledged is delivered under the contract within a reasonable time of the lender's advance being made.

Pledge---Monthly statements of stocks lying in godown showing goods as pledged with defendant-Bank---All such documents signed by authorised person on behalf of plaintiff---Debit advice vouchers produced by defendants showing conveyance charges paid to Godown Keeper visiting godown, and debited to account of plaintiff---Goods, held, in possession of defendant under pledge and not merely hypothecated.

Contract of Agency

In general terms, Agency refers to the relationship which exists between two persons, the **Principal** and the **Agent** in which the Agent has to perform different duties/ functions as per instructions of the **principal** and also enters into contract with the third party / parties on behalf of the principal. The relationship of agency plays an important role in business and commercial dealings. This relationship is legal created by virtue of agreement between **Principal** and **Agent.**

Definition of Agent and Principal: Sec. 182

Agent is a person employed to do any act for another or to represent another in dealing with a third persons. The person for whom such act is done, or who is so represented, is called the **Principal.**

Explanation

The legal relation between a merchant in one country and a commission agent in other is that of principal and agent, and not seller and buyer, though this is consistent with the agent and principal, when the agent consigns the goods to the principal, being in a relation like that of seller and buyer for some purposes. A merchant, therefore, in this country who orders goods through a firm of commission agents in Europe cannot hold the firm liable as if they were vendors for failure to deliver the goods. And the result is the same if the goods are ordered through a branch in this country of a firm of commission agents in another country. For the same reason, where a commission agent buys goods for a merchant at a price smaller than the limit specified in the indent, he cannot charge any price higher than that actually paid by him, except in the case of a custom to the contrary.

An agent may have, and often has, in fact, a large discretion, but he is bound in law to follow the principal's instructions provided they do not involve anything lawful. To this extent an agent may be considered its a superior kind of servant; and a servant who is entrusted with any dealing with third persons on his master's behalf is to that extent an agent. But a servant may be wholly without authority to do anything as an agent, and agency, in the case of partners, even an extensive agency, may exist without any contract of hiring and service.

Agency may be created in the following ways:

1. By consent
2. By operation of law
3. By estoppel
4. By ratification

Agency by Consent:

Consent may be express or implied.

Such agency is created by words either spoken or written. In business transactions, this relationship is usually established through writing an agreement

Implied Agency:
An authority is referred to as implied when it is inferred from the conduct of the parties or circumstances of the case. Definitions of express and implied authority as contained in section 187 of the Act are given below:

"An authority is said to be express when it is given by words spoken or written. An authority is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written, or the ordinary course of dealing, may be accounted for circumstances of the case."

LESSON 21

CONTRACT OF AGENCY

As already discussed, agency may be created in the following ways:

1. By consent
2. By operation of law
3. By estoppel
4. By ratification

We have already discussed the creation of an agency by the consent of the parties, remaining ways of creation of agencies are discussed below:

Agency by Operation of Law:
Agent's authority in an emergency (section 189)
An agent has authority, in an emergency; to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence, in his own case, under similar circumstances.

Illustration:
Mr. Aslam, a fruit merchant, shipped fruits by truck from Lahore to DG Khan. The truck on its way to DG Khan met an accident. The truck driver could not establish contact with Mr. Aslam despite best efforts. There was danger that fruits would perish, as such the truck driver decided to sell the fruits at the market rate. The relationship of agency shall be governed under the provision of section 189.

Illustrations

(a) An agent for sale may have goods repaired if it be necessary.
(b) A consigns provisions to B at Karachi with directions to send them immediately to C at Quetta. B may sell the provisions at Karachi if they will not bear the journey to Quetta without spoiling.

Comments

If goods are perishable and perishing, the agent may deviate from his instructions as to the time or price at which they are to be sol as has been explained through the above illustrations.

Agency by Estoppel

Agency by estoppel refers to a situation when the words or conduct of the principal creates an impression in the minds of third party that agent's authority is greater than the authority actually vested in him. And the third party under this impression enters into an agreement with the agent.

Illustration:
Due to the conduct of Mr. Aslam (principal), Mr. Salman (third party) believes that Mr. Kaleem is an agent of Mr. Aslam and under this impression Mr. Salman enters into an agreement with Mr. Kaleem.

The following situations may emerge from this scenario:
Mr. Aslam terminated the agency relationship with Mr. Kaleem, however this was not in the knowledge of Mr. Salman and he continued his commercial dealings with Mr. Kaleem. Under the principle of estoppel, Mr. Aslam cannot claim that Mr. Kaleem is not his agent, as far as these transactions are concerned.

Mr. Salman enters into an agreement with Mr. Kaleem. The transaction is in the knowledge of Mr. Aslam. Mr. Aslam does not intimate Mr. Salman that Mr. Kaleem is not his agent. Mr. Aslam under the principle of estoppel cannot claim that Mr. Kaleem is not his agent.

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Mr. Salman was entering into business dealings with Mr. Kaleem, treating Mr. Kaleem as an authorized agent of Mr. Aslam. Mr. Kaleem entered into some agreements which were beyond the authority vested in him by the Principal, Mr. Aslam. Mr. Salman is not aware of this fact. Mr. Aslam (Principal) under the principle of estoppel cannot claim that he cannot own the acts of his agent, Mr. Kaleem which are beyond his (agent) authority.

Agency by Ratification:
Concept of ratification is contained in Sec. 196
Sec. 196- Right of person as to acts done for him without his authority: where acts are done by one person on behalf of another, but without his knowledge or authority, he may elect to ratify or to disown such acts. If he ratifies them, the same effects will follow as if they had been performed by his authority.

Illustration:
Mr. Fahad, an agent of Mr. Salman lends Rs 100,000 to Mr. Kaleem. Mr. Kaleem is paying monthly profits to Mr. Fahad, who has rendered accounts in this respect to the principal, Mr. Salman. By accepting the profits, Mr. Salman's conduct implies a ratification of the amount of loan provided by his agent, although without his authority.

Conditions of ratification: "On behalf of another

Ratification must be by the person for whom the agent professes to act. That an act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal; if subsequently ratified by him, is the known and well-established rule of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent as by, and with all the consequences which follow from, the same act done by his previous authority. But where A does an act as agent for B without any communication with C, C cannot, by afterwards adopting that act, make A his agent and thereby incur any liability, or take any benefit, under the act of A. Ratification in the proper sense of the term, as used with reference to the law of agency, is applicable only to acts done on behalf of the ratifier. And this rule is recognised in S. 196 of the Contract Act. Ratification can be express or implied from conduct.

A ratification of the unauthorised contract of an agent can only be effectual when the contract has been made by the agent avowedly for, or on account of, the principal, and not when it has been made on account of the agent himself

A man cannot adopt by ratification an act which was not authorised by him at the time and did not purport to be done on behalf of any principal.

Since ratification is in law equivalent to a previous authority, a person not competent to authorise an act cannot give it validity by ratifying it.

Ratification must be by an existing person on whose behalf the contract might have been made at the time. Thus a newly-formed company cannot ratify an act done in its name before it was incorporated. And where a time is limited for doing an act, and A does it on behalf of B, but without his authority, within that time, B can ratify it only before the time has expired.

The person on whose behalf an act purports to be done need not be individually known to the agent; it is enough if he is ascertainable as owner of specified property or the like. A man may affect an insurance on behalf of all persons interested, and any such person may adopt the contract of insurance for his own share by ratification. A bailiff may receive the rent of land on behalf of the unknown heirs of the last owner in possession, and those heirs, when their title is ascertained, can ratify his acts.

"Acts done without knowledge or authority"---An act done by an agent in excess of his authority may also be ratified. But there is a wide distinction between ratifying a particular act which has been done in excess of authority and conferring a general power to do similar acts in future. Therefore the ratification by a company of certain acts done by its directors in excess of the authority given to them by the articles of the company does not extend the authority of the directions so as to authorise them to do similar acts in future.

Retrospective effect --Ratification, if effective al all, relates back to the date of the act ratified. If an action is brought in a man's name without his knowledge, he may adopt the proceedings and make them good at any time. The rule goes so far that if A makes an offer to B which Z accepts in B's name without authority, and B afterwards ratifies the acceptance, an attempted revocation of the offer by A in the time between Z's acceptance and B's ratification is inoperative. So long as the professed agent purports to act on behalf of the principal, it is immaterial whether in his own mind he intends the principal's benefit or not, and what his real motive and intention may be; nor does it make any difference if the third party discovers before ratification that the agent meant to keep the contract for himself. In fact, the third party gets by the ratification exactly what he bargained for.

But if Z pays money to B as in satisfaction of A's debt, and B, afterwards discovering that Z had no authority, returns him the money by agreement between them. A can no longer adopt the payment and rely on it as a discharge. A man is not bound to accept payment of a debt, or satisfaction of any other obligation from a stranger to the contract, though, if B had accepted the payment with knowledge of Z's want of authority, or acquieseed in it after he obtained that knowledge, he would have been estopped from denying Z's authority as against A.

If an offer is accepted by an agent subject to ratification no contractual relationship with the principal comes into existence until ratification, and therefore up to that moment the offer can be withdrawn. It has been held that where a partner without authority to do so referred a dispute between a third party and the partnership to arbitration, and the other partners did not ratify the submission to arbitration, the award cannot be enforced even against the partner who so referred the dispute. It is submitted that the liability is joint and several, and the partner submitting the matter to arbitration is bound by the award.

What acts cannot be ratified---A transaction which is void ab initio cannot be ratified. This is illustrated by a line of cases in company law marking the distinction between irregularities capable of being made goods if the act is ratified by a general meeting, or the whole body of shareholders, and acts not within the company's objects as defined by its original constitution, and therefore incapable of being made binding on the company by any ordinary means known to the law. A forged signature cannot be ratified; but a person whose signature has been forged may be estopped from denying that a signature is his, if for example, he has by his conduct induced the holder of a bill of cheque to alter his (the holder's) position.

Ratification would be effective though it is made subsequently---Ratification validates act already performed---It relates back to time of inception of transaction and carries a complete retrospective efficacy---Islamic Law as to ratification stated in judgment.

Principal---Ratification of acts by---Definite rule of ratification of acts of person by another person on whose behalf the acts laid down in S. 196 of Contract Act---Held: Principle of law enunciated in such section to equally apply to acts of attorney if ratified by principal.

Only the civil liability created by act of an agent acting for his principal ratified and not a criminal liability---Guarantee being a forged document---No ratification therefore permissible this being a criminal liability.

Principle of ratification of contract---Scope of---Acts done by one person on behalf of another without such person's knowledge or authority---Principal might ratify or disown acts done by agent on his behalf---Exception to such ratification was where right or interest of third person was involved---Agent having entered into transaction of exchange in favour of vendee, not having been specifically authorized to do so---

if such exchange transaction was validated by principal, no benefit of exchange, held, could be extended to vendee.

Agent.---Act of---Ratification of---Person authorised by principal to act as his attorney or agent in respect of particular properly---Scope of such authority described in instrument---Held: Any incidental action to property of such attorney or agent to be binding on principal only when he accepts, acknowledges or undertakes by ratifying same---In absence of ratification of action constituting transgression of authority, principal not to be held responsible for such action of---Even unauthorised action of attorney in suit or proceeding when ratified by principal (also) to be upheld.

Agent bidding at auction for his principal without duly executed power of attorney---Principal ratifying act of agent---Auction is valid and effective. Where the agent who made a bid at an auction for his principal did not have a duly executed power of attorney as was required by the rules of auction and the transfer by such auction was therefore challenged. Held: If the principal is named and accepts the action of his agent, even though the same was not covered by a duly executed power of attorney at the time of the auction, the matter would be fully covered by the doctrine of ratification, as embodied in section 196 of the Contract Act, 1872.

Overdraft granted unauthorisedly by Manager of Bank---Bank charging interest on amount and suing on hypothecation---Act of agent stands ratified by conduct.

Servants, unauthorised acts of---May be ratified by Master.---These sections are not limited to acts of agents but they lay down general principles which are equally applicable to a servant who is generally his master's agent for some purpose, the extent of the agency depending on the duties and position of the servant.

Unauthorised act of agent when implied ratification by conduct is presumed---No ratification by conduct where acts are disapproved: To constitute implied ratification by conduct of acts previously unauthorised, the conduct of the principal must be such as to lead to the necessary inference that there was an unqualified and binding adoption of those acts by him. Where the Board categorically declined to approve of the alleged contract despite recommendations by the Managing Director, there can be no implied ratification by conduct of those acts.

Effect of Ratification: Sec. 199
Effect of ratifying unauthorized act forming part of a transaction is discussed below:
A person ratifying any unauthorized act done on his behalf ratifies the whole of the transaction of which such act formed a part.

It is obvious that a man cannot at his own choice ratify part of a transaction and repudiates the rest. The only possible exception is in the case of the part repudiated being wholly for the principal's benefit, which is not likely to occur. The general rule is that, where ratification is established as to a part, it operates as a confirmation of the whole of that particular transaction of the agent.

Rights and Obligations of different parties as a result of Ratification:
We can conclude that parties to a contract of agency have the following rights and obligations:

1. Principal may sue the third party and third party can also sue the principal.
2. No liability shall be incurred by the agent to third party
3. Agent not liable for exceeding his authority
4. Principal is required under law to pay reasonable remuneration to the agent.

LESSON 22

CONTRACT OF AGENCY

Contract of Agency

We have already discussed some aspects of agency; other areas relating to a contract of agency are discussed in the following paragraphs.

Types of Agent:

The agents may be classified as under:

1. Public Agents: these are representatives of a State
2. Private Agents: these agents represent individuals or companies
3. General Agents: these agents pertaining to a business, vocation or profession
4. Special Agents: such agents are appointed for a specific transaction.
5. Co-Agents: such Agents act along with Principal.

Duties of the Agent:

Duties of agent are contained in sections from 211 to 218 of the Contract Act. Some of the important duties are enumerated below:

- To follow principal's instructions
- To show required skill and diligence
- Agent to render proper accounts
- Agent to pass on any benefits derived by him

Agent's duty in conducting principal's business: (section 211)

An agent is bound to conduct the business of his principal according to the directions given by the principal, or, in the absence of any such directions, according to the custom which prevails in doing business of the same kind at the place where the agent conducts such business. When the agent acts otherwise, if any loss be sustained, he must make it good to his principal, and, if any profit accrues, he must account for it.

Illustrations

(a) A, an agent engaged in carrying on for B, a business, in which it is the custom to invest from time to time, at interest, the moneys which may be in hand, omits to make such investments. A must make good to B the interest usually obtained by such investments.

(b) B, a broker, in whose business it is not the custom to sell on credit, sells goods of A, on credit to C, whose credit at the time was very high. C before payment, becomes insolvent. B must make good the loss to A.

(c) An agent, instructed to warehouse goods at a particular place, warehouse a portion of them at another place, where they are destroyed, without negligence. He is liable to the principal for the value of the goods destroyed.

(d) An agent, instructed to insure goods, neglects to do so. He is liable to the principal for their value in the event of their being lost.

(e) A broker, entrusted with goods for sale, sells them by auction at an inadequate price, not having made an estimate of the value in accordance with the custom of the particular trade. He must make good the loss.

(f) An auctioneer, contrary to the usual custom, takes a bill of exchange in payment of the price of goods sold. He is liable to the principal for the amount of the bill in the event of its being dishonoured.

(g) An agent, bound by his contract to keep proper books of account, omits to scrutinize, examine or check the accounts of his subordinates whom he implicitly trusts. Taking advantage of this, the subordinates commit gross frauds on him and his employers. The frauds and defalcations being due to the agent's failure to perform his duty he is liable to make good the loss thereby caused.

Explanation

It is not an agent's duty to obey instructions which are unlawful. If, at a sale by auction without reserve, the auctioneer is instructed not to sell for less than a certain price, he is not liable to the principal for accepting the highest bona fide bid, though it may be lower than that price.
"If any loss be sustained."---Where an agent sells his principal's goods in breach of his duty below the limit placed upon them by the principal, the measure of damages is the actual loss which the principal has sustained, and not the difference between the price at which they are sold and the limit of the price placed on the goods. Where no loss is suffered, the principal is entitled at least to nominal damages, the sale being wrongful.
The measure of damages where an agent, who had been instructed not to part with the possession of certain goods until they are paid for, parted with them without payment, was held to be the value of the goods, the purchaser having failed to pay the price.

Bank acting as clearing agent---Responsibility of. In a case where a bank in whose favour the drafts for the value of the goods have been endorsed also acts as a clearing agent, the responsibility of such a bank as a clearing agent is no more than that between a principal and agent under the Contract Act. In such cases, before any damages can be claimed from the agent, it is to be fully established that the agent concerned has acted carelessly and not in accordance with the duties imposed on him as an agent.

Skill and diligence required from agent (sec. 212)

An agent is bound to conduct the business of the agency with as much skill as is generally possessed by persons engaged in similar business, unless the principal has notice of his want of skill. The agent is always bound to act with reasonable diligence, and to use such skill as he possesses; and to make compensation to his principal in respect of the direct consequence of his own neglect, want of skill or misconduct, but not in respect of loss or damage which are indirectly or remotely caused by such neglect, want of skill or misconduct.

Illustrations

(a) A, a merchant in Islamabad, has an agent, B, in London to whom a sum of money is paid on A's account, with orders to remit. B retains the money for a considerable time. A, in consequence of not receiving the money, becomes insolvent. B is liable for the money and interest from the day on which it ought to have been paid, according to the usual rate, and for any further direct loss---as e.g., by variation of rate of exchange--but not further.
(b) A, an agent for the sale of goods, having authority to sell on credit, sells to B on credit, without making the proper and usual inquiries as to the solvency of B. B, at the time of such sale, is insolvent. A must make compensation to his principal in respect of any loss thereby sustained.
(c) A, an insurance broker, employed by B to effect an insurance on a ship, omits to see that the usual clauses are inserted in the policy. The ship is afterwards lost. In consequence of the omission of the clauses nothing can be recovered from the underwriters. A is bound to make good the loss to B.
(d) A, a merchant in England, directs B, his agent at Karachi who accepts the agency, to send him 100 bales of cotton by a certain ship. B, having it in his power to send the cotton, omits to do so. The ship arrives safely in England. Soon after her arrival, the price of cotton rises. B is bound to make good to A, the profit which he might have made by the 100 bales of cotton at the time the ship arrived, but not any profit he might have made by the subsequent rise.

Explanation

Liability of a Clearing agent:
When the clearing agent failed to conduct the work entrusted to him with as much skill as is generally possessed by persons engaged in similar business and he failed to act with reasonable diligence in this connection. He was held liable for the loss incurred by the principal on that ground.

Agent's accounts (section 213)

An agent is bound to render proper accounts to his principal on demand.

Comments

Agent's duty to account: ---This duty is elementary, and will be enforced at need by following in the agent's hands property representing money for which he ought to have accounted. It is irrespective of any contract to that effect. It is not discharged by merely delivering to the principal a set of written accounts without attending to explain them and produce the vouchers by which the items of disbursement are supported, but where accounts have been sent by the agent to the principal, and the principal has kept them with him for a length of time, the accounts will be considered stated and settled and will not be reopened unless instances of fraud are proved. If an agent neglects to keep proper accounts, everything consistent with established facts will be presumed against him in the event of his being called upon for an account of the agency. Where an agent mixes up his moneys with the moneys of his principal the onus clearly lies on the agent to prove that in any particular transaction which he claims to be his own he employed his own moneys. "The principle is well established that an agent entrusted with money or goods by a principal to be applied on his principal's account cannot dispute the principal's title unless he proves a better title in a third person and that he is defending on behalf of and with the authority of the third person. The same principle controls the relation of bailor and bailee. Possibly the framers of the Contract Act may have passed it over as belonging to the general law of estoppel; in any case it is quite consistent with the Act.
Liability of representative of agent to account.---The legal representative of an agent cannot be called upon to render accounts to the principal in the same sense as the agent himself. The remedy of the principal is to sue the representative for any loss he may have suffered by remedy of the negligence or misconduct of his agent. In other words, the suit is not one for accounts strictly so called, but a suit for money payable to the principal out of the estate of the agent. If a suit for accounts is instituted against an agent, but he dies while the suit is pending, it can be proceeded with against the legal representative, and the latter is bound to deliver books of account, papers and vouchers, but cannot be called upon to explain the ad-counts, and the onus shifts to the plaintiff to prove the realisation of items by the deceased.
Suit for accounts---When lies---If suit for accounts lies against the legal representative of the agent.
A suit for account will lie if the defendant is under an obligation to account and an obligation to account arises only;

a) if the person upon whom the obligation is sought to be imposed has received some kind of property not belonging to himself;
b) that the person seeking to impose the liability must be the owner or must have some title to that property as would enable him to recover it;
c) that the defendant must have received the property in his possession and control and;
d) there must be fiduciary relationship between the plaintiff and the defendant.

Agent's duty to communicate with principal (section 214)
It is the duty of an agent, in cases of difficulty, to use all reasonable diligence in communicating with his principal, and in seeking to obtain his instructions.
Agent is under a duty to consult principal in a "difficult" situation so as to save repudiation of his action by principal.

Right of principal when agent deals, on his own account, in business of agency without principal's consent: (sec. 215)

If an agent deals on his own account in the business of the agency, without first obtaining the consent of his principal and acquainting him with all material circumstances which have come to his own knowledge on the subject, the principal may repudiate the transaction, if the case shows either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him.

Illustrations

(a) A directs B to sell A's estate. B buys the estate for himself in the name of C. A, on discovering that B has bought the estate for himself, may repudiate the sale, if he can show that B has dishonestly concealed any material fact, or that the sale has been disadvantageous to him.
(b) A directs B to sell A's estate. B, on looking over the estate before selling it, finds a mine on the estate which is unknown to A. B informs A that he wishes to buy the estate for himself, but conceals the discovery of the mine. A allows B to buy in ignorance of the existence of the mine. A on discovering that B knew of the mine at the time he bought the estate, may either repudiate or adopt the sale at his option.

Explanation

For like reasons an agent for sale or purchase must not act for the other party at the same time, or take a commission from him unknown to the principal, or settle any claim of his against the principal on exorbitant terms thereby to increase his own profit. An agent must give his principal the free and unbiased use of his own discretion and judgment.

A principal who seeks to set aside a transaction on the ground that the provisions of the section has been violated must take proceedings for that purpose within a reasonable time after becoming aware of the circumstances relied on.

Principal's right to benefit gained by agent dealing on his own account in business of agency (sec. 216)

If an agent, without the knowledge of his principal, deals in the business of the agency on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction.

Illustration

A directs B his agent, to buy a certain house for him. B tells A, it cannot be bought, and buys the house for himself. A may, on discovering that B has bought the house, compel him to sell it to A at the price he gave for it.

Principal's rights to profits: ---If a person, while holding a fiduciary position and acting in that capacity, makes a profit without fully disclosing his interest to those persons towards whom he stands in such a position, he must account to them for that profit; and it is immaterial that in acquiring the profit the agent may have run the risk of loss, and that the principal may have suffered no injury. Accordingly, if an agent for sale receives a share of commission or extra profit from the buyer's agent without the knowledge of his own principal, the principal can recover the sum of money received to his use. The principal can also recover from the agent and from the person who bribed him under the name of commission or otherwise, jointly and severally, damages for any loss sustained by the principal by reason of entering into the contract, e.g., an addition fraudulently made to the price of goods bought through the agent in order to give the agent a secret profit. Recovery of the illicit profit from the agent is no bar to an action for further damages against the third person. The relation which arises in such cases between the agent in default and the principal is that of debtor and creditor, not of trustee and beneficiary. The ordinary law of limitation is applicable, the time running from the principal's discovery of the facts, and the special rules as to following trust money

into its investments do not apply. Interest is recoverable on bribes and on all secret profits received by the agent.

Where an agent has in effect bought from his principal, a subsequent purchaser from the agent with knowledge of the agency is in no better position against the principal than the agent himself.

Forfeiture of commission: ---An agent who has wrongfully dealt on his own account is obviously not entitled to recover any commission for the transaction, even if the principal adopts it, for the principal could forthwith recover it back from him under this section or the equivalent common law rule. Moreover he had no authority to make a contract with himself, and therefore has earned nothing as agent. The principal's option of ratifying the unauthorised transaction does not give the agent any better right.

Knowledge of principal: ---A transaction of this kind may be approved or ratified by the principal, but it must be upon full disclosure. It is not enough for the agent to tell the principal that he has some interest of his own. He must disclose all material facts, and be prepared to show that full information was given and the agreement made with perfect good faith. Notice sufficient to put the principal on inquiry will not do. Thus where an agent employed to buy goods sells his own goods to the principal at a price higher than the prevailing market rate, the principal is entitled to repudiate the transaction, and he is not bound by a ratification made in the absence of knowledge that the agent was selling his own goods and was charging him in excess of the market price.

It is open to the principal whose agent has bargained for a secret profit of commission to adopt the transaction, if he thinks fit, for the purpose of suing the third party and recovering for himself the sum promised by him to the agent, or any part of it which the agent has not received.

Agreements against agent's duty void.---An agreement between an agent and a third person which comes within the terms of the present section, or in any way puts the agent's interest in conflict with his duty, is not enforceable unless the principal chooses to ratify it.

An agreement whereby the defendant agreed to remunerate an executor appointed under her brother's will out of her own pocket for undertaking the duties of executor, which he declined to do without remuneration, does not create such an interest at variance with the duties imposed upon executors as to render the agreement illegal on the ground of public policy.

Agent's right of retaining out of sums received on principal's account: (sec. 217)

An agent may retain, out of any sums received on account of the principal in the business of the agency, all moneys due to himself in respect of advances made or expenses properly incurred by him in conducting such business, and also such remuneration as may be payable to him for acting as agent.

Agent's duty to pay sums received for principal (sec. 218)

Subject to such deductions, the agent is bound to pay to his principal all sums received on his account.

Rights of the Agent:

When agent's remuneration becomes due-Sec. 219:

In the absence of any special contract, payment for the performance of any act is not due to the agent until the completion of such act; but an agent may detain moneys received by him on account of goods sold, although the whole of the goods consigned to him for sale may not have been sold, or although the sale may not be actually complete.

Agent to be indemnified against consequences of lawful acts (sec. 222)

The employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him.

Illustrations

(a) B, at Singapore, under instructions from A, of Quetta, contracts with C to deliver certain goods to him. A does not send the goods to B and C sues B for breach of contract. B informs A of the suit, and A authorises him to defend the suit. B defends the suit, and is compelled to pay damages and costs and incurs expenses. A is liable to B for such damages, costs, and expenses.

(b) B, a broker at Quetta by the orders of A, a merchant there, contracts with C for the purchase of 10 casks of oil for A. Afterwards A refuses to receive the oil, and C sues B. B informs A, who repudiates the contracts altogether. B defends, but unsuccessfully and has to pay damages and costs, and incurs expenses. A is liable to B for such damages, costs, and expenses.

Agent to be indemnified against consequences of acts done in good faith (sec. 223)

Where one person employees another to do an act and the agent does the act in good faith, the employer is liable to indemnify the agent against the consequences of that act, though it cause an injury to the rights of third persons.

Compensation to agent for injury caused by principal's neglect (sec. 225)

The principal must make compensation to his agent in respect of injury caused to such agent by the principal's neglect or want of skill.

Illustration

A employees B as a bricklayer in building a house, and puts up the scaffolding himself. The scaffolding is unskillfully put up, and B is in consequence hurt. A must make compensation to B.

Enforcement and consequences of agent's contracts (sec. 226)

Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner, and will have the same legal consequences as if the contracts had been entered into and the acts done by the principal in person.

Illustrations

(a) A buys goods from B knowing that he is an agent for their sale, but not knowing who is the principal. B's principal is the person entitled to claim from A the price of the goods, and A cannot, in a suit by the principal, set off against that claim a debt due to himself from B.
(b) A being B's agent, with authority to receive money on his behalf, receives from C a sum of money due to B. C is discharged of his obligation to pay the sum in question to B.

Principal's liability with regard to agreements caused by misrepresentation or fraud by agent under Sec. 238:

Misrepresentation made, or frauds committed, by agents acting in the course of their business for their principals, have the same effect on agreements made by such agents as if such misrepresentations or frauds had been made or committed by the principals; but misrepresentations made, or frauds committed, by agents, in matters which do not fall within their authority, do not affect their principals.

Illustrations

A, being B's agent for the sale of goods, induces C to buy them by a misrepresentation, which he was not authorised by B to make. The contract is voidable as between B and C at the option of C.

A, the captain of B's ship, signs bills of lading without having received on board the goods mentioned therein. The bills of lading are void as between B and the pretended consignor.

Scope of duties of Principal:

Scope is enumerated below:

- Payment of remuneration to the agent
- Not to prevent his agent from performing the duties/ acts assigned to him under the contract and for which remuneration is payable.
- Any legitimate expenses which have been incurred by the agent in the course of performance of his duties are to be indemnified by the principal.

LESSON 23

LAW OF PARTNERSHIP—KINDS & MUTUAL RIGHTS & DUTIES

Partnership Act, 1932
Law of partnership is governed by Partnership Act, 1932.

Partnership has been defined in section 4 of the Act which is reproduced below:

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

Explanation:

Partnership is defined as a voluntary contract between two or more competent person to place their money, effects, labour and skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a communion of the profits thereof between them.

Halsbury defines a partnership as "the relation which subsists between persons carrying on a business in common with a view of profit".

According to case law reported as (PLD-1985 Karachi-85 (90)) partnership has been interpreted as under: Partnership is the relation between individuals who have entered into agreement for the purpose of sharing profits of a business.

'Partner', 'Firm', 'Firm's name'.- Individuals bound in relation of partnership are individually called 'Partners' and collectively 'a firm', and the name under which, their business is carried on is called the 'firm name'.

Proof of existence of Partnership': Where appellant claimed to be a partner of a partnership firm and one of the alleged partners denied any such partnership, it was incumbent upon the appellant to have proved on record that there was an agreement between the alleged partners for carrying on business in partnership. Registration of firm disclosing that certain persons were its partners was not by itself the proof of execution of any such agreement between the said alleged partners to do business in partnership. Case law reported as (Muhammad Sharif Uppal V Akbar Hussain - PLD 1990 Lah 229).

Liability of Partners: The Defendant Establishment is a partnership Firm and other Defendants being Partners of that firm were, therefore, jointly and severally liable for the amount claimed in suit - Case law reported (National Bank of Pakistan V M/s M.M. Agencies and 5 others-1991 CLC 1763)

Essential Elements of Partnership: There are four important elements necessary to constitute partnership.-

(i) There must be an association of two or more persons to carry on a business.
(ii) There must be an agreement entered into by all the persons concerned.
(iii) The agreement must be to share the profits of a business.
(iv) The business must be carried on by all or any of the persons concerned acting for all.

All the above elements must be present before a group of persons can be held to be Partners. Each of these elements are discussed below in their necessary details.

(i) There must be an association of two or more persons to carry on a business. A group of persons with no legal relations inter se, i.e. no mutual rights and liabilities between themselves would not be a partnership. **(ii)** There must be an agreement entered into by all the persons concerned. This requirement emphasizes the fact that partnership can only arise as a result of an agreement, express or implied, between two or more persons there must be an agreement entered into by all the partners. Partnership is thus created by a contract; it does not arise by the operation of law. Joint ownership may arise by the operation of law, but not partnership. Thus on the death of a person, his children may inherit the family properly jointly together with the family business and may share the profits of the business equally; but they are not, for that reasons, partners.

Only lawful Agreement: The contract which is the foundation of partnership, must itself be founded on good faith, and must be for a lawful object and purpose and between competent persons. In short it is subject to the ordinary incidents and attributes of contracts.

(iii) The Agreement must be to share the profits of a business.-The object of the agreement or contract is to carry on a business. And the business which the partners carry on must, of course, be legal. Where there is no partnership. The mere fact that several persons own something in common which produces returns and that such person divide those returns according to their respective interests, does not make them partners. For instance A and B are co-owners of a house let to a tenant and A and B divide the net rent between themselves. A and B are not partners, because receiving rent of a house let to a tenant is not a business.

(a) Term "Business". defined.- The term business has been defined (in Section. 2) to include every trade, occupation and profession. Business may be temporary or permanent (i.e. indefinite). But it must be in existence. An agreement to carry on business at a future time does no result in present partnership.

(b) Sharing of profits. The sharing of profits is an essential element of a partnership agreement. The members of religious or charitable societies and clubs are not partners, as the idea of sharing, or even making of profits is not involved in these societies associations. An agreement to share profit is essential but it should be noted that an agreement to share the losses is not essential. Where nothing is said as to sharing of losses it is implied in a partnership deed. It may, however be agreed that as between the partners any one or more of them shall not be liable for losses.

(c) Profits of business.- The term profits refers to net profits that is to say the excess of returns over advances, or in other words, the excess of what is obtained over the cost of obtaining it. The English Partnership Act expressly provides that sharing gross returns will not constitute a partnership. Thus, in one English case, the owner of a theatre allowed a travelling manager and his company to use the building, scenery, appliances, etc., in consideration of receiving half the money obtained from the spectators. In a case law, the Court observed that this did not make the owner answerable as a partner of the travelling manager. (Lyon V Knowles, 1863, 3 B & S. 556)

(iv) Carrying of business.- The last element is that business must be carried on by all or by any of the persons concerned acting for all. This shows that the persons or the group who conduct the business do so as agents for all the persons in the group, and are, therefore, liable to account to all. In fact, the relation of principal and agent amongst the partners i.e. mutual agency, is the true test of partnership. A partner is both a principal and an agent. While the relation between partners inter se is that of principals, but in relation to third parties for the business of the firm, they are agents of the firm and also of one another. Thus each partner is regarded as an agent of the other partners, and as such, a partner acting in the course of the business of the firm, can bind his co-partners. But in order to bind his co-partners, it is necessary for the partner acting on behalf of the firm to contract in the firm name or in any other manner expressing or implying an intention to bind his co-partners. A partner contracting in his own name can create only a personal liability and not the collective liability of the firm. The mere fact that money borrowed by partner in his own name on security belonging to him personally, has been used for the purpose of the firm with the knowledge of his partners, does not render them liable.

Illustrations:

(1) A and B buy 100 bales of cotton, which they agree to sell on their joint account. A and B are partners in respect of such cotton.
(2) A and B buy 100 bales of cotton, agreeing to share the cotton between them. A and B are not partners.
(3) A and B agree to work together as carpenters. A is to receive all the profits and pay a salary to B,-A & B are not partners.
(4) A and B enter into a "partnership agreement whereby A is to have no share in either the profits or the loss of the business - A and B are not partners.
(5) A and B are joint owners of a ship. This, by itself does not make them partners.

Kinds of Partnership

a) Partnership-at-will (sec. 7)

b) Particular partnership (sec. 8)

These are discussed in detail in the following paragraphs:

Partnership at will:

It has been defined in section 7 of the Act which is reproduced below:
Where no provision is made by contract between the partners for the duration of their partnership, or for the determination of their partnership, the partnership is "partnership at will".

Explanation:

According to Sec. 7 the "Partnership at will" is a partnership agreement between the partners where by neither any definite period of partnership nor a provision. for the determination of the partnership has been provided, and its duration is left to the discretion or will of the partners themselves.

Particular partnership
A particular partnership has been defined in section 8 of the Act which is reproduced below:
A person may become a partner with another person in particular adventures or undertakings.

Explanation:

Particular partnership duration of.- Partnership Deed clearly stating formation of Partnership, to run agency acquired by plaintiff at a particular station from a particular company. Partnership, held formed for a single venture and could continue only as long as agency lasted. Partners if wishing to carry on partnership on expiry of agency for running some other business, could do so only by a fresh agreement. Case law reported (Hussain Bhai V Mohd Iqbal PLD 1976 Quetta 9).

General duties of Partners:

The general duties of the partners are contained in section 9 of the Act which is given below:
Partners are bound to carry on the business of the firm to the greatest **common advantage**, to **be just** and **faithful** to each other, and to **render true accounts** and **full information** of all things affecting the firm to any partner or his legal representative.

Explanation:

Sec. 9 imposes the following two paramount duties and liabilities on a partner.-

1. Duty of good faith and common advantage.

2. Duty to render true accounts and full information.
3. Duty of good faith and common advantage provides that partners are bound-

   (a) to carry on the business of the firm to the greatest common advantage; and
   (b) to be just and faithful to each other. This duty is very widely and generally worded. In practice, it means that all the endeavours of partner must be directed towards securing maximum profit for the firm.

Mutual rights and liabilities of partners:
These are contained in section 13 of the Act which is reproduced below:

Subject to contract between the partners –

a) a partner is not entitled to receive remuneration for taking part in the conduct of the business;
b) the partners are entitled to share equally in the profits earned, and shall contribute equally to the losses sustained by the firm;
c) where a partner is entitled to interest on the capital subscribed by him such interest shall be payable only out of profits;
d) a partner making, for the purposes of the business, any payment or advance beyond the amount of capital he has agreed to subscribe, is entitled to interest thereon at the rate of six per cent per annum;
e) the firm shall indemnify a partner in respect of payments made and liabilities incurred by him-
f) in the ordinary and proper conduct of the business, and
g) in doing such act, in an emergency, for the purpose of protecting the firm from loss, as would be done by a person of ordinary prudence, in his own case, under similar circumstances; and
h) a partner shall indemnify the firm for any loss caused to it by his willful neglect in the conduct of the business of the firm.

