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exclusively for

VEIS COMPUTER EDUCATION

COMPANY'S LAW



**COMPANY AND
IT'S FORMATION**

OBJECTIVES

You will learn:

- Types of Companies
- Share Capital

Chapter -1

COMPANY AND IT'S FORMATION

WHAT IS COMPANY

Company is a voluntary association of persons formed for the purpose of doing business having a distinct name and limited liability. It is a juristic person having a separate legal entity distinct from the members who constitute it, capable of rights and duties of its own and endowed with the potential of perpetual succession. The Companies Act, 1956, states that 'company' includes company formed and registered under the Act or an existing company i.e. a company formed or registered under any of the previous company laws.

CHARACTERISTICS OF A COMPANY

A company registered under the Companies Act has the following features:-

1. Separate legal entity;
2. Incorporated body;
3. Artificial legal person;
4. Perpetual succession;
5. Limited liability;
6. Common seal;
7. Right to own property;
8. Right to sue;
9. Right to enter in to contracts;
10. Flexibility of investment;
11. Separation of control from the ownership.

Persons desirous of forming a company must adhere to the step by step procedure as discussed below:-

1. Selection of type of the company
2. Selection of name for the proposed company.
3. Apply for Directors Identification Number and Digital Signatures.
4. Drafting of Memorandum and Articles of Association.
5. Stamping, digitally signing and e-filing of various documents with the Registrar.
6. Payment of Fees.
7. Obtaining Certificate of Incorporation.
8. Preparation and filing of Prospectus/Statement in lieu of Prospectus and e-Form 19/20 (in case of public companies) for obtaining the certificate of commencement of business.
9. Obtaining Certificate of Commencement of business (in case of public limited companies).

Types of company

- **Private Limited Company**
- **Public Limited Company**
- **Unlimited Company**
- **Partnership**
- **Sole Proprietorship**
- **Liaison Office/Representative Office**
- **Project Office**
- **Branch Office**
- **Joint Venture Company**
- **Subsidiary Company**

Private Limited Company

A private company is a company which has the following characteristics:

- shareholders' right to transfer shares is restricted;
- the number of shareholders is limited to fifty; and
- An invitation to the public to subscribe to any shares or debentures is prohibited.

A Private Limited Company is the most popular form of business entity used for Foreign Investors in India, including USA investors in India. It takes some time to incorporate in India as there are various steps required in forming a private limited company in India. There are various steps required to establish a business in India, before and after incorporation, as mentioned hereinafter.

Public Limited Company

A public company is defined as a company which is not a private company. The following conditions apply only to a public company:

- It must have at least seven shareholders.
- A public company is not authorized to start business upon the grant of the certificate of incorporation. In order to be eligible to commence business as a corporation, it must obtain another document called "trading certificate".
- It must publish a prospectus or file a statement in lieu of a prospectus before it can start transacting business.
- A public company is required to have at least three directors.
- It must hold statutory meetings and obtain government approval for the appointment of the management.

There are several other provisions contained in the Companies Act 1956 which are applicable only to public companies and should be consulted.

Liaison Office/Representative Office

A Liaison Office could be established with the approval of the government of India. The role of Liaison Office is limited to collection of information, promotion of exports/imports and facilitates technical/financial collaborations.

Liaison office cannot undertake any commercial activity directly or indirectly.

Project Office

Foreign companies planning to execute specific projects in India can set up temporary project/site offices in India for carrying out activities only relating to that project. The Government of India has now granted general permission to foreign entities to establish project offices subject to specified conditions.

Branch Office

Foreign companies engaged in manufacturing and trading activities abroad are allowed to set up Branch Offices in India for the following purposes:

- Export/Import of goods
- Rendering professional or consultancy services
- Carrying out research work, in which the parent company is engaged.
- Promoting technical or financial collaborations between Indian companies and parent or overseas group company.
- Representing the parent company in India and acting as buying/selling agents in India.
- Rendering services in Information Technology and development of software in India.
- Rendering technical support to the products supplied by the parent/ group companies.
- Foreign airline/shipping Company.

A branch office is not allowed to carry out manufacturing activities on its own but is permitted to subcontract these to an Indian manufacturer. Branch Offices established with the approval of RBI, may remit outside India profit of the branch, net of applicable Indian taxes and subject to RBI guidelines. Permission for setting up branch offices is granted by the Reserve Bank of India (RBI).

TIME FRAME IN INCORPORATION

Nature of Activity	Time Schedule
1. Allotment of DIN	3 days
2. Acquiring Digital Signature	2 days
3. Name approval	3- 4 days
4. Drafting of MOA* & AOA*, stamping, digitally signing and filing the documents on MCA* portal	3 days
5. Grant of Certificate of Incorporation	4 days

Digital signatures

Electronic records are to be authenticated by affixing a digital signature (DS). This is to be done by the use of "asymmetric crypto system and hash function which envelop and transform the initial electronic record."

The following four categories of users are required to obtain digital signature certificates (DSC): (a) professionals like practicing company secretaries, chartered accountants, cost accountants and lawyers who will

* Memorandum of Association (MOA)

* Articles of Association (AOA)

* Ministry of Corporate Affairs(www.mca.gov.in)

be required to attest documents, (b) directors and other authorized signatories of companies such as company secretaries, (c) representatives of banks and financial institutions, and (d) MCA employees concerned.

A few certifying authorities have been designated to issue DSCs. Their services will not come free. A DSC will be valid for a maximum two year period and will have to be renewed thereafter. A DSC will also have to be registered with the MCA 21 portal.

All the procedures must be followed.

Requirements for a Private Limited Company

1. **A Registered Business Name:** This must be followed by the word 'Limited' or 'Ltd'. The Companies Registration Office exercises some control over the choice of name, it cannot be identical (or very similar to) the name of an existing company. It won't be considered if it is offensive or illegal and the use of certain words in a company (for example, 'Institute', 'National') can only be used in certain circumstances. The company name must be displayed in a conspicuous place at every office, or other premises where the company carries out business.
2. **A Registered Office:** This need not necessarily be the same address as the business is conducted from. Quite frequently the address used for the registered office is that of the firm's solicitor or accountant. This is the address, through, where all official correspondence will go.
3. **Shareholders:** There must be a minimum of two shareholders (also described as 'members' or 'subscribers'). A private company can have up to fifty shareholders.
4. **Share Capital:** The Company must be formed with a stated, nominal share capital divided into shares of fixed amounts. Small companies are frequently formed with a nominal share capital of Rs.100.
5. **Memorandum of Association:** The memorandum is the company's charter. It states the company's name; the situation of its registered office; its share capital; the fact that liability is limited and, most importantly, the object for which the company has been formed. In theory, the company can only operate in the areas mentioned in the objects clause but in practice the clause is drawn to cover as wide an area as possible, and anyway a 75 per cent majority of the members of the company can change the objects whenever they like. Nevertheless, it is worth bearing in mind that directors of the company will incur personal liability if the company engages in a type of business which is not authorized by the objects clause. The memorandum must be signed by at least three shareholders.
6. **Articles of Association:** The document contains the internal regulations of the company, the relationship of the company to its shareholders and the relationship between the individual shareholders. Many companies don't bother to draw up their own articles but adopt (sometimes with some modifications) articles set out in the Companies Act.
7. **Certificate of Incorporation:** This is the document, which the registrar of companies issues to you once he has approved your choice of name and your memorandum. When you receive this document your company legally exists and is ready to trade.
8. **Auditors:** Every company must appoint a qualified auditor. The auditor's duty is to report to the treasurer whether or not the books of the company have been properly kept, and that the balance sheet and profit and loss account presents (or doesn't present) a true and fair view of the company's affairs and

complies with the Companies Act. Auditors are appointed or re-appointed at general meetings at which annual accounts are presented, and they hold office from the conclusion of the meeting until the next general meeting.

9. **Accounts:** The Companies Act lays down strict rules on accounting. Every company must maintain a set of records, which show the financial position at any one time with reasonable accuracy. The accounts comprise a profit and loss account and balance sheet with the auditors' and directors' reports appended. A new company's accounting reference period begins on its incorporation and runs until the following 31st March - unless the company notifies the registrar of companies otherwise. Within ten months of the end of an accounting reference period, an audited set of accounts must be laid before the shareholders at a general meeting and a set delivered to the registrar of companies.
10. **Registers, etc.:** In addition to the accounts books, companies are required to have: a register of members and share ledger; a register of directors and secretaries; a register of share transfers; a register of charges; a register of debenture holders; a book can be purchased to hold all of the above. This will be provided automatically if you buy a running concern.
11. **Company Seal:** All companies must have an engraved seal. This must be impressed on share certificates and must be used whenever the company has to execute a deed. Again, this is included in the ready-made company package.

Corporate Documents & Registration of a Company

For incorporating a company in India, an application for registration should be submitted to the registrar of companies with the following documents:

1. Memorandum of Association;

2. Articles of Association;

3. **a declaration signed** by a person named in the articles of the proposed company as a director, manager, or secretary of the company, or by an advocate of the Supreme Court or High Court, or by an attorney entitled to appear before the High Court, or by a chartered accountant practicing in India stating that all the requirements of the Companies Act 1956 and the applicable rules with respect to the registration and other matters have been complied with;

4. A list of persons who have consented to **act as directors** of the company.

5. If the proposed company is a public company, consent of every person prepared to act as a director must be submitted in a prescribed form;

6. Information about directors, managing directors and managers and secretary must be submitted in a prescribed form;

7. Information about the **registered office** in a prescribed form;

8. **power of attorney** in favour of one of the promoters or any other person, authorizing him/her to make corrections in the documents submitted to the registrar of the companies, if it becomes necessary.

9. Applicable **registration fee** payable to the registrar of the companies.

Applicable Laws for Forming a Company in India

The laws applicable for incorporating a company in India include the Indian Companies Act of 1956, read with Companies (Central Governments') General Rules and Forms, 1956, the Indian Income Tax Act, and other laws & regulations. The Foreign Exchange Management Act of 1999 is applicable for foreign investments and transactions.

Capital of a Company

Capital refers to the amount invested in the company so that it can carry on its activities. In a company capital refers to "share capital". The capital clause in Memorandum of Association must state the amount of capital with which company is registered giving details of number of shares and the type of shares of the company. A company cannot issue share capital in excess of the limit specified in the Capital clause without altering the capital clause of the MOA.

The following different terms are used to denote different aspects of share capital:-

- 1. Nominal, authorized or registered capital** means the sum mentioned in the capital clause of Memorandum of Association. It is the maximum amount which the company raises by issuing the shares and on which the registration fee is paid. This limit is cannot be exceeded unless the Memorandum of Association is altered.
- 2. Issued capital** means that part of the authorized capital which has been offered for subscription to members and includes shares allotted to members for consideration in kind also.
- 3. Subscribed capital** means that part of the issued capital at nominal or face value which has been subscribed or taken up by purchaser of shares in the company and which has been allotted.
- 4. Called-up capital** means the total amount of called up capital on the shares issued and subscribed by the shareholders on capital account. I.e. if the face value of a share is Rs. 10/- but the company requires only Rs. 2/- at present, it may call only Rs. 2/- now and the balance Rs.8/- at a later date. Rs. 2/- is the called up share capital and Rs. 8/- is the uncalled share capital.
- 5. Paid-up capital** means the total amount of called up share capital which is actually paid to the company by the members.

In India, there is the concept of par value of shares. Par value of shares means the face value of the shares. A share under the Companies act, can either of Rs10 or Rs100 or any other value which may be the fixed by the Memorandum of Association of the company. When the shares are issued at the price which is higher than the par value say, for example Par value is Rs10 and it is issued at Rs15 then Rs5 is the premium amount i.e, Rs10 is the par value of the shares and Rs5 is the premium. Similarly when a share is issued at an amount lower than the par value, say Rs8, in that case Rs2 is discount on shares and Rs10 will be par value.

