KCC TUTORIALS

INDEX

1.	Introduction to Law & Legal System
2.	Indian Contract Act, 1872
3.	Sales of Goods Act, 1930
4.	Negotiable Instruments Act, 1881
5.	Indian Partnership Act, 192
6.	Limited Liability Partnership Act, 2008
7.	Factories Act
8.	Payment of Gratuity Act
9.	Employees Provident Fund & Miscellaneous Provisions Act, 1952
10.	ESI Act
11.	Code on Wages
12.	Companies Act, 2013
13.	Ethics

KCC TUTORIALS

Introduction to Law & Legal System

Q. "In modern times, legislation is considered as the most important sources of law." – In light of the statement elaborate the legislation as a source of law. (June, 23 – 10 Marks) (Syllabus, 2022)

Ans. Legislation as a Source of Law:

In modern times, legislation is considered as the most important source of law. The term „legislation" is derived from the Latin word legis which means „law" and latum which means "to make" or "set". Therefore, the word „legislation" means the „making of law". The importance of legislation as a source of law can be measured fromthe fact that it is backed by the authority of the sovereign, and it is directly enacted and recognised by the State. The expression „legislation" has been used in various senses. It includes every method of law-making. In the strict sense it means laws enacted by the sovereign or any other person or institution authorised by him. The chartbelow explains the types of legislation: The kinds of legislation can be explained as follows:

(i) Primary Legislation:

When the laws are directly enacted by the sovereign, it is considered as supreme legislation. One of the features of Supreme legislation is that, no other authority except the sovereign itself can control or check it. The laws enacted by the British Parliament fall in this category, as the British Parliament is considered as sovereign. The law enacted by the Indian Parliament also falls in the same category. However in India, powers of the Parliament are regulated and controlled by the Constitution, through the laws enacted by it are not under the control of any other legislative body.

(ii) Subordinate Legislation:

Subordinate legislation is a legislation which is made by any authority which is subordinate to the supreme or sovereign authority. It is enacted under the delegated authority of the sovereign. The origin, validity, existence and continuance of such

legislation totally depends on the will of the sovereign authority. Subordinate legislation further can be classified into the following types:-

a) Local laws:

In some countries, local bodies are recognized and conferred with the law-making powers. They are entitled to make bye-laws in their respective jurisdictions. In India, local bodies like Panchayats and Municipal Corporations have been recognized by the Constitution through the 73rd and 74th Constitutional amendments. The rules and bye-laws enacted by them are examples of local laws.

b) Laws made by the Executive:

Laws are supposed to be enacted by the sovereign and the sovereigntymay be vested in one authority or it may be distributed among the various organs of the State. In most of the modern States, sovereignty is generally divided among the three organs of the State.

The three organs of the State namely legislature, executive and judiciary are vested with three different functions. The prime responsibility of law-making vests with the legislature, while the executive is vested withthe responsibility to implement the laws enacted by the legislature. However, the legislature delegates some of its law-making powers to executive organs which are also termed delegated legislation. Delegated legislation is also a class of subordinate legislation. In welfare and modern states, the amount of legislation has increased manifold and it is not possible for legislative bodies to go through all the details of law. Therefore, it deals with only a fundamental part of the legislation and wide discretion has been given to the executive to fill the gaps. This increasing tendency of delegated legislation has been criticized. However, delegated legislation is resorted to, on account of reasons like paucity of time, technicalities of law and emergencies. Therefore, delegated legislation is sometimes considered as a necessary evil.

Q. Critically assess how the fundamental rights guarantee equality of citizens. (MTP)

Ans. "Equality is a dynamic concept with many aspects and dimensions and it cannot be described, Cabined and confined" within traditional limits from a positivistic pointof view, equality is antithesis to arbitrariness.

In fact equality and arbitrariness are sworn enemies, one belongs to the rule of lawin a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violated of Article14.

Article 15(1) provides that the state shall not discriminate against any citizen on grounds only of :-

- Religion
- Race
- Caste
- Sex
- Place of birth or
- Any of them

Article 15 (2) provides that :- No citizen shall be on above grounds, subject to any disability, liability, restriction or condition with regard to:

a) access to shops, public restaurants, hotels and places of public entertainment; or
b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the generalpublic.

Exceptions :- Article 15 (3), (4) and (5) contain exceptions to the general principallaid down under Article 15 (1) and (2):-
Nothing in this article shall prevent the State from making any special provision for women and children.

Nothing in this article shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizensor for the Scheduled Castes.
Nothing in this article shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes ofcitizens or for the Scheduled Castes or the Scheduled Tribes in so far as such specialprovisions relate to their admission to educational institutions including private educational institutions,

whether aided or unaided by the State, other than the minority educational institution.

Article-16: Equality of opportunity in matters of public employment :-

- There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.
- No citizen shall, on grounds only of: religion, race, caste, sex, descent, place of birth, residence, or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

Exceptions:-

- Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to anoffice under the Government of, or any local or other authority within, a Stateor Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.
- Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in theservices under the State.
- Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any classor classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.
- Nothing in this article shall affect the operation of any law which provides thatthe incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shallbe a person professing a particular religion or belonging to a particulardenomination.

Abolition of Untouchability "Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "Untouchability" shall be an offence punishable in accordance with law. The term"Untouchability" is not defined under the Constitution. However, it refers to the social disabilities imposed on certain class of person by reason of their birth in certain caste. However, it does not cover social boycott of a few individuals.

Abolition of Titles:

- No title, not being a military or academic distinction, shall be conferred by the State.
- No citizen of India shall accept any title from any foreign State.

- No person who is not a citizen of India shall, while he holds any office of profitor trust under the State, accept without the consent of the President any title from any foreign State.
- No person holding any office of profit or trust under the State shall, without the consent of the President, accept any present, emolument, or office of any kind from or under any foreign State.

Article-17: abolishes the practice of untouchability in any form, making it an offense punishable by law.

Article-18: prohibits the State from conferring any titles other than military or academic distinctions, and the citizens of India cannot accept titles from a foreignstate. Thus, Indian aristocratic titles and title of nobility conferred by the British have been abolished. However, military and academic distinctions can be conferredon the citizens of India.

KCC TUTORIALS

CONTRACT ACT

Q. What are the essential elements of a contract? (MTP – 10 Marks)

Section 10 provides that 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 otherwise expressly declared to be void.

The following are the elements for a valid contract

1. There shall be an offer or proposal by one party and acceptance of the proposal by the other party which results in an agreement.
2. There shall be an intention to create legal relations or intent to legal consequences.
3. The agreement shall be supported by lawful consideration.
4. The parties to the contract shall be competent to contract.
5. There shall be free consent between the parties to the contract.
6. The object and consideration of the contract shall be legal and the same shall not be opposed to public policy.
7. The terms of the consent shall be certain.
8. The agreement is capable of being performed and it is not impossible of being performed.

Examples:

- A proposes, by letter, to sell a house to B at a certain price. 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 and as against B, when the letter is received by A.
- R offers M his house for sale at Rs1 Crore on 5th July, 2022. M agrees to buy the same at the given time and price asked by R. Both R and M are 40 years old and are of sane mind. This is a contract as per Section 10 of the Indian Contract Act, 1872.

Q. Mr. X, a businessman has been fighting a long drawn litigation with Mr. Y, another businessman. To support his legal campaign Mr. X enlists the services of Mr. Z, a legal expert, stating that an amount of ` 10 lakhs would be paid, if Mr. Z does not take up the brief of Mr. Y. Mr. Z agrees, but at the end of

the litigation Mr. X refuses to pay. Decide whether Mr. Z can recover the amount promised by Mr. X under the provisions of the Indian Contract Act, 1872. (June 18 – 5 Marks)

Ans. The problem as asked in the question is based on one of the essentials of a valid contract. Accordingly, one of the essential elements of a valid contract is that the agreement must not be one which the law declares to be either illegal or void. Further Contract Act specifies that any agreements in restraint of trade, marriage, legal proceedings etc. are void agreements.

Thus Mr, Z cannot recover the amount of ` 10 lakhs promised by Mr. X because it is an illegal agreement and cannot be enforced by law.

Q. Describe the essential features of a valid contract. (MTP – 7 Marks)

Ans. Section 10 provides that 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 otherwise expressly declared to be void.

The following are the requirements for a valid contract-

1. There shall be an offer or proposal by one party and acceptance of the proposal by the other party which results in an agreement;
2. There shall be an intention to create legal relations or an intent to legal consequences;
3. The agreement shall be supported by lawful consideration; The parties to the contract shall be competent to contract;
4. There shall be free consent between the parties to the contract;
5. The object and consideration of the contract shall be legal and the same shall not be opposed to public policy;
6. The terms of the consent shall be certain;
7. The agreement is capable of being performed i.e., it is not impossible of being performed.

Q. X Father promised to pay his son Y a sum of ` One lakh if Y (son of X) passed CMA examination in the first attempt. Y passed the CMA examination in his first attempt, but X failed to pay the amount as promised. Y files a suit for

recovery of the said amount. State along with reasons whether Y can recover the amount under the Indian Contract Act, 1872. (June 16 – 5 Marks)

Ans. Problem asked in the question is based on the provisions of the Indian Contract Act, 1872 as contained in section 10. According to the provisions there should be an intention to create legal relationship between the parties. Agreement of a social nature or domestic nature do not contemplate legal relationship and as such are not contracts, which can be enforced. This principle has been laid down in the case of Balfour vs. Balfour. Accordingly, applying the provisions and the ease decision, in the case Y cannot recover the amount of Rupees One lakh from X for the reasons explained above.

Q. What are essential elements of a valid acceptance? (June 16 – 8 Marks)

Ans. Acceptance must be absolute and unqualified; it must conform to the offer:
As per section 7 in order to convert a proposal into a promise, the acceptance must-

1. **Be absolute and unqualified:** if the parties are not ad idem on all matters concerning the offer and acceptance, there is no contract. An invitation with variation is no acceptance, it is simply a counter proposal which must be accepted by the original proposer before any contract is made. A counter offer puts an end to the original offer and cannot be revived by subsequent acceptance unless it is renewed. In Hyde v Wrench 1840 3 Bear 334 an offer to sell a car for $1000 was turned down by the plaintiff who offered $950 for it. This was rejected by the offeror and then the plaintiff agreed to pay $1000. It was held that there would undoubtedly have been perfect contract, instead of that the plaintiff made an offer of his own to purchase the property for $950 and rejected the offer previously made by the defendant. He was not afterwards competent to revive the proposal of the defendant, by tendering an acceptance for it. Thus the suit of the plaintiff was dismissed.

2. **Be 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 a 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. In

Surender Nath v Kedar Nath AIR 1936 Cal 87 the Calcutta High Court held that where an offeror requires that the acceptance should be sent to a particular person in writing, section 7 was not violated when t he offeree instead of writing to t h e particular person, sent his agent in person to communicate the acceptance.

3. **Specific offer can be accepted by the person to whom it is made,** whereas general offer can be accepted by anyone competent to contract and meeting the conditions of offer. It was held in BoultonV Jones (1857)27 LJ ex 117 case that a specific offer can be accepted only by the person to whom it is made. A general offer can be accepted by any one as held in case of Carlill v Carbolic Smoke ball co, HarbansLal V Harbanslal,

4. **Acceptance may be express or implied**: As per section 9 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. It can be inferred from the conduct of the parties. When a person boards in Metro Ra i l it is an implied acceptance.

5. **Acceptance should be of the whole proposal and not in part;** Acceptor should accept the whole proposal in total and not in parts. Part acceptance is no acceptance binding upon the proposer.

6. **Acceptance should be according to the mode prescribed or usual and reasonable mode**; acceptor cannot accept the proposal in a manner different from the manner prescribed in the offer. If no such mode is prescribed it should be usual and reasonable mode. Silence cannot be a mode of acceptance. In *Surernder Nath V Kedar Nath, AIR 1936 cal 87,* the Calcutta High court held that where an offeror requires that the acceptance should be sent in writing to a particular person, section 7 of the Contract Act is not violated when the offeree instead of writing to particular person, sent his agent in person to communicate the acceptance.

7. **Communication of acceptance is must;** a mental determination to accept unaccompanied by any external indication will not be sufficient acceptance. To constitute an acceptance such acceptance must be communicated to the offeror or his authorized agent.Example: A makes an offer to B to supply certain goods at a certain price. B writes the letter of acceptance and puts the letter in the

drawer of his table and forgets all about it. Hence putting the letter of acceptance in the drawer does not amount to communication of acceptance without any external manifestation of the intention to accept the offer (Brogden v Metropolitan Railway co, 1877 AC 666).A mere mental assent is not a sufficient acceptance of an offer.To constitute an acceptance such assent must be communicated to the offeror or his authorised agent.

Acceptance must be given before its lapse; Acceptance must be given before the offer lapses by expiry of time fixed or by expiry of reasonable time if no time is so fixed or before it is withdrawn or revoked by the offeror. In Ramasgate Victoria Hotel co V Montefoire (1866)LR 1 Exch 109 it was held that a person who applied for shares in a company in June was not bound by any allotment made in November.

Q. What is a sound mind for the purpose of contracting? List out the other disqualified persons. (7 Marks)

Ans. A person is said to be of sound mind for the purposes 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.

OTHER DISQUALIFIED PERSONS: The persons who are disqualified from entering into contract due to certain other reasons may be from legal status, political status or corporate status. Some of such categories of persons are given below:

1. **Alien Enemy**: An agreement with an Alien Enemy is void. But agreement with an alien friend is perfectly valid and enforceable. When the Government of an Alien is at war with the Government of India, the alien is called Alien enemy, who cannot enter into any contract with any Indian citizen without the permission of Government of India as the same is against the public policy. Contract entered into with an alien before war is put into suspension during the duration of war.
2. **Foreign Sovereign and Ambassadors:** Foreign sovereigns and their representatives enjoy certain privileges and immunities in every country. They cannot enter into contract except through their agents residing in India. They

can sue the Indian citizen but an Indian citizen cannot sue them.

3. **Convicts:** A convict cannot enter into a contract while he is undergoing imprisonment.
4. **Insolvents:** An insolvent person is one who is unable to discharge his liabilities and therefore has applied for being adjudged insolvent or such proceedings have been initiated by any of his creditors. An insolvent person cannot enter into any contract relating to his property.
5. **Company or Statutory bodies**: A contract entered into by a corporate body or statutory body will be valid only to the extent it is within its Memorandum of Association.

Q. Mr. Ajay is unconscious of his mind when he enters into an agreement with Mr. Vijay on 15th July 2022, in the evening, to sell his office space to him within 15th October 2022. Next day Mr. Ajay declares that he was not well and conscious last night and now he is not willing to transfer the office space to Mr. Vijay. Now, Mr. Vijay is arguing that as Mr. Ajay has already signed the agreement he will have to transfer the property in his name. Decide whether the contract is valid. (Dec 22 – 5 Marks)

Ans. Section 12 of the Indian Contract Act, 1872 provides that a person is said to be of sound mind for the purposes of making 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 interest.

In this case Mr. Ajay when he made the contract in the evening of 15th July 2022, he was not capable of understanding the agreement and of forming rational judgment as to effect upon his interest.

As per the provision of the Indian Contract Act, 1872 Mr. Ajay cannot contact whilst such unconscious lasts. Therefore, the contract between Mr. Ajay and Mr. Vijay is not a valid contract.

Q. What are the position of Minor's agreement and effect thereof? (Dec 17 – 10 Marks) or

Q. Discuss the position of minor's agreement and effect thereof under the Indian Contracts Act, 1872. (June, 23 – 10 Marks) (Syllabus, 2022

Ans. The position of Minor's agreement and effect thereof is under;

1. An agreement with a minor is **void ab-initio**.
2. **The law of estoppel** does not apply against a minor. It means a minor can always plead his minority despite earlier misrepresenting to be a major. In other words he cannot be held liable on an agreement on the ground that since earlier he had asserted that he had attained majority.
3. **Doctrine of Restitution** does not apply against a minor. In India the rules of restitution by minor are similar to those found in English laws. The scope of restitution of contract by minor was examined by the Privy Council in Mohiri Bibi case when it has held that the restitution of money under section 64 of the Indian Contract Act cannot be granted under section 65 because a minor's agreement is not voidable but absolutely void ab-initio. Similarly no relief can be granted under section 65 as this section is applicable where the agreement is discovered to be void or the contract becomes void.
4. **No Ratification on Attaining Majority**-Ratification means approval or confirmation. A minor cannot confirm an agreement made by him during minority on attaining majority. If he wants to ratify the agreement, a fresh agreement and fresh consideration for the new agreement is required.
5. **Contract beneficial to Minor** - A minor is entitled to enforce a contract which is of some benefit to him. Minority is a personal privilege and a minor can take advantage of it and bind other parties.
6. **Minor as an agent** - A minor can be appointed an agent, but he is not personally liable for any of his acts.
7. **Minor's liability for necessities** - If somebody has supplied a minor or his dependents with necessities, minor's property is liable but a minor cannot be held personally liable
8. A minor **cannot be adjudged insolvent** as he is incapable of entering into a contract.
9. Where a **minor and an adult jointly enter into an agreement** with another person the minor is not liable and the contract can be enforced against the major person.

Q. Sunil, aged 16 years, was studying in a Medical College. On 1st March, 2017 he took a loan of ` 3 lakhs from Anil for the payment of his college fee and agreed to pay by 31st May, 2018. Sunil possesses assets worth ` 15 lakhs. On due date Sunil fails to pay back the loan to Anil. Anil now wants to recover the

loan from Sunil out of his assets. Whether Anil would succeed? Decide, referring to the provisions of the Indian Contract Act, 1872. (June 19 – 6 Marks)

Ans. According to **Section 11** of the Indian Contract Act, 1872, a person who is of the age of majority to the law to which he is subject is competent to enter into any contract. A person who has completed the age of 18 years is a major and otherwise he will be treated as minor. Thus Sunil who is a minor is incompetent to contract and any agreement with him is void [Mohori Bibi Vs Dharmodas Ghose 1903, 30 Cal, 539 (PC)].

Section 68 of the Indian Contract Act, 1872 however, prescribes the liability of a minor for the supply of the things which are the necessaries of life to him. It says that though minor is not personally liable to pay the price of necessaries supplied to him or money lent for the purpose, the supplier or lender will be entitled to claim the money/price of goods or services which are necessaries suited to his condition of life provided that the minor has a property. The liability of minor is only to the extent of the minor's property. This type of contract is called a Quasi-contract and the right of the supplier/lender is based on the principle of equity. Thus, according to the above provision, Anil will be entitled to recover the amount of loan given to Sunil for payment of the college fees from the property of the minor.

Q. Who is a minor? Describe the position of minor' s agreement and effect. (MTP - 10 Marks)

Ans. As per section 3 of the Indian Majority Act of 1875, every person in India is a minor if he has not attained the age of 18 years of age. However in case of a minor of whose person or property or both a guardian has been appointed under the Guardian and Wards Act, 1890 or whose property is under the superintendence of any court of wards before he attains 18 years of age is 21 years.

<u>The position of Minor's agreement and effect thereof is as under:</u>

1. An agreement with a minor is void ab-initio.
2. The law of estoppel does not apply against a minor. It means a minor can always plead his minority despite earlier misrepresenting to be a major. In other words, he cannot be held liable on an agreement on the ground that since earlier he had asserted that he had attained majority.
3. Doctrine of Restitution does not apply against a minor. In India, the rules of restitution by minor are similar to those found in English laws. The scope of restitution of contract by minor was examined by the Privy Council in Mohiri Bibi case when it has held that the restitution of money under section 64 of the Indian Contract Act cannot be granted under section 65 because a minor's

agreement is not voidable but absolutely void ab- initio. Similarly no relief can be granted under section 65 as this section is applicable where the agreement is discovered to be void or the contract becomes void.

4. No Ratification on Attaining Majority - Ratification means approval or confirmation. A minor cannot confirm an agreement made by him during minority on attaining majority. If he wants to ratify the agreement, a fresh agreement and fresh consideration for the new agreement is required.
5. Contract beneficial to Minor - A minor is entitled to enforce a contract which is of some benefit to him. Minority is a personal privilege and a minor can take advantage of it and bind other parties.
6. Minor as an agent - A minor can be appointed an agent, but he is not personally liable for any of his acts.
7. Minor's liability for necessities - If somebody has supplied a minor or his dependents with necessities, minor's property is liable but a minor cannot be held personally liable
8. A minor cannot be adjudged insolvent as he is incapable of entering into a contract.
9. Where a minor and an adult jointly enter into an agreement with another person, the minor is not liable and the contract can be enforced against the major person.

Consideration

Q. Anita and Sonali are friends, Sonali treats Anita during Anita's illness. Sonali does not accept payment from Anita for treatment and Anita promises Sonali's daughter Tania to pay her ` 75,000. Anita being in poor circumstances is unable to pay. Tania sues Anita for the money. Can Tania recover? Offer your views based on provisions of the Indian Contracts Act, 1872. (Dec 19 – 5 Marks)

Ans. No, Tania cannot recover the money from Anita. The agreement between Tania and Anita is not a contract in the absence of consideration. In this case, Tania's mother Sonali, voluntarily treats Anita during her illness. Apparently it is not a valid consideration because it is voluntary whereas consideration to be valid must be given at the desire of the promisor-void *Section 2(d).*

The question now is whether this case is covered by the exception given in Section 25(2) which inter-alia provides.

"If it is a promise to compensate a person who has already voluntarily done something for the promisor "

Thus as per the exception the promise must be to compensate a person who has himself done something for the promisor and not to a person who has done nothing for the promisor. As Sonali's daughter, Tania to whom the promise was made, did nothing for Anita, so Anita's promise is not enforceable even under the exception.

Q. Write a short note on Doctrine of Privity of Contract (Dec 22 – 5 Marks)

Ans. Doctrine of Privity of Contract - The doctrine of privity of contract means that a contract is between the parties only and no third person can sue upon it. It means that a stranger to contract cannot sue upon it. The Supreme Court of India recognized this rule in **MC Chacko v State Bank of Travancore**. It is settled law that a person not a party to a contract cannot subject to certain well recognized exceptions, enforce the terms of the contract. Under the English Common law, only a person who is party to a contract can sue upon it. In India, the common law doctrine of privity of contract is applicable. In the course of time, the courts have introduced a number of exceptions to rule of privity of contract. The Indian Contract Act, 1872 is silent about the right of a stranger to contract to sue or not to sue but the Privity Council extended the Principal of English Common law to India in its decision in Jamna Das V Ram Avtar Pandy which was affirmed by the Honourable Supreme Court of India in the case of MC Chako v State Bank of Travancore.

Accordingly, in the following circumstances a stranger to contract can sue:

1. Beneficiaries under trust or charge.
2. Marriage settlement, partition or other family arrangements.
3. Acknowledgement or estoppel.
4. Agency.
5. Assignee in case of insurance policy.

Q. Write a short note on Agreement without consideration (June 19 – 5 Marks)

Ans. Section 25 provides that an agreement made without consideration is void unless-

1) **It is in writing and registered** - 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) **If 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) **It 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 herewith, or by his agent generally or specially authorized 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.

Q. 'No consideration, no contract'. – state the exceptions to it. (Dec 17 – 5 Marks)

Ans. There are exceptional cases where a contract is enforceable even through there is no consideration. They are as follows:

1) **Natural Love and affection:** An agreement made without consideration is valid if it is expressed in writing and registered and is made on account of nature love

and affection between parties standing in a near relation to each other – [Sec.25 (1)]

2) **Voluntary Compensation**: A promise made without consideration is valid if 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 compelled to do [Sec.25(2)]
3) **Time Barred Debt:** A promise to pay wholly or in part, a debt which is barred by the law of limitation can be enforced if the promise is in writing and is signee by the debtor or his authorized agent. [Sec.25(3)]
4) No consideration is required to **create an agency** (Sec.185).

5) **Completed Gift:** The rule "No consideration, no contract" does not apply to Completed Gifts Thus if a person gives certain properties to another according to the provisions of the Transfer of Property Act, he cannot subsequently demand the property back on the ground that there was no consideration.

Q. Anita and Binita are friends, Binita treats Anita during Anita's illness. Binita does not accept payment from Anita for treatment and Anita promises Binita's son Sunit to pay him ₹ 12,000. Anita being in poor circumstances is unable to pay. Sunit sues Anita for the money. Can Sunit recover? (June 15 – 3 Marks)

Ans. No, Sunit cannot recover the money from Anita. The agreement between Sunit and Anita is not a contract in the absence of consideration. In this case, Sumit's mother, Binita, voluntarily treats Anita during her illness. Apparently, it is not a valid consideration because it is voluntary whereas consideration to be valid must be given at the desire of the promisor-void Section 2(d). The question now is whether this case is covered by the exception given in Section 25(2) which inter-alia provides: "If it is a promise to compensate a person who has already voluntarily done something for the promisor " Thus as per the exception the promise must be to compensate a person who has himself done something for the promisor and not to a person who has done nothing for the promisor. As Binita's son, Sunit to whom the promise was made, did nothing for Anita, So Anita's promise is not enforceable even under the exception.

LEGALITY OF CONTRACT

Q. Write a Short Note on Coercion (Dec 21 - 3 Marks)

Ans. The term "Coercion" has been defined in *Section 15* of the Indian Contact Act,1872 as the committing or threatening to commit, any act forbidden by the Indian Penal Code, or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement. Explanation: It is immaterial whether the Indian Penal Code is or is not in force in the place where the coercion is employed.

From the above definition of coercion given in section 15, consent is said to be caused by coercion, when it is obtained by any one of the following;

- Committing or threatening to commit any act forbidden by the Indian Penal Code;
- Unlawful detaining or threatening to detain the property of another person. Coercion may come from a person party to the contract or even third person not connected with the contract directly.

Q. Abhay, UG degree student was induced by his lecturer to sell his brand new car to the later at less the purchase price to secure more marks in the University examination. Accordingly the car was sold. However, the father of Abhay persuaded him to sue his lecturer. State whether Abhay can sue against the lecturer? (June 15 – 3 Marks)

Ans. Yes, Abhay can sue against his lecturer on the ground of influence under the provisions of the Indian Contract Act, 1872. A contract brought as a result of coercion, undue influence, fraud, misrepresentation would be voidable at the option of the person whose consent was caused. As per Sec. 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. Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit there-under, upon such terms and conditions as the court may seem just.

Q. Write a short note on Undue Influence (June 18 – 5 Marks)

Ans. *Section 16* of the Indian Contract Act defines undue influence as under:

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

2. In particular and without prejudice to the generality of the forgoing 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.
3. Where a person, who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

Q. Define Misrepresentation under the Indian Contract Act,1872 (Dec 17 – 3 Marks)

Ans. Misrepresentation means and includes—

1. 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;
2. Any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice or to the prejudice, of anyone claiming under him ;
3. Causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

Q. Write a short note on Misrepresentation (Dec 19 – 5 Marks)

Ans. MISREPRESENTATION: [Sec. 18]

A statement of fact which one party makes in the course of negotiation with a view to induce the other party to enter into a contract is known as misrepresentation. It must relate to some fact which is material to the contract. It may be expressed by words spoken or written or implied from the acts and conduct of the parties.

A representation when wrongly made either innocently or unintentionally is a misrepresentation and when made intentionally or willfully it is fraud. Misrepresentation has been defined in section 18 of the Indian Contract Act 1872 as under:

"Misrepresentation" means and includes:

1. 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;
2. Any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice or to the prejudice of anyone claiming under him ;
3. Causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

Q. P induced Q to buy his motorcycle saying that it was in a very good condition. After taking the motorcycle, Q complained that there were many defects in the motorcycle. P proposed to get it repaired and promised to pay 40% cost of repairs. After few days, the motorcycle did not work at all. Now Q wants to rescind the contract. Decide giving reasons. (Dec 17 – 6 Marks)

Ans. According to Section 18 of the Indian Contract Act. 1872, misrepresentation exists when:

1) When a person positively asserts that a fact is true when his information does not warrant it to be so, though he believes it to be true.
2) When there is any breach of duty by a person, which brings an advantage to the person committing it by misleading another to his prejudice.
3) When a party causes, however, innocently, the other party to the agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

The aggrieved party, in case of misrepresentation by the other party, can avoid or rescind the contract [Section19. Indian Contract Act, 1872]. The aggrieved party loses the right to rescind the contract if he, after becoming aware of the misrepresentation, takes a benefit under the contract or in some way affirms it. Accordingly in the given case Q could not rescind the contract, as his acceptance to the offer of P to bear 40% of the cost of repairs impliedly amount to final acceptance of the sale [Long v. Lloyd,(1958)].

Q. A agreed to become an assistant for five years to B who was a doctor practicing at Chennai. It was also agreed that during the term of agreement A will not practice on his own account in Chennai. At the end of one year, A left

the assistantship of B and began to practice on his own account. Referring to the provisions of the Indian Contract Act, 1872, decide whether A could be restrained from doing so. (Dec 17 – 5 Marks)

Ans. According to the provisions of the Indian Contract Act, 1872, as contained – *Section 27* any agreement through which a person is restrained from exercising a lawful profession or trade/business is void.

But an agreement of service by which a person binds himself during the term of the agreement not to take service with anyone else directly or indirectly to promote any business in direct competition with that of his employer is not in restraint of trade.

Therefore, 'A' cannot be restrained by an injunction from doing so.

Q. Define Fraud under India Contract Act. Does silence amount to fraud?(MTP – 8 Marks)

Ans. "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 a fact, of that which is not true by one who does not believe it to betrue;
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.

Does silence amount to fraud:

At times one of the parties to a contract make s silence to some of the facts relating to the subject matter of contract. The matter on which silence is maintained by party may be material fac t. Does this amount to passive fraud under the Indian Contract Act or not depends upon various factors?

Explanation to Section 17 of the Indian Contract Act provides that mere silence as to facts likely to affect the willingness of a pers on to enter into a contract is not fraud unless the circumstances of case are such that having regard to them, it is the duty of the person keeping silence to speak or unless silence itself is equivalent to speech.

Thus, we can say that there is exception to the rule that mere silence does not amount to silence. These two exceptions are provided in explanation to section 17 and these are as under.

- When there is a duty to speak.
- Where silence is equivalent to speech.

However, in the following two types of cases, silence amounts to fraud, as held by the courts in various cases:

1. Where there is change in circumstances- A representation may be true when made but with the passage of time or changed circumstances it may become false. Accordingly, this must be communicated to other party otherwise it amount to fraud.
2. When there is half-truth- Even when a person is not bound to disclose a fact, he may behold guilty of fraud if he volunteers to disclose a state of fact partly. This is so when the undisclosed part renders the disclosed part false.

Q. Does silence amount to fraud? Explain with exceptions and types of silence amount to fraud. (June 17 – 9 Marks)

Ans. Explanation to section 17 of the Indian Contract Act provides that 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 case are such that having regard to them it is the duty of the person keeping silence to speak or unless silence itself is equivalent to speech. Thus we can say that there is exception to the rule that mere silence does not amount to fraud. The two exception as provided in explanation to section 17 are as under:

1. When there is a duty to speak.
2. Where silence is equivalent to speech.

However, in the following two types of cases, silence amounts to fraud, as held by the courts in various cases:

a) Where there is change in circumstances - A representation may be true when made but with the passage of time or changed circumstances it may become false. Accordingly this must be communicated to other party otherwise it amount to fraud.

b) When there is half-truth- Thus even when a person is not bound to disclose a fact he may be held guilty of fraud if he volunteers to disclose a state of fact partly. This is so when the undisclosed part renders the disclosed part false

E-CONTRACTS

Q. Write a short note on E-Contracts (Dec 18 – 5 Marks) (June 17 – 5 Marks)

Ans. E-contracts are paperless contracts. It is in electronic form. They are conceptually very similar to traditional contracts. E-contract also require basis of contract. The following are ingredients of the e-contracts –

1. An offer is to be made;
2. Offer is to be accepted;
3. There shall be a lawful consideration;
4. There shall an intention to create legal relations;
5. The parties must be competent to contract;
6. There must be free and genuine consent;
7. The object of the contract must be lawful;

The main feature of this type of contract is speed, accuracy and reliability. The parties to the contract have to obtain digital certificate from competent authority. The Information Technology Act, 2000 regulates such contracts. Contract is signed through E-Mail is valid & enforceable.

BAILMENT, PLEDGE, INDEMINITY AND AGENCY

Q. State the essential elements of a contract of bailment. Distinguish between the contract of bailment and contract of pledge. (June 19 – 9 Marks)

Ans. Essential elements of a contract of bailment:

1) **CONTRACT** – The first condition is that there must be a contract between the two parties for the delivery of goods. Such contract may be express or implied written or oral.
2) **DELIVERY OF GOODS** – This contract is for the delivery of some movable goods from one person (bailor) to another person (bailee) or to his authorized agent. If the goods are immovable the contract will not be a contract of bailment.
3) **CHANGE OF POSSESSION** – The possession of goods must be affected by such contract. Mere custody without possession is not a contract of bailment.
4) **PURPOSE OF DELIVERY** – The delivery of the goods is for temporary purposes. It may be for safe-custody, repair, carriage or for gratuitous use by the bailee.
5) **NUMBER OF PARTIES – There is two parties tender such contract e.g., the bailor and bailee. The person delivering the goods is called the bailor and the person to whom the goods are bailed is called the bailee.**
6) **RIGHT OF OWNERSHIP** – In a contract of bailment, the right of ownership remains with an owner (bailor) and is not changed. If the ownership is transferred, the contract will be a contract of sale and is not of bailment.
7) **CHANGE OF FORM** – If the goods bailed are altered in form by the bailee, such as cloth is converted into a shirt still, the contract is one of bailment.
8) **GOODS IN POSSESSION OF BAILEE** – The delivery of the goods is not essential if the goods are already in the possession of the person who enters into the contract as bailee.
9) **REDELIVERY OF GOODS** – Under such contract, the goods are redelivered to the bailor or according to his directions upon the fulfillment of the purpose by the bailee.

