

LESSON – 1.2

MERCANTILE LAW OR COMMERCIAL LAW AND ITS SOURCES

Definition

The laws of a country relate to many subjects e.g .inheritance and transfer of property, relationship between persons, crimes and their punishment, as well as matters relating to industry, trade and commerce.

The term commercial law is used to include only the rules relating to industry, trade and commerce.

Commercial law or Mercantile law may therefore be defined as that part of law which regulates the transactions of the mercantile community.

The scope of commercial law is large. It includes the laws relating to contract, partnership, negotiable instruments, sale of goods, companies etc.

SOURCES OF INDIAN COMMERCIAL LAW

The commercial law of India is based upon statutes of the Indian legislature, English mercantile law and Indian maritime usages, modified and adapted judicial decisions.

We are stating below the sources from which the rules of commercial law of India have been derived.

1. Statutes of the Indian legislatures

The Statue law means Acts of Parliament. These are the most efficient and the most usual way of bringing about changes in law today. The legislature is the main sources of law in modern times. In India, the Central and State legislatures possess law making powers and have exercised the powers extensively. The greater part of Indian Commercial Law is statutory. The Contract Act, 1872 , the Sale of Goods Act, 1930, the Partnership Act, 1932, the Companies Act, 1956, are instances of the Statute law.

2. English Mercantile Law

Many rules of English Mercantile law have been incorporated into Indian Law through statutes and judicial decisions. Indian mercantile law is, in the main, an adaptation of the English Law. It is incorporated in a number of Acts, which follow to a considerable extent the English mercantile law with some reservations and modifications necessitated by the peculiar conditions prevailing in India. To ascertain the sources of Indian Mercantile law, we have, therefore, to trace the sources of the English Mercantile law. The

binding i.e., an agreement to have a cup of tea at a friend's house is simply a social obligation.

Example: “X” offers to play cards with “Y” for pleasure and “Y” accepts. If later on, “X” refuses to do so, “Y” cannot go to the court for enforcing the promise.

3. Lawful Consideration:

Subject to certain exceptions an agreement legally enforceable only when each of the parties to it gives something and gets something. An agreement to do something for nothing is generally not enforceable at law. The something given or obtained is called consideration. The Consideration may be an act (doing something) (or) forbearance (not doing something) or a promise to do or not to do something. Consideration may be past, present or future. But it must be real and lawful.

Example:

“X” agrees to sell his car to “Y” for Rs.1,00,000.

For “X”’s promise, the consideration is Rs.100,000.

For “Y”’s promise the consideration is the car.

4. Capacity of Parties:

The parties to an agreement must be legally capable entering into an agreement; otherwise it cannot be enforced by a court. Want of capacity arises from minority, lunacy, idiocy, drunkenness or similar other factors. If any of the parties to the agreements suffers from any such disability, the agreement is not enforceable by law, except in some special cases.

5. Free Consent:

The two parties to a contract must have agreed as to the particular subject matter in the same sense. By Section 13 “two or more persons are said to consent when they agree upon the same thing in the same sense “Such a meeting of minds creating an identity of opinion or will is carried to by using the term ‘Consensus-ad-idem’. The consent of parties not be affected by any flaw. The consent is said to be free when it is not used by coercion, undue influence, fraud, mistake or misrepresentation.

Example: ‘A’ threatens to beat “B” if he does not sell his land for a low price agrees to do so. The agreement has been brought about by coercion.

6. Legality of Object:

An agreement is unlawful and therefore unenforceable when the object for which the agreement is made is forbidden by law, or if permitted would defeat the provisions of any of the existing law or is fraudulent or involves an injury to the property of another or in the eyes of the court, is immoral, or opposed to public policy (Sec.23).

Thus an agreement will not become a contract or will remain unenforceable, if it is made for an unlawful consideration and with an unlawful object.

Example: 'A', 'B' and 'C' enter into an agreement for the division among them of gains acquired or to be acquired by them by fraud. The agreement is void.

7. Certainty of the Terms of the contract:

The terms of the agreement must be definite and certain and it must not contain any ambiguous information.

Example: '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 want of certainty.

8. Possibility of Performance:

The terms of the agreement must also be such as are capable of performance. An agreement to do an act which is impossible in practice cannot be enforced.

Example: When A agrees with B to find a treasure the agreement is void as it is impossible of performance.

9. Void agreements:

The agreements must not have been expressly declared to be void. Following agreements are expressly declared to be void under the Indian Contract Act:

- a. Agreement in restraint to marriage (Sec.26)
- b. Agreement in restraint to trade (Sec.27)
- c. Agreement in restraint to legal proceedings (Sec.28)
- d. Agreement having uncertain meaning (Sec.29)
- e. Wagering agreement (Sec.30)

10. Legal formalities:

The agreement may either be oral or in writing. But there are certain agreements which are required to be in writing e.g., lease, gift, sale, mortgage of immovable property, negotiable instruments, certain matters under the Companies Act, 1956. Such agreements must be in

Difference between void and voidable contract

	Void	Voidable
1	Not enforceable by law	Enforceable by law at the option of one of the parties to the contract.
2	It has no legally binding effect	It continues to be legal unless avoided by the party.
3	In a void contract, the defects are incurable	In a voidable contract, the defect is curable
4	A third party who purchased goods which had been the subject of a void contract will not acquire good title	But in voidable contract third party will acquire good title.

Difference between void contract and illegal contract

	Void	Illegal
1	All void contracts are not necessarily illegal	All illegal contracts are void
2	All collateral contracts to a void contract are not void	But all collateral contracts to a illegal contract are void
3	Ground for the voidness has to be proved.	Court will, of its own motion, in be case of an illegal contract, refuse to enforce it, even though the illegality has not been pleaded.

Valid contract: An agreement enforceable at law is a valid contract. An agreement becomes a contract when all the essentials of a valid contract stipulated in Sec. 10 are complied with.

2. Classification on the basis of Formation: A contract may be created in three different methods:

1. It may be in writing.
2. It may be made orally, and
3. It may be inferred from the circumstances of the case.

Contracts can be classified according to the mode of their formation as Express, Implied and Quasi contracts

could not sue for the amount on the ground that the promise made by the husband was never intended to give rise to legal consequences.

4. The terms of the offer must be definite and certain: The terms of the offer must be definite, unambiguous and certain and not loose and vague. To constitute a valid contract, it is essential that the proposal must be so certain, that the rights and obligations of the parties arising out of the contract can be exactly fixed. If the terms of an offer are uncertain, its acceptance cannot create any contractual relationship. According to Sec. 29 of the Act, agreements, the meaning of which is not certain or capable of being made certain are void.

Example: 'X' says to 'Y' "I will give you some money if you marry 'Z'". This is not an offer which can be accepted because the amount of money to be paid is not certain.

5. A mere statement of intention is not an offer: Every expression of willingness to enter into a contract may not amount to an offer in the legal sense. It may be only a first and preliminary step in the formation of a contract. Thus it becomes necessary to distinguish between the offer on the one hand and (i) a mere declaration of intention (ii) an invitation to make an offer, and (iii) auction sale on the other hand.