Authorized Capital depends upon how much capital, Equity or preference, the company will be most likely having. **Debentures do not form part of authorized capital. Some points to be noted:**

- Authorized share capital is the nominal or the maximum amount of share capital which a company has power to issue shares as paid up share capital.
- If a company wants to issue shares up to a certain amount, it should have a minimum of that amount as authorized share capital.
- Roc fees depends upon the authorized share capital and approx. the roc fees is rs. 50000/ for every one crore of authorized share capital. So the more you decide as authorized share capital, the more roc fees you have to pay; besides there is a stamp duty cost of 0.15% on authorized share capital. The authorized share capital depends on up to what amount the company wants to issue paid up capital.
- A debenture is debt capital .it is not owner's equity.
Debentures carry interest and equity shares carry dividend as reward (if declared).
- The ratio between paid up share capital (plus free reserves) and debt capital is called debt equity ratio. This ratio is useful for any lender or bank to decide a company's borrowing capacity and profitability as interest payable on debt is an exp. in P&L (profit & loss) account and an admissible deduction for tax purpose. On the other hand dividend payable on equity shares is not an expense; it is an appropriation out of profits.

Authorized share capital. Consists of only equity share capital and pref. share capital only. But it does not consist of debt which is a loan or debt capital.

SHARE CAPITAL

As per Section 2 (46) of the Companies Act, 1956, share means share in the share capital of a company, and include stock except where a distinction between stock and shares is expressed or implied. Further, the capital of a company is divided into the number of indivisible units of fixed amount. These units are known as shares.

Types of shares:

The shares of a company can be classified into three kinds:

a) Equity or Ordinary shares b) Preference shares c) Deferred shares.

However, after the commencement of the Companies Act, 1956, only two kinds of shares can be issued by the company i.e. Equity Share Capital, and Preference Share Capital.

Shares in the company may be similar i.e. they may carry the same rights and liabilities and confer on their holders the same rights, liabilities and duties. There are two types of shares under Indian Company Law:-

1. **Equity shares** means that part of the share capital of the company which are not preference shares.
2. **Preference Shares** means shares which fulfill the following 2 conditions. Therefore, a share which is does not fulfill both these conditions is an equity share.
 - a. It carries Preferential rights in respect of Dividend at fixed amount or at fixed rate i.e. dividend payable is payable on fixed figure or percent and this dividend must paid before the holders of the equity shares can be paid dividend.
 - b. It also carries preferential right in regard to payment of capital on winding up or otherwise. It means the amount paid on preference share must be paid back to preference shareholders before anything in paid to the equity shareholders. In other words, preference share capital has priority both in repayment of dividend as well as capital.

ROC MATTERS

OBJECTIVES

You will learn:

- Company Registration
- E-Filing
- Different Types of Meetings

Chapter -2

ROC Matters COMPANY REGISTRATION

For the purpose of incorporation of a company in India under the Companies Act 1956, it requires name approval from the RoCs (Registrar of Companies) by filing form 1A. After getting the name approval, the promoter(s) has to apply for incorporation of the company through Form 1 and also notify the RoC regarding the situation of registered office through Form 18, and provide details of the Directors' appointment through Form 32. After processing of all three e-Forms i.e. 1, 18 and 32, the company is registered and a Corporate Identity Number (CIN) is generated for the company.

Provisions of registration are also applicable in the case of a foreign company incorporated outside India and which plans to set up places of business in India. Every foreign company within 30 days of establishing business in India, has to deliver required documents with Form 44 to Delhi RoC for registration to be legally authorized to carry on business in India.

Company registration services also cover registration of joint stock companies under Part IX of the Companies Act, 1956 by also filing Form 37 and 39.

In addition, there are also requirements of filling forms with RoC in case of Public companies regarding commencement of business.

E-FILING

Now a days, facilities of e-Filing of various forms and applications under the Companies Act, 1956 and the Rules and Regulations hereunder are also available.

e-FORM

An e-Form is nothing but a re-engineered conventional form and represents a document in electronic format for filing through the Internet.

FORM 32 - (Company Registration) Particulars of appointment of managing director, directors, manager and secretary and the changes among them or consent of candidate to act as a managing director or director or manager or secretary of a company and/ or undertaking to take and pay for qualification shares

FORM 18 - Application or declaration for incorporation of a company

TIME FRAME IN INCORPORATION

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5. Grant of Certificate of Incorporation	4 days

* Memorandum of Association (MOA)

* Articles of Association (AOA)

* Ministry of Corporate Affairs(www.mca.gov.in)

GENERAL STRUCTURE OF AN eFORM

An e-Form contains certain standardized features. Each eForm contains the form reference and the description as well as the particular section of the Companies Act, 1956 or the relevant rules or regulations under which it is required to be submitted. It starts with the Corporate Identity Number (CIN), which works as a unique identifier of a company, in the case of an Indian Company and the foreign Company Registration Number (FCRN) in the case of a foreign Company that is required to be filled-up. By entering the CIN/FCRN, the company details to the extent these are available in static form in the database, are automatically filled in by using the pre-fill functionality.

- The e-Form contains a number of mandatory field which are required to be filled-in. Certain other fields are non-mandatory in nature which may be filled-in as may be relevant in any particular case.
- An e-Form contains tool tips for context-sensitive help.
- An instruction kit is available for each e-Form, which contains details of the instructions for properly filling the e-Form.
- An e-Form may be filled in either online or offline. Offline filing denotes that the e-Form is downloaded into the user's computer and filled later without being connected to the internet.
- An e-Form may require certain mandatory attachments to be filed along with it. Optional attachments may also be filed with an e-Form. The list of such attachments is displayed in the e-Form.
- Next to attachment, there is a declaration that is sought from the person filling the e-Form to the effect that the information given in the e-Form and the attachments is correct and complete.
- Most of the e-Form requires the digital signature of the Managing Director or Director, Manager or Secretary of the company for successful filing/submission.
- Further, the digital signature of a third party may also be required in certain cases. In the case of an e-Form for creation or modification of charges, such digital signature is also required from the Bank or Financial Institution.
- In certain cases, a certificate from the Chartered Accountant or Cost Accountant or Company Secretary in whole-time practice is also required to authenticate the particulars contained in the e-Form. For example, this requirement is mandatory in the case of change of registered office of the company.
- There are built-in facilities to check the filled-in e-Form for requisite validations, to do pre-scrutiny and to modify the e-Form when the same is required to be re-submitted.
- When the e-form is filled on internet, it gets saved into the central document repository.
- The requisite fees as applicable for the e-Form can be paid either on-line or offline.
- Time stamping of e-Form from a trusted source provides evidence that the transaction has occurred at a particular point of time.
- Once the e-Form has been accepted and payment of fees has been acknowledged, a work item is created and assigned to the authorized officer.
- In the case of an e-Form, the authorized officer affixes his/her digital signature for registering/approving/rejecting the same.
- After the processing of the e-Form is completed, an acknowledgement email is sent to the user regarding its approval/rejection.

COMPLIANCE RELATED FILING

All the statutory filing of e-Forms, which are event based, is grouped under compliance related filing services. The filing requirements include the following:

- 1) Returns of allotment including details of shares issued for consideration other than cash
- 2) Return of buy back of securities
- 3) Return of deposits by the company which has accepted public deposits during the year
- 4) Return of appointment of Managing Director, whole time Director
- 5) Notice of appointment of auditor.
- 6) Statutory report
- 7) Cost audit report

Annual filing e-forms

Annual filing e-forms are to be used for filing the annual and Balance Sheet and Profit & loss account of the company.

- a) Form for filing annual return
- b) Form for filing balance sheet and profit and loss account
- c) Form for filing compliance certificate

Books of account to be kept by a company

- 1) Every company shall keep at its registered office such proper books of account with respect to matters as may be prescribed, which shall explain the transaction and give a true and fair and fair view of the state of affairs of the company including that of branch office, if any. Such books shall be kept on accrual basis and according to double entry system of accounting.
Provided that all or any of the books of account aforesaid may be kept at such other place in India as the board of directors may decide and when the board of directors so decides, the company shall, within seven days of the decision, file with the Registrar a notice in writing giving the full address of that other place.
- 2) The inspection of books of account and the period for which the books of account shall be preserved in good order, as prescribed.
- 3) Where the company has:
 - (i) managing director(s),
 - (ii) A manager,
 - (iii) The whole time director incharge of finance,
 - (iv) The Chief Accounts Officer,
 - (v) any other person charged with the duty of seeing that the requirements of this section are complied with such managing director or manager, whole time director incharge of finance, Chief Accounts Officer and any other person charged with the duty of seeing that the requirements of this section are complied with and where the company has no person mentioned in (i) to (v) above, every director of the company shall be liable for punishment under the Act, if they fail to take all reasonable steps to secure compliance by the company with the requirements of this Section and rules made there under or has by his own willful act been the cause of any default by the company.

Annual Account and Balance Sheet

- 1) At every annual general meeting of a company held in pursuance of section 39, the board of directors of the company shall lay before the company;
 - a) A balance sheet as at the end of the period as specified in the Rules and
 - b) A profit and loss account or in the case of company not carrying on business for profit, an Income and Expenditure Account for the period as may be prescribed and referred to as financial year, within six months from the close of the financial year.

Provided that the Registrar of Companies may grant extension of the financial year, in this regard for any special reason, which cannot, in any case, exceed three months. Provided further that a holding company shall have the option to prepare consolidated accounts including balance sheet and profit & loss account for itself and its subsidiary or subsidiaries which shall be a sufficient compliance of the section if such consolidated accounts are laid at its Annual General Meeting which shall be without prejudice to the requirements of subsidiary companies complying with the provisions of this section.

- 2) In case of default in complying with the provisions of this section, any person, being a director of a company or any person, not being the director of the company, having been charged by the board with the duty of seeing that the provisions of this section have been complied with, fails to take all reasonable

steps to comply with the provisions of this section, he shall, in respect of each offence, be punishable under this Act.

Form and contents of Balance Sheet and Profit and Loss Account

1) Every balance sheet of a company shall give a true and fair view of the state of affairs of the company as at the end of the financial year and shall, subject to the provision of this section, be in such form as may be prescribed

(With due regard to the general instructions prescribed and Accounting Standards for the preparation of Balance Sheet) or as near thereto as circumstances admit or in such other form as may be approved by the Central Government either generally or in any particular case.

2) Every profit and loss account of a company of Income and Expenditure Account in case of companies not carrying on business for profit, shall give a true and fair view of the profit or loss of the company for the financial year and shall, subject as aforesaid, be in such form, or as near thereto as circumstances admit, as may be prescribed.

Provided any reference to a Balance Sheet or Profit & Loss Account shall include any notes thereon or documents annexed thereto giving information required by this Act to be given in the form of such notes or documents. Provided further that nothing contained in this sub-section shall apply to any insurance or banking company or any company engaged in the generation or supply of electricity or to any other class of company for which a form of balance sheet has been specified in or under the Act governing such class of company.

- 3) There shall be attached to the balance sheet of a holding company having a subsidiary or subsidiaries at the end of the financial year as at which the holding company's balance sheet is made out, the documents as may be prescribed, in respect of such subsidiary or of each such subsidiary, in case the company does not opt to company with the second proviso to sub-section (1) section 52.
- 4) Where a company is a holding company in relation to one or more of its subsidiaries, the directors shall, instead of preparing separate annual accounts for itself and for each of its subsidiary companies, prepare annual accounts for itself and its subsidiaries (hereinafter in this section referred to as consolidated accounts, the contents of which shall be as prescribed) and place before the annual general meeting of the holding company.
- 5) The Central Government may on its own, or on an application by a class or classes of companies, by notification in the Official Gazette, exempt any class or classes of companies from compliance with any of the requirements of this section or the rules prescribed, if, in its opinion, it is necessary to grant the exemption in public interest. Any such exemption may be granted either unconditionally or subject to such conditions as may be specified in the notification.
- 6) The Central Government may, by a Notification in the Official Gazette, constitute an Advisory Committee to be called the National Advisory Committee on Accounting Standards to advise the Central Government on the formulation and lying down of accounting policies and accounting standards for adoption by companies or class of companies under this Act.
- 7) Every profit and loss account and balance sheet of the company shall comply with the accounting standards as may be prescribed by the National Advisory Committee on Accounting Standards.
- 8) Where the profit and loss account and the balance sheet of the company do not comply with the accounting standards, such companies shall disclose in its profit and loss account and balance sheet, the following, namely:-
 - a) The deviation from the accounting standards
 - b) The reasons for such deviation; and
 - c) The financial effect, if any, arising due to such deviation
- 9) Where the company has
 - a) Managing director(s),
 - b) A manager,
 - c) Wholetime director incharge of finance,
 - d) The chief accounts officer,
 - e) Any other person

Charged with the duty of seeing that the requirements of this section are complied with such managing director or manager, wholtime director incharge of finance, chief accounts officer and any other person charged with the duty of seeing that the requirements of this section are complied with and where the company has no person mentioned in (a) to (e) above, every director of the company shall be liable for punishment under the Act, if they fail to take all reasonable steps to secure compliance by the company with the requirements of this Section and the rules made there under.