10) **RIGHT OF REWARD** – In a contract of bailment, both the parties bailor and the bailee can get a reward but it depends on the nature of the transaction.

Difference between contract of bailment and contract of pledge:-

1) **Right of sale** - In case of pledge, the pawnee (pledgee) can sell the goods and recover his debt, if pawnor (pledger) does not pay while in bailment the bailee can retain the goods and sue for damages, but he has no authority to sell the goods.
2) **Purpose** - Pledge is specifically for securing a debt, while bailment may be for any purpose e.g. For repairs, safe custody etc.,
3) **Right to use the goods** - In case of pledge, pawnee cannot use the goods Pledged but bailee can use the bailed goods if contract so provides.

Q. What do you mean by bailment? Mention the duties of a bailor in this respect. (Dec 21 - 6 Marks)

Ans. Section 148 of the Indian Contract Act defines the term 'bailment' as 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. Section 150 lays down three duties of the Bailor, namely-

1. It is the duty of the bailor to disclose to the bailee faults in the goods bailed, of which the bailor is aware, and which materially interference with the use of them, or expose the bailee to extraordinary risks;
2. If the bailor does not make such disclosure and some loss or damage results, he is responsible for so much of it as arises to the bailee directly from such faults;
3. If the goods are bailed for hire, the bailor is responsible for damage arising to the bailee directly from such faults, whether he was or was not aware of the existence of such faults in the goods bailed.

Q. Mr. X bails 100 bales of cotton marked with particular mark to Mr. Y. After receiving the cotton Mr. Y, without Mr. X's consent, mixes the 100 bales with other bales of his own, bearing a different mark.

Two days later, Mr. X requests to Mr. Y to return at least 50 bales of cotton marked with particular mark, on urgent basis. But, Mr. Y refuses to do so and informed Mr. X that he has mixed all cotton bales with other

bales kept in the warehouse. So, Mr. Y will have to separate the cotton bales received from Mr. X by deploying additional labourers and then only it will be possible to send back the 50 bales of cotton for which Mr. X will have to pay the labour charges for the purpose.
Mr. X is not willing to pay the labour charges and asks Mr. Y to return at least 50 bales of cotton.

Decide the case and present your expert opinion. *(Dec, 23 – 7 Marks) (Syllabus, 2022)*

Ans. Section 156 of the Indian Contract Act, 1872 provides that 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 expenses of separation or division, and any damage arising from the mixture.

In the present case it is observed that Mr. Y, bailee, mixed all 100 bales of cotton marked with particular mark with other bales of his own, bearing a different mark. Now, the bailor, Mr. X, demands for the return of at least 50 bales of cotton. But Mr. Y demands labour charges from Mr. X for separating the cotton bales which were mixed in the warehouse.

As per the provision of the Indian Contract Act, 1872, Mr. X is entitled to have all his 100 bales returned, and Mr. Y is bound to bear all the expenses incurred in the separation of the cotton bales and also any other incidental damage.

Therefore, Mr. Y will have to return 50 bales of cotton at his own cost for separating the cotton bales.

Q. Answer the following questions with regard to the Indian Contract Act:

a) A offers to buy B's House on certain terms. An answer to be given within six weeks. B within this time writes to A, a letter purporting to accept but in fact containing a material alteration of the terms. A then withdraws his offer. B writes again still within six weeks correcting the error in his first letter and accepting the terms originally proposed by A. Is there a contract between A and B? State reasons for your answer.

b) A contract of Bailment becomes void, if the bailee does any act with regards to the goods bailed, which is inconsistent with the conditions of Bailment. Decide.

c) A hirer, who obtains possession of a Refrigerator from its owner under hire

purchase agreement sells the refrigerator to a buyer in good faith and without notice of the right of the owner. Does this buyer get a good title to the Refrigerator? State reasons for your answer.

Ans. Answers to the following questions with regard to the Indian Contract Act are:

a) Acceptance must be absolute and unqualified. A counter proposal or offer, offering different terms, amounts to counter proposal. Further if B subsequently changes his mind and wants to accept the terms originally offered by A, no contract would come into existence, since the original offer of A will be deemed to have lapsed. Further there is no binding on the part of A to keep his offer open for six weeks; that itself would require a contract for which there will have to be separate consideration moving from B to A.
b) According to Sec 153 of the Indian Contract Act, 1872, a contract of Bailment is voidable at the option of the bailor, if the bailee does any act with regard to the goods bailed inconsistent with the conditions of the bailment. Therefore, when an option is available to the bailer, the contract of bailment cannot be said to be void. It is voidable.
c) Since the hirer under hire-purchase agreement referred to in the instant case has no title to the refrigerator, the buyer in question does not give a good title to the refrigerator. This is because the transferee of goods does not get a better title than the transferor had.

Q. Nishant lends a sum of ` 8,000 to Prashant on the security of ten shares of XYZ Ltd. on 1st January, 2015. On 25th March 2015, XYZ Ltd. has issued one Bonus share. Prashant returns the loan amount of ` 8,000 with interest to Nishant. But Nishant returns only ten shares which were pledged and refuse to give one bonus share. Advise Prashant in the light of the provisions of the Indian Contract Act, 1872. (June 15 – 3 Marks)

Ans. As per the provisions of Section 163(4) of the Indian Contract Act, 1872 "in the absence of any contract to the contrary, the bailee is bound to deliver to the bailor, or according to his directions any increase or profit which may have accrued from the goods bailed". Applying the provisions to the instant case, the bonus share is an increase on the shares pledged by Prashant to Nishant. So Nishant is liable to return the shares along with bonus share and hence Prashant the bailor, is entitled to receive the bonus share also from Nishant (Motilal VS Bai Mani).

Q. State the circumstances when an agent is personally liable for the contracts entered into by him on behalf of the principal? (June 18 – 10 Marks)

Ans. The general rule of the Indian Contracts Act, 1872 states that:

a) Only the principal can enforce and can be held liable on a contract entered into by an agent.
b) The agent is not personally liable on a contract entered into by him on behalf of the principal.

The following are the exceptions to the above rule:

1. **Foreign Principal:** When agent acts for sale or purchase of goods for a principal resident abroad i.e., foreign principal.
2. **Personal liability by agreement**: Where it is expressly provided in the contract that the agent shall be personally liable.
3. **Undisclosed principal:** Where agent does not disclose the name/identity of the principal.
4. **Principal cannot be sued:** Where the principal is disclosed but cannot be sued, e.g., foreign sovereigns, ambassadors etc.
5. **Non-existence of Principal:** When the principal is not in existence at the time when the act was done, i.e., the agent acted for a non-existent principal.
6. **Agent's liability**: When the agent exceeds his authority or commits a breach of warranty of authority.
7. **Pretended Agent**: When he acts as a pretended agent.
8. **Mistake or Fraud:** When he receives or pays money by mistake or fraud.
9. **Agent signs an agreement without mentioning that he is an agent:** Where an agent signs a negotiable instrument without mentioning that he is signing as an agent.
10. **Trade or customs:** Where the usage of trade or custom makes an agent personally liable.

Q. C is the wife of A. She purchased some sarees on credit from B. B demanded the amount from A. A refused. B filed a suit against A for the said amount. Decide in the light of provisions of the Indian Contract Act, 1872, whether B would succeed. (Dec 18 – 5 Marks)

Ans. Problem as asked in the question is based on the provisions related with the modes of created by a legal presumption; in a case of cohabitation by a married

woman (i.e. wife is considered as an implied married agent, of her husband). If wife lives with her husband, there is a legal presumption that a wife has authority to pledge her husband's credit for necessaries.

But the legal presumption can be rebutted in the following cases:

(i) Where the goods purchased on credit are not necessaries.
(ii) Where the wife is given sufficient money for purchasing necessaries.
(iii) Where the wife is forbidden from purchasing anything on credit or contracting debts.
(iv) Where the trader has been expressly warned not to give credit to his wife.

If the wife lives apart for no fault on her part, wife has authority to pledge her husband's credit for necessaries. This legal presumption can be rebutted only in cases (iii) and (iv).

Applying the above conditions in the given case 'B' will succeed. He can recover the said amount from 'A' if sarees purchased by 'C' are necessaries for her.

Q. Differentiate between contract of indemnity and contract of guarantee. (Dec, 23 – 7 Marks) (Syllabus, 2022)

Ans. The main differences between Contract of Indemnity and Contract of guarantee are mentioned as below:

Sr. No	Contract of Indemnity	Contract of guarantee
1	In this contract there are two parties – (1) the indemnifier and (2) the indemnified	In this contract three parties are involved – (1) principal debtors, (2) surety and (3) creditors
2	The primary liability is on the indemnifier	The principal liability is on the principal debtors. Secondary liability is on the surety.
3	The indemnifier is not acting at the request of the debtor.	The surety gives contract at the request of the principal debtors.
4	The possibility of any loss happening is the only contingency against which the indemnifier undertakes to indemnify.	There is an existing debt for which the surety gives guarantee to the creditor on behalf of the principal debtor.
5	The indemnifier cannot sue the third party in his own unless	The surety is entitled to proceed against the principal debtor when he is obliged to

	there is an assignment.	perform the guarantee.
6	The contract is between the indemnifier and indemnified.	The contract is between the principal debtor-creditor; surety-creditor; principal debtor-surety.
7	Defined under section 124 of the Indian Contract Act, 1872	Defined under section 126 of the Indian Contract Act, 1872

Q. A stands surety for B for any amount which C may lend to B from time to time during the next three months subject to a maximum of `50,000. One month later A revokes the guarantee, when C had lent to B `5,000. Referring to the provisions of the Indian Contract Act, 1872, decide whether A is discharged from all the liabilities to C for any subsequent loan. What would be your answer in case B makes a default in paying back to C the money already borrowed i.e. `5,000? (June 17 – 4 Marks)

Ans. The problem as asked in the question is based on the provisions of the Indian Contract Act 1872, as contained in Section 130 relating to the revocation of a continuing guarantee as to future transactions which can be done mainly in the following two ways:

1. **By Notice:** A continuing guarantee may at any time be revoked by the surety as to future transactions, by notice to the creditor.
2. **By death of surety:** The death of the surety operates, in the absence of any contract to the contrary, as a revocation of a continuing guarantee, so far as regards future transactions. (Section 131). The liability of the surety for previous transactions however remains.

Thus, applying the above provisions in the given case, A is discharged from all the liabilities to C for any subsequent loan. Answer in the second case would differ i.e. A is liable to C for ` 5,000 on default of B since the loan was taken before the notice of revocation was given to C.

KCC TUTORIALS

BREACH OF CONTRACT

Q. P Ltd., contracts with SK Traders to make and deliver certain machinery to them by 30.04.2017 for `11.50 lakhs. Due to labour strike, P Ltd. could not manufacture and deliver the machinery to SK Traders. Later, SK Traders procured the machinery from another manufacturer for `12.75 lakhs. SK Traders was also prevented from performing a contract which it had made with MK Traders at the time of their contract with P Ltd. and were compelled to pay compensation for breach of contract. Advise SK Traders the amount of compensation which it can claim from P Ltd., referring to the legal provisions of the Indian Contract Act, 1872? (June 17 – 5 Marks)

Ans. Section 73 of the Indian Contract Act, 1872 provides for consequences of breach of contract. According to it, 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 given for any remote and indirect loss or damage sustained by reason of the breach. It is further provided in the explanation to the section that in estimating the loss or damage 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.

Applying the above principle of law to the given case, P Ltd is obliged to compensate for the loss of `1.25 lakhs (i.e. `12.75 minus `11.50 = ` 1.25 lakhs) which had naturally arisen due to default in performing the contract by the specified date.

Regarding the amount of compensation which SK Traders were compelled to make to MK Traders, it depends upon the fact whether P Ltd knew about the contract of SK Traders for supply of the contracted machinery to MK Traders on the specified date. If so, P Ltd is also obliged to reimburse the compensation which SK Traders had to pay to MK Traders for breach of contract. Otherwise P Ltd is not liable.

Quasi Contract, Contingent Contracts, Termination or Discharge of Contracts

Q. Discuss the different types of quasi contract. (Dec, 23 – 7 Marks) (Syllabus, 2022)

Ans. Quasi contracts are so called because the obligations associated with such transactions could neither be referred as tortuous nor contractual but still recognized by law as enforceable like other contracts.

A quasi contract is a fictitious contract created under legal obligations, similar to a valid contract. These contracts are also known as implied-in-law contracts. What makes this different is that the parties involved do not intend to create a contract. A quasi contract is created by the Court. For the same reason, there is no actual offer or acceptance or an agreement between the parties.

Types of Quasi Contracts:

Sections 68 to 72 of The Indian Contract Act, 1872 deals with five kinds of quasi contracts. These are as under:

1) **Section 68 - Claim for necessaries supplied to person incapable of contracting, or on his account** – This section provides that if a person, incapable of entering into a contract, or anyone 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;

2) **Section 69 - Reimbursement of person paying money due by another in payment of which he is interested**- This section provides that a person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other.

3) **Section 70 – Obligation of person enjoying benefit of non-gratuitous act** - This section provides that where a person lawfully does anything for another person or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the later is bound to make compensation to the former

in respect of, or to restore, the thing so done or delivered – it is otherwise called as quantum meruit;

4) **Section 71 – Responsibility of finder of goods** - This section provides that a person who finds goods belonging to another, and takes them into his custody, is subject to the same responsibility as a bailee;

5) **Section 72 – Liability of person to whom money is paid or thing delivered by mistake or under coercion** - This section provides that a person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it.

Q. Explain the meaning of 'Quasi-Contracts'. State the circumstances which are identified as quasi-contracts by the Indian Contract Act, 1872. (Dec 18 – 10 Marks)

Ans. Even in the absence of a contract, certain social relationships give rise to certain specific obligations to be performed by certain persons. These are known as – quasi contracts as they create some obligations as in the case of regular contracts. Quasi-contracts are based on the principles of equity, justice and good conscience. The salient features of quasi-contracts are: Firstly, such a right is always a right to money and generally, though not always, to a liquidated sum of money; Secondly, it does not arise from any agreement between the parties concerned but the obligation is imposed by law and; Thirdly, the rights available are not against all the world but against a particular person or persons only, so in this respect it resembles to a contractual right.

Circumstances identified as quasi-contracts:

1. ***Sec-68--Claim for necessaries supplied to persons incapable of contracting*:** Any person supplying necessaries of life to persons who are incapable of contracting is entitled to claim the price from the other person's property. Similarly, where money is paid to such persons for purchase of necessaries, reimbursement can be claimed.
2. ***Sec-69-Right to recover money paid for another person:*** A person who has paid a sum of money which another person is obliged to pay, is entitled to be reimbursed by that other person provided that the payment has been made by him to protect his own interest.
3. ***Sec-70-Obligation of person enjoying benefits of non-gratuitous act*:** Where a person lawfully does anything for another person, or delivers anything

to him not intending to do so gratuitously and such other person enjoys the benefit thereof, the latter is bound to pay compensation to the former in respect of, or to restore, the thing so done or delivered.

4. ***Sec-71 -Responsibility of finder of goods:*** A person who finds goods belonging to another person and takes them into his custody is subject to same responsibility as if he were a bailee.
5. ***Sec-72- Liability for money paid or thing delivered by mistake or by coercion:*** A person to whom money has been paid or anything delivered by mistake or under coercion, must repay or return it.

In all the above cases contractual liability arises without any agreement between the parties.

Q. Y holds agricultural land in Assam on a lease granted by X, the owner. The land revenue payable by X to the Government being in arrear, his land is advertised for sale by the Government. Under the Revenue law, the consequence of such sale will be termination of Y's lease. Y, in order to prevent the sale and the consequent termination of his own lease, pays the Government, the sum due from X. Referring to the provisions of the Indian Contract Act, 1872 decide whether X is liable to make good to Y, the amount so paid? (Dec 15 – 3 Marks)

Ans. As per Section 69, if

1. One person is legally bound to make a payment.
2. Some other person makes such payment.
3. The person making such payment is not legally bound to make such payment.
4. The person making such payment is interested in paying such amount.

The person who is interested in paying such amount shall be entitled to recover the payment made by him. So, in the given case, Y is entitled to recover the payment from X.

Q. Discuss the rights of the finder of goods? (5 Marks)

Ans. Section 168 provides that the finder of goods has no right to sue the owner for compensation for trouble and expense voluntarily incurred by him to preserve the goods and to find out the owner; but he may retain the goods against the owner until he receives such compensation; and, where the owner has offered a specific reward for the return of goods lost, the finder may sue for such reward, and may retain the goods until he receives it.

Section 169 provides that when a thing which is commonly the subject of sale is lost, if the owner cannot, with reasonable diligence, be found or if he refuses, upon demand, to pay the lawful charges of the finder, the finder may sell it-

- when the thing is in danger of perishing by or of losing the greater part of its value; or
- when the lawful charges of the finder, in respect of the thing found, amount to two thirds of its value.

In *MJR Steels (P) Limited V. Chrisomar Corporation' –AIR 2007 (NOC) 234 (Cal.)* it was held that it is not always necessary that sale should be by owner himself; sale by agent or anyone with the consent of owner is valid. Finder of asset can also sale and give good title. There can also sale by estoppels.

Q. Mr. Jatin found a wrist watch in shopping mall. He made all efforts to trace the true owner of the wrist watch but could not find him. He sold the same to Nitin, who buys without any knowledge that Jatin is merely a finder. Is sale by Jatin to Nitin valid? Decide. (June 15 – 3 Marks)

Ans. When thing which is commonly the subject of sale is lost, if the owner cannot with reasonable diligence be found, or if he refuses upon demand, to pay the lawful charges of the finder, the finder may sell it:

The finder of goods can sell the goods only in the circumstances permitted under section 169 of the Indian Contract Act, 1872 which are as under:

- If the goods are in danger of perishing or losing the greater part of their value, the finder can sell the goods.
- If the lawful charges of the finder in respect of the goods amount to a minimum of two-third of the value then the finder can sell the goods.

In the present case, the sale by the finder will not be valid as it does not seem to fall in any of the above stated circumstances. Hence, the sale by Jatin to Nitin is invalid.

Q. Write a short note on Contingent Contracts (Dec 17 – 5 Marks)

Ans. Section 31 under the Indian Contract Act, 1872 defines 'contingent contract' as a contract to do or not to do something, if some event, collateral to such contract, does or does not happen. The following are the essential of contingent contract-

a) Uncertainty and futurity of the event to which it is related
b) Uncertain future event must be collateral to the contract

A contingent contract need not necessarily be independent on any external event. It may be conditional on the voluntary act or the future conduct of one of the parties or a third person. Section 32 of the Act provides that contingent contract 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.

Q. Mr. P and Mr. Q bet as to whether there would be rain on a particular day of December. Mr. P promises to pay ` 5,000 to Mr. Q if there is rain on that day and Mr. Q promises an equal amount to Mr. P if there is no rain on the day. Suppose, there is no rain on that specific day of December and Mr. Q filed a suit for recovery of ` 5,000 from Mr. P. Can Mr. Q recover the amount under Indian Contract Act, 1872? (June 17 – 6 Marks)

Ans. In this case Mr. P bet with Mr. Q on the possibility of having rain on a specific day of December. Section 30 provides that agreement 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. Therefore, the agreement between Mr. P and Mr. Q is of wagering nature and hence void. Thus, despite of no rain on specific day of December, Mr. Q cannot recover the amount of ` 5,000 from Mr. P for the reason of entering into an agreement of a wagering nature.

Q. Arvinda took a bet of ` 20,000 with Bannerjee that a certain horse would win the race. Arvinda and Bannerjee both residents of Kolkata. Arvinda borrowed ` 20,000 from his friend Chatterjee for this purpose. Arvinda lost the bet and paid ` 20,000 to Bannerjee. Can Chatterjee recover the loan amount from Arvinda? Give reasons. What would have been the difference had the transaction took place in Ahmedabad between the parties residing there? (June 15 – 3 Marks)

Ans. Yes, Chatterjee can recover the loan amount from Arvinda. The transaction between Arvinda and Chatterjee is a collateral transaction which is valid, though the main transaction between Arvinda and Bannerjee is void, being a wager. Had the transaction took place in Ahmedabad, Chatterjee could not have recovered the loan as in Ahmedabad the wager transactions are illegal and a transaction collateral to it is also void on the ground of illegality.

Q. Discuss the different modes of terminating contractual relationship between the parties. (Dec 19 – 10 Marks)

When the rights and obligations created by a contract comes to an end, the contract is said to be discharged or terminated. Discharge of contract means termination of contractual relationship between the parties. The following are the various modes or methods by which a contract is discharged:

1. Discharge by performance:

Performance is the usual mode of discharge of a contract. Performance may be (a) actual performance or (b) attempted performance. Actual performance is the fulfillment of the obligations arising from a contract by the parties to it, in accordance with the terms of the contract. Offer of performance is also known as attempted performance or tender of performance. A valid tender of performance is equivalent to performance.

2. Discharge by agreement:

The parties may agree to terminate the existence of the contract by any of the following ways:

a) **Novation:** Substitution of a new contract in place of the existing contract is known as "Novation of Contract". It discharges the original contract. The new contract may be between the same parties or between different parties. Novation can take place only with the consent of all the parties.
Example: A owes money to B under a contract. It is agreed between A, B and C that B should accept C as his debtor, instead of A. The old debt of A and B is at an end and a new debt from C to B has been contracted. There is novation involving change of parties.

b) **Alteration**: Alteration means change in one or more of the terms of the contract. In case of novation there may be a change of the parties, while in the case of alteration, the parties remain the same. But there is a change in the terms of the contract.

c) **Rescission**: Rescission means "cancellation". All or some of the terms of a contract may be cancelled. Rescission results in the discharge of the contract. Example: A promises to deliver certain goods to B at a certain date. Before the

date of performance A and B mutually agree that the contract need not be performed. The contract stands discharged by rescission.

d) **Remission:** Remission means acceptance of a lesser performance that what is actually due under the contract. There is no need of any consideration for remission. Example: A has borrowed ` 500 from B. A agrees to accept ₹ 250 from B in satisfaction of the whole debt. The whole debt is discharged.

e) **Waiver:** Waiver means giving up or foregoing certain rights. When a party agrees to give up its rights, the contract is discharged. Example: A promises to paint a picture of B. B afterwards forbids him to do so. A is no longer bound to perform the promise.

3. Discharge by lapse of time:

Every contract must be performed within a fixed or reasonable period. Lapse of time discharges the contract. The Indian Limitation Act has prescribed the period within which the existing rights can be enforced in courts of law. Example: If a creditor does not file a suit within three years of debt, the debt becomes time-barred. He is deprived of his legal remedy.

4. Discharge by operation of law:

A contract may be discharged by operation of law in the following cases, (a) Death (b) Insolvency (c) Unauthorized material alteration, (d) Merger a. Death: In contracts involving personal skill or ability, death terminates the contracts. In other cases, the rights and liabilities of the deceased person will pass en to his legal representatives, b. Insolvency: The insolvency of the promisor discharges the contract. The promisor is discharged from all liabilities incurred prior to his adjudication, c. Unauthorized material alteration: Material alteration in the terms of the contract without the consent of the other party discharges the contract. Change in the amount of money to be paid, date of payment, place of payment etc. are examples of material alteration, d. Merger: When inferior rights of a person under a contract merge with superior rights under a new contract, the contract with inferior rights will come to an end. Example: Where a part-time lecturer is made full-time lecturer, merger discharges the contract of part time lectureship.

5. Discharge by impossibility of performance:

Impossibility of performance results in the discharge of the contract. An agreement which is impossible is void, because law does not compel to do impossible things.

6. **Discharge by breach:**
   Breach means failure of a party to perform his obligations under a contract. Breach brings an end to the obligations created by a contract. Example: A and B wanted to marry each other. Before the time fixed for marriage, A goes mad. The contract becomes void.

7. **Termination of Contract:**
   The proper way, in which the agreement could have been terminated by issuing of a notice to the plaintiff, calling upon to complete the transaction within a particular time, failing which the contract will be treated as cancelled. That this is the proper way of terminating the contract is cleared from what has been observed in "Narayana Swami Pillai V. Dhanakodi Ammal' - (1971) 1 Mys. L.J., 245 that when the contract is for the sale of immovable property the vendor must given reasonable notice requiring the performance within a definite time.

Q. Describe the different ways under which a contract may be discharged? (Dec 22 – 10 Marks)

Ans. When the rights and obligations created by a contract come to an end then said contract is said to be discharged. It is termination of contractual relationship between parties.

The following are the various ways of discharging a contract:

1. **Discharge by performance:** Performance is the usual way of discharging a contract. Performance may be
2. **Actual performance** – It is the fulfillment of the obligations arising from a contract by the parties to it in accordance with the terms of the contract.
3. **Attempted performance** – it is offer of performance. A valid tender of performance is equivalent to performance
4. **Discharge by agreement**: Parties may agree to terminate the existence of the contract by different ways viz. novation, alteration, rescission, remission and waiver. When a new contract is substituted in place of existing contract, it is called novation. It discharges the original contract. Alteration means change in one or more of the terms of the contract. When all or some of the terms of the contract are cancelled it is known as rescission. Remission means acceptance of a lesser performance that what is actually due under the

contract. Giving up certain rights is called as waiver. When a party agrees to give up its rights the contract is discharged

5. **Discharge by lapse of time**: Every contract must be performed within a fixed period. Lapse of time discharges the contract
6. **Discharge by operation of law**: A contract may be discharged by operation of law in the cases of death, insolvency, unauthorized material alteration and merger. In contract involving personal skill or ability, death terminates the contract and in other cases the rights and liabilities of the deceased person will pass on to his legal representatives. The insolvency of the promisor discharges the contract. Material alteration in the terms of the contract without the consent of the other party discharges the contract. When inferior rights of a person under a contract merge with the superior rights under a new contract, the contract with inferior rights will come to an end.
7. **Discharge by impossibility of performance**: when performance of contract becomes impossible it results in discharge of the contract. An agreement which is impossible is void, because law does not compel to do impossible.
8. **Discharge by breach:** when a party fails to perform his obligations under a contract it is known as breach. It brings an end to the obligations created by a contract.

Q. Discuss the concept of impossibility of performance of contracts with suitable examples and reference to the related legal provisions. (10 Marks)

Ans. **Impossibility of performance of Contracts:**

1. **Physical impossibility**: An agreement is void, if it is identified to be non-feasible due to physical factors, like time, distance, height, etc.
2. **Legal impossibility**: An agreement is void, if it provides that something shall be done which as a matter of law cannot be done.

Examples:

a) 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 ship conveying the cargo had been cast away and the goods lost. Neither party was aware of the these facts. The agreement is void.

b) A agrees to buy from B a certain 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.

c) A, being entitled to an estate for the life of B, agrees to sell it to C. B was dead at the time of the agreement, but both parties were ignorant of the fact. The agreement is void.

Unilateral Mistake as to fact

As per section 22, a contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact. A unilateral mistake is not allowed as a defence in avoiding a contract unless brought about by another party's fraud or misrepresentation.

KCC TUTORIALS

SALES OF GOODS ACT

Q. How would you differentiate between contract of sale and agreement to sell? (Dec, 23 – 7 Marks) (Syllabus, 2022)

Ans. Difference between Contract of sale and Agreement to sell are as under:

Basis	Contract of sale	Agreement to sell
Transfer of property	The property of the goods passes from the buyer to the seller.	The transfer of property takes place at a future time or subject to certain conditions to be fulfilled.
Type of contract	It is an executed contract.	It is an executory contract.
Type of goods	Sales takes place only for existing and specific goods.	Future and contingent goods.
Risk of loss	If the goods are destroyed, the loss falls on the buyer despite the goods are in the possession of the seller.	If the goods are destroyed, the loss falls on the seller despite the goods are in the possession of the buyer
Breach of contract	The seller can sue the buyer for price and for damages in case of breach by the buyer	The seller can sue for damages only in case of breach by the buyer
General and particular property	It gives buyer to enjoy the goods as against the world at large including the seller	It gives a right to the buyer against the seller to sue for damages
Insolvency of the buyer	In the absence of lien over the goods the seller is to return the goods to the official receiver or assignee. He is entitled to get the dividend declared by the Official receiver which will be at the reduced rate.	The seller is not bound to part with the goods until the price is paid to him.
Insolvency of the seller	The buyer, becoming the owner, is entitled to recover the same from the Official receiver or assignee	The buyer cannot claim the goods but the dividend declared by the Official receiver or assignee.

Q. Explain the different type of Implied Conditions. (June, 23 – 8 Marks)

Ans. Implied conditions are of the following types.

(i) Condition as to title [Section 14(a)]:

In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is an implied condition on the part of the seller that, in the case of a sale, he has a right to sell the goods and that, in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass.

(ii) Sale by description [Section 15]:

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. Goods are sold by description when they are described in the contract, and the buyer contracted relying on such description of goods by the seller.

(iii) Condition as to quality or fitness [Section 16]:

As per Sec 16 of the Sale of Goods Act, the buyer is supposed to satisfy himself about the quality of goods he purchased and is also charged with the responsibility of seeing that the goods suit the purpose for which they were purchased by him. Later on if the goods does not turn out to be as per his purpose, the seller cannot be asked to compensate him. This is based on the famous doctrine of Caveat Emptor which means „let the buyer beware"

(iv) Sale by sample [Section 17]:

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.

In the case of a contract for sale by sample there is an implied condition –

- That the bulk shall correspond with the sample in quality.
- That the buyer shall have a reasonable opportunity of comparing the bulk with the sample.
- That the goods shall be free from any defect, rendering them un-merchantable, which would not be apparent on reasonable examination of the sample.

In case of eatables and provisions, in addition to the implied condition as to merchantability, there is another implied condition that the goods shall be wholesome.

Q. Himadri sells 400 Kgs. of tea to Rahul and sends 200 Kgs. by lorry and 200 Kgs. By Railway. Rahul receives delivery of 200 Kgs. sent by lorry, but before he receives the delivery of the tea sent by railway, he becomes bankrupt. Himadri being still unpaid, stops the goods in transit. The official receiver, on Rahul's insolvency claims the goods. Decide the case with reference to the provisions of the Sale of Goods Act, 1930. (June 19 – 7 Marks)

Ans. Section 50, of Sale of Goods Act, states that, subject to the provisions of this Act, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transit, that is to say, he may resume possession of the goods as long as they are in course of transit and retain them until payment of tender of the price.

Stoppage in transit (Sections 50-52)

The right of stoppage in transit is a right of stopping the goods while they are in transit, resuming possession of them and retaining possession until payment or tender of the price. The right to stop goods is available to an unpaid seller

1) when the buyer becomes insolvent; and
2) the goods are in transit.

The buyer is insolvent if he has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due. It is not necessary that he has actually been declared insolvent by the court.

The goods are in transit from the time they are delivered to a carrier or other bailee like a wharfinger or warehouse keeper for the purpose of transmission to the buyer and until the buyer takes delivery of them. The transit comes to an end in the following cases:

1) If the buyer obtains delivery before the arrival of the goods at their destination;
2) If, after the arrival of the goods at their destination, the carrier acknowledges to the buyer that he holds the goods on his behalf, even if further destination of the goods is indicated by the buyer;
3) If the carrier wrongfully refuses to deliver the goods to the buyer.

Applying the above provisions in the given case, we may conclude that Himadri being unpaid, can stop the 200 Kgs. of tea sent by railway as these goods are still in transit and Rahul has become insolvent.

Q. M/s. Tea Enterprises agreed to supply 2,200 Kgs. of Tea to M/s. Gopal Enterprises at ` 1,200/- per Kg. by 30th April, 2018. On 1st March, 2018 M/s. Tea Enterprises informs Gopal Enterprises that they are not willing to supply the Tea as the price of Tea increased to ` 1,400/- per Kg. Examine the right of M/s. Gopal Enterprises. (June 18 – 8 Marks)

Ans. In terms of the provisions of Section 32 and 33 of the Sale of Goods Act, 1930; unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller shall be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer shall be ready and willing to pay the price in exchange for possession of the goods.

Rights of the Buyer according to the Sale of Goods Act, 1930 include:

1. To have delivery of the goods as per contract. (Sec. 31 & 32);
2. To sue the seller for recovery of the price, if already paid, when the seller fails to deliver the goods;
3. To sue the seller for damages if the seller wrongfully neglects or refuses to deliver the goods to the buyer (Sec 57);
4. To sue the seller for specific performance;

5. To sue the seller for damages for breach of a warranty or for breach of a condition treated as breach of a warranty (Sec 59);
6. To sue the seller the damages for anticipatory breach of contract (Sec 60)

In the instant case M/s. Gopal Enterprises can exercise any of his rights discussed above.

Q. What do you understand by "Caveat-Emptor" under the sale of Goods Act, 1930? What are the exceptions to this rule? (Dec 17 – 8 Marks)

Ans. 'Caveat emptor' means "let the buyer beware", i.e. in sale of goods the seller is under no duty to reveal unflattering truths about the goods sold. Therefore, when a person buys some goods, he must examine them thoroughly. If the goods turn out to be defective or do not suit his purpose, or if he depends upon his skill and judgment and makes a bad selection, he cannot blame anybody excepting himself.

The rule is enunciated in the opening words of section 16 of the Sale of Goods Act, 1930 which runs thus: -Subject to the provisions of this Act and of any other law for the time being in force, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale".

The rule of caveat emptor does not apply in the following cases:

1. **Fitness for buyer's purpose:** Where the buyer, expressly or by implication, makes know to the seller the particular purpose for which he requires the goods and relies on the seller's skill or judgment and the goods are of a description which it is in the course of the seller's business to supply, the seller must supply the goods which shall be fit for the buyer's purpose. (Section 16(1)).
2. **Sale under a patent or trade name**: In the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition that the goods shall be reasonably fit for any particular purpose (Section 16(1)).
3. **Merchantable quality:** Where goods are bought by description from a seller who deals in goods of that description (whether he is in the manufacturer or producer or not), there is an implied condition that the goods shall be of merchantable quality. But if the buyer has examined the goods, there is no implied condition as regards defects which such examination ought to have revealed. (Section 16(2)).
4. **Usage of trade:** An implied warranty/or condition as to qualify or fitness for a particular purpose may be annexed by the usage of trade. (Section 16(3)).