A distinction is usually made between an 'offer' and "a statement of intention". Price lists, catalogues and tenders from customers are merely statements of intention. They are not regarded as offers but as invitation to others to make offers.

Harvey Vs Facey: Harvey telegraphed to Facey asking to inform him whether he would sell Bumper Hall pen and if so at what price? Facey informed Harvey that the lowest price was \$900 but did not say that he was willing to sell at that price. Harvey telegraphed that he would buy at that price. Facey gave no reply to the telegram. Held, there was no contract because facey did not say that he was willing to sell or not. Mere mentioning of price is not an offer.

Similarly, in an auction sale, articles displayed in auction sale are displayed with an intention that the bidders present during the auction sale may bid for them. i.e. may make an offer for them. In an auction sale, a bid is an offer. It can therefore, be taken back at any time before acceptance is made by the auctioneer is effected by the fall of the hammer.

Mr. G applied for shares in a company. A letter of allotment was posted but the letter did not reach 'G'. held there was a binding contract and 'G' was shareholder of the company (Household Fire Co. Vs. Grant)

REVOCATION OF OFFER AND ACCEPTANCE

Revocation of an offer: An offer comes to an end and is no longer open to acceptance under the following cases-Sec.6

1. Lapse of time.
2. After expiry of reasonable time.
3. An offer lapses by the failure of the acceptor to fulfil a condition precedent to acceptance, where such a condition has been prescribed.
4. An offer lapses by the death or insanity of the proposer, if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance.
5. When the counter-offer is given, the original offer lapses.
6. A proposal once refused is dead and cannot be revived by its subsequent acceptance.

Example: 'A' offers to sell his farm to 'B' for Rs.1,00,000 'B' replies offering to pay Rs.90,000. 'A' refuses. Subsequently 'B' writes accepting the original offer. There is no contract because the original offer has lapsed.

7. By notice: If the offeror gives notice of revocation to the other party, an offer may be revoked anytime before acceptance but not afterwards. Once an offer is accepted there is a binding contract.

The acceptance of an offer becomes binding on the offeror as soon as the acceptance is put in course of communication to the offeror so as to be out of the power of the acceptor. But anytime before this happens, the offer may be revoked.

Example: A proposal is sent by 'X' to 'Y' and accepted by 'Y' by letter. The proposal might have been revoked anytime before the letter of acceptance was posted but it cannot be revoked after the letter is posted.

The notice of revocation does not take effect until it comes within the knowledge of the offeree.

LESSON - 2.3

CONSIDERATION AND CAPACITY OF PARTIES CONSIDERATION

Meaning

Consideration is an essential element in a contract. It is the sign and symbol of every bargain subject to certain exceptions. An agreement made without consideration is void. Consideration is the necessary evidence required by law of the intention of the parties to effect their legal relations. All contracts require consideration to support them. Consideration means the valuable considerations (i.e) the price paid for the other party's promise. Contract results where one party promises to do in exchange for something in return. Consideration is otherwise known as "something in return." In a nutshell, consideration is the price paid by the promisee for the obligation of the promisor.

Example

- (i) 'P' agrees to sell his land for Rs.2,00,000 to 'Q'. for 'P's promise, the consideration is Rs.2,00,000. For 'Q's promise, the consideration is the house.
- (ii) 'X' promises not to file a suit against 'Y' if 'Y' pays him Rs.10,000 on a particular date. 'X's act of not filing a case against 'Y' is the consideration for 'Y' and Rs.10,000 is the consideration for 'X'. If there is no consideration there is no contract.

In an Allahabad case, a person subscribed Rs.500 to rebuild a mosque. It was held that the promise was without consideration and the subscriber was not liable. (Abdul Aziz V. Masum Ali)

Definitions

Sec. 2(d) of contract act defines consideration as follows:

"when at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstains from doing, such act or abstinence or promise is called a consideration for the promise."

In the English case Currie V. Misa (1875) consideration was defined as, "some right, interest, profit or benefit accruing to one party for some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other."

Example: 'X' engages 'Y' as a steno in his office for Rs.2000 per month. The monthly wage is the consideration received by 'Y'. the services of 'Y' is the consideration for 'X'.

minor was absolutely void and therefore, the question of refunding the money did not arise. Had the agreement been only voidable, the benefit received would have been refunded under Sections 64 and 65 of the Act.

2. A Minor can be a Promisee or a Beneficiary: During his minority, a minor cannot bind himself by a contract, but there is nothing in the contract act which prevents him from making the other party to the contract to be bound to the minor. Thus, a minor is incapable of making mortgage, or a promissory note. But he is capable of becoming a mortgagee, a payee or endorsee. He can derive benefit under the contract.

3. A minor's Agreement cannot be Ratified by the Minor on his attaining Majority: A minor cannot ratify the agreement on attaining the age of majority as the original agreement is totally void from the beginning, and, therefore, validity cannot be given to it later on.

Example: Indira Ramasamy V Anthiappa Chettiar. 'A' a minor makes a promissory note in favour of 'B'. on attaining majority, he makes out a fresh promissory note in place of the old one. Neither the original nor the fresh promissory note is valid.

4. If a Minor has Received any Benefit Under a Void Contract he Cannot be Asked to Refund the same: We have already mentioned the facts in Mohiri Bibee's case. In that case, the lender could not recover the money paid to the minor. Also the property mortgaged by the minor in favour of the lender could not be sold by the latter for the realisation of his loan.

5. A Minor is Always Allowed to plead Minority: He is not prevented from this right even where he had procured a loan or entered into some other contract by falsely representing that he was of full age. Thus, an minor who has deceived the other party to the agreement by representing himself as of full age is not prevented from later asserting that he was minor at the time he entered into agreement.

Examples: Leslie V Shiell (1914) In this case 'S', a minor, borrowed £ 400 from L, a money lender, by fraudulently misrepresenting that he was of full age. On default by 'S', 'L' sued for return of £ 400 and damages for the crime. Held, 'L' could not recover £ 400, and his claim for damages also failed. Even on equitable grounds, the minor could not be asked to refund £ 400, as the money was not traceable as the minor had already spent it.

service rendered to the minor. Other examples of necessary services rendered to a minor are: provision of education, medical and legal advice, provision of a house on rent to minor for the purpose of living and continuing his studies.

8. Minor's parents or guardians are not liable to a minor's creditors for the breach of contract by the minor, whether the contract is for necessities or not. But the parents are liable where the minor is acting as an agent of the parents or the guardian.
9. A minor can act as an agent and bind his principal by his acts without incurring any personal liability.
10. **No specific performance:** An agreement by a minor being void, the court can never direct specific performance of such an agreement by him.
11. **No Insolvency:** A minor cannot be declared insolvent even though there are dues payable from the properties of the minor.
12. **Company' shares to a minor:** A minor cannot apply for and be a member of a company. If a minor has, by mistake, been recorded as a member, the company can rescind the transaction and remove the name from the register. But where a minor was made a member and, after attaining majority, he received and accepted dividends, he will be stopped from denying that he is a member. (*Fazlul Hoque V The Credit Bank of India*)

PERSONS OF UNSOUND MIND

Definition of "Sound Mind" for a valid agreement it is necessary that each party to it should have a sound mind. What is sound mind for the purpose of contracting is laid down in Sec. 12 of the Indian contract act.