Filing of the Balance Sheet with the Registrar and right of Member to copies of Audited Balance Sheet

- 1) A copy of every Balance Sheet (including the Profit and Loss Accounts, the Auditors` Report and every other document required by law to be annexed or attached, as the case may be, to the balance sheet) which is to be laid before a company in general meeting shall, not less than twenty-one days before the date of the meeting, be sent to such of the persons as may be prescribed.
Provided in the case of a company whose shares are listed in a recognized Stock Exchange, sending of a statement containing salient features of documents referred to in this sub-section shall be deemed as sufficient compliance with this sub-section.
- 2) If default is made in complying with this section the company and every officer of the company who is in default shall be punishable under the Act.
- 3) After the balance sheet and the profit and loss account have been laid before a company at an annual general meeting a copy each of such balance sheet and profit and loss account, and in the manner as may be prescribed, shall be filed with the Registrar.
- 4) Where Annual General Meeting of a company for any year has not been held, the documents referred to in sub-section (1), duly signed, along with statement of the fact and reasons for not holding the Annual General Meeting shall be filed with the Registrar within 30 days from the latest day on or before the Annual General Meeting ought to have been held in accordance with the provisions of this Act.
- 5) If default is made in complying with the requirement of sub-section (3) or sub-section (4) of this section and rules made, the company and every officer of the company, who is in default, shall be punishable under this Act.
- 6) Where any particulars or information including payments made to any director or other persons by any other company, body corporate, firm or person which are required to be given in the balance sheet or profit and loss account of a company or in any document required to be annexed or attached thereto, it shall be the duty of the concerned officer of the company to furnish without delay to the company, and also to the company's auditor, whenever he so requires, those particulars or that information in as full a manner as possible.
- 7) The Chief Accounts Officer and any other person knowingly makes default in performing the duty cast on him by sub-section (6), he shall be punishable under the Act.

What are the different types of meetings conducted by a Company? Explain the provisions thereof.

The different kinds of Meetings are:

a. Board Meeting: The Board of Directors must meet atleast four times a year, i.e. atleast once every quarter of the year. The quorum of the Board meeting is one-third of the total number of Directors.

b. Statutory Meeting: It is the first general meeting of the members of the Company that is held within a period of not less than one month and not more than six months from the date of commencement. This meeting is held to discuss matters related to formation of the Company.

c. Annual General Meeting: This is held every year for adoption of the annual accounts and appointment of auditors and directors. The first meeting should be held within 18 months from the date of incorporation of the Company.

d. Extra-ordinary General Meeting: This is held when some urgent business is to be conducted such as enhancement of authorized capital, change of name of the Company etc. before the ensuing Annual General Meeting.

What are the requisites of a valid general meeting?**Requisites of a valid meeting are :**

- (i) It should be properly convened, which means proper notice should be given by the proper authority to every person entitled to receive the notice.
- (ii) It should be properly constituted, which means that a proper person should be there in the chair and the company should follow proper quorum along with other rules.
- (iii) It should be properly conducted, which means the meeting should be conducted in the manner of law as prescribed under the Companies Act 1956.

Who are required to hold a Statutory Meeting?

Every public company which is limited by shares and every company limited by guarantee and having a share capital or a private company which is a subsidiary of a public company is required to hold a general meeting of the members of the company within a period of not less than one month but within six months from the date from which the company is entitled to commence its business. This meeting is known as statutory meeting of the company.

What are the objects of holding statutory meeting of the Company?

Objects for holding the statutory meeting of the company are:

- (i) to acquaint the members of the company with the matters relating to promotion and formation of the company.
- (ii) To acquaint the members regarding details of receipts and expenditure of the company.
- (iii) To provide the shareholders an opportunity for discussing on the proper appraisal of the management methods, procedure and the future prospect of the company.

SHARE ISSUE

OBJECTIVES

You will learn:

- Share and Dividends
- Debenture
- Forfeiture and reissue of shares
- Transfer & Transmission of shares

Chapter -3

COMPANY AND IT'S FORMATION

Shares

In financial markets, a share is a unit of account for various financial instruments including stocks, mutual funds, limited partnerships etc.

Definition:

Plain and simple, a “stock” is a share in the ownership of a company.

A stock represents a claim on the company's assets and earnings. As you acquire more stocks, your ownership stake in the company becomes greater.

Note: Some times different words like shares, equity, stocks etc. are used. All these words mean the same thing.

Dividend

Some stocks, especially blue chips, pay dividends. This means that for every share you own, you are paid a portion of the company's earnings. For example, for every share of AT&T you own, you will get sent \$0.15 every year. Most companies pay dividends quarterly (four times a year), meaning at the end of every business quarter, the company will send a check for 1/4 of \$0.15 for each share you own.

A share is one of a finite number of equal portions in the capital of a company, entitling the owner to a proportion of distributed, non-reinvested profits known as dividends and to a portion of the value of the company in case of liquidation. Shares can be voting or non-voting, meaning they either do or do not carry the right to vote on the board of directors and corporate policy. Whether this right exists often affects the value of the share. Voting and Non-Voting shares are also known as Class A and B shares.

The income received from shares is called a **dividend**, and a person who owns shares is called a shareholder.

The rights, duties and liabilities of all shareholders are clearly defined at the time of issue of the shares. Once the rights of shareholders are fixed, they cannot be altered unless the provisions of the Companies Act for this purpose are complied with.

Types of Shares

Shares in the company may be similar i.e. they may carry the same rights and liabilities and confer on their holders the same rights, liabilities and duties. There are two types of shares under Indian Company Law:-

Equity shares mean that part of the share capital of the company which are not preference shares.

Preference Shares means shares which fulfill the following 2 conditions. Therefore, a share which is does not fulfill both these conditions is an equity share.

It carries Preferential rights in respect of Dividend at fixed amount or at fixed rate i.e. dividend payable is payable on fixed figure or percent and this dividend must paid before the holders of the equity shares can be paid dividend.

It also carries preferential right in regard to payment of capital on winding up or otherwise. It means the amount paid on preference share must be paid back to preference shareholders before anything in paid to the equity shareholders. In other words, preference share capital has priority both in repayment of dividend as well as capital.

What is a dividend?

A dividend is a distribution of the profits that a company has generated. Therefore a dividend can only be paid when accumulated profits are available.

Dividends are paid to the shareholders of a company.

There are two types of dividends, interim and final.

Interim Dividend

Interim dividends are declared by the directors from time to time throughout the year and they can only be paid if the company's articles permit the directors to declare a dividend. Lack of such express power is unusual but it is worth checking.

For a dividend to be legal there must be profits available and directors declaring a dividend have a responsibility to ensure that there are sufficient profits available for distribution. To do this, the directors are required to make a reasonable judgment of the position before they pay an interim dividend. Evidence should be kept to substantiate the directors' judgment.

Final Dividend

A final dividend is approved by the shareholders of the company at an AGM.

If a company has an elective resolution in place to dispense with annual general meetings only interim dividends can be paid.

Explain the rules that must be satisfied before a public company can issue shares.

- a. . Preparation of Prospectus.
- b. Issue of prospectus & invitation for subscription.
- c. Receiving minimum subscription.
- d. Allotment of Shares.

Define Debenture

A Debenture is a document given by the Company under its seal as an evidence of a debt to the holder usually arising out of a loan and most commonly secured by a charge. A debenture is therefore a document that either creates debt or acknowledges it.

Different types of debentures that a Company can issue are:

- a. Redeemable Debentures.
- b. Irredeemable debentures.
- c. Mortgage debentures. (Charge on assets)
- d. Simple debenture. (No Charge on assets)
- e. Registered debenture.
- f. Bearer debenture.
- g. Convertible debenture. (Can be converted into equity)
- h. Unconvertible debenture.

Differentiate between Shares and Debentures.

Share

- a) Shares are part of the capital of a Company
- b) Shareholders are members of the Company
- c) Shares have no charge on assets of the Company.
- d) Rate of dividend varies depending on the profit of the Company.
- e) Shareholders enjoy voting rights.

Debenture

- a) Debentures constitute a loan
- b) Debenture holders are creditors
- c) Debentures have a charge on assets of the Company.
- d) Rate of interest is fixed.
- e) Debenture holders have no voting rights.

Forfeiture of shares

Usually the Company may provide in its Articles powers to forfeit the shares of a member who fails to pay calls or installments of the issue price of his shares within a certain time after the same had fallen due for payment. Forfeiture of shares does not amount to reduction of share capital.

What are the rules to be followed in connection with forfeiture of shares?

The rules that may be followed in connection with forfeiture of shares:

- a) It must be in accordance with the provisions contained in the Articles of Association of the Company.
- b) Proper notice should be served before forfeiting shares.
- c) Board resolution should be passed for forfeiting the shares.
- d) Power of forfeiture must be exercised bona fide and in good faith.

What are the effects of forfeiture (surrender) of shares?

The effects of forfeiture of shares are as follows:

- a) ceases to be a member.
- b) Liability of the member ceases if and when the Company receives the payment in full in respect of the forfeited shares.
- c) Past members shall be liable to pay calls if the liquidation takes place within 1 year of the forfeiture.
- d) The forfeited shares become the property of the Company on forfeiture and the Company can re-issue or dispose of such shares in such manner as it thinks fit.

TRANSFER & TRANSMISSION OF SHARES**1. What is the form of instrument of transfer? What are the conditions which are to be satisfied before registering transfer of shares?**

Ans: An instrument of transfer of shares shall be in form 7B of the Companies (Central Governments, General Rules and Forms, 1957)

A company can register transfer of shares only if the following conditions are satisfied:

- i) there is a proper instrument of transfer
- ii) the instrument is duly stamped
- iii) the instrument is executed by or on behalf of the transferor and by or on behalf of the transferee
- iv) the instrument specifies the name, address and occupation, if any, of the transferee
- v) the instrument of transfer is delivered along with the share certificate or letter of allotment relating to the shares or debentures

2. What is transmission of shares? Can a transmission of shares be refused?

Ans: Transmission of shares refers to transfer of property or title in shares by law. Under this case, the shares of the deceased member may be transferred to his legal representatives. In the case of a bankrupt member, the shares may be transferred to his official receiver. In the case of a lunatic member, the shares are transferred to his administrator, appointed by the Court.

Transmission of shares takes place by operation of law and therefore cannot be generally refused. However the transmission of shares requires succession certificate to be issued.

3. Is succession certificate necessary for transmission of shares?

In case of transmission of shares, the succession certificate is required to establish the status of the person who is claiming to be the rightful heir. However, in case of controversy or dispute as to the actual legal heirs, the company may ask the legal heirs to produce a letter of succession order, probate of a will or a letter of administration.

4. What is blank transfer?

Ans: When a Transfer Form is executed without filling in the name of the transferee and the date of execution and it is handed over to the transferee along with the share certificate to enable him to deal with the shares, it is known as Blank Transfer. Shares are generally transferred in blank in case of pledging. However, a transferee holding blank transfer deed is not considered to be a member of the Company until his name is entered in the register of members.

5. What is Certification of Transfer?

Ans: Where a shareholder sells only part of his shares mentioned in the share certificate, the share certificate is not handed over to the buyer along with instrument of transfer. Both these documents are lodged by the transferor at the Company's registered office. The company retains the share certificate, endorses the instrument with the words, certificate lodged and return it to the transferor. This process is called certification of transfer.