5. **Consent by fraud:** Where the consent of the buyer, in a contract of sale, is obtained by the seller by fraud or where the seller knowingly conceals a defect which could not be discovered on a reasonable examination, the doctrine of caveat emptor does not apply.

OLD SYLLABUS

Q. What are the consequences of "destruction of goods" under the Sale of Goods Act,1930, where the goods have been destroyed after the agreement to sell but before thesale is affected? (Dec 17 – 5 Marks)

Ans. In accordance with the provisions of the Sale of Goods Act. 1930 as contained in Section 7, a contract for the sale of specific goods is void if at the time when the contract was made; the goods without the knowledge of the seller, perished or become so damaged as no longer to answer to their description in the contract, then the contract is void abinitio. This section is based on the rule that whether both the parties to a contract are under a mistake as to a matter of fact essential to a contract, the act is void.

In a similar way Section 8 provides that an agreement to sell specific goods becomes void if subsequently the goods, without any fault on the part of the seller or buyer, perish or become so damaged as no longer to answer to their description in agreement before the risk passes to the' buyer. This rule is also based on the ground of impossibility of performance as stated above. It may however, be noted that section 7 & 8 apply only to specific goods and not to unascertained goods or generic goods. If the agreement is to sell a certain quantity of unascertained goods, the perishing of even the whole quantity of such goods in the possession of the seller will not relieve him of his obligation to deliver the goods.

Q. Mr. A was shopping in a self-service super market. He picked up a bottle of cold drink from a shelf. While he was examining the bottle, it exploded in his hand and injured him. He files a suit for damages against the owner of the market on the ground of breach of condition. Decide, under the Sale of Goods Act, 1930, whether Mr. A would succeed in his claim. (Dec 17 – 3 Marks)

Ans. The problem as given in the question is based on Section 16(2) of the Sale of 'Goods Act, 1930, which states that where goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be of merchantable quality. Though the term 'merchantable quality' is not defined in the Act, it means that in the present case, the bottle must be properly sealed. In other words, if the goods are purchased for self-use, they should be reasonably lit for the purpose for which it is being used, in the instant case, on an examination of the bottle of cold drink, it exploded and injured the buyer. Applying the provision of Section 16(2). Mr. A would succeed in claim for damages from the-owner of the shop

Q. Mr. S agreed to purchase 100 bales of cotton from V, out of his large stock and sent his men to take delivery of the goods. They could pack only 60 bales. Later on, there was an accidental fire and the entire stock was destroyed including 60 bales that were already packed. Referring to the provisions of the Sale of Goods Act, 1930, explain as to who will bear the loss and to what extent? (June 17 – 8 Marks)

Ans. Section 26 of the Sale of Goods Act,1930 provides that unless otherwise agreed, the goods remain at the seller's risk until the property there in is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at buyer's risk whether delivery has been made or not. Further Section 18 read with Section 23 of the Act provide that in a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer, unless and until the goods are ascertained and where there is contract for the sale of unascertained or future goods by description, and goods are of that description, in a deliverable state and are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied. Applying the aforesaid law to the facts of

the case in hand, it is clear that Mr. S has the right to select the good out of the bulk and he has sent his men for same purpose.

Hence the problem can be answered based on the following assumption and the answer would be:

Where the bales have been selected with the consent of the buyer's representatives: In this case the property in the 60 bales has been transferred to the buyer and goods have been appropriated to the contract. Thus, loss arising due to fire in case of 60 bales would be borne by Mr. S. As regards 40 bales, the loss would be borne by Mr. V, since the goods have not been identified and appropriated.

Q. Under which circumstances can an unpaid seller exercise his right of lien? Distinguish between right of lien and right of stoppage of goods in transit, under the Sale of Goods Act, 1930. (June 17 – 6 Marks)

Ans. Section 47 of the Sale of Goods Act, 1930 lays down cases in which an unpaid seller is entitled to lien. They are as follows:

1. Where goods have been sold without any stipulation as to credit.
2. Where goods have been sold on credit but the term of credit expired, or
3. Where the buyer becomes insolvent.

Distinction between right of lien and right of stoppage of goods in transit

a) The essence of a right of lien is to retain possession whereas the right of stoppage in transit is right to regain possession.
b) Seller should be in possession of goods under lien while in stoppage in transit (i) Seller should have parted with the possession (ii) possession should be with a carrier and (iii) buyer has not acquired the possession.
c) Right of lien can be exercised even when the buyer is not insolvent but it is not the case with right of stoppage in transit.
d) Right of stoppage in transit begins when the right of lien ends. Thus the end of the right of lien is the starting point of the stoppage in transit.

Q. State your views on the following:

a) Consideration for sale of goods must be in terms of money.

b) In an auction sale, a bid once made cannot be withdrawn by the bidder. (June 16 – 4 Marks)

Ans.

a) Correct: It is one of the essentials of the contract of sale, that price must be paid in terms of money.

b) Incorrect: The bidder can withdraw his bid any time before the fall of the hammer i.e., completion of sale.

Q. Ram sells 200 bales of cloth to Shyam and sends 100 bales by lorry and 100 bales by Railway. Shyam receives delivery of 100 bales sent by lorry, but before he receives the delivery of the bales sent by railway, he becomes bankrupt. Ram being still unpaid, stops the goods in transit. The official receiver, on Shyam's insolvency claims the goods. Decide the case with reference to the provisions of the Sale of Goods Act, 1930. (June 16 – 5 Marks)

Ans. The problem is based on section 50 of the Sale of Goods Act, 1930 dealing with the right of stoppage of the goods in transit available to an unpaid seller. The section states that the right is exercisable by the seller only if the following conditions are fulfilled.

1. The seller must be unpaid
2. He must have parted with the possession of goods
3. The goods must be in transit
4. The buyer must have become insolvent
5. The right is subject to the provisions of the Act.

Applying the provisions to the given case, Ram being still unpaid, can stop the 100 bales of cloth sent by railway as these goods are still in transit.

Q. X buys synthetic pearls for a high price thinking that they are natural pearls. The seller though understood X's intention, kept silent. Examine the remedies X has against the seller as per the Sale of Goods Act, 1930. (Dec 15 – 3 Marks)

Ans. X has no remedy against the seller as the doctrine of Caveat Emptor will apply.

'Caveat emptor' means "let the buyer beware". i.e. in sale of goods the seller is under no duty to reveal unflattering truths about the goods sold. Therefore, when a person buys some goods, he must examine them thoroughly. If the goods turn out to be defective or do not suit his purpose, or if he depends upon his skill and judgment and makes a bad selection, he cannot blame anybody excepting himself.

The rule is enunciated in the opening words of section 16 of the Sole of Good: Act. 1930 which runs thus: "Subject to the provisions of this Act and of any other law for the time being in force, there is no implied warranty or condition on to the quality or fitness for any particular purpose of goods supplied under a contract of sale"

Q. With a view to boost the sales, M/s ABC Ltd. sells a new machine to Mr. B on trial basis for a period of three days with a condition that if Mr. B is not satisfied with the performance of the new machine, he can return back the new machine. However, the machine was destroyed in a fire accident at the place of Mr. B before the expiry of three days. Decide whether Mr. B is liable for the loss suffered under Sale of Goods Act, 1930. (June 15 – 3 Marks)

Ans. The problem as asked in the question is based on the provisions of the Sale of Goods Act, 1930 as contained in Section 8. Where there is an agreement to sell specific goods and subsequently the goods without any fault on the part of the seller or buyer perish or become so damaged as no longer to answer to their description in the agreement before the risk passes to the buyer, the agreement is thereby avoided. In the given case that the subject matter of the contract i.e., new machine was destroyed before the transfer of property from the seller to the buyer. Thus, the risk passes only when the ownership is transferred to the buyer.

Therefore, in the present case Mr. B is not liable for the loss suffered due to the fire accident over which B has no control. Thus M/s. ABC Ltd will have to bear whatever loss that has taken place due to the fire accident.

Q. Angel agrees to sell to Peter his two Mercedes cars on the terms that the price was to be fixed by David. Peter takes the delivery of one car immediately. David refuses to oblige Angel and Peter and fixes no price. Angel asks for the return of the car already delivered whereas Peter insisted on the delivery of the second car to him for a reasonable price of both the cars.

Decide the case. (June 15 – 3 Marks)

Ans. As per section 10 of the Sale of Goods Act, the parties to the contract of sales may agree to the valuation done by the third party which have no interest in the contract except making a fair valuation of the subject matter of sales. It is quite possible that the third party may not do the valuation due to his own inability or due to fault of either of the parties to the contract. If the third party did not make any valuation for the reasons not attributable to any party, the contract is void. If non valuation of the goods by the third party is attributed to any fault on the part of any party to the contract, the aggrieved party i.e., party not at fault may sue the party at fault for breach of contract and even demand damages from him. This case is governed by Section 10 which provides that if the third party refuses to fix the price, the contract becomes void except as to part of goods delivered and accepted pay as regards which the buyer must pay a reasonable price. Thus as regards the car already delivered, Angel cannot ask for its return and must accept a reasonable price for that. As regards the second car, Peter cannot insist on its delivery to him since the contract has become void.

MOCK TESTS

Q. Discuss the provisions with respect to transfer of title by non-owner of goods. State the exceptions to this doctrine which seeks to protect the interest of bona fide buyers. (7 Marks)

Ans. *Transfer of Title by Non-Owners of Goods:*

As per section 27 of the Sale of Goods Act, where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by conduct precluded from denying the seller's authority to sell.

A buyer cannot get good title to the goods unless he purchased the goods from a person who is the owner thereof and sell them under the authority or with the consent of real owner.

"Nemo dat qui non habet" means that no one can give what he himself does not have. It means a non owner cannot make valid transfer of property in goods. If the title of the seller is defective, the buyer's title will also be subject to same defect.

If the seller has no title, the buyer does not acquire any title although he might have acted honestly and might have acquired the goods after due payment. This rule is to protect the real owner of the goods. Though this doctrine seeks to protect the interest of real owners, but in the interest of the trade and commerce, there must be some safeguard available to a person who acquired such goods in good faith for value.

Accordingly the Act provides the following exceptions to this doctrine which seek to protect the interest of bona fide buyers:

1. **Sale by a mercantile agent**: If a mercantile agent is authorized by the owner of the goods to sell on his behalf, then such sale shall be valid. In such cases, the buyer can acquire a good title of the goods. This exception will be implemented subject to fulfilment of the following conditions:-
   a) The person must be in possession of goods or documents of title to the goods in his capacity as a mercantile agent and with the consent of his owner
   b) The person must sell the goods while acting in the ordinary course of business.
   c) The buyer must act in good faith without having any notice, at the time of contract that the mercantile agent has no authority to sell the goods.
2. **Transfer of title by Estoppels**: This exception is based on the principle of personal estoppels. Sometime, the real owner may lead the buyers by virtue of his conduct or words or by act to believe that the seller is the owner of the goods or has the authority to sell them. In such case, he may not thereafter deny the seller's authority to sell.
3. **Sale by a joint owner**: As per Section 28, it there are several joint owners of goods, one of them if has sole possession of the goods by permission of the co-owners, then the property in goods is transferred to any person who buys them from such joint owner. In order to apply this exception, following conditions must be fulfilled.
   a) One of the several owners must be in sole possession of the goods.
   b) The joint owner must have permission of co-owners.
   c) The buyer must purchase goods in good faith.
   d) The buyer should not have notice regarding the matter that the seller has no authority to sell.
4. **Sale by person in possession under voidable contract**: According to the Section 29 a person in possession of goods under a voidable contract which is not rescinded, can transfer a good title to the buyer. The buyer should purchase the goods in good faith and without notice of the seller's defective

title.

5. **Sale by seller in possession after sale**: Under Section 30 (1) it is laid down that where a person has sold goods but he continues in possession of goods or of the documents of title to the goods, he may sell them to a third person and if such person obtains delivery thereof in good faith and without notice of the previous sale, the person can get a good title to them. In order to apply this exception, the seller must be in possession after sale of goods and there must be delivery or transfer of the goods or documents of title by the seller.

Q. Examine the concept of Caveat Emptor in line with the provisions of the Sale of Goods Act with two examples. (8 Marks)

Ans. The term "caveat emptor" is a Latin word which means "let the buyer beware". This principle states that it is for the buyer to satisfy himself that the goods which he is purchasing are of the quality which he requires. If he buys goods for a particular purpose, he must satisfy himself that they are fit for that purpose. The doctrine of caveat emptor is embodied in Section 16 of the Act which states that "subject to the provisions of this Act and of any other law for the time being in force, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale". It is not the seller's duty to give to the buyer the goods which are fit for a suitable purpose of the buyer. If he makes a wrong selection, he cannot blame the seller if the goods turn out to be defective or do not serve his purpose.

Example 1: The principle was applied in the case of Ward v. Hobbs, (1878), where certain pigs were sold by auction and no warranty was given by seller in respect of any fault or error of description. The buyer paid the price for healthy pigs. But they were ill and all but one died of typhoid fever. They also infected some of the buyer's own pigs. It was held that there was no implied condition or warranty that the pigs were of good health. It was the buyer's duty to satisfy himself regarding the health of the pigs.

Example 2: Sharon went to buy a second-hand car. Aaron was the owner of the second-hand car which clearly had a door broken. Sharon did not say anything but after buying the car she complained against Aaron for selling her a car with a broken door. Aaron is not bound to compensate for the damage that the car had which was easily discoverable or seen by Sharon. Neither is Sharon eligible to revoke the contract of sale on the same grounds.

Q. How can you apply the implied conditions in a contract of sale by sample. Discuss your answer with the appropriate examples and reference to the law. (8 Marks)

Ans. 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. In the case of a contract for sale by sample there is an implied condition –

- That the bulk shall correspond with the sample in quality.
- That the buyer shall have a reasonable opportunity of comparing the bulk with the sample.
- That the goods shall be free from any defect, rendering them un-merchantable, which would not be apparent on reasonable examination of the sample.

Example: David sold Indian variant of sunflower seeds at his shop and sold it in bulk for who ever wanted to buy the same. Tatiana tested the sample of the seeds at David's shop and decided to order it in bulk. However when David sent the seeds in bulk, Tatiana decided to sow the seeds. Months later Tatiana discovered that the seeds were of Swedish variant and not the Indian variant that she has requested for. Tatian now wanted full refund for the seeds that were delivered to her by David. David is now bound to either reimburse her the whole amount or give her the quantity of Swedish variant that she requested for.

In case of eatables and provisions, in addition to the implied condition as to merchantability, there is another implied condition that the goods shall be wholesome.

KCC TUTORIALS

NEGOTIABLE INSTRUMENTS ACT

Q. Mr. P draws a bill of exchange of 75,000 on Mr. Q, who accepts the same and returned to former. Later Mr. P endorsed the instrument in favour of Mr. R in settlement of an amount of 60,000 payable to him after recording the fact on the back of the bill that 15,000 has been received by Mr. P as a part payment of the bill. On maturity, Mr. R presented the bill for payment but it was dishonored. Discuss whether the endorsement of the bill by Mr. P to Mr. R is valid as per the provision of the Negotiable Instruments Act, 1881 (Dec 22 – 5 Marks)

Ans. It is important to note that the whole amount of the bill has to be endorsed for a valid endorsement. A part of the amount of an instrument cannot be endorsed. However, when a part of the amount has been received by the holder, the whole of the remaining unpaid amount can be endorsed to any party.

In this particular case a bill of exchange of Rs. 75,000 hold by Mr. P who has already received Rs. 15,000 as a part payment which has been clearly recorded on the back of the instrument. Since Mr. P has endorsed whole of the remaining amount of the bill i.e. Rs. 60,0000 to Mr. R, it will be considered as a valid endorsement. Thus, Mr. R will enjoy all the legal rights to recover the amount from Mr. P as per the provisions of the Negotiable Instruments Act, 1881.

Q. How would you differentiate between negotiation and assignment? (Dec 21 – 6 Marks)

Ans. Differences between Negotiation and Assignment are as under:

Sr. No.	Negotiation	Assignment
1	Consideration is presumed until contrary is proved.	Consideration must be proved.
2	If transferee is a holder in due course, he takes the instrument free from any defects.	Assignee's title is always subject to defenses and equities between the original debtor and assignor.
3	Notice of transfer is not necessary.	Notice of assignment must be given
4	Negotiation is effected by delivery in case of instruments payable to bearer and by delivery and endorsement in case of instrument	Assignment is effected only by writing

	payable to order.	
5	Transferee can sue the third party in his own name.	Assignee cannot do so.
6	There are a number of presumptions in favor of holder in due courses	There are no such presumptions.

Q. Write Short Notes on Endorsement under Negotiable Instruments Act, 1881 (Dec 21 - 3 Marks)

Ans. Section 15 of the Negotiable Instrument Act provides that when the maker or holder of a negotiable instrument signs the same, otherwise than as such maker, for the purpose of negation 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 negotiable instrument he is said to indorse the same and is called the 'indorser'.

Therefore, endorsement (indorsement) means writing of a person's name (other than maker) on the face or back of an instrument or on a slip of paper attached thereto for the purpose of negotiation. The person signing the instrument is known as endorser and the person in whose favour it is endorsed is known as endorsee.

Q. Mr. S. K drew a cheque in favour of Mr. P. K who was seventeen years old. Mr. P. K settled his rental due by endorsing the cheque in favour of Mrs. R. K the owner of the house in which he stayed. The cheque was dishonoured when Mrs. R. K presented it for payment on the grounds of inadequacy of funds. Advice Mrs. R. K how she can proceed to collect her dues. (Dec 19 – 6 Marks)

Ans. Section 26 of Negotiable Instrument Act 1881,provides that every person capable of contracting may bind himself and be bound by the making, drawing, acceptance, indorsement, delivery and negotiation of a promissory note, bill of exchange or cheque. However A minor may draw, indorse, deliver and negotiate such instrument so as to bind all parties except himself.

As per the facts given in the question, Mr. S.K drew a cheque in favour of Mr P.K a minor. Mr. P. K endorses the same in favour of Mrs. R. K. to settled his rental dues. The cheque was dishonoured when it was presented by Mrs. R. K. to the bank on the grounds of inadequacy of funds. Here in this case, Mr. P. K. being a minor may draw, endorse, deliver and negotiate the instrument so as to bind all parties except himself. Therefore, Mr. P. K is not liable. Mrs. R. K can thus, proceed against Mr. S. K to collect her dues.

Q. Ajay draws a bill on Anoop. Anoop accepts the bill without any consideration. The bill is transferred to Udit without consideration. Udit transferred it to Vicky for value. Decide-

a) Whether Vicky can sue the prior parties of the bill?
b) Whether the prior parties other than Vicky have any right of action intense? (June 19 – 8 marks)

Ans. *Section 43* of Negotiable Instrument Act,1881, provides that an instrument made, drawn, accepted, indorsed or transferred without consideration, or for a consideration which fails, creates no obligation of payment between the parties to the transaction. But if any such party has transferred the instrument with or without endorsement to a holder for consideration, such holder, and every subsequent holder deriving title from him, may recover the amount due on such instrument from the transferor for consideration or any prior party thereto.

a) In the problem, as asked in the question, Ajay has drawn a bill on Anoop and Anoop accepted the bill without consideration and transferred it to Udit without consideration. Later on in the next transfer by Udit to Vicky is for value. According to provisions of the aforesaid Section 43, the bill ultimately has been transferred to Vicky with consideration. Therefore, Vicky can sue any of the parties i.e. Ajay, Anoop or Udit, as Vicky arrived a good title on it being taken with consideration.
b) As regards to the second part of the problem, the prior parties before Vicky i.e. Ajay, Anoop and Udit have no right of action inter se because first part of Section 43 has clearly lays down that a negotiable instrument, made, drawn, accepted, indorsed or transferred without consideration, or for a consideration which fails, creates no obligation of payment between the parties to the transaction prior to the parties who receive it on consideration.

Q. Rahul draws a cheque payable to 'sell or order'. Before he could encash the cheque, one of his creditors, Samrat approaches him for payment. Rahul endorses the same cheque in Samrat's favour. The banker refuses payment to Samrat on account of insufficiency of funds in the account. Can Rahul be made liable to penalties for dishonor of cheque due to insufficiency of funds in the account under section 138 of Negotiable Instruments Act, 1881? (Dec 18 – 7 Marks)

Ans. Section 138 of Negotiable Instrument Act, 1881, creates statutory offence in the matter of dishonour of cheques on the ground of insufficiency of funds in the account maintained by a person with the banker.

Section 138 of the Act can be said to be falling either in the acts which are not criminal offense in real sense, but are acts which in public interest are prohibited under the penalty or those where although the proceeding may be in criminal form, they are really only a summary mode of enforcing a civil right. Normally in criminal law existence of guilty intent is an essential ingredient of a crime. However the Legislature can always create an offence of absolute liability or strict where 'mens rea' is not at all necessary.

No, Rahul cannot be made liable to penalties for dishonour of cheque due to insufficiency of funds in the account since the cheque was not originally drawn payable to another person.

A cheque drawn payable to self and later endorsed in favour of another person does not seem to fall within the purview of the provisions of Section 138 which lay down that the cheque should have been drawn for payment to another person.

Q. Anil draws a bill of exchange payable to himself on Sushil, who accepts the bill without consideration just to accommodate Anil. Anil transfers the bill to Ajay for good consideration.State the rights of Anil and Ajay. Would your answer be different if Anil transferred the bill to Ajay after maturity? (June 18 – 7 Marks)

Ans. Section 43 of the Negotiable Instrument Act, 1881 states the following:-

(1) *Liability of parties if there is no consideration* - A negotiable instrument made, drawn, accepted, endorsed or transferred without consideration, or for a consideration which fails, creates no obligation of payment between the parties to the transaction.

(2) *Rights of holder for consideration* - but if any such party has transferred the instrument to a holder for consideration, such holder, and every subsequent holder deriving title from him, may recover the amount due on such instrument from the transferor for consideration or any prior party thereto.

(3) *No right of accommodating party to recover from accommodating party* - No party for whose accommodation a negotiable instrument has been made, drawn, accepted, endorsed can, if he has paid the amount thereof, recover

thereon such amount from any person who became a party to such instrument for his accommodation.

In the given case, Anil is not entitled to sue Sushil, since there is no consideration between Anil and Sushil and hence there is no obligation to pay. is entitled to sue the transferor for consideration and every other party prior to him.

According to Sec 59, in the case of accommodation bills, a defect in the title of the transferor does not affect the title of the holder acquiring after maturity. Hence, even if Ajay has acquired the bill for consideration after maturity, he is entitled to sue.

Q. X, by inducing Y, obtains a Bill of Exchange from him fraudulently in his (X) favour. Later, he enters into a commercial deal and endorses the bill to Z towards consideration to him (Z) for the deal. Z takes the Bill as a holder in due course. Z subsequently endorses the bill to X for value, as consideration to X for some other deal. On maturity, the bill is dishonoured. X sues Y for recovery of money. With reference to the provisions of Negotiable Instruments Act, decide whether X will succeed in the case. (Dec 17 – 7 Marks)

Ans. *Section 58* of Negotiable Instruments Act provides that when an instrument is obtained by fraud, offence or for unlawful consideration, possessor or endorsee cannot receive the amount of Instrument. Hence, normally X would not be entitled to sue Y as X has obtained instrument through fraud.

However, as per section 53, a holder who derives title from holder in due course has all rights of a holder in due course. Since X derives his title from Z (who is a holder in due course), X has all rights of Z.

Second part of section 58 also makes it clear that even if a negotiable instrument is obtained by means of an offence or fraud or for unlawful consideration, the possessor or endorsee is entitled to receive the amount from the maker, if he is a holder in due course or claims through a person who was a holder in due course. Hence, X can sue Y as he is deriving his right from Z, who is holder in due course. Hence, X will succeed.

Q. A draws a bill on B. B accepts the bill without any consideration. The bill is transferred to C without consideration. C transferred it to D for value, Decide – (i) Whether D can sue the prior parties of the bill, (ii) Whether the prior parties other than D have any right of action intense? Give your answer

in reference to the Provisions of Negotiable Instruments Act, 1881. (June 17 – 6 Marks)

Ans. *Section 43* of the Negotiable Instruments Act. 1881 provides that an instrument made, drawn, accepted, indorsed or transferred without consideration, or for a consideration which fails, creates no obligation of payment between the parties to the transaction. But if any such party has transferred the instrument with or without endorsement to a holder for consideration, such holder, and every subsequent holder deriving title from him, may recover the amount due on such instrument from the transferor for consideration or any prior party thereto.

In the problem, as asked in the question, A has drawn a bill on B and B accepted the bill without consideration and transferred it to C without consideration. Later on in the next transfer by C to D is for value. According to provisions of the aforesaid section 43, the bill ultimately has been transferred to D with consideration. Therefore, D can sue any of the parties i.e. A, B or C, as D arrived a good title on it being taken with consideration.

As regards to the second part of the. problem, the prior parties before D i.e., A, B and C have no right of action inter se because first part of Section 43 has clearly lays down that a negotiable instrument, made, drawn, accepted, indorsed or transferred without consideration, or for a consideration which fails, creates no obligation of payment between the parties to the transaction prior to the parties who receive it on consideration.

Q. In what way does the Negotiable Instruments Act, 1881 regulate the determination of the "Date of maturity" of a Bill of Exchange. Ascertain the "Date of maturity" of a bill payable 120 days after the date. The Bill of exchange was drawn on 1st June, 2017. (June 17 – 10 Marks)

Ans. The maturity of a bill, not payable on demand, at sight or on presentment, is at maturity on the third day after the day on which it is expressed to be payable (Section 22, Para 2 of Negotiable Instruments Act, 1881). Three days are allowed as days of grace. No days of grace are allowed in the case of a bill payable on demand, at sight, or presentment. When a bill is made payable as stated number of months after date, the period slated terminates on the-day of the month, which corresponds with, the day on which the instrument is dated.

1. When it is made payable after a stated number of' moths after sight the period terminates on the day of the month which corresponds with the day on which it is presented for acceptance or sight or noted for non-acceptance on protested for non acceptance when it is payable a staled number of

months after a certain event, the period terminates on the day of the month which corresponds with the day on which the event happens. (Section - 23).

2. When a bill is made payable a stated number of months aft er sight and has been accepted for honour, the period terminates winch the clay of the month which corresponds with the day on which it was so accepted. If the month in which the period would terminate has no corresponding day, the period terminates on the last day of such mouth (Section 23)
3. In calculating the date a bill made payable a certain number of days after date or after sight or after a certain event is at maturity, the day of the date, or the day of protest for non-accordance, or the day on which the event happens shall be excluded (Section 24).
4. Three days of grace are allowed to these instruments after the day on which they are expressed to be payable. (Section 22). When the last day of grace falls on a day, which is public holiday, the instrument is due and payable on the preceding business day (Section 25).

Answer to Problem: In this case the day of Presentment for sight is to be excluded i. e. 1st June 2017. The period of 120 days ends on 29thSeptember, 2017 (June 29 days + July 31 days + Aug. 31 days + September 29 days). Three days of grace are to be added. It falls due on 2nd October 2017, which happens to be a public holiday. As such it will fall due on 1st October, 2017 i. e., the preceding Business day.

Q. Distinguish between Bill of Exchange and Promissory Note. (Dec 17 – 7 Marks)

Ans. Distinguish between Bill of Exchange and Promissory Note.

The following are the points of differences between a Bill of Exchange and Promissory note:

1. **Number of Parties:** In a Bill of Exchange there are three parties - the drawer, the drawer and the payee. In a promissory note, there are 2 parties - the maker and the payee.
2. **Promise and Order:** in a Bill of Exchange, there is an order to pay. in a Promissory note there is a promise to pay.
3. **Acceptance:** A bin needs acceptance but a promissory note does not require acceptance.

4. **Liability:** The drawer of a bill is liable only when the drawer does not accept the bill or pay the money due. But the make of a Promissory note is primarily liable on the instrument.
5. **Relationship:** In a Bill of Exchange, a drawer stands in an immediate relationship with the acceptor; But the maker of the Promissory note stands in an immediate relationship to the payee
6. **Notice:** In case of non-acceptance or non-payment of a bill of notice must be given to all persons liable to pay. This is called 'Notice of Dishonour', in the case of a Promissory note, no 'Notice of Dishonour' is necessary.

In case of dishonour, foreign bill must not be protested; in case of promissory note, protest is not necessary.

Q. "It would be safer for the drawer to cross a cheque 'not negotiable' with the words 'account payee' added to it". Explain, how it is safer for the drawer in such case. (June 17 – 8 Marks)

Ans. As per the instructions issued by Reserve Bank of India on 09.09.1992, it would be safer for the drawer to cross a cheque 'not negotiable' with the words 'account payee' added to it. The effect of the words "not negotiable' on a crossed cheque is that the title of the transferee of such a cheque cannot be better than that of its transferor (Section 130 of Negotiable Instrument Act). The addition of the words 'not negotiable' does not restrict the further transferability of the cheque; it only takes away the main feature of negotiability, which is, that a holder with a defective title can give a good title to subsequent holder, in due course. Anyone who takes a cheque marked 'not negotiable' takes it at his own risk. The object of crossing a cheque 'not negotiable' is to award protection to the drawee or holder of the cheque against miscarriage or dishonesty in the course of transit by making it difficult to get the cheque so crossed cashed, until it reaches its destination.

The words 'Account Payee' on a cheque are a direction to the collecting banker that the amount collected on the cheque is to be credited to the account of the payee. If he credits the proceeds to a different account, he is prima facie guilty of negligence and will be liable to the true owner for the amount of the cheque. But such a crossing does not affect the paying banker who is under no duty to ascertain that the cheque in fact has been collected for the account of the person named as the payee.

Thus, the cheque crossed 'not negotiable' with the words 'account payee' added to it protects the drawer of the cheque in two ways. (1) The main feature of negotiability is lost i.e., the holder in due course cannot get a better title than that of the transferor. (2) The collecting banker must take utmost care to inquire into the title of its customer and satisfy itself that there is no defect in the title of the customer presenting such cheque of collection.

OLD SYLLABUS

Q. State the circumstances under which a banker is bound to refuse the payment of a cheque. (June 16 – 8 Marks)

Ans. Following are the circumstances in which the banker is bound to refuse the payment of a cheque:

(1) **When the customer has countermanded payment.** The term 'countermand' means the issue of instruction to the banker not to pay a particular cheque. Thus, where a customer issues instructions to the banker not to make the payment of a particular cheque, the banker must not make the payment. A cheque, the payment of which is stopped by the customer is known as a 'stopped cheque'. And a stopped cheque is a piece of waste paper in the hands of payee. It is, however, necessary that a countermand to be effective must reach the banker before he had paid the cheque in the ordinary course. It may also be noted that the countermand notice must be duly signed by the customer and give correct particulars of the cheque.

(2) **When the customer has died.** Sometimes, the banker receives notice of customer's death. In such cases, he must refuse the payment of the cheque presented after the notice of death. However, if the payment is made before the banker receives the notice of death, the payment is valid and banker is justified in making such payment.

(3) **When the customer has become insolvent**. Sometimes, the banker receive; the notice of customer's insolvency. In such cases also he must refuse the payment of the cheques presented after the notice.

(4) When the customer has become a person of unsound mind (i.e. insane). Sometimes, the banker receives the notice that his customer has become insane. In such cases also, he must refuse payment of the cheque presented after the notice.

(5) When a garnishee order has been received by the banker. The term Garnishee order may be defined as a court order attaching the balance in customer's account. When the banker receives such order then he is bound to refuse the payment of the customer's cheque.

(6) When the cheque is lost. Sometimes, the drawer informs the banker that a particular cheque is lost. In such cases, banker must refuse the payment of that cheque.

(7) When the account is closed. Sometimes the customer closes his account and gives notice to the banker. In such cases the banker must not pay any cheque of the customer after the closure of the account.

(8) When holder's title is defective. Sometimes, the banker comes to know of any defect in the title of the person presenting the cheque. In such cases, he must refuse the payment of the cheque.

(9) When a customer gives notice of assignment of credit balance in his account, the banker must refuse the payment of cheque.

Q. 'P' draws a cheque for ` 50,000. When the cheque ought to be presented to the drawee bank, the drawer has sufficient funds to make payment of the cheque. The bank fails before the cheque is presented. The payee demands payment from the drawer. What is the liability of the drawer? (Dec 15 – 3 Marks)

Ans. Section 84 of the Negotiable Instruments Act, 1881 provides that where a cheque is not presented for payment within a reasonable time of its issue and the drawer or person on whose account it is drawn had the right at the time when presentation ought to have been made, as between himself and the banker, to have the cheque paid and suffers actual damage through the delay, he is discharged from the liability, that is to say, to the extent to which such drawer or person is a creditor

of the banker to a larger amount than would have been if such cheque had been paid. In determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade and of banker, and the facts of the particular case.

Applying the above provisions to the given problem since the payee has not presented the cheque to the drawer's bank within a reasonable time when the drawer had funds to pay the cheque, and the drawer has suffered actual damage, the drawer is discharged from the liability.

Q. Mr. Big, a major and Small, a minor, executed a promissory note in favour of Ms. Purva. Examine with reference to the Provisions of the Negotiable Instrument Act, the validity of the promissory note and whether it is binding on Mr. Big and Small. (Dec 15 – 3 Marks)

Ans. Minor being a party to negotiable instrument: According to section 26 of the Negotiable Instruments Act, 1881, every person competent to contract has capacity to incur liability by making, drawing, accepting, endorsing, delivering and negotiating a promissory note, bill of exchange or cheque.

As a minor's agreement is void, he cannot bind himself by becoming a party to a negotiable instrument. But he may draw, endorse, deliver and negotiate such instruments so as to bind all parties except himself.

In view of the provisions of Section 26 explained above, the promissory note executed by Mr. Big and Small is valid even though a minor is a party to it. Small being a minor is not liable; but his immunity from liability does not absolve the other joint promisor, namely Mr. Big from liability [Sulochana v. Pandiyan Bank Ltd., AIR (1975) Mad. 70].