Rights and duties of Partners:
These are contained in section 17 of the Act which is given below:
Subject to contract between the partners,-

a) where a change occurs in the constitution of a firm, the mutual rights and duties of the partners in the reconstituted firm remain the same as they were immediately before the change as far as may be;
b) where a firm constituted for a fixed term continues to carry on business after the expiry of that term, the mutual rights and duties of the partners remain the same as they were before the expiry, so far as they may be consistent with the incidents of partnership-at-will; and
c) where a firm constituted to carry out one or more adventures or undertakings carries out other adventures or undertakings, the mutual rights and duties of the partners in respect of the other adventures or undertakings are the same as those in respect of the original adventures or undertakings.

Relations of partners to third parties:
Partner to be agent of firm
It is contained in section 18 of the Act which is given below:

Subject to the provisions of this Act a partner is the agent of the firm for the purposes of the business of the firm.

A Partner Principal as well as an Agent:- This is one of the most important tests of partnership as agency is the essence of the relationship of partnership. Therefore, a partner is both a principal and an agent. While the relation between partners with regard to principals, they are agents of the firm and of one

regarded as an agent of the other partners, and as such, a partner, acting in the course of the business of the firm, can bind his co-partners. But, in order to bind his co-partners, it is necessary for the partner acting on behalf of the firm to contract in the firms name or in any other manner expressing or implying an intention to bind his co-partners. A partner contracting in his own name incurs only a personal liability, and not the collective liability of the firm. The mere fact that money borrowed by a partner in his own name on security belonging to him personally has been used for the purpose of the firm with the knowledge of partners, does not render them liable.

Implied authority of partner as agent of the firm:

The provisions on this subject are contained in section 19 of the Act which is reproduced below:

(1) Subject to the provisions of section 22, the act of a partner which is done to carry on, in the usual way, business of the kind carried on by the firm, binds the firm. The authority of a partner to bind the firm conferred by this section is called his "implied authority".

(2) In the absence of any usage or custom of trade to the contrary, the implied authority of a partner does not empower him to:-

(a) Submit a dispute relating to the business of the firm to arbitration.
(b) Open a banking account on behalf of the firm in his own name,
(c) Compromise or relinquish any claim or portion of a claim by the firm,
(d) Withdraw a suit or proceeding filed on behalf of the firm,
(e) Admit any liability in a suit or proceeding against the firm,
(f) Acquire immovable property on behalf of the firm,
(g) Transfer immovable property belonging to the firm or
(h) Enter into partnership on behalf of the firm.

Section.19, which is one of the most important sections of the Act, lays down that subject to the provisions of section-22 (which deals with the mode of doing an act to bind the firm) the act of a partner which is done to carry on, in the usual way, business of the kind carried on by the firm, binds the firm. The authority of a partner to bind the firm is called his "implied authority".

In order to bind the firm an act of a partner done within the scope of his implied authority, these conditions must exist-

1. The act must be done in the conduct of the business of the kind carried on by the firm.

2. The act must be done in the way which is usual in such business.

3. Finally, the act must be done in the firm name or in any other manner expressing or implying an intention to bind the firm.

LESSON 24

LAW OF PARTNERSHIP

We have already discussed the concept of partnership; some more concepts are discussed in the following paragraphs:

Relations of partners to third parties

Liability of a partner for acts of the firm:

It is contained in section 25 of the Act which is reproduced below:

Every partner is liable, jointly with all the other partners and also severally, for all acts of the firm done while he is a partner.

Sec. 25 of the Act lays down that all the partners of a firm, jointly and severally, share liabilities of the firm therefore, even where a partner has signed in his own name a promissory note for the benefit of the firm, all partners are liable on it as members of the partnership.

Holding out:

This concept is dealt with in section 28 of the Act which is given below:

> (1) Any one who by words spoken or written or by conduct represents himself, or knowingly permits himself to be represented, to be a partner in a firm, is liable as a partner in that firm to any one who has on the faith of any such representation given credit to the firm, whether the person representing himself or represented to be a partner does or does not know that the representation has reached the person so giving credit.
>
> (2) Where after a partner's death the business is continued in the old firm name, the continued use of that name or of the deceased partner's name as a part thereof shall not of itself make his legal representative or his estate liable for any act of the firm done after his death.

Liability by Holding out: Section 28 of the Act deals with what is known as liability by "holding out". Where a person represents himself or knowingly permits himself to be represented as a partner in a firm, he will be liable as a partner in that firm, to any one who, on the faith of any such representation, has given credit to the firm. The person so representing himself, or permitting himself to be so re-presented is known as a partner by holding out or a partner by estoppel. Even want of knowledge on his part of the effects of his acts and conduct would not absolve him from liability.

In other words where a man holds himself out as a partner, or a allows others to do it, he is then estopped from denying the character he has assumed upon the faith of which creditors may be presumed to have acted. A man so acting may be rightly held liable as a partner by estoppel. In other words, the doctrine of "holding out" is a part of the principle of estoppel, which lays down that where one person, by words or conduct induces another to believe him and act upon the existence of a particular state or facts, he can not afterwards, as regards that person, deny the existence of such facts.

Thus A is in the habit of representing himself to be a partner of a particular firm. B on the strength of such representation, and without giving any notice to A supplies goods on credit to the firm. A would be liable as a partner to B for the price of the goods.

Essentials of Section 28.- In order to estop a person from denying that he is a partner on the doctrine of "Holding out", the following two important elements must co-exist.

1. A person must represent himself to be a partner in a firm, or knowingly permit himself to be represented and
2. Another person must have given credit to the firm on the faith of such representation.

The following seven additional points may also be noted in connection with the doctrine of holding outs.

(i) The representation may be express or implied it need not necessarily be by words spoken or written, it need not be made by the person himself, but may be made by others.

(ii) There will be no representation by conduct if the acts relied upon are ambiguous.

(iii) A general representation to the, world at large is not sufficient, unless the person who gives credit can satisfy the court that he was aware of, and acted upon it to his prejudice.

(iv) To establish liability, it is not essential to show that the party making the representation (or permitting it to be made) has acted fraudulently or negligently. Even want of knowledge on his part, of the effects of his acts and conduct, would not absolve him from liability, if his acts and conduct were such as would induce a reasonable man to believe that he was a partner, and to act upon such belief. The main thing is whether the

representation has caused the person to whom it was made to act on the faith of it so as to alter his position.

(v) A former owner does not become a partner by estoppel merely because the firm has continued to use its old name of which his own name forms a component part. The rule of estoppel is binding on a former partner who has retired without giving proper notice of his retirement.

(vi) There is no liability in tort on the ground of holding out, because the injured person can not claim that he was led to suffer the injury by his belief in any representation. Thus, B allowed his name to appear on a traction engine. A hired the engine, and through his negligence, injured C sued B on the ground of "holding out". It was hold that B was not liable.

(vii) There can be no holding out to a person who is aware of the actual facts e.g. a person who has inspected the register of a firm which has been registered under the Act.

Effects of holding out:- If a person holds himself out to be a partner of a firm, he becomes personally liable, he does not thereby become a partner in the firm and he is also not entitled to any rights as against those who are in fact partners in the firm. By holding out to be a partner, he does not become an agent of the firm. He merely makes himself personally liable for the credit given to the firm on the faith of his representation.

Introduction of a partner:

It is contained in section 31 of the Act which is reproduced below:

(1) Subject to contract between the partners and to the provisions of section 30 no person shall be introduced as a partner into a firm without the consent of all the existing partners.

(2) Subject to the provisions of section 30 a person who is introduced as a partner into a firm does not thereby become liable for any act of the firm done before he became a partner. **Section 30** is about the contracts of wagering, which are void.

Explanation:

Section.31 provides that no person can be introduced as a partner into a firm without the consent of all the existing partners. Where one of the partners of a firm transfers his share in the firm without the consent of the other partners the transferee does not get the status of a partner in view of S. 31, Partnership Act. He has only limited rights and can claim only a share of the profits to which the transferor partner was entitled.

It may be noted that there is nothing to prevent an incoming partner agreeing with his co-partners to make himself liable for the debts incurred by the firm prior to his admission therein. But, even where he has so agreed the agreement does not confer any right on creditors of the old firm to impose the old debts on the new partner. They can acquire such a right only by entering into an agreement between themselves and the new partner, either expressly or by implication.

The only way in which a new partner can be made liable to the creditors of the firm in respect; of past debts is by proving:-

(1) That the re-constituted firm has assumed the liability to pay the debt, and

(2) That the creditor concerned has agreed to accept the re-constituted firm as his debtors, and discharge the old firm from its liability.

Revocation of continuing guarantee by change in firm:

It is provided in section 38 of the Act which is reproduced here under:

A continuing guarantee given to a firm, or to a third party in respect of the transaction of a firm, is in the absence of agreement to the contrary, revoked as to future transactions from the date of any change in the constitution of the firm.

Dissolution of a Firm:

It is contained in section 39 of the Act which is given below:

The dissolution of partnership between all the partners of a firm is called the "dissolution of the firm".

Explanation:

This Chapter contains Sections - 39 to 55, which lay down the rules regulating the dissolution of a firm. S.39 lays down that the dissolution of partnership between all the partners of a firm is called the 'dissolution of the firm'.

The various way of dissolution of Firm- The dissolution of a firm may take place in one of the following five ways.

1. As a result of an agreement between all the partners: (Section 40).

(a) By the adjudication of all the partners, or of all the partners but one, as insolvent: Section.41 (a).
(b) By the business of the firm becoming unlawful: Section 41(b).

3. Subject to agreement between the partners, on the happening of certain contingencies, such as-
(i) efflux of time;
(ii) completion of the adventure for which it was entered into;
(iii) death of a partner; and
(iv) insolvency of a partner: Section.42
4. By a partner giving notice of his intention to dissolve the firm, in case of a partnership at will: Section.43.
5. By intervention of the Court in case of
(i) a partner becoming of unsound mind;
(ii) permanent incapacity of a partner;
(iii) misconduct of a partner affecting the business of the firm;
(iv) willful or persistent breaches of agreement by a partner;
(v) transfer or sale of the whole interest of a partner;
(vi) improbability of the business being carded on save at a loss;
(vii) the Court being satisfied on any other equitable ground that the firm should be dissolved: Section 44.

The ways of dissolution as enumerated above are discussed below:

Dissolution by agreement: Sec. 40

A firm may be dissolved with the consent of all the partners or in accordance with a contract between the partners.

A firm may be dissolved.

(a) with the consent of all the partners or
(b) in accordance with a contract between the parties.

Compulsory dissolution: **sec. 41**

A firm is dissolved -

a) by the adjudication of all the partners or of all the partners but one as insolvent or

b) by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the partners to carry it on in partnership:

Provided that, where more than one separate adventure or undertaking is carried on by the firm, the illegality of one or more shall not of itself cause the dissolution of the firm in respect of its lawful adventures and undertakings.

Dissolution on the happening of certain contingencies: Sec. 42

Subject to contract between the partners a firm is dissolved-

(a) if constituted for a fixed term, by the expiry of that term;

(b) if constituted to carry out one or more adventures or undertakings, by the completion thereof;

(c) by the death of a partner; and

(d) by the adjudication of a partner as an insolvent.

Dissolution by notice of partnership-at-will— Sec. 43:

(1) Where the partnership is at will, the firm may be dissolved by any partner giving notice in writing to all the other partners of his intention to dissolve the firm.
(2) The firm is dissolved as from the date mentioned in the notice as the date of dissolution or, if no date is so mentioned, as from the date of the communication of the notice.

Dissolution of a firm by the Court: Sec. 44

At the suit of a partner, the Court may dissolve a firm on any of the following grounds, namely:-

a) that a partner has become of unsound mind, in which case the suit may be brought as well by the next friend of the partner who has become of unsound mind as by any other partner;

b) that a partner, other than the partner suing, has become in any way permanently incapable of performing his duties as partner;

c) that a partner, other than the partner suing, is guilty of conduct which is likely to affect prejudicially the carrying on of the business, regard being had to the nature of the business;

d) that a partner, other than the partner suing, willfully, or persistently, commits breach of agreements relating to the management of the affairs of the firm or the conduct of its business, or otherwise so conducts himself in matters relating to the business that it is not reasonably practicable for the other partners to carry on the business in partnership with him;
e) that a partner, other than the partner suing, has in any way transferred the whole of his interest in the firm to a third party, or has allowed his share to be charged under the provisions of rule 49 of Order XXI of the First Schedule to the Code of Civil Procedure, 1908, or has allowed it to be sold in the recovery of arrears of land-revenue or of any dues recoverable as arrears of land-revenue due by the partner;
f) that the business of the firm cannot be carried on save at a loss; or
g) on any other ground which renders it just and equitable that the firm should be dissolved.

Registrations of firms:
Application for Registration—sec. 58
(1) The registration of a firm may be effected at any time by sending by post or delivering to the Registrar of area in which any place of business of the firm is situated or proposed to be situated, a statement in the prescribed form and accompanied by the prescribed fee, stating –

a) the firm name,
b) the place or principal place of business of the firm,
c) the names of any other places where the firm carries on business,
d) the date when each partner joined the firm,
e) the names in full and permanent addresses of the partners, and,
f) duration of the firm.

The statement shall be signed by all the partners, or by their agents specially authorized in this behalf.
The application for registration must be made to a Registrar appointed under Section-57.
The registration of a firm may be effected at any time by sending by post or delivering to the Registrar of the area in which any place of business of the firm is situated or proposed to be situated, a statement in the prescribed form and accompanied by the prescribed fee, stating:-

(a) the firm name.
(b) the place or principal place of business of the firm.
(c) the names of any other places where the firm
(d) the names in full and permanent addresses of the partners, and
(e) the duration of the firm.

Such a statement is to be signed by all the partners or by their agents specially authorised in this behalf. Each person signing the statement must also verify it in the prescribed manner. When the Registrar is satisfied that the provisions of section-58 have been duly complied with, he will entertain the statement for its Registration.
Registration –sec. 59
When the Registrar is satisfied that the provisions of section 58 have been duly complied with, he shall record an entry of the statement in a register called Register of Firms and shall file the statement.
Effect of non-registration—sec. 69
The provisions are contained in section 69 of the Act which is given below:
1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm.
2) No suit to enforce a right arising from a contract shall be instituted in any court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.
3) The provisions of subsections (1) and (2) shall apply also to a claim of set-off or other proceeding to enforce a right arising from a contract, but shall not affect –

a) the enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm, or any right or power to realize the property of a dissolved form,
b) the powers of an official assignee, receiver or court under the [Insolvency] […Federal Territory of

4) This section shall not apply -

a) to firms or to partners in firms which have no place of business in [Pakistan] or whose places for business in [Pakistan] are situated in areas to which by notification under [section 56] this Chapter does not apply or

b) to any suit or claim of set-off not exceeding one hundred rupees in value which, is not of a kind specified in the Second Schedule to the Provincial Small Cause Courts Act, 1887 or to any proceeding in execution or other proceeding incidental to or arising from any such suit or claim.

Penalty for furnishing false particulars—sec. 70

Any person who signs any statement, amending statement, notice or intimation under this Chapter containing any particular which he knows to be false or does not believe to be true, or containing particulars which he knows to be incomplete or does not believe to be complete, shall be punishable with imprisonment which may extend to three months, or with fine, or with both.

LESSON 25

COMPANIES ORDINANCE, 1984

Law relating to Companies:

At the time of independence, Companies Act, 1913 prevalent in undivided India was adapted by a government of Pakistan. Companies Act, 1913 was replaced by Companies Ordinance, 1984 which is the law relating to company.

Scope of Company Law:

Company Law covers the following areas:

- Rules regarding incorporation of companies
- Rules regarding issue of prospectus
- Conditions with regard to issue of shares
- Rights of various classes of shares
- Transfer of shares
- Rights, duties and obligation of promoters, directors, managers, secretaries, chief executives and other officers of the company
- Rights and duties of members, auditors, liquidators, creditors of the company
- Rules regarding the preparation of memorandum and articles of association

Objects of Companies Ordinance, 1984:

- Consolidate and amend the law relating to companies.
- Healthy growth of corporate sector
- Setting minimum standards of integrity and management
- Prevention of malpractices
- Promotion of investment
- Protection of interests of share holders
- Full and fair disclosure of information
- Empowering government to intervene and investigate

Advantages of Incorporation:

- Company a separate legal entity
- Artificial person
- Perpetual succession
- Company has legal capacity to sue and can be sued in its own name.
- Liability of members is limited
- Shares are freely transferable.

Definitions as contained in section 2 of the Ordinance are reproduced below:

(1) In this Ordinance, unless there is anything repugnant in the subject or context –

a) "articles" means the articles of association of a company as originally flamed or as altered in accordance with the provisions of any previous Companies Act, or of this Ordinance, including so far as they apply to the comp-any, the regulations contained in Table A in the First schedule;

b) "associated companies" and "associated undertakings" mean any two or more companies or undertakings, or a company and an undertaking interconnected with each other in the following manner, namely:

c) if a person who is the owner or a partner or director of a company or undertaking or who, directly or indirectly holds or controls shares carrying not less than ten per cent of the voting power in such company or under-taking, is also the owner or partner or director of another company or under-taking or directly or indirectly, holds or controls shares carrying not less than Twenty per cent. of the voting power in that company or undertaking; or

d) if the companies or undertakings are under common management or control or one is the subsidiary of another; or

e) if the undertaking is a Modaraba managed by the company; and a person who is the owner of or a partner or director in a company or undertaking or, who so holds or controls shares carrying not less than ten per cent. of the voting power in a company or undertaking, shall be deemed to be an "associated person" of every such other person and of the person who is the owner of or a partner

or director in such other company or undertaking or who so holds or controls such shares in such other company or undertaking

Directors

41. The number of the directors and the names of the first directors shall be determined in writing by a majority of the subscribers of the memorandum of association, so, however, that such number shall not in any case be less than that specified in section 174.

42. The remuneration of the directors shall from time to time be determined by the company in general meeting subject to the provisions of the Ordinance.

43. Save as provided in section 187, no person shall be appointed as a director unless he is a member of the company.

Powers and duties of directors

44. The business of the company shall be managed by the directors, who may pay all expenses incurred in promoting and registering the company, and may exercise all such powers of the company as are not by the Ordinance or any statutory modification thereof for the time being in force. or by these regulations, required to be exercise by the company in general meeting, subject nevertheless to the provisions of the Ordinance or to any of these regulations and such regulations being not inconsistent with the aforesaid provisions, as may be prescribed by the company in general meeting but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if that regulation had not been made.

45. The directors shall appoint a chief executive in accordance with the provisions of sections 198 and 199.

46. The amount for the time being remaining undischarged of moneys borrowed or raised by the directors for the purposes of the company (otherwise than by the issue of share capital) shall not at any time, without the sanction of the company in general meeting, exceed the issued share capital of the company.

47. The directors shall duly comply with the provisions of the Ordinance, or any statutory modification thereof for the time being in force, and in particular with the provisions in regard to the registration of the particulars of mortgages and charges affecting the property of the company or created by it, to the keeping of a register of the directors, and to the sending to the registrar of an annual list of members, and a summary of particulars relating thereto and notice of any consolidation or increase of share capital or sub-division of shares, and copies of special resolutions and a copy of the register of directors and notifications of any changes therein.

48. The directors shall cause minutes to be made in books provided for the purpose—

(a) of all appointments of officers made by the directors;

(b) of the names of the directors present at each meeting of the directors and of any committee of the directors:

(c) of all resolutions and proceedings at all meetings of the company and of the directors and committee of directors;

and every director present at any meeting of directors or committee of directors shall sign his name in a book to be kept for that purpose.

The seal

49. The directors shall provide for the safe custody of the seal and the seal shall not be affixed to any instrument except by the authority of a resolution of the board of directors or by a committee of directors authorized in that behalf by the directors and in the presence of at least two directors and of the secretary. or such other person as the directors may appoint for the purpose; and those two directors and secretary. or other person as aforesaid shall sign every instrument to which the seal of the company is so affixed in their presence.

Disqualification of directors

50. No person shall become the director of a company if he suffers from any of the disabilities or disqualifications mentioned in section 187 and. if already a director. shall cease to hold such office from the date he so becomes disqualified or disabled:

Provided, however, that no director shall vacate his office by reason only of his being a member of any company which has entered into contracts with, or done any work for the company of which he is director, but such director shall not vote in respect of any such contract or work, and if he does so vote, his vote shall not be counted.

51. The directors may meet together for the despatch of business, adjourn and otherwise regulate their meetings, as they think fit. Questions arising at any meeting shall be decided by a majority of votes. In case of an equality of votes, the chairman shall have and exercise a second or casting vote. A director may, and the secretary on the requisition of a director shall, at any time, summon a meeting of directors. It shall not be necessary, to give notice of a meeting of directors to any director for the time being absent from Pakistan.
52. The directors may elect a chairman of their meetings and determine the period for which he is to hold office; but, if no such chairman is elected, or if at any meeting the chairman is not present within ten minutes after the time appointed for holding the same or is unwilling to act as chairman, the directors present may choose one of their number to be chairman of the meeting.
53. The directors may delegate any of their powers not required to be exercised in their meeting to committees consisting of such member or members of their body as they think fit; any committee so formed shall, in the exercise of the powers so delegated, conform to any restrictions that may be imposed on them by the directors.
54. (1) A committee may elect a chairman of its meetings; but, if no such chairman is elected, or if at any meeting the chairman is not present within ten minutes after the time appointed for holding the same or is unwilling to act as chairman, the members present may choose one of their number to be chairman of the meeting.
(2) A committee may meet and adjourn as it thinks proper. Questions arising at any meeting shall be determined by a majority of votes of the members present. In case of an equality, of votes, the chairman shall have and exercise a second or casting vote.
55. All acts done by any meeting of the directors or of a committee of directors, or by any person acting as a director, shall, notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such directors or persons acting as aforesaid, or that they or any of them were disqualified, be as valid as if every, such person had been duly appointed and was qualified to be a director.
56. A resolution in writing signed by all the directors for the time being entitled to receive notice of a meeting of the directors shall be as valid and effectual as if it had been passed at a meeting of the directors duly convened and held.

Filling of vacancies

57. At the first annual general meeting of the company, all the directors shall stand retired from office. and directors shall be elected in their place in accordance with section 178 for a term of three years.
58. A retiring director shall be eligible for re-election.
59. The director shall comply with the provisions of sections [74 to 178 and sections 180 and 184 relating to the election of directors and matters ancillary, thereto.
60. Subject to the provisions of the Ordinance, the company may from time to time in annual general meeting increase or decrease the number of directors.
61. Any casual vacancy occurring on the board of directors may be filled up by the directors. but the person so chosen shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is chosen was last elected as director.
62. The company may remove a director but only in accordance with the provisions of the Ordinance.

Dividends and reserve

63. The company in general meeting may declare dividends but no dividend shall exceed the amount recommended by the directors.
64. The directors may from time to time pay to the members such interim dividends as appear to the directors to be justified by the profits of the company.
65. No dividends shall be paid otherwise than out of profits of the year or any other undistributed profits.
66. Subject to the rights of persons (if any) entitled to shares with special rights as to dividends, all dividends shall be declared and paid according to the amounts paid on the shares, but if and so long as nothing is paid upon any of the shares in the company, dividends may be declared and paid according to the amounts of the shares. No amount paid on a share in advance of calls shall be treated for the purposes of this regulation as paid on the share.
67. (1) The directors may, before recommending any dividend, set aside out of the profits of the company such stuns as they think proper as a reserve or reserves which shall, at the discretion of the directors, be applicable for meeting contingencies, or for equalizing dividends, or for any other purpose to which the

either be employed in the business of company or be invested in such investments (other than shares of the company) as the directors may, subject to the provisions of the Ordinance, from time to time, think fit.
(2) The directors may carry forward any profits which they may think prudent not to distribute, without setting them aside as a reserve.
68. If several persons are registered as joint-holders of any share, any one of them may give effectual receipt for any dividend payable on the share.
69. Notice of any dividend that may have been declared shall be given in mariner herein after mentioned to the persons entitled to share therein but, in the case of a public company, the company may give such notice by advertisement in a newspaper circulating in the Province in which the registered office of the company is situate.
70. The dividend shall be paid within the period laid down in the Ordinance.

Accounts

71. The directors shall cause to be kept proper books of account as required trader section 230.
72. The books of accounts shall be kept at the registered office of the company or at such other place as the directors shall think fit and shall be open to inspection by the directors during business hours.
73. The directors shall from time to time determine whether and to what extent and at what time and places and trader what conditions or regulations the accounts and books or papers of the company or any of them shall be open to the inspection of members not being directors and no member (not being a director) shall have any right of inspecting any account and book or papers of the company except as conferred by law or authorised by the directors or by the company in general meeting.
74. The directors shall as required by sections 233 and 236 cause to be prepared and to be laid before the company in general meeting such profit and loss accounts or income and expenditure accounts and balance-sheets duly audited and reports as are referred to in those sections
75. A balance-sheet, profit and loss account, income and expenditure account and other reports referred to in Regulation 74 shall be made out in every year and laid before the company in the annual general meeting made up to a date not more than six months before such meeting. The balance-sheet and profit and loss account or income and expenditure account shall be accompanied by a report of the auditors of the company and the report of directors.
76. A copy of the balance-sheet and profit and loss account or income and expenditure account and reports of directors and auditors shall, at least twenty-one days preceding the meeting be sent to the persons entitled to receive notices of general meetings in the manner in which notices are to be given hereunder.
77. The directors shall in all respects comply with the provisions of sections 230 to 236.
78. Auditors shall be appointed and their duties regulated in accordance with sections 252 to 255.

Notices

79. (1) A notice may be given by the company to any member either personally or by sending it by post to him to his registered address or (if he has no registered address in Pakistan) to the address, if any, within Pakistan supplied by him to the company for the giving of notices to him.
(2) Where a notice is sent by post, service of the notice shall be deemed to be effected by properly addressing, prepaying and posting a letter containing the notice and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary, course of post.
80. If a member has no registered address in Pakistan, and has not supplied to the company an address within Pakistan for the giving of notices to him, a notice addressed to him or to the shareholders generally and advertised in a newspaper circulating in the neighbourhood of the registered office of the company shall be deemed to be duly given to him on the day on which the advertisement appears.
81. A notice may be given by the company to the joint-holders of a share by giving the notice to the joint-holder named first in the register in respect of the share.
82. A notice may be given by the company to the persons entitled to a share in consequence of the death or insolvency of a member by sending it through the post in a prepaid letter addressed to them by name, or by the title of representatives of the deceased, or assignee of the insolvent or by any like description, at the address (if any) in Pakistan supplied for the purpose by the person claiming to be so entitled, or (until such an address has been so supplied) by giving the notice in any manner in which the same might have been given if the death or insolvency had not accrued.
83. Notice of every general meeting shall be given in some manner herein before authorised to (a) every member of the company except those members who, having no registered address within Pakistan, have not

person entitled to a share in consequence of the death or insolvency of a member, who but for his death or insolvency would be entitled to receive notice of the meeting, and (c) to the auditors of the company for the time being.

Winding up

84. (1) If the company is wound up, the liquidator may, with the sanction of a special resolution of the company and any other sanction required by the Ordinance divide amongst the members, in specie or kind, the whole or any part of the assets of the company, whether they consist of property of the same kind or not.

(2) For the purpose aforesaid, the liquidator may set such value as he deems fair upon any property, to be divided as aforesaid and may determine how such division shall be carried out as between the members or different classes of members.

(3) The liquidator may, with like sanction, vest the whole or any part of such assets in trustees upon such trusts for the benefit of the contributories as the liquidator, with the like sanction, thinks fit, but so that no member shall be compelled to accept any shares or other securities whereon there is any liability.

Indemnity

85. Every officer of agent for the time being of the company may be indemnified out of the assets of the company against any liability incurred by him in defending any proceedings, whether civil or criminal, arising out of his dealings in relation to the affairs of the company, except those brought by the company against him, in which judgment is given in his favour or in which he is acquitted, or in connection with any application under section 488 in which relief is granted to him by the Court.

Effects thereof: --Sec 32

After registration the company becomes a separate legal entity, having perpetual succession and a common seal.

Effects of registration are given here under:

- Subscribers form a body corporate.
- All rights vested in body corporate to exercise all the functions of an incorporated company
- Body corporate acquires perpetual succession.
- Body corporate possesses a common seal
- Body corporate acquires the status of a separate and distinct legal person

Certificate of Incorporation:

This shall be explained in our later discussion.

LECTURE 26

LAW RELATING TO COMPANIES

Formation of company:

We have discussed different aspects with respect to formation of a company; some other aspects in this regard are discussed in the following paragraphs. The following documents are required to be prepared/ submitted for formation of a company.

1. Certificate of Incorporation
2. Commencement of business
3. Memorandum of Association
4. Articles of Association
5. Prospectus

Certificate of Incorporation:

On issuance of this certificate, the promoters of proposed company become entitled on the registration of its memorandum with the registrar of companies. This certificate contains the following information:

- Date of issue
- Name of the company
- Certification by the registrar that company is incorporated
- In case of limited company certificate by the registrar that company is limited.
- Province and seal of the registrar

Authority of issuing certificate of incorporation:

Authority vested in the province where registered office of the company is proposed in the memorandum of association to be situated.

Certificate of incorporation is issued in the following situations:

- On registration of a company
- On the change of the name of a company—amended certificate to be issued
- On the request of a person on payment of prescribed fee as laid down in section 466 (6)

Any person may inspect the documents kept by the registrar and any person may require a certificate of incorporation or a certificate of commencement of business of any company, or a copy or extract of any other document or register or any part of any other document or register to be certified by the registrar on payment of the fees specified in the Sixth Schedule.

Commencement of business:

Commencement of business by a private company: sec 146 (6)

A private company can start its business on issuance of certificate of incorporation, meaning thereby that private company can enter into binding contracts and also exercise borrowing powers.

Commencement of business by a public company: sec 146 (1)

A public company cannot start business on issuance of certificate of incorporation whereas it can only start business on issuance of certificate of commencement of business under the provisions of sec 146 (1) which is reproduced below:

Commencement of business by a public company: sec 146 (1)

(1) A company shall not commence any business or exercise any borrowing powers unless-

(a) shares held subject to the payment of the whole amount thereof in cash have been allotted to an amount not less in the whole than the minimum subscription;

(b) every director of the company has paid to the company full amount on each of the shares taken or contracted to be taken by him and for which he is liable to pay in cash;

(c) no money is or may become liable to be repaid to applicants for any shares or debentures which have been offered for public subscription by reason of any failure to apply for or to obtain permission for the shares or debentures to be dealt in on any stock exchange;

(d) there has been filed with the registrar a duly verified declaration by the chief executive or one of the directors and the secretary in the prescribed form that the aforesaid conditions have been complied with and the registrar has issued a certificate referred to in sub-section (2); and

(e) in the case of a company which has not issued a prospectus inviting the public to subscribe for its shares, there has been filed with the registrar a Statement in lieu of prospectus.

Certificate of commencement of business:

- it is a conclusive evidence that public company can start the business and enter into contracts with the rest of world.
- Any contract made before issuance of this certificate shall be provisional and the contracts enter into are not binding.

Restrictions on commencement of business:

(1) A company shall not commence any business or exercise any borrowing powers unless—

(a) shares held subject to the payment of the .,whole amount thereof in cash have been allotted to an amount not less in the whole than the minimum subscription;

(b) every director of the company has paid to the company full amount on each of the shares taken or contracted to be taken by him and for which he is liable to pay in cash;

(c) no money is or may become liable to be repaid to applicants for any shares or debentures which have been offered for public subscription by reason of any failure to apply for or to obtain permission for the shares or debentures to be dealt in on any stock exchange;

(d) there has been filed with the registrar duly verified declaration by the chief executive or one of the directors and the secretary in the prescribed form that the aforesaid conditions have been complied with and the registrar has issued a certificate referred to in subsection (2); and

(e) in the case of a company which has not issued a prospectus inviting the public to subscribe for its shares, there has been filed with the registrar a statement in lieu of prospectus.

(2) The registrar shall, on the filing of a duly verified declaration in accordance with the provisions of subsection (1) and after making such enquiries as he may deem fit to satisfy himself that all the requirements of this Ordinance have been complied with in respect of the commencement of business and matters precedent and incidental thereto, certify that the company is entitled to commence business, and that certificate shall be conclusive evidence that the company is so entitled:

Provided that, in the case of a company which has not issued a prospectus inviting the public to subscribe for its shares, the registrar shall not give such a certificate unless a statement in lieu of prospectus has been filed with him.

(3) Any contract made by a company before the date at which it is entitled to commence business shall be provisional only, and shall not be binding on the company until that date, and on that date it shall become binding.

(4) Nothing in this section shall prevent the simultaneous offer for subscription or allotment of any shares and debentures or the receipt of any money payable on application for debentures.

(5) If any company commences business or exercises borrowing powers in contravention of this section, every, officer and other person who is responsible for the contravention shall, without prejudice to any other liability, be liable to a fine not exceeding one thousand rupees for every day during which the contravention continues.

(6) Nothing in this section shall apply to a private company, or to a company limited by guarantee and not having a share capital.

Memorandum of Association:

Memorandum of association is a legal document for incorporation of a company

Memorandum of association is a fundamental legal document on the basis of which the company conducts its external affairs. This document **signifies the powers of the company** as well as the **limitations of the company**. It contains information regarding the purpose, capital, place of business, liability of the members and acquisition of shares by the subscribers.

Contents of Memorandum—section 16,17,18

Memorandum of association is required to be subscribed by at least three persons in case of public company and at least by one person in case of private company.

- Name Province in which the registered office of the company is to be located
- Objects
- Liability of the members—limited or unlimited
- Authorized capital

Memorandum of company limited by shares: Sec 16

In the case of a company limited by shares,-

(a) the memorandum shall state—

(i) the name of the company with the word "limited" as the last word of the name in the case of a public limited company, and the parenthesis and words "(Private) Limited" as the last words of the name in the case of a private limited company,
(ii) the Province or the part of Pakistan not forming part of a Province, as the case may be, in which the registered office of the company is to be situate;
(iii) the objects of the company, and except in the case of a trading corporation the territories to which they extend;
(iv) that the liability of the members is limited; and
(v) the amount of share capital with which the company proposes to be registered, and the division thereof into shares of a fixed amount:
(b) no subscriber of the memorandum shall take less than one share; and
(c) each subscriber of the memorandum shall write opposite to his name the number of shares he takes.

Memorandum of company limited by guarantee: sec 17

In the case of a company limited by guarantee,-

(a) whether or not the company has a share capital, the memorandum shall state-
(i) the name of the company with the parenthesis and words "(Guarantee) Limited" as the last words of its name;
(ii) the Province or the part of Pakistan not forming part of a Province, as the case may be, in which registered office of the company is to be situate;
(iii) the objects of the company, and, except in the case of a trading corporation, the territories to which they extend;
(iv) that the liability of the members is limited; and
(v) that each member undertakes to contribute to the assets of the company in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before he ceases to be a member, and of costs, charges and expenses of winding up, and for adjustment of the rights of the contributories among themselves, such amount as may be required, not exceeding a specified amount; and
(b) if the company has a share capital,--
(i) the memorandum shall also state the amount of share capital with which the company proposes to be registered and the division thereof into shares of a fixed amount:
(ii) no subscriber of the memorandum shall take less than one share: and
(iii) each subscriber shall write opposite to his name the number of shares he takes.

Memorandum of unlimited company: sec 18

In the case of an unlimited company—

(a) whether or not the company has a share capital, the memorandum shall stale
(i) the name of the company;
(ii) the Province or the part of Pakistan not forming part of a Province, as the case may be, in which the registered office of the company is to be situate; and
(iii) the objects of the company, and, except in the case of a trading corporation, the territories to which they extend; and
(b) if the company has a share capital,-
(i) no subscriber of the memorandum shall take less than one share; and
(ii) each subscriber shall write opposite to his name the number of shares he takes

Requirements of memorandum:

Following requirements must be fulfilled before submission of the memorandum of association to the Registrar.

- Required to be printed
- Should be divided into paragraphs
- Paragraphs to be consecutively numbered
- To be signed by the subscribers
- Signatures duly witnessed by at least one witness
- Signature of each subscriber to be attested by the witness
- Complete address/ occupation of the subscriber to be mentioned.
- Address, occupation of the witness to be mentioned

- Memorandum to be duly stamped under stamp Act

Articles of Associations

Article of association is another important legal document which is subordinate to memorandum of association. It is concerned with the internal conduct and control of the company.

Articles of association as provided in section 2 (1) (i) :

--"**articles**" means the articles of association of a company as originally framed or as altered in accordance with the provisions of any previous Companies Act, or of this Ordinance, including, so far as they apply to the company, the regulations contained in Table A in the First Schedule;

Contents of Articles of association are comprised of provisions, rules of Articles of Association:

Regulations concerning the internal management of the company which are outlined here under:

- Definition of important terms
- Issue of shares and allotment of shares
- Share capital, rights of share holders.
- Transfer of shares
- Alteration of share capital
- Dividend
- Directors—appointment, election, removal, powers, duties
- Meetings, voting, powers
- Borrowing powers
- Accounts and Audit
- Winding up

Section 26 of the Ordinance as contained in the Ordinance is reproduced here under for reference:

Registration of articles: sec 26

(1) There may, in the case of a company limited by shares, and there shall, in the case of a company limited by guarantee or an unlimited company, be registered with the memorandum, articles of association signed by the subscribers to the memorandum and setting out regulations for the company.