6. What is a Forged (fake) Transfer?

Ans: An instrument, on which the signature of the transferor is forged, is called a forged transfer. It does not have any legal effect. It cannot transfer ownership from one person to another, however genuine the transaction may appear.

7. Differentiate between transfer & transmission of shares.

Ans:

Transfer

1. It is voluntary.
2. A duly executed instrument
3. Consideration is essential.
4. Shares are transferred
5. Stamp duty is mandatory.

Transmission

1. It is as per the law.
2. No need for instrument of transfer. of transfer is essential. But a letter of request with Succession Certificate should be enclosed.
3. No consideration is essential.
4. It happens only in case of events such as death etc. such as bankruptcy, lunacy or death of members.
5. No Stamp duty is necessary.

INVESTMENT AND SENSEX

OBJECTIVES

You will learn:

- Stocks and Share
- Mutual Funds
- Sensex

Chapter -4

Investment and Sensex

INTRODUCTION

In finance, an investment is a monetary asset purchased with the idea that the asset will provide income in the future or appreciate and be sold at a higher price.

There are different ways one can go about making an investment. This includes putting money into stocks, bonds, mutual funds, or real estate. Sometimes these are also known as “investment vehicles,” which is just another way of saying “a way to invest.” Irrespective of the vehicle for investment to be chosen, the goal is always to put the finance to work so it earns an additional profit.

The investment can be further classified into:

1. **Bonds**

Grouped under the general category called fixed-income securities, the term bond is commonly used to refer to any securities that are founded on debt. When you purchase a bond, you are lending out your money to a company or government. In return, they agree to give you interest on your money and eventually pay you back the amount you lent out.

The main attraction of bonds is their relative safety. If you are buying bonds from a stable sources, investment is virtually guaranteed, or risk-free. The safety and stability, however, come at a cost. Because there is little risk, there is little potential return. As a result, the rate of return on bonds is generally lower than other securities.

In general, fixed-income securities are classified according to the length of time before maturity. These are the three main categories:

Bills – debt securities maturing in less than one year.

Notes – debt securities maturing in one to 10 years.

Bonds – debt securities maturing in more than 10 year.

2. **Stocks**

When you purchases stocks, or equities, you become a part owner of the business. This entitles you to vote at the shareholders’ meeting and allows you to receive any profits that the company allocates to its owners. These profits are referred to as dividends.

While bonds provide a steady stream of income, stocks are volatile. That is, they fluctuate in value on a daily basis. When you buy a stock, you aren’t guaranteed anything. Many stocks don’t even pay dividends, in which case, the only way that you can make money is if the stock increases in value-which might not happen.

Compared to bonds, stocks provide relatively high potential returns. Of course, there is a price for this potential: you must assume the risk of losing some or all of your investment.

There are two types of stocks:

a. **Common Stock (Equity Shares)**

The majority of stock is issued in this form. Common shares represent ownership in a company and a claim (dividends) on a portion of profits.

b. Preferred Stock (Preferred Shares)

Preferred stock represents some degree of ownership in a company but usually doesn't come with the some voting rights. (This may vary depending on the company.) With preferred shares, investors are usually guaranteed a fixed dividend forever.

Stock markets are places where buyers and sellers of stock meet to trade. Stock prices change according to supply and demand. There are many factors influencing prices, the most important of which is earnings.

There are two scenarios in stock market:

The Bulls

A bull market is when everything in the economy is great, people are finding jobs, gross domestic product (GDP) is growing, and stocks are rising. Things are just plain rosy! Picking stocks during a bull market is easier because everything is going up. Bull markets cannot last forever though, and sometimes they can lead to dangerous situations if stocks become overvalued.

The Bears

A bear market is when the economy is bad, recession is looming and stock prices are falling. Bear markets make it tough for investors to pick profitable stocks. One solution to this is to make money when stocks are falling using a technique called short selling. Another strategy is to wait on the sidelines until you feel that the bear market is nearing its end, only starting to buy in anticipation of a bull market.

3. Mutual Funds

A mutual fund is a collection of stocks and bonds. When you buy a mutual fund, you money with a number of other investors, which enables you (as part of a group) to pay a Fund manager to select specific securities for you. Mutual funds are all set up with a specific strategy in mind, and their distinct focus can be nearly anything: large stocks, small stocks, bonds from governments, bonds from companies, stocks and bonds, stocks in certain industries, stocks in certain countries, etc.

The primary advantage of a mutual fund is that you can invest your money without the time or the experience that are often needed to choose a sound investment. Theoretically, you should get a better return by giving your money to a professional than you would if you were to choose investments yourself.

You can make money from a mutual fund in three ways:

1. Income is earned from dividends on stocks and interest on bonds. A fund pays out nearly all of the income it receives over the year to fund owners in the form of a distribution.
2. If the fund sells securities that have increased in price, the fund has a capital gain. Most funds also pass on these gains to investors in a distribution.
3. If fund holdings increase price but are not sold by the fund Manager, the fund's shares increase price. You can then sell your mutual fund shares for a profit.

The different types of Mutual Funds are as follows:

Diversified Equity Mutual Fund Scheme

A mutual fund scheme that achieves the benefits of diversification by investing in the stocks of companies across a large number of sectors. As a result, it minimizes the risk of exposure to a single company or sector.

Sectoral Equity Mutual Fund Scheme

A mutual fund scheme which focuses on investments in the equity of companies across a limited number of sectors- usually one to three.

Index Funds

These funds invest in the stocks of companies, which comprise major indices such as the BSE Sensex or the S&P CNX Nifty in the same weightage as the respective indices.

Tax Saving Equity Scheme

Schemes investing predominantly in equity which offer tax rebates to investors under specific provision of the Income Tax Act, 1961 as the Government offers tax incentives for investment in specified avenues. e.g. Equity Linked Savings Schemes (ELSS). Currently rebate u/s 88 can be availed up to a maximum investment of Rs. 10,000.

A Lock-in of 3 years is mandatory.

Monthly Income Plan Scheme

A mutual fund scheme which aims at providing regular income (not necessarily monthly, don't get misled by the name) to the unit holder, usually by way of dividend, with investments predominantly in debt securities (upto 95%) of corporatism and the government, to ensure regularity of returns, and having a smaller component of equity investments (5% to 15%) to ensure higher return.

Income Schemes

Debt oriented schemes investing in fixed income securities such as bonds, corporate debentures, Government securities and money market instruments.

Floating-Rate Debt Fund

A fund comprising of bonds for which the interest rate is adjusted periodically according to a predetermined formula, usually linked to an index.

Gilt Funds

These funds invest exclusively in government securities.

Balanced Funds

The aim of balanced funds is to provide both growth and regular income as such schemes invest both in equities and fixed income securities in the proportion indicated in their offer documents. They generally invest 40-60% in equity and debt instruments.

Fund of Funds

Fund of Funds (FoF) is a mutual fund scheme that invests in other mutual fund schemes. Just as fund invests in stocks or bonds on your behalf, a FoF invests in other mutual fund schemes.

SENSEX

A share in the share capital of a company. The share gives you a voting right, a right to receive a part of the profit of the company as well as a privilege to subscribe new shares at a share issue. (Osake)

Equity can be defined as anything that represents ownership interests, such as stock in a company. Equity also generally refers to the difference between an asset's current market value and the debt against it. ...

The market value of a property minus the amount of any existing liens.

The Index was initially calculated based on the "Full Market Capitalization" methodology but was shifted to the free-float methodology with effect from September 1, 2003. The "Free-float Market Capitalization" methodology of index construction is regarded as an industry best practice globally.

WHAT IS SENSEX?

The SENSEX, short form of the BSE-Sensitive Index, is a "Market Capitalization-Weighted" index of 30 stocks representing a sample of large, well-established and financially sound companies. It is the oldest index in India and has acquired a unique place in the collective consciousness of investors. The index is widely used to measure the performance of the Indian stock markets. SENSEX is considered to be the pulse of the Indian stock markets as it represents the underlying universe of listed stocks at The Stock Exchange, Mumbai. Further, as the oldest index of the Indian Stock market, it provides time series data over a fairly long period of time (since 1978-79).

Objectives of SENSEX

The SENSEX is the benchmark index of the Indian Capital Markets with wide acceptance among individual investors, institutional investors, foreign investors and fund managers. The objectives of the index are:

- **To measure market movements**

Given its long history and its wide acceptance, no other index matches the SENSEX in reflecting market movements and sentiments. SENSEX is widely used to describe the mood in the Indian Stock markets.

- **Benchmark for funds performance**

The inclusion of blue chip companies and the wide and balanced industry representation in the SENSEX makes it the ideal benchmark for fund managers to compare the performance of their funds.

- **For index based derivative products**

Institutional investors, money managers and small investors all refer to the SENSEX for their specific purposes. The SENSEX is in effect the proxy for the Indian stock markets. The country's first derivative product i.e. Index-Futures was launched on SENSEX.

The criteria for selection and review of scrip for the SENSEX

A. Quantitative Criteria:

1. Market Capitalization:

The scrip should figure in the top 100 companies listed by market capitalization. Also market capitalization of each scrip should be more than 0.5 % of the total market capitalization of the Index i.e. the minimum weight should be 0.5 %. Since the SENSEX is a market capitalization weighted index, this is one of the primary criteria for scrip selection. (Market Capitalization would be averaged for last six months)

2. Liquidity:

(i) Trading Frequency: The scrip should have been traded on each and every trading day for the last one year. Exceptions can be made for extreme reasons like scrip suspension etc. (ii) Number of Trades: The scrip should be among the top 150 companies listed by average number of trades per day for the last one year. (iii) Value of Shares Traded: The scrip should be among the top 150 companies listed by average value of shares traded per day for the last one year.

3. Continuity:

Whenever the composition of the index is changed, the continuity of historical series of index values is re-established by correlating the value of the revised index to the old index (index before revision). The back calculation over the last one-year period is carried out and correlation of the revised index to the old index should not be less than 0.98. This ensures that the historical continuity of the index is maintained.

4. Industry Representation:

Script selection would take into account a balanced representation of the listed companies in the universe of BSE. The index companies should be leaders in their industry group.

5. Listed History:

The scrip should have a listing history of at least one year on BSE.

B. Qualitative Criteria:**Track Record:**

In the opinion of the Index Committee, the company should have an acceptable track record.

Beta of SENSEX scrip

Beta measures the sensitivity of a scrip movement relative to movement in the benchmark index i.e. SENSEX. A Beta of one means that for every change of 1% in index, the scrip moves by 1%. Statistically Beta is defined as: Covariance (SENSEX, Stock)/ Variance (SENSEX)

Note: Covariance and variance are calculated from the Daily Returns data of the SENSEX and SENSEX scrip.

How is SENSEX calculated?

SENSEX is calculated using a "Market Capitalization-Weighted" methodology. As per this methodology, the level of index at any point of time reflects the total market value of 30 component stocks relative to a base period. (The market capitalization of a company is determined by multiplying the price of its stock by the number of shares issued by the company). An index of a set of combined variables (such as price and number of shares) is commonly referred as a 'Composite Index' by statisticians. A single indexed number is used to represent the results of this calculation in order to make the value easier to work with and track over time. It is much easier to graph a chart based on indexed values than one based on actual values.

The base period of SENSEX is 1978-79. The actual total market value of the stocks in the Index during the base period has been set equal to an indexed value of 100. This is often indicated by the notation 1978-79=100. The formula used to calculate the Index is fairly straightforward. However, the calculation of the adjustments to the Index (commonly called Index maintenance) is more complex.

The calculation of SENSEX involves dividing the total market capitalization of 30 companies in the Index by a number called the Index Divisor. The Divisor is the only link to the original base period value of the SENSEX. It keeps the Index comparable over time and is the adjustment point for all Index maintenance adjustments. During market hours, prices of the index scrip, at which latest trades are executed, are used by the trading system to calculate SENSEX every 15 seconds and disseminated in real time.

How is the closing Index calculated? The closing SENSEX is computed taking the weighted average of all the trades on SENSEX constituents in the last 15 minutes of trading session. If a SENSEX constituent has not traded in the last 15 minutes, the last traded price is taken for computation of the Index closure. If a SENSEX constituent has not traded at all in a day, then its last day's closing price is taken for computation of Index closure. The use of Index Closure Algorithm prevents any intentional manipulation of the closing index value.