Q. 'A partial endorsement does not operate as a negotiation of the instrument'. Explain. (June 15 – 3 Marks)

Ans. Section 56 provides that a negotiable instrument cannot be endorsed for a part of the amount appearing to be due on the instrument. In other words, a partial endorsement which transfers the right to receive only a part payment of the amount due on the instrument is invalid. Such an endorsement has been declared invalid because it would subject the prior parties to plurality of actions (one action by holder for part value and another action by endorsee for part value) and will thus cause inconvenience to them. Moreover, it would also interfere with the free circulation of negotiable instruments. It may be noted that an endorsement which purports to transfer the instrument to two or more endorsees separately and not jointly as also treated as partial endorsement and hence would be invalid. Thus, where A holds a bill

for ` 2,000 and endorses it in favour of B for ` 1,000 and in favour of C for the remaining ` 1,000, the endorsement is partial and invalid.

Section 56, however further provides that where an instrument has been paid in part, a note to that effect may be endorsed on the instrument and it may then be negotiated for the balance. Thus, if in the above illustration the acceptor has already paid ` 1,000 to A, the holder of the bill, A can then make an endorsement saying "pay B or order ` 1,000 being the unpaid residue of the bill". Such an endorsement would be valid.

Q. Amrut draws a cheque payable to 'self or order'. Before he could encash the cheque, one of his creditors, Bihari approaches him for payment. Amrut endorses the same cheque in Bihari's favour. The banker refuses payment to Bihari on account of insufficiency of funds in the account. Can Amrut be made liable to penalties for dishonor of cheque due to insufficiency of funds in the account under section 138? (June 15 – 3 Marks)

Ans. Section 138 of Negotiable Instrument Act 1881, creates statutory offence in the matter of dishonor of cheques on the ground of insufficiency of funds in the account maintained by a person with the banker. Section 138 of the Act can be said to be falling either in the acts which are not criminal offense in real sense, but are acts which in public interest are prohibited under the penalty or those where although the proceeding may be in criminal form, they are really only a summary mode of enforcing a civil right. Normally in criminal law existence of guilty intent is an essential ingredient of a crime. However the Legislature can always create an offence of absolute liability or strict liability where „mens rea" is not at all necessary.

No, Amrut cannot be made liable to penalties for dishonor of cheque due to insufficiency of funds in the account since the cheque was not originally drawn payable to another person. A cheque drawn payable to self and later endorsed in favor of another person dies not seem to fall within the purview of the provisions of Section 138 which lay down that the cheque should have been drawn for payment to another person.

Q. Amit signs, as maker, a blank stamped paper and gives it to Sumit and authorizes him to fill it as a note for ` 500, to secure an advance which Namit is to make to Sumit. Sumit fraudulently fills it up as a note for ` 2,000, payable to Namit who has in good faith advanced ` 2,000. Decide, with reasons, whether Namit is entitled to recover the amount, and if so, upto what extent? (June 15 – 3 Marks)

Ans. A duly signed blank stamped instrument is called an inchoate instrument.

According to Section 20 of the Negotiable Instruments Act, an Inchoate instrument is an incomplete Instrument in some respect. When a person signs and delivers blank or incomplete stamped paper to another, such other is authorized to complete it for any amount not exceeding the amount covered by the stamp. The person so signing is liable upon such instrument, to any holder in due course for nay amount. But any other person can't claim more than the amount intended by the drawer of the instrument.

Thus, for Namit's claim to be valid and enforceable, two things are important:

- That Namit is a holder in due course, i.e., there should be valid consideration and he would have obtained it in good faith and before maturity.
- The amount filled in i.e., ` 2,000 is covered by stamp amount.

In Negotiable Instruments Act every holder is deemed to be a holder in due course. Thus, the other party has to establish that Namit is not a holder in due course.

MOCK TESTS

Q. Distinguish between promissory note and cheque. (8 Marks)

Ans.

PROMISORY NOTE	CHEQUE
It is defined in Sec. 4 of NI Act, 1881.	It is defined in Sec. 6 of the NI Act, 1881.
There are two parties: ▪ Maker. ▪ Payee. If it is given a guarantee, then there willbe a third person, who is called as Guarantor or Surety.	There are three parties: ▪ Drawer. ▪ Drawee. ▪ Payee.
Promissory note contains a promise topay the sum with interest or without interest at a later date.	A cheque is payable immediately on demand without any days of grace.
Promissory note is not crossed.	Cheque can be crossed.
No protection is available to the payee of note.	Statutory protection is given to the drawee banker. (Sec. 128)
A promissory note cannot be self-drawn.	A cheque can be self-drawn or bearer cheque.
No criminal liability shall be imposed onthe maker.	Criminal Liability may be imposed on drawee for the dishonor of cheques in certain circumstances.

Stamp is necessary.	Stamp is not necessary.
Limitation: 3 years.	Limitation: 6 months.

Q. Differentiate between bill of exchange & cheque. (7 Marks)

Ans.

BILL OF EXCHANGE	CHEQUE
It is defined in Sec. 5 of NI Act, 1881.	It is defined in Sec. 6 of the NI Act,1881.
There are three parties: ▪ Drawer ▪ Drawee ▪ Payee	There are three parties: ▪ Drawer ▪ Drawee ▪ Payee
Bills of exchange are not crossed.	Cheques may be crossed.
Generally, three days of grace are given for the payment in case of a bill of exchange. However, this convenience is not allowed in case of bill of exchange payable on demand.	Immediate payment is required in case of cheque. No grace days are allowed.
Anybody including banker may be a drawee in case of bill of exchange.	The drawee is always a baker.
It must be accepted before the acceptor can be made liable upon it.	It requires immediate payment. It does not require acceptance of the maker. Thus, the question of acceptance does not arise in case of cheque.
Where a Bill of Exchange is not paid and not honoured, a notice of dishonour should be sent to the drawer to charge him.	Where a cheque is dishonoured, Notice of Dishonour is not strictly necessary. The banker can return the cheque with the memo "Refer to Drawer" which is a sufficient notice.
Statutory protection is not available.	Sec. 85 of the N.I Act, 1881 affords protection to bankers.
Civil Liability in case of dishonour of bill of exchange.	Criminal liability in case of dishonour of a cheque/bouncing of a cheque and is liable to be prosecuted under Sec. 138 of the N.I. Act, 1881.

Q. Distinguish between a Promissory Note and a Bill of Exchange. (5 Marks)

Ans.

Promissory Note	Bill of Exchange
It is defined in Sec. 4 of NI Act, 1881	It is defined in Sec. 5 of the NI Act, 1881.
There are two parties: • Maker • Payee	There are three parties: • Drawer • Acceptor • Payee
It contains a Promise to pay.	It contains an order to pay.
No conditions shall be made in a promissory note.	A bill may be accepted conditionally.
The liability of a maker of the promissory note is primary and absolute.	The liability of the drawee of a bill of exchange is secondary and conditional.

Q. L draws a bill of exchange payable to himself on P, who accepts the bill without consideration just to accommodate L. L transfers the bill to G for good consideration. State the rights of L and G. Would your answer be different if L transferred the bill to G after maturity? (8 Marks)

Ans. Section 43 of the Negotiable Instrument Act, 1881 states the following: -

1. Liability of parties if there is no consideration - A negotiable instrument made, drawn, accepted, endorsed or transferred without consideration, or for a consideration which fails, creates no obligation of payment between the parties to the transaction.
2. Rights of holder for consideration - but if any such party has transferred the instrument to a holder for consideration, such holder, and every subsequent holder deriving title from him, may recover the amount due on such instrument from the transferor for consideration or any prior party thereto.
3. No right of accommodating party to recover from accommodating party - No party for whose accommodation a negotiable instrument has been made, drawn, accepted, endorsed can, if he has paid the amount thereof, recover thereon such amount from any person who became a party to such instrument for his accommodation.

In the given case, L is not entitled to sue P since there is no consideration between L and P and hence there is no obligation to pay. Again G is entitled to sue L and P,

since G is a holder for consideration. G is entitled to sue the transferor for consideration and every other party prior to him. According to Sec 59, in the case of accommodation bills, a defect in the title of the transferor does not affect the title of the holder acquiring after maturity. Hence, even if G has acquired the bill for consideration after maturity, he is entitled to sue.

Q. Discuss the special characteristics of "Negotiable Instruments". (5 Marks)

Ans. Special characteristics of Negotiable Instruments are -

1. It must be in writing.
2. It should be signed by the maker or drawer.
3. There must be a promise or order to pay.
4. The promise or order must be unconditional.
5. It must call for payment in money and money only.
6. It should call for payment of a certain sum.
7. The property in the instrument may be passed in two ways:
   a) by mere delivery; and
   b) by indorsement and delivery.
8. The consideration is also presumed to have been passed

KCC TUTORIALS

PARTNERSHIP ACT

Q. Amar and Kunal are partners in a firm. They borrowed sum of ₹ 5,00,000 from Sunita. Later on, Amar becomes insolvent but his assets are insufficient to payback the loan. Sunita compels kunal for the payment of entire loan. With reference to the provisions of the Indian Partnership Act, 1932, examine the validity of Sunita's claim and decide as to why may be held liable for the above loan. (June, 23 – 5 Marks) (Syllabus, 2022)

Ans. This problem is concerned with the contractual liability of the Partners. As stated in the Section 25 of the Indian Partnership Act,1932, in partnership the liability of the partners is unlimited.

The share of each partner in the partnership property along with his private property is liable for the discharge of partnership liabilities.

The liability of the partners is not only unlimited but is also stated that a partner is both jointly and severally liable to third parties.

However, every partner is liable jointly with other partner and also severally for the acts of the firm done while he is a partner.

On the basis of above provisions, Sunita can compel Kunal for the payment of entire loan. Kunal must pay the said loan and they he can recover the share of Amar''s loan from his property.

Q. Prepare the list of mutual rights and liabilities of partners as per the Indian Partnership Act, 1932. (June, 23 – 7 Marks) (Syllabus, 2022)

Ans. **Followings are the Mutual rights and liabilities of partners:**

Section 13 of the Indian Partnership Act, 1932 provides that subject to the contract between the partners-

(i) a partner is not entitled to receive remuneration for taking part in the conduct of the business;

(ii) the partners are entitled to share equally in the profits earned and shall contribute equally to the losses sustained by the firm;

(iii) where a partner is entitled to interest on the capital subscribed by him, such

interest shall be payable only out of profits;

(iv) 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 6% per annum;

(v) the firm shall indemnify a partner in respect of payments made, and liabilities incurred, by him-

a) in the ordinary and proper conduct of the business, and

b) 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

(vi) a partner shall indemnify the firm or any loss caused to it by his willful neglect in the conduct of thebusiness of the firm.

(vii) When the profits are not shared equally, the losses are, in the absence of the agreement, to be borne in the same proportion as the profits are shares, regardless, whether one partner has put up more capital than other.

Q. What are the rights of outgoing partners? (June 17 – 9 Marks)

Ans. Section 36 provides that an outgoing partner may carry on a business competing with that of the firm. He may advertise such business, but, subject to contract to the contrary, he may not-

- use the firm name;.
- represent himself as carrying on the business of the firm; or
- solicit the custom of persons who were dealing with the firm before he ceased to be a partner.

Section 37 provides that in case where a partner has died or ceased to be a partner, the surviving and continuing partners may carry on the business of the firm with the property of the firm without any final settlement of accounts as between them and the outgoing partner or the estate of deceased partner. In the absence of a contract to the contrary, the outgoing partner of the representative of the deceased partner is entitled at the option-

- to such share of the profits made since he ceased to be a partner as may be attributable to the use of his share of the property of the firm; or
- to interest at 6% per annum on the amount his share in the property of the firm.

Where an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner and the same is duly exercised, the estate of the deceased partner or the outgoing partner is not entitled to any further or other share of profits. But if any partner, assuming to act in exercise of the option, does not, in all material respects comply with the terms, he is liable to account under the provisions of this section.

Q. Discuss the right and liability of partners after dissolution as per Indian Partnership Act, 1932. (Dec, 23 – 7 Marks) (Syllabus, 2022)

Ans. Right of partners after dissolution

Section 46 provides that on the dissolution of a firm, every partner or his representative is entitled as against all the other partners or their representatives, to have the property of the firm applied in payment of the debts and liabilities of the firm and to have the surplus distributed among the partners or their representatives according to their rights.

Liability of partners after dissolution

Section 45 provides that the liability of the partners will continue for the acts done before the dissolution, even after the dissolution, until public notice is given of the dissolution. The following partner is not liable for the acts after the date on which he ceases to be a partner-

- a deceased partner;
- a partner who is adjudicated as an insolvent;
- a partner, who not having been known to the person, dealing with the firm, to be a person, retires from the firm

In 'Rajagopala Pillai v. Krishnaswai Chetti' - 8 Mad LJ 261 it was held that the legal representatives of a deceased partner cannot be validly bound by an acknowledgement made by the surviving partner after dissolution caused by death. Once the partnership is dissolved, even the theory of implied agency disappears. After the jural relationship of partners having been put an end, there can be no question of any partner, acting in any representative capacity, so as to bind the firm.

OLD SYLLABUS

Q. State the modes by which a partner may transfer his interest in the firm in favour of another person under the Indian Partnership Act. What are the rights of such a transferee? (June 17 – 5 Marks)

Ans. Modes by which a partner may transfer his interest in the firm:

According to Section 29 of the Indian Partnership Act, 1932 a partner may transfer his interest in the firm by sale, mortgage or charge. The transfer may be absolute or partial. The transfer does not entitle the transferee, during the continuance of the firm:

- to interfere in the conduct of the business of the firm, or
- to require accounts of the firm, or
- to inspect the books of the firm

On transfer of interest by a partner, the transferee only becomes entitled to receive share of profit of the transferring partner. But in this case also the transferee has to accept the account of profits agreed to by the partners [Section 29(1)]. If the firm is dissolved or if the transferring partner ceases to be a partner, the transferee is entitled to receive the transferring partner's share in the assets of the firm. For the purpose of ascertaining that share, he is entitled to an account as from the date of the dissolution (Section 29(2)).

Q. ABC & Co., a firm consists of three partners A, B and C having one-third share each in the firm. According to A and B, the activities of C are not in the interest of the partnership and thus want to expel C from the firm. Advise A and B whether they can do so quoting the relevant provisions of the Indian Partnership Act. (June 16 – 5 Marks)

Ans. Normally it is not possible for the majority of partners to expel a partner from the firm without satisfying the conditions as laid down in Section 33 of the Indian Partnership Act, 1932. The essential conditions before expulsion can be done are:

1. power of expulsion should exist in the partnership deed (contract between the partners).
2. power has been exercised by the majority of the partners in good faith.

The test of good faith includes:

a) that the expulsion must be in the interest of the partnership;
b) that the partner to be expelled is served with a notice; and
c) that the partner has been given an opportunity of being heard.

Thus, in the given case A and B the majority partners can expel the partner only if the above conditions are satisfied and procedure as stated above has been followed. Further the invalid expulsion of a partner does not put an end to the partnership and it will be deemed to continue as before.

Q. "Implied Authority of a partner can be extended or restricted."—Discuss the above statement in the light of the provisions of the Indian Partnership Act, 1932. (Dec 15 – 3 Marks)

Ans. Section 19 (1) of the Indian Partnership Act 1932 provides that the act of a partner which is done to carry on the usual way, business of the kind carried on by the firm bind the firm, provided the act is done in the film's name or in any manner expressing or implying an intention to bind the firm. The implied authority of a partner extends only to such acts which are common in the type of business carried on by the firm and are done by him in usual way of carrying on the firm's business. Thus, if it is usual to give credit to customers, in a particular business, the giving of credit by a partner to a customer will bind the firm. However, if a usual act is done in an unusual manner, this must raise a suspicion as to the authority of a partner and the protection on the ground of implied authority may not be available.

Q. B and C were partners in ABC & Co. During the course of partnership, the firm ordered SS Ltd. to supply a machine to the firm. Before the machine was delivered, A expired. The machine, however, was later delivered to the firm. Thereafter, the remaining partners become insolvent and the firm failed to pay the price of machine to SS Ltd. Explain with reasons:

a) Whether A's private estate is liable for the price of the machine purchased by the firm?

b) Against whom can the creditor obtain a decree for the recovery of the price? (Dec 15 -3 Marks)

Ans. The problem in question is based on the provisions of the Indian Partnership Act, 1932 contained in Section 35. The Section provides that where under a contract between the partners the firm is not dissolved by the death of a partner, the estate of a deceased partner is not liable for any act of the firm done after his death. Therefore, considering the above provisions, the problem may be answered as follows:

a) A's estate in this case will not be liable for the price of Machinery purchased. [Bagel Vs. Willer]

b) The creditors in this case can have only a personal decree against the surviving partners and decree against the partnership assets in the hands of those partners. However, since the surviving partners are already insolvent, no suit for recovery of the debt would lie against them. A suit for goods sold and delivered would not lie against the representative of the deceased partner. This is because there was no debt due in respect of the goods in A's life time. [Bagel Vs. Willer].

Q. Rohit and Anurag are partners in a firm. They borrowed a sum of ` 10,000 from Parul. Later on, Rohit becomes insolvent but his assets are sufficient to pay back the loan. Parul compels Anurag for the payment of entire loan. Referring to the provisions of the Indian Partnership Act, 1932, examine the validity of Parul's claim and decide as to who may be held liable for the above loan. (June 15 – 3 Marks)

Ans. The present problem is concerned with the contractual liability of the Partners. As stated in the section 25 of the Indian Partnership Act, 1932, in partnership the liability of the partners is unlimited. The share of each partner in the partnership property along with his private property is liable for the discharge of partnership liabilities. The liability of the partners is not only unlimited but is also stated that a partner is both jointly and severally liable to third parties. However, every partner is liable jointly with other partner and also severally for the acts of the firm done while he is a partner. On the basis of above provisions, Parul can compel Anurag for the payment of entire loan. Anurag must pay the said loan and then he can recover the share of Rohit's loan from his property.

Q. What tests would apply for determining the existence of partnership? Discuss. (June 15 – 3 Marks)

Ans. As must be clear from the discussion of various elements of partnership, there is no single test of partnership. For example, in one case there may be sharing of

profits but may not be any business, in the other case there may be business but there may not be sharing of profits, in yet another case there may be both business and sharing of profits but the relationship between persons sharing the profits may not be that of principal and agent. And in either case, therefore, there is no partnership. Thus, all the essential elements of partnership must coexist in order to constitute a partnership. To emphasize this fact, Section 6 expressly provides that "in determining whether a group of persons is or is not a firm or whether a person is or is not a partner in a firm, regard shall be given to the real relation between the parties, as shown by all relevant facts taken together." Thus, the existence of partnership has to be determined with reference to the real intention of the parties, which must be gathered from all the facts of the case and the surrounding circumstances.

Q. Arun, Varun and Tarun started a Kirana business in Chennai on 1st January, 2012 for a period of five years. The business resulted in a loss of ` 20,000 in the first year, ` 25,000 in the second year and ` 35,000 in the third year, Varun and Tarun wish to dissolve the firm while Arun wants to continue the business. Advise Varun and Tarun. (June 15 – 3 Marks)

Ans. As per provisions of Sec 44(f) of Indian Partnership Act, 1932, Varun and Tarun are advised to make a petition to the court for the dissolution of the firm on the ground that the firm cannot be carried on except at a loss. Since the firm was constituted for fixed term of five years it cannot be dissolved without the consent of all the partners and as such Varun and Tarun cannot compel Arun to dissolve the firm.

Mock tests

Q. State the procedure to form a partnership as per Partnership Act. (8 Marks)

Ans. The first step is to decide the number of partners of a firm. The law provides for minimum 2 number of partners. The upper limit is 10 in case of banking business and 20 in respect of other business.

1. First decide to who are the partners of the firm, considering the limit envisaged in the Act;
2. The name of the partnership firm is selected subject to the provisions of the partnership Act;
3. Select the business to be done by the partnership and object of the

business;

4. Decide the capital to be brought by each and every partner
5. Prepare the agreement deed of the firm – th e deed is the vital and most significant document. The deed shall contain all aspect s of the partnership firm. This document prescribes the „a to z" of the partnership firm to be formed;
6. The agreement should invariably in writing and signed by all partners;
7. The provisions contained in the agreement are binding all partner
8. The partnership firm is to be registered. According to the Act the partnership firm may be registered or may not be registered. Unregistered firms have no legal protection and therefore registration of partnership firm is to be preferred.
9. Open bank account in the name of the partnership firm;
10. In the present scenario obtaining PAN is necessary and get the PAN from the Income Tax Authority;
11. Acquire all mandatory licences from the respective authorities for the conduct of the business;
12. Registration with required tax authorities i.e., direct tax as well as indirect tax such as central excise, service tax, VAT etc.,
13. The Registration certificate is the conclusive evidence of the formation of the partnership firm.

KCC TUTORIALS

LLP ACT

Q. Discuss the procedure of conversion from unlisted public company into limited liability partnership. (Dec 22 – 10 Marks)

Ans. *Para 1(b)* of the fourth schedule defines the term 'convert' in relation to a company converting into a LLP, as a transfer of the property, assets, interests, rights, privileges, liabilities, obligations and the undertaking of the company to the LLP in accordance with the provisions of the schedule.

Para 1(c) defines the term 'listed company' as defined in SEBI (Disclosure and Investor Protection) Guidelines, 2000 issued by SEBI under Section 11 of the SEBI Act, 1992 which defines as a company which has any of its securities offered through an offer document listed on a recognized stock exchange and also includes Public Sector Undertakings whose securities are listed on a recognized stock exchange.

Para 1(d) defines the term 'unlisted company' as a company which is not a listed company. A company may apply to convert into a LLP if and only if-
there is no security interest in its assets subsisting or in force at the time of application; and the partners of the LLP to which it converts comprise all the shareholders of the company and no one else.

A company is also to file the following documents-

- A statement by all its shareholders in Form No.18 along with fee containing the following particulars-
- the name and registration number of the company;
- the date of which the company was incorporated; and
- Incorporation document and statement;

On receipt of the above statements the Registrar shall register the documents, subject to the provisions of the Act and the rules made there under. The Registrar may require the documents to be verified as he considers fit. The Registrar shall issue a certificate of registration in Form No. 19 as the Registrar may determine stating that the LLP is, on and from the date specified in the certificate, registered under the Act.

The LLP shall inform the concerned Registrar of Companies within 15 days of the date of registration about the conversion and the particulars of the LLP. The Registrar, if is he is not satisfied with the particulars or other information furnished, may refuse to register. Against this order an appeal may be filed before the Tribunal.

Q. Discuss the procedure of conversion from private limited company into limited liability partnership. (Dec 19 – 9 Marks)

Ans. The procedure of conversion from private limited company into Limited Liability Partnership (LLP) is discussed as under:

Para 1(b) of the third schedule defines the term 'convert' in relation to a private company converting into a LLP, as a transfer of the property, assets, interests, rights, privileges, liabilities, obligations and the undertaking of the private company to the LLP in accordance with the third schedule.

A company may apply to convert itself into a LLP if and only if -

- there is no security interest in its assets subsisting or in force at the time of application; and
- the partners of the LLP to which it converts comprise all the shareholders of the company and no one else.

Upon the conversion of a private company into an LLP, the company and its shareholders, the LLP and the partners of the LLP shall be bound by the provisions of this schedule that are applicable to them.

The company has to apply with the Registrar by filing a statement by all its shareholders in Form No. 18 and fees containing the following particulars

- The name and registration number of the company;
- The date on which the company was incorporated; and
- incorporation document and statement;

On the receipt of the above said documents, the Registrar shall register the documents subject to the provisions of the Act and the rules made there under. The Registrar may require the documents to be verified as he considers fit. The Registrar shall issue a certificate of registration in Form No. 19 as the Registrar may determine stating that the LLP is, on and from the date specified in the certificate.

The LLP shall inform the concerned Registrar of Companies within 15 days of the date of registration about the conversion and of the particulars of LLP in Form along with the fees. If the Registrar is not satisfied with the particulars or other information furnished the Registrar may refused to register. Against this order appeal may be made before the Tribunal.

Q. A limited liability partnership wants to shift its registered office from Mumbai in the State of Maharashtra to Kolkata in the State of West Bengal. What procedure the corporate has to follow under Limited Liability Partnership Act, 2008? (Dec 18 – 8 Marks)

Ans. *Change of LLP Office from one State to another* (in the given problem, it is from Mumbai, Maharashtra to Kolkata, West Bengal)

Resolution for Change of Address: It should be done as per LLP Agreement. If where the Limited LLP doesn't provide for any such procedure, consent of all partners shall be required for changing the place of Registered Office of Limited LLP to another place.

Secured Creditors: Consent of Secured Creditors required for such change of address.

Form to be filed: Form- 15 to be filed with Registrar from where (here it is Mumbai) the LLP proposes to shift its registered office with a copy thereof for the information to the Registrar under whose jurisdiction (Kolkata) the registered office is proposed to be shifted within 30 days of such change.

Public Notice: Publish a general notice, not less than 21 days before filing any notice with Registrar, in a daily newspaper published in English and in the principal language of the district in which the registered office of the LLP is situated (Mumbai, Maharashtra)and circulated in that district giving notice of change of registered office.

From when to be filed: Within 30 days of publishing of notice.

Failure to comply with these provisions, the LLP and its every partner is liable to punishable with fine which shall not be less than two thousand rupees but which may extend to twenty five thousand rupees.

OLD SYLLABUS

Q. Discuss, in brief, rules for winding up and dissolution of a LLP. (Dec 17 – 9 Marks)

Ans. Dissolution of LLP- Rules for winding up and dissolution

Central Government has power to make rules for dissolution and winding up of a LLP. A perusal of the LLP Act 2008 shows that the provisions relating to dissolution of a LLP are more or less the same as provided in the Partnership Act, 1932 for dissolution of a Partnership firm. (Sec 65)

A partner may lend money to and transact other business with the limited liability partnership and has the same rights and obligations with respect to the loan or other transactions as a person who is not a partner (sec 66).

Application of the provisions of the Companies Act: As per section 67 the Central Government has power to direct by notification in the official gazette specify the provision of Companies Act,1956 which will be applicable to a LLP or applicable to a LLP with such modification or adaption as may be specified in the notification. A copy of such notification is required to be laid in draft before each house of Parliament, and such notification shall be issued only in such form as may be agreed upon by both the houses of Parliament.

By virtue of the power conferred upon the Central Government, the Central Government has from time to time issued order for application of various provisions of the Companies Act, 1956 as such of with some modification to the LLP.

Section 68 contains provisions regarding filing, recording or registered under this Act to be so filed, recorded or registered in such manner and subject to such conditions as may be prescribed.

A copy of or an extract from any document electronically filed with or submitted to the Registrar which is supplied or issued by the Registrar and certified through affixing digital signature as per the Information Technology Act, 2000 to be a true copy of or extract from such document shall, in any proceeding, be admissible in evidence as of equal validity with the original document.

As per sub section 3 of section 68 any information supplied by the Registrar that is certified by the Registrar trough affixing digital signature to be true extract from any document filed with or submitted to the Registrar shall, in any proceeding, be admissible in evidence and be presumed, unless evidence to the contrary is adduced to be a true extract from such document.

Section 69 allow a LLP to file any belated document or return not filed or registered to be filed or registered within three hundred days from the date within which it should have been filed on payment of additional fee of one hundred rupee for every day of such delay in addition to any fee as is payable for filing of such documents or returns. Such documents or return may without prejudice to any other action or liability under this Act, also be filed after such period of three hundred days on payment of fee and additional fee specified in this Act.

Q. Explain provisions relating to unlimited liability in case of fraud under LLP Act (June 17 – 7 Marks)

Ans. Unlimited liability in case of fraud (Sec 30)

In order to check the misuse of corporate veil by a LLP for the purpose of defrauding the creditors or any other person or for any fraudulent purpose the liability of the limited liability partnership and partners who acted with intent to defraud creditors or for any fraudulent purpose shall be unlimited for all or any of the debts or other liabilities of the limited liability partnership;

If any such act is carried out by a partner, the limited liability partnership is liable to the same extent as the partner unless it is established by the limited liability partnership that such act was without the knowledge or the authority of the limited liability partnership.

Where the business of a LLP is carried out for fraudulent purpose every person who was knowingly been a party to the carrying on of the business in the manner aforesaid shall be punishable with imprisonment for a term which may extend to two years and with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees. Moreover, the limited liability partnership and any such partner or designated partner or employee shall be liable to pay compensation to any person who has suffered any loss or damage by reason of such conduct:

However, the limited liability partnership shall not be liable if any such partner or designated partner or employee has acted fraudulently without knowledge of the limited liability partnership.

Q. Limited Liability Partnerships are body corporate. Do you agree? Justify (June 16 – 5 Marks)

Ans. Limited Liability Partnerships formed and registered under Limited Liability Partnership Act, 2008 are body corporate. All LLPs have the following features:

1. A Limited Liability Partnership is a body corporate formed and incorporated under this Act and is legal entity separate from that of its partners.
2. A limited liability partnership shall have perpetual succession.
3. Any change in the partners of a limited liability partnership shall not affect the existence, rights or liabilities of the limited liability partnership.
4. Save as otherwise provided, the provisions of the Indian Partnership Act, 1932 shall not apply to a limited liability partnership.

5. Any individual or body corporate may be a partner in a limited liability partnership.

Q. List the circumstances under which an LLP formed under the Limited Liability Partnership Act, 2008 may be wound up by tribunal? (Dec 15 – 3 Marks)

Ans. A Limited liability partnership may be wound up by the Tribunal,

1. If the limited liability partnership decides that limited liability partnership be wound up by the Tribunal;
2. If, for a period of more than six months, the number of partners of the limited liability partnership is reduced below two;
3. If the limited liability partnership is unable to pay its debts;
4. If the limited liability partnership has acted against the interests of the sovereignty and integrity of India, the security of the State or public-order;
5. If the limited liability partnership has made a default in filing with the Registrar the Statement of Account and Solvency or annual return for any five consecutive financial years; or
6. If the Tribunal is of the opinion that it is just and equitable that the limited liability partnership be wound up.

Q. Explain the extent of liability of limited liability partnership under section 26 of LLP Act. (June 15- 3 Marks)

Ans. Section 27 of LLP Act, provides that:

(1) A LLP is not bound by anything done, a partner in a dealing with a particular person if –

a) the partner in fact has no authority to act for the LLP in doing a particular act; and

b) the person knows that he has no authority or does not know or believe him to be a partner of the LLP

(2) The LLP is liable if a partner of a LLP is liable to any person as a result of wrongful act or omission on his part in the course of the business of the LLP or with its authority

(3) An obligation of LLP whether arising in contract or otherwise, shall be solely the obligation of the LLP

(4) The liabilities of LLP shall be met out of the property of the LLP.

MOCK TESTS

Q. Can a Partnership Firm convert into a LLP? If yes then please discuss the procedure. (7 Marks)

Ans. Yes. Conversion of firm into LLP Para 1(a) of the second schedule defines the term 'firm' as a firm as defined in Section 4 of the Indian Partnership Act, 1932. Para 1(b) defines the term 'convert' in relation to a firm converting into a LLP as a transfer of the property, assets, interests, rights, privileges, liabilities, obligations and the undertaking of the firm to LLP.

A firm may convert into a LLP on the condition that the partners of the firm shall be bound by the provisions of the second schedule that are applicable to them. A firm may apply to convert into a LLP if and only if the partners of the LLP into which the firm is to be converted, comprise, all the partners of the firm. Except the partners in the partnership no other person will be allowed to be a partner in LLP after its conversion. A firm may apply to the Registrar by filing-

- A statement by all of its partners in Form No. 17 and accompanied by fee containing the following particulars the name and registration number, if applicable, of the firm and the date on which the firm was registered under the Indian Partnership Act, 1932 or under any other law, if applicable; and
- Incorporation document and statement.

On receipt of the above said documents, the Registrar shall register the documents and issue a certificate of registration in Form No. 19 as the Registrar may determine stating that the LLP is, on and from the date specified in the certificate, registered under the Act. The Registrar may require the documents to be verified in such manner, as he considers fit. The LLP shall within 15 days of the date of the registration, inform the concerned Registrar of Firms with which it was registered under the provisions of Indian Partnership Act about the conversion and the particulars of the LLP.

The Registrar may refuse registration if he is not satisfied with the particulars or other information furnished. In such cases appeal may be filed before the Tribunal.

Q. Prepare a list of the circumstances under which a partnership firm can be dissolved? (7 Marks)

Ans. As per Partnership Act, 1932, Section 39 provides that the dissolution of partnership between all the partners of a firm is called the 'dissolution of the firm'. Modes of Dissolution of a firm:

Dissolution without the order of the court or voluntary dissolution

1. Dissolution by agreement [Section 40]
   Section 40 provides that a firm may be dissolved with the consent of all partners or in accordance with a contract between the parties.

2. Compulsory dissolution [Section 41]
   It provides that a firm is dissolved by the -
   - Adjudication of all the partners or of all the partners but one as insolvent; or
   - 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. Where more than one separate adventure or undertaking is carried on by the firm, the illegality of one or more shall not cause the dissolution of the firm in respect of its lawful adventures and undertakings.

3. Dissolution on the happenings of certain contingencies [Section 42]
   It provides that subject to the contract between the partners, a firm is dissolved-
   - if constituted for a fixed term, by the expiry of that term;
   - if constituted to carry out one or more adventures or undertakings, by the completion thereof;
   - by the death of a partner; and
   - by the adjudication of a partner as an insolvent.

4. Dissolution by notice of partnership at will [Section 43]
   Section 43 provides that 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. The firm is dissolved as from the date mentioned in the notice as the date of dissolution or, if no date is mentioned, as from the date of the communication of then notice.