(2) Articles of association may adopt all or any of the regulations contained in Table A in the First Schedule.

(3) In the case of an unlimited company or a company limited by guarantee, the articles, if the company has a share capital, shall state the amount of share capital with which the company proposes to be registered.

(4) In case of an unlimited company or a company limited by guarantee, if the company has not a share capital, the articles shall state the number of members with which the company proposes to be registered.

(5) In the case of a company limited by shares and registered after the commencement of this Ordinance, if articles are not registered, or, if articles are registered, in so far as the articles do not exclude or modify the regulations in Table A in the First Schedule, those regulations shall, so far as applicable, be the regulations of the company in the same manner and to the same extent as if they were contained in duly registered articles.

(6) The articles of every company shall be explicit and without ambiguity and, without prejudice to the generality of foregoing, shall list and enumerate the voting and other rights attached to the different classes of shares and other securities, if any, issued or to be issued by it.

Alteration of articles: sec 28

Subject to the provisions of this Ordinance and to the conditions contained in its memorandum, a company may by special resolution alter or add to its articles, and any alteration or addition so made shall be as valid as if originally contained in the articles, and be subject in like manner to alteration by special resolution: Provided that, where such alteration affects the substantive rights or liabilities of members or of a class of members, it shall be carried out only if a majority of at least three-fourth of the members or of the class of members affected by such alteration, as the case may be, personally or through proxy vote for such alteration.

Form of memorandum and articles: sec 29

The form of memorandum of articles shall be in accordance with the forms set out in tables, B,C,D and E of the first schedule

(a) the memorandum of association of a company limited by shares;

(b) the memorandum and articles of association of a company limited by guarantee and not having a share capital;

(c) the memorandum and articles of association of a company limited by guarantee and having a share capital;

(d) the memorandum and articles of association of an unlimited company having a share capital;

Registration of memorandum and articles, etc: sec 30

(1) The memorandum and the articles, if any, shall be filed with the registrar in the Province or the part of Pakistan not forming part of a Province, as the case may be, in which the registered office of the company is stated by the memorandum to be situate.

(2) A declaration by such person as may be prescribed in this behalf, or by a person named in the articles as a director, or other officer of company, of compliance with all or any of the requirements of this Ordinance and the rules made thereunder shall be filed with the registrar; and the registrar may accept such a declaration as sufficient evidence of such compliance.

(3) If the registrar is satisfied that the company is being formed for lawful purposes, that none of its objects stated in the memorandum is inappropriate or deceptive or insufficiently expressive and that all the requirements of this Ordinance and the rules made thereunder have been complied with in respect of registration and matters precedent and incidental thereto, he shall retain and register the memorandum and articles. if any.

(4) If registration of the memorandum is refused, the subscribers of the memorandum or any one of them authorised by them in writing may either supply the deficiency and remove the defect pointed out, or within thirty days of the order of refusal prefer an appeal—

(a) where the order of refusal has been passed by an additional registrar, a joint registrar, a deputy registrar or an assistant registrar, to the registrar; and

(b) where the order of refusal has been passed, or upheld in appeal, by the registrar, to the Authority.

(5) An order of the Authority under subsection (4) shall be final and shall not be called in question before any Court or other authority.

LECTURE 27

LAW RELATING TO COMPANIES

Law relating to Companies:
We have gone through the different formalities and documents required to be completed/submitted to the registrar in the process of formation of a company. We have discussed two important documents namely Memorandum of Association and Articles of Association, the distinction between these two documents are explained below:

Distinguishing features between Memorandum and Articles of Association:

Memorandum of Association:

1. Fundamental legal document
2. It is the constitution of the company in relation to outside world.
3. Memorandum constitutes the conditions upon which the company is granted incorporation.

Articles of Association:

1. Subordinate to memorandum
2. It is doctrine of indoor management.
    1. These are internal rules and regulations of the company.

Prospectus:
Prospectus has been defined in section 2(29) of the ordinance which is reproduced below:
"prospectus" means any document described or issued as prospectus, and includes any notice, circular, advertisement, or other communication, inviting offers from the public for the subscription or purchase of any shares in, or debenture of, a body corporate, or inviting deposits from the pubic, other than deposits invited by a banking company or a financial institution approved by the Federal Government, whether described as prospectus or otherwise;

Important features of Prospectus:
--An invitation to public
--Invitation should be for subscription to shares or debentures
--Invitation to be made on behalf of a company

Contents of Prospectus:
--List of directors and details of benefits available to directors
--Profits made by the promoters
--Capital required by the company
--Financial records of the company
--Preliminary contracts, commission and preliminary expenses, voting rights and dividend rights for each class of shares.

The different aspects with reference to prospectus are contained in section 45, 53, and section 69 of the ordinance which is reproduced below:

Prospectus or statement in lieu of prospectus to be fled by private company on ceasing to be private company:—Sec. 45
(1) If a company, being a private company, alters its articles in such a manner that they no longer include the provisions which, under clause (28) of subsection (1) of section 2, are required to be included in the articles of a company in order to constitute it a private company, the company
(a) shall, as on the date of the alteration, cease to be a private company, and
(b) shall, within a period of fourteen days after the said date, file with the registrar either a prospectus or a statement in lieu of prospectus as specified in subsection (2) or sub section (3).
(2) Every prospectus filed under subsection (1) shall state the matters specified in section 1 of Part I of the Second Schedule and set out the reports specified in section 2 of that Part, and the said sections 1 and 2 shall have effect subject to the provisions contained in section 3 of that Part.
(3) Every statement in lieu of prospectus filed under subsection (1) shall be in the form and contain the particulars set out in section I of Part III of the Second Schedule and, in the cases mentioned in section 2 of that Part, set out the reports specified therein, and the said sections 1 and 2 shall have effect subject to the provisions contained in section 3 of that part.
(4) Where the persons making any such report as is referred to in subsection (2) or subsection (3) have made therein, or have, without giving reasons indicated therein, made any such adjustments as are

mentioned in clause 3 6 of Part I of the Second Schedule or clause 5 of section 3 of Part III of the Second Schedule, as the case may be, the prospectus or statement in lieu of prospectus filed as aforesaid shall have endorsed thereon or attached there-to a written statement, signed by those persons, setting out the adjustments and giving the reasons thereof.

(5) If default is made in complying with the provisions of any of the preceding subsections, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to five thousand rupees and to a further fine not exceeding one hundred rupees for every day after the first during which the default continues.

(6) Where any prospectus or statement in lieu of prospectus filed under sub-section (1) includes any untrue statement, any person who authorised the filing of such prospectus or statement shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to ten thousand rupees, or with both, unless he proves either that the statement was immaterial or that he had reasonable ground to believe, and did, up to the time of the filing of the prospectus or statement, believe, that the statement was true.

(7) For the purposes of sub section (6)--

(a) a statement included in a prospectus or a statement in lieu of prospectus shall be deemed to be untrue if it is misleading in the form and context in which it is included; and

(b) where the omission from a prospectus or a statement in lieu of prospectus of any matter is calculated to mislead, the prospectus or statement in lieu of prospectus shall be deemed, in respect of such omission, to be a prospectus or a statement in lieu of prospectus in which an untrue statement is included.

(8) For the purposes of subsection (6) and clause (a) of subsection (7), the expression "included" when used with reference to a prospectus or statement in lieu of prospectus, means included in the prospectus or statement in lieu of prospectus itself or contained in any report or memorandum appearing on the face thereof, or by reference incorporated therein.

Matters to be stated and reports to be set out in prospectus:—Sec. 53

(1) Every prospectus issued-

(a) by or on behalf of a company, or

(b) by or on behalf of any person who has been engaged or interested in the formation of a company, shall state the matters specified in section 1 of Part I of the Second Schedule and set out the reports specified in section 2 of that Part and the said sections I and 2 shall have effect subject to the provisions contained in section 3 of that Part.

A sufficient number of copies of the prospectus issued under sub-section (1) shall be made available at the registered office of the company, with the stock exchange at which the company is listed or is proposed to be listed and with the bankers to the issue, and the prospectus in its full text or in such abridged form as may be prescribed, shall be published at least in one Urdu and one English daily newspaper.

(2) No prospectus shall be issued or an advertisement of a prospectus published in a newspaper less than seven days or more than thirty days before the subscription list, as specified in the prospectus, is due to open:

Provided that the Authority may for special reasons allow a prospectus to be issued or an advertisement of a prospectus to be published more than thirty days before the subscription list is due to open.

(3) If a prospectus is issued which does not comply with the provisions of subsection (I) or sub section (2), every person who is knowingly responsible for the issue of such prospectus shall be liable to a fine not exceeding ten thousand rupees and in the case of a continuing default to a further fine not exceeding two hundred rupees for every day from the day of the issue of the prospectus until a prospectus complying with the requirements aforesaid is issued and a copy thereof is filed with the registrar.

(4) A condition requiring or binding an applicant for shares in or debentures of a company to waive compliance with any of the requirements of this section, or purporting to affect him with notice of any contract, document or matter not specifically referred to in the prospectus shall be void.

(5) No one shall issue any form of application for shares in or debentures of a company, unless the form is accompanied by a prospectus which complies with requirements of this section:

Provided that this subsection shall not apply if it is shown that the form of application was issued either-

(i) in connection with a bona fide invitation to a person to enter into an underwriting agreement with respect to the shares or debentures; or

(ii)) in relation to shares or debentures which were not offered to the public.

exceeding two thousand rupees.
(7) A director or other person responsible for the prospectus shall not incur any liability by reason of any non-compliance with, or contravention of, any of the requirements of this section, if--
(a) as regards any matter not disclosed, he proves that he had no knowledge thereof, or
(b) he proves that the non-compliance or contravention arose from an honest mistake of fact on his part; or
(c) that non-compliance or contravention was in respect of matters which, in the opinion of the registrar or officer dealing with the case, were immaterial or was otherwise such as ought, in the opinion of the registrar or officer, as the case may be, having regard to all the circumstances of the case, reasonably to be excused:
Provided that no director or other person shall incur any liability in respect of the failure to include in a prospectus a statement with respect to the matters specified in clause 18 of Part I of the Second Schedule, unless it is proved that he had knowledge of the matters not disclosed.
(8) This section shall not apply--
(a) to the issue to existing members or debenture-holders of a company of a prospectus or form of application relating to shares in or debentures of the company, whether an applicant for shares or debentures will or will not have the right to renounce in favour of other persons; or
(b) to the issue of a prospectus or form of application relating to shares or debentures which are, or are to be, in all respects uniform with shares or debentures previously issued and for the time being dealt in or quoted on a stock exchange,
but, Subject as aforesaid, this section shall apply to a prospectus or a form of application, whether issued on or with reference to the formation of a company or subsequently,
(9) Nothing in this section shall limit or diminish any liability which any person may incur under the general law or under any other provision of this Ordinance.

Statement in lieu prospectus: sec. 69

(1) A company having a share capital, which does not issue a prospectus on or with reference to its formation, or which has issued such a prospectus but has not proceeded to allot any of the shares offered to the public for subscription, shall not allot any of its shares or debentures unless, at least three days before first allotment of either share or debenture, there has been delivered to the registrar for registration a statement in lieu of prospectus signed by every person who is named therein as a director or proposed director of the company or by his agent authorised in writing, in the form and containing the particulars set out in section I of Part 11 of the Second Schedule and, in the cases mentioned in section 2 of that Part, setting out the reports specified therein, and the said sections 1 and 2 shall have effect subject to the provisions contained in section 3 of that Part.
(2) Every statement in lieu of prospectus delivered under subsection (1), where the persons making any such report. as aforesaid have made therein, or have without giving the reasons indicated therein, made any such adjustments as are mentioned in clause (5) of Part 11 of the Second Schedule, shall have endorsed thereon or attached thereto a written statement signed by those persons, setting out the adjustments and giving the reasons thereof.
(3) This section shall not apply to a private company.
(4) If a company acts in contravention of subsection (I) or subsection (2), the company, and every officer of the company who wilfully authorises or permits the contravention, shall be liable to a fine not exceeding five thousand rupees and in the case of a continuing contravention with a further fine not exceeding one hundred rupees for every day after the first during which the contravention continues.
(5) Where a statement in lieu of prospectus delivered to the registrar under subsection (I) included any untrue statement, any person who signed or authorised the delivery of the statement in lieu of prospectus for registration shall be punishable with imprisonment for a term which may extend to two years or with fine which may extend to ten thousand rupees, or with both, unit he proves either that the statement was immaterial or that he had reasonable ground to believe and did up to the time of the delivery for registration of the statement in lieu of prospectus believe, that the statement was trust.
(6) For the purposes of this section,--
(a) a statement included in a statement in lieu of prospectus shall be deemed to be untrue if it is misleading in the form and context in which it is included; and
(b) where the omission from a statement in lieu of prospectus of any matter is calculated to mislead, the statement in lieu of prospectus shall be deemed, in respect of such omission, to be a statement in lieu of prospectus in which an untrue statement is included.

with reference to a statement in lieu of prospectus means included in the statement in lieu of prospectus itself or contained in any report or memorandum appearing on the face thereof, or by reference incorporated therein, or issued therewith

Shares of a Company

The scope, kind and types of shares are discussed below:

Types of Share Capital:

--Authorized Capital
--Issued Share Capital
--Called Up Capital

Shares

A limited company can raise their funds by way of issuing shares to the general public. The face value of the total shares issued by a company reflects the company's share capital. A share in a company is a unit into which the total capital of the company is divided, as such share is a proportion of capital which each share holder is entitled to. Share represents a legal relationship between the company and the share holder.

Share has been defined in sec 2 (35) of the ordinance which is reproduced below:

"share" means share in the share capital of a company;

Kind of shares:

--Equity Shares
--Preferred Shares
--Deferred Shares
--Bonus Shares

Equity shares:

--The holder of these shares do not enjoy any preferential rights
--These shares rank after preference shares
--Dividend is dependent on the size of profits of the company, the rate of dividend is determined by the directors of the company.
--The total of equity shares held by the company is called **"equity share capital"**

Ordinary shares have been defined in section 90 (1) which is reproduced below:

A company limited by share may have different kinds of share capital and classes therein as provided by its memorandum and articles:

Provided that different rights and privileges in relation to the different classes of shares may only be conferred in such manner as may be prescribed.

Preference shares:

- Preference shares are entitled to receive dividend in preference to equity shares.
- Preference shares are entitled to a fixed rate of dividend.
- Preference shares have preference to equity shares at the time of payment of capital in case of winding up of the company.
- Accumulative preference shares are entitled to receive arrears of dividend whenever there is sufficient profit.
- Redeemable preference shares may be paid back by the company

Kind of Preference shares:

- Simple or non cumulative preference shares—entitled to a fixed dividend.
- Cumulative preference shares—also entitled to arrears of dividends in case of company earns profits in subsequent years.
- Participating preference shares—Entitled to a fixed rate of dividend in preference to other classes of shares as well as preference right to participate in surplus profit with the ordinary shares after the rights of the ordinary shares or fulfilled.
- Redeemable preference shares—These shares are to be redeemed by the company after a fix time or on its own option or at the option of share holders.

Deferred shares / Founder shares / Management shares:

- These shares are issued to the promoters or the underwriters of the company.
- The holders of these shares generally do not receive dividend until dividend to all classes of shares are paid up in full.

Bonus Shares:

The company elects to issue these shares called bonus shares instead of paying dividend to the share holders. In this way the company capitalizes the amount issued as bonus share.

Share Certificates:

A Share certificate is a document of title of the shares held by a shareholder in a company. These certificates are issued under the common seal of the company and include the following particulars:

- Name and address of the holder of the shares
- Number of shares held
- Serial number allotted to a particular share
- Amount paid through the respective shares

Allotment of Shares:

It is a contract between the shareholder and the company. There is an offer from the intending share holders and the company accepts that offer by allotting the shares to that person.

Share Capital:

There are two main sources of funds on which a company depends in acquisition of capital for its business activities

- Loan capital
- Share capital

The greater reliance of a company is on raising funds through subscription by its share holder.

Types of Share Capital:

- Authorized capital
- Issued share capital
- Called up share capital

Authorized capital—is a total amount of the share capital which the company can issue under the articles of its memorandum. This is provided under **section 16** of the ordinance:

In the case of a company limited by shares,-

(a) the memorandum shall state -

(i) the name of the company with the word **"limited"** as the last word of the name in the case of a public limited company, and the parenthesis and words "(Private) Limited" as the last words of the name in the case of a private limited company;

(ii) the Province or the part of Pakistan not forming part of a Province, as the case may be, in which the registered office of the company is to be situate;

(iii) the objects of the company, and, except in the case of a trading corporation, the territories to which they extend;

(iv) that the liability of the members is limited; and

(v) the amount of share capital with which the company proposes to be registered, and the division thereof into shares of a fixed amount;

(b) no subscriber of the memorandum shall take less than one share; and

(c) each subscriber of the memorandum shall write opposite to his name the number of shares he takes.

Issued share Capital/allotted

This is the amount of share capital allotted and issued to the members.

Called up share Capital:

This the amount of share capital invited /called up by the company from share holders.

LECTURE 28

ESTABLISHMENT OF NON BANKING FINANCE COMPANY & WINDING UP OF COMPANIES

Non Banking Finance Companies:

Non Banking Finance Companies (NBFCs') include the companies licensed by Securities and Exchange commission of Pakistan (SECP) and such other company or class of companies or corporate body as the Federal Government may, by notification in the official Gazette specify for the purpose.

Forms of Business that may be carried out by NBFCs':

These are provided in section 282-A which is reproduced below:

The provisions of this Part shall apply to-

(a) non-banking finance companies (NBFCs) which include companies licensed by the Commission to carry out any one or more of the following forms of business, namely: -
   (i) Investment Finance Services;
   (ii) Leasing;
   (iii) Housing Finance Services;
   (iv) Venture Capital Investment;
   (v) Discounting Services;
   (vi) Investment Advisory Services;
   (vii) Asset Management Services; and
   (viii) any other form of business which the Federal Government may, by notification in the official Gazette specify from time to time; and

(b) such other company or class of companies or corporate body as the Federal Government may, by notification in the official Gazette specify for the purpose.

Power to make Rules: (282 B)

The Federal Government may make rules for establishment and regulation of NBFCs and such rules may, inter alia, in addition to anything already provided in this Ordinance, provide for conditions relating to qualifications of directors, chief executive, chairman, auditors, for licensing, capital and audit requirements; and any other matter which the Commission may deem fit for the effective regulation of NBFCs and / companies established under the rules framed hereunder.

Incorporation of NBFC: (Sec 282 C)

(1) A NBFC shall not be incorporated without prior approval of the Commission.

(2) Notwithstanding anything contained in any other provision of this Ordinance, a NBFC shall not carry on business unless it holds a **license** issued in that behalf by the Commission; and any such license may be issued subject to such conditions, as the Commission may deem fit to impose.

(3) Every company in existence which is engaged in any one or more forms of business as specified in section 282 A, before the expiry of six months from coming into force of this section and every other company before commencing any form of business as specified in section 282 A, shall apply in writing to the Commission for grant of a license under this section.

(3) The Commission, if it is satisfied that the company has fulfilled the conditions prescribed by the Commission in respect of the business for which the licencse is being sought, may grant license (s) to such company for one or more of the forms of business specified in section 282 A.

(4) A NBFC shall not commence or carry on business unless it has such minimum paid up capital as may be prescribed by the Commission from time to time in respect of each form of business as specified in section 282 A

Power to issue directions: (282 D)

(1) Notwithstanding anything contained in any other provision of this Ordinance, where the Commission is satisfied that it is necessary and expedient so to do –

(a) in the public interest; or

(b) to prevent the affairs of any NBFC being conducted in a manner detrimental to the interests of shareholders or persons whose interests are likely to be effected or in a manner prejudicial to the interests of the NBFC; or

(c) to secure the proper management of any NBFC generally, issue directions to NBFCs generally or to any NBFC in particular to carry out such changes as are necessary to rectify the situation and the NBFCs shall be bound to comply with such directions.

(2) The Commission may, on representation made to it or on its own motion, modify or cancel any direction issued under sub-section (1), and in so modifying or canceling any direction may impose such conditions as it thinks fit.

Power to remove: (282 E)

(1) Notwithstanding anything contained in any other provision of this Ordinance, where the Commission is satisfied that –

(a) continued association of any chairman or director or chief executive or any other officer of a NBFC, is or is likely to be detrimental to the interests of NBFC or its shareholders or persons whose interest is likely to be affected; or

(b) the public interest so demands; or

(c) to prevent the affairs of a NBFC being conducted in a manner detrimental to the interest of its shareholders or in a manner prejudicial to the interests of NBFC; or

(d) to secure a proper management of the NBFC, it is necessary so to do, the Commission may, for reasons to be recorded in writing, by order, remove from office, with effect from such date as may be specified in the order, any chairman or director or chief executive or other officer of the NBFC.

No order under sub-section (1) shall be made unless the chairman or director or chief executive or other officer has been given a reasonable opportunity of making a representation and of being heard:

Provided that if, in the opinion of the Commission, any delay would be detrimental to the public interest or the interest of its shareholders, the Commission may, at the time of giving the opportunity aforesaid or at any time thereafter and pending the consideration of the representation aforesaid, if any, by order direct that—

(i) the chairman or, director or chief executive or other officer shall not, with effect from the date of the order.-

(a) act as such chairman or director or chief executive or other officer of
the NBFC; or

(b) in any way, whether directly, or indirectly, be concerned with, or take part in the management of the NBFC;

(ii) any person authorized by the Commission in this behalf shall act as such chairman or director or chief executive of the NBFC till another person is elected in a general meeting or a board meeting , as may be directed by the Commission, to fill in the vacancy.

Where any order under sub-section (1) is made in respect of a chairman or director or chief executive or other officer of a NBFC, he shall cease to be a chairman or a director or chief executive or other officer of the NBFC and shall not in any way, whether directly or indirectly, be concerned with, or take part in, the management of the NBFC or any other NBFC for such period not exceeding three years as may be specified in the order.

Any person appointed as chairman or director or chief executive under sub-section (2) shall—

(a) hold office during the pleasure of the Commission subject to such conditions as may be specified in the order of his appointment and, subject thereto, for such period, not exceeding three years as the Commission may specify; and

(b) not incur any obligation or liability for anything which is done or intended to be done in his capacity as such chairman or director or chief executive.

No person removed from office under sub-section (1) shall be entitled to claim any compensation for the loss or termination of office.

Power to supersede Board of Directors (282 F):

Notwithstanding anything contained in any other provision of this Ordinance, where the Commission is satisfied that the association of the Board of Directors of any NBFC is or is likely to be detrimental to the interest of the NBFC or its shareholders or is otherwise undesirable; or for all or any of the reasons specified in section 282 E; it is necessary so to do, the Commission may, for reason to be recorded in writing, by order, supersede the Board of Directors of a NBFC with effect from such date and for such period as may be specified in the order.

(2) The period of supersession specified in an order under sub-section (1) may from time to time be

(3) All powers and duties of the Board of Directors; shall, during the period of supersession, be exercised and performed by such person as the Commission may from time to time appoint in this behalf.
(4) The provisions of sub-sections (2), (3), (4) and (5) of section 282 E shall, with necessary modifications apply to an order made under sub-section (1) or (3) of this section.

Power to require to furnish information, etc (282 G)

(1) The Commission may, at any time, by notice in writing, require NBFCs generally, or any NBFC in particular to furnish it within the time specified therein or such further time as the Commission may allow, with any statement or information or document relating to the business or affairs of such NBFC or NBFCs (including any business or affairs with which such NBFC or NBFCs is or are concerned) and, without prejudice to the generality of the foregoing power, may call for information, at such intervals as the Commission may deem necessary.
(2) No NBFC, director, officer, employee or agent or auditor thereof shall, in any document, prospectus, report, return, accounts, information or explanation required to be furnished in pursuance of this part or the rules made thereunder, or in any application made under this Part or the rules, make any statement or give any information which he knows or has reasonable cause to believe to be false or incorrect or omit any material fact therefrom

Special Audit. (282 H)

(1) Notwithstanding anything contained in any other provision of this Ordinance, the **Commission** shall **monitor** the general financial condition of a NBFC, and, at its discretion, may **order special audit** and appoint an auditor to carry out detailed scrutiny of the affairs of NBFC, provided that the Commission may, during the pendency of the scrutiny, pass such interim orders and directions as may be deemed appropriate by the Commission.
(2) On receipt of the special audit report, the Commission may direct a NBFC to do or to abstain from doing certain acts and issue directives for immediate compliance which shall forthwith be complied with, or take such other action under this Ordinance as it deems fit.

Winding up of companies

Winding Up-- Defined:

It is a process through which the property of the company is administered by the liquidator who takes control of the company, liquidates the assets and pay off the debts owed by the company and thereafter distributes the surplus, if any to the members according to the proportion of shares held by them. Winding up is a process culminating on dissolution. **Dissolution** is the stage where a company ceases to exist, its' name is struck off by the registrar.

These modes as provided in section 297 of the ordinance are reproduced below:

Modes of winding up –(sec 297)

Winding up by Court –a compulsory winding up by the order of court or

Voluntary winding up

- Members' voluntary winding up or
- Creditors' voluntary winding up

Winding up subject to the supervision of the Court:

Circumstances in which company may be wound up by Court: – Sec 305

A company may be wound up by the Court -

(a) if the company has, by special resolution, resolved that the company be wound up by the Court;
(b) if default is made in delivering the statutory report to the registrar or in holding the statutory meeting or any two consecutive annual general meetings;
(c) if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year;
(d) if the number of members is reduced, in the case of private company, below two or, in the case of any other company, below seven;
(e) if the company is unable to pay its debts;
(f) if the company is -
  (i) conceived or brought forth for, or is or has been carrying on, **unlawful or fraudulent activities;**
  (ii) carrying on business not authorized by the memorandum;
(g) if the company is -

(iii) conducting its business in a manner oppressive to any of its members or persons concerned with the formation or promotion of the company or the minority shareholders;
(iv) run and managed by persons who fail to maintain proper and true accounts, or commit fraud, misfeasance or malfeasance in relation to the company; or
(h) if the company is -
(v) managed by persons who refuse to act according to the requirements of the memorandum or articles or the provisions of this Ordinance or fail to carry out the directions or decisions of the Court or the registrar or the Commission given in the exercise of powers under this Ordinance;
(i) if, being a listed company, it ceases to be such company; [
(j) if the Court is of opinion that it is just and equitable that the company should be wound up; or
(i) if the company ceases to have a member.

Explanation I. - The promotion or the carrying on of any scheme or business, except the business carried on under the provisions of the Insurance Act, 1938 (IV of 1938), howsoever described, whereby, in return for a deposit or contribution, whether periodically or otherwise, of a sum of money in cash or by means of coupons, certificates, tickets or other documents, payment, at future date or dates of money or grant of property, right or benefit, directly or indirectly, and whether with or without any other right or benefit, determined by chance or lottery or any other like manner, is assured or promised shall be deemed to be an unlawful activity.

Explanation II. - "Minority shareholders" means shareholders together holding not less than twenty per cent of the equity share capital of the company.

Company when deemed unable to pay its debts: sec 306

(1) A company shall be deemed to be unable to pay its debts,-
a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding one per cent of its paid-up capital or fifty thousand rupees, whichever is less, has served on the company, by causing the same to be delivered by registered post or otherwise, at its registered office, a demand under his hand requiring the company to pay the sum so due and the company has for thirty days thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or
(b) if execution or other process issued on a decree or order of any Court or any other competent authority in favor of a creditor of the company is returned unsatisfied in whole or in part; or
(c) if it is proved to the satisfaction of the Court that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the Court shall take into account the contingent and prospective liabilities of the company.
(2) The demand referred to in clause (a) of sub-section (1) shall be deemed to have been duly given under the hand of the creditor if it is signed by an agent or legal adviser duly authorized on his behalf, or in the case of a firm if it is signed by such agent or legal adviser or by any member of the firm on behalf of the firm.

LESSON 29

WINDING UP & SECP ACT, 1997

Winding Up:

We have already discussed the modes and process of winding up, some other aspects regarding winding up are discussed in the following paragraphs.

Commencement of winding up by Court: Sec 311

A winding up of a company by the Court shall be deemed to commence at the time of the presentation of the petition for the winding up.

Hearing of winding up petition by the Court: Sec 312

A petition for winding up of a company shall come up for regular hearing, be proceeded with and decided in the manner laid down in section 9.

Court may grant injunction: Sec 313

The Court may, at any time after presentation of the petition for winding up a company under this Ordinance, and before making an order for its winding up, upon the application of the company itself or of any its creditors or contributories, restrain further proceedings in any suit or proceeding against the company, upon such terms as the Court thinks fit.

Powers of Court on hearing petition: Sec 314

(1) On hearing a winding up petition the Court may dismiss it with or without costs, or adjourn the hearing conditionally or unconditionally subject to the limitation imposed in section 9 or make any interim order, or any order for winding up the company or any other order that it deems just; but the Court shall not refuse to make a winding up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets.

(2) Where the petition is presented on the ground that it is just and equitable that the company should be wound up, the Court may refuse to make an order of winding up, if it is of opinion that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy.

(3) Where the petition is presented on the ground of default in delivering the statutory report or in holding the statutory meeting or any two consecutive annual general meetings, the Court may, instead of making a winding up order, direct that the statutory report shall be delivered or that a meeting shall be held, and order the costs to be paid by any persons who, in the opinion of the Court, are responsible for the default.

(4) If, on hearing a petition, the Court is of opinion that, although the facts would justify the making of a winding up order, the making of such order would unfairly prejudice the members or the creditors, the Court may, instead of making an order for winding up the company, make such order as it thinks fit in the circumstances for regulations the conduct of the affairs of the company and bringing to an end the matters complained of, including an order for a change in the management of the company.

(5) Where the Court makes an order for the winding up of a company, it shall forthwith cause intimation thereof to be sent to the official liquidator appointed by it and to the registrar.

Copy of winding up order to be filed with registrar: 315

(1) Within fifteen days from the date of the making of the winding up order, the petitioner in the winding up proceedings and the company shall file a certified copy of the order with the registrar.

(2) If default is made in complying with the foregoing provision, the petitioner or, as the case may require, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to one hundred rupees for each day during which the default continues.

(3) On the filing of a certified copy of a winding up order, the registrar shall forthwith make a minute thereof in his books relating to the company, and shall simultaneously notify in the official Gazette that such an order has been made.

(4) Such order shall be deemed to be notice of discharge to the servants of the company, except when the business of the company is continued.

Suits stayed on winding up order: Sec 316

(1) When a winding up order has been made or a provisional managers has been appointed, no suit or other legal proceeding shall be proceeded with or commenced against the company except by leave of the Court, and subject to such terms as the Court may impose.

(2) The Court which is winding up the company shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of, any suit or proceeding by or against the company.
(3) Any suit or proceeding by or against the company which is pending in any Court other than that in which the winding up of the company is proceeding may, notwithstanding anything contained in any other law for the time being in force, be transferred to and disposed of by the Court.

Court may require expeditious disposal of suits, etc: sec 317

(l) Notwithstanding anything contained in any other law—
(a) if any suit or proceedings, including an appeal, by or against the company which is allowed to be proceeded with in any Court other than the Court in which winding up of the company is proceeding, the Court may issue directions to that other Court if that court is subordinate to it and, in any other case, make a request to that other Court for expeditious disposal of the pending suit or proceeding by or against the company; and
(b) if any proceedings, including proceedings for assessment or recovery of any tax, duty or levies or appeal or review petition against any order is pending or is likely to be instituted, before any officer, tribunal, authority or other body, the Court may issue directions to that officer, tribunal, authority or other body for expeditious action and disposal of the said proceedings.
(2) Upon issue of a direction or making of a request as aforesaid, the Court, officer, tribunal, authority or body to whom the same is addressed shall, notwithstanding anything contained in any other law proceed to dispose of the said suit or other proceedings expeditiously by according it special priority and adopting such measures as may be necessary in this behalf, and shall inform the Court issuing the direction or making the request of the action taken.

Effect of winding up order: Sec 318

An order for winding up a company shall operate in favor of all the creditors and of all the contributories of the company as if made on the joint petition of a creditor and of a contributory.

Dissolution of company: Sec 350

(1) When the affairs of a company have been completely wound up, or when the Court is of the opinion that the official liquidator cannot proceed with the winding up of the company for want of funds and assets or any other reason whatsoever and it is just and reasonable in the circumstances of the case that an order of dissolution of the company be made, the Court shall make an order that the company be dissolved from the date of the order, and the company shall be dissolved accordingly:
Provided that such dissolution of the company shall not extinguish any right of, or debt due to, the company against or from any person.
(2) A copy of the order shall, within fifteen days of the making thereof, be forwarded by the official liquidator to the registrar, who shall make in his books a minute of the dissolution of the company.
(3) If the official liquidator makes default in complying with the requirements of this section, he shall be liable to a fine not exceeding one hundred rupees for every day during which he is in default.

358. Circumstances in which company may be wound up voluntarily.-

A company may be **wound up voluntarily-**
(a) when the period (if any) fixed for the duration of the company by the articles expires, or the event (if any) occurs, on the occurrence of which the articles provide that the company is to be dissolved and the company in general has passed a resolution requiring the company to wound up voluntarily;
(b) if the company resolves by special resolution that the company be wound up voluntarily; and, in the subsequent provisions of this Part, the expression "resolution for voluntary winding up" means a resolution passed under clause (a) or clause (b).

359. Commencement of voluntary winding up.-

A voluntary winding up shall be deemed to commence at the time of the passing of the resolution for voluntary winding up.

360. Effect of voluntary winding up on status of company.-

In the case of voluntary winding up, the company shall, from the commencement of the winding up, cease to carry on its business, except so far as may be required for the beneficial winding up thereof:
Provided that the **corporate state and corporate powers** of the company shall, notwithstanding anything to the contrary in its articles, **continue until it is dissolved.**

SECURITIES & EXCHANGE COMMISSION OF PAKISTAN
SECP Act, 1997

Short title and commencement-sec. 1

(1)This Act may be called as the Securities and Exchange Commission of Pakistan Act, 1997.

(2) It extends to the whole of Pakistan.

Definitions as contained in section 2 of the Act are given below:

In this Act, unless there is anything repugnant in the subject or context,-

(a) "appointed day" means the day on which section 43 comes into force;

(b) "Authority" means the Corporate Law Authority constituted under the Companies Ordinance, 1984 (XLVII of 1984);

(c) "Board" means the Securities and Exchange Policy Board established under section 12;

(d) "Chairman" means the Chairman of the Commission;

(e) "civil servant" means a civil servant as defined in section 2 of the Civil Servants Act, 1973 (LXXI of 1973);

(f) "clearing house" means a clearing house by whatever name or designation established or arranged to be established by a Stock Exchange for the registration of dealing in securities or settlement of trading in futures contracts;

(g) "Commission" means the Securities and Exchange Commission of Pakistan established under section 3;

(h) "Commissioner" means a Commissioner of the Commission and shall include the Chairman thereof;

(i) "committee" means a committee of the Board constituted under section 15;

(j) "dealing in securities" means making or offering to make, whether as principal or agent, with any person or inducing or attempting to induce any person to enter into or to offer to enter into-

(i) any agreement for or with a view to acquiring, disposing of, subscribing for or underwriting securities, or

(ii) any agreement the apparent or ostensible purpose of which is to secure a profit to any of the parties from the yield of securities or by reference to fluctuations in the value of securities;

(k) "employee" means any officer or servant of the Commission;

(l) "Fund" means the fund established under section 23;

(la) "Law of Insurance" means the Insurance Ordinance, 2000 (XXXIX of 2000) or any other law in relation to insurance, the administration of which is vested in the Commission by the Federal Government by notification in the official Gazette."

(m) "Member" means a Member of the Board;

(n) "NBFI" means a non-banking financial institution and includes a development finance institution, a modaraba, a leasing company, a housing finance company and an investment bank but shall not include a banking company as defined in clause (c) of section 5 of the Banking Companies Ordinance, 1962 (LVII of 1962);

(o) "Ordinance" means the Companies Ordinance, 1984 (XLVII of 1984);

(p) "private sector person" means a person who is not in the service of Pakistan or of any statutory body or any body which is owned or controlled by the Federal Government or a Provincial Government not including a University or an educational institution;

(q) "regulations" means the regulations made by the Board or the Commission; and

(r) "rules" means the rules made by the Federal Government.

Establishment of the Commission- Sec. 3

(1) There is hereby established a Commission to be called the Securities and Exchange Commission of Pakistan.

(2) The Commission shall be a body corporate with perpetual succession and a common seal, and may sue and be sued in its own name and, subject to and for the purposes of this Act, may enter into contracts and may acquire, purchase, take, hold and enjoy movable and immovable property of every description and may convey, assign, surrender, yield up, charge, mortgage, demise, reassign, transfer or otherwise dispose of or deal with, any movable or immovable property or any interest vested in it, upon such terms as it deems fit.

The Commissioners- sec. 5

(1) Subject to sub-section (2), the Commission shall consist of such number of Commissioners, including

number shall not be less than five and more than seven. A Commissioner shall be a person who is known for his integrity, expertise, experience and eminence in any relevant field, including the securities market, law, accountancy, economics, finance[, insurance] and industry.
(2) The majority of the Commissioners shall always be of private sector persons.
(3) Subject to the provisions of this Act, the Commission shall, in discharge of its functions and exercise of its powers, conduct its proceedings in accordance with the regulations made by the [Commission]. [(4)] The Commissioners, including the Chairman, shall be paid such remuneration and allowances as the Commission may, with the approval of the Board, determine.