How are adjustments for Bonus, Rights and newly issued Capital carried out in SENSEX?

The arithmetic calculation involved in calculating SENSEX is simple, but problem arises when one of the component stocks pays a bonus or issues rights shares. If no adjustments were made, a discontinuity would arise between the current value of the index and its previous value. The Index Cell of the Exchange periodically adjusts the base value to take care of such corporate announcements.

Adjustments for Rights Issues:

When a company, included in the compilation of the index, issues right shares, the market capitalization of that company is increased by the number of additional shares issued based on the theoretical (ex-right) price. An offsetting or proportionate adjustment is then made to the Base Market Capitalization (see ' Base Market Capitalization Adjustment' below).

Adjustments for Bonus Issue:

When a company, included in the compilation of the index, issues bonus shares, the market capitalization of that company does not undergo any change. Therefore, there is no change in the Base Market Capitalization, only the 'number of shares' in the formula is updated.

Other Issues: Base Market Capitalization Adjustment is required when new shares are issued by way of conversion of debentures, mergers, spin-offs etc. or when equity is reduced by way of buy-back of shares, corporate restructuring etc. Base Market Capitalization Adjustment: The formula for adjusting the Base Market Capitalization is as follows:

New Base Market Capitalization = Old Base Market Capitalization X (aggregate market capitalization+ the market capitalization of the shares)/Old Market Capitalization)

To illustrate, suppose a company issues right shares which increases the market capitalization of the shares of that company by say, Rs.100 crores. The existing Base Market Capitalization (Old Base Market Capitalization), say, is Rs.2450 crores and the aggregate market capitalization of all the shares included in the index before the right issue is made is, say Rs.4781 crores. The "New Base Market Capitalization" will then be: Rs.2501.24 crores = $2450 \times (4781+100)/4781$.

This figure of 2501.24 will be used as the Base Market Capitalization for calculating the index number from then onwards till the next base change becomes necessary.

With what frequency is SENSEX calculation done?

During market hours, prices of the index scrip, at which trades are executed, are automatically used by the trading computer to calculate the SENSEX every 15 seconds and continuously updated on all trading workstations connected to the BSE trading computer in real time.

WINDING OF COMPANY

OBJECTIVES

You will learn:

- Compulsory Winding up
- Voluntary Winding up
- Duties of Liquidator

Chapter -5

WINDING OF COMPANY

Winding up the Company

Generally, the winding up of a company can be voluntary or by a court order if it fails to pay its debts.

WHAT IS INSOLVENCY AND WINDING-UP ?

A company is a legal entity and it is a different legal person from its directors and shareholders, unlike the proprietorships where the assets and liabilities of the proprietor are just one form of assets of the proprietor.

When a company cannot pay its debt as and when it falls due, a company is insolvent

A company that is insolvent will cease business and go into liquidation after being wound up by the court. The company will be struck-off from the register of companies and the assets of the company will be liquidated or sold off. The proceeds of the sale will be distributed according to law.

Generally secured creditors and preferred creditors will have higher priority in their claims.

Voluntary winding up

There are two types of voluntary winding up:

- **Member's Voluntary Winding up (Solvency)**
- **Creditor's Voluntary Winding up (Insolvency)**

Winding up or Liquidating of A Company

Winding up is a process where the company's asset will be gathered and will be used to pay all debts, and the balance for the cost of winding up will be distributed among the shareholders according to their interests in the company.

Meanwhile, for the sole proprietor and partnership the procedure for winding up is under the **Registration of Businesses Act, 1956**.

A company can be wound up in two circumstances:

- **Compulsory Winding up**
- **Voluntary Winding up**

Procedure for Compulsory Winding Up

The procedure for compulsory winding up is as follows:

1. Presentation of petition by company (special resolution required), creditors, contributories, the Official Receiver, the liquidator.
2. Hearing by the court at which the winding up order is made
3. Liquidator continues with the duties of winding up which will involve calling meetings of the Committee of Inspections.
4. Liquidator distributes assets in correct legal order
5. Liquidator applies to the court for an order for his release and the company is dissolved.

Procedures for Creditor's Voluntary Winding Up

Below is the procedure for creditor's voluntary winding up:

- a. A board meeting convenes by company's directors to decide on the date of the EGM and creditor's meeting. These meeting must be held within one month from the date of statutory declaration (Form 65A)
- b. The directors make a statutory declaration of Form 65 (statutory declaration of inability of company to continue business and that meeting of the company and its creditors have been summoned) and lodged with the CCM.
- c. company's director shall appoint and approved liquidator to be the provisional liquidator.
- d . at the EGM:
 - A special resolution will be passed to wind up your company by the way of creditor's voluntary winding up because of your company's inability to continue business by its own liabilities
 - To nominate a liquidator for the winding up
- e. File Form 11 with the CCM within 7 days after passing of the resolution
- f. Give notice of the resolution in local newspaper within 10 days after the passing of the resolution
- g. At the creditor's meeting:
 - The director appointed by the board to attend the meeting shall preside and disclose to the meeting the company's affairs and the circumstances leading up to the proposed winding up
 - A full statement of the company's affair together with a list of the creditors and the estimated amount of their claims must be laid before the meeting of creditors
 - To nominate a liquidator. If the creditors and members nominated different person to act as liquidator for the winding up, then the liquidator appointed by the creditors shall be the liquidator
 - To appoint committee inspection consisting not more than five persons. The function of a committee of inspections is to supervise the act of the liquidator.
- h. The liquidator must, within 14 days of his appointment, lodge with the CCM a Notice of Appointment and Situation of Office of Liquidator in a Creditor's Voluntary Winding Up (Form72)

Procedures for Member's Voluntary Winding-Up

Below is the procedure for member's voluntary winding up:

- a. The Company's directors convene a board meeting to make a declaration of solvency (Form 66) which must be signed by all the directors or where the company has more than two directors by a majority of the directors.
- b. At the EGM, the resolution for the voluntary winding up and the resolution for the appointment of a liquidator are passed.
- c. The liquidator shall within 14 days after his appointment and the situation of his office on Form 71
- d. The liquidator will then notify his appointment to the company's auditors, solicitor, insurers, bankers, employees, suppliers and customers.
- e. The liquidator takes over the property, banking accounts, investment by transferring his name as liquidator and he shall be the authorized signatory.

Some common questions (FAQ)

WHAT HAPPENS WHEN A COMPANY IS IN LIQUIDATION?

A liquidator is an authorized person who will deal with the assets and liabilities of the company including the bank account and employees of the company.

When a provisional receiver or official liquidator is appointed over the affairs of a company, the company is said to be in liquidation.

Once the liquidator has been appointed, the directors cannot bind the company. The directors will be removed from office.

WHAT ARE THE DUTIES OF THE PROVISIONAL RECEIVER OR LIQUIDATOR?

The primary duty of the receiver or liquidator is to realize the assets of the company and distribute them to repay creditors.

The liquidator will also investigate the assets and liabilities of the company and recover any assets that are missing or have been transferred out of the company at undervalue. The liquidator can revoke these transactions.

MCA-21 & ITS ONLINE PROCEDURE

OBJECTIVES

You will learn:

- Ministry of Corporate Affairs
- Services available under MCA-21
- Online Procedure (Power Point presentation)

Chapter -6

MCA -21 INTRODUCTION AND ITS ONLINE PROCEDURE

INTRODUCTION

Ministry of Corporate Affairs

THE MCA 21 project, envisaging (SCHEME OR FORECAST) electronic filing of documents and paperless administration pertains only to Registrar of Companies offices as stipulated in the Companies Act (the Act).

About MCA

The Ministry is primarily concerned with administration of the Companies Act, 1956, other allied Acts and rules & regulations framed there-under mainly for regulating the functioning of the corporate sector in accordance with law. The Ministry is also responsible for administering the Competition Act, 2002 which will eventually replace the Monopolies and Restrictive Trade Practices Act, 1969 under which the Monopolies and Restrictive Trade Practices Commission (MRTPC) is functioning. Besides, it exercises supervision over the three professional bodies, namely, Institute of Chartered Accountants of India (ICAI), Institute of Company Secretaries of India (ICSI) and the Institute of Cost and Works Accountants of India (ICWAI) which are constituted under three separate Acts of the Parliament for proper and orderly growth of the professions concerned. The Ministry also has the responsibility of carrying out the functions of the Central Government relating to administration of Partnership Act, 1932, the Companies (Donations to National Funds) Act, 1951 and Societies Registration Act, 1980.

Better working of company law through e-governance

No need for new legislation; some fine-tuning of existing law can meet the desired objectives of reform

There is scope for reducing corruption through e-governance, making company law administration transparent, accountable and effective.

Securities aspect

Many benefits have been claimed for the project such as speedier and more productive work by ROC staff, avoidance of visits to ROC offices and better control on directors. However, a drawback with security implications is the scope for hacking the MCA portal and problems of computer contaminant and computer virus.

There is scope for reducing corruption through e-governance, making company law administration transparent, accountable and effective.

THE MCA-21 Initiative of the Ministry of Company Affairs facilitating e-filing of documents under Indian Company Law is commendable in many ways. First, this is perhaps the first time a government in independent India has moved swiftly to put in place a mechanism that is imaginative, technologically savvy and stakeholder friendly. In a record time of 60 weeks, the MCA-21 Initiative has gone live.

Second, there is a good public-private partnership between the Ministry and Tata Consultancy Services (TCS) whereby the latter will man the front offices of all Registrar of Companies (RoC) offices across the country to facilitate easy stabilization of e-filing of documents under company law.

Last, inspection of any document relating to a company allowed under company law can now be done online from anywhere on payment of the prescribed fee.

Role for e-governance

A major factor for the absence of transparency, accountability and effectiveness in company law administration in India is corruption in RoC offices and in the central bureaucracy in charge of company law. While e-filing will reduce public

interface with RoC offices thereby minimizing the scope for corruption, unless comprehensive e-governance embracing all aspects of company law administration is introduced, rule of law for the corporate sector will remain a distant dream. MCA-21 should be used imaginatively as a stepping stone for total e-governance.

MCA21 NOTIFICATION

File Balance sheet and profit and loss account of your company within 30 days and annual return within 60 days of holding AGM to avoid:

- Prosecution under The Companies Act 1956
- Payment of additional fee
- Publication of name of your company in the list of defaulters.
- Intimation to your Banker/Financial institution.

File the documents online through www.mca.gov.in.

About MCA

MCA has a three tier organizational set-up:

1. Headquarters at New Delhi Regional Directors (RD) at Mumbai, Kolkata, Chennai and Noida: MCA Headquarters handles cases that require approval of the GoI for citizen related functions.
2. Registrar of Companies (RoC) in States and Union Territories: RD supervises the functioning of RoCs and handles the matters delegated by GoI while the RoC offices handle the bulk of citizen facing functions.

The Official Liquidators (OL) attached to various High Courts functioning in the country are also under the overall administrative control of the MCA. Its headquarters at Delhi also includes two Directors of Inspection and Investigation and Director of Research and Statistics.

MCA-21 Program

Ministry of Company Affairs (MCA), Government of India (GoI) has initiated MCA21 program, for easy and secure access to MCA services in a manner that best suits the businesses and citizens.

The program goals have been set as follows keeping in mind stakeholders' needs:

1. Business enabled to register a company and file statutory documents quickly and easily Public to get easy access to relevant records and effective grievances redressed Professionals to be able to offer efficient services to their client companies Financial Institutions to easily find charges registration and verification Employees to ensure proactive and effective compliance of relevant laws and corporate governance
2. MCA21 is envisioned to provide anytime and anywhere services to businesses. It is a pioneering program being the first mission mode e-governance project being undertaken in the country. This program builds on the GoI vision to introduce a Service Oriented Approach in the design and delivery of Government services, establish a healthy business ecosystem and make the country globally competitive.