Section 12: 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 judgement as to its effect upon his interests.

A person usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind. However, when he is of sound mind he is capable of becoming a party to a contract.

Illustrations

- (a) A patient in lunatic state of mind, who is at intervals of sound mind, may make a contract during these intervals.
- (b) A sane man who is delirious from fever, or who is so drunk that he cannot understand the terms of a contract, or form a rational judgement as to its effect on his interests, cannot contract whilst such delirium or drunkenness lasts. Unsoundness of mind may arise from insanity or lunacy, idiocy, drunkenness and similar factors.

Idiocy: The term idiot is applied to a person whose mental powers are completely absent. Idiocy is a congenital defect caused by lack of development of the brain.

Insanity or Lunacy: This is a disease of the brain. A lunatic is one whose mental powers are so deranged that he cannot form a rational judgement on any subject. Lunacy can sometimes be cured. Idiocy is incurable.

Drunkenness: Drunkenness produces temporary incapacity. The mental faculties are clouded for sometime, so that no rational judgement can be formed.

Effects of Agreements Made by Persons of Unsound mind

Agreements by persons of unsound mind are void. But an Agreement entered into by a lunatic or a person of unsound mind for the supply of necessities for himself or for persons whom he is bound to support (e.g. his wife, children) is valid as a quasi-contract under Section 68 of the Act. Only the estate of such a person is liable. There is no personal liability.

The guardian of a lunatic can bind the estate of the lunatic by contracts entered into on his behalf. The mode of appointments of such a guardian and his powers are laid down in the Lunacy Act.

Example: Inder Singh V Parmeshwardhari Singh (1957)

A person agreed to sell a property worth Rs.25,000 for Rs.7000. his mother proved that he was a congenital idiot and she pleaded for cancellation of the contract. The court held the agreement to be null and void.

DISQUALIFIED PERSONS

Aliens: An alien means a citizen of a foreign state. Contracts with aliens are valid. An alien living in India is free to enter into contracts which citizens of India. But the government may impose certain restrictions. Certain types of transactions with aliens may be prohibited. A contract with an alien becomes unenforceable if war breaks out with the country of which the alien concerned is a citizen.

Foreign Sovereigns: Foreign sovereigns or governments cannot be sued unless they voluntarily submit to the jurisdiction of the local court (Mighell V Sultan of Johore)

Professional Persons: in England, barristers and members of the Royal College of Physicians are prohibited by the etiquette of their profession from suing for their fees. But they can sue and be sued for all the claims other than their professional fees. In India, there is no such restrictions on barristers and physicians.

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obtained. In other words, the affected party can have the contract cancelled or if he so desires to insist on its performance by the other party.

Sec. 72: A person to whom money has been paid or anything delivered under coercion must repay or return it.

Example: A railway company refuses to deliver certain goods to the consignee, except upon the payment of an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as was illegally excessive.

UNDUE INFLUENCE

Definition: A contract is said to be induced by undue influence where,

- (i) One of the parties is in a position to dominate the will of the other, and
- (ii) He uses the position to obtain an unfair advantage over the other Sec. 16(1)

Sec. 16(2) provides that undue influence may be presumed to exist in the following cases:

1. Where one party holds a real or apparent authority over the other or where he stands in a fiduciary relationship to the other. Fiduciary relationship means a relationship of mutual trust and confidence, such a relationship is supposed to exist in the following cases – father and son; guardian and ward; solicitor and client; doctor and patient; saint and disciple; trustee and beneficiary etc.
2. Where a party makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily distress.

Example: ‘F’ 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 advanced. ‘F’ employs undue influence.

Consequences of Undue influence: An agreement caused by undue influence is a contract voidable at the option of the party whose consent was obtained by undue influence (Sec. 19-A).

3. In case of fraud the person who made the false statement cannot argue that the aggrieved person had the means of discovering the truth or could have done so with ordinary diligence.

MISTAKE

Definition: Mistake may be defined as an erroneous belief concerning something. Consent cannot be said to be 'free' when an agreement is entered into under a mistake.

Mistake is of two kinds:

1. Mistake of law
2. Mistake of Fact

Mistake of law: Mistake on a point of Indian law does not affect the contract. Mistake on a point of law in force in a foreign country is to be treated as mistake of fact

Example: 'A' and 'B' make a contract based on the erroneous belief that a particular debt is barred by the Indian law of limitation. This is a valid contract. The reason is that every man is presumed to know the law of his own country and if he does not he must suffer the consequence of such lack of knowledge. But if in the above case, the mistake is related to the law of limitation of a foreign country, the agreement could have been avoided (Sec. 20)

Mistake of Fact: An agreement induced by mistake of fact is void. Mistake of fact may be

1. a bilateral mistake
2. a unilateral mistake

Bilateral Mistake: When both the parties to the agreement are under a mistake of fact essential to the agreement, the mistake is called a bilateral mistake of fact and the agreement is void (Sec. 20). For the application of Sec. 20 the following two conditions are to be fulfilled.

- (i) The mistake must be mutual
- (ii) The mistake must relate to a matter of fact essential to the agreement.

Example: (1) and example (2)

1. 'A' agrees to buy from 'B' a horse. It turns out that, the horse was dead at the time of bargain, though neither party was aware of the fact, the agreement is void.
2. 'A' agrees to sell to 'B' a specific cargo of goods supposed to be on its way from England to Bombay. It turns out that, before the day of the bargain, the

Bailment for Reward: A bailment for reward is one where either the bailor or the bailee is entitled to remuneration.

Example: Motor car let out for hire; goods given to a carrier for carriage for a price; articles given to a person for being repaired for a remuneration etc.

Bailment can also take the form of any one of the following:

- a. Deposit
- b. Gratuitous
- c. Hire
- d. Pledge
- e. Carriage
- f. Given to complete a work

DUTIES AND LIABILITIES OF THE BAILOR

(1) Bailor's Duty to Disclose Faults in Goods Bailed: "The bailor is bound to disclose to the bailee faults in the goods bailed, of which the bailor is aware, and which materially interfere with the use of them, or expose the bailee to extraordinary risk, and if he does not make full disclosure, he is responsible for damages arising to the bailee directly from such faults [ssec. 150].

In case of bailment for reward (or) non-gratuitous bailment, the bailor is responsible for such damage, whether he was or was not aware of the existence of such faults in the goods bailed."

Example:

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

(2) To repay expenses to the bailee: In case of gratuitous bailment all ordinary expenses are to be borne by the bailee while extraordinary expenses are to be borne by the bailor and if the bailee has incurred such expenses, the bailor must repay to the bailee all such expenses. On the otherhand, in the case of non-gratuitous bailment, the bailor must repay even the ordinary expenses incurred by the bailee [Sec. 158].