The Chairman-sec. 6

(1) The Federal Government shall appoint one of the Commissioners to be the Chairman of the Commission, and no Commissioner shall be appointed Chairman for more than two consecutive terms.
(2) The Chairman shall be the chief executive officer of the Commission and shall, together with the other Commissioners, be responsible for the day to day administration of the affairs of the Commission and shall, subject to the regulations made by the Commission, be assisted by the other Commissioners in carrying out the functions of the Commission.

Powers and functions of the Commission: sec 20

The Commission shall be responsible for the performance of the following functions:
(a) Regulating the issue of securities;
(b) Regulating the business in Stock Exchanges and any other securities markets;
(c) Supervising and monitoring the activities of any central depository and Stock Exchange clearing house;
(d) Registering and regulating the working of stock brokers, sub-brokers, share transfer agents, bankers to an issue, trustees of trust deeds, registrars to an issue, underwriters, portfolio managers, investment advisers and such other intermediaries who may be associated with the securities markets in any manner;
(e) Proposing regulations for the registration and regulating the working of collective investment schemes, including unit trust schemes;
(f) Promoting and regulating self-regulatory organizations including securities industry and related organizations such as Stock Exchanges and associations of mutual funds, leasing companies and other NBFIs;
(g) **Prohibiting fraudulent and unfair trade practices** relating to securities markets;
(h) Promoting **investors' education and training** of intermediaries of securities markets;
(i) Conducting investigations in respect of matters related to this Act and the Ordinance and in particular for the purpose of investigating insider trading in securities and prosecuting offenders;
(j) Regulating substantial acquisition of shares and the merger and take-over of companies;
(k) Calling for information from and undertaking inspections, conducting **inquiries and audits** of the **Stock Exchanges** and intermediaries and self-regulatory organizations in the securities market;
(l) considering and **suggesting reforms of the law** relating to **companies and bodies corporate,** securities markets, including changes to the constitution, rules and regulations of companies and bodies corporate, Stock Exchanges or clearing houses;
(m) Encouraging the **organized development** of the **capital market** and the corporate sector in Pakistan;
(n) **Conducting research** in respect of any of the matters set out in this sub-section;
We shall continue with the powers and functions of the commission in later discussion.

LESSON 30

SECP & CODE OF CORPORATE GOVERNANCE

Powers and Functions of the Commission:

We have already covered some powers and functions of the commission, rest of powers and functions are given below:
(o) performing such functions and exercising such powers of the Authority, including any powers of the Federal Government delegated to the Authority, (other than the power to make any rules or regulations) under the provisions of the Ordinance, the Securities and Exchange Ordinance, 1969 (XVII of 1969), the Modaraba Companies and
(p) performing such functions and exercising such powers (other than the power to make any rules or regulations) under the Ordinance or any other law for the time being in force as may, after the commencement of this Act, be delegated to it by the Federal Government and exercising any power or performing any functions conferred on it by or under any other law for the time being in force;
(q) Proposing regulations in respect of all or any of the aforesaid matters for the consideration and approval of the Board [; and
(r) Exercising all powers, discharging all duties and performing all functions assigned to the Commission under, and generally administering, the Law of Insurance;
(s) ensuring and **monitoring compliance** by **insurers, insurance surveyors** and insurance intermediaries **of all laws,** rules and regulations pertaining to insurance for the time being in force;
(t) Regulating professional organizations connected with the insurance business; and
(u**) Encouraging** the **organized development** of the **insurance market** in Pakistan.

Functions and powers of the Securities and Exchange Policy Board-Sec 21
(1) Subject to the provisions of this Act, the Board shall-
(a) when so asked to do and after consultation with the Commission, advise the Federal Government on all matters relating to-
(i) the securities industry [and insurance industry];
(ii) regulation of companies and corporate sector and protection of the interests of investors;
[regulation of the insurance sector and protection of the interests of insurance policy holders;]
(iii) measures to encourage self-regulation by the Stock Exchanges[, insurers, insurance intermediaries, insurance surveyors]| and NBFIs by specifying the standards for such self regulatory organizations;
(iv) measures to promote the development of and to regulate the securities market [and the insurance market]and
(v) other related matters;
[(b) consider and approve (with or without modification) any regulations with respect to implementation of policy decisions, proposed to be made by the Commission under the Act;]
(c) consider and approve (with or without modification) the budget for each financial year of the Commission prepared and submitted to it pursuant to the provisions of sub-section (2) of section 24;
(d) express its opinion in writing on any policy matter referred to it by the Federal Government or the Commission;
(e) oversee the performance of the Commission to the extent that the purposes of this Act are achieved;
(f) exercise all such powers and perform all such functions as are conferred or assigned to it under this Act; and
(g) specify fees, penalties and other charges chargeable by the Commission for carrying out the purposes of this Act.
(2) All policy decisions, including any change in previously established policy, in respect of all and any matters within the jurisdiction of the Commission shall be made only by the Board. The Board may make policy decisions *suo motu* or adopt such policy recommendations of the Commission, with or without modification, as the Board may deem fit in its sole discretion.

Supplementary provisions: Sec 22

(1) All guidelines, decisions and directives whether of the Board or the Commission shall be in writing expressed by resolutions, orders or in such other form as may be appropriate in the circumstances and shall be authenticated in the manner prescribed by the regulations and where so provided by regulations, also sealed with the seal of the Commission.
(2) All policy decisions and directives of the Board and the Commission respectively shall be published in the official Gazette and the Board and the Commission shall make such publications available to the public.
(3) The Commission shall, in adjudicating upon the rights of any person whose application on any matter it is required to consider in the exercise of any power or function under this Act, give the reasons for its decision after giving the person concerned a personal hearing, in addition to any written applications or submission which may be required to be made.
(4) The Commission when exercising its powers under this Act shall have regard, so far as relevant to the circumstances of the particular case, to-
(a) the viability of the company or body corporate;
(b) the quality and capability of the management of the company or body corporate;
(c) the suitability for listing of the company or body corporate on a Stock Exchange where applicable;
(d) the interest of public investors, existing or potential, in the company or body corporate;
[(da) the professional competence and capability of persons engaged in the provision of services in the insurance industry;
(db) the interest of insurance policy holders, existing or potential, where applicable;][
(e) any policy decision or directives of the Board; and
(f) the general public interest.
(5) Subject to the compliance of the provisions of sub-section (3), section 24A of the General Clauses Act, 1897 (X of 1897), shall apply to any order made or direction given under this Act

Enforcement and Investigation

Investigation and proceedings-sec. 29

(2) The Commission may appoint such number of investigating officers to be known as investigating officers of the Commission as it considers necessary for the purposes of carrying out investigation of any offence or inspection under this Act, the Ordinance or any other law in respect of which it has been empowered to exercise the powers of the Authority and such investigating officer shall have all the powers given to any person for the purposes of carrying out investigation of any offence under this Act, the Ordinance and any other law.

Powers of the investigating officers of the Commission– sec. 30

(1) An investigating officer carrying out an investigation or inspection may, only after the written order of the Commission signed by any two Commissioners, enter any place or building-
(a) to inspect and make copies of or take extracts from any book, minute book, register or document; and
(1). (b) where he has reason to believe that an offence has been committed under this Act or the Ordinance or any other law in respect of which the Commission has power to make investigation or inspection, to search for, seize, take possession of and detain any object, article, material, thing, accounts book or other document, including any travel or other personal document which may be used as evidence.
(2) When an order has been made under sub-section (1) an investigating officer of the Commission may, by notice in writing, require any person to produce before him such books, registers or documents as are in the custody or under the control of that person.
(3) A person who-
(a) fails deliberately to produce any such books, registers or documents as are required by the Commission or an investigating officer; or
(3). (b) obstructs or hinders an investigating officer while exercising any of the powers under this section; shall be guilty of an offence and shall be liable on conviction to a fine which may extend to one million rupees or to imprisonment for a term not exceeding one month, or to both.
(4) Any accounts book or other document seized and taken possession of by the investigating officer of the Commission under sub-section (1) may be inspected by any person if such person is entitled to inspect such accounts, book or document under this Act, and if so authorized to do in writing by the Commission.
(5) sub-section (1) shall not be construed as limiting or affecting any similar powers conferred on any person under any other law.
(6) Any person aggrieved by the conduct of an investigating officer may lodge a complaint in respect

(7) The Commission shall, within fifteen days of receipt of the complaint under sub-section (6) commence a hearing to determine the veracity of such complaint in accordance with such procedure as may be prescribed by rules made by the Federal Government.

Forcible entry-sec. 31

(1) For the purpose of exercising his powers under sub-sections (1) and (2) of section 30, an investigating officer of the Commission may enter any place or building by force, if necessary.

(2) Notwithstanding anything contained in sub-section (1), no investigating officer of the Commission shall enter any premises by the use of force without a written order of the Commission signed by any two Commissioners.

(3) If, on enquiry conducted in accordance with the rules it is found that the exercise by an investigating officer of his power under sub-section (2) was vexatious, excessive or with malafide intent such officer shall be dismissed from service, and shall be guilty of an offence punishable with fine which may extend to five hundred thousand rupees and imprisonment for a term not exceeding one year.

(4) Whenever a criminal court imposes a fine under sub-section (3) it shall, when passing judgment, order that a sum equal to the whole or any part of the fine recovered, be paid to the person on whose complaint the investigating officer was convicted, and in case the fine is not recovered the sum shall be paid out of the Fund.

(5) Any sum paid under sub-section (4) shall be without prejudice to the right of the aggrieved person to avail any other remedies available to him under the law but at the time of awarding compensation in any subsequent proceedings relating to the same matter the court shall take into account any sum recovered from the convict and paid to the aggrieved person.

Power to call for examination- sec. 32

(1) For the purpose of sub-section (1) of section 29, the Commission may by notice in writing require any person acquainted with the facts and circumstances of the case to appear before an investigating officer authorized by it in this regard. Such person shall be examined orally and any statement made by such person during the course of the examination shall be reduced into writing.

(2) Such person shall be bound to answer all questions relating to such case put to him by the investigating officer, as the case may be, and to state the truth, whether or not the statement is made wholly or partly in answer to questions.

(3) Subject to sub-section (4), a statement made by any person under this section shall be taken down in writing and signed by the person making it or affixed with his signature and thumb print, as the case may be, after it has been read to him and after he had been given an opportunity to make any correction he may wish.

(4) Where the person examined refuses to sign and affix his thumb print on the statement, the investigating officer of the Commission shall endorse thereon under his hand the fact of such refusal and the reason therefore, if any, stated by the person examined.

(5) Any person who:-

(a) **fails to appear** before an investigating officer of the Commission as required under sub-section (1);

(b) **refuses to answer any question** put to him by an investigating officer of the Commission as required under sub-section (2); or

(c) **Knowingly furnishes** to an investigating officer of the Commission information or statement that is false or misleading in any material particular;

(d) Willfully refuses to obey or disregards any lawful order of the Commission;

Appeal to the Appellate Bench of the Commission –Sec. 33

(1) An appeal shall lie to an Appellate Bench of the Commission in respect of an order of the Commission made by one Commissioner. The person aggrieved by such order may within thirty days of the passing of the order prefer an appeal to the Appellate Bench of the Commission.

(2) The Commission shall constitute an Appellate Bench of the Commission comprising not less than two Commissioners to hear appeals under sub-section (1).

(3) If any Commissioner who is included in the Appellate Bench has participated or been concerned in the decision being appealed against the Chairman shall nominate an other Commissioner to sit in the Bench to hear that appeal.

(4) The form in which an appeal is to be filed and the fees to be paid therefore and other related matters shall be prescribed by rules.

(1) An appeal shall lie to the Court referred to in Part II of the Ordinance in respect of an order of the Commission comprising two or more Commissioners or the Appellate Bench.
(2) The appeal under sub-section (1) shall be filed within sixty days of the date of the decision and shall by accompanied by a fee of one hundred rupees.

Cognizance and prosecution of offences:

Cognizance of offences: Sec 37

Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (Act No. V of 1898) no court other than the court of session shall have jurisdiction to try any offence under this Act.

Conduct of prosecution: Sec 38

(1) No prosecution for any offence under this Act against any person shall be instituted except with the consent in writing of the Commission signed by any two Commissioners.
(2) Prosecution of any offence under this Act shall be conducted by any officer of the Commission authorized in writing by the Commission.

LESSON 31

CODE OF CORPORATE GOVERNANCE

Code of Corporate Governance

This code is circulated by SECP vide notification dated 28th March 2002. This code covers the following areas:

Board of Directors

(i) All listed companies shall encourage effective representation of independent non-executive directors, including those representing minority interests, on their Boards of Directors so that the Board as a group includes core competencies considered relevant in the context of each listed company. For the purpose, listed companies may take necessary steps such that:

(a) minority shareholders as a class are facilitated to contest election of directors by proxy solicitation, for which purpose the listed companies may:

- annex to the notice of general meeting at which directors are to be elected, a statement by a candidate(s) from among the minority shareholders who seeks to contest election to the Board of Directors, which statement may include a profile of the candidate(s);
- provide information regarding shareholding structure and copies of register of members to the candidate(s) representing minority shareholders; and
- on a request by the candidate(s) representing minority shareholders and at the cost of the company, annex to the notice of general meeting at which directors are to be elected an additional copy of proxy form duly filled in by such candidate(s) and transmit the same to all shareholders in terms of section 178 (4) of the Companies Ordinance, 1984;

(b) The Board of Directors of each listed company includes at least one independent director representing institutional equity interest of a banking company, Development Financial Institution, Non-Banking Financial Institution (including a modaraba, leasing company or investment bank), mutual fund or insurance company; and

Explanation: For the purpose of this clause, the expression "independent director" means a director who is not connected with the listed company or its promoters or directors on the basis of family relationship and who does not have any other relationship, whether pecuniary or otherwise, with the listed company, its associated companies, directors, executives or related parties. The test of independence principally emanates from the fact whether such person can be reasonably perceived as being able to exercise independent business judgment without being subservient to any apparent form of interference.

Any person nominated as a director under sections 182 and 183 of the Companies Ordinance, 1984 shall not be taken to be an "independent director" for the above-said purposes. The independent director representing an institutional investor shall be selected by such investor through a resolution of its Board of Directors and the policy with regard to selection of such person for election on the Board of Directors of the investee company shall be disclosed in the Directors' Report of the investor company. (c) executive directors, i.e. working or whole time directors, are not more than 75% of the elected directors including the Chief Executive:

Provided that in special circumstances, this condition may be relaxed by the Securities and Exchange Commission of Pakistan.

Provided further that nothing contained in this clause shall apply to banking companies, which are required by Prudential Regulation No.9 for Banks to have not more than 25% of the directors as paid executives of the banks.

(ii) The directors of listed companies shall, at the time of filing their consent to act as such, give a declaration in such consent that they are aware of their duties and powers under the relevant law(s) and the listed companies' Memorandum and Articles of Association and the listing regulations of stock exchanges in Pakistan.

Qualification and Eligibility to Act as a Director:

(iii) No listed company shall have as a director, a person who is serving as a director of ten other listed companies.

(iv) No person shall be elected or nominated as a director of a listed company if:

(a) His name is not borne on the register of National Tax Payers except where such person is a non-resident; and
(b) he has been convicted by a court of competent jurisdiction as a defaulter in payment of any loan to a banking company, a
Development Financial Institution or a Non-Banking Financial Institution or he, being a member of a stock exchange, has been declared as a defaulter by such the stock exchange; and
(v) A listed company shall endeavour that no person is elected or nominated as a director if he or his spouse is engaged in the business of stock brokerage (unless specifically exempted by the Securities and Exchange Commission of Pakistan).

Tenure of Office of Directors:

(vi) The tenure of office of Directors shall be three years. Any casual vacancy
in the Board of Directors of a listed company shall be filled up by the directors within 30 days thereof.

Responsibilities, Powers and Functions of Board of Directors:

(vii) The directors of listed companies shall exercise their powers and carry out their fiduciary duties with a sense of objective judgment and independence in the best interests of the listed company.
(viii) Every listed company shall ensure that:
(a) a 'Statement of Ethics and Business Practices' is prepared and circulated annually by its Board of Directors to establish a standard of conduct for directors and employees, which Statement shall be signed by each director and employee in acknowledgement of his understanding and acceptance of the standard of conduct;
(b) the Board of Directors adopt a vision/ mission statement and overall corporate strategy for the listed company and also formulate significant policies, having regard to the level of materiality, as may be determined it;

Explanation: Significant policies for this purpose may include:

- risk management;
- human resource management including preparation of a succession plan;
- procurement of goods and services;
- marketing;
- determination of terms of credit and discount to customers;
- write-off of bad/ doubtful debts, advances and receivables;
- acquisition/ disposal of fixed assets;
- investments;
- borrowing of moneys and the amount in excess of which borrowings shall be sanctioned/ratified by a general meeting of shareholders;
- donations, charities, contributions and other payments of a similar nature;
- determination and delegation of financial powers;
- transactions or contracts with associated companies and related parties; and
- health, safety and environment

A complete record of particulars of the significant policies, as may be determined, along with the dates on which they were approved or amended by the Board of Directors shall be maintained. The Board of Directors shall define the level of materiality, keeping in view the specific circumstances of the listed company and the recommendations of any technical or executive sub -committee of the
Board that may be set up for the purpose;
(c) the Board of Directors establish a system of sound internal control, which is effectively implemented at all levels within the listed company;
(d) the following powers are exercised by the Board of Directors on behalf of the listed company and decisions on material transactions or significant matters are documented by a resolution passed at a meeting of the Board:

- investment and disinvestment of funds where the maturity period of such investments is six months or more, except in the case of banking companies, Non-Banking Financial Institutions, trusts and insurance companies;
- determination of the nature of loans and advances made by the listed comp any and fixing a monetary limit thereof;
- write-off of bad debts, advances and receivables and determination of a reasonable provision for doubtful debts;

- write-off of inventories and other assets; and
- determination of the terms of and the circumstances in which a law suit may be compromised and a claim/ right in favour of the listed company may be waived, released, extinguished or relinquished;

(e) appointment, remuneration and terms and conditions of employment of the Chief Executive Officer (CEO) and other executive directors of the listed company are determined and approved by the Board of Directors; and

(f) in the case of a modaraba or a Non-Banking Financial Institution, whose main business is investment in listed securities**,** the Board of Directors approve and adopt an investment policy, which is stated in each annual report of the modaraba/ Non-Banking Financial Institution.

Explanation: The investment policy shall inter alia state:

- that the modaraba/ Non-Banking Financial Institution shall not invest in a connected person, as defined in the Asset Management Companies Rules, 1995, and shall provide a list of all such connected persons;
- that the modaraba/ Non-Banking Financial Institution shall not invest in shares of unlisted companies; and
- the criteria for investment in listed securities.

The Net Asset Value of each modaraba/ Non-Banking Financial Institution shall be provided for publication on a monthly basis to the stock exchange on which its shares/ certificates are listed.

(ix) The Chairman of a listed company shall preferably be elected from among
the non-executive directors of the listed company. The Board of Directors
shall clearly define the respective roles and responsibilities of the Chairman and Chief Executive, whether or not these offices are held by separate individuals or the same individual.

Significant issues for this purpose may include:

- Annual business plans, cash flow projections, forecasts and long term plans;
- Budgets including capital, manpower and overhead budgets, along with variance analyses;
- Quarterly operating results of the listed company as a whole and in terms of its operating divisions or business segments;
- Internal audit reports, including cases of fraud or irregularities of a material nature;
- Management letter issued by the external auditors;
- Details of joint venture or collaboration agreements or agreements with distributors, agents, etc;
- Promulgation or amendment of a law, rule or regulation, enforcement of an accounting standard and such other matters as may affect the listed company;
- Status and implications of any law suit or proceedings of material nature, filed by or against the listed company;
- Any show cause, demand or prosecution notice received from revenue or regulatory authorities, which may be material;
- Default in payment of principal and/or interest, including penalties on late payments and other dues, to a creditor, bank or financial institution or default in payment of public deposit;
- Failure to recover material amounts of loans, advances, and deposits made by the listed company, including trade debts and inter-corporate finances;
- Any significant accidents, dangerous occurrences and instances of pollution and environmental problems involving the listed company;
- Significant public or product liability claims likely to be made against the listed company, including any adverse judgment or order made on the conduct of the listed company or of another company that may bear negatively on the listed company;
- Disputes with labour and their proposed solutions, any agreement with the labour union or collective Bargaining Agent and any charter of demands on the listed company; and
- Payment for goodwill, brand equity or intellectual property

Corporate and financial reporting framework:

The directors' report to shareholders

The directors of listed companies shall include statements to the following effect in the Directors' Report, prepared under section 236 of the Companies Ordinance, 1984:

(a) The financial statements, prepared by the management of the listed company, present fairly its state of affairs, the result of its operations, cash flows and changes in equity.

(b) Proper books of account of the listed company have been maintained.

(c) Appropriate accounting policies have been consistently applied in preparation of financial statements and accounting estimates are based on reasonable and prudent judgment.
(d) International Accounting Standards, as applicable in Pakistan, have been followed in preparation of financial statements and any departure therefrom has been adequately disclosed.
(e) The system of internal control is sound in design and has been effectively implemented and monitored.
(f) There are no significant doubts upon the listed company's ability to continue as a going concern.
(g) There has been no material departure from the best practices of corporate governance, as detailed in the listing regulations.
The Directors' Reports of listed companies shall also include the following, where necessary:
(a) If the listed company is not considered to be a going concern, the fact along with reasons shall be disclosed.
(b) Significant deviations from last year in operating results of the listed company shall be highlighted and reasons thereof shall be explained.
(c) Key operating and financial data of last six years shall be summarized.
(d) If the listed company has not declared dividend or issued bonus shares for any year, the reasons thereof shall be given.
(e) Where any statutory payment on account of taxes, duties, levies and charges is outstanding, the amount together with a brief description and reasons for the same shall be disclosed.
(f) Significant plans and decisions, such as corporate restructuring, business expansion and discontinuance of operations, shall be outlined along with future prospects, risks and uncertainties surrounding the listed company.
(g) A statement as to the value of investments of provident, gratuity and pension funds, based on their respective audited accounts, shall be included.
(h) The number of Board meetings held during the year and attendance by each director shall be disclosed.
(i) The pattern of shareholding shall be reported to disclose the aggregate number of shares (along with name wise details where stated below) held by:

- associated companies, undertakings and related parties (name wise details);
- NIT and ICP (name wise details);
- directors, CEO and their spouse and minor children (name wise details);
- executives;
- public sector companies and corporations;
- banks, Development Finance Institutions, Non-Banking Finance Institutions, insurance companies, modarabas and mutual funds; and shareholders holding ten percent or more voting interest in the listed company (name wise details).

Auditors Not To Hold Shares:
All listed companies shall ensure that the firm of external auditors or any partner in the firm of external auditors and his spouse and minor children do not at any time hold, purchase, sell or take any position in shares of the listed company or any of its associated companies or undertakings:
Provided that where a firm or a partner or his spouse or minor child owns shares in a listed company, being the audit client, prior to the appointment as auditors, such listed company shall take measures to ensure that the auditors disclose the interest to the listed company within 14 days of appointment and divest themselves of such interest not later than 90 days thereof.

LECTURE 32

NEGOTIABLE INSTRUMENTS

Concept/Object/Purpose:

The object and purpose of the Act is to legalize the system under which claims upon certain mercantile instruments are treated like ordinary goods passing from hand to hand. The Act is not exhaustive of all matters relating to negotiable instruments nor does it purport to deal with all kinds of negotiable instruments. It merely regulates the issue and negotiations of bills notes and cheques and even as regards them it does not deal with its transmissions of rights in them by operation of law or by assignment by deed. In the absence of any express provisions in this Act to the contrary, the general rules contained in the Contract Act are applicable to such instruments as to obligations of parties to the negotiable instruments are contractual in nature. For example the Act does not declare what consideration is sufficient and valid for a bill or note and therefore any consideration which will support a simple contract will support a bill or a note also.

This clause as provided in section 3 of the Negotiable Instrument Act 1881 is reproduced here under:

In this Act, unless there is anything repugnant in the subject or context:-

(a) "accommodation party" means a person who has signed a negotiable instrument as a marker, drawer acceptor or endorser without receiving the value thereof and for the purpose of lending his name to some other person;

(b) "banker" means a person transacting the business of accepting, for the purpose of lending or investment, of or deposits of money from the public, repayable on demand otherwise withdrawable by cheque, draft, order, or otherwise, and includes any Post Office Savings Bank;.

(c) "bearer" means a person who by negotiable comes into possession of a negotiable instrument, which is payable to bearer,

(d) "delivery" means transfer of possession actual or constructive, from one person to another;

(e) "issue" means the first delivery of a promissory notice, bill of exchange of cheque complete in form to a person' who takes it as holder .

(f) "material alteration" in relation to a Promissory note, bill, of exchange or cheque includes an alteration of the date, the sum payable, the time of payment, the of payment, and, where any such instrument has been accepted generally, the addition of a place of payment without the acceptor's assent, and

(g) "notary public" includes any person appointed by the Central Government to perform the functions of notary public under this Act and a notary appointed under the Notaries Ordinance, 1961.

Explanation:

The words “material alteration” are not defined in the Act, but in the definition clause with reference to negotiable instrument these words are followed by “include”, which has an effect of enlarging the scope of the already understood meaning of the words. The definitions extends the scope of the words to take into its folds the change or alteration in relation to the date, sum payable, time and place of payment with reference to negotiable instrument. It means any material and substantial change, variation, modification, substitution, insertion, erosion, addition or alteration in the contents or body of the negotiable instrument including any alteration of date, the sum payable, the time and place of payment after its due execution which affects the rights, liabilities or legal position of a party.

Some of the important concepts as discussed in the Act are given below:

Negotiable means the quality of transferability by delivery or by endorsement and delivery.

Instrument means a written document by which a right is created in favor of some person.

Negotiable Instrument means a written document, which is freely transferable and which creates a right in favor of some person to receive some money.

Negotiable Instrument as defined in section 13 of the Act is given below:

“A negotiable instrument means a promissory note, bill of exchange or cheque payable either to order or to bearer”.

The Act besides above three negotiable instruments recognizes any other instrument satisfying the characteristics of negotiability, as a Negotiable Instrument.

Quasi Negotiable Instruments- (Instruments recognized as such)

- Dividend Warrants
- Share Warrants
- Bearer Debentures
- Government Promissory Notes etc.

Promissory Note

It has been defined in section 4 of the Act which is given here under:

"A promissory note is an instrument in writing (not being a bank note or a currency note) containing unconditional undertaking, signed by the maker to pay on demand or at a fixed or determinable future time a certain sum of money only to or to the order of a certain person, or to the bearer of the instrument.

Specimen of a Promissory

Rs. 100,000/- Lahore
August 20, 2007

Thirty days after date, I promise to pay Mr. Ahmad Kamal or order the sum of rupees one hundred thousand only for value received.

Signature Revenue Stamp

Yasir Mehmood
(The Maker)

The Notes given below do not qualify to be called promissory note in the light of definition contained in section 4:

Thirty days after date, I promise to pay Mr. Ahmad Kamal or order the sum of rupees one hundred thousand only and the amounts which may be due to Ahmed Kamal by due date.

This is not the promissory note since the amount promised is not certain and ascertainable on the date of making the promise/ undertaking.

The notes given below do not qualify to be called promissory note in the light of definition contained in section 4

- I owe Rs 100,000 to MR. Ahmad Kamal

  --This is not a promissory note since it is just an acknowledgement not an undertaking
- I promise to pay Rs 100,000 to Mr. Ahmad Kamal thirty days after getting admission in a University.

  --This is not a promissory note since the time of payment is not certain/ ascertainable at the time of making the promise.

Explanation:

The definition of promissory note as given in the Act is much the same as that in section 83 (1) of the Bills of Exchange Act. This and the following sections attempts to define different kinds of negotiable instruments dealt with by the Act. To understand the essentials of a negotiable instrument we have to bear in mind the purpose of such instruments, which is, that they may represent money and do all the work of money in business transactions. It is obvious, therefore, that the first and essential requisite is certainty. Certainty as to the person to make the payment, the person to receive it, the time and place of payment, the conditions of liability, and also as to the amount to be paid. These sections endeavour to define these certainties not "in such exact and technical way as would only embarrass the transaction of business but substantially, in a perfect and practical way. " A promissory note may be in the form of a letter or in any other form of words which fulfill the requirements of this section, and from which the intention to make a note appears.

The section recognizes three kinds of promissory notes:-

1. A promise to pay a certain sum of money to a person.
2. A promise to pay a certain sum of money to the order of a certain person. This is nevertheless payable to the person named or his order.
3. A promise to pay the bearer.

The main question in deciding whether a document is a promissory note is to consider not whether it is negotiable or not but to consider whether in substance and primary intention it was a note and whether it

contains the necessary recitals and is not intended to record a different kind of transaction altogether. The question whether the words in documents amount to mere acknowledgement or to a promise has to be decided on the intention as mentioned above and the real characteristics of the document. Mere reference to account in the promissory note does not make it any the less a promissory note. When the requirements of the section are satisfied, a promissory note is not the less a note because it contains a recital that the maker has deposited title deeds with the payee; or because it is attested by witnesses, or because it refers to an agreement which does not, however, qualify the note, or because the words "security for overdraft" are found printed upon it or because it contains a promise to pay at certain place.

In order that a document should be a promissory note, it is necessary that It should be:

1. An unconditional undertaking to pay;
2. the sum should be a sum of money and should be certain;
3. the payment should be to, or to the order of, a person who is certain, or to the bearer of the instrument;
4. and the maker should sign it.

If these four conditions are present, a document becomes a promissory note.

Sum to paid must be only money and certain:

It is also necessary that the medium of payment must be money only that is specie or other legal currency, and not bonds, bills, notes or any article other than money. But it is not necessary that the money to be paid must be that current in the place of payment, or where the bill is drawn, it may be in the money form of any country whatever. The amount promised to be paid must be certain and incapable of being varied by indefinite editions or deductions. If the amount is not capable of being ascertained of the face of the instrument, that instrument will not be a promissory note.

"To or to the order of certain person"

An instrument that does not own it face indicate to whom the money is payable is not a promissory note. But where it is clear from the instrument itself who the payee is, it in not necessary that the name of the payee must appear in that part of the note which expresses a promise to pay. Therefore a promissory note made in favour of a person described by his office is one made in favour of certain person and is valid. A promissory note payable to manage of a bank is payable to a certain person. But where the payee is described only as " you" the instrument is not a promissory note.

Signature:

The Act contains no definition of the term " signature" it includes the mark made by a person who is unable to write his name such signature need not be al the foot or at any particular part of the document. Where the intention of the parties is clear, the position of a signature on a bill is immaterial; if the maker writes his name to a bill or note on any part of it so as to authenticate it and to give effect to the contract by him thereon. It will be sufficient. A signature to a bill may be in pencil; it may be lithographed, and even printed; in which case however, it must be shown to have been adopted and used by the party as his signature, or again, the affixing of the facsimile of a name (e.g. by rubber stamp) is good as signature.

Plaintiff had established his case on the basis of evidence both documentary as well as oral and the Trial Court decreed the suit against the defendant. Contents of the document would bring the document within the definition of promissory note. Heading given to such document was not legally relevant. Document forming basis of the decree against the defendant was in fact a promissory note as defined in section 4 of negotiable instruments Act, 1881, even though the same was described as a pronote.

Writing:

The instrument may be written on paper, parchment, or any other convenient substitute for paper. "Writing" would be held to include printing, engraving, lithographing, and in fact every mode by which words and figures can be expressed on any material. The writing may be in pencil or in ink, but the imperfection of the former mode of writing and its liability to obliteration prevent its being generally adopted.

The fact that a promissory note is written on a page in an account book of the creditor does not make it illegal or anytheless a promissory note. There is nothing in the Negotiable Instrument Act to make even a promissory note not negotiable by express terms or by necessary implication.

How it differs from agreement:

It depends upon the circumstances and wording in each case as to whether a document is a promissory note or an agreement. One of the tests to be applied to find out is the intention of the parties. The second is whether the document as drawn out can be said to be negotiable, that is to say, could a third person file a suit on the strength of the document. If he could not, then it is a mere agreements, where the document clearly stated that the amount was kept in deposit the mere fact that the document bore twenty five paisa stamps and the impression of the scribe would not make it a pronote.

Notice to surety:

Delivery of notice to surety is not a condition precedent for making him liable on a negotiable instrument if the maker does not pay

Proof:

A party seeking to prove a promissory note need not go behind the promissory note, he has only to prove due execution of the note. Where the plaintiff bank produced two witnesses who categorically stated all documents including promissory notes, hypothecation agreement, letter of revival and balance credit slips having been signed by the defendant, no evidence was produced by defendant to discharge the burden placed upon him in the face of the positive evidence produced by the plaintiff, the genuineness of the promissory note stood proven

Under Article 73 of the Limitation Act, a suit based on a promissory note payable on demand has to be filed with in 3 years from the date of the note. Under Article 64-A a suit under Order XXXVII of the Code of Civil Procedure, is required to be filed within 3 years from the date when the debt becomes payable immediately where a promissory note makes it obligatory on the holder to sue on expiry of three days after notice to pay was given, limitation of the suit begins three days after the notice to pay was given.

Not necessary that the consideration for a pronote or nay other document should be paid on the same date on which the pronote or the document is executed. Even a consideration paid earlier intime is a good consideration.

Mere fact that there was an oral understanding between the parties to return the amount within three months, would not take away the uncoditinal effect of the pronote.

Promissory Note:

Proof of promissory note, would be unquestionable when witnesses were subjected to lengthy cross-examination but noting was extracted to demolish their credibility and neutrality.

"Promissory note" is an instrument in writing containing an unconditional undertaking, signed by the maker to pay on demand or at the fixed or determinable future time a certain sum of money only to the order of a certain person, or to the bearer of the instrument. Any instrument attested by a witness and not payable to order or bearer, whereby a person obliges himself to pay money to another would be included in the definition of "bond". Where amount of the deed was not payable on demand and was not payable only to the order of the plaintiff (creditor) or to the bearer of the instrument, such deed would not fall within the definition of "promissory note" deed in question containing attestation of two witnesses would thus be covered by the definition of "bond" as defined in section 2 (5), Stamp Act, 1899

Promissory note is not required to be attested. Requirement as to attestation of promissory note prescribed in Art. 17 (2)(a), Qanun-e-Shahadat, 1984, would not override Negotiable Instruemnts Act, 1881 which does not require attestation of promissory note.

Signature only on stamp:

Where defendant denied the execution of promissory note but did not deny signature on revenue stamp affixed on the pronote. Contention of defendant was that he did not sign beyond the revenue stamp, his signature was for the payment of salary and promissory note was the result of fraud. The Court rejected the contention.

A question may however arise whether this bond can be considered to be a promissory note as defined in section 4 of Negotiable Instruments Act as an instrument containing an unconditional undertaking to pay on demand to bearer of instrument. This Tribunal is considering this question notwithstanding fact that representatives for department have conceded that FEBC is a promissory note. Reason is that term promissory note has been used distinctly in sub-clause (ii) of clause (a) of Section 2 of Public Debt Act, 1944 but it seems to ask a reference only to a promissory note payable to order. Thus, question is whether a bearer bond payable to bearer is also promissory note or not. Bond in legal terminology means certificate of debt, assurance or a promissory note. Bond, has been defined in Legal Thesaurus by William C. Burton as "BONK, (noun) assurance, certificate of debt, certificate of indebtedness, chirographum, debenture,

note, re-security, security, surety, syngrapha, voucher, warrant, warranty, ASSOCIATED CONCEPTS, bank bond, bearer bond, bond discount, bond for costs, bond for deed, bond for title, bond holder, bond issue, bond of matrimony, bond premium, bonded indebtedness, bondsmen, cash bond, construction bonk, coupon bonk, defense bond, delivery bond, fidelity bond, governmental bond, indemnity bonk, interest free bond, municipal bond, serial bond, state bond, supersedes bond, tax-exempt bond". A perusal of above definition shows that bond is also a promissory note and, therefore, when definition of government security as contained in Public Debt Act, 1944 is read with definition of promissory note contained in holding that FEBC is also promissory note payable to bearer is takes care of contention of representative for department FEBC is a foreign security as defined in section 2 (e) of Foreign Exchange Regulation Act, 1947 and, therefore, it cannot be treated as foreign exchange.

Unconditional undertaking:

In a promissory note there must be an unconditional undertaking to pay, and the note must be payable at all events. When a promise to pay is said o be conditional and when not, is explained in section 5. A letter requesting a loan, and stating that the amount lent will be repaid is not such an unconditional undertaking, because the repayment is dependent on the advance being made. But mentioning a place of payment is not such a condition under the section as to make it not a promissory note. Mere acknowledgement of indebtedness is not sufficient. A document which contained an unconditional undertaking on the part of the appellant to pay a sum of Rs. 10,000 to the respondent by a fixed date was a promissory note.