Program Scope

1. MCA21 program will provide for anytime anywhere electronic services with speed and certainty to all the stakeholders. It will include:
 - Design and development of application system Setting up of IT infrastructure Setting up the Digital Signature/PKI delivery mechanisms and associated security requirements and digitization of paper

documents to the new system Providing MCA services to all MCA21 stakeholders in accordance with the Service Oriented Approach Providing user training at all levels and all offices (Front and Back Offices)

2. The MCA21 is designed to automate processes related to the proactive enforcement and compliance of the legal requirements under the Companies Act, 1956.

Front Office

- The implementation of Front Offices (FO) is done in two ways. These can be called as Virtual Front Office (VFO) and Physical Front Office (PFO).
- The VFO is what the citizen has in front while accessing the MCA21 portal. The PFO will be a replacement to the existing RoC counters. The PFO will also accept paper documents. However, these will be converted into electronic documents by customer service agents manning PFO. Also, the authorized person(s) will have to sign these documents digitally. Consequently the authorized signatories for a given document will need to appear in person at the PFO for the purpose of digitally signing the document.
- The user can avail the following services on MCA21 portal eFiling Viewing public document Requesting certified copies Registering investor complaint Tracking transaction status

Back Office

- The back office is what MCA employee has in front which accessing back office portal. The back office process relates to:
- Dynamic routing of documents that have been electronically filed to the concerned official within MCA based on the type of service request.
- Electronic workflow systems to support speed and certainty in service delivery Supporting all routine tasks such as registrations and approvals Storing of all approved documents of companies as part of electronic records, including provision of access to electronic records for the stakeholders.

Overview of Online MCA 21

- 1 **Easy secure access**
- 2 **Automated all process of compliance**
- 3 **24 hours / 7 days from anywhere and any place**
- 4 **Service oriented approach**
- 5 **No need to visit physical office of ROC**
- 6 **Even complaints can be on e-mode**
- 7 **Incorporation of company online**
- 8 **Simplified/easy mode of filing**
- 9 **Registration / verification of charges anytime & from anywhere**
- 10 **Inspection of companies from anytime & from anywhere**
- 11 **Total transparency ,Compliance - timely readdressed, Qualitative analysis of information of corporate by MCA personnel – time availability**
- 12 **Everyone's time is saved since no physical visit to government offices.**

Services available under MCA-21

- 1 **New company – registration and incorporation**
- 2 **Annual returns / annual return filing**
- 3 **Filing for change of name / address / directors details**
- 4 **Registration and verification of charges**
5. **Inspection of documents**

6. Applications on line for various services
7. Investors grievance readdressed

System requirement under MCA-21

- 1 Personal computer
- 2 Web browser – internet explorer / Netscape navigator
- 3 Internet access – preferred brand band connectivity
- 4 Adobe acrobat reader 7.0.5
- 5 WinZip 8.0
6. Scanner (documents required to be scanned & required to file as an attachment to e-form).
7. Printer (for printing bank payment challan or service fee bill)

Note:

- IF ONE HAS THE ABOVE FACILITIES ONE CAN HAVE THE VIRTUAL FRONT OFFICE AT HOME
- EVEN A CYBER CAFÉ COULD BE USED FOR THIS PURPOSE

MCA facilitates e filing of various forms and applications under companies act. Steps to be followed:

- 1 Open MCA website
- 2 Select e-form & download
- 3 Fill the e-form
- 4 Make attachments to e-form
- 5 Sign e-form and submit, automated pre-scrutiny takes Place
6. Field / form data validation
7. Digital signature validation, when, through with this, then proceed to payment mode. *Select payment method*
 - (i) *Online payment – credit card*
 - (ii) *Internet payment via bank*
 - (iii) *Challan creation and payment – e-FORM STORED SECURELY TILL BANK CONFIRMS PAYMENT*
8. *SEND e-form for approval*

Note:

- Each transaction uniquely identified by a service request number (SRN) and once the transaction is completed and accepted the SRN created and one can take print out for the records or store it in soft form too.

FORM DOWNLOADING AND FILLING

- 1 e-FORM COULD BE DOWNLOADED PREFILL FILED IS AVAILABLE BY GIVING COMPANY NUMBER / DIN NUMBER - THE DETAILS WILL GET FILLED AUTOMATICALLY.
- 2 ATTACHMENT NEED TO GO IN PDF FORMAT ONLY

DIGITAL SIGNATURE

- 1 APPLICATION TO BE MADE TO THE CERTIFYING AUTHORITIES
- 2 TCS / NIC / MTNL / IDRBT / CSL Etc. S

3 Some websites are: www.tcs-ca.tcs.co.in, www.nic.in, www.mtnltrustline.com
Idrbta.org.in, www.gnvfc.com

Note:-

- For future transaction, they will provide the following revocation password and the reference ID – site details

GETTING THE CERTIFICATE

One has to log in to the site and claim the certificate by providing the details of:-

- 1 ***SUBSCRIBER ID***
- 2 ***CLAIMING PASSWORD AND***
- 3 ***REFERNCE ID***

Finally certificate would get installed

CAN YOU VIEW THE DSC

Yes – you can see the certificate, but where it is installed?

- 1 ***Go to internet explorer***
- 2 ***Go to tools***
- 3 ***Go to internet option***
- 4 ***Click content&you will see the certificat***
5. ***Click on certificate&it will then show the following***
 - i ***Issued to whom***
 - ii ***Issued by whom***
 - iii ***Expiry date***

IMPORTING THE DSC

By clicking on the import button and following the instructions of the window “certificate import wizard” the certificate could be stored in USB token / USB drive etc. Which can be carried and used in other places

PAYMENT OF FEES

Once the formalities of filling the form, checking the form, prescrutiny (prescribed amount) and signature – recertification where required all are over, then one has to proceed with payment option(credit card and internet banking). the payment is made instantly and the form is accepted for filing and payment receipt showing the SRN is issued immediately.

CHALLAN CREATION

In case of challan creation, the challan is created and the form is kept pending for want of payment. One need to take the print out of challan – go to bank – make payment – provide evidence of payment from bank then form is processed

PAYMENT RECEIPT

In all the cases, once payment is made, form accepted the payment receipt is issued showing the SRN number.

Note:

- The SRN number is a unique number generated in respect of each transaction and any enquiry / status / tracking can be done only by providing this number and this is very important. In the absence of SRN number nothing would work

TRACKING OF THE TRANSACTION / STATUS

The site also provide for tracking and viewing the status of a particular transaction by giving the SRN number. Procedural aspects of holding board meeting

1. CIN of company: this is provided by the department - every company could be identified only with this number and the public viewing / filling forms / application all can be done only after providing CIN
2. Din number of directors and pan number of the secretary is required

CONTRACT ACT-1872

OBJECTIVES

You will learn:

- What is Contract
- Rules and Regulations

Chapter -7

CONTRACT ACT-1872

The Indian Contract Act extends to the whole of India and it came into force on the first day of September 1872.

WHAT IS A CONTRACT?

An agreement enforceable by law is a contract.

Thus for the formation of a contract there must be

1. an agreement
2. the agreement should be enforceable by law An agreement is defined as every promise and every set of promises forming the consideration for each other and a promise is an accepted proposal.
3. FORMATION OF A CONTRACT

For the formation of a contract the process of **proposal or offer** by one party and the **acceptance** thereof by the other is necessary. This generally involves the process of negotiation where the parties apply their minds make offer and acceptance and create a contract.

. WHO CAN ENTER INTO A CONTRACT?

A person who

- a. is of the age of majority according to the law to which he is subject
- b. Is of sound mind - A person is said to be of sound mind for the purpose of making a contract, if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests.
- c. is not disqualified from contracting by any law to which he is subject is competent to contract.

Therefore a minor is not competent to contract and an agreement by a minor is void *ab initio*. He can not ratify an agreement on attaining the age of majority and validate the same. (Void *ab initio* means it has at no time had any legal validity).

The following persons are therefore incompetent to contract

1. Minors
2. Persons of unsound mind
3. Persons disqualified by law to which they are subject

ESSENTIALS OF A VALID CONTRACT

All agreements are contracts if they are made

- a. **BY THE FREE CONSENT OF PARTIES** competent to contract - Consent is said to be free if it is not caused by

- **Coercion** - Consent is said to be caused by coercion when it is obtained by pressure exerted by either committing or threatening to commit an act forbidden by the Indian Penal Code or unlawfully detaining or threatening to detain any property.
- **Undue influence** - A contract is said to be induced by "undue influence" where the relation 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.
- **Fraud** - Means and includes the following acts done with the intention to deceive or to induce a person to enter into a contract. (a) the suggestion that a fact is true when it is not true and the person making the suggestion does not believe it to be true (b) active concealment of a fact by a person who has knowledge or belief of the fact, (c) promise made without the intention of performing it.
- **Misrepresentation** - 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, it is misrepresentation. A breach of duty which brings an advantage to the person committing it by misleading the other to his prejudice is also a misrepresentation.
- **Mistake** - Where both parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void. An erroneous opinion as the value of the thing, which forms the subject matter of the agreement, is not deemed as mistake as to a matter of fact. Unilateral mistake, i.e. the mistake in the mind of only one party does not affect the validity of the contract.

b. **FOR A LAWFUL CONSIDERATION AND OBJECT -**

Consideration or object is unlawful if

- (1) It is forbidden by law,
- (2) Is of such a nature if permitted it would defeat the provisions of any law,
- (3) It is fraudulent,
- (4) The court regards it immoral,
- (5) The court regards it opposed to public policy. Every agreement of which the consideration or object is unlawful is void.

VOID AGREEMENTS

1. Agreements void if **considerations and objects unlawful** in parts.
2. **Agreement without consideration** is void, unless it is in writing and registered, or it is a promise to compensate for something done, or is a promise to pay a debt barred by limitation.
3. **Agreement in restraint of marriage.** Every agreement in restraint of the marriage of any person, other than a minor is void. It is the policy of law to discourage agreements, which restrain freedom of marriage. Where a party is restrained from marrying at all, or for marrying for a fixed period or from marrying a particular person, or class of persons, the agreement is void.
4. **Agreement in restraint of trade.** Every agreement, by which one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.
5. **Agreement in restraint of legal proceedings.** Every agreement by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights is void to that extent.
6. **Agreements for uncertainty.** Agreements the meaning of which is not certain, or capable of being made certain, are void.
7. **Agreements by way of wager/ Bet.** Agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to be won on wager, or entrusted to any person to abide by the result of any game or other uncertain event on which any wager is made. (Wager means betting or gambling). However certain prizes for horseracing are exempted.

Some Legal specification

THE INDIAN CONTRACT ACT, 1872
ACT No. 9 OF 1872 1
[25th April, 1872.]

WHEREAS it is expedient to define and amend certain parts of the law relating to contracts ; It is hereby enacted as follows -

PRELIMINARY**1. Short title –**

This Act may be called the Indian Contract Act, 1872.

Extent, Commencements.-It extends to the whole of India 2*[except the State of Jammu and Kashmir]; and it shall come into force on the first day of September, 1872.

Nothing herein contained shall affect the provisions of any Statute, Act or Regulation not hereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract, not inconsistent with the provisions of this Act.

2. Interpretation-clause.

In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context :-

- (a) When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal:
- (b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise:
- (c) The person making the proposal is called the "promisor and the person accepting the proposal is called the promisee":
- (d) When, at the desire of the promisor, the promisee or any other person has done or abstains from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such Act or abstinence or promise is called a consideration for the promise :
- (e) Every promise and every set of promises, forming the consideration for each other, is an agreement:
- (f) Promises, which form the consideration or part, of the. Considerations for each other are called reciprocal promises:
- (g) An agreement not enforceable by law is said to be void:
- (h) An agreement enforceable by law is a contract:
- (i) An agreement which is enforceable by law at the option of one or more of the parties- thereto, but not at the option of the other or others, is a voidable contract:
- (j) A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable.

I**OF THE COMMUNICATION, ACCEPTANCE AND REVOCATION OF PROPOSALS****3. Communication, acceptance and revocation of proposals -**

The communication of proposals the acceptance of proposals, and the revocation of proposals and acceptances, respectively, are deemed to be made by any act or omission of the party proposing, accepting or revoking by

which he intends to communicate such proposal acceptance or revocation, or which., has the effect of communicating it.