Essentials of a valid Pledge

1. There must be a debt or a promise to perform some act.
2. Goods are bailed by way of security for the repayment of the debt or the performance of the promise.
3. Goods to be pledged must be delivered to the pledgee.
4. Only movable goods can be pledged.
5. Legal Possession is necessary in case of pledge and therefore, mere physical possession cannot be considered to be a pledge, e.g., a servant cannot pledge the goods belonging to his master because legally he is not the owner of those goods.

Rights of Pledgee or Pawnee

(1) Right of Retainer: “The pawnee can retain the goods pledged not only for payment of the debt or the performance of the promise, but also for the interest of the debt and all necessary expenses incurred by him in respect of the possession or for the preservation of the goods pledged” [Sec. 173]. The pawnee enjoys only particular lien. If the pawnee makes fresh advances to the same debtor it will be presumed that the debtor has agreed to create lien on the goods already pledged for the fresh advance [Sec. 174].

(2) Rights to sell: The pawnee may sell the goods by giving reasonable notice to the pawnor if the principal debt and the interest is not paid to him even if the pawnor's title to the goods was defective. If the sale results in deficit, he can recover the remaining amount by filing a suit against the pawnor.

(3) Rights to Sue the Pawnor: If the pawnor does not repay the debt or perform the promise after the expiry of the period, he may sue the pawnor for the same without losing his right of lien or the right to sell the goods pledged.

Rights of Pledgor or Pawnor

(1) Defaulting Pawnor's Right to Redeem [Sec. 177]: A pawnor who has committed default in the payment of the debt or in the performance of the promise within the stipulated time, may redeem (take back) the goods pledged, before the pawnee has sold the goods by giving a reasonable notice.

4. Right of Stoppage in Transit: This right is available to the agent in the following cases:

- a) Where he has purchased goods on behalf of the principal either with his own funds, or by incurring a personal liability for the price, he stands towards the principal in the position of an unpaid seller. Like an unpaid seller, he enjoys the right of stopping the goods in transit if in the meantime the principal has become insolvent.
- b) Where an agent holds himself liable to his principal for the price of the goods sold; for example, del credere agent; he may exercise the unpaid seller's right of stopping the goods in transit in case of buyer's insolvency.

5. Right of Indemnification (Sec. 222-224): The principal is bound to indemnify the agent against consequences of all lawful acts done by the agent in exercise of authority conferred upon him. However, the agent cannot claim indemnification for an unlawful act, even though the principal had agreed to do so.

6. Right to Compensation for Injury Caused by Principal's Negligence (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. **Example:** 'A' employs 'B' as a bricklayer in building a house and he failed to provide enough support systems and safety measures. Consequently, 'B' met with an accident. 'A' must make compensation to 'B'.

SCOPE OF AGENT'S AUTHORITY

Express and Implied Authority: The authority of an agent may be express or implied [Sec. 186]. The authority is said to be express when it is given by words or written. The authority is said to be implied when it is to be inferred from the circumstances of the case. The inference as to implied authority may be drawn from things spoken or written or ordinary course of dealing between the parties and others. (Sec. 187). **Example:** 'A' owns a shop in Serampur, himself living in Calcutta and visiting the shop occasionally. The shop is managed by B, and he is in the habit of ordering goods from 'C' in the name of 'A' for the purposes of the shop, and of paying for them out of A's funds with A's knowledge. 'B' has an implied authority from 'A' to order goods from 'C' in the name of 'A' for the purposes of the shop.

Sale and “Agreement to Sell” Distinguished

A contract for the sale of goods may be either a sale or an agreement to sell (Sec. 4).

Sale: Where under a contract of sale the ownership is transferred from the seller to the buyer the contract is called a sale. The transaction is a sale even though the price is payable at a later date or delivery is to be given in the future, provided the ownership of the goods is transferred from the seller to the buyer.

Agreement to sell: When the transfer of ownership is to take place at a future date or subject to some condition to be transferred are fulfilled later, the contract is called agreement to sell.

When an agreement to sell becomes a sale: An agreement to sell becomes a sale when the prescribed time elapses or the conditions, subject to which the property in the goods is to be transferred, are fulfilled.

Example:

- (i) P agrees to buy from B a haystack on B's land with liberty to come on 'B's land to take it away. This is a sale because the property in the goods has passed to the buyer.
- (ii) 'P' agrees to buy a quantity of soda to arrive by a certain ship. This is an agreement to sell because the property in the goods will pass to the buyer when the goods come and the agreement is naturally subject to the condition that the ship arrives in port with the goods.

Distinction between a condition and warranty

Condition	Warranty
1. A condition is a stipulation which is essential to the main purpose of the contract. 2. A breach of condition gives the aggrieved party a right to sue for damages as well as right to repudiate the contract.	1. A warranty is a stipulation which is only subsidiary to the main purpose of the contract. 2. A breach of warranty gives him only the right to sue damages. The damages cannot be repudiated.

The Distinction between the two may be illustrated as follows: A man buys a particular horse, which is warranted quiet to ride and drive. If the horse turns out to be vicious, the buyer's only remedy is to claim damages. But if instead of buying a particular horse, a man asks a dealer to supply him with a quiet horse and the horse turns out to be vicious, the stipulation is a condition and the buyer can reject the horse and claim damages.

Implied Conditions and Warranties

A stipulation in a contract of sale of goods may be express or implied. Express terms are those which have been expressly agreed upon by the parties. Implied terms are those which have been enacted in Sections 14 to 17 of the Sale of Goods Act.

Implied Conditions

- 1. Conditions as to title:** There is an implied condition on the part of the seller that in the case of a sale he has the right to sell the goods, and in the case of an agreement to sell, he will have the right to sell the goods at the time when the property is to pass [Sec. 14(a)]. **Example: Rowland V. Divell** 'R' bought a motor car from D and used it for four months. D had no title to the car. 'R' was forced to return the car to the true owners. Held, there is a breach of the implied condition as to title and 'R' is entitled to get back the purchase money paid, notwithstanding the fact that he had used the car for four months.

Unpaid Seller's Lien is lost in the following circumstances:

- i. When the seller delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer, without reserving a right of disposal of goods to himself; example; takes R/R or Transport Receipt in the name of buyer or his agent.
- ii. Where the buyer or his agent lawfully obtains possession of the goods;
- iii. By waiving the right of lien
- iv. Where he assents to a sub-sale;
- v. Where he takes a security from the buyer for the payment of the price, in place of his lien.
- vi. Lien of an unpaid seller is lost, once the possession is lost.

In a Bombay case on a sale of certain shares the relevant share certificates and transfer forms duly signed were handed over by the seller to the buyer against payment of price by cheque. On the buyer becoming subsequently insolvent, it was held that the seller had no lien on the share certificate or transfer forms. His lien is lost when he parted with their possession. *Bhameha V. Wadilal*

1. (b) Right of stoppage in transit: (Sections 50-52): When the buyer of goods becomes insolvent and the goods are in course of transit to the buyer, the seller can resume possession of the goods from the carrier. This is known as the right of stoppage in transit.