LECTURE 33

NEGOTIABLE INSTRUMENTS

Promissory Note

As we already know that there are following parties in a promissory note

- Maker &
- Payee

Essentials of a Promissory Note:

These are enumerated below:

- In writing
- Promise to pay
- Unconditional promise
- Signed by maker
- Maker a certain person
- Payee is a certain person
- Certain sum
- Legal tender money to be paid
- Time of payment
- Other formalities.

Bill of Exchange

It is an important form of a negotiable instrument and has been defined in section 5 of the Act, the said definition is reproduced below:

"A bill of exchange is an instrument in writing containing an unconditional order, signed by maker, directing a certain person, to pay on demand or at fixed or determinable future time a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument".

Specimen of Bill of Exchange

Rs. 100,000/- Lahore
August 20, 2007

Ninety days after date, pay to Mr. Ahmad Kamal or order rupees one hundred thousand only for value received

Signature
Yasir Mehmood
(Drawer)

Accepted by
Drawee XYZ (Drawee)

Revenue Stamp

Essentials of Bill of Exchange

These are outlined here under:

- In writing
- Order to pay
- Unconditional order
- Signed by the drawer
- Drawee certain person
- Time of payment
- Certain sum
- Legal tender money
- Payee certain person
- Other formalities
  - Date
  - Place
  - Lawful consideration

- Revenue stamp

Explanation of different features of a Bill of Exchange:
A promise or order to pay is not " conditional, within the meaning of this section and section 4, by reason of the time for payment of the amount or any installment thereof being expressed to be on the lapse of a certain period after the occurrence of a specified event which, according to the ordinary expectation of mankind, is certain to happen , although the time of its happening may be uncertain.

The sum payable may be " certain" within the meaning of this section and section 4, although it includes future interest or return in any other form or is payable at an indicated rate of exchange, or is payable at the current rate of exchange and although it is to be paid in stated installments and contains a provision that on default of payment of one or more installments or interest. Or return in any other form the whole or the unpaid balance shall become due.

A promise order to pay is not 'conditional' nor is the sum payable uncertain within the meaning of this section or section 4 by reason of the sum payable being subject to adjustment for profit or loss, as the case may be of the business of the maker.

Where the person intended can reasonably be ascertained from the promissory note or the bill of exchange; he is a 'certain person' within the meaning of this section and section 4, although he is misnamed or designated by description only.

An order to pay out of a particular fund is not unconditional within the meaning of this section; but an unqualified order to pay, coupled with—

(a) an indication of a particular fund out of which the drawee is to reimburse himself or a particular account to be debited to the amount, or \
(b) a statement of the transaction which gives rise to the note of bill, in unconditional

An essential character of a bill of exchange is that it shall contain an order to accept or to pay and that acceptor should accept it, in the absence of such a direction to pay the document will not be a bill of exchange or a hundi.

The following are the ingredients of a bill of exchange:

1. it must in writing \
2. it must contain an order to pay and addressed to some person
3. the order must be unconditional
4. the order must be signed by the maker
5. the order must direct to pay or demand or at a fixed or determinable future time.
6. the sum ordered to be paid must be certain.
7. the payment should be ordered to be paid to a certain person, or to his order, or to the bearer.

Irrevocable letter of credit:
Payment against irrevocable letter of credit cannot be stopped unless there is a fraud on face of documents produced before bank, to knowledge of bank concerned

Order should be unconditional:
The drawer's order to the drawee must be unconditional and should not make the payment of the bill dependent on a contingency. Where an instrument is expressed to be payable on a contingency, it does not cease to be invalid by the happening of the event before the expiry of the period fixed for the performance of the obligation, for the instrument must be valid ab initio, and carry its validity on its face.

Drafts:

A banker's draft is a bill drawn either on demand or otherwise by one bank on another in favor of third party, or by one branch of a bank on another branch of the same bank, or by the head office on a branch, or vice versa. It is a bill of exchange and therefore a negotiable instrument. The issue of a draft is regarded in banking practice as a matter of purchase and ordinarily the relationship between the holder of a demand draft and the bank issuing it is that of debtor and creditor.
Where a document run as follows:
I agree to pay you, or to your order, on demand, the sum of Rs.10,000 only being the amount my brother and I have agreed to pay you for bringing about the sale of the I.L.T.D. Company Ltd. of our site in Guntur with interest thereon at 12 p.c from this day till realization. It was held that the party could not call in aid para 2 of this section because the time for payment was not postponed.

Future interest, etc:
If the sum payable includes future interest, or is payable at an indicated rate of exchange, or is according to course of exchange, the sum payable shall be considered to be "certain" although the instrument may provide that on default of payment of an installment the whole of unpaid balance shall become due.
Certain person:
Although a certain person is misnamed or designated by description only, yet the person shall be "certain" if it is clear as to who is the person to whom direction is given or payment is to be made.
Instrument must contain an order to pay money and money only: In order that an instrument may amount to a promissory note, it is essential that the medium of payment must be money only. It should not consist in any article of food or any animal or in any bonds, simply or coupled with money in specie.

If after issuing a cheque the drawer keeps quiet and takes no steps to inform the bank in time i.e. before the cheque is encashed that the cheque should not be according to section 10 of the Negotiable Instruments Act, means payment in accordance with the apparent tenor of the instrument in good faith, the liability for the drawn cheque shall absolutely and squarely fall on the drawer.

Difference between promissory note and bill of exchange:
--In a promissory note the executant promises himself to pay while in a bill of exchange he directs another to pay.
In a bill of exchange the person liable is responsible to executant and not scribe
--In a promissory note the maker is the principal debtor. In the case of bill of exchange the drawer is surety.
--A bill of exchange can be accepted conditionally while a promissory note cannot be so made.
--A pronote cannot be made payable to the maker himself. In a bill of exchange this is possible and one person may become both drawer and payee or both drawee and payee.
In promissory notes there are two parties—the promisor and the promisee (the maker and the payee). In the case of bills of exchange there are three parties—the drawer (who makes the order), the drawee, the bill is drawn).
--The most important distinction is that in the case of a promissory note the maker unconditionally undertakes to pay the amount mentioned in the pronote while in the case of a bill of exchange or hundi the maker gives an unconditional order directing another person to pay.
--Interest on a promissory note was subsequently increased by agreement of the parties. The guarantors of the promissory note were not discharged where the suit was brought on the original promissory note and not on the subsequent agreement.
Cheque
Another important type of negotiable instrument is cheque. Cheque as defined in section 6 of the Act is given below:
"A cheque is a bill of exchange drawn on a specified banker and not expressed to payable otherwise than on demand".
Parties:
There are three parties in the cheque which are as under:

- **Drawer**
- **Drawee (Banker)**
- **Payee.**

Essentials of a Cheque
These are outlined below:

- In writing
- Unconditional order
- Signed by drawer
- Payable on demand
- Specified banker
- Printed form (Cheque Leaves to be printed)
- Payment in money form only
- Certain amount
- Payable to specific person or order of or bearer.
- Date

Types of Cheques:
The cheques are divided in the following types:

- **Bearer Cheques**
- **Order Cheques**
- **Crossed Cheques**

Crossed Cheques and their Collection
Crossing: Crossing means drawing two parallel transverse lines across the cheque.

- General Crossing
- Special crossing

Explanation:
A cheque is a peculiar sort of instrument in many ways resembling a bill of exchange, but in some entirely different. In the ordinary course, it is never accepted, it is not intended for circulation, it is given for immediate payment, it is not entitled to days of grace. In addition, a cheque is presented for payment, whereas a bill in the first instance is presented for acceptance, this is not so in the case of a cheque, because the holder of a cheque, as between himself and the drawer, has no right to require acceptance. A cheque is not intended for circulation; it is given for immediate payment; it is not entitled to days of grace; and though it is, strictly speaking an order upon a debtor by a creditor to pay to a third person the whole or part of a debt, yet, in the ordinary understanding of persons, it is not so considered.
Cheque dishonoured by Bank for reason of "drawer's signature differs":
Endorsement on cheque to effect that "drawer's signature differs, does not amount to refusal to pay on demand by Bank and hence limitation for filing suit does not arise from date of such endorsement.
Difference between a cheque and a bill of exchange:

i. a cheque is drawn on a specified banker, but a bill may be drawn on any one including a banker
ii. a cheque is payable immediately on demand, a bill is entitled to days of grace.
iii. A cheque requires no acceptance: it is intended for immediate payment whereas a bill of exchange has to be accepted before acceptor can be made liable.
iv. Failure of presentment for payment discharges the drawer in the case of a bill, but the drawer of a cheque is not discharged by failure of the holder to present it in due time unless the drawer has sustained damage by the delay.
v. When a cheque is not met, notice of dishonour is not necessary as in the case of bills: want to assets in the hands of the banker is sufficient notice.
vi. A cheque is revocable while a bill is not.

In case the drawer of the cheque denies its execution, he may take a plea in the alternative that if his signature on the cheque is found to be genuine it may be taken that a signed cheque had been stolen from him and as such he is not liable on it. In such a case it is for the plaintiff to prove that the cheque was actually drawn by the defendant and therefore he was liable on it.

Cheque is in the nature of an order from the account—holder to the Bank directing it to pay the specified amount out of his account. Where signature of the account-holder on a cheque is forged then it is not his

order to pay. Payment on the basis of a forged cheque is thus payment without authority and would not bind the customer.

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LECTURE 34

NEGOTIABLE INSTRUMENTS—ENDORSEMENT & NEGOTIATION

Endorsement:
It has been defined in section 14 of the Act which is reproduced below:
"When the maker or holder of a negotiable instrument signs the same, otherwise than as such maker, for the purpose of negotiation, on the back or face thereof or on a slip of paper annexed thereto, or so signs for the same purpose a stamped paper intended to be completed as a negotiable instrument, he is said to indorse the same, and is called endorser".

Essentials of an Endorsement:
These are outlined below:
- Endorser must be holder
- Instrument Signed by the Endorser
- Intention to Negotiate

Kinds of Endorsement:
The endorsements are divided as under:
- Blank or general.
- Full or special endorsement.
- Restrictive endorsement
- Partial endorsement

The above endorsements are discussed in the following paragraphs:

Instrument endorsed in blank:
It has been discussed in section 16 which is given below:
If the endorser signs his name only, the endorsement is said to be **"in blank",** and if he adds a direction to pay the amount mentioned in the instrument to, or to the order of, a specified person, the endorsement is said to be **'in full",** and the person so specified is called the "endorsee" of the instrument.
-- In such type of endorsement, endorser just signs his name.

Full or special endorsement:
The said endorsement has been defined in section 16 which is given below:
If the endorser signs his name only, the endorsement is said to be **"in blank",** and if he adds a direction to pay the amount mentioned in the instrument to, or to the order of, a specified person, the endorsement is said to be **'in full",** and the person so specified is called the "endorsee" of the instrument.
Endorser mentions the name of endorsee and puts his signature.

"Endorsee"
The provisions of this Act relating to a payee shall apply with the necessary modifications to an endorsee.

Restrictive Endorsement:
It has been defined in section 50(2) of the Act which is reproduced below:
An endorsement is restrictive which either--

(a) restricts or excludes the right to further negotiate the instrument, or

(b) constitutes the endorsee an agent of the endorser to endorse the instrument or to receive its contents for the endorser or for some other specified person.

Such endorsement restricts further negotiation of the instruments, for example

Pay Yasir only

Signature of endorser

Without Recourse Endorsement
It has been defined in section 52 of the Act which is reproduced below:
The endorser of a negotiable instrument may, by express words in the endorsement, exclude his own liability thereon, or make such liability or the right of the endorsee to receive the amount due thereon depend upon the happening of a specified event, although such event may never happen.

Where an endorser so excludes his liability and afterwards becomes the holder of the instrument, all intermediate endorsers are liable to him.
Where the right of an endorsee to receive the amount due on the negotiable instrument is made dependent in the aforesaid manner the condition is valid only as between the endorser and the endorsee.
Where the endorsement of a negotiable instrument purports to be conditional, the payer may disregard the condition and payment of the endorsee is valid whether the condition has been fulfilled or not.

Without responsibility of the endorser, for example:

Pay Yasir without recourse to me

Signature of endorser

Partial Endorsement:
It has been defined in section 56 of the Act which is reproduced below:
(1) Negotiation by endorsement must be of the entire instrument.
(2) An endorsement which purports to transfer to the endorsee only a part of the amount payable, or which purports to transfer the instrument to two or more endorsees severally, is not valid as a negotiable of the instrument; but where such amount has been paid in part, a note to that effect may be endorsed on the instrument, which may then be endorsed for the balance.
The endorser directs the transfer only a part of amount payable on a bill of exchange or promissory note through such endorsement.

Effect of endorsement:
When a negotiable instrument is endorsed and delivered to the endorsee, the endorsee becomes entitled for the ownership rights in the instrument and also a right is vested in him to further transfer/ endorse the instrument, if he does not become the endorsee through a restrictive endorsement.

Maturity of the Instruments

What is Maturity?
It is the date of a promissory note or bill of exchange, at which it falls due. (Section 22 defines the maturity)
Days of Grace:
Three days of grace are provided in section 22 for determining payability of instrument but said days of grace are not available when instrument is payable on demand or at sight or on presentment
Days of Grace are applicable in case of Promissory note and bill of exchange but not cheque, since it is always payable on demand.
Parties To Notes, Bills And Cheques
Every person capable of contracting can be a party to a negotiable instrument that is can be a party by making/ drawing, accepting, endorsing a negotiable instrument. The various aspects in connection with parties to these instruments are discussed in detail in the following paragraphs:
Positions of parties who are incompetent to enter into contracts:
- Minor: He can draw an instrument but cannot be sued in his own name.
- Person of unsound mind: such person is incompetent to draw, make, endorse and negotiate an instrument
- Insolvent: in case of insolvency, property is vested in official receiver, hence insolvent person is not a competent person to draw, endorse, accept, and negotiate the instrument.

Capacity to make/draw negotiable instruments:
It has been defined in section 26 of the Act which is reproduced below:
Every person capable of contracting, according to the law to which he is subject, may bind himself and be bound by the making, drawing, acceptance, endorsement, delivery and negotiation of a promissory note, bill of exchange or cheque.
Parties incompetent to enter into contract:
1. Minor

Where such an instrument is made, drawn or negotiated by a minor, the making, drawing or negotiating entitles the holder to receive payment of such instrument and to enforce it against any party thereto other than minor.
Although the minor cannot bind himself by making/ drawing a negotiable instrument but through such an instrument bind all other parties.
2. A person of unsound mind- incompetent
3. Insolvent
The property belonging to an insolvent vests in an official receiver, hence the insolvent person cannot neither sue nor capable of negotiating/ transfer/ endorse the instrument
4. Lunatic- Position same as that of minor
Agent /Agency
It has been defined in section 27 of the Act which is reproduced below:
Every person capable of binding himself or of being bound by the making, drawing, acceptance or negotiation of a negotiable instrument, may so bind himself or be bound by a duly authorized agent acting in his name.
A general authority to transact business and to receive and discharge debts does not confer upon an agent the power of accepting or indorsing bills of exchange so as to bind his principal.
An authority to draw bills of exchange does not of itself import an authority to endorse.
Liability of the Agent:
An agent may draw, accept or negotiate an instrument on behalf of the principal so as to bind him. However this binding is subject to following conditions:

- That the agent has been authorized by the principal to that effect:
- That the authority has been expressed in clear terms
- That the principal is a competent person to enter into a contract
- That the agent acts in the name of the principal: and
- That the agent has not exceeded his authority
- The agent will be personally liable in any of the following cases;
- If he does not disclose the name of his principal:
- If he does not indicate that he is an agent.
- If he executes an instrument without or in excess of his authority

The above provisions are contained in **section 28** which is reproduced:
(l) Where a person signs a promissory note, of exchange or cheque without adding to his signature words indicating that he signs it as an agent for and on behalf of a principal or in a representative character, he is personally liable thereon but the mere addition to his signature of words describing him as an agent or as filling a representative character does not exempt him from personal liability.
(2) Notwithstanding anything contained in sub-section (1), any person signing a promissory note, bill of exchange or cheque for and on behalf of the principal is not liable to a person who induces him to sign upon the belief that the principal alone would be held liable.
Parties to Promissory Note:
These are discussed below:
Maker: The person who makes the note and undertakes to pay the amount stated in the promissory note.
Payee: The person to whom the amount is payable under promissory note.
Holder: The person who may be the payee or endorsee of the promissory note. Holder is the person who is entitled to the possession of the instrument in his own name and also entitled to receive the amount due under a promissory note.
Endorser: The person who by endorsement transfers the promissory note to another person.
Endorsee: The person to whom the promissory note is transferred by endorsement .
Parties to bill of exchange:
These are discussed below:
Drawer
The maker of a bill of exchange is Drawer.
Drawee
The person who is directed by the drawer to pay the amount stated in bill of exchange is called drawee.
Accepter

The drawee when accepts the **Bill of Exchange**, he becomes acceptor.

Payee

The person to whom or to whose order the amount stated in Bill of Exchange is to be paid.

Holder

Explained while discussing promissory note

Endorser

Explained while discussing promissory note

Endorsee

Explained while discussing promissory note

Parties to a Cheque:

These are discussed below:

Drawer

The person who draws/ writes a cheque is called the drawer

Drawee

The person who is directed through a cheque to pay the specified amount is called the drawee, however in case of a cheque, drawee must always be a bank.

Payee

Explained while discussing promissory note

Holder

Explained while discussing promissory note

Endorser

Explained while discussing promissory note

Endorsee

Explained while discussing promissory note

Holder:

The scope of the holder is contained in section 8 of the negotiable instrument 1881 which is reproduced below:

The "holder" of a promissory note, bill of exchange or cheque means the payee or endorsee who is in possession of it or the bearer thereof but does not include a beneficial owner claiming through a benamidar.

Sec 8

In order to be called a 'Holder', the person must satisfy the following two conditions:

- He must be entitled to the possession of the instrument in his own name
- He must be entitled to receive or recover the amount due thereon from the parties liable thereto

Holder in Due Course:

Holder in due courser has been explained in section 9 of the Act, which is reproduced below:

"Holder in due course" means any person who for consideration becomes the possessor of a promissory note, bill of exchange or cheque if payable to bearer, or the payee or endorsee thereof, if payable to order, before it became overdue, without notice that the title of the person from whom he derived his own title was defective.

Conditions for a person to be called 'Holder in Due Course':

- He must be holder
- He obtains the instrument for valuable consideration
- He must become the holder of the instrument before maturity
- he must have obtained the instrument in good faith
- He must take the instrument complete and regular on the face of it.

Acceptor's liability to the Holder in Due Course when endorsement forged: Sec 41

An acceptor of a bill of exchange already endorsed is not relieved from liability by reason that such endorsement is forged, if he knew or had reason to believe the endorsement to be forged when he accepted the bill.

Privileges of a holder in due course

In case of Inchoate stamped instruments:

An inchoate stamped instrument can be completed by the transferee/ holder in due course and his right is not affected that the instrument was not bearing the required stamps at the time he acquired the instrument.

Prior parties liable to holder in due course:

It has been defined in section 36 which is given below:

Every prior party to a negotiable instrument is liable thereon to a holder in due course until the instrument is duly satisfied

No effect of conditional delivery:

It has been defined in section 46 which is given below:

The making, acceptance or endorsement of promissory note, bill of exchange or cheque is completed by delivery, actual or constructive.

Holder in due Course acquires better title than that of the transferor:

-- He acquires a better title to the instrument despite of the fact that there may be defect in the title of the transferor.

Distinguishing Features between Holder and Holder in due Course

Holder

- Title of the holder shall not be good if the title of any prior parties is defective.
- Consideration is not necessary to be a holder of an instrument
- A holder does not enjoy any special privileges
- A holder is a person who is entitled in his own name to the possession of the instrument and to recover or receive the amount due thereon from the parties.

Holder in Due Course

- Holder in due course shall have a good title even if the title of prior parties is defective. However condition is that he should obtain that title in good faith.
- Consideration is necessary
- Enjoys special privileges
- He is a person who has taken the instrument in good faith and for value, and also before its maturity

Liabilities of the parties to an instrument:

- **Liability of** Drawer– sec.30
- **Liability of** Drawee **of a cheque– sec.31**
- **Liability of** maker **of note and** acceptor **of bill—sec. 32**
- **Liability of** Endorser– sec.35

Liability of Drawer:

It has been defined in section 30 which is given below:

-- the drawer of a bill or cheque is bound to compensate the holder in case dishonored by the drawee or acceptor provided due notice of dishonour has been given or received by the drawer. Before acceptance of a bill, drawer's liability is primary and after acceptance his liability becomes secondary to acceptor's liability.

Liability of drawee of cheque:

It has been defined in section 31 which is given below:

-- The drawee of a cheque having sufficient funds of the drawer in his hands properly applicable to the payment of such cheque must pay the cheque when duly required so to do, and, in default of such payment, must compensate the drawer for any loss or damage caused by such default

Liability of maker of note and acceptor of bill:

It has been defined in section 32 which is given below:

1) In the absence of a contract to the contrary, the maker of a promissory note, by making it, the acceptor before maturity of a bill of exchange by accepting it, engages that he will pay it according to the tenor of the note or his acceptance respectively, and in default of such payment, such maker or acceptor is bound to compensate any party to the note or bill for any loss or damage sustained by him and caused by such default. .

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

Liability of endorser:

It has been defined in section 35 which is given below:

In the absence of a contract to the contrary, the .endorser of a negotiable instrument, by indorsing it, engages that on due presentment it shall be accepted and paid according to its tenor and that if it be dishonored he will compensate the holder or subsequent endorser who is compelled to pay it for any loss or damage caused to him by such dishonor.

Extent of Liability-- Rules as to compensation:
It has been defined in section 117 which is given below:
The compensation payable in case of dishonour of a promissory, bill of exchange or cheque, by any party liable to the holder or any endorsee, shall be determined by the following rules:,-
(a) the holder is entitled to the amount due upon the instrument; together with the expenses properly incurred in presenting, noting and protesting it;
(b) when the person charged resides at a place different from that at which the instrument was payable, the holder is entitled to receive such sum at the current rate of exchange between the two places;
(c) an endorser who, being liable, has paid the amount due on the same is entitled to the amount so paid with interest at six per centum per annum from the date of payment until, tender or realization thereof, together with all expenses caused by the dishonour
(d) when the person charged and such endorser reside at different places the endorser is entitled to receive such sum at the current rate of exchange between the two places;
(e) the party entitled to compensation may draw a bill upon the party liable to compensate him, payable at sight or on demand, for the amount due to him, together with all expenses properly incurred by him. Such bill must be accompanied by the instrument dishonoured and the protest thereof (if any). If such bill is dishonoured, the party dishonouring the same is liable to make compensation thereof in the same manner as in the case of the original bill.

Negotiation:
In general terms, negotiation is the characteristic of transferability possessed by a negotiable instrument.
It has been defined in section 36 which is given below:
When a promissory note, bill of exchange or cheque is transferred to any person, so as to constitute that person the holder thereof, the instrument is said to be negotiated.
- This transfer by way of negotiation can take place in the following ways:
- Negotiation by delivery
- Negotiation by endorsement and delivery

Negotiation by delivery:
It has been defined in section 47 which is given below:
Subject to the provisions of section 58, a promissory note, bill of exchange or cheque payable to bearer is negotiable by delivery thereof.
Exception.---A promissory note bill of exchange or cheque delivered on condition that it is not to take effect except in a certain event is not negotiable (except in the hands of a holder for value without notice of the condition) unless such event happens.

ILLUSTRATION:
Mr. Aslam is the payee of a bearer cheque amounting Rs 50,000 and this cheque fulfills all essential requirements . Mr. Aslam delivers this cheque to Mr. Yasir. This cheque has been negotiated/ transferred to Mr. Yasir by way of delivery.

Negotiation of the instruments

Negotiation by Endorsement and Delivery:
It has been defined in section 48 which is given below:
-- Subject to the provisions of section 58 a promissory note, bill of exchange or cheque payable to order is negotiable by the holder by endorsement and delivery thereof.
-- Section 58 is regarding defective title.

Who may negotiate the instruments
- Maker/ Drawer
- Payee
- Endorsee

This is provided in **Section 51** of the Act.
Every sole-maker, drawer, payee or endorsee, or all of several joint makers, drawers, payees or endorsees, of a negotiable instrument may, if the negotiability of such instrument has not been restricted or excluded as mentioned in Section 50, endorse and negotiate the same.

Right of the holder of the instrument acquired after dishonour or when overdue:

It has been defined in section 59 which is given below:

The holder of negotiable instrument who has acquired it after dishonour, whether by non-acceptance or non-payment, with notice thereof, or after maturity, has only, as against the other parties, the rights thereon of his transferor and is subject to the equities to which the transferor was subject at the time of acquisition by such holder.

Effect of Defective Title:

It has been defined in section 58 which is given below:

When a promissory note, bill of exchange or cheque has been lost or has been obtained from any maker, drawer, acceptor or holder thereof by means of an offence or fraud, or for an unlawful consideration, neither the person who finds or so obtains the instrument nor any possessor or endorsee who claims through such person is entitled to receive the amount due thereon from such maker, drawer, acceptor or holder, unless such possessor or endorsee is, or some person through whom he claims was, a holder thereof in due course.

Instrument negotiable till payment or satisfaction Sec 60

It has been defined in section 60 which is given below:

A negotiable instrument may be negotiated (except by the maker, drawer or acceptor after maturity) until payment or satisfaction thereof by the maker, drawee or acceptor at or after maturity, but not after such payment or satisfaction.

Presentment of Negotiable Instrument

Presentment for Acceptance:

It has been defined in section 61 which is given below:

A bill of exchange payable after sight must, if no time or place is specified therein for presentment, be presented to the drawee thereof for acceptance, if he can, after reasonable search, be found, by a person entitled to demand at within a reasonable time after it is drawn and in business hours on a business day. In default of such presentment, no party thereto is liable thereon to the person making such default

Essentials of Valid Acceptance:

- Must be in writing
- Signed by drawee or his agent
- Acceptance must appear on the bill
- Accepted bill must be delivered to the holder

Who can accept the Bill

- Drawee or his agent, in case of several drawees, all the drawees can accept
- In case of death of the drawee, bill can be accepted by the legal representative of the deceased drawee
- Official receiver, in case drawee declared as insolvent

Presentment for Sight:

It has been defined in section 62 which is given below:

A promissory note payable at a certain period after sight, must be presented to the maker thereof for sight (if he can after reasonable search be found) by a person entitled to demand payment, within a reasonable time after it is made and in business hours on a business day. In default of such presentment, no party thereto is liable thereon to 'the person making such default.

Presentment for Payment:

It has been defined in section 64 which is given below:

Subject to the provisions of section 76, promissory notes, bills of exchange and cheques must be presented for payment to the maker, acceptor or drawee thereof respectively, by or on behalf of the holder as hereinafter provided. In default of such presentment, the other parties thereto are not liable thereon to such holder. Section 76 underlines situations when presentment is unnecessary e.g. Drawee prevents presentment.

Payment and Interest:

To whom payment could be made:

It has been defined in section 78 which is given below:

Subject to the., provisions of section 82, payment of the amount due on a promissory note, bill of exchange or cheque must, in order to discharge the maker or acceptor, be made **to the holder** of the instrument. Section 82 underlines the situations when maker, drawer, acceptor of an instrument are discharged from liability.

Interest when rate specified or not specified:

It has been defined in section 79 which is given below:
Subject to the provision of any law for the time being in force relating to the relief of debtors, and without prejudice to the provisions of section 34 of the Code of Civil Procedure, 1908,---
(a) when interest at a specified rate is expressly made payable on a promissory note or bill of exchange and no date is fixed from which interest is to be paid, interest shall be calculated at the rate specified, on the amount of the principal money due thereon, from the date of the note, or, in the case of a bill, from the date on which the amount becomes payable, until tender or realization of such amount, or until the date of the institution of a suit to recover such amount;
(b) where a promissory note or bill of exchange is silent as, regards interest or does not specify the rate of interest, interest on the amount of the principal money due, thereon shall, notwithstanding any collateral agreement relating to interest between any parties to the instrument, be allowed and calculated at the rate of six per centum per annum from the date of the note, or, in the case of a bill, from the date on which the amount becomes payable, amount due thereon, or until the date of the institution of a suit to recover such amount.

Interest when no rate specified:

It has been defined in section 80 which is given below:
When no rate of interest is specified in the instrument, interest on the amount due thereon shall, notwithstanding any agreement relating to interest between any parties to the instrument, be calculated at the rate of six per centum per annum, from the date at which the same ought to. have been paid by the party charged, until tender or realization of the amount due thereon, or until such date after the institution of a suit to recover such amount as the Court directs.

Discharge from liability:

It has been defined in section 82 which is given below:
The maker, acceptor or endorser respectively of a negotiable instrument is discharged from liability thereon-
(a) **by cancellation**; to a holder thereof who cancels such acceptor's or endorser's name with intent to discharge him, and to all parties claiming under such holder;
(b) **by release**; to a holder thereof who otherwise discharges such maker, acceptor or endorser, and to all parties deriving title under such holder after notice of such discharge; and
(c**) by payment;** to all parties thereto, if the instrument is payable to bearer, or has been endorsed in blank, and such maker, acceptor or endorser makes payment in due course of the amount due thereon.

LECTURE 35

TRANSFER OF PROPERTY

Matters relating to Transfer of property are governed by Transfer of Property **Act, 1882.**
We shall focus on the following areas:
Transfers of property by act of parties. (Properties whether movable or immovable**)**
- Transfer of immovable property
- Sale of immovable property
- Mortgages of immovable property
- Exchanges
- Transfer through gifts
- Transfers of actionable claims

Transfer of Property:
It has been defined in section 5 of the Act which is given below:
In the following sections **"transfer of property"** means **an act** by which a **living person conveys property**, in present or in future, **to** one or more **other living persons**, or to himself and one or more other living persons; and "to transfer property" is to perform such act.
In this section **"living person includes a company or association** or body of individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals.
Transfer must be made by the owner of property
"Living Person": A juristic person is also treated as a living person but a living person is not necessarily a living person in all cases. However certain non-animate bodies with the rights of person are treated as living person such as companies.
"Gift to God Almighty": is treated as transfer under the provisions of this Act.
"Conveys": use of the word 'convey' is not necessary condition leading to 'transfer of property', if through the documents it is established that transfer of ownership has taken place, it would constitute transfer of property.
"Creation of a charge" on a property **does not** lead to transfer of property.
"Family arrangement": this is **not** a 'transfer of property'. Agreement regarding share of each party
"Property": All properties for the purpose of this Act should be transferable or attachable and saleable.
Some Examples of property:
- Rights relating to physical objects
- Actionable claims
- Copyright
- Right of a company to call up shares

"Property": All properties for the purpose of this Act should be transferable or attachable and salable.
Following are not to be treated as property:
- Uncalled share capital of a company—this is not property.
- Power of appointment—this power held by a person is not property.

What may be Transferred: Sec 6
It has been defined in section 6 of the Act which is given below:
Property of any kind may be transferred, except as otherwise provided by this Act or by any other law. Following can not be transferred:
(a) The chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred.
(b) A mere right of re-entry for breach of a condition subsequent cannot be transferred to anyone except the owner of the property affected thereby.
(c) An easement cannot be transferred apart from the dominant heritage.
(d) An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him.
(dd) A right to future maintenance, in whatsoever manner arising, secured or determined, cannot be transferred.
(e) A mere right to sue cannot be transferred.
(f) A public office cannot be transferred, nor can the salary of a public officer, whether before or after it has become payable.

(g) Stipends allowed to military, naval, air-force and civil pensioners of the government and political pensions cannot be transferred.
(h) No transfer can be made (1) insofar as it is opposed to the nature of the interest affected thereby, or (2) for an unlawful object or consideration within the meaning of section 23 of the Indian Contract Act, 1872 (9 of 1872), or (3) to a person legally disqualified to be transferee.
(i) Nothing in this section shall be deemed to authorize a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate, under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee.

Persons competent to transfer: Sec 7

It has been defined in section 7 of the Act which is given below:
Every person competent to contract and entitled to transferable property, or authorized to dispose of transferable property, not his own, is competent to transfer such property either wholly or in part, and either absolutely or conditionally, in the circumstances, to the extent and in the manner, allowed and prescribed by any law for the time being in force.

Explanation:

Transferor must be **competent and entitled** to deal with said property.

Sales of immovable property

Sale:

It has been defined in section 54 of the Act which is given below:
"Sale" is a **transfer of ownership in exchange** for **a price** paid or promised or part-paid and part-promised.

Sale how made:

Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

Reversion- Transfer of property in the possession of tenant is called Reversion.

In case of tangible immovable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.
Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

Contract for sale:

A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.
Contract of sale does not, of itself, create any interest in or charge on such property.

Agreement of Sale:

Agreement for sale does not create any interest or charge on property whereas such rights are created by the sale of property, hence agreement of sale is not to be considered at par with sale, since it does not lead to transfer of ownership in property.

Essentials of Sale:

- Parties
- Subject matter
- Transfer
- Price or consideration

Transfer of Ownership:

It means transfer of ownership rights in full and permanently by transferor in exchange for price.
Transferor must have title to the property being transferred.

- Gift- consideration natural love & affection
- In exchange for a price
- Price must be paid or promised to pay.
- Consideration-No sale without price/consideration

Rights and liabilities of Buyer and Seller: Sec 55

It has been defined in section 55 of the Act which is given below:
In the absence of a contract to the contrary, the buyer and the seller of immovable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following or such of them as are applicable to the property sold:

Liabilities of seller (seller is bound)--

To disclose to the buyer any material defect in the property or in the seller's title

- To produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power;
- To answer to the best of his information all relevant questions put to him by the buyer in respect to the property or the title thereto;
- On payment or tender of the amount due in respect of the price, to execute a proper conveyance of the property when the buyer tenders it to him for execution at a proper time and place;
- between the date of the contract of sale and the delivery of the property, to take as such care of the property and all documents of title relating thereto which are in his possession as an owner of ordinary prudence would take of such property and documents;
- to give possession of the property
- to pay all public charges and rent accrued due in respect of the property up to the date of the sale,

Rights and liabilities of Buyer and Seller: Sec 55

Rights of seller (The seller is entitled)

- to the rents and profits of the property till the ownership thereof passes to the buyer;
- where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money, to a charge upon the property in the hands of the buyer, and for interest on such amount or part from the date on which possession has been delivered.

Liabilities of Buyer:

- to disclose to the seller any fact as to the nature or extent of the seller's interest in the property of which the buyer is aware, but of which he has reason to believe that the seller is not aware, and which materially increases the value of such interest;
- to pay or tender, at the time and place of completing the sale, the purchase-money to the seller or such person as he directs

Rights of Buyer (buyer is entitled)

where the ownership of the property has passed to him, to the benefit of any improvement in, or increase in value of, the property, and to the rents and profits thereof;

- to a charge on the property, as against the seller and all persons claiming under him, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount;

Mortgages of Immovable Property

Mortgage Defined:

It has been defined in section 58 of the Act which is given below:

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

Mortgagor:

The transferor is called a mortgagor

Mortgagee:

The transferee a mortgagee

Mortgage Money:

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

Mortgage Deed:

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

Scope of Mortgage:

According to the provisions of sec 58 of the Act, Mortgages can be made as outlined below:

- Of specific immovable property
- Purpose--securing the payment of:
  - Money advanced or to be advanced by way of loan
  - For an existing debt or future debt or
  - For performance of an engagement which may give rise to pecuniary liability

Rights of Mortgagee

- To sell the mortgaged property in case of default by mortgagor

- Right to fore-closure
- Right to file suit

Types of Mortgages:

There are two types of Mortgages which are given below:

- Registered Mortgage
- Equitable Mortgage

Registered or Legal Mortgage

- This is created through a formal document called mortgage deed.
- Mortgage deed is registered with the Registrar of titles.
- It is comparatively expensive as it involves stamp duty and registration fee.

Equitable Mortgage:

This is created by deposit of title deed by the mortgagor.

- **Memorandum regarding deposit of title deed is also signed by respective parties.**
- **Clear title of the mortgagor must be ascertained by the mortgagee.**

Lease of Immovable Property

Lease:

It has been defined in section 105 of the Act which is given below:

lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

Lessor

-- The transferor is called the lessor

Lessee

-- The transferee is called the lessee

Premium

-- The price is called the premium

Rent

-- The money, share, service or other thing to be so rendered is called the rent.

Essentials of a Lease:

- The right that is transferred must be with respect to immovable property
- The right is only the right of enjoyment of property. It is not the transfer of ownership of the property.
- Such right must be transferred
- This transfer of right must be for a stipulated period
- The consideration must be in the form of the modes stated in section 105 such as rent or premium.

Exchange:

It has been defined in section 118 of the Act which is given below:

When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an "exchange".

A transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale.

Gift

It has been defined in section 122 of the Act which is given below:

"Gift" is the transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.

Acceptance when to be made-Such acceptance must be made during the lifetime of the donor and while he is still capable of giving.

If the donee dies before acceptance, the gift is void.

Scope of Gifts- Intention, Delivery & Acceptance

- Consideration
- Donor's competency
- Property both movable and immovable as well as existence of property
- donor's death before acceptance by donee, the gift would be void.