4. **Communication when complete –**

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

The communication of an acceptance is complete, -

as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor;

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

The communication of a revocation is complete, -

as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as "to be out of the power of the person who makes it;

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

Illustrations

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

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

(c) A revokes his proposal by telegram. The revocation is complete as against A when the telegram is despatched. It is complete as against B when B receives it. B revokes his acceptance by telegram. B's revocation is complete as against B when the telegram is despatched, and as against A when it reaches him.

5. **Revocation of proposals and acceptances –**

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

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

Illustrations

A proposes, by a letter sent by post, to sell his house to B. B accepts the proposal by a letter sent by post.

A may revoke his proposal at any time before or at the moment when B posts his letter of acceptance, but not afterwards.

B may revoke his acceptance at any time before or at the moment when the letter communicating it reaches A, but not afterwards.

6. **Revocation how made –**

A proposal is revoked-

- 1) by the communication of notice of revocation by the proposer to the other party
- 2) by the lapse of the time prescribed in such proposal for its acceptance, or, if no time is so prescribed, by the lapse of a reasonable time, without communication of the acceptance;
- 3) by the failure of the acceptor to fulfill a condition precedent to acceptance ; or
- 4) by the death or insanity of the proposer, if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance.

7. **Acceptance must be absolute –**

In order to convert a proposal into a promise, the acceptance must-

- 1) be absolute and unqualified;
- 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 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.

8. Acceptance by performing conditions, or receiving consideration -

Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal.

9. Promises express and implied –

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

II**OF CONTRACTS, VOIDABLE CONTRACTS AND VOID AGREEMENTS****10. What agreements are contracts –**

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

Nothing herein contained shall affect any law in force in 1*[India] and not hereby expressly repealed by which any contract is required to be made in writing^{2*} or in the presence of witnesses, or any law relating to the registration of documents.

11. Who are competent to contract –

Every person is competent to contract who is of the age of majority according to the law to which he is subject, ^{3*}and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.

12. What is a sound mind for the purposes of contracting –

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

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

A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.

Illustrations

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

13. "Consent" defined –

Two or more persons are said to consent when they agree upon the same thing in the same sense.

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

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

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

15. "Coercion" defined –

"Coercion" is 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. (45 of 1860.)

Explanation.-It is immaterial whether the Indian Penal Code is or is not in force in the place where the coercion is employed. (45 of 1860.)

Illustration

A, on board an English ship on the high seas, causes B to enter into an agreement by an act amounting to criminal intimidation under the Indian Penal Code. (45 of 1860.) A afterwards sues B for breach of contract at Calcutta.

A has employed coercion, although his act is not an offence by the law of England, and although section 506 of the Indian Penal Code was not in force at the time when or place where the act was done.(45 of 1860.)

16. "Undue influence" defined. defined -

- 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 foregoing principle, a person is deemed to be in a position to dominate the will of another-
 - (a) where he holds a real or apparent authority over the other or where he stands in a fiduciary relation to the other; or
 - (b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.
- 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.

Nothing in this sub-section shall affect the provisions of section III of the Indian Evidence Act, 1872. (1 of 1872.)

Illustrations

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

17. "Fraud" defined.-

"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 be true;
- 2) the active concealment of a fact by one having knowledge or belief of the fact;
- 3) a promise made without any intention of performing it
- 4) any other act fitted to deceive;
- 5) any such act or omission as the law specially declares to be fraudulent.

Explanation.- Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak,^{1*} or unless his silence is, in itself, equivalent to speech.

Illustrations

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

18. "Misrepresentation" defined –

"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 any one 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.

19. Voidability of agreements without free consent –

When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

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

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

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

Illustrations

- a) A, intending to deceive B, falsely represents that five hundred mounds of indigo are made annually at A's factory, and thereby induces B to buy the factory. The contract is voidable at the option of B.
- b) A, by a misrepresentation, leads B erroneously to believe that, five hundred mounds of indigo are made annually at A's factory. B examines the accounts of the factory, which show that only four hundred mounds of indigo have been made. After this B buys the factory. The contract is not voidable on account of A's misrepresentation.
- c) A fraudulently informs B that A's estate is free from incumbrance. B thereupon buys the estate. The estate is subject to a mortgage. B may either avoid the contract, or may insist on its being carried out and the mortgage debt redeemed.
- d) B, having discovered a vein of ore on the estate of A, adopts means to conceal, and does conceal, the existence of the ore from A. Through A's ignorance B is enabled to buy the estate at an under-value. The contract is voidable at the option of A.
- e) A is entitled to succeed to an estate at the death of B; B dies: C, having received intelligence of B's death, prevents the intelligence reaching A and thus induces A to sell him his interest in the estate. The sale is voidable at the option of A.

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

When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused. Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit there under, upon such terms and conditions as to the Court may seem just.

Illustrations

- a) A's son has forged B's name to a promissory note. B, under threat of prosecuting A's son, obtains a bond from A for the amount of the forged note. If B sues on this bond, the Court may set the bond aside.
- b) A, a money-lender, advances Rs.100 to B, an agriculturist, and, by undue influence, induces B to execute a bond for Rs. 200 with interest at 6 per cent. per month. The Court may set the bond aside, ordering B to repay the Rs. 100 with such interest as may seem just. Agreement void where both parties are under mistake as to matter of fact.

20. Agreement void where both parties are under mistake as to matter of fact. Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

Explanation.- An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement is not to be deemed a mistake as to a matter of fact.

Illustrations

- 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 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 the 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.

21. Effect of mistakes as to law –

A contract is not voidable because it was caused by a mistake as to any law in force in 1*[India]; but a mistake as to a law not in force in [India] has the same effect as a mistake of fact.

Illustration

A and B make a contract grounded on the erroneous belief that a particular debt is barred by the Indian Law of Limitation: the contract is not voidable.

22. Contract caused by mistake of one party as to matter of fact –

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.

23. What considerations and objects are lawful and what not –

The consideration or object of an agreement is lawful, unless- it is forbidden by law; or is of such a nature that, if permitted, it would defeat the Provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another or; the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

- a) A agrees to sell his house to B for 10,000 rupees. Here B's promise to pay the sum of 10,000 rupees is the consideration for A's promise to sell the house, and A's promise to sell the house is the consideration for B's promise to pay the 10,000 rupees. These are lawful considerations.
- b) A promises to pay B 1,000 rupees at the end of six months, if C, who owes that sum to B, fails to pay it. B promises to grant time to C accordingly. Here the promise of each party is the consideration for the promise of the other party and they are lawful considerations.
- c) A promises, for a certain sum paid to him by B, to make good to B the value of his ship if it is wrecked on a certain voyage. Here A's promise is the consideration for B's payment and B's payment is the consideration for A's promise and these are lawful considerations.
- d) A promises to maintain B's child and B promises to pay A 1,000 rupees yearly for the purpose. Here the promise of each party is the consideration for the promise of the other party. They are lawful considerations.
- e) A, B and C enter into an agreement for the division among them of gains acquired, or- to be acquired, by them by fraud. The agreement is void, as its object is unlawful.
- f) A promises to obtain for B an employment in the public service, and B promises to pay 1,000 rupees to A. The agreement is void, as the consideration for it is unlawful.
- g) A, being agent for a landed proprietor, agrees for money, without the knowledge of his principal, to obtain for B a lease of land belonging to his principal. The agreement between A and B is void as it implies a fraud by concealment, by A, on his principal.
- h) A promises B to drop a prosecution which he has instituted against B for robbery, and B promises to restore the value of the things taken. The agreement is void, as its object is unlawful.
- i) A's estate is sold for arrears of revenue under the provisions of an Act of the Legislature, by which the defaulter is prohibited from purchasing, the estate. B, upon an understanding with A, becomes the purchaser, and agrees to convey the estate to A upon receiving from him the price which B has paid. The agreement is void, as it renders the transaction, in effect a purchase by the defaulter, and would so defeat the object of the law.
- j) A, who is B's mukhtar promises to exercise his influence, as such, with B in favour of C, and C promises to pay 1,000 rupees to A. The agreement is void, because it is immoral.
- k) A agrees to let her daughter to hire to B for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the Indian Penal Code. (45 of 1860.)

24. Agreement void, if considerations and objects unlawful in part -

If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void.

Illustration

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

25. Agreement without consideration, void, unless it is in writing and registered, or is a promise to compensate for something done, or is a promise to pay a debt barred by limitation law -

An agreement made without consideration is void, unless –

- 1) it is expressed in writing and registered under the law for the time being in force for the registration of 1*[documents], and is made on account of natural love and affection between parties standing in a, near relation to each other ; or unless
- 2) 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, made in writing and signed by the person to be charged therewith, 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.

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

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

Illustrations

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

26. Agreement in restraint of marriage void --

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

27. Agreement in restraint of trade void –

Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void. Saving of agreement not to carry on business of which good-will is sold.-Exception 1.-One who sells the good-will of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the good-will from him, carries on a like business therein, provided that such limits appear to the Court reasonable, regard being had to the nature of the business.

28. Agreements in restraint of legal proceedings void –

Every agreement –

- a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or
- b) which extinguishes the rights of any party thereto, or discharges any party thereto from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to that extent.

Saving of contract of refer to arbitration dispute that may arise.-Exception 1.-This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

Suits barred by such contracts.-1* When such a contract has been made, a suit may be brought for its specific performance and if a suit, other than for such specific performance, or for the recovery of the amount so awarded, is brought by one party to such contract against any other such party, in respect of any subject which they have so agreed to refer, the existence of such contract shall be a bar to the suit.

Saving of contract to refer questions that have already arisen.-

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

29. Agreements void for uncertainty –

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

Illustrations

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

30. Agreements by way of wager void –

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

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

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

III**OF CONTINGENT CONTRAC****31. "Contingent contract" defined -**

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

Illustration

A contracts to pay B Rs. 10,000 if B's house is burnt. This is a contingent contract.

32. Enforcement of contracts contingent on an event happening.-

Contingent contracts to do or not to do anything if an uncertain future event appends cannot be enforced by law unless and until that event has happened.

If the event becomes impossible, such contracts become void.

Illustrations

- a) A makes a contract with B to buy B's horse if A survives C. This contract cannot be enforced by law unless and until C dies in A's lifetime.
- b) A makes a contract with B to sell a horse to B at a specified price, if C, to whom the horse has been offered, refuses to buy him. The contract cannot be enforced by law unless and until C refuses to buy the horse.

- c) A contracts to pay B a sum of money when B marries C. C dies without being married to B. The contract becomes void.

33. Enforcement of contracts contingent on an event not happening.-

Contingent contracts to do or not to do anything if an uncertain future event does not happen can be enforced when the happening of that event becomes impossible, and not before.

Illustration

A agrees to pay B a sum of money if a certain ship does not return. The ship is sunk. The contract can be enforced when the ship sinks.

34. When event on which contract is contingent to be deemed impossible, if it is the future conduct of a living person –

If the future event on which a contract is contingent is the way in which a person will act at an unspecified time, the event shall be considered to become impossible when such person does anything which renders it impossible that he should so act within any definite time, or otherwise than under further contingencies.

Illustration

A agrees to pay B a sum of money if B marries C. C marries D. The marriage of B to C must now be considered impossible, although it is possible that D may die and that C may afterwards marry B.

35. When contracts become void which are contingent on happening of specified event within fixed time –

Contingent contracts to do or not to do anything if a specified uncertain event happens within a fixed time become void if, at the expiration of the time fixed, such event has not happened, or if, before the time fixed, such event becomes impossible.

When contracts may be enforced which are contingent on specified event not happening within fixed time.- Contingent contracts to do or not to do anything if a specified uncertain event does not happen within a fixed time may be enforced by law when the time fixed has expired and such event has not happened or, before the time fixed has expired, if it becomes certain that such event will not happen.

Illustrations

- a) A promises to pay B a sum of money if a certain ship returns within a year. The contract may be enforced if the ship returns within the year, and becomes void if the ship is burnt within the year.
- b) A promises to pay B a sum of money if a certain ship does not return within a year. The contract may be enforced if the ship does not return within the year, or is burnt within the year.