Rules Regarding the Course of Transit:

1. The goods are deemed to be in course of transit from the time they are delivered to the carrier to the time they are delivered to the buyer or his agent.
2. The right of stoppage-in-transit comes to an end as soon as the goods are delivered to the buyer or his agent.
3. Where a part delivery has been made, the remainder of the goods may be stopped in transit unless It is shown that the part delivery was made under such circumstances as to show an agreement to give up possession of the whole of the goods.

Types of Crossing

Crossing may be divided into three types viz. (1) General crossing (2) Special crossing and (3) Restrictive crossing.

1. General Crossing: In general crossing two parallel transverse lines are put on the face of the cheque at left hand corner at the top and in between the lines the words “and company” or its abbreviation “& Co” is written. The words “not negotiable” are also added in certain cases.

Specimens: Fig. in the next page .When a general crossing is done the drawee banker should not make payment unless it is presented through a banker.

2. Special Crossing: If a cheque bears across its face an addition of the name of a banker, either, with or without the words ‘not negotiable’, the cheque is deemed to be crossed specially (Sec. 124) Even transverse lines are not necessary in case of a special crossing.

Specimens: Fig. in the next page .In the case of specially crossed cheques payment can be obtained only through the particular banker whose name appears on the cheque.

3. Restrictive Crossing: This type of crossing has come into practice by commercial and banking usage. The words ‘A/C payee’ is added to general or special crossing, under this type.

Specimens: Fig. in the next page . This type of crossing gives an indication to the collecting banker that the amount collected on the cheque is to be credited to the bank account of the payee. It should be noted that account payee cheques are negotiable.

Not Negotiable Crossing: The words ‘not negotiable’ written in crossing does not restrict further transferability of the cheque. But it takes away the main feature of negotiability. That is, normally a holder with a defective title can give a good title to a subsequent holder in due course. But if it is crossed “not negotiable” on a cheque, the title of the transferee of such a cheque cannot be better than that of its transferor. It gives protection to the drawer and holder against miscarriage or dishonesty in the course of transit.

Who can Cross a Cheque: A cheque can be crossed generally or specially by the (a) drawer (b) The holder or (c) . The banker. If the drawer has crossed it generally the holder or the banker can cross it specially.

13. Undated Bills and Notes: A negotiable instrument cannot be made invalid for the reason that it is not dated, when it satisfies all other aspects. A holder in due course is empowered to insert the true date of acceptance. This insertion is not taken as a material alteration.

Bills in Sets: In foreign trade, sometimes a bill of exchange is prepared in sets of two or three to avoid problems resulting from losing one during the transit. These are called bills insets. If anyone from the set reaches the drawer for acceptance and comes back safe, without delay, the purpose is served. Each part of the bill in the set is called a “via”. As soon as any of the parts in the set is accepted and paid, the other parts become ineffective.

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5. Partners: Each partner in a trading firm has the implied authority to bind his co-partners by drawing, endorsing, accepting or negotiating bills, notes and cheques. But a partner of a non-trading firm has no such implied authority.

6. Joint Hindu Families: In a joint Hindu family the eldest person viz. Karta alone has the capacity to contract on behalf of the family. Therefore an instrument executed by him binds all other members of the family.

7. Legal Representative: After the death of the holder of a negotiable instrument, the legal representative gets all the rights and liabilities on such instruments.

Holder and Holder In Due Course

Holder - (Sec-8): Holder of a negotiable instrument is any person entitled in his own name (i) to the possession of an instrument and (ii) to receive or recover the amount due thereon from the parties thereto.

Holder in Due Course (Sec-9): A holder in due course is any person who for considerations becomes a possessor of a negotiable instrument (if payable to bearer) provided he got possession before the amount mentioned in it became payable and without sufficient cause to believe that any defect existed in the title of the person from whom he derived his title.

Privileges of a Holder in Due Course

A holder in due course is at a privileged position. He is protected from certain risks to which an ordinary holder of the negotiable instrument is exposed to. The following are the special privileges of a holder in due course:

1. When the Instrument is Inchoate: A blank instrument stamped and signed without filling up the amount is called an inchoate instrument. If such an instrument is filled up by a holder in due course and presented when it is due, payment cannot be denied for the reason that the amount is filled up without the authority, so long as the amount does not exceed the amount covered by the stamp.

2. When the Payee is Fictitious: Even when the names of the drawer and the payee are fictitious in a negotiable instrument the holder in due course can claim the amount from

the acceptor. That is, the acceptor of a bill cannot avoid payment to a holder in due course for the reason that other parties to the bill were fictitious.

3. When the Instrument is Made without Consideration: A contract made without consideration is void. But if a negotiable instrument made without consideration gets into the hands of a holder in due course, the absence of consideration cannot be raised against him or subsequent holders deriving title from him.

4. When there are Prior Parties: Every prior party to a negotiable instrument is liable thereon, to a holder in due course, until the instrument is duly satisfied (Sec. 36).

5. When the Instrument was Escrow: When a negotiable instrument is delivered to a person for a special purpose without intention of transferring the property therein, it is called an escrow. If that person negotiates it and it finally comes into the hands of a holder in due course the parties to the instrument cannot avoid liability on the ground that it was an escrow.

6. When the Instrument is Defective Due to Fraud or Illegality: Where at any time the instrument was affected by fraud or illegality while passing through the previous parties, it gets cleaned up when it comes into the hands of a holder in due course. Any defect in the title of the instrument will not affect the rights of the holder in due course provided he himself was not a party to the fraud.

7. When the Instrument was Obtained for Unlawful Consideration or by Unlawful Means: The person liable to pay on a negotiable instrument cannot avoid payment to a holder in due course on the ground that the instrument was lost or that it was obtained from him by means of an offense or fraud or for an unlawful consideration.

8. When the Validity of the Instrument is Denied: The validity of an instrument cannot be denied when it is in the hands of a holder in due course. There is an estoppel against denying original validity of instrument when it is in the hands of a holder in due course.

9. When the Payee's Capacity to Endorse is Challenged: When the instrument is in the hands of a holder in due course, there is an estoppel against denying the capacity of payee to endorse.

4. Partial Endorsement: When an endorsement is done only for one part of the amount of the instrument it is said to be a partial endorsement. A partial endorsement does not result in the negotiation of the instrument. But where one part of the endorsement is paid and is noted on the instrument, then the instrument can be negotiated.

5. Conditional Endorsement: An endorsement is conditional when it limits or removes the liability of the endorser, while a restrictive endorsement places restriction on the negotiability of the instrument a conditional endorsement limits or removes the liability of the endorser. The following are the different types of conditional endorsements.

(a) *Sans Recourse Endorsement:* When an instrument is endorsed by adding the words “Sans Recourse” to the Endorsement he does not incur the liability of an endorser to the endorsee.

Example: “Pay ‘X’ or order Sans Recourse”. After such an endorsement if the instrument is dishonoured the holder of the instrument cannot claim payment from the endorser.

(b) *Contingency Endorsement :* An endorsement, where the endorser gets the liability only on the happening of an event which may or may not happen, is called contingency endorsement.