Transfers of actionable claims

Defined:

It has been defined in section 130 of the Act which is given below:

(1) The transfer of an actionable claim whether with or without consideration shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorized agent, shall be complete and effectual upon the execution of such instrument, and thereupon all the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee, whether such notice of the transfer as is hereinafter provided be given or not:

PROVIDED that every dealing with the debtor other actionable claim by the debtor or other person from or against whom the transferor would, but for such instrument of transfer as aforesaid, have been entitled to recover or enforce such debt or other actionable claim, shall (save where the debtor or other person is a party to the transfer or has received express notice thereof as hereinafter provided) be valid as against such transfer.

(2) The transferee of an actionable claim may, upon the execution of such instrument of transfer as aforesaid, sue or institute proceedings for the same in his own name without obtaining the transferor's consent to such suit or proceeding and without making him a party thereto.

Exception : Nothing in this section applies to the transfer of a marine or fire policy of insurance or affects the provisions of section 38 of the Insurance Act, 1938 (4 of 1938).

LECTURE 36

LAW RELATING TO SALE OF GOODS

The law relating to sale of goods is governed by Sale of Goods Act, 1930.

Scope of Sale of Goods Act:

This Act is applicable only to movable property. Actionable claims and money although movable items but are not the subject matter of this Act. These are excluded from 'goods'. Actionable claims have been defined by the transfer of property Act, 1882.

Contract of Sale:

It has been defined in section 4(1) of the Act which is given below:

A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one part-owner and another.

Essentials:

- An agreement
- Parties (there must be two parties)
- Transfer of property (that is transfer of ownership)
- Sale of goods (movable property)
- The consideration being the price
- Sale

Goods:

It has been defined in section 2 (7) of the Act which is given below:

"Goods" means every kind of movable property other than actionable claims and money; and includes 4[electricity, water, gas,] 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;

Classification of Goods:

- Existing Goods
- Future Goods
- Contingent Goods

Existing goods:

It has been defined in section 6(1) of the Act which is given below:

The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or future goods.

Future goods:

It has been defined in section 2 (6) of the Act which is given below:

"Future goods" means goods to be manufactured or produced or acquired by the seller after the making of the contract of sale;

Goods as contained in various provisions of the Act:

It has been defined in section 6 (2) of the Act which is given below:

There may be a contract for the sale of goods the acquisition of which by the seller depends upon a contingency which may or may not happen.

Sale:

It has been defined in section 4 (3) of the Act which is given below:

Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

Agreement to sell:

- Contract of sale is comprised of sale as well as agreement to sell.
- When transfer of ownership in the goods is to be transferred from seller to buyer at some future date, it shall be called as agreement to sell.
- Agreement to sell is not sale of goods.

Distinguishing features between Sale and Agreement to sell:

Sale	Agreement to sell
Nature of Contract Executed contract Transfer of Property Ownership transfers to the buyer immediately Risk of Loss Loss shall be suffered by the buyer. Right of Re-sale The seller cannot resell the goods. Insolvency of seller The buyer has the right to recover the goods from the official receiver.	Nature of Contract Executory contract Transfer of Property Ownership is transferred to buyer at some future date / time Risk of Loss Loss shall be suffered by the seller. Right of Re-sale Since possession of goods is with the seller he can sell the goods but this act would lead to the breach of contract. Insolvency of seller The buyer cannot recover the goods from the official receiver.

Although there is transfer of ownership in sale of goods and gift of goods yet the sale is different from gift since there is no price involved in gift of goods. Gift of goods are transferred from the donor to the donee.

Distinguishing features between Sale and Mortgage:

Sale

1. The buyer becomes absolute owner of the goods sold.
2. Ownership of the goods as a whole is transferred from the seller to the buyer.
3. Consideration is the price.

Mortgage

1. Ownership of the goods remains vested in the mortgagor.
2. Only the interest is transferred and ownership transfer is subject to certain conditions.
3. Consideration is the advance of the loan and the securing of the debt.

The sale is always for a price and governed by the Sale of Goods Act whereas Barter/ Exchange is the transfer of ownership of one property against the other and governed by Transfer of Property, Act 1882.

Concept of Price:

Price has been defined in section 2 (10) of the Act which is reproduced below:

"Price" means the money consideration for a sale of goods.

Conditions and Warrantees

A contract of sale of goods contains some stipulations/ conditions regarding the various aspects such as price, mode of payment, time of payment, place of delivery of goods and so on. But these conditions and warrantees have special meanings and have been exclusively been defined in the Act.

Condition:

It has been defined in section 12 (2) of the Act which is given below:

--A condition is a stipulation essential to the main purpose of the contract, the breach of which gives rise to a right to treat the contact as repudiated.

Warrantee:

It has been defined in section 12 (3) of the Act which is given below:

--A warranty is a stipulation collateral to the main purpose of the contract, the breach of which gives rise to claim for damages but not to a right to reject the goods and treat the contract as repudiated.

Distinguishing features between Condition and Warrantee:

Condition

1. The stipulation in case of condition is essential to the main purpose of contract.
2. The fulfillment of condition is essential for fulfillment of a contract of sale.
3. In case of breach, aggrieved party has the right of claiming damages.
4. A breach of condition may be treated as a breach of warrantee.

Warrantee

1. It is such a stipulation which is secondary or subsidiary to the main purpose of the contract.
2. In case of warrantee the contract can be fulfilled without fulfillment of a warrantee.
3. In case of breach of condition, aggrieved party has a right to repudiate the contract as well as to claim damages.
4. A breach of warrantee may be treated as a breach of condition.

Circumstances when condition to be treated as warrantee:

It has been defined in section 13 of the Act which is given below:

(1) Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition or elect to treat the breach of the condition as a breach of warranty and not as a ground for treating the contract as repudiated.

(2) Where a contract of sale is not severable and the buyer has accepted the goods are part thereof, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is a term of the contract, express or implied, to that effect.

(3) Nothing in this section shall affect the case of any condition or warranty fulfillment of which is excused by law by reason of impossibility or otherwise.

Express and Implied conditions and Warrantees:

Implied Conditions:

Conditions regarding title:

It has been defined in section 14 (a) of the Act which is given below:

An implied condition on the part of the seller that, in the case of sale, he has a right to sell the goods and that, in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass;

Condition regarding description:

It has been defined in section 15 of the Act which is given below:

Where there is a contract for the sale of goods by description there is an implied condition that the goods shall correspond with the description; and, if the sale is by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

Condition regarding sample:

It has been defined in section 17 of the Act which is given below:

(1) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.

(2) In the case of a contract for sale by sample there is an implied condition---

(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;

(3) In the case of a contract for sale by sample there is an implied condition---

(a) that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

Condition implied by customs:

It has been defined in section 16 (3) of the Act which is given below:

An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

Warrantee of quiet possession:

It has been defined in section 14 (b)of the Act which is given below:

--an implied warranty that the buyer shall have and enjoy quiet possession of the goods;

Freedom from encumbrances:

It has been defined in section14 (c) of the Act which is given below:

An implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party not declared or known to the buyer before or at the time when the contract is made.

Warrantee regarding usage of trade

It has been defined in section 16 (3) of the Act which is given below:

--An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the

Performance of Contract of Sale of Goods:

▪This is provided in section 31 of the Act:

▪The parties to a contract of sale of goods should also enter the following factors including any other terms and conditions in their contract:

- Time of delivery of goods
- Place of delivery of goods
- Acceptance of delivery
- Payment of price

If the contract does not expressly state any of the above terms then the provisions of section 31 shall apply Section 31 of the Act is reproduced under:

--It is duty of the seller to deliver the goods and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.

Delivery—Defined

Delivery has been defined in section 2(2) of the Act which is reproduced below:

"Delivery" means voluntary transfer of possession from one person to another;

Modes of Delivery:

▪Actual delivery

▪Symbolic delivery

▪Constructive delivery

Significant Points Regarding Delivery of Goods:

- Duties of Seller and Buyer: Duty of the seller to deliver the goods and duty of the buyer to accept and pay for goods according to terms of the contract of sale. (sec 31).
- Place of delivery: if place of delivery not mentioned in the contract then goods will be delivered according to rules contained in the Act. (section 36)
- Expenses of delivery shall be borne by the seller if not otherwise provided in the contract—sec 36(5)
- Delivery in installments: the buyer is not required to accept the goods in installments if not otherwise provided in the contract. –sec 38
- Delivery to Carrier: Delivery of goods by the seller to the carrier shall be treated to be the delivery of goods to the buyer. –sec 39
- Right of examination of goods: Reasonable opportunity of examining the goods to be provided by the seller to the buyer.
- Acceptance of delivery: the buyer shall be treated to have accepted the goods as contained in section 42 of the Act.

Carriage of Goods:

▪The delivery of goods/ consignments from seller to buyer is an important feature of the sale of goods. There are different modes of delivery of goods which are given below:

- ▪Carriage of goods by Land
- ▪Carriage of goods by Sea
- ▪Carriage of goods by Air

Contract of Carriage:

-- A contract whereby a person or company agrees to carry goods or people from one place to another in return of payment is called a contract of carriage.

Carriage of Goods by Land:

Carrier:

-- The party or person who carries goods or passengers for payment whether by land, air, or sea is called the carrier.

Kinds of Carrier:

- Private Carrier
- Common Carrier
- Private Carrier

A private carrier does not make offer to general public but the offer is restricted to specified person/ persons and contract of carriage of goods is entered with that person/ party for a specified period as per terms of the contract.

Common Carrier:

Common Carrier as defined in the Carriers Act, 1865 is given below:

- " any individual, firm or company other than the government engaged in the business of transporting for hire, goods from place to place, by land or inland navigation, for all persons indiscriminately."
- A common carrier is one who undertakes to carry goods for hire for all persons who employ him.
- Common carrier perform its activities as a regular business.
- It is the right of the common carrier of accepting the offer of goods for carriage or rejecting the same.

Features of Common Carrier

- An individual, firm or a company but not a government may act as a common carrier.
- For hire
- Regular business
- Inland Navigation
- The offer of carriage of goods must be without any discrimination.

Distinguishing features between Common Carrier and Private Carrier:

Common Carrier:

--Governed by the Common Carriers Act, 1865,
--the offer is to public at large. ,
-- Operates as regular business ,
-- In case of default without any special reason by the common carrier, a suit for damages may be filed by the aggrieved party. ,
-- A common carrier carries the goods for hire. ,

Private Carrier:

-- Governed by the Contract Act, 1872
-- The offer is to particular person/ party according to the terms and conditions settled.
-- It is not regular business.
-- Suit for damages cannot be filed against the private carrier on his refusal to carry the goods.
-- A private carrier may carry the goods for hire or free of charge.

Carriage of Goods by Sea

The law relating to the carriage of goods by sea is governed by Carriage of Goods by Sea Act, 1925

Contract to carry Goods by Sea is termed as Contract of Affreightment:

There are following parties in this contract:

- Consignor
- Owner of ship

▪There must be consideration for this contract and the consideration paid is called freight.
▪Formal agreement documented in this regard is called Charter party.

Charter Party Agreement:

It is an agreement in writing for hiring a ship as a whole or a part of the ship for carriage of goods.

Charterer:

A person who hires the ship is called the charterer.

Bill of lading is an important document of title of good consigned/ shipped by sea.

Liabilities of a Carrier of goods by Sea:

▪Ship owner is liable for any loss accruing due to his negligence.
▪The above liability is limited to the extent of the value of the goods as declared at the time of shipment.

Carriage of Goods by Air:

- This is governed by the Carriage by Air Act 1934.
- **High contracting party**—it includes the governments those are the signatories of Warsaw Convention Rules
- **International Carriage—** it means any arrangement pertaining to carriage of goods by air where the place of departure and place of destination are located within the jurisdictions of two high contracting

parties or within the territorial jurisdiction of a single high contracting parties and a state which is not high contracting party, in cases where an agreement of stopover is entered into with that state.

Important documents of Carriage of Goods by Air:

- Passenger ticket
- Luggage ticket
- Air Way Bill

Liabilities of the Carrier:

Carrier is liable for damages in the following situations:

- In case of death or wounding of a passenger
- Loss of registered/ booked baggage or cargo
- Delay in receipt of baggage or cargo.

LECTURE 37

LAW OF TRUST

The law relating to trust is governed by the Trusts Act, 1882. It extends to the whole of Pakistan. The provisions of this Act shall not affect the rules of **Muhammadan Law** as regarding **Waqf.**

Some Important Terms Defined/ Explained in section 3 of the Act :

Trust:

A **"trust"** is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner

Author of the Trust:

The person who reposes or declares the confidence is called the "author of the trust"

Trustee:

The person who accepts the confidence is called the "trustee"

Beneficiary:

The person for whose benefit the confidence is accepted is called the "beneficiary "

Trust Property or Trust Money:

The subject matter of the trust is called "trust property" or "trust money

Beneficial Interest or Interest:

The "beneficial interest" or "interest" of the beneficiary is his right against the trustee as owner of the trust property

Instrument of Trust:

Instrument, if any, by which the trust is declared is called the "instrument of trust"

Breach of Trust:

A breach of any duty imposed on a trustee is called a breach of trust.

Registered:

"registered" means registered under the law for the registration of documents for the time being in force

Purpose of Trust:

A trust may be created for any lawful purpose. If the purpose is unlawful, the trust would be void.

The purpose of a trust is lawful unless it is:

(a) forbidden by law, or
(b) is of such a nature that, if permitted, it would defeat the provisions of any law, or
(c) is fraudulent, or
(d) involves or implies injury to the person or property of another, or
(e) the Court regards it as immoral or opposed to public policy.

Declaration of Trust:

It has been defined in sec 5 of the Act which is reproduced below:

No trust in relation to immoveable property is valid unless declared by a non testamentary instrument in writing signed by the author of the trust or the trustee and registered, or by the will of the author of the trust or of the trustee.

No trust in relation to moveable property is valid unless declared as aforesaid, or unless the ownership of the property is transferred to the trustee.

These rules do not apply where they would operate so as to effectuate a fraud.

Creation of Trust:

It has been defined in sec 6 of the Act which is reproduced below:

A trust is created when the author of the trust indicates with reasonable certainty by any words or acts

(a) an intention on his part to create thereby a trust,
(b) the purpose of the trust,
(c) the beneficiary, and
(d) the trust property, and (unless the trust is declared by will or the author of the trust is himself to be the trustee) transfers the trust property to the trustee.

It has been defined in sec 7 of the Act which is reproduced below:
Trust may be created:

- by every person competent to contract; and
- with the permission of a principal Civil Court of original jurisdiction, by or on behalf of a minor; but subject in each case to the law for the time being in force as to the circumstances and extent in and to which the author of the trust may dispose of the trust property

Scope of Beneficiary: Sec 9:
It has been defined in sec 9 of the Act
▪Every person capable of holding property may be a beneficiary.
▪A proposed beneficiary may renounce his interest under the trust by disclaimer addressed to the trustee, or by setting up, with notice of the trust, a claim inconsistent therewith.

Scope of Trustee:
It has been defined in sec 10 of the Act which is reproduced below:
▪Every person capable of holding property may be a trustee; but, where the trust involves the exercise of discretion, he cannot execute it unless he is competent to contract.
▪No one is bound to accept a trust.
▪A trust is accepted by any words or acts of the trustee indicating with reasonable certainty such acceptance.

Duties of Trustees:
Duty to fulfill the purpose of the trust:
It has been defined in sec 11 of the Act which is reproduced below:
The trustee is bound to fulfill the purpose of the trust, and to obey the directions of the author of the trust given at the time of its creation, except as modified by the consent of all the beneficiaries being competent to contract. Where the beneficiary is incompetent to contract, his consent may, for the purposes of this section, be given by a principal Civil Court of original jurisdiction.

Duty to acquaint himself with the nature and circumstances of a Trust Property:
It has been defined in sec 12 of the Act which is reproduced below:
A trustee is bound to acquaint himself, as soon as possible, with the nature and circumstances of the trust property; to obtain, where necessary, a transfer of the trust property to himself; and (subject to the provisions of the instrument of trust) to get in trust moneys invested on insufficient or hazardous security.
Duty to Maintain and Defend Suits:
It has been defined in sec 13 of the Act which is reproduced below:
A trustee is bound to maintain and defend all such suits, and (subject to the provisions of the instrument of trust) to take such other steps as, regard being had to the nature and amount or value of the trust property, may be reasonably requisite for the preservation of the trust property and the assertion or protection of the title thereto.
Trustee not to set up title adverse to the interest of beneficiary:
It has been defined in sec 14 of the Act which is reproduced below:
Trustee must not for himself or another set up or aid any title to the trust property adverse to the interest of the beneficiary.
Duty to exercise care in dealing with Trust property:
It has been defined in sec 15 of the Act which is reproduced below:
A trustee is bound to deal with the trust property as carefully as a man of ordinary prudence would deal with such property if it were his own; and, in the absence of a contract to the contrary, a trustee so dealing is not responsible for the loss, destruction or deterioration of the trust property.
Duty to convert property of wasting nature into property of a permanent and profitable character:
It has been defined in sec 16 of the Act which is reproduced below:
Where the trust is created for the benefit of several persons in succession, and the trust property is of a wasting nature or a future or reversionary interest, the trustee is bound, unless an intention to the contrary may be inferred from the instrument of trust, to convert the property into property of a permanent and immediately profitable character.

Duty to be impartial:
It has been defined in sec 17 of the Act which is reproduced below:
-- Where there are more beneficiaries than one, the trustee is bound to be impartial, and must not execute the trust for the advantage of one at the expense of another.
--Where the trustee has a discretionary power, nothing in this section shall be deemed to authorize the Court to control the exercise reasonably and in good faith of such discretion.
Duty to prevent an act which may be destructive to property:
It has been defined in sec 18 of the Act which is reproduced below:
Where the trust is created for the benefit of several persons in succession and one of them is in possession of the trust property, if he commits, or threatens to commit, any act which is destructive or permanently injurious thereto, the trustee is bound to take measures to prevent such act.
Duty of Maintenance of accurate accounts:
It has been defined in sec 19 of the Act which is reproduced below:
A trustee is bound

(a) to keep clear and accurate accounts of the trust property, and

(b) at all reasonable times, at the request of the beneficiary, to furnish him with full and accurate information as to the amount and state of the trust property.

Duty as to Investment of money held as trust Property: Sec 20:
Where the trust property consists of money and cannot be applied immediately or at an early date to the purposes of the trust, the trustee is bound (subject to any direction contained in the instrument of trust) to invest the money on the following securities, and on no others:

(a) in promissory notes, debentures, stock or other securities of any Provincial Government or of the Central Government

(b) in bonds and debentures

(c) in stock or debentures of, or shares in, Railway or other Companies

Liabilities of Trustees:
- In case of breach of trust, trustee shall be personally liable and after his death, the burden shall fall on his estate.
- Trustee liable for any interest and damages due to breach of trust.
- Trustee not liable on account of any default by his predecessor

Rights of the Trustees:
- Right of possession of instrument of trust and all documents of title.(**Sec 31**)
- Right of reimbursement of expenses incurred by the trustee with respect to trust property. (**Sec 32)**
- **Right to be indemnified:**

It has been defined in sec 33 of the Act which is reproduced below:
A person other than a trustee who has gained an advantage from a breach of trust must indemnify the trustee to the extent of the amount actually received by such person under the breach; and where he is a beneficiary the trustee has a charge on his interest for such amount. Nothing in this section shall be deemed to entitle a trustee to be indemnified who has, in committing the breach of trust, been guilty of fraud.
- **Right to file petition in a Court of Law to seek opinion/ direction:**

It has been defined in sec 34 of the Act which is reproduced below:
--Any trustee may, without instituting a suit, apply by petition to a principal Civil Court of original jurisdiction for its opinion, advice or direction on any present questions respecting the management or administration of the trust property other than questions of detail, difficulty or importance, not proper in the opinion of the Court for summary disposal.
A copy of such petition shall be served upon, and the hearing thereof may be attended by, such of the persons interested in the application as the Court thinks fit.
The trustee stating in good faith the facts in such petition and acting upon the opinion, advice or direction given by the Court shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee in the subject matter of the application.
The costs of every application under this section shall be in the discretion of the Court to which it is made.
Powers of the Trustees:
Power to sell Trust Property:

It has been defined in sec 37 of the Act which is reproduced below:
Where the trustee is empowered to sell any trust property, he may sell the same subject to prior charges or not, and either together or in lots, by public auction or private contract, and either at one time or at several times, unless the instrument of trust otherwise directs.

Power to convey or otherwise dispose off the Trust Property

It has been defined in sec 39 of the Act

Power to apply property for the benefit/ interest of the minor: Sec 41:

It has been defined in sec 41 of the Act which is reproduced below:
Where any property is held by a trustee in trust for a minor, such trustee may, at his discretion, pay to the guardians (if any) of such minor, or otherwise apply for or towards his maintenance or education or advancement in life, or the reasonable expenses of his religious worship, marriage or funeral

Power to give Receipt:

It has been defined in sec 42 of the Act which is reproduced below:
Any trustees or trustee may give a receipt in writing for any money, securities or other moveable property payable, transferable or deliverable to them or him by reason, or in the exercise, of any trust or power; and, in the absence of fraud, such receipt shall discharge the person paying, transferring or delivering the same there from, and from seeing to the application thereof, or being accountable for any loss or misapplication thereof.

Power to Compound/ Compromise:

It has been defined in sec 43 of the Act which is reproduced below:
-- Two or more trustees acting together may, if and as they think fit,
-- accept any composition or any security for any debt or for any property claimed;
-- allow any time for payment of any debt;
-- compromise, compound, abandon, submit to arbitration or otherwise settle any debt, account, claim or thing whatever relating to the trust

Disabilities of Trustees:

- Trustee who has accepted the trust cannot afterwards renounce it except in situations as contained in section 46
- A trustee cannot delegate his office or any of his duties either to a co trustee or to a stranger except in situations as contained in section 47
- When there are more than one trustees, all must join in the execution of the trust, except where the instrument of trust otherwise provides.
- Discretion power conferred on a trustee must be exercised reasonably or in good faith as provided in section 49.
- A trustee may not use or deal with the trust property for his own profit or for any other purpose unconnected with the trust.
- A trustee whose duty is to sell the trust property shall not himself buy the property.

Rights of Beneficiary:

- Beneficiary has right to the rents and profits of the trust property. Sec 55.
- Right to specific execution if beneficiary is so entitled according to intention of the author of the trust. Sec 56.
- The right to inspect and take copies of the instrument of trust and documents of title relating to the trust property. Sec 57.
- Right to institute the suit for the execution of the trust. Sec 59

Liabilities of Beneficiary:

Beneficiary is liable when he has committed breach of trust as outlined below:

- Failure to proceed a trustee, where beneficiary has knowledge that trustee has committed a breach.
- Joins in committing breach of trust, or
- Beneficiary deceives a trustee.

Vacating the office of Trustee:

- the office of a trustee is vacated by his death or by his discharge from his office. Sec 70
- Discharge of a trustee: A trustee may be discharge from his office as provided below:
    a) by the extinction of the trust;
    b) by the completion of his duties under the trust;
    c) by such means as may be prescribed by the instrument of trust;

d) by consent of himself and the beneficiary, or, where there are more beneficiaries than one, all the beneficiaries being competent to contract, or
e) by the Court to which a petition for his discharge is presented under this Act.

Extinction of Trusts:

It has been defined in sec 77 of the Act which is given below:

A trust is extinguished as outlined below:

- When its purpose is completely fulfilled; or
- When its purpose becomes unlawful; or
- When the fulfillment of its purpose becomes impossible by destruction of the trust property or otherwise; or
- When the trust, being revocable, is expressly revoked

Revocation of Trust:

A trust may be revoked as outlined below:

It has been defined in sec 78 of the Act which is given below:

- **A trust created by will** may be revoked at the pleasure of the testator.
- In other situations, the trust may be revoked as given under:
  - **where all the beneficiaries are competent to contract by their consent;**
  - **where the trust has been declared by a non testamentary instrument or by word of mouth in exercise of a power of revocation expressly reserved to the author of the trust; or**

In other situations, the trust may be revoked as given under:

where the trust is for the payment of the debts of the author of the trust, and has not been communicated to the creditors at the pleasure of the author of the trust.

LECTURE 38

LAW OF INSURANCE

Matters relating to insurance are governed by Insurance Ordinance, 2000. It extends to the whole of Pakistan. The Securities and Exchange Commission of Pakistan (SECP) shall be the regulatory authority to implement this law.

Concept of Insurance:

- Risk and uncertainties are the part of human life and businesses.
- There are risks of different types and dimensions and culminating in loss of human life and property. These may occur due to death of a person, accident, earth quake, fire, floods and riots.
- Since the underlying risk is uncertain therefore the loss likely to arise from such risk is also uncertain.
- The desire of the people and the businesses is to mitigate the underlying risks. Insurance provides a mechanism whereby such risk can be mitigated/ reduced.
- Insurance is a methodology of spreading over a loss likely to be incurred/ suffered over a number of persons.
- the methodology adopted is to collect the premium from a number of persons who have the fear of any type of loss and pay to the ones who are actually confronted with such loss.
- Contract of insurance is a contingent contract whereby the insurer undertakes to pay to the insured a certain amount on happening of certain event, the consideration for insurer is the amount of premium received.

Important Definitions:

"Insurance" means the business of entering into and carrying out policies or contracts, by whatever name called, whereby, in consideration of a premium received, a person promises to make payment to another person contingent upon the happening of an event, specified in the contract, on the happening of which the second-named person suffers loss, and includes reinsurance and retrocession:

--Provided that a contract of life insurance shall be deemed to be a contract of insurance notwithstanding that it may not comply with the definition set out in this clause;

"Insurance broker" means a person carrying on the business of insurance

"Insurer" means:

(i) any **company or other body corporate** carrying on the **business of insurance**, which is a company or other body corporate incorporated under any law for the time being in force in Pakistan; and

(ii) any body corporate incorporated under the law of any jurisdiction outside Pakistan carrying on insurance business which carries on that business in Pakistan.

"participating", in reference to life insurance business, means contracts of life insurance, other than investment-linked contracts, **health contracts,** group life contracts and **group health contracts,** under the terms and conditions of which the policy holder has an entitlement to participate in distributions by the life insurer of profits or surpluses;

"Policy" means a contract of insurance;

"policy holder / insured" means the person to whom a policy is issued or, in the case of a policy of life insurance, the person to whom the whole of the interest of the policy holder in the policy is assigned once and for all, but does not include an assignee thereof whose interest in the policy is defeasible or is for the time being subject to any condition;

"Policyholder liability", in relation to life insurance, means:

(i) a liability that has arisen under a policy of life insurance; or

(ii) a liability that, subject to the terms and conditions of a policy, will arise on the happening of an event, or at a time, specified in the policy;

"private motor property damage policy" means a contract of insurance that provides insurance cover in respect of loss of or damage to a motor vehicle or of the contents of a motor vehicle used primarily and principally as a means of **private transport** by the policy holder, by persons with whom the policy holder has a family or personal relationship, or by both the policy holder and such persons;

"Premium"

The consideration received by the insurer from the insured with the undertaking to take up the risk with regard to the property insured is called premium.

"Insured amount/ policy amount"

This refers to the amount for which insurance policy is issued.

"reinsurance" means a contract of insurance under which the event, specified in the contract, contingent upon the happening of which, payment is promised to be made to the policy holder thereunder, is payment by the policy holder of a claim or claims made against that policy holder under another contract or contracts of insurance issued by that policy holder;

"Subject matter"

The property or the object **which is insured** is called the subject matter.

"Takaful" means a scheme based on mutual assistance in compliance with the provisions of Islamic shariah, and which provides for mutual financial aid and assistance to the participants in case of occurrence of certain contingencies and whereby the participants mutually agree to contribute to the common fund for that purpose;

Essentials of a contract of insurance:

Following are the essentials of a contract of insurance:

- There must be an offer and acceptance of that offer.
- Parties must be legally competent to enter into contract.
- The contract should be entered into for lawful purpose.
- There must be a consideration (premium paid by the insured and undertaking by the insurer to compensate the loss is consideration).

Free consent of the parties should be insured.

- Insurance policy should be duly executed.
- Agreement of the parties on all material terms i.e. nature, period, amount of policy and the premium.
- The contracting parties must act in good faith.

Classification of insurance business:

- **Life insurance**
- **General insurance (including fire insurance, marine insurance and miscellaneous insurance)**

Life Insurance:

It is the type of insurance whereby insurer undertakes to pay a certain amount on the death of the insured or on expiry of certain period of time, the insurer charges premium on account of this undertaking.

Kinds of Life Insurance:

Whole life policy: In such policies the person insured undertakes to pay the premium to the insurer in his life time and on his death the policy amount is payable to the legal heirs of the assured/ insured.

Endowment policy: In this type, the insured person is require to pays the premium for a stipulated period of time and the amount insured is payable to the insured on the expiry of this period, however in case of death of the insured before this period, the amount insured is payable to the legal heirs of the insured.

Joint Life Policy: it is a joint policy in the name of two or more persons. In such type of policy if any of the joint policy holders dies, the amount insured is payable to the survivors.

Procedure and Methodology in acquiring life insurance:

- Furnishing information/ profile to the insurer on prescribed form.
- Processing of the information by the insurer
- Certification that the proposer does not suffer from any fatal decease
- Certificate authenticating the age of the proposer
- On acceptance of the proposer by the insurer, the proposer (insured) to be duly notified and demand notice for payment of first premium issued.
- The contract between the parties is reached on payment of the first premium.

Methodology/ procedure of demanding/ paying insurance claims:

- Beneficiary to intimate the insurer regarding the death of the insurer along with the information regarding the policy
- Certificate authenticating the death of the insurer
- The person claiming against the policy to establish his credentials and entitlement with respect to the said policy

- On completion of the required documentation/ formalities, the insurance company shall issue discharge form to the claimant. On submission of the said form duly filled in and signed by the claimant, the insurance company shall pay the amount to the claimant.

Fire Insurance:

It is a contract whereby insurer indemnifies the insured to compensate in case of loss caused to the subject matter on account of any fire within the period specified in the policy. The insured is required to pay the premium as consideration for the undertaking given by the insurance company.

Characteristics of Fire Insurance:

- The contracting parties must act in good faith
- Contract is for a given period
- The insurer must have insurable interest in the subject mater.
- Insurable interest in any goods or property arises by virtue of the following attributes:
  - **Ownership of the subject matter**
  - **Lawful possession of the subject matter or**
  - **By virtue of some agreement**

Types of Fire Insurance policies:

Valued policy: in such type of policy, the insured pays the premium for specified time and insurer undertakes that in case of loss, a fixed amount shall be paid to the insured without demanding any proof of loss.

Specific policy: In such policies, the insured is covered against loss by fire to the extent of the amount mentioned in the policy. The insurer is liable to compensate the actual loss but not exceeding the amount as specified in the policy.

Comprehensive Policy: it covers the different type of losses which may accrue to the insured. The details of such eventualities are specified in the policy.

Payment of Claims:

-- For lodging the claim, the insured must serve a notice on the insurance company so that insurer may take necessary remedial measures to save the rest of the property from the loss due to fire. The notice must be given within a specified time. The insured may lodge a claim for the actual damage suffered by him.

Rights of the insurer:

- Right to avoid the contract in cases where insured conceals any material facts
- Right to take control of the possession of the building where loss has taken place
- Insurer has a right of entry in the premises, in case of fire.
- Right to salvage after the fire, insured is duty bound to handover the salvage to the insurer.

Distinguishing features between Life insurance and Fire Insurance:

Life Insurance	**Fire Insurance**
1. Life insurance covers the human life 2. It is a contingent contract	1. Fire insurance covers the property or goods. 2. It is a contract of indemnity.
3. A life policy is usually for a fairly long period, say, 10 years, 15 years or 20 years etc.	3. Fire insurance policies are generally for one year and are renewed from time to time.
4. The claim is certain. Claim is payable either on death or expiry of the period of the policy.	4. The claim is uncertain, if property is destroyed, there is claim, otherwise no claim.
5. Policy carries a surrender value. 6. Whole amount of claims, as fixed in the policy, is payable.	5. Policy does no carry any surrender value. 6. Only the amount of actual loss suffered, subject to the limit mentioned in the policy, is payable.
7. There is a provision for nomination 8. The question of insurable interest arises at the time of completion of the contract.	7. There is no provision of nomination 8. The question of insurable interest arise both at time of contract and at the time when the

	loss take place

Marine Insurance:
Marine insurance is the business of compensating to the insured on account of any losses by the perils of sea. It is an agreement between the insurer and insured whereby the insurer undertakes to indemnify the insured in an agreed manner and under the terms and conditions of the agreement against marine losses. The insured is required to pay the premium as a consideration for this undertaking.

Contract of Marine Insurance:
It is a contract whereby the insurer undertakes to indemnify the insured against losses arising from certain perils or risks to which the ship, merchandise or other interest of the assured may be exposed during a certain voyage or for a certain period of time in consideration of a stipulated amount for premium paid by the assured.

Requirements of a Marine Insurance Policy:
Following information must be mentioned in a marine policy:

- Name of the assured or of some person who effects the insurance on his behalf.
- The subject matter insured and risk insured against,.
- The voyage or period of time or both covered by the insurance
- The amount insured
- The name of the insurer

Types of Marine Insurance policy:
Voyage Policy: such policy is insured for a specified voyage from the port the goods are consigned to the port of destination.
Time Policy: such policies are insured for a specified period.
Mixed Policy: it is a combination of the two types mentioned above
Valued policy: in this type the goods are insured for specified value. In case of total loss, the insurer shall pay the same and will not demand any proof of actual loss but in case of partial loss, the insurance company shall pay for actual loss suffered and not for the amount of value specified in the policy.

LECTURE 39

INDUSTRIAL RELATIONS ORDINANCE

Law relating to industrial relations is governed by Industrial Relations Ordinance, 2002.
It extends to the whole of Pakistan

Purpose of the ordinance:

The purpose of the Ordinance is to amend, consolidate and rationalize the law relating to formation of trade unions, regulation and improvement of relations between employers and workmen and avoidance and settlement of any differences or disputes arising between them.

Applicability of the Ordinance:

It has been defined in section 1 (4) of the ordinance which is given below:
It shall apply to all persons employed in any establishment or group of establishments or industry except those employed.

(a) in the Police or any of the Defence Services of Pakistan;
(b) in any installations or services exclusively connected with the Armed Forces of Pakistan including Ministry of Defence lines of the Railways;
(c) by the Pakistan Security Printing corporation or the Security Papers Limited or Pakistan Mint;
(d) in the administration of the State other than those employed as workmen by the Railways, Post Telegraph and Telephone Departments;
(e) by an establishment or institution maintained for the treatment or care of sick, infirm, destitute and mentally unfit persons excluding those run on commercial basis;
(f) by an institution established for payment of employees' old-age pensions or for workers' welfare;
(g) as a member of the Watch and Ward, Security or Fire Service Staff of an oil refinery or of an establishment engaged in the production, transmission or distribution of natural gas or liquefied petroleum gas or petroleum products or of a seaport or an airport.

Provided that the Federal Government may suspend, in the public interest, by an order published in the official Gazette; the application of this Ordinance to any establishment or industry for a period specified in the order not exceeding six months at a time.

Important Definitions as contained in the Ordinance:

"arbitrator" means a person appointed as such under this Ordinance
"award" means the determination by a Labour Court, Arbitrator or an Appellate Court of competent jurisdiction of any industrial dispute or any matter relating thereto and includes an interim award;
"Association" means any organization of employers formed primarily for furthering and defending the interests and rights of employers.
"Board of Conciliators" means a tripartite Board of Conciliators constituted under sub-section (3) of section 26;
"collective bargaining agent" means the trade **union of workmen which,** under section 20, is the **agent of the workmen** in the establishment, group of establishments or, as the case may be, industry in **the matter of collective bargaining**;
"collective bargaining unit" means those workers or class of workers of an employer in one or more establishments coming within the same class of industry whose terms and conditions of employment are, or could appropriately be, the subject of collective bargaining together;
"Commission" means the National Industrial Relations Commission constituted under section 49;
"Conciliation proceedings" means any proceedings before a Conciliator or Board of Conciliators;
"Conciliator" means-
(a) a person appointed as such by the Federal Government under sub-section (2) of section 26, in respect of disputes which the Commission is competent to adjudicate and determine; and
(b) in respect of other disputes, a person appointed as such by the Provincial Government under sub-section (1) of section 26.
"employer" in relation to an establishment means any person or body of person, whether incorporated or not, who or which employs workmen in an establishment under a contract of employment and includes others as contained in sub-clause A to G of clause 10 of section 2 of this ordinance.