Dissolution by the court [Section 44]

Section 44 prescribes the grounds on which the Court may direct dissolution of a firm in a suit as discussed below if the:

- Partner has become of unsound mind;
- Partner has become permanently incapable of performing his duties as partner;
- Partner is guilty of conduct which is likely to affect prejudicially the carrying on of business, regarding being had to the nature of business;
- Partner will fully or persistently commits breach of agreements relating to-
  - Management of the affairs of the firm or the conduct of its business; or 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;
- Partner 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; or
  - Has allowed it to be sold in the recovery of the arrears of land revenue; or
  - Of any dues recoverable as arrears of land revenue due by the partner; The business of the firm cannot be carried on save at a loss; or
  - On any other ground which renders it just and equitable that the firm should be dissolved.

Q. Mr. X was appointed as a partner of an LLP but after just 3 months he was declared undischarged insolvent. Can he continue as a partner because he was solvent when he was appointed as a partner? Justify your answer with reference to the relevant provisions of the applicable Act. (7 Marks)

Ans. Section 5 of LLP Act 2008 provides that any individual or body corporate may be a partner in a LLP.

<u>An individual shall not be capable of becoming a partner of LLP, if-</u>

- he has been found to be of unsound mind by a Court of competent jurisdiction and the findings is in force.
- he is undischarged insolvent; or
- he has applied to be adjudicated as an insolvent and his application is pending.

So, Mr. X cannot continue as a partner because he is undischarged insolvent. As per act he is not capable or eligible a partner of LLP,

Q. Demonstrate the differences between various modes for settlement of accounts between the partners after dissolution. (7 Marks)

Ans. Section 48 provides the mode of settlement of accounts between the partners after the dissolution. In this regard, the following shall be observed, subject to the agreements by the partners-

- losses, including deficiencies of capital, shall be paid first out of profits, next out of capital and lastly if necessary by the partners individually in the proportions in which they were entitled to share profits;
- the assets of the firm, including any sums contributed by the partners to make up deficiencies of capital shall be applied in the following manner and order-
  - in paying the debts of the firm to the third parties;
  - in paying to each partner rateably what is due to him from the firm for advances as distinguished from capital;
  - in paying to each partner rateably what is due to him on account of capital; and
  - the residue, if any, shall be divided among the partners in the proportions in which they were entitled to share profits.

Q. Recommend the provisions that should be complied with by a liquidator in a case where the Tribunal has made a winding up order for LLP. Refer to the related the legal and regulatory provisions wherever necessary.(7 Marks)

Ans. Petition for winding up Rule 26 provides that an application to the Tribunal for the winding up of an LLP shall be by a petition presented by-

- the LLP or any of its partner or partners;
- any secured creditor or creditors, including any contingent or prospective creditor or creditors;
- the Registrar; or
- any person authorized by the Central Government in this behalf;
- the Central Government, in a case falling under Section 64(d).

A petition filed by the LLP or any of its partner or partners for winding up before the Tribunal shall be admitted only if accompanied by a statement of affairs of the LLP on the date of petition and a resolution of three fourths of the total number of partners.

The Registrar shall not a present a petition on the ground that the LLP is unable to pay its debts unless it appears to him either from the financial condition of the LLP as disclosed in its Statement of Accounts and Solvency or from the report of an Inspector that the LLP is unable to pay its debts. Further the Registrar shall obtain then previous sanction of the Central Government to the presentation of a petition.

The Central Government shall not accord its sanction for the presentation of the petition unless the LLP concerned has been given a reasonable opportunity of making representations, if any.

KCC TUTORIALS

FACTORIES ACT, 1948

Q. Discuss the powers of an inspector appointed by the State Government as prescribed in the Factories Act, 1948. (Dec 22 – 9 Marks)

Q. Discuss the different powers that can be exercised by an inspector under the Factories Act. (Dec 21 – 7 Marks)

Ans. As per the provision of *Section 8 of the Factories Act, 1948*, the state government may appoint a person possessing the *prescribed qualifications* to be inspector for the purpose of this Act and may also assign local limits as may be think fit by the said government. As per *Section 9* of the Act the following powers can be exercised by the inspector:

1. He may enter to any place which is used, or which has reason to believe is used as a factory,
2. He can examine the premises, plant, machinery, article or substance,
3. He may inquire into any accident or dangerous occurrence whether resulting in bodily injury, disability or not take on the spot statements of any person which he may consider necessary for such inquiry,
4. He can require the production of any document relating to factory,
5. He may seize or take copies of any register, record or other documents of any portion thereof as he may consider necessary,
6. He can take possession of any article or substance or part thereof and detain it for so long as is necessary for such examination
7. He can exercise any such other powers as may be prescribed.

Q. Write a Short Note on Hazardous Processes (Dec 21 - 3 Marks)

Ans. *Section 2 (cb)* of the Factories Act, 1948 defines the expression 'hazardous process' as any process or activity in relation to an industry specified in the First Schedule where, unless special care is taken, raw materials used therein or the intermediate or finished products, bye-products, wastes, or effluents thereof would-

- cause material impairment to the health of the persons engaged in or connected therewith, or
- result in the pollution of the general environment.

The State Government may, by notification in the Official Gazette, amend the First Schedule by way of addition, omission or variation of any industry, specified in the said Schedule.

Q. Write a short note on Annual Leave under the Factories Act, 1948 (June 19 – 5 Marks)

Ans. Section 79 of The Factories Act, 1948 provides that every worker who has worked for a period 240 days or more in a factory during a calendar year shall be allowed leave with wages for a number lays calculated at the rate of-

- if an adult, one day for every 20 days of work performed by him during the previous calendar rear;
- if a child, one day for every 15 days of work performed by him during the previous calendar year.

The following shall be deemed to be days on which the worker has worked for the purpose of computation of the period of 240 days or more-

1. any days of lay off, by agreement or contract or as permissible under the standing orders;
2. in the case of a female worker, maternity leave for any number of days not exceeding 12 weeks;
3. and the leave earned in the year prior to that in which the leave is enjoyed

But the above shall not be entitled for a worker to earn leave. The leave admissible shall be exclusive of all holidays whether occurring during or at either end of the period of leave.

Q. Discuss the welfare measures to be taken in a factory for the workmen employed therein as per the Factories Act, 1948. (Dec, 19 – 8 Marks)

Ans. The following are the welfare measures prescribed in the Factories Act, 1948 to be provided by the factory to their workmen:

Washing facilities:

Section 42 provides that in every factory adequate and suitable facilities for washing shall be provided and maintained for the use of the workers. Separate and adequately screened facilities shall be provided for the use of male and female workers. The washing facility shall be conveniently accessible and shall be kept clean.

Facilities for storing and drying clothing:

Section 43 provides that the State Government may, in respect of any factory or class or description of factories, make rules requiring the provision therein of suitable places for keeping clothing not worn during working hours and for the drying of wet clothing.

Facilities for sitting:

Section 44 provides that suitable arrangements for sitting shall be provided and maintained for all workers obliged to work in a standing position, in order that they make take advantage of any opportunities for rest which may occur in the course of their work.

First aid appliances:

Section 45 provides that first aid appliances shall be provided and maintained so as to be readily accessible during all working hours or cupboards equipped with the prescribed contents and the number of such boxes or cupboards to be provided and maintained shall not be less than for every 150 workers at any one time in the factory. Each first aid box or cupboard shall be kept in charge of a separate reasonable person who holds a certificate in the first aid treatment recognized by the State Government and he should always be readily available during the working hours of the factor. In a factory where more than 500 workers are employed an ambulance of the prescribed size containing the prescribed equipment, nursing staff etc., shall be provided and made readily available at all times.

Canteens:

Section 46 provides that if more than 250 workers are employed in a factory a canteen or canteens shall be provided and maintained by the occupier for the user of the workers. The items of expenditure in the running of the canteen which are not to be taken into account in fixing the cost of foodstuffs shall be borne by the employer.

Shelters, Rest Rooms and Lunch Rooms

Section 47 provides that if more than 150 workers are employed adequate and suitable shelters or rest rooms and a suitable lunch room with provision for drinking water shall be provided and maintained for the use of the workers. The same shall be sufficiently lighted and ventilated and shall be maintained in a cool and clean condition.

Creches:

Section 48 provides that if more than 30 women workers are employed there shall be provided and maintained a suitable room for the use of children under the age of 6 years of such women. The same shall be adequately ventilated and shall be maintained in clear and sanitary conditions and under the charge of women trained in the care of children and infants.

Welfare Officers:

Section 49 provides that if 500 or more than workers are employed in a factory, the occupier shall employ in the factory such number of welfare officers as may be prescribed. In 'Shyam Vinyals Limited V. T. Prasad' - (1993) 83 FJR 18 (SC) it was held that an Assistant Personnel Officer cannot be held that he was in fact appointed as a Labor Welfare Officer simply because as a Assistant and Personnel Officer he was looking after the problems of the laborers and the welfare of the laborers.

Q. Critically examine the duties of certified surgeon under the Factories Act, 1948. (June, 18 – 8 Marks)

Ans. Section 10 under Factories Act, 1948 provides that the State Government may appoint qualified medical practitioners to be certifying surgeons for the purposes of this Act within such local limits or for such factory or class or description of factories as it may assign to them respectively. The duties of certified surgeons are as follows-

- the examination and certification of young persons;
- the examination of person engaged in factories in such dangerous occupations or processes as may be prescribed;
- the exercising of such medical supervision as may be prescribed for any factory or class or description of factories, where -
  - ✓ cases of illness have occurred which it is reasonable to believe are due to the nature of the manufacturing process carried on, or other conditions of work prevailing, therein;
  - ✓ by reason of any change in the manufacturing process carried on or in the substances used therein or by reason of the adoption of any new manufacturing process or of any new substance for use in a manufacturing process, there is a likelihood of injury to the health of workers employed in that manufacturing process;

- ✓ young persons are, or are about to be, employed in any work which is likely to cause injury to their health.

Q. Write a short note on Manufacturing process under the Factories Act, 1948. (June, 18 – 5 Marks)

Ans. Under Section 2(k) of Factories Act 1948 define 'manufacturing process' as under any process for-

- making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing, or otherwise treating or adapting any article or substance with a view to its use, sale, transport, delivery or disposal, or
- pumping oil, water, sewage or any other substance; or
- generating, transforming or transmitting power; or
- composing types for printing, printing by letter press, lithography, photogravure or other similar process or book binding; or
- constructing, reconstructing, repairing, refitting, finishing or breaking up ships or vessels; or
- preserving or storing any article in cold storage.

In 'M/s Qazi Noorul Hasan Hamid Hussain Petrol Pump V. Deputy Director, Employees' State Insurance Corporation' - 2003 LLR 476 it was held that the definition 'manufacturing process' does not depend upon and is not correlated with any end product being manufactured out of a manufacturing process. It includes even repair, finishing, oiling or cleaning process with view to its use, sale, transport, delivery or disposal. It cannot be restricted an activity which may result into manufacturing something or production of a commercially different article. The 'manufacturing process' cannot be interpreted in a narrow sense in respect of an act which is meant for the purpose connected with the social welfare.

Q. Write a short note on Cleanliness of factory (Dec, 17 – 5 Marks)

Ans. As per Section II of the Factories Act, 1948 every factory shall be kept clean and free from effluvia arising from any drain, privy or other nuisance, and in particular -

- Removal of accumulated dirt and refuse on floors, benches of workroom, stair

cases and passages and effective disposal of the same,

- Cleaning of the floor of every workroom once in every week by washing with disinfectant or by some other effective method,
- Providing effective drainage for removing water to the extent possible,
- All doors, windows and other framework which are of wooden or metallic shall be kept painted or varnished at least once in every period of five years,
- To ensure that interior walls and roofs etc. are kept clean the following is to be complied with -
  - White wash or color wash should be carried out at least once in every period of 14 months,
  - Where surface has been painted or varnished, repair or re-varnished should be carried out once in every 5 years, if washable then once in every period of 6 months,
  - Where they are painted or varnished or where they have smooth impervious surface, it should be cleaned once in every period of 14 months by such method as may be prescribed.

The dates on which such processes are carried out shall be entered in the prescribed register.

Q. What are the responsibilities of an occupier in a factory? (June, 17 – 5 Marks)

Ans. The occupier has to follow the procedure-

- to lay down a detailed policy with respect to the health and safety of the workers;
- to disclose all the information regarding dangers including health hazards and the measures to overcome such hazards arising from the exposure to or handling of the materials or substances in the manufacture, transportation, storage and other processes to the workers employed in the factory;
- to draw up an onsite emergency plan and detailed disaster control measures for the factory and make known to the workers and to the general public living in the vicinity of the factory, the safety measures required to be taken in the event of accident taking place.

Section 41C provides that the occupier is having specific responsibilities in relation to hazardous processes. He has to maintain the health records of the employees. He is to appoint experienced persons who possess specified qualifications in handling hazardous substances and competent to supervise such handling within the factor.

KCC TUTORIALS

OLD SYLLABUS

Q. Who is Occupier under the Factories Act, 1948? (June 17 – 9 Marks)

Ans. Occupier of a factory is the person who has ultimate control over the affairs of the factory:

Provided that -

1. In the case of a firm or other association of individuals, any one of the individual partners or members thereof shall be deemed to be the occupier:
2. In the case of a company, any one of the directors shall be deemed to be the occupier;
3. In the case of a factory owned or controlled by the Central Government or an) Stale Government, or any local authority, the person or persons appointed to manage t he affairs of the factory by the Central Government, the State Government or the local authority, as the case may be. Shall be deemed to be the occupier:

Provided further that in the case of a ship which is being repaired, or on which maintenance work is being carried out, in a dry dock which is available for hire, -

(1) The owner of the dock shall be deemed to be the occupier for the purposes of any matter provided for by or under—
   a) Section 6, section 7, section 7A, section 7B, section 11 or section 12;
   b) Section 17, in so far as it relates to the providing and maintenance of sufficient and suitable lightingin or around the dock;
   c) Section 18, section 19, section 42. Section 46. Section 47 or section 49, in relation to the workers employed on such repair or maintenance;

(2) The owner of the ship or his agent or master or other officer-in-charge of the ship or any person who contracts with such owner, agent or master or other officer-in- charge to carry out the repair or maintenance work shall be deemed to be the occupier for the purposes of any matter provided for by or under section 13, section 14, section 16 or section 17 (save as otherwise provided in this proviso) or Chapter IV (except section 27) or section 43, section 44 or section 45. Chapter VI, Chapter VII, Chapter VII] or Chapter IX or section 108, section 109 or section 110, in relation to -
   a) The workers employed directly by him, or by or through any agency; and

b) The machinery, plant or premises in use for the purpose of carrying out such repair or maintenance work by such owner, agent, master or other officer-in- charge or person;

Q. Define 'Hazardous Process' under The Factories Act, 1948. (June 17 – 3 Marks)

Ans. "Hazardous process" means any process or activity in relation to an industry specified to the First Schedule where, unless special care is taken, raw materials used therein or the intermediate or finished products, bye-products, wastes or effluents thereof would—

1. Cause material impairment to the health of the persons engaged in or connected therewith, or
2. Result in the pollution of the general environment

Provided that the State Government may, by notification in the Official Gazette, amend the First Schedule by way of addition, omission or variation of any industry specified in the said Schedule;

Q. Employees of an electricity generation station claimed that their unit is covered under the definition of 'factory' considering the process of transforming and transmission of electricity generated at the power station as a 'manufacturing process'. Will their claim succeed? (Dec 15 – 3 Marks)

Ans. As per section 2(k) of The Factories Act, 1948, manufacturing process means any process for-

1. Making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing, or otherwise treating or adapting any article or substance with a view to its use, sale, transport, delivery or disposal, or
2. Pumping oil, water, sewage or any other substance; or;
3. Generating, transforming or transmitting power; or
4. Composing types for printing, printing by letter press, lithography, photogravure or other similar process or book binding;
5. Constructing, reconstructing, repairing, refitting, finishing or breaking up ships or vessels; (Inserted by the Factories (Amendment) Act. 1976, w.e.f. 26-10- 1976.)

6. Preserving or storing any article in cold storage;

Process undertaken at electricity generating station, substation transferring and transmitting electricity is not a manufacturing process and are not thus factory- [Delhi Electricity Supply Undertaking vs. Management of DESU. AIR (1973)SCC 365]

Q. Explain the right of workers to warn about imminent danger under the Factories Act, 1948. (June 15 – 3 Marks)

Ans. As per section 41H of The Factories Act, 1948, it is the right of workers to warn about imminent danger

(1) Where the workers employed in any factory engaged in a hazardous process have reasonable apprehension that there is a likelihood of imminent danger to their lives or health due to any accident, they may bring the same to the notice of the occupier, agent, manager or any other person who is in-charge of the factory or the process concerned directly or through their representatives in the safety Committee and simultaneously bring the same to the notice of the Inspector.

(2) It shall be the duty of such occupier, agent, manager or the person incharge of the factory or process to take immediate remedial action if he is satisfied about the existence of such imminent danger and send a report forthwith the action taken to the nearest Inspector.

(3) If the occupier, agent manager or the person incharge referred to in sub- section (2) is not satisfied about the existence of any imminent danger as apprehended by the workers, he shall, nevertheless, refer the matter forthwith to the nearest Inspector whose decision on the question of the existence of such imminent danger shall be final.

Q. What is the procedure in imposition of fine on the employee under the Factories Act? (8 Marks)

Ans. Section 8 of the Act provides imposing of fines by the employer on the employees. The procedure of imposition of fine is detailed as below:

1. No fine shall be imposed on any employed person who is under the age of fifteen years;
2. No fine shall be imposed on any employed person save in respect of such acts and omissions on his part as the employer, with the previous approval of the appropriate Government or of the prescribed authority, may have specified by notice;

3. A notice specifying such acts and omissions shall be exhibited in the prescribed manner on the premises in which the employment carried on or in the case of persons employed upon a railway (otherwise than in a factory), at the prescribed place or places.
4. No fine shall be imposed on any employed person until he has been given an opportunity of showing cause against the fine, or otherwise than in accordance with such procedure as may be prescribed for the imposition of fines.
5. The total amount of fine which may be imposed in any one wage-period on any employed person shall not exceed an amount equal to three per cent of the wages payable to him in respect of that wage-period.
6. No fine imposed on any employed person shall be recovered from him by instalments or after the expiry of 90 days from the day on which it was imposed.
7. Every fine shall be deemed to have been imposed on the day of the act or omission in respect of which it was imposed.
8. All fines and all realizations thereof shall be recorded in a register to be kept by the person responsible for the payment of wages under section 3 in such form as may be prescribed; and all such realizations shall be applied only to such purposes beneficial to the persons employed in the factory or establishment as are approved by the prescribed authority.

KCC TUTORIALS

GRATUITY ACT, 1972

Q. Anurag an employee of Majestic Iron Ltd., continued to occupy the quarter of the company for nine months after superannuation, company decided to forfeit the amount of gratuity of Anurag. Examine the decision taken by company to forfeit the amount of gratuity in the light of Payment of Gratuity Act, 1972. (June, 23 – 5 Marks) (Syllabus, 2022)

Ans. The gratuity of an employee, whose services have been terminated for any act, willful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer, can be forfeited to the extent of the damage or loss so caused. The gratuity payable to an employee may be wholly or partially forfeited:

i) If the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part or

ii) If the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him in the course of his employment.

It is not a valid ground for forfeiture of entire gratuity. In such a case, the company is entitled to charge the quarter rent as per rules and after adjustment of such charges, Anurag is entitled to receive the balance gratuity.

Q. What is the procedure of determining the amount of gratuity as per the Payment of Gratuity Act, 1972? (Dec 22 – 5 Marks)

Q. Discuss the procedure for determination of the amount of gratuity. (Dec 21 – 5 Marks)

Ans. *Section 7* of the Payment of Gratuity Act, 1972 prescribes the procedure for determination of the amount of gratuity. As soon as the gratuity becomes payable the employer shall whether the employee has made application or not, determine the amount of gratuity. Then he is to give notice to the person to whom the gratuity is payable and also to the controlling authority, specifying the amount of gratuity so determined. The employer shall arrange to pay the amount of gratuity within 30 days from the date of its becoming payable to the person to whom it is payable. If it is not paid within stipulated period the employer is liable to pay interest at the rate of

10 % per annum. If the delay in payment is due to the fault of the employee and the employer has obtained permission in writing from the controlling authority for the delayed payment, on this ground, no interest is payable. If the claim for gratuity is not found admissible, issue a notice in Form „M" to the applicant employee, nominee or legal heir, as the case may be, specifying the reasons why the claim for gratuity is not considered admissible. In either case a copy of the notice shall be endorsed to the controlling authority.

Q. M/s TNT Pvt. Ltd. incorporated on 2nd Mach,2009 carrying on business from the date of incorporation employing 70 persons. It's one of the renowned companies in the country.

There had been certain turn of events recently and the company has started to face challenges since mid of the year of 2020 due to COVID-19 pandemic. Like most parts of the world this company was also badly hit by this pandemic. A larger number of companies in India were affected directly or indirectly by this pandemic and complete lockdown. Due to this pandemic and losses, the number of employees reduced to 7 w.e.f. 15-07-2020 by M/s. TNT Pvt. Ltd. Mr. Jain who retired on 30-12-2020 was refused gratuity on the ground that the total number of employees is below 10. Another senior employee of the company Mr.T.K.Singhania who retired on 31-12-2020. Mr. Singhania, continued to occupy the quarter of the company for eight months after superannuation and as a result the company decided to forfeit the amount of gratuity of Mr. Singhania. Mr. Arun Bharat an employee of the company who was frustrated with his work and willfully causing damage of a machine. M/s TNT Pvt Ltd. had to spend `95000 to get the machine in working condition and due to this damages M/s TNT Pvt. Ltd. withhold the gratuity of Mr. Arun Bharat. On the other hand one employee Mr. Jain retired on 30-11-20 was refused gratuity on the ground that the total number of employees is below ten. M/s TNT Pvt. Ltd. has a separate factory which is a seasonal establishment.

MrBarun Bharat brother of Mr. Arun Bharat is employed in this factory. The factory was in operation for four months only during the financial year: 2020-21due to Covid-19 pandemic. Mr. Barun Bharat was not in continuous service during this period and he has worked only 60 days.

(i) Examine the validity of decision taken by M/s TNT Pvt. Ltd. to forfeit the amount of gratuity of Mr. Singhania in the light of the Payment of Gratuity Act,1972. (4 Marks)

(ii) Examine the validity of decision taken by M/s TNT Pvt. Ltd. to withhold the amount of gratuity of Mr. Arun Bharat in the light of the Payment of Gratuity Act,1972. (2 Marks)

(iii) From the above decide whether Mr. Barun Bharat is entitled to claim gratuity under the provisions of the Payment of Gratuity Act,1972. (4 Marks)

(iv) Examine the validity of decision taken by M/s TNT Pvt. Ltd. for Mr. Jain to refuse to pay the gratuity since the number of employees reduced to seven w.e.f. 15-07-20 under the provisions of the Payment of Gratuity Act,1972. (2 Marks) (Dec 21)

Answer:

(i) The gratuity of an employee, whose services have been terminated for any act, willful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer, can be forfeited to the extent of the damage or loss so caused. The gratuity payable to an employee may be wholly or partially forfeited:

- if the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part or
- if the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him in the course of his employment.

It is not a valid ground for forfeiture of entire gratuity. In such case, the company is entitled to charge the quarter rent as per rules and after adjustment of such charges, Mr. Singhania is entitled to receive the balance amount of gratuity.

(ii) The Employer cannot withhold or forfeit gratuity of Mr. Arun Bharat since his services was not terminated for the damages caused by the worker as per Payment of Gratuity Act, 1972.

(iii) For entitlement of gratuity one must work for at least 75% of the days on which the establishment was open and in operation. The factory was in operation for 120 days. One must work for 75% of 120 i.e. 90 days to claim gratuity. Mr. Barun Bharat is not entitled to gratuity, since he has actually worked for less than 75% of the number of days on which the establishment was in operation during such period.

(iv) Payment of Gratuity Act provides that a shop or establishment to which this Act has become applicable shall continue to be governed by this Act in spite of persons employed therein at any time it has become so applicable falls below ten. Hence TNT Pvt. Ltd. cannot refuse payment of gratuity to Mr. Jain.

KCC TUTORIALS

Q. Deepak is employed in Assam Coffee Estate Ltd., a seasonal establishment. The factory was in operation for four months only during the financial year 2018-19. Deepak was not in continuous service during this period. However, he has worked only 60 days. Referring to the provisions of The Payment of Gratuity Act, 1972, decide whether Deepak is entitled to gratuity payable under the Act. Would your answer be the same in case Deepak works for 100 days? (June 19 – 5 Marks)

Ans. For entitlement of gratuity one must work for at least 75% of the days on which the establishment was open and in operation. The factory was in operation for 120 days. One must work for 75% of 120 i.e. 90 days to claim gratuity. Deepak is not entitled to gratuity, since he has actually worked for less than 75% of the number of days on which the establishment was in operation during such period.

If Deepak had worked for 100 days, then he would have been entitled to gratuity since the number of days on which he would have worked, in that case, would have been 75% or more of the number of days on which the establishment was in operation.

Q. Mr. Gill, an employee of M/s Sonabheel Tea Ltd., continued to occupy the quarter of the company for eight months after superannuation, company decided to forfeit the amount of gratuity of Mr. Gill. Examine the decision taken by the company to forfeit the amount of gratuity in the light of the Payment of Gratuity Act, 1972. (Dec, 18 – 5 Marks)

Ans. The gratuity of an employee, whose services have been terminated for any act, willful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer, can be forfeited to the extent of the damage or loss so caused.

The gratuity payable to an employee may be wholly or partially forfeited:

(i) if the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part or

(ii) if the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him in the course of his employment.

It is not a valid ground forfeiture of entire gratuity. In such a case, the company is entitled to charge the quarter rent as per rules and after adjustment of such charges, Mr. Gill is entitled to receive the balance gratuity.

Q. Discuss the procedure for determination of the amount of gratuity as per section 7 of the Payment of Gratuity Act, 1972. (Dec 17 – 5 Marks)

Ans. Section 7 of the Payment of Gratuity Act. 1972 prescribes the procedure for determination of the amount of gratuity. As soon as the gratuity becomes payable the employer shall whether the employee has made application or not, determine the amount of gratuity Then he is to give notice to the person to whom the gratuity is payable and also to the controlling authority, specifying the amount of gratuity so determined.

The employer shall arrange to pay the amount of gratuity within 30 days from the date of its becoming payable to the person to whom it is payable. If it is not paid within stipulated period the employer is liable to pay interest at the rate of 10 % per annum. If the delay in payment is due to the fault of the employee and the employer has obtained permission in writing from the controlling authority for the delayed payment, on this ground, no interest is payable.

If the claim for gratuity is not found admissible, issue a notice in form 'M' to the applicant employee nominee or legal heir, as the case may be, specifying the reasons why the claim for gratuity is not considered admissible. In either case a copy of the notice shall be endorsed to the controlling authority.

OLD SYLLABUS

Q. A is employed in XYZ Ltd., which is a seasonal establishment. The factory was in operation for five months during the financial year of 2016-17. A was not in continuous service during this period. However, he was worked for sixty days only. Referring to the provisions of the Payment of Gratuity Act, 1972 decide whether A is entitled to gratuity payable under the Act. Would your answer be the same in case A works for 100 days? (Dec 17 – 4 Marks)

Ans. As per the provision given under the section 2A of the Payment of Gratuity Act, 1972, where an employee is employed in an seasonal establishment and is not in continuous service for any period of one year or six months, there such an employee shall deemed to be in continuous service under the employer for such period if he has actually worked not less than seventy-five percent of the number of days on which the establishment was in operation during such period.

In the given problem, as per the above provisions of the Act, A has worked has worked only for 60 days which is less than 75% of the number of days on which the establishment was in operation during such period, i.e. 150 days. Therefore, A shall not be eligible for getting any gratuity in the first case.

In the second case also, A would not eligible for gratuity for the same reasons, though he had worked for 100 days

Q. E was an employee of T E Ltd. The whole of the undertaking of T E Ltd. was taken over by a new company, ATE Ltd. The services of E remained continuous in new company. After serving for one year E met with an accident and became permanently disabled. E applied to the new company for the payment of gratuity. The company refused to pay gratuity on the ground that E has served only for a year in the company. Examine the validity of the refusal of the directors in the light of the provisions of the Payment of Gratuity Act, 1972. (June 17 – 5 Marks)

Ans. According to Section 4(1) of the Payment of Gratuity Act, 1972, gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years on his super annulations, or, on his retirement or resignation or on his death or disablement due to accident or disease.

The condition of the completion of five years of continuous service is not essential in case of the termination of the employment of any employee due to death or disablement for the purpose of this section. Disablement means such disablement as incapacitates an employee for the work which he was capable of performing before the accident or disease resulting in such disablement.

The given problem fulfils all the above requirements as stated. Therefore, E is entitled to recover gratuity after becoming permanently disabled, and continuous service of five years is not required in this case. Hence, the company cannot refuse to pay gratuity on the ground that he has served only for a year.

Q. Under what circumstances the gratuity payable to an employee be forfeited? (June 16 – 8 Marks)

Ans. The legal provisions relating to the forfeiture of gratuity are contained in section 4(6) of the Payment of Gratuity Act, 1972 and may be summed up as under:

1. The gratuity payable to an employee shall be forfeited where the services of an employee have been terminated due to any act, willful omission or negligence on the part of the employee and employee's such act etc. has caused:
   a) damage or loss to the property belonging to the employer, or
   b) destruction of the property belonging to the employer.

   In this case, the gratuity payable to the employee shall be forfeited to the extent of the damage or loss caused to employer's property due to employees act, omission or negligence |Section 4(6)(a)]

2. <u>The gratuity payable to an employee may be forfeited:</u>
   a) If the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part, or
   b) If the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him in the course of his employment.

   In the above stated cases, the gratuity payable to an employee may be forfeited wholly or partially. [Section 4(6)(b)]

3. <u>Following judicial decisions are important to note in connection with the forfeiture of gratuity by the employer:</u>
   a) The right of the employer to forfeit the amount of gratuity of an employee whose services were terminated due to any act, willful omission or negligence causing any damage to the employer's property is limited to the extent of damage and the proof of such damage. [*Permali Wallance Ltd. V. state of M.P. (1996) IILLJ 515 (MP)].*
   b) The right of the employer to forfeit the gratuity is available only in the circumstances enumerated in section 4(6), as stated in points (1) and (2) above, and is not available in any other circumstances as employee's right to gratuity is the statutory right. *[K.C. Mathew v. Plantation Corpn. Of Kerala Ltd. (2001) LLR 123 (ker.)].*
   c) The refusal by the employees to surrender land belonging to the employer is not a ground for forfeiture of gratuity. *[Travancore Plywood Industries Ltd. V. Regional Join labour Co.mmr, (1996) II LLJ 85 (Ker.)].*

d) In case of termination of services on account of offence involving moral turpitude the gratuity may be wholly or partially forfeited. In this regard, the Karnataka High Court has held that when an offence of theft under law involvesmoral turpitude, gratuity stands wholly forfeited in view of section 4 (6) of the Act. *[Bharat Gas Mines Ltd. V. Regional Labour Commr. (Central) (1987) 70 FJR 11 (Karn)].*

Q. When an employee becomes disabled due to any accident or disease and is unable to do the same work and re-employed on the reduced wages, how the gratuity of such employees shall be computed under the provisions of the Payment of Gratuity Act, 1972? (Dec 15 – 3 Marks)

Ans. Computation of Gratuity of a disabled employee: According to Section 4 (4) of the Payment of Gratuity Act, 1972, when an employee becomes disabled due to any accident or disease and is not in a position to do the same work and re- employed on reduced wages on some other job, the gratuity will be calculated in two parts :

- For the period preceding the disablement: on the basis of wages last drawn by the employee at the time of his disablement.
- For the period subsequent to the disablement: On the basis of the reduced wages as drawn by him at the time of the termination of services.

In the case of Bharat Commerce and Industries Vs. Ram Prasad, it was decided that if for the purposes of computation of quantum of the amount of gratuity the terms of agreement or settlement are better than the Act, the employee is entitled for that benefit.

However, the maximum statutory ceiling limit as providing under Sub-Section 3 of Section 4 of the Act (the maximum amount of gratuity payable to an employee shall not exceed `10 lakh), cannot be reduced by mutual settlement or agreement.

Q. X is employed in ABC Ltd., a seasonal establishment. The factory was in operation for four months during the financial year 2010-11. X was not in continuous service during this period. However, he has worked for sixty days. Referring to the provisions of the Payment of Gratuity Act, 1972 decide whether X is entitled to gratuity payable under the Act. Would your answer be the same in case X works for 100 days? (Dec 15 – 3 Marks)

Ans. As per the provision given under section 2A of the Payment of Gratuity Act, 1972, where an employee is employed in a seasonal establishment and is not in continuous service for any period of one year or six months, there such an employee shall be deemed to be in continuous service under the employer for such period if he has actually worked for not less than seventy-five percent of the number of days on which the establishment was in operation during such period.

In the given problem, as per the above provision of the Act, X has worked only for 'sixty days that are less than 90 days (75% of 4 months) therefore, X shall "hoi be 'eligible for getting any gratuity in first case. In the second case, since X has worked for 100 days that is more than 75% of number of days therefore, he is entitled for gratuity.

Q. Describe the procedure for mode of payment of gratuity. (5 Marks)

Ans. Rule 9 provides that the gratuity payable under the Act shall be paid in cash or, if so desired by the payee, in Demand Draft or bank Cheque to the eligible employee, nominee or legal heir, as the case may be. In case the eligible employee, nominee or legal heir, as the case may be, so desires and the amount of gratuity payable is less than one thousand rupees, payment may be made by postal money order after deducting the postal money order commission there for from the amount payable. Intimation about the details of payment shall also be given by the employer to the controlling authority of the area.

In the case of nominee, or an heir, who is minor, the controlling authority shall invest the gratuity amount deposited with him for the benefit of such minor in term deposit with the State Bank of India or any of its subsidiaries or any Nationalized Bank.