Example: “Pay ‘X’ or order on his marriage with ‘C’.” In such an endorsement the liability of the holder as an endorser would arise only if ‘X’ marries ‘C’.

(e) *Facultative Endorsement:* The endorser by express words abandons some right or takes up some liability under this type of endorsement.

Example: “Pay ‘X’ or order, Notice of dishonour not required”. The endorser has a right to get notice of dishonour. But in this example he abandons the right.

(d) *‘Sans Frais’ Endorsement:* An endorsement which does not make the endorsee or the holder of the instrument to incur any liability on account of the instrument, is called a sans frais Indorsement.

QUESTIONS

1. What is a negotiable instrument? Explain its special characteristics?
2. What are the types of negotiable instruments?
3. What is a promissory note? What are its essential elements?
4. Distinguish between (a) a bill and a promissory note and (b) a bill and a cheque.
5. What is meant by crossing a cheque? Who can cross a cheque? What is the difference between a general crossing and a special crossing?
6. Explain the significance and legal implications of marking a cheque.
7. In what respects does an accommodation bill differ from other bills?
8. What is the effect of the words 'not negotiable' written in the crossing of a crossed cheque?
9. Write short note on;
(a) a bill in sets, and (b) a holder in due course.
10. What are the liabilities of (a) the drawer and (b) the endorsers (assuming there are more than one) in case of a bill of exchange.
11. A holder in due course gets a title free from equities; comment.
12. Explain clearly what is meant by negotiation. How is it effected and in what way does it differ from an ordinary assignment?
13. Explain the meaning and effect of (a) endorsement in blank (b) special endorsement (c) restrictive endorsement.
14. What is the effect of fraud, forgery and absence of consideration on a negotiable instrument?
15. Write notes on: (a) endorsement sans recourse (b) allonge (c) negotiation back.
16. What is meant by acceptance of a bill of exchange? When must a bill be accepted? If acceptance is refused, what steps should the holder take?
17. Define acceptance for honour; Can the drawer of a bill of exchange accept it for honour?
18. When is a negotiable instrument considered as dishonoured? what are the duties of a holder upon such dishonour?
19. When is a negotiable instrument said to be discharged? What is the difference between discharge of an instrument and discharge of a party to an instrument?
20. What is a hundi? What are its various kinds?

money and property belong to the company and not to the shareholders. The member's personal property cannot be held liable to pay the creditors of the company. In *Solomon V. Solomon & Co.Ltd.*, it was held that company is a different person altogether from its members. It is this feature of corporate personality that distinguishes it from other forms of business organizations.

3. Perpetual Succession: Section 34(2) of the Act states that an incorporated company has perpetual succession. The life of a company is not related to the life of its members. Law creates the company and the law alone can dissolve it. The existence of a company is not affected by death, insolvency, retirement or transfer of shares of members. Members may come and members may go, the company continues until it is dissolved. Gower, L.C.B in his book has given an interesting example. He says "During the war all the members of one private company, while in general meeting, were killed by a hydrogen bomb. But the company survived, not even a hydrogen bomb could have destroyed it."

4. Limited Liability: It is the most important advantage of a corporate form of business organization. It means that the liability of a member should be limited to the nominal value of the shares held by him. Once he has paid the full amount on the shares held by him, he cannot be called upon to bear the loss from his personal property. In the case of a company limited by guarantee, the liability of members is limited up to the amount guaranteed by a member. In case of partnership, the liability of members is unlimited. It may, however, be noted that the benefit of limited liability accrues only to members and not to the company as such. A company, in fact, incurs unlimited liability.

5. Transferability of Shares: The shares of a joint stock company are freely transferable except in the case of a private company. A shareholder can transfer his shares to any person without the consent of other members. A company cannot impose absolute restrictions on the rights of members to transfer their shares. However, the articles shall lay down the procedure of transfer of shares and it may also contain bonafide and reasonable restrictions on the rights of members to transfer their shares.

6. Separate Property: Because of its corporate personality, a company can own and transfer property in its own name. Although the shareholders have contributed to the capital of the company, they do not become the part owners of its property. Property of the

These companies may be:

- (a) Companies limited by shares;
- (b) Companies limited by guarantee; or
- (c) Unlimited companies.

(a) Companies limited by shares: Where the liability of the members of a company is limited by the Memorandum to the amount, if any, unpaid on the shares, such a company is known as a company limited by shares [Sec. 12(2) (a)]. If the shares are fully paid, then the liability of the member is nil. On the other hand, in case of partly paid-up shares, his liability will extend to the amount unpaid on shares held but him. The liability of the members to pay the unpaid amount can be enforced during the existence of the company found in India.

(b) Companies limited by guarantee: Where the liability of the members of a company is limited by the Memorandum to a fixed amount which the members undertake to contribute to the assets of the company in case of its winding up, the company is called a company limited by guarantee [Sec. 12(2)(b)].

Such companies are generally non – trading companies, and they are not formed for the purpose of earning profits, rather they are formed for the promotion of art, science, sports, culture etc. Such companies may be registered with or without a share capital. The Articles of such a company must state the number of members with the company is to be registered [Sec. 27(2).]

(c) Unlimited companies: A company not having any limit on the liability of its members is termed as an unlimited company [Sec. 12(2) (c)]. The members are personally liable for the debts of the company. It should, however, be noted that because of separate legal entity of the company. The creditors of an unlimited company cannot sue the members directly. The creditors will have to ask the court for the winding up of the company and then the members have to contribute their property and then the Liquidator shall use the funds in the discharge of the debts of the company. Such companies may or may not have share capital.

Government of India Notification No. S.O.1578 dated 8 July 1961. The license may at any time be revoked by the Central Government, if the fundamental conditions of the license are contravened; such companies may be public or private companies and may or may not have share capital.

It is worth nothing that a partnership firm may be a member in a licensed company in its firm name and it is only on the dissolution of the firm that its membership shall cease [Sec. 25(4)].

2. One-man Company or Family Company

Where one man holds Practically the whole of the share capital of a company and takes a few more dummy members (usually family members) simply to meet the statutory requirement of the minimum number of persons (6 more persons in case of a public company), such a company is known as “one-man company”, such a company is perfectly in order in the eyes of law and is regarded to have a separate entity, as distinct from the majority shareholder (Salomon us. Salomon & Co. Ltd.).

3. Foreign Company

A foreign company means a company incorporated outside India but having a place of business in India [Sec. 59(1)].

Within 30 days of the establishment of the business in India, a foreign company has to furnish to the Registrar, the following documents as per Section 592;

- (1) A certified copy of the Charter, Statute, Memorandum and Articles of the company, containing the constitution of the company. If the instrument is not in English language, a certified translation thereof.
- (2) The full address of the Registered, or Principle Office of the company.
- (3) A list of directors and secretary of the Company giving name in full, usual residential address, nationality of origin, his business and particulars of other directorships held by him.
- (4) The names and address of any person or persons resident in India, authorized to accept service of legal process and notices on behalf of the company.
- (5) The full address of that office of the company in India which is to be deemed as its principal place of business in India.