"establishment" means any office, firm, factory, society, undertaking, company, shop, premises or

business or industry and includes all its departments and branches, whether situated in the same place or in different places having a common balance sheet and profit and loss account and, except in section 54, includes a collective bargaining unit, if any, constituted under that section in any establishment;
“executive" means a person or body of persons, by whatever name called, to whom or which the management of the affairs of a trade union is entrusted under its constitution;
"group of establishments" means establishments belonging to the same employer and the same industry;
“illegal lock-out" means a lock-out declared, commenced or continued otherwise than in accordance with the provisions of this Ordinance;
"illegal strike" means a strike declared, commenced or continued otherwise than in accordance with the provisions of this ordinance
"industrial dispute" means any dispute or difference between employers and workmen or between workmen and workmen which is concerned with the employment or non-employment or the terms of employment or the conditions of work; and is not in respect of the enforcement of any right guaranteed or accrued to workers by or under any law, other than this Ordinance, or any award or settlement for the time being in force;
"industry" means any business, trade, manufacture, calling, service, occupation or employment engaged in an organized economic activity of producing goods or services for sale, excluding those set up exclusively for charitable purposes, operating, through public or private donations where
"charitable purpose" includes provision of education, medical care, emergency relief and other needs of the poor and indigent;
"Inspector" means an Inspector appointed under this Ordinance
"Labour Court" means a Labour Court established under section 44;
"lockout" means the closing of a place of employment or part of such place or the suspension, of work, wholly or partly, by an employer, or refusal, absolute or conditional, by an employer to continue to employ any number of workmen employed by him where such closing, suspension or refusal occurs in connection with an industrial dispute or is intended for the purpose of compelling workmen employed to accept certain terms and conditions of, or affecting, employment;
"office bearer" means any member of the executive of a trade union in an establishment, industry or trade, but does not include in auditor or legal advisor thereof;
"prescribed" means prescribed by rules made under section 79;
"public utility service" means any of the services specified in Schedule I;
"registered trade union" means a trade union registered under this Ordinance;
"Registrar" means Registrar of trade unions appointed under section 57;
"settlement" means a settlement arrived at in the course of conciliation proceedings, and includes an agreement between an employer, the collective bargaining agent or workmen, as the case may be, arrived at otherwise than in the course of such proceedings, where the agreement is in writing and has been signed by the parties thereto in such manner an may be prescribed and a copy thereof has been sent to the Provincial Government, the Conciliator and such other persons as may be prescribed;
"Schedule" means the Schedule to the Ordinance;
“Strike" means cessation of work by a body of persons employed in any establishment acting in combination or a concerted refusal or refusal under a common understanding of any number of persons who have been so employed to continue to work or to accept employment;
"trade union" means any combination of workers formed primarily for the purpose of furthering and defending the interests and rights of workers in any industry or establishment and includes an industry-wise federation of two or more collective bargaining agent unions and a federation at the national level of ten or more collective bargaining agent unions; and
"worker" and "workman" means any and all persons not falling within the definition of employer who is employed in an establishment or industry for remuneration or reward either directly or through a contractor, whether the terms of employment be express or implied, and for the purpose in of any proceeding under this Ordinance relation to an industrial dispute includes a person who has been dismissed, discharged, retrenched, laid-off or otherwise removed from employment in connection with or as a consequence of that dispute or whose dismissal, discharge, retrenchment, lay-off or removal has led to that dispute but does not include any person who is employed mainly in a managerial or administrative capacity.

TRADE UNIONS

Trade Unions and Freedom of Associations:

It has been defined in section 3 of the ordinance which is given below:

Following provisions of law shall apply with respect to different aspects of trade unions and freedom of associations:

(1) Subject to the provision of Article 17 of the Constitution of the Islamic Republic of Pakistan, this Ordinance and any other law for the time being in force-

(a) the workers shall, without distinction whatsoever, have the **right to form** and subject to the constitution or rules of a **trade union**, **join any trade union** of their choice within the establishment or industry they are employed in; provided that worker shall not be entitled to be a member of more than one trade union at any one time; provided further that on joining another union, the earlier membership will stand automatically cancelled;

Settlement of differences and industrial disputes:

- The differences and industrial disputes shall be settled through following methods:
- Negotiations
- Conciliation
- Arbitration

Each one of above is provided below as contained in the relevant sections of the ordinance.

Strike and lockout:

- If no settlement is arrived at during the course of conciliation proceedings and the parties to the dispute do not agree to refer it to an arbitrator under section 30, the workmen, subject to a **seven days notice** to the employer, may go on strike or, as the case may be, the employer may declare a lock-out on the expiry of the period of the notice under section 27 or upon a declaration by the Conciliator or the Board that conciliation proceedings have failed, whichever is the later.

LECTURE 40

INDUSTRIAL RELATIONS ORDINANCE

Trade Unions:
It has been defined in section 3 of the ordinance which is given below:
Following provisions of law shall apply with respect to different aspects of trade unions and freedom of associations:
(1) Subject to the provision of Article 17 of the Constitution of the Islamic Republic of Pakistan, this Ordinance and any other law for the time being in force-
(a) the workers shall, without distinction whatsoever, have the right to form and subject to the constitution or rules of a trade union, join any trade union of their choice within the establishment or industry they are employed in; provided that worker shall not be entitled to be a member of more than one trade union at any one time; provided further that on joining another union, the earlier membership will stand automatically cancelled;
(b) the employers, shall, without distinction whatsoever, have the right to form or join any association of their choice and their association shall have the right to draw up their constitution and rules, elect freely their representatives, organize their administration and activities and formulate their programmes;
(c) trade unions of workers and associations of employers shall have the right to form and join federations and confederations of trade unions and associations, and such federations and confederations shall have the right to affiliate with international organizations and confederations of workers and employers, as the case may be; and
(d) every collective bargaining agent union shall have to affiliate with any federation at the national level registered with the National Industrial Relations Commission within two months after its determination as collective bargaining agent or promulgation of this Ordinance, whichever is earlier.
(2) The workers and employers and their respective bodies shall, exercising their rights under section (1), like other persons or organized collectivities, respect and abide by all Federal and Provincial laws.

Registration of Trade Union:
The following procedure shall be adopted with respect to registration of a trade union:

- Filing of the application for registration of the trade union as per requirements of the ordinance

Requirements for application:
It has been defined in section 5 of the ordinance which is given below:
An application for registration shall be made to the Registrar and shall be accompanied by-

(a) A statement showing-
  (i) The name of the trade union and the address of its head office;
  (ii) Date of formation of the trade union;
  (iii) The titles, names, ages, addresses and occupations of the office bearers of the trade union;
  (iv) Statement of total paid membership;
  (v) The name of the establishment, group of establishments or the industry, as the case may be, to which the trade union relates along with a statement of the total number of workers employed therein;
  (vi) The names and addresses of the registered trade unions in the establishment, group of establishments or industry, as the case may be, to which the trade union relates;
  (vii) The names, addresses and registration number of member trade unions, in case the application is made by a federation of trade unions;

(b) three copies of the constitution of the trade union together with a copy of the resolution by the members of the trade union adopting such constitution bearing the signatures of the Chairman of the meeting;
(c) a copy of the resolution by the members of the trade union authorizing its President and the General Secretary to apply for its registration; and
(d) a copy of the resolution from each of the constituent trade unions agreeing to become a member of a federation or confederation of trade unions, where such application is made by a federation or

Requirements for Registration:

It has been defined in section 6 of the ordinance which is given below:

Following matters are essential for the registration of a trade union.

(1) A trade union shall not be entitled to registration under this Ordinance unless the constitution thereof provides for the following matters, namely:

(a) The name and address of the trade union;

(b) the purposes for which the trade union has been formed;

(c) the purposes for which the general funds of the union shall be applicable;

(d) the number of persons forming the executive which shall not exceed the prescribed limit and shall include not less than seventy five per cent from amongst the workmen actually engaged or employed in the establishment or establishments or the industry for which the trade union has been formed;

(e) the conditions under which a member shall be entitled to any benefit assured by the constitution of the trade union and under which any fine or forfeiture may be imposed on him;

(f) the maintenance of a list of the members of the trade union and of adequate facilities for the inspection thereof by the office bearers and members of the trade union;

(g) the manner in which the constitution shall be amended, varied or rescinded;

(h) the safe custody of the funds of the trade union, its annual audit, the manner of audit and adequate facilities for inspection of the account books by the office bearers and members of trade union;

(i) the manner in which the trade union may be dissolved;

(j) the manner of election of office bearers by the general body of the trade union and the term not exceeding three years, for which an office bearer may hold office upon his election or re-election through secret ballot;

(k) the procedure for expressing want of confidence in any office bearer of the trade union; and

(l) the meetings of the executive and of the general body of the trade union, so that the executive shall meet at least once in every four months and the general body at least once every year.

(2) Without prejudice to the provisions of the sub-section (1) a trade union of workmen shall not be entitled to registration under this Ordinance-

(a) unless all its members are workmen actually engaged or employed in the establishment or industry with which the trade union is connected; and

(b) where there are two or more registered trade unions in the establishment, group of establishments or industry, with which the trade union is connected, unless it has as its members not less than one-fourth of the total number of workmen employed in such establishments, group of establishments or industry, as the case may be.

Disqualification for being an office-bearer of a trade union:

It has been defined in section 7 of the ordinance which is given below:

A person who has been convicted on account of a criminal offence such as theft, physical assault, murder, attempt to murder, etc. , shall be disqualified from being elected as member or office bearer.

Registration of Trade Union by the Registrar and issuance of Registration Certificate:

The procedure and requirements to be fulfilled are provided in section 9 of the ordinance.

(1) The Registrar, after having exercised due diligence and verification of facts, and on being satisfied that a trade union has complied with all requirements of this Ordinance, shall register the trade union in a prescribed register and issue a registration certificate in the prescribed form within a period of fifteen days from the date of receipt of the application under intimation to the concerned employer.

(2) In case the application for registration is found by the Registrar to be deficient in any material respect, he shall communicate in writing all his objections to the trade union within a period of fifteen days from the receipt of the application and the trade union shall reply thereto within a period of fifteen days from the receipt of the objections.

(3) When the objections raised by the Registrar have been satisfactorily met, the Registrar shall register the trade union as provided in sub-section (1) and issue a registration certificate there under within three days of the date of the objections having been so met under intimation to the employer.

(4) In case the objections raised under sub-section (2) are not satisfactorily met or are not replied to within the time mentioned therein, the Registrar shall reject the application.

(5) Where the application for registration is rejected or the Registrar delays the disposal of such application

within a period of three days specified in sub-section (3), the trade union may appeal to the Labour Court which may, for reasons to be recorded, by an order, direct the Registrar to register the trade union and to issue a registration certificate or may dismiss the appeal.

(6) Notwithstanding anything contained in any other provision of this Ordinance, every alteration made in the constitution of a registered trade union and every change of its office bearers shall be notified by registered post to the Registrar by the trade union within fifteen days of such alteration or change, as the case may be.

(7) The Registrar may refuse to register any alteration or change referred to in sub-section (6), if it is in contravention of any of the provisions of this Ordinance or if it is in violation of the constitution of the trade union.

(8) Subject to the provisions of sub-section (7), every inclusion or exclusion of any constituent unit of a federation of trade unions shall be notified by registered post to the Registrar by the federation within fifteen days of such inclusion or exclusion.

(9) In case there is a dispute in relation to the change of office bearers of a trade union or any trade union is aggrieved by order of the Registrar made under sub-section (7), any office bearer or member of the trade union may apply or appeal to the Labour Court which shall within seven days of receipt of the application or appeal, as the case may be, pass an order either directing the Registrar to register such alteration or change or may, for reasons to be recorded in writing, direct the Registrar to hold fresh elections of the trade union under his supervision.

Cancellation of Registration:

- Registration of trade Union can be cancelled by a Labour court.
- Cancellation can be made by the registrar.

Appeal against cancellation of registration.

Appeal against the cancellation can be made before the following courts:

- In case of cancellation by labour court, appeal shall be made before the High Court.
- In case of cancellation of registration by the Registrar, appeal shall be made before the labour court. (Sec 13).

LECTURE 41

INDUSTRIAL RELATIONS ORDINANCE

Trade Unions:

Collective bargaining agent:

(1) Where there is only one registered trade union in an establishment or a group of establishments or industry, such trade union shall, if it has as its members not less than one-third of the total number of workmen employed in such establishment or group of establishments or industry, upon an application made in this behalf be certified by the Registrar in the prescribed manner to be the collective bargaining agent for such establishment or, as the case may be, group of establishments.

(2) **Where there are more registered trade unions than one** in an establishment or a group of establishments or industry, the Registrar shall, upon an application made to him in this behalf by any such trade union, hold within fifteen days from the making of the application, a secret ballot to determine as to which one of such trade unions shall be the collective bargaining agent for the establishment or group of establishments:

Provided that the Registrar may, in the case of a large establishment having its branches in more than one town, hold the secret ballot within thirty days from the making of the application:

Provided further that the Registrar shall not entertain any application under this sub-section in respect of an establishment or group of establishment consisting of, or including, a seasonal factory within the meaning of section 4 of the Factories Act, 1934 (XXV of 1934), unless such application is made during the month in which the number of workmen employed in such factory in a year in usually the maximum

(3) Upon receipt of an application under sub-section (2) the Registrar shall, by notice in writing, call upon every registered trade union in the establishment or group of establishments to which the application relates-

(a) to indicate whether it desires to be a contestant in the secret ballot to be held for determining the collective bargaining agent in relation to such establishment or group of establishments, as the case may be; and

(b) to submit to him within the time specified in the notice a list of its members showing, in respect of each member, his parentage, age, the section or department and the place in which he is employed, his ticket number and the date of his becoming a member and if the trade union is a federation of trade unions, a list of its affiliated trade unions together with a list of members of each such trade union showing in respect of each such member the said particulars.

(4) Every employer shall-

(a) on being so required by the Registrar, within fifteen days, submit a list of all workmen employed in the establishment excluding those whose period of employment in the establishment is less than three months and showing, in respect of each workman, his parentage, age, the section or department and the place in which he is employed, his ticket number and the date of his employment in the establishment. However a separate list of workmen whose period of employment is less than three months showing the said particulars in respect of each workman may also be submitted; and

(b) provide such facilities for verification of the list submitted by him and the trade unions as the Registrar may require;

Provided that in computing the period of three months referred to in clause (a), in the case of a workman employed in a seasonal factory within the meaning of section 4 of the Factories Act, 1934 (XXV of 1934), the period during which he was employed in that factory during the preceding season shall also be taken into account

(5) The Registrar shall, after verification of the lists submitted by trade unions, prepare a list of voters in which shall be included the name of every workman whose period of employment, as computed in accordance with sub-section (4), is not less than three months and who is a member of any of the contesting trade unions and shall, at least four days prior to the date fixed for the poll, send to each of the contesting trade unions a certified copy of the list of voters so prepared.

(6) Every workman who is a member of any of the contesting trade unions and whose name appears in the list of voters prepared under sub-section (5) shall be entitled to vote at the poll to determine the collective bargaining agent.

(7) Every employer shall provided all such facilities in his establishment as may be required by the Registrar for the conduct of the poll but shall not interfere with, or in any way, influence, the voting.
(8) No person shall canvass for vote within a radius of hundred yards of the polling station
(9) For the purpose of holding secret ballot to determine the collective bargaining agent, the Registrar shall-
(a) fix the date of the poll and intimate the same to each of the contesting trade unions and also to every employer four days prior to such date;
(b) on the date fixed for the poll so place, in the polling station set up for the purpose, the ballot boxes which shall be sealed in the presence of the representatives of the contesting trade unions as to receive the ballot papers;
(c) conduct the poll at the polling station at which the representatives of the contesting trade unions shall have the rights to be present;
(d) after the conclusion of the poll and in the presence of such of the representatives of the contesting trade unions as may be present, open the ballot boxes and count the votes; and
(e) after the conclusion of the count, certify the trade union which has received the highest number of votes to be the collective bargaining agent:
Provided that no trade union shall be certified to be the collective bargaining agent for an establishment or group of establishments unless the number of votes received by it is not less than one-third of the total number of workmen employed in such establishment or, as the case may be, group of establishment:
Provided further that, if not trade union secures such number of votes in the first poll, a second poll shall be held between the two trade unions which secure the highest numbers of votes in the first poll and the trade union which secures a majority of the votes cast at such further poll
Provided also that, if the number of votes secured by two or more trade unions securing the highest number of votes is equal, further poll shall be held between them until one of them secures a majority of the votes cast at such further poll.
(10) No trade union shall be certified to be the collective bargaining agent under sub-section (2) without holding a secret ballot
(11) Where a registered trade union has been certified under clause (e) of sub-section (9) to be the collective bargaining agent for an establishment or group of establishments, no application for determination of the collective bargaining agent for such establishment or group of establishments shall be entertained within a period of three years from the date of such certification except where the registration of such a registered trade union is cancelled before the expiration of that period
(12) A collective bargaining agent may, without prejudice to its own position, implead as a party or any federation of trade unions of which it is a member
(13) A collective bargaining agent in relation to an establishment or group of establishments shall be entitled to-
(a) undertake collective bargaining with the employer or employers on matters connected with employment, non-employment, the terms of employment or the conditions of work, other than matter which relate to the enforcement of any right guaranteed or secured to it or any award or settlement;

(b) represent all or any of the workmen in any proceedings; and
(c) give notice of, and declare, a strike in accordance with the provisions of this Ordinance
(d) nominate workmen on the Boards of Provident Funds and Workers' Participation Fund of their respective establishment or industry
(14) The Registrar may authorize in writing an office bearer to perform all or any of his functions under this Ordinance and the rules made there under
(15) After an application under sub-section (2) is made to the Registrar, no employer shall transfer, remove, retrench or terminate any worker who is office bearer of any contestant trade union save with the permission of the Registrar

Workers' Participation and Dispute Resolution:

Nomination/ election of shop steward:
Shop steward shall act as link between labour and management as per provisions of section 23:
In every establishment in which fifty or more workmen are employed, a Shop Steward, from amongst the

(a) be nominated by the collective bargaining agent, where there is a collective bargaining agent in the establishment; or
(b) be elected at a secret ballot held in the prescribed manner, where there is no collective bargaining agent in the establishment.
The employer shall provide all such facilities in his establishment as may be required for the holding of a ballot under sub-section (1) but shall not interfere with, or in any way influence, the voting.
A Shop Steward shall hold office for period of one year from the date of his nomination or election, as the case may be.
Any dispute arising out of or in connection with, the election of a Shop Steward shall be referred to the Registrar whose decision shall be final and binding on all parties to the dispute.
A Shop Steward shall act as a link between the workers and the employer, assist in the improvement of arrangements for the physical working conditions and production work in the shop section or department for which he is elected and help workers in the settlement of their problems either connected with work or with any such individual grievance of a workman as is referred to in sub-section (1) of section 46.

Setting up of joint Works Council:
Joint Works Council shall be setup as provided in section 24 of the Ordinance:
Every establishment which employs fifty persons or more, shall set up a Joint Works Council consisting of not more than ten members in which workers' participation shall be to the extent of forty per cent and the Convener of the Council shall be from the management.
The employer's representatives on the Joint Works Council shall be from amongst the Directors or their nominees or senior executives and the workers' representatives shall be the office bearers of collective bargaining agent or their nominees or from workers elected in the prescribed manner, in case there is no collective bargaining agent.
Functions of joint works council:

- improvement in production, productivity and efficiency;
- provision of minimum facilities for such of the workers employed through contractors as are not covered by the laws relating to welfare of workers;
- promoting settlement of differences through bilateral negotiations;
- promoting conditions of safety and health for the workers;

Setting up of joint Works Council:
Joint Works Council shall be set up as provided in section 24 of the Ordinance:

- encouraging vocational training within the establishment;
- taking measures for facilitating good and harmonious working conditions in the establishment;
- provision of educational facilities for children of workmen.

The Joint Works Council may call for reasonable information about the working of the establishment from its management and the management shall supply the information called for.
The Joint Works Council shall meet at such intervals as may be prescribed.
Settlement of differences and industrial disputes:
The differences and industrial disputes shall be settled through following methods:

- Negotiations
- Conciliation
- Arbitration

LECTURE 42

INDUSTRIAL RELATIONS ORDINANCE

Workers' Participation and Dispute Resolution:

Settlement of differences and industrial disputes:
The differences and industrial disputes shall be settled through following methods:

- Negotiations
- Conciliation
- Arbitration

Negotiations relating to differences and disputes
If at any time an employer or a collective bargaining agent finds that an industrial dispute has arisen or is likely to arise, the employer or, as the case may be, the collective bargaining agent may communicate his or its views in writing to the other party.
On receipt of the communication under sub-section (1), the party receiving it shall try to settle the dispute by bilateral negotiations within fifteen days of the receipt of the communication or within such further period as may be agreed upon by the parties and, if the parties reach a settlement, a memorandum of settlement shall be recorded in writing and signed by both the parties and a copy thereof shall be forwarded to the Conciliator and the authorities specified in clause (xxvi) of section 2.

- Where a settlement is not reached between the employer and the collective bargaining agent, the employer or the collective bargaining agent may, within fifteen days from the end of the period referred to in sub-section (2), serve on the other party to the dispute a notice of conciliation, in accordance with the provisions of this Ordinance.
- Where a settlement is not reached between the employer and the collective bargaining agent, the employer or the collective bargaining agent may, within fifteen days from the end of the period referred to in sub-section (2), serve on the other party to the dispute a notice of conciliation, in accordance with the provisions of this Ordinance.

Conciliator:
The Provincial Government shall, by notification in the official Gazette, appoint as many persons as it considers necessary to be Conciliators for the purposes of this Ordinance and shall specify in such notification the area within which, or the class of establishments or industries in relation to which, each one of them shall perform his functions.
The Federal Government may, by notification in the official Gazette, appoint as many persons as it considers necessary to act as Conciliators in such disputes as the National Industrial Relations Commission is competent to adjudicate and determine under this Ordinance.
A tripartite Board of Conciliators, hereinafter called the Board, consisting of men of standing competence shall be appointed on the request of the party raising the dispute, by the Federal Government or by a Provincial Government, as the case may be, by notification in the official Gazette, to conciliate in an industrial dispute involving more than one establishment in a Province or in an industry at national level or in an industrial dispute of national importance, if the negotiations are not satisfactorily progressing.
The Board constituted under sub-section (3) shall stand dissolved on the settlement of dispute or on the failure of conciliation proceedings.
Period of notice of conciliation.- The period of a notice of conciliation under sub-section (3) of section 25 shall be fifteen days.
Conciliation after notice:- Where a party to an industrial dispute serves a notice of conciliation under sub-section (3) of section 25, it shall, simultaneously with the service of such notice, deliver a copy thereof to the Conciliator who shall proceed to conciliate in the dispute and to the Labour Court.
Proceedings before Conciliator:
(1) The Conciliator or the Board shall, as soon as possible, call a meeting of the parties to a dispute for the purpose of bringing about a settlement.
(2) The parties to a dispute shall be represented before the Conciliator or the Board by persons nominated by them and authorized to negotiate and enter into an agreement binding on the parties:

Provided that if, in the opinion of the Conciliator or the Board, the presence of the employer or any office bearer of the trade union connected with the dispute is necessary in a meeting called by him, he or, as the case may be, it shall give notice in writing requiring the employer or such office bearer to appear in person before him or it at the place, date and time, specified in the notice and it shall be the duty of the employer or the office bearer of trade union to comply with the notice.

The Conciliator or the Board shall perform such functions in relation to a dispute before him or it as may be prescribed may, in particular, suggest to either party to the dispute such concessions or modifications in its demand as are in the opinion of the Conciliator or the Board likely to promote an amicable settlement of the dispute.

If a settlement of the dispute or of any matter in dispute is arrived at in the course of the proceedings before him or it, the Conciliator or the Board shall send a report thereof to the Provincial Government or the Federal Government, as the case may be, together with the memorandum of settlement signed by the parties to the dispute. (5) If no settlement is arrived at within the period of the notice of conciliation, the conciliation proceedings may be continued for such further period as may be agreed upon by the parties.

Arbitration:

If the conciliation fails, the Conciliator shall try to persuade the parties to agree to refer the dispute to an arbitrator, and in case the parties agree, they shall make a joint request in writing for reference of the dispute to an arbitrator agreed upon by them.

The arbitrator to whom a dispute is referred under sub-section (1) may be a person borne on a panel to be maintained by a Provincial Government or the Federal Government as the case may be or any other person agreed upon by the parties.

The arbitrator shall give his award within a period of thirty days from the date on which the dispute is referred to him under sub-section (1) or such further period as may be agreed upon by the parties to the dispute.

After the arbitrator has made the award, he shall forward a copy thereof to the parties and to a Provincial Government or the Federal Government, as the case may be, who shall cause it to be published in the official Gazette.

The award of the arbitrator shall be final and no appeal shall lie against it and shall be valid for a period not exceeding two years or as may be fixed by the arbitrator.

Strike and lockout:

If no settlement is arrived at during the course of conciliation proceedings and the parties to the dispute do not agree to refer it to an arbitrator under section 30, the workmen, subject to a seven days notice to the employer, may go on strike or, as the case may be, the employer may declare a lock-out on the expiry of the period of the notice under section 27 or upon a declaration by the Conciliator or the Board that conciliation proceedings have failed, whichever is the later.

The party raising a dispute may at any time, either before or after the commencement of a strike or lock-out, make an application to the Labour Court for adjudication of the dispute.

Where a strike or lock-out lasts for more than fifteen days, the Federal Government, if it relates to a dispute which the Commission is competent to adjudicate and determine, and a Provincial Government, if it relates to any other dispute, may, by order in writing, prohibit the strike or lock-out;

Provided that the Federal Government may, with respect to a strike or lock-out relating to a dispute which the Commission is competent to adjudicate and determine and the Provincial Government, with the previous approval of the Federal Government may, with respect to any other strike or lock-out, by order in writing, prohibit a strike or lock-out at any time before the expiry of thirty days, if its is satisfied that the continuance of such a strike or lock-out is causing serious hardship to community or is prejudicial to the national interest;

Provided further that the Federal Government or a Provincial Government, as the case may be, shall prohibit, by an order in the official Gazette, the commencement of a strike or lock-out, as the case may be, if the same, in the opinion of the Government concerned, is detrimental to the interest of the community at large.

In any case in which the Federal Government or a Provincial Government prohibits a strike or lock-out it shall forthwith refer the dispute to the Commission or, as the case may be, the Labour Court.

The Commission, or as the case may be, the Labour Court shall, after giving both the parties to the dispute an opportunity of being heard, make such award as it deems fit as expeditiously as possible but not exceeding thirty days from the date on which the dispute was referred to it;
Provided that the Commission, or as the case may be, the Labour Court may make an interim award on any matter of dispute; Provided further that any by the Commission or, as the case may be, the Labour Court in making an award shall not affect the validity or any award by it.

An award of the Commission or, as the case may be, the Labour Court shall be for such period, as may be specified in the award, but shall not be for more than two years.

LECTURE 43

INDUSTRIAL RELATIONS ORDINANCE

Forums for Adjudication of disputes available under the ordinance:

- Labour courts
- Appeal to the High Court
- National Industrial Relations Commission

The provisions with regard to above forums as provided in Industrial Relations Ordinance, 2002 are given below:

Labour Courts:

It has been defined in section 44 of the Ordinance which is given below:

(1) A Provincial Government may, in consultation with the Chief Justice of the respective High Court, by notification in the official Gazette, establish as many Labour Courts as it considers necessary and, where it establishes more than one Labour Court, shall specify in the notification the territorial limits within which or the industry or the classes of cases in respect of which, each one of them shall exercise jurisdiction under this Ordinance.

(2) A Labour Court shall consist of one Presiding Officer appointed by a Provincial Government, in consultation with the Chief Justice of the respective High Court.

(3) A person shall not be qualified for appointment as Presiding Officer unless he has been, or is qualified to be, Judge or Additional Judge of the respective High Court or is a District Judge.

(4) A Labour court shall-

(a) adjudicate and determine an industrial dispute which has been referred to or brought before it under this Ordinance;

(b) enquire into or adjudicate any matter relating to the implementation or violation of a settlement which is referred to it by a Provincial Government;

(c) try offences under this Ordinance and such other offences under any other law as the Provincial Government may, by notification in the official Gazette, specify in this behalf; and

(d) exercise and perform such other powers and functions as are or may be conferred upon or assigned to it by or under this Ordinance or any other law.

Procedure and powers of Labour Court:

It has been defined in section 45 of the Ordinance which is given below:

(1) Subject to the provisions of this Ordinance, while trying an offence a Labour Court shall follow as nearly as possible summary procedure as provided under the Code of Criminal Procedure, 1898 (Act V of 1898).

(2) A Labour Court shall, for the purpose of adjudicating and determining any industrial dispute, be deemed to be a Civil Court and shall have the same powers as are vested in such Court under the Code of Civil Procedure, 1908 (Act V of 1908), including the powers of-

(2) (a) enforcing the attendance of any person and examining him on oath;

(b) compelling the production of documents and material objects; and

(c) issuing commissions for the examination of witnesses or documents.

(3) A Labour Court shall, for the purpose of trying an offence under this Ordinance or the West Pakistan Industrial and Commercial Employment (Standing Orders) Ordinance, 1968 (W.P. Ordinance VI of 1968), or any other labour law, have the same powers as are vested in the Court of a Magistrate of the first class specially empowered under section 30 of the Code Criminal Procedure, 1898 (Act V of 1898).

(4) No court fee shall be payable for filling, exhibiting or recording any document in, or obtaining any document from a Labour Court.

(5) If the parties to a case, at any time before a final order is passed by a Labour Court that matter has been resolved by them amicably and that there are sufficient grounds for withdrawing the case, it may allow such withdrawal.

Redress of individual grievances:

It has been defined in section 46 of the Ordinance which is given below:

(1) A **worker may bring his grievance** in respect of any right guaranteed or secured to him by or under any law or any award or settlement for the time being in force to the notice of his employer in writing,

either himself or through his Shop Steward or collective bargaining agent, within one month of the day on which cause of such grievance arises.
(2) Where a worker brings his grievance to the notice of an employer himself or through his Shop Steward or collective bargaining agent, the employer shall, within fifteen days of the grievance being brought to his notice, communicate his decision in writing to the worker.
(3) If an employer fails to communicate a decision within the period specified in sub-section (2) or if a worker is dissatisfied with such decision, the worker or Shop Steward may take the matter to his collective bargaining agent or the Labour Court, as the case may be, and where the matter is taken to the Labour Court, it shall give a decision within seven days from the date of the matter being brought before it as if such matter were an industrial dispute: Provided that a worker who desires to take the matter to the Labour Court, he shall do so within a period of two months from the date of communication of the employer or, as the case may be, from the expiry of the period specified in sub-section (2).
(4) In adjudicating and determining a grievance under sub- section (3), the Labour Court shall go into all the facts of the case and pass such orders as may be just and proper in the circumstances of the case.
(5) The Labour Court, in case the termination of services of a workman is held to be wrongful, may award compensation equivalent to not less than twelve months and not more than thirty months basic pay last drawn and house rent, if admissible, in lieu of reinstatement of the worker in service.
(6) If a decision under sub-section (4) or an order under sub-section (5) given by the Labour Court or a decision of the High Court in an appeal against such a decision or order is not given effect to or complied with within one month or within the period specified in such order or decision, the defaulter shall additionally be punishable with fine which may extend to ten thousand rupees.
(7) No person shall be prosecuted under sub-section (6) except on a complaint in writing by a workman if the order or decision in his favour is not implemented within the period specified therein.
(8) For the purposes of this section, workers having common grievance arising out of a common cause of action may make a joint application to the Labour Court.

Awards and decision of Labour Court: sec 47

It has been defined in section 47 of the Ordinance which is given below:
(1) An award or decision of a Labour Court shall be given in writing and delivered in open Court and two copies thereof shall be forwarded forthwith to a Provincial Government, provided that if the Federal Government be a party, two copies of the award or decision shall be forwarded to that Government as well.
(2) Government shall, within a period of one month from the receipt of the copies of the award or decision, publish it in the official Gazette.
(3) Any party aggrieved by an award given under sub-section (1) or a decision given under section 46 or on an application made under section 33 or a sentence passed in an offence tried by the Labour Court under clause (c) of sub-section (4) of section 44 may prefer an appeal to the High Court within thirty days of the delivery or passing thereof and the decision of the High Court in such appeal shall be final.
(4) Save as otherwise expressly provided in this Ordinance, all decisions of, and all sentences passed by, a Labour Court shall be final and shall not be called in question in any manner by or before any court or other authority.

Appeal to the High Court:

It has been defined in section 48 of the Ordinance which is given below:
(1) The High Court may, on appeal, confirm, set aside, vary or modify the award or decision given under section 46 or 33 a sentence passed under clause (c) of sub-section (4) of section 44 and shall exercise all the powers conferred by this Ordinance on the Labour Court, save as otherwise provided.
(2) The decision of the High Court shall be delivered as expeditiously as possible, within a period of sixty days following the filing of an appeal, provided that such decision shall not be rendered invalid by reason of any delay in its delivery.
(3) The High Court may, on its own motion, at any time, call for the record of any case or proceedings under this Ordinance in which Labour Court within it jurisdiction has passed an order, for the purpose of satisfying itself as to the correctness, legality, or propriety of such order, and may pass such order, in relation thereto as it thinks fit:
Provided that no order under this sub-section shall be passed revising or modifying any order adversely affecting any person without giving such person a reasonable opportunity of being heard.

(4) The High Court, subject to its appellate jurisdiction, shall punish for contempt of its authority, or that of any Labour Court with a fine which may extend to twenty five thousand rupees.
(5) Any person if sentenced with a fine exceeding twenty thousand rupees by a single bench of a High Court under sub- section (4) may prefer an appeal to the division bench of that High Court.
(6) A High Court may, on its motion or on the application of any party, transfer any application or proceeding from a Labour Court within its jurisdiction to any other Labour Court.
(7) Notwithstanding anything contained in sub-section (3), if, in an appeal preferred to it against the order of a Labour Court directing the re-instatement of a workman or compensation in lieu thereof, the High Court makes an order staying the operation of the order of the Labour Court, the High Court shall decide such appeal as soon as possible but not later than sixty days.

LECTURE 44

NATIONAL INDUSTRIAL RELATIONS COMMISSION

Forums for Adjudication of disputes available under the ordinance:
It has been defined in section 49 of the Ordinance which is given below:
(1) The Federal Government shall constitute a national Industrial Relations Commission consisting of not more than eight members, including its Chairman.
(2) The Chairman and the members shall be appointed by the Federal Government.
(3) The qualification and terms and conditions of service for appointment as Chairman and member of the Commission shall be such as may be determined by the Federal Government.
(**4) The functions of the Commission shall be to -**
(a) adjudicate and determine an industrial dispute to which an industry-wise trade union or a federation of such trade unions is a party and any other industrial dispute which, in the opinion of the Federal Government, is of national importance and is referred to it by that Government;
(b) register industry-wise trade unions, federations of such trade unions and federations at the national level and carry out ratings of the trade unions and federations registered by it in terms of their standing and representative character;
(c) determine the collective bargaining agents amongst industry- wise trade unions, federations of such trade unions and federations at the national level;
(d) try offences punishable under.-
(i) section 65, other than sub-section (1) and (5) thereof; and
(ii) any other provisions, in so far as they relate to employers or workers in relation to an industry-wise trade union, a federation of such trade unions, a federation at the national level or office-bearers of such unions or federation;
(e) deal with cases of unfair labour practices specified in section 63 and 64 on the part of employers, workmen, collective bargaining agents, industry-wise trade unions of either of them or persons acting on behalf of any of them, whether committed. individually or collectively, in the manner laid down under section 46 or 33 or in such other way as may be prescribed and to take, in such manner as may be prescribed by regulations under section 55, measures calculated to prevent an employer or workman from committing an unfair labour practice;
Provided that, except during pendency of an industrial dispute, the Commission shall not grant interim relief against any action mentioned in section 63 (d) of this Ordinance.
(f) advise Government, industry-wise trade unions and federations in respect to the education of workers in the essentials of trade unionism, including education in respect of their rights and obligations, and to secure the provision of facilities required thereof;
(g) promote healthy trade unionism whether in establishments within a Province or in more than one Province and federations of such trade unions;
(h) facilitate the formation of federations at the national level; and
(i) exercise such other powers and perform functions as the Federal Government may by notification in the official Gazette, assign to it from time to time.

(5) The Commission may, on the application of a party, or of its own motion-
(a) initiate prosecution, trial or proceedings or take action, with regard to any matter relating to its functions; and
(b) withdraw from a Labour Court any application, proceedings or appeal relating to unfair labour practice.
(6) For the purpose of dealing with a case of unfair labour practice of which the Commission is seized, the Commission may- (a) proceed directly with the case; (b) ask the registrar within whose jurisdiction the case has occurred or is likely to occur to enquire into it and submit a report; or (c) refer the case to the Labour Court within whose jurisdiction the case has occurred or is likely to occur, either for report or for disposal.
(7) The Labour Court to whom the case is referred under clause (c) of sub- section (6) shall enquire into it and, if the case was referred to it for report, forward its report there on to the Commission or, if the case was referred to it for disposal, continue the proceedings and dispose of the case as if the proceedings had originally commenced before it and grant such relief as the Commission has the power to grant.