Q. Prepare a list of the provisions relating to protection of gratuity as discussed in Payment of Gratuity Act, 1972. (5 Marks)

Ans. Section 13 provides that no gratuity payable under this Act shall be liable to attachment in execution of any decree or order of any civil, revenue or criminal court.

Section 13A provides that notwithstanding anything contained in any judgment, decree or order of any court, for the period commencing on and from the 3rd day of April 1997 and ending on the day on which the Payment of Gratuity (Amendment) Act 2009 receives the assent of the president, the gratuity shall be payable to an employee in pursuance of this

notification of the Government of India in the Ministry of Labor and Employment vide SO 1080 dated the 3rd day of April 1997 and the said notification shall be valid and shall be deemed always to have been valid as if the payment of gratuity (Amendment) Act 2009 had been in force at all material times and the gratuity shall be payable accordingly.

Nothing contained in this section shall extend or be construed to extend to affect any person with any punishment or penalty whatsoever by reason of the non employment by him of the gratuity during the period specified in this section which shall become due in pursuance of the said notification.

Employees State Insurance Act

Q. Write a short note on the Duties of medical benefit council (Dec 22 – 5 Marks)

Ans. *Section 22* of the Employees State Insurance Act, 1948 provides the duties of the Medical Benefit Council as to

1. Advice the corporation and the standing committee on matters relating to the administration of medical benefit, the certification for purposes of the agent of benefits and other connected matters,
2. Have such powers and duties of investigation as may be prescribed in relation to complaints against medical practitioners in connection with the medical treatment and attendance, and
3. Perform such other duties in connection with the medical treatment and attendance as may be specified in the regulations.

Q. Mention any seven purposes for which the ESI fund may be expended. (Dec, 19 – 7 Marks)

Q. What are the different purposes for which employees' state insurance fund may be utilized by the central government? (June, 17 – 10 Marks)

Ans. Section 28 of the Employees State Insurance Act, 1948 provides the Central Government may utilize the State Insurance Fund only for the following purposes:

- payment of benefits and provision of medical treatment and attendance to insured persons and, where the medical benefit is extended to their families, the provision of such medical benefit to their families in accordance with the provisions of this Act and defraying the charges and costs in connection therewith;
- payment of fees and allowances to members of the Corporation, the Standing Committee and the Medical Benefit Council, the Regional Boards, Local Committees and Regional and Local Medical Benefit Councils;
- payment of salaries, leave and joining time allowances, travelling and compensatory allowances, gratuities and compassionate allowances, pensions, contributions to provident or other benefit fund of officers and servants of the Corporation and meeting the expenditure in respect of offices and other services set up for the purpose of giving effect to the provisions of this Act;
- establishment and maintenance of hospitals, dispensaries and other institutions and

the provision of medical and other ancillary services for the benefit of insured persons and, where the medical benefit is extended to their families;

- payment of contributions to any State Government, local authority or any private body or individual, towards the cost of medical treatment and attendance provided to insured persons and, where the medical benefit is extended to their families, including the cost of any building and equipment, in accordance with any agreement entered into by the Corporation;
- defraying the cost (including all expenses) of auditing the accounts of the Corporation and of the valuation of its assets and liabilities;
- defraying the cost (including all expenses) of the Employees' Insurance Courts set up under this Act;
- payment of any sums under any contract entered into for the purpose of this Act by the Corporation or the Standing Committee or by any officer duly authorized by the Corporation or the Standing Committee in that behalf;
- payment of sums under any decree, order or award of any Court or Tribunal against the Corporation or any of its officers or servants for any act done in the execution of his duty or under a compromise or settlement of any suit or other legal proceeding or claim instituted or made against the Corporation;
- defraying the cost and other charges of instituting or defending any civil orcriminal proceedings arising out of any action taken under this Act;
- defraying expenditure, within the limits prescribed, on measures for the improvement of the health, welfare of insured persons and for the rehabilitation and re-employment of insured persons who have been disabled or injured; and
- such other purposes as may be authorized by the Corporation with the previous approval of the Central Government.

Q. Write a short note on Dependent (Dec, 19 – 5 Marks)

Ans. Section 2(6A) of The Employees' State Insurance Act, 1948, defines the term 'dependent' as any of the following of a deceased insured person:

- a widow, a legitimate or adopted son who has not attained the age of 25 years, an unmarried legitimate or adopted daughter;
- a widowed mother;
- if wholly dependent on the earnings of the insured person at the time of his

death, a legitimate or adopted son or daughter who has attained the age of 25 years and is infirm;

- if wholly or in part dependent on the earnings of the insured person at the time of his death-
- a parent other a widowed mother;
- a minor illegitimate son, an unmarried illegitimate daughter or a daughter legitimate or adopted or illegitimate if married and a minor or if widowed and a minor;
- a minor brother or an unmarried sister or a widowed sister if a minor;
- a widowed daughter-in-law;
- a minor child of a pre-deceased son;
- a minor child of a pre-deceased daughter where no parent of the child is alive; or
- a paternal grand-parent if no parent of the insured person is alive.

Q. Mention the benefits that are entitled to the insured persons under the Employees' State Insurance Act, 1948. (Dec, 18 - 6 Marks) or

Q. Prepare the list of benefits that are entitled to the insured persons under the Employees' State Insurance Act, 1948. (June, 23 – 5 Marks) (Syllabus, 2022)

Ans. Section 46 of the Employees State Insurance Act, 1948 provides that the insured persons, their dependents shall be entitled to the following benefits

1) Periodical payments to any insured person in case of his sickness ;
2) Periodical payments to an insured woman in case of confinement or mis-carriage or sickness arising out of the pregnancy, confinement, premature birth of child or miscarriage;
3) Periodical payments to an insured person suffering from a disablement as a result of an employment injury sustained as an employee;
4) Periodical payments to such dependents of an insured person who dies as a result of an employment injury sustained as an employee ;
5) Medical treatment for and attendance on insured persons ;
6) payment of funeral expenses on the death of insured person at the prescribed rate of.

The amount of such payment shall not exceed such amount as may be prescribed by the Central Government. The claim for such payments shall be made within 3 months of the death of the insured person or within such extended period as the Corporation allow in

this behalf.

Q. What are the different purposes for which employees' state insurance fund may be utilized by the central government? (June 17 – 10 Marks)

Ans. *Section 28* of the Employee's State Insurance Act, 1948 provides that the central government may utilize the state insurance fund only for the following purposes:

1. Payments of benefits and provision of medical treatment and attendance to insured persons and where the medical benefit is extended to their families, the provision of such medical benefit to their families in accordance with the provision of this Act and defraying the charges and costs in connection therewith
2. Payment of fees and allowances to members of the corporation, the standing committee and the Medical Benefit Council, the Regional Board, Local Committees and Regional Local Medical Councils,
3. Establishment and maintenance of hospitals, dispensaries and other institutions and the provision of medical and other ancillary service for the benefit of insured persons and where the medical benefit is extended to their families,
4. Defraying the cost of auditing the accounts of the corporation and of the valuation of its assets and liabilities,
5. Defraying the cost of the Employees' Insurance Courts set up under this Act,
6. Payment of any sums under any contract entered into for the purpose of this Act by the, corporation or the standing committee or any officer duly authorized by the corporation or the standing committee in that behalf,
7. Payment of any sums under any decree, order or award of any court or tribunal against the corporation or any of its officers or servants for any act done in the execution of his duty or under a compromise or settlement of any suit or other legal proceedings or claim instituted or made against the corporation
8. Defraying the cost and other charges of instituting or defending any civil or criminal proceedings arising out of any action taken under this Act,
9. Defraying expenditure, within the limits prescribed on measures for the improvement of the health, welfare of insured persons and for the rehabilitation and re-employment of insured person who have been disabled or injured, and
10. Such other purposes as may be authorized by the corporation with the previous approval of the central government.

11. payment of salaries, leave and joining time allowances, travelling and compensatory allowances, gratuities and compassionate allowances, pensions, contributions to provident fund and other benefit fund of officers and servants of the Corporation and meeting the expenditure in respect of offices and other services set up for the purpose of giving effect to the provisions of this Act.
12. Payment of contributions to any State Government, local authority or any private body or individual, towards the cost of medical treatment and attendance provided to the insured person and where the medical benefit is extended to their families, including the cost of any building and equipment, in accordance with any agreement entered into by the Corporation.

OLD SYLLABUS

Q. Who is an insurable employee under ESI Act, 1948? (June 17 – 4 Marks)

Ans. Every employee of a factory or establishment to which the Act applies is an insurable person. Section 38 states that subject to provisions of the Act, all employees in factories or establishments to which this Act applies shall be insured in manner as provided in Act. However the following persons are not insurable and Act does not provide any benefit to them:

a) Workers in mines subject to Mines Act, 1952[Sec 2(12)]
b) Workers in a railway running shed[Sec 2(12)]
c) Any member of [the Indian] naval, military or air forces [Sec2(9)]
d) Any person so employed whose wages (excluding remuneration for overtime work) exceed [such wages as may be prescribed by the Central Government]:

MOCK TESTS

Q. Define the term 'Immediate Employer' and Employee' under ESI Act. (8 Marks)

Ans. Immediate employer

Section 2(13) defines the terms „immediate employer" in relation to employees employed by or through him, as a person who has undertaken the execution, on the premises of a factory or an esta blishment to which this Act applies or under the supervision of the princip al employer or his ag ent, of the whole or any part of any

work which is ordinarily part of the work of the factory or esta blishment of the princip al employer or is preliminary to the work carried on in, or incidental to the purpose of, any such factory or establishment, and includes a person by whom the services of an employee who has entered into a contract of service with him are temporarily lent on hire to the principal employer and includes a contractor.

Employee

Section 2(9) defines the term „employee " as any person employed for wages in or in connection with the work of a factory or establishment to which the Act applies and-

- Who is directly employed by the principal employer, on any work of, or incidental or preliminary to or connected with the work of, the factory or establishment, whether such work is done by the employee in the factory or establishment, whether such work is done by the employee in the factory or establishment or elsewhere; or
- Who is employed by or through an immediate employer, on the premises of the factory or establishment or under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment; or
- Whose services are temporarily lent or let on hire to the principal employer by the person with whom the person whose services are so lent or let on hire has entered into a contract of service; and includes any person employed for wages on any work connected with the administration of the factory or establishment or any part, department or branch thereof or with the purchase of raw materials for, or the distribution or sale of the productions of, the factory or establishment or any person engaged as apprentice, not being an apprentice engaged under the apprentices act, 1961 and includes such person engaged as apprentice whose training period is extended to any length of time but does not include -
- Any member of the Indian naval, military or air forces; or
- Any person so employed whose wages (excluding remuneration for overtime work) exceed such wages as may be prescribed by the central government provided that an employee whose wages as may be prescribed by the central government at any time after (and not before) the beginning of the contribution period, shall continue to be an employee until the end of that period.

Q. Describe contributions payable under the ESI Act,1948. Discuss the methods of recovery of contribution. (7 Marks)

Ans. Contributions

The contribution payable under this Act is of two types – one is the contribution of the employer and the other is the contribution of the employee which is recovered from his wages and remitted to the Fund. The present rate contribution is 4.75% and 1.75% of workers' wages by employers and employees respectively. The contribution shall be paid in a bank duly authorized corporation within 21 days of the last day of the calendar month in which the contribution falls due for any wage period.

The employer is required to file monthly contributions online through ESIC portal on a monthly basis in respect of all its employees after duly registering them. Through this, the employer has to file employee wise number of days for which wages paid and the amount of the wages paid respectively to ascertain the amount of contributions payable. The total amount of contribution, both by the employer and the employee, for each month is to be deposited in any branch of SBI in cash or by cheque or demand draft on generation of such a challan through ESIC portal using credentials. The contributions can also be paid through SBI internet banking.

Recovery of contributions

Section 45B provides that any contribution payable under this Act may be recovered as an arrear of land revenue. Section 45C provides that the authorized officer may issue certificate to Recovery Officer, who in turn proceed to recover the amount by one or more of the modes mentioned below-

- attachment and sale of moveable or immovable property of the factory or establishment or, as the case may be, the principal, or immediate employer;
- arrest of the employer and his detention in prison;
- approving a receiver for the management of the movable or immovable properties of the factory or establishment or, as the case may be, the employer.

The attachment shall first be affected against the properties of the factory or the establishment and such attachment and sale is insufficient for recovering the whole of the amount of arrears, the Recovery Officer may take such proceedings against the property of the employer.

Q. With reference to the Employees State Insurance Act in India examine what type of organisations are covered under provisions of this Act. (7 Marks)

Ans. The ESI Act extends to entirety of India. This Act applies to-

1. in the first instance applicable to all factories, including factories belonging to the Government, other than season factories;
2. the appropriate Government may, in consultation with the corporation and where the appropriate Government is a State Government, with the approval of Central Government, after giving one month's notice of its intention of so doing by notification in the Official Gazette, extend the provisions of this Actor any of them, to any other establishment or classes of establishments, industrial, commercial, agricultural or otherwise;
3. a factory or an establishment to which this Act applies shall continue to be governed by this Act notwithstanding that the number of persons employed therein at any time falls below the limit specified by or under this Act or the manufacturing process therein ceases to be carried on with the aid of power.

In *'Employees' State Insurance Corporation V. Premlal' – 2009 LLR 282 (Ker HC)* it was held that ESI scheme will be applicable to establishment preparing sweets with the aid of LPG.

In *'Kuriacose V. Employees' State Insurance Corporation' – (1988) 2 CLR 301 (Ker)* it was held that once the Act has become applicable to a factory or an establishment, its application will be continuous.

Q. Can an employee can be dismissed or punished during sickness? Apply the related provisions of the ESI Act with examples to substantiate your answer. (7 Marks)

Ans. *Section 73* provides that no employee shall dismiss, discharge or reduce or otherwise punish an employee during the period the employee is in receipt of sickness benefit or maternity benefit, nor shall be, except as provided under the regulations, dismiss, discharge or reduce or otherwise punish an employee during the period which he is in receipt of disablement benefit for temporary disablement or is under medical treatment for sickness or is absent from work as a result of illness duly certified in accordance with the regulars to arise out of the pregnancy or confinement rendering the employee unfit for work.

Jurisdiction of Civil Court

Section 75(3) provides that no Civil Court have jurisdiction to decide or deal with any question or dispute as aforesaid or to adjudicate on any liability which is to be decided by a medical board or a medical appeal tribunal or ESI Court. In 'ESI Corporation V. Jalandhar Gymkhana Club'- 1972 LLR 733 (P&H) it was held that a civil court cannot determine whether this Act is applicable to an establishment or not.

Code on Wages, 2019

Q. Demonstrate the time limit for payment of wages under the Code on Wages, 2019. (Dec, 23 – 7 Marks)

Ans. Time limit for payment of wages (Section -17)

1) The employer shall pay or cause to be paid wages to the employees, engaged on:
   a) daily basis, at the end of the shift;
   b) weekly basis, on the last working day of the week, that is to say, before the weekly holiday;
   c) fortnightly basis, before the end of the second day after the end of the fortnight;
   d) monthly basis, before the expiry of the seventh day of the succeeding month.

2) Where an employee has been:
   a) removed or dismissed from service; or
   b) retrenched or has resigned from service, or became unemployed due to closure of the establishment, the wages payable to him shall be paid within two working days of his removal, dismissal, retrenchment or,as the case may be, his resignation.
3) Notwithstanding anything contained in sub-section (1) or sub-section (2), the appropriate
   Government may, provide any other time limit for payment of wages where it considers reasonable having regard to the circumstances under which the wages are to be paid.
4) Nothing contained in sub-section (1) or sub-section (2) shall affect any time limit for payment of wages provided in any other law for the time being in force.

Q. Explain the procedure for fixing and revising minimum wages under the Code on Wages , 2019. (June, 23 – 10 Marks) (Syllabus, 2022)

Ans. Section 8 of the Code lays down provision relating to procedure for fixing and revising minimum wages. It contemplates the following:

1. In fixing minimum rates of wages for the first time or in revising minimum rates of wages under this Code, the appropriate Government shall either:

a) appoint as many committees as it considers necessary to hold enquiries and recommend in respect of such fixation or revision, as the case may be; or

b) by notification publish its proposals for the information of persons likely to be affected thereby and specify a date not less than 2 months from the date of the notification on which the proposals shall betaken into consideration.

2. Every committee appointed by the appropriate Government under clause (a) of sub- section (1) shall consist of persons:

   a) representing employers;
   b) representing employees which shall be equal in number of the members specified in clause (a); and
   c) independent persons, not exceeding 1/3 of the total members of the committee.

3. After considering the recommendation of the committee appointed under clause (a) of sub-section (1) or, as the case may be, all representations received by it before the date specified in the notification under clause (b) of that sub-section, the appropriate Government shall by notification fix, or as the case may be, revise the minimum rates of wages and unless such notification otherwise provides, it shall come into force on the expiry of 3 months from the date of its issue:

   Provided that where the appropriate Government proposes to revise the minimum rates of wages in the manner specified in clause (b) of sub-section (1), it shall also consult concerned Advisory Board constituted under section 42.

4. The appropriate Government shall review or revise minimum rates of wages ordinarily at an interval not exceeding five years.

COMPANIES ACT

BASICS

Q. What is meant by Lifting of Corporate Veil? In which circumstances the corporate veil can be lifted by court? (June 19 – 8 Marks)

The separate personality or a company is a statutory privilege and it must be used for legitimate business purposes only. Where a fraudulent and dishonest use is made of the legal entity, the individuals concerned will not be allowed to take shelter behind the corporate personality. The Court will break through the corporate shell and apply the principle/doctrine of what is called as "lifting of or piercing the corporate veil". The Court will look behind the corporate entity and take action as though no entity separate from the members existed and make the members or the controlling persons liable for debts and obligations of the company.

In the following circumstances, different courts found it necessary to lift the corporate veil and punish the actual persons who did wrong or unlawful acts under the name of the company

1) **Protection of Revenue**: The Court may ignore the Separate Legal Entity status of a Company, where it is used for tax invasion or circumventing tax obligation.
2) **Determination of enemy character of the Company**: Company being an artificial person cannot be enemy or friend. But during war, it may become necessary to lift the corporate veil and see the persons behind it to determine whether they are friends or enemy. This is due to the reason that though a company enjoys Separate Legal Entity but its affairs are run by individuals.
3) **Prevention of fraud:** Where a Company is used for committing frauds or improper conduct, the Court may lift the corporate veil and look at the realities of the situation.
4) **Protection of public policy**: The Court shall lift the Corporate Veil without any hesitation to protect the public policy and prevent transaction opposed to public policy.
5) **Company mere sham or cloak**: Where the Company is a mere sham and was really a ploy used for committing illegalities and to defraud people, the Court shall lift the Corporate Veil.
6) **Where a Company acts as an agent of its shareholders**: If there is an arrangement between the shareholders and a Company to the effect that the

Company will act as agent of shareholders for the purpose of carrying on the business, the business is essentially of that of the shareholders and will have unlimited liability.

7) **Avoidance of Welfare Legislation:** Where a Company tries to avoid its legal obligations, the corporate veil shall be lifted to look at the real picture.
8) **To punish for contempt of Court**: Company being an artificial person cannot disobey the orders of the Court. Therefore, the persons at fault should be identified.

Q. Define the term "Body Corporate" as per Section 2(ii) of the Companies Act, 2013. (Dec 15 – 2 Marks)

Ans. "Body corporate" or 'corporation' includes a company incorporated outside India, but does not include —

- a co-operative society registered under any law relating to co-operative societies; and
- any other body corporate (not being a company as defined in this Act), which the Central Government may, by notification, specify in this behalf. [Section 2(11)]

Q. Define the term 'Small Company' as contained in the Companies Act, 2013. (June 16 – 5 Marks) (Dec, 18 – 5 Marks)

Ans. Under Section 2(85) of the Companies Act, 2013 read with Rules, "small company means a company, other than a public company: -

i. having PAID-UP SHARE CAPITAL not exceeding ₹ 4 crore or such higher amount as may be prescribed which shall not be more than ₹ 10 crore; or
ii. having TURNOVER as per its last profit and loss account not exceeding ₹ 40 crore or such higher amount as may be prescribed which shall not be more than ₹ 100 crore rupees.

EXCEPTIONS: This section shall not apply to:

a) a holding company or a subsidiary company;
b) a company registered under section 8, or
c) a company or body corporate governed by any special Act.

Q. Define the term 'Financial Statement' as contained in the Companies Act, 2013. (Dec 15 – 2 Marks)

Ans. "Financial statement" in relation to a company, includes —

i. A balance sheet as at the end of the financial year;

ii. A profit and loss account or in the case of a company carrying on any activity not for profit an income and expenditure account for the financial year;

iii. Cash flow statement for the financial year;

iv. A statement of changes in equity, if applicable; and

v. Any explanatory note annexed to or forming part of any document referred to in sub clause (i) to sub-clause (iv);

Provided that the financial statement with respect to one person company, small company and dormant company, may not include the cash flow statement. [section 2(40)]

INCORPORATION OF COMPANIES

Q. What are the conditions stipulated in the Act in formation of One Person company? (5 Marks)

Ans. The conditions stipulated in the Act in formation of One Person Company are:

1. No natural person shall be eligible to incorporate more than a OPC or become nominee in more than a OPC;
2. Where a natural person, being a member of OPC in accordance with this rule becomes a member in another such company by virtue of his being a nominee in that OPC, such person shall meet the eligibility criteria within a period of 182 days;
3. No minor shall become member or nominee of OPC or can hold share with beneficial interest;
4. Such company cannot be incorporated or converted into Section 8 company;
5. Such company cannot carry out Non Banking Financial Investment activities including investment activities in securities of anybody corporate;
6. No such company can convert voluntarily into any kind of company unless two years have expired from the date of incorporation of OPC, except threshold limit of paid up share capital is increased beyond ` 50 lakh or its average annual turnover during the relevant period exceeds 2 crore rupees.

Q. What are the benefits of One Person Company? (Dec 21 - 6 Marks)

Ans. The concept of One Person Company is quite revolutionary. It gives the individual entrepreneurs all the benefits of a company, which means they will get credit, bank loans, and access to market, limited liability, and legal protection available to companies.

Prior to the new Companies Act, 2013 coming into effect, at least two shareholders were required to start a company. But now the concept of One Person Company would provide tremendous opportunities for small businessmen and traders, including those working in areas like handloom, handicrafts and pottery. Earlier they were working as artisans and weavers on their own, so they did not have a legal entity of a company. But now the OPC would help them do business as an enterprise and give them an opportunity to start their own ventures with a formal business structure.

Further, the amount of compliance by a one person company is much lesser in terms of filing returns, balance sheets, audit etc. Also, rather than the middlemen usurping profits, the one person company will have direct access to the market and the wholesale retailers. The new concept would also boost the confidence of small entrepreneurs.

Q. What are the conditions stipulated in the Companies Act, 2013 in formation of One Person Company? (June 17 – 5 Marks)

Ans. The following are the conditions in formation of a OPC:
No person shall be eligible to incorporate more than a OPC or become nominee in more than such company;

1. Where a natural person, being a member of OPC in accordance with this rule becomes a member in another such company by virtue of his being a nominee in that OPC, such person shall meet the eligibility criteria within a period of 182 days;
2. No minor shall become member or nominee of OPC or can hold share with beneficial interest;
3. Such company cannot be incorporated or converted into Section 8 company;
4. Such company cannot carry out Non Banking Financial investment activities including investment activities in securities of any body corporate;

No such company can convert voluntarily into any kind of company unless two years have expired from the date of incorporation of OPC, except threshold limit of paid up share capital is increased beyond ` 50 lakh or its average annual turnover during the relevant period exceeds ` 2 crore rupees.

Q. Discuss the procedure for conversion of private company into One Person Company. (June 18 – 7 Marks)

Ans. Rule 7 provides the procedure for conversion of private company into OPC. Rule 7(1) provides that a private company other than Section 8 company, having paid up share capital of ₹ 4 crore or less and average annual turnover during the relevant period is ₹ 40 crore or less may convert itself into OPC by passing a special resolution in the general meeting.

Before passing such resolution the company shall obtain 'No Objection Certificate' in writing from the members and creditors. The OPC shall file copy of the resolution

with the Registrar of Companies within 30 days from the date of passing such resolution in Form No. MGT-14.

The company shall file an application in Form No. INC-6 for its conversion into OPC along with fees. The following documents are to be attached:

1. The directors of the company shall give a declaration by way of affidavit duly sworn in confirming that all members and creditors of the company have given their consent for conversion, the paid up share capital of the company is ₹ 4 crore or less or average annual turnover is less than ₹ 40 crores, as the case may be;
2. The list of members and creditors;
3. The latest Audited Balance sheet arid the Profit and Loss Account;
4. The copy of No objection letter of secured creditors.

On being satisfied and complied with the requirements the Registrar shall issue the certificate.

Q. Examine the procedure to be followed for the incorporation of a company under section 7 of the Companies Act, 2013. (June, 23 – 9 Marks) (Syllabus, 2022)

***Ans.* Section 7 of the Companies Act, 2013** provides for the procedure to be followed for the incorporations of a company. The promotor of the company shall submit the following documents to the Registrar of companies within whose jurisdiction the registered office of the company is proposed to be situated for registration.

1) Memorandum and articles of the company duly signed by all the subscribers to the memorandum in such manner as may be prescribed;
2) A declaration in the prescribed form by an Advocate, a Chartered Accountant, Cost Accountant or Company Secretary in practice, who is engaged in the formation of the company and by a person named in the articles as a director, manager or secretary of the company, that all the requirements of the Act and rules made thereunder in respect of registration;
3) A declaration from each of the subscribers to the memorandum and from persons

named as the first directors, if any, in the articles stating that - **(Form No. INC-9)**

(i) he is not convicted of any offence in connection with the promotion, formation or management of any company, or

(ii) he has not been found guilty of any fraud or misfeasance or of any breach of duty to any company under this Act or any previous company law during the last 5 years and

(iii) that all the documents filed with the Registrar for registration of the company contain information that is correct and complete and true to the best of his knowledge and belief;

4) The address for correspondence till registered office is established;

5) All particulars of every subscriber to the memorandum along with the proof of identity;

6) The particulars of the persons mentioned in the articles as the first directors of the company;

7) The consent to act as directors of company in such form as may be prescribed.

The memorandum of association and articles of association are the basic essential documents of the company.

A new **section (10A)** has been introduced with the introduction of Companies Amendment Ordinance. It provides that every company, incorporated after the notification of the ordinance, shall not commence business, unless the directors file a declaration within 180 days of incorporation that every subscriber has paid for the shares as agreed and the registered office has been verified by filing necessary returns. Under 12A (new in section) the name of the company may be striked off if no office is found on physical verification.

Q. What are the features of companies registered under section 8 of the Companies Act, 2013?

Ans. Section 8 of companies Act 2013 - These companies intend to promote art, commerce, sports, safety, science, research, healthcare, social welfare, religion, protection of the environment etc.

The following are the features of companies registered under Section 8 of the Companies Act, 2013;

1) has its objects the promotion of commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment or any such other object;
2) intends to apply its profit, if any, or other income in promoting its objects; and
3) intends to prohibit the payment of any dividend to its members;
4) the company registered under this Section shall enjoy all the privileges and be subject to all the obligations of the limited company;
5) a firm may be a member of the company registered under this section ;
6) a company registered under this Section shall not alter the provisions of its memorandum and articles except with the previous approval of the Central Government.
7) a company registered under this section may convert itself into a company of any other kind only after complying with such conditions as may be prescribed.

Q. Can a non-profit organisation be registered as a company under the companies Act, 2013? If so, what procedure does it have to adopt? (June 16 – 7 Marks)

Ans. According to section 8 (1) of the Companies Act,2013, the Central Government may allow a person or an association of persons to be registered as a Company under the Companies Act if it has been set up for promoting commerce, arts, science, sports, education, research, social welfare, religion, charity, protection of environment or any such other useful object and intends to apply its profits or other income in promotion of its objects. However, such company has to prohibit payment of any dividend to its members.

Procedure: An association of persons intending to carry any or all or some of the activities mentioned in section 8(1) as mentioned above, has to apply to the Central Government seeking its permission forbeing set up as a company under the Act. The

Central Government if satisfied on the above may by the issue of a licence in such manner as may be prescribed and on such conditions as it may deem fit, allow such association to be registered as a limited company under section 8(1) without the addition of word "Limited" or words "Private Limited" as the case may be, to its name.

After the issue of the licence by the Central Government, an application must be made to the Registrar in the prescribe form after which the Registrar will register the association of persons as a company under section 8(1). Under section 8(2) a company registered under section 8(1) as above, shall enjoy all the privileges and be subject to all the obligations of a limited company.

This licence issued by the Central Government is revocable, and on revocation the Registrar shall put the words 'Limited' or 'Private Limited' against the company's name in the Register. But before such revocation, the Central Government must give the company a written notice of its intention to revoke the licence and provide an opportunity lo it to be represented and heard in the matter.

Q. What action may be taken by the Central Government on revocation of licence of Section 8 of the Companies Act, 2013? (Dec 22 - 6 Marks)

Ans. Section 8(6) provides that the Central Government may, by order, revoke the licence granted to the company registered under this section-

(1) if the company contravenes any of the requirements of this section; or

(2) any of the conditions subject to which a licence is issued; or

(3) the affairs of the company are conducted fraudulently or in a manner violative of the objects of the company or prejudicial to public interest.

The Central Government shall direct the company to convert its status and change its name to add the words "Limited" or "Private Limited" to its name. No such order will not be passed without giving opportunity to the company of being heard. A copy of such order shall be given to the Registrar. The Registrar shall, without prejudice to any action taken, on application, in the prescribed form, register the company accordingly.

Where a licence is revoked by the Central Government, it may direct that the company may be wound up under this Act or amalgamated with another company registered under this section, if it is satisfied that it is essential in the public

interest. No such order shall be made unless the company is given a reasonable opportunity of being heard. Where a licence is revoked by the Central Government and where the Central Government is satisfied that it is essential in the public interest that the company registered under this section should be amalgamated with another company registered under this section and having similar objects, then the Central Government may, by order, provide for such amalgamation to form a single company with such constitution, properties, powers, rights, interest, authorities and privileges and with such liabilities, duties and the obligations as may be specified in the order.

Q. Write a Short Note on Revocation of license under Section 8(6) of Companies Act. (Dec 21 – 3 Marks)

Ans. *Section 8(6)* provides that the Central Government may, by order, revoke the license granted to the company registered under this section-

- if the company contravenes any of the requirements of this section; or
- any of the conditions subject to which a license is issued; or
- the affairs of the company are conducted fraudulently or in a manner violative of the objects of the company or prejudicial to public interest.

The Central Government shall direct the company to convert its status and change its name to add the words "Limited" or "Private Limited" to its name. No such order will not be passed without giving opportunity to the company of being heard. A copy of such order shall be given to the Registrar. The Registrar shall, without prejudice to any action taken, on application, in the prescribed form, register the company accordingly.

Q. Write a short note on Revocation of licence (June 17 – 5 Marks)

Ans. Section 8(6) of Companies Act, 2013 provides that the Central Government, by order, revoke the licence granted to the company registered under this section-

1. if the company contravenes any of the requirements of this section; or
2. any of the conditions subject to which a licence is issued; or
3. the affairs of the company are conducted fraudulently or in a manner violative of the objects of the company.

The Central Government shall direct the company to convert its status and change its name to add the words 'limited' or 'private limited' to its name. No such order will not be passed without giving opportunity to the company of being heard.

A copy of such order shall be given to the Registrar. The Registrar shall, without prejudice to any action taken, on application, in the prescribed form register the company accordingly.

Q. What is the effect of the registration of the Memorandum of Association of a Company on (1) the subscribers of the memorandum and (2) such other persons as may from time to time become members of the company. (Dec 15 – 4 Marks)

Ans. Section 10 – When the Memorandum of Association of a Company has been registered, it has the following effect:-

(1) The signatories become members of the company, the entry of their names in the register of members not being legally necessary, and they are bound to observe all the provisions of the Memorandum.

(2) Such other persons as may from time to time become members of the company are bound by the Memorandum, as if it had been signed by them, to observe all the provisions thereof.

Q. The Articles of a Public Company clearly stated that Mr. X will be the Solicitor of the Company. The Company in its general meeting of the shareholders resolved unanimously to appoint Y in place of X as the solicitor of the company by altering the Articles of Association. Examine whether the company can do so? Give reasons. (Dec 15 – 4 Marks)

Ans. According to **Section 10(1)** of the Companies Act, 2013, the memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed by the company and by each member and contained covenants on its and his part to observe all the provisions of the memorandum and articles.

Further, under Section 14(1) subject to the provisions of this Act and to the conditions contained in the Memorandum, a company may by a special resolution, alter its Articles.

Moreover, under section 14(2) the company will be required to file within fifteen days the altered Articles with the Registrar along with necessary documents, such as the copy of the special resolution etc, and in such manner as may be prescribed. On receipt of all documents the Registrar shall register the same.

Section 14(3) further provides that any alterations in the Articles will be valid as

if they were in the original Articles.

In the present case, the company has altered the Articles by a unanimous resolution of the members passed at a general meeting. Hence, the alteration is valid and after registration of the altered Articles the appointment of Y will stand and X will be terminated.