36. Agreement contingent on impossible events void –

Contingent agreements to do or not to do anything, if an impossible event happens, are void, whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made.

Illustrations

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

IV.

37. Obligation of parties to contracts –

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

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

Illustrations

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

38. Effect of refusal to accept offer of performance –

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

Every such offer must fulfill the following conditions:-

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

Illustration

A contracts to deliver to B at his warehouse, on the 1st March, 1873, 100 bales of cotton of a particular quality. In order to make an offer of a performance with the effect stated in this section, A must bring the cotton to B's warehouse, on the appointed day, under such circumstances that B may have a reasonable opportunity of satisfying himself that the thing offered is cotton of the quality contracted for, and that there are 100 bales.

39. Effect of refusal of party to perform promise wholly –

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

Illustrations

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

By whom contracts must be performed

40. Person by whom promise is to be performed –

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

Illustrations

- a) A promises to pay B a sum of money. A may perform this promise, either by personally paying the money to B or by causing it to be paid to B by another; and, if A dies before the time appointed for payment, his representatives must perform the promise, or employ some proper person to do so.
- b) A promises to paint a picture for B. A must perform this promise personally.

41. Effect of accepting performance from third person –

When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.

42. Devolution of joint liabilities –

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

43. Any one of joint promisors may be compelled to perform –

When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any 1*[one or more] of such joint promisors, to perform the whole of the promise.

Each promisor may compel contribution. Each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract.

Sharing of loss by default in contribution.-If any one of two or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares.

Explanation.-Nothing in this section shall prevent a surety from recovering from his principal; payments made by the surety on behalf of the principal, or entitle the principal to recover anything from the surety on account of payments made by the principal.

Illustrations

- a) A, B and C jointly promise to pay D 3,000 rupees. D may compel either A or B or C to pay him 3,000 rupees.
- b) A, B and C jointly promise to pay D the sum of 3,000 rupees. C is compelled to pay the whole. A is insolvent, but his assets are sufficient to pay one-half of his debts. C is entitled to receive 500 rupees from A's estate, and 1,250 rupees from B.
- c) A, B and C are under a joint promise to pay D 3,000 rupees. C is unable to pay anything, and A is compelled to pay the whole. A is entitled to receive 1,500 rupees from B.
- d) A, B and C are under a joint promise to pay D 3,000 rupees, A and B being only sureties for C. C fails to pay. A and B are compelled to pay the whole sum. They are entitled to recover it from C.

44. Effect of release of one joint promisor –

Where two or more persons have made a joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor or joint promisors ; neither does it free the joint promisors so released from responsibility to the other joint promisor or joint promisors.

45. Devolution of joint rights –

When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and, after the death of any of them, with the representative of such deceased person. Jointly with the survivor or survivors, and, after the death of the last survivor, with the representatives of all jointly.

Illustration

A, in consideration of 5,000 rupees, lent to him by B and C, promises B and C jointly to repay them that sum with interest on a day specified. B dies. The right to claim performance rests with B's representative jointly with C during C's life, and after the death of C with the representatives of B and C jointly.

46. Time for performance of promise, when no application is to be made and no time is specified –

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

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

47. Time and place for performance of promise, where time is specified and no application to be made –

When promise is to be performed on a certain day, and the promisor has undertaken to perform it without application by the promisee, the promisor may perform it at any time during the usual hours of business on such day and at the place at which the promise ought to be performed.

Illustration

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

48. Application for performance on certain day to be at proper time and place –

When a promise is to be performed on a certain day, and the promisor has not undertaken to perform it without application by the promisee, it is the duty of the, promisee to apply for performance at a proper place and within the usual hours of business.

Explanation.-The question "what is a proper time and place." is, in each particular case, a question of fact.

49. Place for performance of promise, where no application to be made and no place fixed for performance –

When a promise is to be performed without application by the promisee, and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise, and to perform it at such place.

Illustration

A undertakes to deliver a thousand maunds of jute to B on a fixed day. A must apply to B to appoint a reasonable place for the purpose of receiving it, and must deliver it to him at such place. Performance in manner or at time prescribed or sanctioned by promisee.

50. Performance in manner or at time prescribed or sanctioned by promisee –

The performance of any promise may be made in any manner, or at any time which the promisee prescribes or sanctions.

Illustrations

- a) B owes A 2,000 rupees. A desires B to pay the amount to A's account with C, a banker. B, who also banks with C, orders the amount to be transferred from his account to A's credit, and this is done by C. Afterwards, and before A knows of the transfer, C fails. There has been a good payment by B.
- b) A and B are mutually indebted. A and B settle an account by setting off one item against another, and B pays A the balance found to be due from him upon such settlement. This amounts to a payment by A and B, respectively, of the sums which they owed to each other.
- c) A owes B 2,000 rupees. B accepts some of A's goods in reduction of the debt. The delivery of goods operates as a part payment.
- d) A desires B, who owes him Rs. 100, to send him a note for Rs. 100 by post. The debt is discharged as soon as B puts into the post a letter containing the note duly addressed to A.

Performance of reciprocal promises

51. Promisor not bound to perform, unless reciprocal promisee ready and willing to perform. When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

Illustrations

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

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

52. Order of performance of reciprocal promises –

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

Illustrations

- a) A and B contract that A shall build a house for B at a fixed price. A's promise to build the house must be performed before B's promise to pay for it.
- b) A and B contract that A shall make over his stock-in-trade to B at a fixed price and B promises to give security for the payment of the money. A's promise need not be performed until the security is given, for the nature of the transaction requires that A should have security before he delivers up his stock.

53. Liability of party preventing event on which the contract is to take effect –

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

Illustration

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

54. Effect of default as to that promise which should be first performed, in contract consisting of reciprocal promises –

When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract.

Illustrations

- a) A hires B's ship to take in and convey, from Calcutta to the Mauritius, a cargo to be provided by A, B receiving a certain freight for its conveyance. A does not provide any cargo for the ship. A cannot claim the performance of B's promise, and must make compensation to B for the loss which B sustains by the non-performance of the contract.
- b) A contracts with B to execute certain builder's work for a fixed price, B supplying the scaffolding and timber necessary for the work. B refuses to furnish any scaffolding or timber, and the work cannot be executed. A need not execute the work, and B is bound to make compensation to A for any loss caused to him by the non-performance of the contract.
- c) A contracts with B to deliver to him, at a specified price, certain merchandise on board a ship which cannot arrive for a month, and B engages to pay for the merchandise within a week from the date of the contract. B does not pay within the week. A's promise to deliver need not be performed, and B must make compensation.
- d) A promises B to sell him one hundred bales of merchandise, to be delivered next day, and B promises A to pay for them within a month. A does not deliver according to his promise. B's promise to pay need not be performed, and A must make compensation.

55. Effect of failure to perform at fixed time, in contract in which time is essential –

When a party to a contract promises to do a certain thing at or before a specified time or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

Effect of such failure when time is not essential - If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time ; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

Effect of acceptance of performance at time other than that agreed upon. If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance he gives notice to the promisor of his intention to do so.1*

56. Agreement to do impossible act. An agreement to do an act impossible in itself is void. Contract to do act afterwards becoming impossible or unlawful –

A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the Promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.2*

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

Illustrations

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

57. Reciprocal promise to do things legal and also other things illegal –

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

Illustration

A and B agree that A shall sell B a house for 10,000 rupees, but that, if B uses it as a gambling house, he shall pay A 50,000 rupees for it.

The first set of reciprocal promises, namely, to sell the house and to pay 10,000 rupees for it, is a contract.

The second set is for an unlawful object, namely, that B may use the house as a gambling house, and is a void agreement.

58. Alternative promise, one branch being illegal –

In the case of an alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced.

Illustration

A and B agree that A shall pay B 1,000 rupees for which B shall afterwards deliver to A either rice or smuggled opium.

This is a valid contract to deliver rice, and a void agreement as to the opium.

Appropriation of payments

Appropriation of payments

59. Application of payment where debt to be discharged is indicated –

Where a debtor, owing several distinct debts to one person, makes a payment to him, either with express intimation, or under circumstances implying that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly.

Illustrations

- a) A owes B, among other debts 1,000 rupees upon a promissory note which falls due on the first June. He owes B no other debt of that amount. On the first June A pays to B 1,000 rupees. The payment is to be applied to the discharge of the promissory note.
- b) A owes to B, among other debts, the sum of 567 rupees. B writes to A and demands payment of this sum A sends to B 567 rupees. This payment is to be applied to the discharge of the debt of which B had demanded payment.

60. Application of payment where debt to be discharged is not indicated -

Where the debtor has omitted to intimate and there are no other circumstances, indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits.

61. Application of payment where neither party appropriates.-

Where neither party makes any appropriation the payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law in force for the time being as to the limitation of suits. If the debts are of equal standing, the payment shall be applied in discharge of each proportionally.

62. Effect of novation, rescission, and alteration of contract -

If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

Illustrations

- a) A owes money to B under a contract. It is agreed between A, B and C that B shall thenceforth accept C as his debtor, instead of A. The old debt of A to B is at an end, and a new debt from C to B has been contracted.
- b) A owes B 10,000 rupees. A enters into an arrangement with B, and gives B a mortgage of his (A's) estate for 5,000 rupees in place of the debt of 10,000 rupees. This is a new contract and extinguishes the old.
- c) A owes B 1,000 rupees under a contract. B owes C 1,000 rupees. B orders A to credit C with 1,000 rupees in his books, but C does not assent to the arrangement. B still owes C 1,000 rupees, and no new contract has been entered into.

63. Promisee may dispense with or remit performance of promise –

Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit.

Illustrations

- a) A promises to paint a picture for B. B afterwards forbids him to do so. A is no longer bound to perform the promise.

- b) A owes B 5,000 rupees. A pays to B, and B accepts, in satisfaction of the whole debt, 2,000 rupees paid at the time and place at which the 5,000 rupees were payable. The whole debt is discharged.
- c) A owes B 5,000 rupees. C pays to B 1,000 rupees, and B accepts them, in satisfaction of his claim on A. This payment is a discharge of the whole claim.
- d) A owes B, under a contract, a sum of money, the amount of which has not been ascertained. A, without ascertaining the amount, gives to B, and B, in satisfaction thereof, accepts, the sum of 2,000 rupees. This is a discharge of the whole debt, whatever may be its amount.
- e) A owes B 2,000 rupees, and is also indebted to other creditors. A makes an arrangement with his creditors, including B, to pay them a 3*[composition] of eight annas in the rupee upon their respective demands. Payment to B of 1,000 rupees is a discharge of B's demand.

64. Consequences of rescission of voidable contract –

When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he have received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received.'

65. Obligation of person who has received advantage under void agreement, or contract that becomes void –

When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it.

Illustrations

- a) A pays B 1,000 rupees in consideration of B's promising to marry C, A's daughter. C is dead at the time of the promise. The agreement is void, but B must repay A the 1,000 rupees
- b) A contracts with B to deliver to him 250 maunds of rice before the first of May. A delivers 130 maunds only before that day, and none after. B retains the 130 maunds after the first of May. He is bound to pay A for them.
- c) A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and B engages to pay her a hundred rupees for each night's performance. On the sixth night, A willfully absents herself from the theatre, and B, in consequence, rescinds the contract. B must pay A for the five nights on which she had sung.
- d) A contracts to sing for B at a concert for 1,000 rupees, which are paid in advance. A is too ill to sing. A is not bound to make compensation, to B for the loss of the profits which B would have made if A had been able to sing, but must refund to B the 1,000 rupees paid in advance.

66. Mode of communicating or revoking rescission of voidable contract –

The rescission of a voidable contract may be communicated or revoked in the same manner, and subject to the same rules, as apply to the communication or revocation of a proposal.

67. Effect of neglect of promisee to afford promisor reasonable facilities for performance –

If any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise, the promisor is excused by such neglect or refusal as to any non-performance caused thereby.

Illustration

A contract with B to repair B's house.

B neglects or refuses to point out to A the places in which his house requires repair.

A is excused for the nonperformance of the contract if it is caused by such neglect or refusal.