(8) Save as provided in sub-sections (6) and (7), no Registrar or Labour Court shall take any action, or entertain any application or proceedings, in respect of any matter which falls within the jurisdiction of the Commission.
(9) Nothing in this section shall be deemed to exclude the jurisdiction of a Labour Court to entertain cases of unfair labour practices on the part of employers or workmen, whether individually or collectively:
Provided that no Court, including a Labour Court, shall take any action or entertain any application or proceedings in respect of a case of unfair labour practice which is being dealt with by the Commission.
Explanation.- In this section and in the succeeding provision of this Ordinance, the expressions "industry-wise trade unions, "federation of such trade unions" and federation at the national level "refer to a trade union, membership of which extends to establishments in more than one Province and a federation of trade unions whose membership extends to registered trade unions in more than one Province.
Explanation: In this section and in the succeeding provision of this Ordinance, the expressions "industry-wise trade unions, "federation of such trade unions" and federation at the national level "refer to a trade union, membership of which extends to establishments in more than one Province and a federation of trade unions whose membership extends to registered trade unions in more than one Province.
(f) advise Government, industry-wise trade unions and federations in respect to the education of workers in the essentials of trade unionism, including education in respect of their rights and obligations, and to secure the provision of facilities required thereof;
(g) promote healthy trade unionism whether in establishments within a Province or in more than one Province and federations of such trade unions;
(h) facilitate the formation of federations at the national level; and
(i) exercise such other powers and perform functions as the Federal Government may by notification in the official Gazette, assign to it from time to time.
(5) The Commission may, on the application of a party, or of its own motion-
(a) initiate prosecution, trial or proceedings or take action, with regard to any matter relating to its functions; and
(b) withdraw from a Labour Court any application, proceedings or appeal relating to unfair labour practice.
(6) For the purpose of dealing with a case of unfair labour practice of which the Commission is seized, the Commission may- (a) proceed directly with the case; (b) ask the registrar within whose jurisdiction the case has occurred or is likely to occur to enquire into it and submit a report; or (c) refer the case to the Labour Court within whose jurisdiction the case has occurred or is likely to occur, either for report or for disposal.
(7) The Labour Court to whom the case is referred under clause (c) of sub- section (6) shall enquire into it and, if the case was referred to it for report, forward its report there on to the Commission or, if the case was referred to it for disposal, continue the proceedings and dispose of the case as if the proceedings had originally commenced before it and grant such relief as the Commission has the power to grant.
(8) Save as provided in sub-sections (6) and (7), no Registrar or Labour Court shall take any action, or entertain any application or proceedings, in respect of any matter which falls within the jurisdiction of the Commission.
(9) Nothing in this section shall be deemed to exclude the jurisdiction of a Labour Court to entertain cases of unfair labour practices on the part of employers or workmen, whether individually or collectively:
Provided that no Court, including a Labour Court, shall take any action or entertain any application or proceedings in respect of a case of unfair labour practice which is being dealt with by the Commission.
Explanation.- In this section and in the succeeding provision of this Ordinance, the expressions "industry-wise trade unions, "federation of such trade unions" and federation at the national level "refer to a trade union, membership of which extends to establishments in more than one Province and a federation of trade unions whose membership extends to registered trade unions in more than one Province.
(8) Save as provided in sub-sections (6) and (7), no Registrar or Labour Court shall take any action, or entertain any application or proceedings, in respect of any matter which falls within the jurisdiction of the Commission.
(9) Nothing in this section shall be deemed to exclude the jurisdiction of a Labour Court to entertain cases of unfair labour practices on the part of employers or workmen, whether individually or collectively:
Provided that no Court, including a Labour Court, shall take any action or entertain any application or proceedings in respect of a case of unfair labour practice which is being dealt with by the Commission.
Explanation.- In this section and in the succeeding provision of this Ordinance, the expressions "industry-

union, membership of which extends to establishments in more than one Province and a federation of trade unions whose membership extends to registered trade unions in more than one Province.

Benches of the Commission:

(1) The Chairman of the Commission shall exercise general superintendence over its affairs.

(2) For the efficient performance of the functions of the Commission, the Chairman of the Commission shall constitute-

(a) a Full Bench of the Commission which shall consist of not less than three members of the Commission; and

(b) as many other Benches of the Commission consisting of one or more members of the Commission as he may deem fit.

(3) The benches shall-

(a) in relation to cases based on allegations of unfair labour practices brought before the Commission for trial of offences, or enforcement of, or for redress of individual grievances in respect of any right guaranteed or secured to any employer or worker by or under any law or any award or settlement, perform such functions and exercise such powers as are performed and exercised by a Labour Court; and

(b) in relation to industry-wise trade unions, federations of such trade unions, federations at the national level and cases referred to the Commission, perform such functions and exercise such powers as are performed and exercised by a Registrar or a Labour Court in relation to trade unions and federations of trade unions within a Province, and, for this purpose, any reference in this Ordinance to a "Registrar" or **"Labour Court",** as the case may be, shall be deemed to be a reference to the appropriate Bench of the Commission to which such functions are assigned:

Provided that, in the performance of those functions and in the exercise of those powers, the Benches shall, unless otherwise provided in this Ordinance, m follow the procedure laid down in the regulations to be made under section 55.

(4) If any member of the Commission is absent from, or is otherwise unable to attend any sitting of the Commission or of a Bench consisting of more than one member of which he is a member, the proceedings of the Commission or Bench may continue, and the decision or award may be given or judgement or sentence may be passed in the absence of such member and no act, proceedings, decision, or award of the Commission or Bench shall be invalid or be called in question merely on the ground of such absence or of the existence of vacancy in or any defect in the constitution of the Commission or Bench.

(5) If the members of a Bench differ in opinion as to the decision to be given on any point-

(a) the point shall be decided according to the opinion of the majority, if there is a majority; and

(b) if the members are equally divided, they shall state the point on which they differ and the case shall be referred by them to the Chairman for hearing on such point by one or more of the other members of the Commission and such point shall be decided according to the opinion or the majority of the members of the Commission who have heard the case, including those who first heard it: Provided that if upon any matter requiring the decision of a Bench which includes the Chairman of the Commission as one of its members, there is a difference of opinion among its members and the members so constituting the Bench are equally divided, the opinion of the Chairman shall prevail and the decision of the bench shall be expressed in terms of the views of the Chairman.

(6) Any order of decision made, award given sentence passed, power exercised, function performed or proceedings taken by any Bench of the Commission in accordance with this Ordinance and the order constituting the Bench shall be deemed to be the order or decision made, award given sentence passed, power exercised, function performed or proceedings taken, as the case may be, by the Commission.

Explanation: In this section, the expression 'the Chairman of the Commission' includes such member of the Commission (to be known as Senior Member) as the Federal Government may nominate to perform the functions and exercise the powers of the Chairman during his absence.

Additional powers of the Commission:

It has been defined in section 51 of the Ordinance which is given below:

In addition to the powers which the Commission has under section 50-

(a) the Commission shall have power to punish any person who obstructs or abuses its process or disobeys any of its order or directions or does anything which tends to prejudice the case of a party before it, or tends to bring it or any of its members in relation to proceedings of the Commission into hatred or contempt, or does anything which, by law, constitutes contempt of court, with fine which may extend to

(b) for the purpose of any investigation, inquiry or adjudication to be made by the Commission under this Ordinance, the Chairman or any member of the Commission may at any time between the hours of sunrise and sunset, and any other person authorized in writing by the Chairman or any member of the Commission in this behalf may, after he has given reasonable notice, enter any building, factory, workshop, or other place or premises whatsoever and inspect the same or any work, machinery, appliance or article therein or interrogate any person therein in respect of anything situated therein or any matter relevant to matters before the Commission.

Appeals to the Commission:

It has been defined in section 52 of the Ordinance which is given below:

(1) Notwithstanding anything contained in this Ordinance, or in any other law for the time being in force, any person aggrieved by an award or decision given or a sentence or order determining and certifying a collective bargaining unit passed by any Bench of the Commission, other than a Full Bench, may, within thirty days of such award, decision, sentence.

(2) An appeal preferred to the Commission under sub-section (1) shall be disposed of by the Full Bench of the Commission which shall have the power to confirm, set aside, vary or modify such award, decision, sentence or order.

Finality of order:

It has been defined in section 53 of the Ordinance which is given below:

No Court shall entertain any plea as to the jurisdiction of the Commission or an application or as to the legality or propriety of anything done or purporting to be done by the Commission or any of its Benches, and no order, decision, judgment or sentence be called in question in any manner whatsoever, in or before any Court or authority.

Determination, etc., of collective bargaining unit:

It has been defined in section 54 of the Ordinance which is given below:

(1) Where the Commission, on an application made in this behalf, by a trade union of workmen or a federation of such trade unions, or on a reference made by the Federal Government, after holding such inquiry as it deems fit, is satisfied that for safeguarding the interest of the workmen employed in an establishment or group of establishments belonging to the same employer and the same industry, in relation to collective bargaining, it is necessary, just and feasible to determine one or more collective bargaining units of such workmen in such establishment or group of establishments, it may, having regard to the distribution of workers, existing boundaries of the components of such establishment or group of establishments, facilities of communication, general convenience, sameness or similarity of economic activity and other cognate factors-

(a) determine and certify one or more collective bargaining units in such establishment or group of establishments;

(b) specify the modifications which, in consequence of the decision under this section, shall take effect in regard to the registration of the trade unions and federations of trade unions affected by among such unions and federations, nomination or election of Shop Stewards, and workers' representatives for participation in the management of the factories, if any, affected by such decision;

(c) specify the date or dates from, and the period for which, all or any of such changes shall take effect: Provided that the date so specified shall not be a date falling within the period of three years-specified in sub-section (II) of section 20 in its application to a collective bargaining agent certified in respect of an establishment or establishments; Provided further that, after the receipt of a reference for determination of a collective bargaining unit, the Commission may stop or prohibit the proceedings to determine collective bargaining agent under section 20 for any establishment or group of establishments which is likely to be affected by a decision made under this section.

(d) take such measures or issue such directions to the Registrar as may be necessary to give effect to such modifications; and

(e) determine and certify a collective bargaining agent for each such unit in accordance with section 20, in so far as applicable and with necessary modifications, if such a unit relates to more than one Province, or direct the Registrar to take such action, if such a unit relates to only one Province.

(2) Where the Commission issues any directions to the Registrar under this section, the Registrar shall comply with them within such period as the Commission may from time to time determine.

(3) After the certification of a collective bargaining unit, no trade union shall be registered in respect of that

bargaining agent under section 20 shall take place for a part of a collective bargaining unit or a group of collective bargaining units.
(4) An order of the Commission under this section shall have effect notwithstanding anything to the contrary contained in this Ordinance.
Where the Commission, on an application made in this behalf, by a trade union of workmen or a federation of such trade unions, or on a reference made by the Federal Government, after holding such inquiry as it deems fit, is satisfied that for safeguarding the interest of the workmen employed in an establishment or group of establishments belonging to the same employer and the same industry, in relation to collective bargaining, it is necessary, just and feasible to determine one or more collective bargaining units of such workmen in such establishment or group of establishments, it may, having regard to the distribution of workers, existing boundaries of the components of such establishment or group of establishments, facilities of communication, general convenience, sameness or similarity of economic activity and other cognate factors-
(a) determine and certify one or more collective bargaining units in such establishment or group of establishments;
(b) specify the modifications which, in consequence of the decision under this section, shall take effect in regard to the registration of the trade unions and federations of trade unions affected by among such unions and federations, nomination or election of Shop Stewards, and workers' representatives for participation in the management of the factories, if any, affected by such decision;
(c) specify the date or dates from, and the period for which, all or any of such changes shall take effect: Provided that the date so specified shall not be a date falling within the period of three years-specified in sub-section (II) of section 20 in its application to a collective bargaining agent certified in respect of an establishment or establishments;
Provided further that, after the receipt of a reference for determination of a collective bargaining unit, the Commission may stop or prohibit the proceedings to determine collective bargaining agent under section 20 for any establishment or group of establishments which is likely to be affected by a decision made under this section.
(d) take such measures or issue such directions to the Registrar as may be necessary to give effect to such modifications; and
(e) determine and certify a collective bargaining agent for each such unit in accordance with section 20, in so far as applicable and with necessary modifications, if such a unit relates to more than one Province, or direct the Registrar to take such action, if such a unit relates to only one Province.
(2) Where the Commission issues any directions to the Registrar under this section, the Registrar shall comply with them within such period as the Commission may from time to time determine.
(3) After the certification of a collective bargaining unit, no trade union shall be registered in respect of that unit except for the whole of such unit and no certification or proceedings for determination of collective bargaining agent under section 20 shall take place for a part of a collective bargaining unit or a group of collective bargaining units.
(4) An order of the Commission under this section shall have effect notwithstanding anything to the contrary contained in this Ordinance.

Power to make regulations:

It has been defined in section 55 of the Ordinance which is given below:
(1) Subject to the provisions of this Ordinance, the Commission may, with the prior approval of the Federal Government, make such regulations relating to its procedure and the performance of its functions as it may deem fit.
(2) In particular and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely:-
(a) registration on industry-wise trade unions, federations of such trade unions and federations at the national level, and the procedure for such registration;
(b) determination of collective bargaining units;
(c) determination of collective bargaining agent from amongst the industry-wise trade unions, federations of such trade unions or, as the case may be, federations at the national level, and the procedure there for;
(d) procedure, including rules of evidence, for adjudication of industrial disputes;
(e) procedure, including rules of evidence, for trial of offences;

(g) superintendence of the Chairman over the affairs of the Commission;
(h) forms of registers, processes and returns in respect of matters relating to the functions of the Commission; and

Raising of industrial dispute by a federation:

(1) Notwithstanding anything contained in this Ordinance, a federation of industry-wise trade unions or a federation at the national level may, if it is a collective bargaining agent, raise an industrial dispute affecting all employers or workers of the establishments represented by that federation and a decision of the Commission shall be binding on all such employers and workers.
(2) No collective bargaining agent shall, at any time when a decision of the Commission in respect of any matter is effective, be entitled to raise a demand relating to that matter.

LECTURE 45

LABOUR LAWS

Unfair Labour Practices:

Unfair Labour practices on the part of employer:

It has been defined in section 63of the Ordinance which is given below:

No employer shall:

(a) impose any condition in a contract of employment seeking to restrain the rights of a person who is a party to such contract to join a trade union or continue his membership of a trade union; or

(b) refuse to employ or refuse to continue to employ any person on the ground that such person is or is not, a member or office-bearer of a trade union; or

(c) discriminate against any person in regard to any employment, promotion, condition of employment or working condition on the ground that such person is or is not, a member or office-bearer of a trade union; or

(d) dismiss, discharge, remove from employment or transfer a workman or injure him in respect of his employment by reason that the workman- (i) is or proposes to become a member or office-bearer of a trade union; or (ii) participates in the promotion, formation or activities of a trade union;

(e) induce any person to refrain from becoming, or to cease to be a member or office-bearer of a trade union, by conferring or offering to confer any advantage on, or by procuring or offering to procure any advantage for such person or any other person; or

(f**)** compel or attempt to compel any office-bearer of a collective bargaining agent to arrive at a settlement by using intimidation, coercion, pressure, threat, confinement to a place, physical injury, disconnection of water, power or telephone facilities or by such other methods; or

(g) interfere with or in any way influence the balloting provided for in section 20; or

(h) recruit any workman during the period of notice of strike under section 31 or during the currency of a strike which is not illegal except where the Conciliator has, being satisfied that complete cessation of work is likely to cause serious damage to the machinery or installations, permitted temporary employment of a limited number of workmen in the section where the damage is likely to occur; or

(i) close down the whole of an establishment in contravention of Standing Order 11A of the West Pakistan Industrial and Commercial Employment (Standing Orders) Ordinance, 1969 (West Pakistan Ordinance No VI of 1968); or

(j) commence, continue, instigate or incite others to take part in, or expend or supply money or otherwise act in furtherance or support of an illegal lock-out.

Unfair Labour practices on the part of workmen:

It has been defined in section 64 of the Ordinance which is given below:

No workman or trade union of workmen shall:

(a) persuade a workman to join or refrain from joining a trade union during working hours; or

(b) intimidate any person to become, or refrain from becoming, or to continue to be or to cease to be a member or office-bearer of a trade union; or

(c) induce any person to refrain from becoming, or cease to be a member or office-bearer of a trade union by intimidating or conferring or offering to confer any advantage on or by procuring or offering to confer any advantage on or by procuring or offering to procure any advantage for such person or any other person; or

(d) compel or attempt to compel the employer to accept any demand by using intimidation, coercion, pressure, threat, confinement or ouster from a place, dispossession, assault, physical injury, disconnection of telephone, water or power facilities or by such other methods; or

(e) compel or attempt to compel any member of a body, bipartite or tripartite or of any composition, relating to the functioning of the industry or is in place for the benefit of workers, to accept any demand by using intimidation, coercion, pressure, threat, confinement or ouster from a place, dispossession, assault, physical injury or by such other methods; or

(f) commence, continue, instigate or incite others to take part in or expend or supply money or otherwise act in furtherance or support of an illegal strike or adopt go- slow measures; or

(g) carry any arms or weapons within the premises of an employer without any legal authority.

Explanation.- In clause (f) the expression 'go slow' means an organized, deliberate and purposeful slowing down of normal output, or the deterioration of the normal quality, of work by a body of workmen acting in a concerted manner, but does not include the slowing down of normal output, or the deterioration of the normal quality, of work which is due to mechanical defect, break-down of machinery, failure or defect in power-supply or in the supply of normal materials and spare parts of the machinery.
(2) It shall be an unfair labour practice for a trade union to interfere with a ballot held under section 20 by the exercise of undue influence, intimidation, impersonation or bribery through its executive or through any person acting on its behalf.

Penalty for unfair labour practices:

- Whoever contravenes the provisions of section 63 shall be punishable with fine which may extend to thirty thousand rupees.
- Whoever contravenes the provisions of section 64, other than those of clause (d) of sub-section (1) thereof shall be punishable with fine may extend to twenty thousand rupees.

Rights of Employer:

- Right to manage, control and carry on business according to his discretion
- Right to use the available resources for the benefit and in the interest of business

Duties of Employer:

- To act according to law to protect the rights of workers to take necessary steps for the welfare of workers
- To create healthy environment leading to the efficiency of labour and production

Rights of Workers:

- To perform the job/ duties for which he is hired.
- To receive agreed wages
- To avail benefits
- Right to form a trade union/ to be the member of a trade union
- To be a collective bargaining agent

Duties of Workers:

- Perform duties as per agreement,
- To maintain discipline
- To extend cooperation to the employer

THE WORKMEN'S COMPENSATION ACT, 1923

Compensation to Workmen:
The laws relating to Workmen's Compensation is governed by Workmen's Compensation Act, 1923. This law extends the whole of Pakistan.

Some Important Definitions:
"Minor" means a person who has not attained the age of 18 years;
"Wages" includes any privilege or benefit which is capable of being estimated in money, other than a traveling allowance or the value of any traveling concession or a contribution paid by the employer a workman towards any pension or provident fund or a sum paid to a workman to cover any special expenses entailed on him by the nature of his employment;
"employer" includes any body of persons whether incorporated or not and any managing agent of an employer and the legal representative of a deceased employer, and, when the services of a workman are temporarily lent or let on hire to another person by the person with whom the workman has entered into a contract of service or apprenticeship, means such other person while the workman is working for him;
"Partial disablement" means, where the disablement is of a temporary nature, such disablement as reduces the earning capacity of a workman in any employment in which he was engaged at the time of the accident resulting in the disablement, and, where the disablement is of a permanent nature, such disablement as reduces his earning capacity in every employment which he was capable of undertaking at that time:
Provided that every injury specified in Part II of Schedule I shall be deemed to result in permanent partial disablement:

"Total disablement" means such disablement, whether of a temporary or permanent nature, as incapacitates a workman for all work which he was capable of performing at the time of the accident resulting in such disablement

Provided that permanent total disablement shall be deemed to result from every injury specified in Part I of Schedule I or from any combination of injuries specified in Part II thereof where the aggregate percentage of the loss of earning capacity, as specified in the said Part II against those injuries, amounts to one hundred per cent or more;

"Dependent" means any of the following relatives of a deceased workman, namely :-

(i) a widow, a minor legitimate or adopted son, and unmarried legitimate or adopted daughter, or a widowed mother; and

(ii) if wholly dependent on the earnings of the workman at the time of his death, a son or a daughter who has attained the age of 18 years and who is infirm;

(iii) if wholly or in part dependent on the earnings of the workman at the time of his death,

(a) a widower,

(b) a parent other than a widowed mother,

(c) a minor illegitimate son, an unmarried illegitimate daughter or a daughter legitimate or illegitimate or adopted if married and a minor or if widowed and a minor,

(d) a minor brother or an unmarried sister or a widowed sister if a minor,

(e) a widowed daughter-in-law,

(f) a minor child of a pre-deceased son,

(g) a minor child of a pre-deceased daughter where no parent of the child is alive, or

(h) a paternal grandparent if no parent of the workman is alive.

"workman" means any person (other than a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business) who is - (i) a railway servant as defined in clause (34) of section 2 of the Railways Act, 1989 (24 of 1989), not permanently employed in any administrative, district or sub-divisional office of a railway and not employed in any such capacity as is specified in Schedule II, or (ia) (a) a master, seaman or other member of the crew of a ship,

(d) a person recruited for work abroad by a company, and who is employed outside India in any such capacity as is specified in Schedule II and the ship, aircraft or motor vehicle, or company, as the case may be, is registered in India, or

(b) a captain or other member of the crew of an aircraft,

(c) a person recruited as driver, helper, mechanic, cleaner or in any other capacity in connection with a motor vehicle,

(ii) employed in any such capacity as is specified in Schedule II, whether the contract of employment was made before or after the passing of this Act and whether such contract is expressed or implied, oral or in writing; but does not include any person working in the capacity of a member of the Armed Forces of the Union; and any reference to a workman who has been injured shall, where the workman is dead, include a reference to his dependants or any of them.

(2) The exercise and performance of the powers and duties of a local authority or of any department acting on behalf of the Government shall, for the purposes of this Act, unless a contrary intention appears, be deemed to be the trade or business of such authority or department.

Employers Liability for Compensation:

The employer is liable to pay compensation to a workman for personal injury and occupational disease arising out of and in the course of employment**.** Besides injury, the employer is liable to pay compensation if the workman contracts any of the occupational diseases specified in schedule iii of the Act.

Personal Injury:

An employer is liable to pay compensation to a workman if personal injury is caused to him by accident arising out of and in the course of employment.

(b) Out of employment: An accident arising out of employment means that there must be some relation between the injury and the accident and the work dome in the course of employment. In order to prove that injury arose out of employment two conditions must be fulfilled.

- Injury must have resulted from some risk incidental to the duties of the service.
- At the time of injury worker must have been engaged in the business of the employer and must not be doing something or his personal advantage.

It refers to the time during which employment continues. It covers whole of the time a workman is carrying out the duties required of him as incidental to his service. It includes not only the time when he is doing the work but also the time he is at place where he would not be but for his employment.

(d) Occupational diseases.

Workers employed in certain occupations are exposed a certain diseases which are inherent in theses occupations. Contracting of an occupational disease is deemed to be an injury by accident.

Employer not Liable:

The employer is not liable for compensation in the following cases:

(a) in respect of any injury which does not result in the total or partial disablement of the workman for a period exceeding three days;

(b) in respect of any injury, not resulting in death or permanent total disablement, caused by an accident which is directly attributable to:

(i) the workman having been at the time thereof under the influence of drink or drugs, or

(ii) the willful disobedience of the workman to an order expressly given, or to a rule expressly framed, for the purpose of securing the safety of workmen, or

(iii) the willful removal or disregard by the workman of any safety guard or other device which he knew to have been provided for the purpose of securing the safety of workmen,

Amount of Compensation:

Subject to the provisions of this Act, the amount of compensation shall be as follows, namely:-

(a) where death results an amount equal to fifty from the injury cent of the monthly wages of the deceased workman multiplied by the relevant factor; or an amount of fifty thousand rupees, whichever is more;

(1)(b) where permanent total an amount equal to disablement results from sixty the injury per cent of the monthly wages of the injured workman multiplied by the relevant factor, or an amount of sixty thousand rupees, whichever is more.

(c) where permanent partial disablement results from the injury

(i) in the case of an injury specified in Part II of Schedule I, such percentage of the compensation which would have been payable in the case of permanent total disablement as is specified therein as being the percentage of the loss of earning capacity caused by that injury, and

(ii) in the case of an injury not specified in Schedule I, such percentage of the compensation payable in the case of permanent total disablement as is proportionate to the loss of earning capacity (as assessed by the qualified medical practitioner) permanently caused by the injury;

(d) Where temporary a half monthly payment of the sum disablement, whether equivalent to twenty-five per cent of total or partial, results monthly wages of the workman, to from the injury be paid in accordance with the provisions of sub-section (2).

(2) The half-monthly payment referred to in clause (d) of sub-section (1) shall be payable on the sixteenth day –

(i) from the date of disablement where such disablement lasts for a period of twenty-eight days or more; or

(ii) after the expiry of a waiting period of three days from the date of disablement where such disablement lasts for a period of less than twenty-eight days; and thereafter half-monthly during the disablement or during a period of five years, whichever period is shorter :

(a) there shall be deducted from any lump sum or half-monthly payments to which the workman is entitled the amount of any payment or allowance which the workman has received from the employer by way of compensation during the period of disablement prior to the receipt of such lump sum or of the first half-monthly payment, as the case may be; and

(b) no half-monthly payment shall in any case exceed the amount, if any, by which half the amount of the monthly wages of the workman before the accident exceeds half the amount of such wages which he is earning after the accident.

Explanation : Any payment or allowance which the workman has received from the employer towards his medical treatment shall not be deemed to be a payment or allowance received by him by way of compensation within the meaning of clause (a) of the proviso.

(3) On the ceasing of the disablement before the date on which any half-monthly payment falls due, there shall be payable in respect of that half-month a sum proportionate to the duration of the disablement in that half-month.

(4) If the injury of the workman results in his death, the employer shall, in addition to the compensation

same to the eldest surviving dependant of the workman towards the expenditure of the funeral of such workman or where the workman did not have a dependant or was not living with his dependant at the time of his death to the person who actually incurred such expenditure.

FACTORIES ACT, 1934

The laws relating to Factory is governed by Factory's Act, 1934. This law extends the whole of Pakistan.

Some Important Definitions:

"adolescent" means a person who has completed his fifteenth but has not completed his seventh year;
"**Adult"** means a person who has completed his seventeenth year;
"child" means a person who has not completed his fifteenth year;
"day" means a period of twenty four hours beginning at midnight;
"week" means a period of seven days beginning at midnight on Saturday night;
"**power"** means electrical energy, and any other form of energy which is mechanically transmitted and is not generated by human or animal agency;
"manufacturing process" means any process—
(i) for making, altering, repairing, ornamenting, finishing or packing, or otherwise treating any article or substance with a view to its use, sale, transport, delivery or disposal, or
(ii) for pumping oil, water or sewage, or
(iii) for generating, transforming or transmitting power
"worker" means a person employed, whether for wages or not, in any manufacturing process, or in cleaning any part of the machinery or premises used for a manufacturing process, or in any other kind of work whatsoever incidental to or connected with the manufacturing process or connected with the subject of the manufacturing process, but does not include any person solely employed in a clerical capacity in any room or place where no manufacturing process is being carried on;
"factory" means any premises including the precincts thereof whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried out with the aid of power, or is ordinarily so carried out, but does not include a mine subject to the operation of the Mines Act, 1923;
"machinery" includes all plant whereby power is generated, transformed, transmitted or applied;
"occupier" of a factory means the person who has ultimate control over the affairs of the factory;
"prescribed" means prescribed by rules made by the Provincial Government under this Act.

Seasonal Factory: Sec 4

It has been defined in section 4 of the Act which is given below:
For the purposes of this Act, a factory which is exclusively engaged on one or more of the following manufacturing processes, namely, cotton ginning, cotton or jute pressing, the decortications of groundnuts, the manufacturer of coffee, indigo, lac, rubber, sugar (including gur) or tea, or any manufacturing process which is incidental to or connected with any of the aforesaid processes, is a seasonal factory;
Provided that the Provincial Government may, by notification in the official Gazette, declare any such factory in which manufacturing processes are ordinarily carried on for more than one hundred and eighty working days in the year, not to be a seasonal factory for the purposes of this Act.
The Provincial Government may, by notification in official Gazette, declare any specified factory in which manufacturing processes are ordinarily carried on for not more than one hundred and eighty working days in the year and cannot be carried on except during particular seasons or at times dependent on the irregular action of natural forces, to be a seasonal factory for the purposes of this Act.

Powers of Provincial Government:

It has been defined in section 5 to 8 of the Act which is given below:
The Provincial Government may, by notification in the official Gazette, declare that all or any of the provisions of this Act applicable to factories shall apply to any place wherein a manufacturing process is being carried on or is ordinarily carried out whether with or without the use of power whenever ten or more workers are working therein or have worked therein on any one day of the twelve months immediately preceding.
A notification under sub-section (1) may be made in respect of any one such place or in respect of any class of such places or generally in respect of all such places.

Notwithstanding anything contained in clause (j) of section 2, a place, to which all or any of the provisions of this Act applicable to factories are for the time being applicable in pursuance of a declaration under sub-section (1), shall, to the extent to which such provisions are so made applicable but not otherwise, be deemed to be a factory.

The Provincial Government may, be order in writing, direct that the different departments or branches of a specified factory shall be treated as separate factories for all or any of the purposes of this Act.

Where the Provincial Government is satisfied that; following upon a change of occupier of a factory or in the manufacturing processes carried on therein, the number of workers for the time being working in the factory is less than twenty and is not likely to be twenty or more on any day during the ensuing twelve months, it may, by order in writing, exempt such factory from the operation of this Act;

Provided that any exemption so granted shall cease to have effect on and after any day on which twenty or more workers work in the factory.

In any case of public emergency the official Gazette, exempt any factory from any or all of the provisions of this Act for such period as it may think fit.

Inspector Staff:

It has been defined in section 10 of the Act which is given below:

The Provincial Government may, by notification in the official Gazette appoint such persons as it thinks fit to be Inspectors for the purposes of this Act within such local limits as it may assign to them respectively.

The Provincial Government may, by notification as aforesaid, appoint any person to be a Chief Inspector, who shall, in addition to the powers conferred on a Chief Inspector under this Act, exercise the powers of an Inspector through the Province

No person shall be appointed to be an Inspector under sub-section (1) or a Chief Inspector under sub-section (2) or, having been so appointed, shall continue to hold office, who is or becomes directly or indirectly interested in a factory or in any process or business carried on therein or in any paten or machinery connected therewith.

Every District Magistrate shall be an Inspector for his district.

The Provincial Government may also, by notification as aforesaid, appoint such public officers as it thinks fit to be additional Inspectors for all or any of the purposes of this Act, within such local limits as it may assign to them respectively.

In any area where there are more Inspectors than one, the Provincial Government may, by notification as aforesaid, declare the powers which such Inspectors shall respectively exercise, and the Inspector to whom the prescribed notices are to be sent.

Every Chief Inspector and Inspector shall be deemed to be a public servant within the meaning of the Pakistan Penal Code and shall be officially subordinate to such authority as the Provincial Government may specify in this behalf.

Powers of Inspector:

It has been defined in section11 of the Act which is given below:

The powers of inspector are as under:

(a) enter, with such assistants (if any), being persons in the service of the State or of any municipal or other public authority, as he thinks fit, any place which is, or which he has reason to believe to be, used as a factory or capable of being declared to be a factory under the provisions of section 5;

(b) make such examination of the premises and plant and of any prescribed registers, and take on the spot or otherwise such evidence of any persons as he may deem necessary for carrying out the purposes of this Act; and

(c) exercise such other powers as may be necessary for carrying out the purposes of this Act:

Provided that no one shall be required under this section to answer any question or give any evidence tending to criminate himself.

Certifying Surgeons: sec 12

The Provincial Government may appoint such registered medial practitioners as it thinks fit to be certifying surgeons for the purposes of this Act within such local limits as it may assign to them respectively.

A certifying surgeon may authorize any registered medial practitioner to exercise any of his powers under this Act :

Certifying Surgeons:

It has been defined in section 12 of the Act which is given below:

A certificate of fitness for employment granted by such authorized practitioner shall be valid for a period of three months only, unless it is confirmed by the certifying surgeon himself after examination of the person concerned.

Explanation.—In this section a "registered medical practitioner" means any person registered under the Medical Act, 1958, or any subsequent enactment amending it, or under any Act of the Central Legislature or any Provincial Legislature providing for the maintenance of a register of medical practitioners, and includes, in any area where no such register is maintained, any person declared by the Provincial Government, by notification in the official Gazette, to be a registered medical practitioner for the purposes of this section.

Facilities regarding health of workers required to be provided under the Act:

Cleanliness:

It has been defined in section 13 of the Act which is given below:

Every factory shall be kept clean and free from effluvia arising from any drain, privy or other nuisance, and shall be cleaned at such times and by such methods as may be prescribed, and these methods may include lime-washing or colour-washing, painting, varnishing, disinfecting and deodorising.

- Disposal of Water and Effluents: Sec 18
- Ventilation and temperature: Over crowding: Lighting: Sec 19
- Drinking Water: Sec 20
- Precautions in case of fire: Sec 25
- Fencing of machinery: Sec 26
- Prohibition of employment of women and children near cotton openers
- Protection of eyes: Sec 33 (g)

Provisions regarding working hours:

- Daily hours: Sec 36
- Weekly hours: Sec 34
- Intervals for rest: sec 37
- Overtime work: sec 47

Provisions regarding Child Workers:

- Working hours: Sec 54
- Fitness certificate: Sec 52

Provisions regarding Women Workers

- Machinery in motion: Sec 27
- Suitable room: Sec 33
- Working hours: Sec 36
- Working time: Sec 45

Provisions regarding Holidays with pay:

- Annual holidays : Sec 49(B)
- Casual leave: Sec 49(H)
- Sick leave: Sec 49 (H)

EMPLOYEES' SOCIAL SECURITY ORDINANCE, 1965

Title of the Ordinance:

It is called The (Provincial) Employees' Social security Ordinance, 1965. It extends to the whole of Pakistan.

Purpose of the Ordinance:

To introduce a scheme of social security for providing benefits to certain employees or their dependants in the event of:

- Sickness
- Maternity
- Employment injury or death
- Ancillary matters.

Important Definitions:

"appointed day" means in relation to any area, class of persons, industries, establishments or benefits, the day on which this Ordinance is applied to such area or in respect of such class of persons, industries, establishments or benefits;
"**Chairman"** means the Chairman of the Governing Body;
"Commissioner" means the Commissioner of the institution;
"Contribution" means the sum of money payable to the institution by an employer in respect of an employee, in accordance with the provisions of this Ordinance;
"dependent" means the wife or wives or a needy invalid husband ,dependent parents] and any unmarried children under the age of years dependent upon the secured person
[Provided that such age limit shall not apply to unmarried dependent daughters;]
"Disablement" means a condition caused by an employment injury which, as certified by a medical practitioner authorized for the purpose as provided in the regulations, has permanently reduced or is likely to reduce permanently a secured person's earning capacity, and disablement shall be "minor" where the loss of earning capacity [is less than twenty per centum], "partial" where the loss of earning capacity ranges from twenty-one per centum to sixty-six per centum, and "total" where the loss of earning capacity is in excess of sixty-six per centum;
"domestic servant" means any person working whole-time in connection with the work of any household for any consideration, whether in cash or in kind];
"Employment injury" means a personal injury to a secured person caused by an accident or by such occupational disease as may be specified in the regulations, arising out of and in the course of his employment;
"Establishment" means an organization, whether industrial, commercial, agricultural or otherwise;
"Fund" means the Employees' Social Security Fund set up under section
"Governing Body" means the Governing Body of the institution;
"Secured person" means a person in respect of whom contributions are or were payable under this Ordinance;
"Social Security Court" means a court constituted under section 60
"strike" and "lock-out" shall have the same meaning as is respectively assigned to them in the Industrial Disputes Ordinance, 1959 (LVI of 1959);
Topics covered under the Ordinance:

- Organization
- Contributions
- Finance and Audit
- Benefits
- Determination of Questions and Claims
- Offences and Penalties

Establishment and Incorporation of Employees Social Security Institution

- The institution is a body corporate
- It has power to acquire, hold and dispose off property.
- The institutions shall have its own funds which is called employees social security fund.

Management of the Institution

- The institution shall be managed by a governing body with the assistance of commissioner

Governing body
The Governing Body shall consist of the following members to be appointed by Government, by notification, namely:-

the Minister-in-charge of the Labour Department, a person who is or has been a Judge of the High Court, a senior officer in the service of Pakistan not below the rank of a Commissioner of a Division or Secretary to Government, and such person shall be the Chairman of the Governing Body];
Four persons to represent Government, one each respectively from the departments of Labour, Industries, Health and Finance;

- three persons to represent employers;
- three persons to represent secured persons;
- the Commissioner and the Medical Adviser, *ex-officio*].

Power and Functions of General Body:
To approve the budget estimates, the audited accounts and the annual report of the Institution for submission to Government in accordance with the provisions of this Ordinance; and
To call for any information, or direct any research to be made for the furtherance of the objects of this Ordinance.

Benefits provided by the Social Security Institution:

- Sickness benefit: Sec 35
- Maternity benefit: Sec 36
- Death grant: Sec 37
- Medical care during sickness and maternity: Sec 38
- Injury benefits: Sec 39
- Disablement pension: Sec 40
- Disablement gratuity: Sec 41
- Survivor's Pension: Sec 42
- Death grant in case of death while in receipt of injury benefit or total disablement: Sec 43
- Medical care in the case of employment injury: Sec 44

REVISIT OF MODULES:

MODULE 1
Scope of Law and Legal System of Pakistan
MODULE 2
Law of Contract (Contract Act, 1872)
MODULE 3
Law of Partnership (Partnership Act 1932)
MODULE 4
Law relating to companies (Companies Ordinance, 1984)
MODULE 5
Law of negotiable instruments
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Law relating to transfer of property (Transfer of Property Act, 1932)
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Law relating to sales of goods and
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