Q. Discuss the procedure of alteration of memorandum of association as per the companies Act, 2013. (June 17 – 10 Marks)

Ans. As per the provision of **section 13** of the Companies Act, 2013 the alteration of the memorandum may be taken place in the following manner:

1. **Alteration by special resolution:** Company may alter the provisions of its memorandum with the approval of the members by a special resolution
2. **Name change of the company**: Any change in the name of a company shall be effected only with the approval of Central Government in writing. However no such approval is necessary where the change in the name of the company is only the deletion there from, or addition thereto of the word 'private', on the conversion of any one class of companies to another class.
3. **Entry in register of companies:** On any change in the name of the company, the Registrar shall enter the new name in the register of companies in place of the old name and issue a fresh certificate of incorporation with the new name and the change in the name shall be complete and effective only on the issue of such a certificate.
4. **Change in the registered office**: The alteration of the memorandum relating to the place of the registered office from one State to another shall not have any effect unless it is approved by the Central Government on an application in such form and manner as may be prescribed.
5. **Disposal of the application of change of place of the registered office:** The Central Government shall dispose of the application of change of place of the registered office within a period of sixty days before passing of order. The central government may satisfy itself that-
    a) The alteration has the consent of the creditors, debenture-holders and other persons concerned with the company, or
    b) The sufficient provision has been made by the company either for the due discharge of all its debt and obligations, or
    c) Adequate security has been provided for such discharge.

6. **Filing with Registrar**: A company shall in relation to any alteration of its memorandum file with the Registrar -
    a) The special resolution passed by the company under sub-section (1),
    b) The approval of the central government under sub-section (2), if the alteration involves any change in the name of the company.
7. **Filing of the certified copy of the order with the registrar of the states:** Where an alteration of the memorandum results in the transfer of the registered office of a company from one state to another, a certified copy of the order of the central government approving the alteration shall be filed by the company with the Registrar of each of the State within such time and in such manner as may be prescribed, who shall register the same.
8. **Issue of fresh certificate of incorporation**: The Registrar of the State where the registered office is being shifted to shall issue afresh certificate of incorporation including the alteration.
9. **Change in the object of the company**: A company which has raised money from public through prospectus and still has any unutilized amount out of the money so raised, shall not change its objects for which it raised the money through prospectus unless a special resolution through postal ballot is passed by the company and -
    a) The details in respect of such resolution shall also be published in the newspaper
    b) The dissenting shareholders shall be given an opportunity to exit by the promoters and shareholders having control in accordance with regulations to be specified by the SEBI
10. **Registrar to certify the registration on the alteration of the objects**: The Registrar shall register any alteration of the memorandum with respect to the objects of the company and certify the registration within a period of thirty days from the date of filing of the special resolution.
11. **Alteration to be registered:** No alteration made under this section shall have any effect until it has been registered in accordance with the provisions of this section.
12. **Only members have a right to participate in the divisible profits of the company**: Any alteration of the memorandum in the case of a company limited by guarantee and not having a share capital intending to give any person right to participate in the divisible profits of the company otherwise than as a member shall be void.

Q. State the procedure for shifting of a registered office of the company from one state to another state under the provisions of the Companies Act, 2013 (June 19 – 7 Marks)

Ans. The steps involved in changing the registered office from one state to another state:

1. Call for a board meeting to decide on the change in the domicile clause.
2. In the board meeting fix up the date, time, place of the general meeting and approve the notices for this purpose, send the notices, hold the meeting and pass special resolutions.
3. After taking the approval of the members, file a certified copy of the special resolution along with the explanatory statement in Form 23 with ROC.
4. Publish a general notice in at least one regional language newspaper and one English language newspaper circulated in the area in which registered office of the company is situated clearly stating the substance of the petition.
5. Send individual notices to all creditors/debenture holders of the company.
6. After a gap of one month from the date of sending notices as above, file petition with the Company Law Board (CLB) pursuant to the CLB Regulations, 1991. The petition has to be filed with the Regional Bench of the CLB at which the existing registered office is situated.
7. Serve a copy of the petition on the ROC.
8. Serve a copy of the notice along with a petition to the Chief Secretary to the Government of the State where the registered office of the company is situated or to the Administrator / Lt. Governor of the Union Territory where the registered office is situated in the Union Territory.
9. A hearing may take place at the CLB office at which creditors, if any, and the representatives of the company are heard before making any order.
10. After receiving the CLB order for shifting the registered office, the company is required to file certified copy of the order with the ROC along with Form No. 21 within 3 months of receipt of certified copy along with the printed copy of the memorandum of association.
11. A certified copy of the order from the ROC within one month of the date of filing must be obtained.

12. The certified copy of the order should be filed with the ROC of the new state within one month of the date of the filing along with the certified copy of the memorandum of association.
13. The ROC of the new state i.e. at which registered office will be shifted will issue a fresh certificate of incorporation which will be conclusive evidence of the shift of registered office.
14. File Form No. 18 with the new ROC for the situation of the registered office.
15. Necessary changes are required to be made in the letter heads, books, records etc. of the company.
16. Arrange to adopt new common seal of the company.

Q. Discuss the shifting of registered office within the same state. (Dec 17 – 5 Marks)

Ans. The Shifting of registered office within the same State.

A) An application seeking confirmation from the Regional Director for shifting the registered office within the same State from the jurisdiction of one Registrar of Companies to the jurisdiction of another Registrar of Companies, shall be filed by the company with the Regional Director in Form no.INC.23 along with the fee.

B) The company shall, not less than one month before filing any application with the Regional Director for the change of registered office. -
   a) publish a notice, at least once in a daily newspaper published in English and in the principal language of that district in which the registered office of the company is situated and circulating in that district; and
   b) serve individual notice on each debenture holder, depositor and creditor of the company, clearly indicating the matter of application and stating that any person whose interest is likely to be affected by the proposed alteration of the memorandum may intimate his nature of interest and grounds of opposition to the Regional Director with a copy to the company within twenty-one days of the date of publication of that notice:
   Provided that in case no objection is received by the Regional Director within twenty one days from the date of service or publication of the notice, the person concerned shall be deemed to have given his consent to the change of registered office proposed in the application.

Provided further that the shifting of registered office shall not be allowed if any inquiry, inspection or investigation has been initiated against the company or any prosecution is pending against the company under the Act.

C) The confirmation referred to in sub-section (5) of section 12 shall be communicated within a period of thirty days from the date of receipt of application by the Regional Director to the company and the company shall file the confirmation with the Registrar within a period of sixty days of the date of confirmation who shall register the same and certify the registration within a period of thirty days from the date of filing of such confirmation.

PROSPECTUS

Q. Ascertain the financial information which are to be stated in a Prospectus for IPO. (5 Marks)

Ans. *Section 26* of the Act provides the matters to be stated in a prospectus. Every prospectus issued by or on behalf of a public company shall be dated and signed and shall state such information and set out such reports on financial information as may be specified by the Securities and Exchange Board in consultation with the Central Government: Provided that until the Securities and Exchange Board specifies the information and reports on financial information under this sub- section, the regulations made by the Securities and Exchange Board under the Securities and Exchange Board of India Act, 1992, in respect of such financial information or reports on financial information shall apply.

Section 27 of the Act provides that a company shall not, at any time, vary the terms of a contract referred to in the prospectus or objects for which the prospectus was issued except subject to the approval of or except subject to an authority given by the company in general meeting by way of special resolution through the postal ballot. The notice of the proposed special resolution, according to Rule 7(1), shall contain the following particulars:

1. the original purpose or object of the issue;
2. the total money raised the money utilized for the objects of the company stated in the prospectus;
3. the extent of achievement of proposed objects;
4. the unutilized amount of the money so raised through prospectus;
5. the particulars of the proposed variation in terms of contracts referred to in the prospectus or objects for which prospectus was issued;
6. the reason and justification for seeking variation;
7. the proposed time limit within which the proposed varied objects would be achieved;
8. the clause-wise details as specified in Rule 3(3) as was required with respect to the originally proposed objects of the issue;
9. the risk factors pertaining to the new objects; and
10. the other relevant information which is necessary for the members to take an informed decision on the proposed resolution.

Q. Write a short note on Red herring prospectus (June 19 – 5 Marks)

Ans. The Explanation to Section 32 defines the term 'red herring prospectus' as a prospectus which does not include complete particulars of the quantum or price of the securities included therein,

Section 32 provides that a company proposing to make an offer of securities may issue a red herring prospectus prior to the issue of a prospectus. The same shall be filed with the Registrar at least three day prior to the opening of the subscription list and the offer. It shall carry the same obligations as are applicable to a prospectus and any variation between the red herring prospectus and a prospectus shall be highlighted as variations in the prospectus.

At the time of closing of the offer, the prospectus stating the total capital raised, whether by way of debt or share capital and the closing price of the securities and any other detail as are not included in the red herring prospectus shall be filed with the Registrar and the SEBI.

Q. What is Shelf Prospectus? Explain it with relevant provisions. (June 17 – 9 Marks)

OR

Q. Analyse the concept of shelf prospectus under the Companies Act, 2013. (June, 23 – 5 Marks) (Syllabus, 2022)

Ans. Shelf Prospectus [Section 31]

(1) Any class or classes of companies, as the Securities and Exchange Board may provide by regulations in this behalf, may file a shelf prospectus with the Registrar at the stage of the first offer of securities included therein which shall indicate a period not exceeding one year as the period of validity of such prospectus which shall commence from the date of opening of the first offer of securities under that prospectus, and in respect of a second or subsequent offer of such securities issued during the period of validity of that prospectus, no further prospectus is required.

(2) A company filing a shelf prospectus shall be required to file an information memorandum containing all material facts relating to new charges created,

changes in the financial position of the company as have occurred between the first offer of securities or the previous offer of securities and the succeeding offer of securities and such other changes as may be prescribed, with the Registrar within the prescribed time, prior to the issue of a second or subsequent offer of securities under the shelf prospectus.

Provided that where a company or any other person has received applications for the allotment of securities along with advance payments of subscription before the making of any such change, the company or other person shall intimate the changes to such applicants and if they express a desire to withdraw their application, the company or other person shall refund all the monies received as subscription within fifteen days thereof.

(3) Where an information memorandum is filed, every time an offer of securities is made under sub - section (2), such memorandum together with the shelf prospectus shall be deemed to be a prospectus.

Explanation: — For the purposes of this section, the expression "shelf prospectus" means a prospectus in respect of which the securities or class of securities included therein are issued for subscription in one or more issues over a certain period without the issue of a further prospectus.

Q. Critically examine the provisions for payment of commission in connection with subscription to the securities, by a public limited company. (5 Marks)

Ans. Section 40(6) of the Companies Act, 2013 provides that a company may pay commission to any person in connection with the subscription to its securities subject to such conditions as may be prescribed in the Rules.

Rule 13 provides that a company may pay commission to any person in connection with the subscription or procurement of subscription to its securities, whether absolute or conditional, subject to the following conditions:

- the payment of such commission shall be authorized in the company's articles of association;
- the commission may be paid out of proceeds of the issue or the profit of the company or both;
- the rate of commission paid or agreed to be paid shall not exceed, in case of shares, 5% of the price at which the shares are issued or a rate authorized by

the articles, whichever is less, and in the case of debentures, shall not exceed 2.5% of the price at which the debentures are issued, or as specified in company's articles, whichever is less;

- the prospectus of the company shall disclose the name of the underwriters, the rate and amount of the commission payable to the underwriter and the number of securities which is to be underwritten or
- subscribed by the underwriter absolutely or conditionally;
- commission shall not be paid to any underwriter on securities which are not offered to the public for subscription;
- a copy of the contract for the payment of commission is delivered to the Registrar at the time of delivery of the prospectus for registration.

Share Capital and Debentures

Q. Prepare the list of different rights of a shareholder of a company under the Companies Act, 2013. (June, 23 – 10 Marks) (Syllabus, 2022)

Ans. A person who is a shareholder of a company has many rights under the Companies Act, 2013. Some of them are:

(i) The right to vote at all meetings **[Sec.47];**

(ii) The right to requisition an extraordinary general meeting of the company **[Sec.100];**

(iii) The right to receive notice of a general meeting **[Sec.101];**

(iv) The right to appoint proxy and inspect proxy register **[Sec.105]**

(v) In the case of a body corporate which is a member, the right to appoint a representative to attend a generalmeeting on its behalf **[Sec.113];** and

(vi) The right to require the company to circulate resolution **[Sec.111].**

(vii) To have certificate of share held ready for delivery to him within two months from the date of allotment **[Sec.56]**

(viii) To Transfer shares subject to the provisions of the Act and Article of Association **[Sec.44].**

(ix) To inspect the Register of members and Register of debenture-holders and get extracts there from**[Sec.94].**

(x) To obtain, on request, minutes of proceedings at general meetings as also to inspect the minutes [Sec.119].

(xi) To apply to the Tribunal to have any variation of shareholders rights set aside **[Sec.48].**

(xii) To participate in the removal of directors by passing an ordinary resolution **[Sec.169]**

Q. Sweat equity shares are issued to directors or employees at a discount or for consideration other than cash. Discuss under the provisions of the Companies Act, 2013. (Dec 19 – 8 Marks)

Ans. ***Section 2(88)*** defines the expression 'sweat equity shares' as such equity shares as are issued by a company to its directors or employees at a discount or for consideration, other than cash, for providing their know-how or making available rights in the nature of intellectual property rights or value additions, by whatever name called.

For this purpose the term 'employee' means-

- a permanent employee of the company who has been working in India or outside India; or
- a director of the company, whether a whole time director or not; or
- an employee or a director as defined above of a subsidiary, in India or outside India, or of holding company of the company.

The expression *'value additions'* means actual or anticipated economic benefits derived or to be derived by the company from an expert or a professional for providing know-how or making available rights in the nature of intellectual property rights, by such person to whom sweat equity is being issued for which the consideration is not paid or included in the normal remuneration payable under the contract of employment, in the case of employee.

Section 54 provides that a company may issue sweat equity shares of a class of shares already issued, if the following conditions are fulfilled:

1. the issue is authorized by a special resolution passed by the company;
2. the resolution specifies the number of shares, the current market price, consideration, if any, and the class or classes of directors or employees to whom such equity shares are to be issued;
3. where the equity shares of the company are listed on a recognized stock exchange, the sweat equity shares are issued in accordance with the regulations made by SEBI in this behalf. If they are not so listed, the sweat equity shares are issued in accordance with such rules as may be prescribed.

Rule 8(1) provides that a company other than a listed company shall not issue sweat equity shares to its directors or employees at a discount or for consideration other than cash, for their providing know-how or making available rights in the nature of intellectual property rights or value additions unless the issue is authorized by a special resolution passed by the company in general meeting.

Q. Write a short note on Alteration of Share Capital (June 18 - 5 Marks)

Ans. ***Section 61*** provides that a limited company having a share capital may, if so authorized by its articles alter its memorandum in its general meeting-

1) Increase its authorized share capital by such amount as it thinks expedient;
2) Consolidate and divide all or any of its share capital into shares of a larger amount than its existing shares. No consolidation and division which results in change in the voting percentage of the shareholders shall take effect unless it is approved by the tribunal on an application made in the prescribed manner;
3) Convert all or any of is fully paid up shares into stock and reconvert that stock into fully paid up shares of any denomination;
4) Sub division of shares, or any of them, into shares of smaller amount than is fixed by the memorandum, so, however that in the sub division the proportion between the amount paid and the amount, if any, unpaid on each reduced share shall be the same as it was in the case of the share from which the reduced share is derived;
5) Cancel shares which, at the date of the passing of the resolution in that behalf, have not been taken or agreed to be taken by any person, and diminish the amount of its share capital by the amount of the shares so cancelled. The cancellation shall not be deemed to reduction of share capital.

Q. Discuss the relevant provisions of the Companies Act, 2013 relating to issue of bonus shares. (Dec 22 – 9 Marks)

Q. Discuss the provisions of the Companies Act, 2013 regarding issue of bonus shares (Dec 18 – 8 Marks)

Ans. ***Section 63*** of the Companies Act, 2013 provides for the issue of bonus shares. Section 63(1) provides that a company issue fully paid-up bonus shares to its members out of its

- free reserves;
- he securities premium account; or
- the capital redemption reserve account.

Note: No bonus shares shall be made by capitalizing reserves created by the revaluation of assets.

Section 63(2) provides that no company shall capitalize is profits or reserves fothe purpose of issuing fully paid-up shares unless-

1) it is authorized by its articles;
2) it has, on the recommendation of the Board, been authorized in the general meeting of the company;
3) it has no defaulted in payment of interest or principal in respect of fixed deposits or debt securities issued by it;
4) it has not defaulted in respect of the payment of statutory dues of the employees, such as, contribution to provident fund, gratuity and bonus;
5) the partly paid-up shares, if any outstanding on the date of allotment are made fully paid up;
6) it complies with such conditions as may be prescribed;

Section 63(3) provides that the bonus shares shall not be issued in lieu of dividend. Rule 14 provides that the company which once announced the decision of the Board recommending a Bonus issue shall not subsequently withdraw the same.

Q. Write a short note on Trust Deed as per Companies Act, 2013 (Dec 22 – 5 Marks)

Ans. A trust deed in ***Form No. SH-12*** shall be executed by the company issuing debenture in favor of the debenture trustees within 3 months of closure of the issue or offer. A trust deed for securing any issue of debentures shall be open for inspection to any member of debenture holder of the company, in the same manner, to the same extent and on the payment of the same fees, as if it were the register of members of the company. A copy of the trust deed shall be forwarded to any member or debenture holder of the company, at his request, within 7 days of the making, on payment of fee.

Q. What is the procedure for issue of renewed share certificate under Companies Act,2013? (Dec 21 - 6 Marks)

Ans: *Rule 6* provides that the certificate of any share(s) shall not be issued either in exchange for those which are sub-divided or consolidated or in replacement of those which are defaced, mutilated, torn or old, decrepit, worn out or where the pages on the reverse for recording transfers have been duly utilized, unless the certificate in lieu of which it is issued is surrendered to the company. The company may charge such fees as the Board thinks fit, not exceeding Rs.50/- per certificate issued on splitting or consolidation of share certificate(s) or in replacement of share certificate(s) that are defaced, mutilated, torn or old, decrepit or worn out.

In such cases it shall be stated on the face of the share that it is "Issued in lieu of

Share Certificate No. _____ Sub-divided/replaced/on consolidation" and also that no fee shall be payable pursuant to scheme of arrangement sanctioned by the High Court or Central Government.

A company may replace all the existing certificates by new certificates upon subdivision or consolidation of shares or merger or demerger or any reconstitution without requiring old certificates to be surrendered. The details of such nature are to be entered in the Register maintained for this purpose.

Q. Critically assess the conditions for Buy back of Shares by listed company in India with an example. (7 Marks)

***Ans.* Section 68(2)** of Companies Act 2013 provides that a company shall purchase is own shares or other specified securities if-

1) The buy-back is authorized by its articles;
2) A special resolution has been passed at a general meeting of the company authorizing the buy back. This shall not apply to a case where-
3) The buy-back is, 10% or less of the total paid up equity capital and free reserves of the company; and
4) Such buy-back has been authorized by the board by means of a resolution passed at its meeting.
5) The buy-back is 25% or less of the aggregate of paid-up capital and free reserves of the company.
6) In respect of the buy-back of equity shares in any financial year, the reference to 25% shall be construed with respect to its total paid-up equity capital in that financial year.
7) The ratio of the aggregate of secured and unsecured debts owed by the company after buy- back is not more than twice the paid up capital and free reserves. The central government may, by order, notify a higher ratio of the debt to capital and free reserves for a class or classes of companies
8) All the shares or other specified securities for buy-back are fully paid up;
9) The buy-back of shares or other specified securities in a listed company is done in accordance with the regulations made by SEBI; and
10) The buy-back in respect of shares or other specified securities of a unlisted company is to be in accordance with the rules as may be prescribed.

Example: Both the Companies Act and SEBI guidelines made provisions for companies to buy back their own shares. Indian regulations require companies to cancel the

shares that it buys back unlike in some other countries where it's allowed to keep those shares alive on its own balance sheet. The concept of share buybacks is also common in India. Several companies announce buybacks in order to improve shareholder value. **For example**, in Oct-2022, Bajaj Auto announced a share buyback of about 64 lakh number shares from the public.

Let's say company ABC has ₹ 20,00,000 in cash and 1,00,000 shares in issue, trading at a price of ₹ 10 per share. If ABC buys back 150,000 shares, using ₹ 1,50,000 in cash, it's left with 8,50,000 shares in circulation and ₹ 18,50,000 in cash.

Q. ABC Limited decides to buy-back its own shares. Advise the Company's Board of Directors about the sources of which the company can buy-back its own shares. (June 16 – 4 Marks)

Ans. Under **section 68 (1)** of the Companies Act,2013 a company can purchase its own shares or other specified securities. The purchase should be out of:

i) its free reserves: or
ii) the securities premium account: or
iii) the proceeds of the issue of any shares or other specified securities.

However, buy-back of any kind of shares or other specified securities cannot be made out of the proceeds of an earlier issue of the same kind of shares or same kind of other specified securities.

'Specified securities' includes employees' stock option or other securities as may be notified by the Central Government from time to time. [Explanation (1) under Section, 68].

Q. Enumerate different points in context of buy back of shares under the Companies Act, 2013. (Dec, 23 – 7 Marks) (Syllabus, 2022)

Ans. Buy back of Shares

Section 68(2) of the Companies Act, 2013 provides that a company shall purchase is own shares or other specified securities if-

- the buy-back is authorized by its articles;
- a special resolution has been passed at a general meeting of the company authorizing the buy back. This shall not apply to a case where-

➢ the buy-back is, 10% or less of the total paid up equity capital and free reserves of

the company; and

- such buy-back has been authorized by the Board by means of a resolution passed at its meeting.

- the buy-back is 25% or less of the aggregate of paid-up capital and free reserves of the company.
- In respect of the buy-back of equity shares in any financial year, the reference to 25% shall be construed with respect to its total paid-up equity capital in that financial year.
- the ratio of the aggregate of secured and unsecured debts owed by the company after buy- back is not more than twice the paid up capital and free reserves. The Central Government may, by order, notify a higher ratio of the debt to capital and free reserves for a class or classes of companies;
- all the shares or other specified securities for buy-back are fully paid up;
- the buy-back of shares or other specified securities in a listed company is done in accordance with the regulations made by SEBI; and
- the buy-back in respect of shares or other specified securities of an unlisted company is to be in accordance with the rules as may be prescribed.

Q. A company wants to buy back its own shares in the current financial year. State the defaults which make the company ineligible to buy back its own shares as outlined in the companies Act, 2013. (June 15 – 4 Marks)

Ans. As per **Sec. 70** of the Companies Act, 2013, no company shall directly or indirectly purchase its own shares or other specified securities –

a) Through any subsidiary company including its own subsidiary companies;

b) Through any investment company or group of investment companies; or

c) If a default, is made by the company, in the repayment of deposits accepted either before or after the commencement of this Act, interest payment thereon, redemption of debentures of preference shares or payment of dividend to any shareholder, or repayment of any term loan or interest payable thereon to any financial institution or banking company:

(1) Provided that the buy-back is not prohibited, if the default is remedied and a period of three years has lapsed after such default ceased to subsist.

(2) No company shall, directly or indirectly, purchase its own shares or other specified securities in case such company has not complied with the provisions of section 92 (submit annual return), section 123 (declare dividend), section 127 (failure to distribute dividend) and section 129

(contravention of provisions of financial statement).

Q. Elucidate the circumstances in which a company cannot buy-back its own shares as per the provisions of the Companies Act, 2013. (Dec 17 – 6 Marks)

Ans. Circumstances in which a company cannot buy back its own shares As per ***Section 70*** of the company act 2013, a company cannot buy back shares or other specified securities directly or indirectly

a) Through any subsidiary company including its own subsidiaries; or
b) Through investment or group of investment companies; or
c) When the company has defaulted in the repayment of deposit or interest thereon, redemption of debentures or preference shares or payment of dividend or repayment of any term loan or interest thereon to any financial institution or bank. The problem does not apply if the default has been remedied and a period of three years has elapsed after such default ceased to subsist.

Company has defaulted in filing of Annual Return (section 92), declaration of dividend (section 123) or punishment for failure to distributed dividend (section 127) and financial statement (section 129)

Q. Write notes on Debentures. Who may not be appointed as debenture trustee? (8 Marks)

Ans. Section 2(30) of the Act defines the term 'debentures ' as including debenture, stock, bonds or any other instrument of a company evidencing a debt, whether constituting a charge on the assets of a company or not. Section 44 provides that the debentures shall be the movable property transferable in the manner provided in the articles of the company.

Section71 (1) of the Act provides that a company may issue debentures with an option to convert such debentures into shares, either wholly or partly at the time of redemption. The issue of debentures with an option to convert such debentures into shares, wholly or partly, shall be approved by a special resolution passed at a general meeting.

Section 71(2) provides that no company shall issue any debentures carrying any voting rights.

Who may not be appointed as debenture trustee:

Rule 18 (2) (C) provides that a person shall not be appointed as a debenture trustee, if he-

- beneficially holds shares in the company
- is promoter, director or key managerial personnel or any other officer or an employee of the company or its holding, subsidiary or associate company;
- is beneficially entitled to moneys which are to be paid by the company otherwise than as remuneration payable to the debenture trustee;
- is indebted to the company, or its subsidiary or its holding or associate company or a subsidiary of such holding company;
- has any pecuniary relationship with the company amounting to 2% or more of its gross turnover or total income or ₹50 lakh or such higher amount as may be prescribed, whichever is lower, during the two immediately preceding financial years or during the current financial year;
- is relative of any promoter or any person who is in the employment of the company as director or key managerial personnel.

Q. Write a short note on Secured Debentures (5 Marks)

Ans. Section 71(3) provides that secured debentures may be issued by a company subject to such terms and conditions as may be prescribed. Rule 18(1) of Companies (Share Capital and Debentures) Rules, 2014 provides the conditions for the issue of secured debentures. The conditions are as follows:

1. The date of redemption of secured debentures shall not exceed ten years;
2. The following classes of companies may issue secured debentures for a period exceeding 10 years but not exceeding 30years:
   - Companies engaged in infrastructure projects;
   - 'Infrastructure Finance Companies'
   - Infrastructure Debt Fund Non Banking Financial Companies;
3. The issue shall be secured by the creation of charge, on the properties or assets of the company, having a value which is sufficient for the due repayment of the amount of debentures and interest thereon;
4. The company shall appoint a debenture trustee before the issue of prospectus or letter of offer for subscription of its debentures and not later than 60 days after the allotment of debentures;
5. A debenture deed shall be executed to protect the interest of debenture holders; and
6. The security for the debentures by way of a charge or mortgage shall be created in favor of the debenture trustee on

- any specific movable property of the company; and
- any specific immovable property wherever situate, or any interest therein.

In case of a non banking financial company, the charge or mortgage may be created on any movable property. In case any issue of debentures by a Government company which is fully secured by the guarantee given by the Central Government or one or more State Government or by both, the requirement of creation of charge shall not apply.

GENERAL MEETINGS

Q. Write notes on the maintenance of register of Members under the Companies Act, 2013. (Dec 17 – 9 Marks)

Ans. As per section 88 of Companies Act, 2013

(1) Every company shall keep and maintain the following registers in such form and in such manner as may be prescribed, namely:—
   a) register of members indicating separately for each class of equity and preference shares held by each member residing in or outside India;
   b) register of debenture-holders; and
   c) register of any other security holders.

(2) Every register maintained under sub-section (1) shall include an index of the names included therein.

(3) The register and index of beneficial owners maintained by a depository under section 11 of the Depositories Act, 1996, shall be deemed to be the corresponding register and index for the purposes of this Act.

(4) A company may, if so authorised by its articles, keep in any country outside India, in such manner as may be prescribed, a part of the register referred to in sub- section (1), called —foreign register‖ containing the names and particulars of the members, debenture holders, other security holders or beneficial owners residing outside India.

(5) If a company does not maintain a register of members or debenture-holders or other security holders or fails to maintain them in accordance with the provisions of sub-section (1) or sub-section (2), the company and every officer of the company who is in default shall be punishable with fine which shall not be less than fifty thousand rupees but which may extend to three lakh rupees and where the failure is a continuing one, with a further fine which may extend to one thousand rupees for every day, after the first during which the failure continues.

Q. Indicate what are the particulars to be incorporated in the Annual Return? (10 Marks)

Ans. Section 92 of the Act requires a company to file Annual Return. This section provides that every company shall prepare a Annual Return in Form No. MGT-7. The Annual Return shall contain the following particulars as they stood at the end of the financial year-

1. its registered office, its principal business activities, particulars of its holding, subsidiary and associate companies;
2. its shares, debentures and other securities and shareholding pattern;
3. its indebtedness;
4. its members and debenture holders along with changes therein since the close of the previous financial year;
5. its promoters, directors, key managerial personnel along with changes therein since the close of the previous financial year;
6. meetings of members or a class thereof, Board and its various committees along with attendance details;
7. remuneration paid to Directors and Key Managerial Personnel;
8. penalty and punishment imposed on the company, its directors or officers and details of compounding of offences and appeals made against such penalty or punishment;
9. matters relating to certification of companies, disclosures as may be prescribed;
10. details in respect of shares held by or on behalf of the Foreign Institutional Investors; and
11. such other matters as may be prescribed.

The return shall be signed by a director and the Company Secretary. Where there is no company secretary, then it shall be signed by a Company Secretary in practice. The proviso to Section 92(1) provides that the annual return of a OPC and small company, shall be signed by the Company Secretary or where there is no Company Secretary by the director of the Company.

Q. What are the procedures of sending notice through electronic mode under the Companies Act, 2013? (June 18 – 8 Marks)

Ans. The procedure of sending notice through electronic mode under the Companies Act, 2013 is discussed as detailed below:

1) A notice may be sent through email as a text or as an attachment to email or as a notification providing electronic link or Uniform Resource Locator for accessing such notice;

2) The email shall be addressed to the person entitled to receive such email as per the records of the company or as provided by the depository;
3) The subject shall state the name of the company, notice of the type of meeting, place and date on which the meeting is scheduled;
4) The attachment shall in a PDF or in a non editable format together with a link or instructions for recipient for downloading relevant version of the software;
5) The company should ensure that it uses a system which produces confirmation of the total number of recipients emailed and a record of each recipient to whom the notice has been sent and copy of such record and any notices of any failed transmissions and subsequent re-sending shall be retained or on behalf of the company as 'proof of sending';
6) The company is not responsible for the failure in transmission beyond its control;
7) If a member fails to provide or update relevant email address to the company or to the depository participant, the company shall not be in default for not delivering notice via email;
8) The company may send email through in house facility or its registrar and transfer agent or authorize any third party agency providing bulk email facility;
9) The notice made through electronic mode shall be readable and the recipient should be able to obtain and retain copies and the company shall give the complete Uniform Resource Locator or address of the website and full details of how to access the document or information;
10) The notice of the general meeting of the company shall be simultaneously placed on the website of the company, if any and on the website as may be notified by the Government.

Q. Discuss the procedure for conducting a poll in a meeting of a company. (Dec 17 – 9 Marks)

Ans. As per the provisions of the Companies Act, 2013 where a poll is to be taken, the Chairman of the meeting shall appoint such number of persons, as he deems necessary, to scrutinize the poll process and votes given on the poll to report thereon to him. The Chairman of the meeting shall have power to regulate the manner in which the poll shall be taken.

Rule 21 provides that the Chairman of a meeting shall, in the poll process, ensure that-

- The Scrutinizes are provided with the Register of Members, specimen signatures of the members, Attendance Register and Register of Proxies;
- The Scrutinizers are provided with all the documents received by the Company
- The Scrutinizers shall arrange for Polling papers and distribute them to the members and proxies present at the meeting;.
- In case of joint shareholders, the polling paper shall be given to the first named holder or in his absence to the joint holder attending the meeting as appearing in the chronological order in the folio;
- The Polling shall be in Form No. MGT-12;
- The Scrutinizers shall lock and seal an empty polling box in the presence of the members and proxies:
- The Scrutinizers shall open the Polling box in the presence of two persons as witnesses after the voting process is over;
- In case of ambiguity about the validity of a proxy, the Scrutinizers shall decide the validity in consultation with the Chairman;
- The Scrutinizers shall ensure that if a member who has appointed a proxy has voted in person, the proxy's vote shall be disregarded;
- The Scrutinizers shall count the votes cast on poll and prepare a report thereon addressed to the Chairman;
- The Scrutinizers shall submit the Report to the Chairman who shall counter-sign the same;
- The Chairman shall declare the result of Voting on poll. The result may either be announced by him or a person authorized by him in writing.

The scrutinizers appointed for the poll, shall submit a report to the Chairman of the meeting in form No. MGT-13. The report shall be signed by the scrutinizer(s) and the same shall be submitted by them to the Chairman of the meeting within seven days from the date the poll is taken.

Accounts & Audit

Q. Who is Internal Auditor to conduct internal audit of the functions and activities of the company under the Companies Act, 2013? (Dec 15 – 2 Marks)

Ans. **Section 138** - Internal Auditor shall either be a chartered accountant or a cost accountant, or such other professional as may be decided by the Board to conduct internal audit of the functions and activities of the company.

Here, the term "Chartered Accountant" shall mean a Chartered Accountant whether engaged in practice or not. The internal auditor may or may not be an employee of the company.

Q. MB Pvt. Ltd. Company having outstanding loans or borrowing from banks exceeding one hundred crore rupees wants to appoint Internal Auditor. Please guide him who can be appointed as Internal Auditor. (June 16 – 4 Marks)

Ans. **Section 138** of the Companies Act, 2013 states that every private limited company is required to conduct internal audit if its' outstanding loans or borrowings from banks or public financial institutions exceeding one hundred crore rupees or more at any point of time during the preceding financial year.

In view of above provisions, M. B. Pvt. Ltd. is under compulsion to conduct internal audit as its loans or borrowings are falling under the prescribed limit.

Who can be appointed as Internal Auditor- The internal auditor shall either be a chartered accountant, whether engaged in practice or not, or a cost accountant, or such other professional as may be decided by the Board to conduct internal audit of the functions and activities of the companies. The internal auditor may or may not be an employee of the company.

Q. Explain the provisions relating to Removal and Resignation of an Auditor. (June 17 – 6 Marks)

Ans. Removal, resignation of Auditor [Section 140]

(1) The auditor appointed under section 139 may be removed from his office before the expiry of his term only by a special resolution of the company, after obtaining the previous approval of the Central Government in that behalf in the prescribed manner. Provided that before taking any action under

this sub-section, the auditor concerned shall be given a reasonable opportunity of being heard.