(b) Where in addition to the Central Government, any State Government is also a member of Government company, that State Government shall place a copy of the annual report (prepared by Central Government) together with a copy of the audit report and the comments (referred to earlier) before the House or both Houses of the State Legislature.

(c) Where the Central Government is not a member of Government company, every State Government which is a member shall cause an annual report on the working and affairs of the company to be prepared within the same time (as referred to above), and then soon after lay it before the House or both Houses of the State Legislature with a copy of the audit report and comments thereupon.

(3) Application of the Companies Act: A Government company is to be registered under the Companies Act. It may be incorporated as a 'public' or 'private' company. The Central Government may, however, by notification in the Official Gazette, direct that any of the provisions of this Act shall not apply to any Government company or shall apply only with such exceptions, modifications shall be effective to the extent to which it is approved by Parliament (Sec. 620). Subject to such notification, such companies are governed by the Companies Act like any other limited company without any discrimination. The Central Government has issued notifications (published in the Gazette of India, dated 11 February and 4 March 1971) granting certain exemptions from complying with the provisions of Sections 198, 259, 268, 269, 309, 310, 311, 387 and 388 relating to the appointment of them. Similarly, Section 255, 256 and 257 pertaining to appointment and retirement of directors, and Section 370 relating to making of loans, etc., to companies under the same management shall not apply to such Government companies which are wholly owned by the Central or/and State Government(s).

In a bid to streamline the functioning of Government companies and to cut down delays, the Central Government has again issued five notifications (published in the Gazette of India, dated 16-7-85) granting exemption to Government companies from the application of the following Sections of the Companies Act:

- (i) Section 165, 187D, 294, 294AA(2) and (3).
- (ii) Section 108 in respect of shares held by nominees of government,

it has further been notified that Sections 43A, 149 (2A), 205A, 205B, 263, 264, 265, 266, 307, 308, 316, 317 and 386 of the Companies Act shall not apply to Government companies wholly owned by Central or/and State Government(s).

- b. Where its annual turnover at any time is not less than Rs.10 crores for three consecutive financial years.
- c. Where it holds not less than 25 per cent of the paid-up share capital of a public company, having a share capital.
- d. Where it invites, accepts or renews deposits from the public, Acceptance of deposits by a private company from its members, directors, or their relatives is excluded from the purview of this provision.

Privilege to Companies deemed to be public: The Articles of Association of a private company, which has become public by virtue of Sec. 43-A, may continue to have the essential requirements (viz., restriction on transfer of shares, limitation of the number of members to fifty and prohibition to the public to buy shares or debentures) which make it a private company.

A private company which becomes a public company by virtue of Sec. 43-A continues to be a public company until it has with the approval of the Central Government again become a private company.

3. Conversion by Choice (Sec.44): A private company may deliberately choose to become a public company. The requirement of Section 3(1)(ii) may be deleted by passing a special resolution. Within 30 days of its becoming a public company, it shall file with the Registrar a prospectus or a statement in lieu of prospectus along with a copy of the special resolution.

Conversion of public company into a private company

A public company may be converted into a private company without resorting to winding up of the company. There is no statutory bar on the conversion of a public company into a private company. According to Sec. 31 of the Companies Act, no alteration made in the Articles which has the effect of converting a public company into a private company shall have effect unless such alteration has been approved by the Central Government. The company must amend its articles by a special resolution so as to include therein the necessary restrictions and file with the Registrar within thirty days.

2. Arrangement must be made for the preparation and printing of the Memorandum, and Articles of Association and for having them stamped according to the Indian Stamp Act.

3. The Memorandum and Articles are to be signed by at least 7 or 2 subscribers depending upon the nature of the company and each subscriber should add his address, description and occupation and the number of shares subscribed for; the documents should also be dated.

4. The promoters of the company should make arrangements for filing the following documents with the Registrar of Companies and paying the necessary fees for the incorporation of the company.

(a) Memorandum of Association

(b) Articles of Association

(c) Agreement if any, which the company proposes to enter into with any individual for appointment as its managing or whole time director or manager.

(d) Name availability letter received from the Registrar.

(e) In case the name of first directors are given in the Articles or in the Prospectus, then the written consent of the directors to act as such in Form No. 29. Such persons shall have to give a written undertaking to take up and pay for their qualification shares.

(f) A statutory declaration that all the requirements of the Act and the rules thereunder in respect of registration have been complied with. The declaration may be signed by any of the following:

(i) An advocate of the Supreme Court or of a High Court

(ii) An attorney or pleader entitled to appear before a High Court

(iii) A chartered Accountant in whole time practice in India

(iv) A company secretary in whole time practice in India

(v) A person named in the Articles as a director, managing director, manager or Secretary of the Company.

This declaration should be on a non-Judicial stamp paper of appropriate value.

(g) The prescribed fee should be paid along with application. The amount of fees depends on the nominal capital of the company to be incorporated. The fee can be

3. **Objects clause:** Of all the clauses in the memorandum the object clause is the most important. It should specify in unambiguous language the objects for which the company is formed. Great care should be taken in drawing up this clause, as the company will not be allowed to do any business which is not specifically mentioned here. As it is difficult to alter the objects clause later, it is necessary that promoters should include in this clause all possible types of business in which a company may engage in the future. Although it is best to state all powers in addition to the objects clause, yet if the company does anything which is incidental to and consequential upon the powers specified, such an act will not be illegal. Thus a trading company under its implied - power, though not mentioned in the objects clause, can borrow, draw and accept bills in the ordinary course of business.

According to the amendment to the Companies Act made in 1965, the objects clause of a company formed after the commencement of the Amendment Act must contain:

- (i) Main Objects of the company and objects incidental or ancillary to the attainment of these main objects;
- (ii) Other objects of the company not included above.

A statement of the objects in the Memorandum has two fold operation: It states affirmatively the ambit and extent of vitality and power which by law are given to the corporation, and it states, if it is necessary so to state, negatively that nothing shall be done beyond that ambit, and that no attempt shall be made to use the corporate life for any other purpose than that which is so specified. A company which has a main object together with a number of subsidiary objects cannot continue to pursue the subsidiary object after the main object has come.

4. **Liability clause:** This clause has to state the nature of liability that members incur. In the case of a company limited by shares, the members are liable only up to the amount paid on the shares taken by them. In the case of a company limited by guarantee, the members are liable to the amount undertaken to be contributed by them to the assets of the company in the event of its being wound up.

In case (a), notice is to be given within thirty days after the date of the change to the Registrar who shall record the same [Sec. 146(2)].

In case (b), special resolution is required to be passed at a general meeting of the shareholders and a copy of it is to be filed with the Registrar within thirty days. Then within thirty days of the removal of the office, a notice has to be given to the Registrar of the new location of the office.

Change of Registered Office from one State to another [Sec. 17]

A company may, by special resolution, alter the provisions of its Memorandum so as to change the place of its registered office from one state to another for certain purposes referred to in Sec. 17(1). The alteration shall take effect only when it is confirmed by the Company Law Board. (Procedure is similar to alteration of objects). The Board shall consider the objections of persons whose interests will, in the opinion of the Board, be affected by the alteration (Sec. 17(3)).