(2) The auditor who has resigned from the company shall file within a period of thirty days from the date of resignation, a statement in the prescribed form with the company and the Registrar, and in case of companies referred to in sub-section (5) of section 139, the auditor shall also file' such statement with the Comptroller and Auditor-General of India, indicating the reasons and other facts as may be relevant with regard to his resignation.

(3) If the auditor does not comply with sub-section (2), he or it shall be punishable with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees

Q. Enumerate the range of activities as outlined in the Statement of Responsibilities of Internal Auditors. (June 17 – 5 Marks)

Ans. The range of activities as outlined in the Statement of responsibilities of Internal Auditors is as follows:

1) Reviewing and appraising the soundness, adequacy and application of accounting, financial, and other operating controls, and promoting effective control at reasonable cost.
2) Ascertaining the extent of compliance with established policies, plans and procedures.
3) Ascertaining the extent to which company's assets are accounted for and safeguarded from losses of all kinds.
4) Ascertaining the reliability of management data developed within the organisation.
5) Appraising the quality of performance in carrying out assigned responsibilities.
6) Recommending operating improvements.

Q. What are the aspects to be taken into account with regard to the follow-up of the Audit Report? (June 15 – 4 Marks)

Ans. Following are the aspects to be taken into account with regard to the follow-up of the Audit Report –

a) Action taken on report-implementation of recommendations;

b) Difficulties faced by auditee in implementing audit recommendations;

c) Importance of follow-up.

The importance and necessity of follow-up arises due to the fact that human tendencies is "resistance to change" and to delay the adoption of audit recommendations. That is why, to reap the full benefits of audit, recommendations are to be implemented without any loss of time. The sooner the recommendations are put to action the better for all in the organization. Unless the observations and recommendations are considered, the objective of appraisal is dissipated. To avoid such unhealthy tendencies, the auditor will have a close and constant follow-up so that:

(1) Challenging the validity of recommendations may receive due and timely attention by the auditor.

(2) If the auditee finds practical difficulties in implementing audit suggestions may come out with his facts and figures for discussion with his superiors and the internal auditor.

(3) Deficiencies and lack of control measures may be rectified without putting the organization into loss monetarily or otherwise.

To ensure that the recommendations being actually put into action, the internal auditor may have to pay a visit to the department/location, which is known as "follow-up visit" if the circumstances warrant.

It must be remembered in this connection, that the auditor does not have line authority to enforce the recommendations. Hence, the auditor in the case adhered of follow up has to act in an advisory capacity, i.e., auditor is to pursue that the recommendations are to if the management so desired.

Q. With reference to provisions laid down under the Companies Act, 2013, state briefly which company is required to constitute CSR (Corporate Social Responsibility) Committee? (Dec 15 – 4 Marks)

Ans. Every company including its holding or subsidiary and a foreign company defined under section 2(42) of the Companies Act, 2013 having its branch office or project office in India having

- net worth of rupees 500 crore or more, or
- turnover of rupees 1000 crore or more or
- a net profit of rupees 5 crore or more

during any financial year shall constitute a Corporate Social Responsibility Committee of the Board.

Q. Briefly explain the provisions relating to submission of Cost Audit Report to the Board of Directors as per the Companies Act, 2013. (June 16 – 4 Marks)

Ans. The cost auditor shallsubmit the cost audit report along with his or its reservations or qualifications or observations or suggestions, if any, in Form CRA-3. He shall forward his report to the Board of Directors of the company within a period of 180 days from the closure of the financial year to which the report relates and the Board of Directors shall consider and examine such report particularly any reservation or qualification contained therein.

DIRECTORS

Q. What is meant by Corporate Governance? State the measures of Corporate Governance' with reference to Indian Companies. (June 16 – 6 Marks)

Ans. MEANING: Corporate governance is about promoting corporate fairness, transparency and accountability. It is concerned with the structures and processes for decision-making accountability, control and behavior at the top level of organizations. It influences how the objectives of an organization are set and achieved, how risk is monitored and assessed and how performance is optimized.

MEASURES: In general, corporate governance measures include appointing non-executive directors, placing constraints on management power and ownership concentration, as well as ensuring proper disclosure of financial information and executive compensation. Many companies have established ethical and/or social responsibility committees on their Boards to review strategic plans, assess progress and offer guidance on social responsibilities of their business. In addition to having committees and Boards, some companies have adopted guidelines governing their own policies around such issues like board diversity, independence, and compensation, Indian companies are also required to comply with Clause 49 of the listing agreement.

Q. "Directors are agents of the company." - Discuss. (June 18 – 5 Marks)

Ans. The company can act only through Directors, and so the relationship between the company and the Director is that of Principal and Agent. Contract entered into by a person as a Director of a company, will be binding on the Company. However, Directors are not Agents of Members of the company.

Directors have personal liability. They would be personally liable under the following circumstances:

1. Director acts in his own name,
2. Director enters into an agreement/ contract which does not state clearly as to whether the Director signing in his personal capacity or in his representative capacity as an Agent of the Company.

Rights of the Company:

1. Contract executed by the Director in excess of his authority, is binding on the Company. However, the Company may claim damages from the Director for breach of implied warranty of authority.
2. When Directors act properly on behalf of the Company, they do not incur personal liability; they do not exceed their powers.

Q. Who shall be considered as "Key Managerial Personnel", in relation to a Company according to the definition given in the Companies Act, 2013. (Dec 15 – 2 Marks)

Ans. Key managerial personnel", in relation to a company means —

1. the Chief Executive Officer or the managing director or the manager;
2. the Company Secretary;
3. the Whole-time Director;
4. the Chief Financial Officer;
5. such other officer as may be prescribed. [Section 2(51)]

Q. Enumerate the provisions of the Companies Act, 2013 relating to women director in a company. (Dec 18 – 5 Marks)

Ans. Second proviso to Section 149(1) of the Companies Act, 2013 read with Rule 3 of Companies (Appointment and Qualification of Directors) Rules, 2014 provides that the following classes of companies shall appoint at least one woman director:

(1) every listed company ;

(2) every other public company having

- paid up share capital ` 100 crores or more; or
- turnover of ` 300 crores or more.

For this purpose, the paid capital or turnover as on the last date of latest audited financial statements shall be taken into account. A company incorporated under the Companies Act shall comply with such appointment of woman director within a period of 6 months from the date of its incorporation. Any intermittent vacancy of a woman director shall be filed up by the Board at the earliest but not later than immediate next Board meeting or 3 months from the date of such vacancy whichever is later.

Q. What is the time limit within which the Board has to appoint an Independent

director and at which meeting the Independent director is appointed under the Companies Act, 2013? (June 15 – 2 Marks)

Ans. Section 149(5) of the Companies Act, 2013 inter alia provides that company existing on before the commencement of this Act, which are falling within the ambit of section 149(4), shall have to appoint Independent Directors within one year from the commencement of Companies Act, 2013 or rules made in this behalf, as may be applicable.

Further, as per section 152(2) read with Schedule IV to the Companies Act, 2013, inter alia provides that, the appointment of the Independent Director shall be approved by the Company in its meeting of shareholders.

Q. What is the qualification of independent directors under Companies Act? (MTP – 5 Marks)

Ans. Rule 5 prescribes the qualifications of independent directors. An independent director shall possess appropriate skills, experience and knowledge in one or more fields of finance, law, management, sales, marketing, administration, research, corporate governance, technical operations or other disciplines related to the company's business.

Section 149, further provides that an independent director shall not be entitled to any stock option. He may receive remuneration by way of sitting fee and the reimbursement of expenses for participation in the Board and other meetings and profit related commission as may be approved by the members. An independent director shall hold office for a term of office up to five consecutive years on the Board of a company. He shall be eligible for re-appointment on passing a special resolution by the company.

The Board's report shall disclose the same. No independent director shall hold office for more than two consecutive terms. He shall be eligible for appointment after the expiration of three years of ceasing to become an independent director. The provisions for retirement of directors by rotation shall not be applicable to independent directors.

Independent directors may be selected from a data bank containing the details of persons who are eligible and willing to act as independent directors maintained by any agency as notified by the Central Government. The appointment of independent director shall be approved by the company in general meeting.

Q. Describe the term 'independent director' as per the Companies Act, 2013. (June 17 – 6 Marks)

Ans. 'Independent director' is defined under *Section 149(6)* of the Companies Act as a other than a managing director or a whole time director or a nominee director -

a) Who in the opinion of the board is a person of integrity and possesses relevant expertise and experience,
b) He shall not be a promoter of the company or its holding, subsidiary or associate company,
c) He shall not relate to the promoters or directors in the company, its holding, subsidiary or associate company,
d) He shall not any pecuniary relationship with the company or their promoters or directors during two immediately preceding financial years or during the current financial year,
e) His relative shall not have any pecuniary relationship with the company or their promoters or directors amounting to 2 % or more or more of its gross turnover or total income or ` 50 lakhs or such higher amounts as may be prescribed, whichever is lower, during the two immediately preceding financial years or during the current financial year,
f) he or his relatives-
   - holds or has held the position of a key managerial personnel or is or has been employee of the company or its holding, subsidiary or associate company, in any of the three financial years immediately preceding the financial year;
   - is or has been an employee or proprietor or partner, in any of the three financial years immediately preceding the financial year in which he is proposed to be appointed, of-
     - a firm of auditors or company secretaries in practice or cost auditors of the company; or
     - any legal or a consulting firm that has or had any transaction with the company, amounting to 10% or more of the gross turnover of such firm.
   - holds together with his relatives 2% or more of the total voting power of the company; or
   - is a Chief Executive or Director of any nonprofit organization that receives 25% or more of its receipts from the company, any of its promoters, directors or its holding, subsidiary or associate company or that holds 2% or more of the total voting power of the company; or
   - who possess such other qualifications as may be prescribed.

Q. Discuss the rules of appointment of director elected by small shareholders in a company. (June 19 – 5 Marks)

Ans. Section 151 - **'Small shareholder'** means a shareholder holding shares of nominal value of not more than ` 20,000 or such other sum as may be prescribed. A listed company may have one director elected by small shareholders.

Rules 7 requires that a listed company, may upon notice of not less than 1000 small shareholders or one tenth of the total number of such shareholders, whichever is lower, have a small shareholders' director elected by small shareholders.

Such director shall not be liable to retire by rotation. The tenure shall not exceed a period of three consecutive years and on the expiry of the tenure such director shall not be eligible for reappointment. A disqualified person for the appointment of director shall not be eligible for such appointment. No person shall hold the position of small shareholder's director in more, than two companies at the same time. A small shareholders' director shall not, for a period of 3 years from the date on which he ceases to hold office as a small shareholders' director in a company, be appointed in or be associated with such company in any other capacity either directly or indirectly.

Q. Discuss the procedure for Rotation of Directors. (June, 23 – 5 Marks) (Syllabus, 2022)

Ans. **Rotation of directors:**

Unless the articles provide for the retirement of all directors at every annual general meeting, not less than two thirds of the total number of directors of a public company shall -

- be persons whose period of office is liable to determination by retirement of directors by rotation; and
- save as otherwise expressly provided in the Act, be appointed by the company in general meeting.

At the first annual general meeting of a public company held next after the date of the general meeting at which the first directors are appointed at every subsequent annual general meeting, one third of such of the directors for the time being as are liable to

retire by rotation, or if their number is neither three nor a multiple of three, then, the number nearest to one-third, shall retire from office.

The directors to retire by rotation at every annual general meeting shall be those who have been longest in office since their last appointment, but as between persons who became directors on the same day, those who are to retire shall, in default of and subject to any agreement among themselves, be determined by lot. The company may fill up the vacancy by appointing the retired director or some other person thereto.

Q. Demonstrate the procedure for rotation and re-appointment of a member of Board of Directors of limited Company. (8 Marks)

Ans. Section 152 - If the articles of association provided for retirement of all directors in the annual general meeting, then all the directors are liable to directors. According to Sec 152(6) of the Companies Act, 2013, 2/3rd of the total number of directors is liable to retire by rotation and those directors are called as retiring directors. Out of the retiring directors (2/3rd of total number of directors) 1/3rd of directors is liable to vacate the office. The directors who were in the office for the longer period, is liable to retire first. However, if the two or more directors have been appointed on the same day, then directors will retire based on the mutual understanding between them and when mutual understanding is not available then they retire based on draw by lots. Section 152(6) provides that unless the articles provide otherwise for the retirement of all directors at every annual general meeting, not less the two- third (2/3rd) of the total number of directors (excluding independent directors, whether appointed under this act or under any other law) of a public company shall:

1) be persons whose period of office is liable to determination by retirement of directors by rotation; and
2) have as otherwise expressly provided in this Act, be appointed by the company in general meeting. The remaining directors (i.e. non- rotational/non-retiring/permanent directors) in the case of public company shall be appointed as per provisions contained in the articles of the company. Where a director retires by rotation at the annual general meeting of a company,

Q. Who can file an application for allotment of DIN? (Dec 15 – 2 Marks)

Ans. Any individual who is an existing director of a company or intends to be appointed as a director of the company can file an application for allotment of DIN.

Q. Write a short note on Director Identification Number (Dec 19 – 5 Marks) (Dec 17 – 5 Marks)

Ans.

- Director Identification Number is allotted by the central government to every individual who is to be appointed as director of a company after receiving the application form in prescribed Form No. DIR-3 along with the fees for the same.
- The form shall be attested by a chartered accountant in practice or a company secretary in practice or a cost accountant in practice.
- The central government shall process the application form within 30 days of receiving the same and allot the Director Identification Number to the applicant after approving the application or give intimation of rejection of the application.
- The DIN once allotted shall remain valid for the life time of the director and it will not be allotted to any other person.
- The director on allotment of DIN is to intimate the company in Form No. DIR-3C within 15 days from the intimation given to him.
- Every company shall within 15 days of the receipt of intimation furnish the same with the Registrar.
- If company fails to furnish DIN the company shall punishable with fine which shall not be less than ₹ 25,000 but which may extend to ₹ 1 lakh.
- Every officer of the company who is default shall be punishable with fine which shall not be less than ₹ 25,000 but which may extend to ₹ 1 lakh.

Q. What are the disqualifications of a person for the appointment as a director under the Companies Act, 2013? (Dec 19 – 8 Marks)

Q. Discuss the provisions of the Companies Act, 2013 regarding disqualifications for appointment of director. (June 18 – 10 Marks)

Ans. **Section 164** of the Companies Act, 2013 details the disqualification of a person for the appointment as a Director. A person shall not be eligible for appointment as a Director of a company, if

1) He is of unsound mind and stands so declared by a competent court;
2) He is an undercharged insolvent;
3) He has applied to be adjudicated as an insolvent and his application is pending;
4) He has been convicted by a court of any offence, whether involving moral turpitude or otherwise and sentenced to imprisonment for not less than 6 months and a period of 5 years has not elapsed from the date of expiry of the sentence; if a person has been convicted of any offence and sentenced in respect thereof to imprisonment for a period of 7 years or more, he shall not be eligible to be appointed as a director in any company.
5) An order disqualifying him for appointment as a director has been passed by the court or tribunal and the order is in force;
6) He has not paid any calls in respect of any shares of the company held by him, whether alone or jointly with others and six months have elapsed from the last day fixed for the payment of the call;
7) He has been convicted of the offence dealing with related party transactions under section 188 at any time during the last preceding five years; or
8) He has not obtained DIN.

A private company may by its articles provide for any disqualifications for appointment as a director in addition to the above disqualifications. The disqualifications in (4), (5), and (6) above shall continue to apply even if the appeal or petition has been filed against the order of conviction or disqualification.

Q. What are the different duties of a director of a company under the Companies Act, 2013? (Dec 21 – 6 Marks) (Dec, 19 – 8 Marks) (MTP – 8 Marks)
Ans: As per **Section 166** of the Companies Act, 2013 a director of a company is bound to perform the following duties as mentioned below:

1) A director of a company shall act in accordance with the articles of the company,
2) A director of a company shall act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment,
3) A director of a company shall exercise his duties with due and reasonable care, skill and diligence and shall exercise independent judgment,

4) A director shall not involve in a situation in which he may have a direct or indirect interest that conflicts, or possibly may conflict, with the interest of the company,
5) A director of a company shall not achieve or attempt to achieve any undue gain or advantages either to himself or to his relatives, partners or associates and if such director is found guilty of making any undue gain, he shall be liable to pay an amount equal to that gain to the company,
6) A director of a company shall not assign his office and any assignment so made shall be void, If a director of a company contravenes the provisions of Section 166 such director shall be punishable with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees.

Q. Analyze different duties and liabilities imposed on the directors of companies by the Companies Act, 2013. (Dec, 23 – 7 Marks) (Syllabus, 2022)

Ans. Section 166 - The following duties and liabilities have been imposed on the directors of companies, by the Indian Companies Act of 2013, under its Section 166: -

1) A director of a company shall act in accordance with the Articles of Association of the company.
2) A director of the company shall act in good faith, in order to promote the objects of the company, for the benefits of the company as a whole, and in the best interests of the stakeholders of the company.
3) A director of a company shall exercise his duties with due and reasonable care, skill and diligence and shall exercise independent judgment.
4) A director of a company shall not involve in a situation in which he may have a direct or indirect interest that conflicts, or possibly may conflict, with the interest of the company.
5) A director of a company shall not achieve or attempt to achieve any undue gain or advantage either to himself or to his relatives, partners, or associates and if such director is found guilty of making any undue gain, he shall be liable to pay an amount equal to that gain to the company.
6) A director of a company shall not assign his office and any assignment so made shall be void.

Q. What are the different duties of a director in a company as per the Companies Act, 2013? (Dec 17 – 8 Marks)

Ans. As per ***Section 166*** of the Companies Act, 2013 a director of a company is bound to perform the following duties as mentioned below:

1. A director of a company shall act in accordance with the articles of the company.
2. A director of a company shall act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment.
3. A director of a company shall exercise his duties with due and reasonable care, skill and diligence and shall exercise independent judgment,
4. A director shall not involve in a situation in which he may have a direct or indirect interest that conflicts, or possibly may conflict, with the interest of the company,
5. A director of a company shall not achieve or attempt to achieve any undue gain or advantages either to himself or to his relatives, partners or associates and if such director is found guilty of making any undue gain, he shall be liable to pay an amount equal to that gain to the company,
6. A director of a company shall not assign his office and any assignment so made shall be void,

It a director of a company contravenes the provisions of Section 166 such director shall be punishable with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees.

Q. When the office of a Director shall become vacant? (MTP - 7 Marks)

Ans. Section 167 provides that the office of a Director shall become vacant in case-

a) he incurs any of the disqualifications specified in Section 164; Provided that where he incurs disqualification under sub-section (2) of section 164, the office of the director shall become vacant in all the companies, other than the company which is in default under that sub-section.

b) he absents himself from all the meetings of the Board of Directors held during a period of 12 months with or without seeking leave of absence of the Board;

c) he acts in contravention of the provisions of Section 184 relating to entering into contracts or arrangements in which he is directly or indirectly interested.

d) he fails to disclose his interest in any contract or arrangement in which he is

directly or indirectly interested, in contravention of the provisions of Section 184;

e) he becomes disqualified by an order of a Court or Tribunal;

f) he is convicted by a court of any offence, whether involving moral turpitude or otherwise and sentenced in respect thereof to imprisonment for not less than 6 months.

and f)-

i. for 30 days from the date of conviction or order of disqualification;

ii. where an appeal or petition is preferred within 30 days as aforesaid against the conviction resulting in sentence or order, until expiry of 7 days from the date on which such appeal or petition is disposed of; or

iii. where any further appeal or petition is preferred against order or sentence within 7 days, until such further appeal or petition is disposed of.

g) he is removed in pursuance of the provisions of the Act;

h) he, having been appointed a director by virtue of his holding any office or other employment in the holding, subsidiary or associate company, ceases to hold such office or other employment in that company.

i) he breaches the limits of maximum directorship allowed.

A private company may, by its articles, provide any other ground for the vacation of the office of a director in addition to the above.

Q. Describe the procedure for the resignation of Director under the Companies Act, 2013. (June 19 – 10 Marks) (June 17 – 9 Marks)

Ans. ***Resignation of Director*** : ***Section 168*** of the Companies Act 2013, provides the procedure for the resignation of a director as detailed below:

1. A director may resign from his office by giving a notice in writing to the company;
2. He shall within 30 days from the date of resignation, forward to the Registrar a copy of his resignation along with the reasons for the resignation, in Form No. DIR - 11 along with the fee;
3. A foreign director may authorize in writing a practicing Chartered Accountant or Cost Accountant in practice or Company Secretary in practice or any other resident director of the company to sign the Form No. DIR - 11 and file the same on his behalf intimating the reasons for the resignation;

4. The Board shall on receipt of such notice take notice of the same;
5. The company shall intimate the Registrar in Form No. DIR-12 within one month from the date of receipt of such notice;
6. The said information is to be posted on the website of the company;
7. The fact of the resignation shall be included in the report of directors laid in immediately following general meeting by the company;
8. The resignation of a director shall take effect from the date on which the notice is received by the company or the date, if any, specified by the director in the notice, whichever is later;
9. The director who has resigned shall be liable even after his resignation for the offences which occurred during his tenure;

Where all directors of a company resign from their offices the promoter or, in his absence, the Central Government shall appoint the required number of directors, who shall hold the office till the directors are appointed by the company in general meeting.

Q. Mr. Dilip Kumar, a director of ABC Co., resigns from his office on and with effect from 15.04.2023 by tendering his resignation letter addressed to the Chairman of the ABC Co. The letter reaches to the desk of the Chairman on 25.04.2023. Mr. Dilip Kumar did not forward a copy of his resignation along with detailed reasons for the resignation to the Registrar. The Board did not accept the resignation on the ground that the same letter has not been forwarded to the Registrar.

Mr. Dilip Kumar argues that he need not to send the letter to the Registrar, hence, his resignation be accepted with effect from 15.04.2023.

Analyze the situation and discuss.

Ans .A director may resign from his office by giving a notice in writing to the company as per **Section 168** (1) of the Companies Act, 2013. On receipt of such notice, the Board shall take note of the same and the company shall intimate the Registrar in such manner, within such time and in such form as may be prescribed and shall also place the fact of such resignation in the report of directors laid in the immediately following general meeting by the company.

The resignation of a director shall take effect from the date on which the notice is received by the company or the date, if any, specified by the director in the notice, whichever is later.

In the present case, resignation of Mr. Dilip Kumar, a director of ABC Co, may be accepted and it cannot be rejected on mere the ground that the copy of the letter has not been forwarded to the Registrar, It was held in Saumil Dilip Mehta vs. State of Maharashtra [2002], that a director can resign just by sending in writing a letter informing either chairman or secretary of company, his intention to resign from post of director of said company. He can tender his resignation unilaterally and without sending a notice to Registrar of Companies.

Therefore, the resignation letter of Mr. Dilip Kumar may be accepted with effect from 25.04.2023 i.e. the date of receiving the intimation of the resignation of the director by the Chairman and not with effect from the date of sending the resignation letter.

Q. Can a director be removed? If so give the procedure in detail as per Companies Act, 2013. (Dec 22 – 10 Marks)

Ans. ***Section 169*** deals with the procedure of removal of directors. A company may remove a director by passing ordinary resolution. A company cannot remove a director appointed by the Tribunal.

The following is the procedure to remove a director and to appoint another director in the place of removed director:

1. A special notice of any resolution shall be sent for a meeting in which the director is to be removed, to the company;
2. On receipt of notice of a resolution to remove a director, the company shall send a copy of it to the director concerned;
3. The director, whether he is a member or not, is entitled to be heard on the resolution at the meeting;
4. The director concerned may make his representation in writing to the company;
5. The director may request the company to send his representation to the members of the company;
6. The Company, shall if the time permits it to do so
   - in any notice of the resolution given to members of the company, state the fact of the representation having been made; and
   - send a copy of the representation to every member of the company to whom notice of the meeting is sent, whether before or after receipt of the representation of the company.

If a copy of the representation is not sent due to insufficient time or for the

company"s default, the director may require that the representation shall be read out at the meeting. The copy of the representation need not be sent out and read out at the meeting if, on the application either of the company or of any other person who claims to be aggrieved, the Tribunal is satisfied that the rights conferred by this section are being abused to secure needless publicity for defamatory matter. The Tribunal may order the company"s costs on the application to be paid in whole or in part by the director notwithstanding that he is not a party to it.

A vacancy created by the removal of the director may be filled by the appointment of another director in his place at the meeting at which he is removed. Provided special notice of the intended appointment has been given. The new director so appointed shall hold office till the date up to which his predecessor would have held office if he had not been removed. If the vacancy is not filled, it may be filled as casual vacancy in accordance with the provisions of the Act.

The removed director shall not be reappointed as director by the Board of Directors. Nothing in this sector shall be taken as depriving a person removed under this section of any compensation or damages payable for his removal as director, as per the terms of contract or terms of his appointment as director or of any other appointment terminating with that as director or as derogating from any power to remove a director under other provisions of the Act.

Q. What is the role of the Audit Committee under corporate Governance in India? (Dec 17 – 6 Marks)

Ans. Section 177 – The role of the Audit committee shall include the following:

1. Oversight of the company's financial reporting process and the disclosure of its financial information to ensure to ensure that the financial statement is correct, sufficient and credible;
2. Recommendation for appointment, remuneration and terms of appointment of auditors of the company;
3. Approval of payment to statutory auditors for any other services rendered by the statutory auditors:
4. Reviewing, with the management, the annual financial statements and auditor's report there on before submission to the board for approval, with particular reference to:
    a) Matters required tobe included in the Director's Responsibility Statement to be included in the Board's report in terms of clause (c) of sub-section 3 of section 134 of the Companies Act. 2013

b) Changes, if any in accounting policies and practices and reasons for the same
c) Major accounting entries involving estimates based on the exercise of judgment by management
d) Significant adjustments made in the financial statements arising out of audit findings
e) Compliance with l i st ing and other legal requirements relating to financial statements
f) Disclosure of any related party transactions
g) Qualifications in the draft audit report

5. Reviewing, with the management, the quarterly financial statements before submission to the board for approval;
6. Reviewing, with the management, the statement of uses /application of funds raised through an issue (public issue, rights issue, preferential issue, etc.). the statement of funds ut i l i zed for purposes other than those stated in the offer document / prospectus / notice and the report submitted by the monitoring" agency monitoring the utilisation of proceeds of a public or rights, issue, and making appropriate recommendations to the Board to take up steps in this matter;

Q. Critically assess the role of the Audit Committee with reference to the Board as per the Companies Act, 2013. (Dec, 23 – 7 Marks) (Syllabus, 2022)

Ans. Section 177 - Every Audit Committee shall act in accordance with the terms of reference specified in writing by the Board which shall, inter alia, include, -

(i) the recommendation for appointment, remuneration and terms of appointment of auditors of the company;
(ii) review and monitor the auditor's independence and performance, and effectiveness of audit process;
(iii) examination of the financial statement and the auditors' report thereon;
(iv) approval or any subsequent modification of transactions of the company with related parties; Provided that the Audit Committee may make omnibus approval for related party transactions proposed tobe entered into by the company subject to such conditions as may be prescribed; Provided further that in case of transaction, other than transactions referred to in section 188, and where Audit Committee does not approve the transaction, it shall make its recommendations to the Board:

Provided also that in case any transaction involving any amount not exceeding one crore rupees is entered into by a director or officer of the company without obtaining the approval of the Audit Committee and it is not ratified by the Audit Committee within three months from the date of the transaction, such transaction shall be voidable at the option of the Audit Committee and if the transaction is with the related party to any director or is authorized by any other director, the director concerned shall indemnify the company againstany loss incurred by it:

Provided also that the provisions of this clause shall not apply to a transaction, other than a transaction referred to in section 188, between a holding company and its wholly owned subsidiary company.

(v) scrutiny of inter-corporate loans and investments;

(vi) valuation of undertakings or assets of the company, wherever it is necessary;

(vii) evaluation of internal financial controls and risk management systems;

(viii) Monitoring the end use of funds raised through public offers and related matters.

Q. Discuss the different powers of the Board of Directors which may be exercised on behalf of the company under the Companies Act, 2013. (Dec, 23 – 7 Marks) (Syllabus, 2022)

Ans. Section 179 - The Board of Directors of a company shall exercise the following powers on behalf of the company by means of resolutions passed at meetings of the Board, namely:

a) to make calls on shareholders in respect of money unpaid on their shares;

b) to authorize buy-back of securities under Section 68;

c) to issue securities, including debenture, whether in or outside India;

d) to borrow monies;

e) to invest the funds of the company;

f) to grant loans or give guarantee or provide security in respect of loans;

g) to approve financial statement and the Board's report;

h) to diversify the business of the company;

i) to approve amalgamation, merger or reconstruction;

j) to take over a company or acquire a controlling or substantial stake in another company;

k) any other matter which may be prescribed:

Provided that the Board may, by a resolution passed at a meeting, delegate to any

committee of directors, the managing director, the manager or any principal officer of the company or in the case of a branch office of the company, the principal officer of the branch office, the powers specified in clauses (d) to (f) on such conditionsas it may specify.

Q. Discuss the powers of the Board of Directors of a company as per the Companies Act, 2013. (Dec 18 – 10 Marks)

Ans. Section 179 of the Companies Act, 2013 deals with the powers of the board; all powers to do such acts and things for which the company is authorised is vested with board of directors. But the board can act or do the things for which powers are vested with them and not with general meeting.

The following section 179(3) read with Rule 8 of Companies (Management & Administration) Rules, 2014 powers of the Board of directors shall be exercised only by means of resolutions passed at meetings of the Board, namely : -
to make calls on shareholders in respect of money unpaid on their shares ;

(1) to authorise buy-back of securities under section 68 ;
(2) to issue securities, including debentures, whether in or outside India ;
(3) to borrow monies ;
(4) to invest the funds of the company ;
(5) to grant loans or give guarantee or provide security in respect of loans ;
(6) to approve financial statement and the Board's report ;
(7) to diversify the business of the company ;
(8) to approve amalgamation, merger or reconstruction ;
(9) to take over a company or acquire a controlling or substantial stake in another company;
(10) to make political contributions ;
(11) to appoint or remove key managerial personnel (KMP) ;
(12) to appoint internal auditors and secretarial auditor ;

The Board may, by a resolution passed at a meeting, delegate to any committee of directors, the managing director, the manager or any other principal officer of the company or in the case of a branch office of the company, the principal officer of the branch office, the powers specified in (4) to (6) above on such conditions as it may specify.

The banking company is not covered under the purview of this section. The company may impose restriction and conditions on the powers of the Board. However, unless

specifically restricted under the act or Article of Association, Board has all the powers to manage the affairs of the company

Q. Enumerate the provisions relating to Restrictions on powers of Board. (Dec 17 – 7 Marks)

Ans. **Section 180** of the Companies Act 2013: Restrictions on powers of Board
The board can exercise the following powers only with the consent of the company by special resolution, namely -

a) To sell, lease or otherwise dispose of the whole or substantially the whole of the undertaking of the company or where the company owns more than one undertaking, of the whole or substantially the whole of any of such undertakings.
b) To invest otherwise in trust securities the amount of compensation received by it as a result of any merger or amalgamation;
c) To borrow money, where the money to be borrowed, together with the money already borrowed by the company will exceed aggregate of its paid-up share capital and free reserves, apart from temporary loans obtained from the company's bankers in the ordinary course of business;
d) To remit, or give time for the repayment of, any debt due from a director.

The special resolution relating to borrowing money exceeding paid up capital and free reserves specify the total amount up to which the money may be borrowed by Board. The title of buyer or the person 'who takes on lease any property, investment or undertaking on good faith cannot be affected and also in case if such sale or lease covered in the ordinary business of such company. The resolution may also stipulate the conditions of such sale and lease, but this doesn't authorise the company to reduce its capital except the provisions contained in this Act. The debt incurred by the company exceeding the paid capital and free reserves is not. Valid and effectual, unless the lender proves that the loan was advanced on good faith and also having no knowledge of limit imposed had been exceeded.

Q. Discuss the prohibitions and restrictions regarding political contributions made by a company under the Companies Act, 2013. (Dec 22 – 5 Marks)

Ans. <u>Prohibitions and Restrictions Regarding Political Contributions:</u>

1. According to **Section 182** of the Companies Act, 2013, a company, may contribute any amount directly to any political party.

   Exceptions: A Government company and a company which has been in existence for less than 3 financial years cannot make any political contribution.

2. The contribution must be authorized by the Board of Directors in its meeting by resolution and such resolution shall be deemed to be the justification in law for such contribution.
3. The donation may be directly or indirectly.
4. If the contribution so made is likely to affect the public support for a political party shall also be deemed to be the contribution for political purpose.
5. The expenditure incurred on advertisement in any publication souvenir, brochure, tract, pamphlet or the like is also deemed as political contribution, if such publication is by or on behalf of political party or if not, then for the advantage to such political party for a political purpose.
6. Every company shall disclose in its profit and loss account the total amount contributed by it under this section during the financial year to which the account relates. The contribution under this section shall not be made except by an account payee cheque drawn on a bank or an account payee bank draft or use of electronic clearing system through a bank account.

Q. Mr. Joseph is the director of a Public Limited Company. He has been removed by the company before the expiry of his term, by passing an ordinary resolution in general meeting. Is the company justified in its action? Is Mr. Joseph entitled to claim compensation for loss of his office? (June 15 – 3 Marks)

Ans. Yes, the company is justified in this action; As per ***section 169*** of Companies Act, 2013, a company has the power to remove a director by ordinary resolution before the expire of his office. Mr. Joseph is not entitled to claim any compensation for loss of his office. As per Section 202, a director is not entitled to any compensation for loss of office. In the present case Mr. Joseph is removed by passing an ordinary resolution, and such removal is valid being authorized under Section 169. There is no entitlement of a director to claim compensation for such removal in view of section 202. Only a managing director, or a director holding office of manager, or a director in whole time employment are entitled to compensation for loss of office **[Section 202]**.