Where the alteration involves a transfer of the registered office from one state to another state, a certified copy of the order confirming the alteration shall be filed by the company with the Registrar of each of the states and Registrar of each state shall register the same. All the records of the company shall then be transferred to the Registrar of the state in which the registered office of the company is transferred [Sec. 18 (3)].

Alteration of Objects clause

Section 17 empowers a company by a special resolution duly confirmed by the Company Law Board (CLB) to alter the objects (or to change the places of its registered office from one state to another) if the alteration is required to enable the company

1. to carry on its business more economically and more efficiently.
2. to attain its main purpose by new or improved means.
3. to enlarge or change the local area of its operation.
4. to carry on some business which under existing circumstance may be conveniently or advantageously combined with the business of the company.
5. to sell or dispose of the whole, or any part of the undertaking, or
6. to restrict or abandon any of the objects specified in the memorandum.
7. to amalgamate with any other company or body of persons.

LESSON-7.2 ARTICLES OF ASSOCIATION

Definition

Section 2(2), of the Companies Act defines the ‘articles’ as, “the articles of association of a company as originally framed or as altered from time to time in pursuance of any previous company law or of this Act including, so far as they apply to the company, the regulations contained in Table A in schedule-I of this Act”. The articles of association of a company and its by-laws are regulations which govern the management of its internal affairs and the conduct of its business. They define the duties, rights, powers and authority of the shareholders and the directors in their respective capacities and of the company. And the mode and form in which the business of the company is to be carried out. The Articles of association of a company have a contractual force between the company and its members as also between the members’ interest in relation to their rights as such members.

REGISTRATION OF ARTICLES OF ASSOCIATION

According to Sec. 26, a public company limited by shares may register the articles of association signed by the subscribers to the memorandum. If however, it does not register its own articles then the articles given in Table A of schedule I become applicable. Further, even if it does register articles of its own, Table A will apply automatically unless it has been excluded or modified. The articles of a company must be: (i) printed (ii) divided into paragraphs numbered consecutively (iii) signed by subscribers to the memorandum in the presence of at least one witness who shall attest the signatures. The articles are to be stamped with requisite stamp and be filed along with the memorandum.

Contents of Articles

The articles of a company usually deal with the following matters:

- (1) The business of the company, the amount of capital issued and the classes of shares into which the capital is divided; the increase and reduction of share capital.

Part II of Schedule II

Requires the company to give detailed information. This part is further sub-divided into three parts, viz., General information, financial information and statutory and other information.

General Information shall include information on matters like

1. Consent of directors, auditors, solicitors, managers to the issue, Registrars to the issue, Bankers of the company, Bankers to the issue and experts.
2. Change, if any in directors and auditors during the last 3 years and reasons there for.
3. Procedure and time schedule for allotment and issue of certificates.
4. Names and addresses of company secretary, legal advisor, lead managers, co-managers, Auditors, Bankers to the issue and Brokers to the issue.

Financial information includes

1. Reports of the auditors of the company with respect to its profits and losses and assets and liabilities and the dividends paid during the five financial years immediately preceding the issue of prospectus.

2. Report by the accountants on the profits or losses for the preceding five financial years and on the assets and liabilities on a date which must not be more than 120 days before the date of the issue of the prospectus.

Statutory and other information includes information about

1. Minimum subscription
2. Expenses of the issue
3. Underwriting commission and brokerage.
4. Previous public or rights issue giving particulars about date of allotment, refunds, premium/discount etc.
5. Issue of shares otherwise than for cash.
6. Particulars about purchase of property, if any.
7. Revaluation of assets, if any.
8. Material contracts and time and place where such documents may be inspected.

Part III of the Schedule Gives explanation of certain terms and expressions used under Part - I and Part — II of the schedule.

are guided, as it provides an opportunity to study the contents of the abridged prospectus before submission to the designated bankers/same company. The particulars that are required to be furnished in the prescribed format Form 2A according to rule 4CC of Companies (Central Government) General Rules & Forms 1956, are enumerated below;

1. General information; (2) capital structure of the company; (3) Terms of the present issue; (4) particulars of the issue; (5) company management and projects; (6) schedule of implementation of the project, (7) products to be manufactured, future prospects etc., (8) payment! refunds. (9) particulars of companies under the same management; (10) Managements perception of risk factors.

Refusal Goods for Registration of Prospectus

The Registrar is empowered to refuse registration of the prospectus under the following grounds: (I) if the prospectus is not dated; (ii) if the prospectus contains a statement purported to be made by an expert without a statement that he has given and has not withdrawn his consent; (iii) if it does not contain consent in writing of directors; (iv) if a copy of the documents mentioned u/s 60(1) has not been filed.

Voluntary Disclosure

The prospectus is the window through which an investor can look into the soundness of the company's venture. The prospective buyer of shares is entitled to all true disclosures in the prospectus. It should not conceal any matter which ought to be revealed. In a nutshell the prospectus shall tell the truth, the whole truth and nothing but the truth. This ruling is called 'the golden rule' for framing a prospectus. This ruling was laid down by V.C. *Kindersley* in *New Brunswick and Canada Railway and Land company Vs. Muggeridge* (1860)

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Deemed Prospectus

According to Sec. 64, an offer for sale is a prospectus and it is deemed to have been issued by the company. Sec. 64 provides that where a company allots or agrees to allot any shares or debentures of the company with a view to allot any of those being offered for sale to the public, the document by which the offer of sale to the public is made shall for

The Golden Rule

It is the duty of those who issue the prospectus to be truthful in all respects. This Golden Rule was enunciated by Kindersley, V.C. in *New Brunswick, etc., co Vs. Muggeridge* and has come to be known as the golden legacy.

The burden of proof in a suit by an allottee that he has been misled by the mis-statement in the prospectus lies on the allottee. He must prove the following:

- (i) the mis-representation was a fact
- (ii) it was in respect of a material fact.
- (iii) he acted on the misrepresentation and
- (iv) he has suffered damages in consequence.

Civil Liability

A person who has been induced to subscribe on the faith of an untrue statement in the prospectus has remedies against the (i) Company (ii) the directors and promoters and experts.

Remedies for mis-representation in prospectus: A company is responsible for a statement in prospectus only if it is shown that the prospectus was issued by the company. The company is liable though the prospectus is issued by the promoters, the Board ratifies and adopts the issue, for the prospectus is the basis of the contract for shares.

Remedies against the company

(i) Rescission of the contract: Where a prospectus contains mis-statement whether innocent or fraudulent, the agreement to take up shares is voidable at the option of the aggrieved shareholder. He may apply to the court for the contract to be set aside, and his name to be struck off from the Register of members. He may also claim his money

(ii) Action for damages: The allottee may recover damages from the company for any loss he may have suffered if the invitation to buy the shares is emanating from the company and the persons making it on behalf of the company have fraudulently misrepresented material facts. Damages are generally claimed from the directors, promoters and other persons who authorised the issue of the prospectus.