PART -ONE
Commercial Law
CHAPTER-1
LAW OF CONTRACT

Contract defined : The law of contract is governed by section 2(h) of the Contract Act of 1872 and it defines a contact as "an agreement enforceable by law". It implies from the definition that in a contract there must be an agreement and it must be enforceable by law. In order to be enforceable the agreement must bring into being an obligation upon the parties of the contract so that in the case of any failure on the part of any of the parties to the contract to perform his duty, the obligation can be enforced by law. It is thus found that two significant things, namely-agreement and obligaiton, must exist in a contract. When two or more persons promise to do or not to do something, then an agreement is created. According to section 2(e) of the Contract Act, "every promise or every set of promises, forming the consideration for each other, is an agreement". It is mentioned here that every agreement does not produce an obligation. Examples—When Mr. Mohiuddin promises to sell his 'house' for Tk. 5,00,000 to Mr. Rabbani, then an obligation is created on the part of Mr. Mohiuddin to sell the 'house' and also on the part of Mr. Rabbani to buy the house at the settled or contracted price. This sort of agreement is enforceable by law and is thus a contract. On the other hand an agreement between Mr. Arif and Mr. Bari to go for enjoying 'Movie' together does not create an obligation on either of them and this agreement is not a contract. Mr. Salmond defines a contract as "agreement creating and defining obligations between the parties". Essentials of a contract : There cannot be a contract excepting mutual assent to the terms. In order to make an agreement a valid contract certain important elements or conditions must be fulfilled. These essentials are discussed as under :

(1) Proposal and Acceptance—Among the two parties of an agreement one party has to make a lawful proposal and the other party must have to accept the proposal lawfully. The

word 'lawful' implies that proposal and acceptance must be done in accordance with the rules laid down in the Contract Act as adopted in Bangladesh.

(2) Legal Relationship—The parties in a contract must have intention for establishing lawful relationship among them. For example—an agreement for taking a dinner at friends house is not an agreement intended to establish lawful relationship and as such it is not a contract. But an agreement for buying and selling goods is an agreement to create a legal relationship and, therefore, it is a contract.

(3) Lawful consideration—Consideration means "some right, interest, profit, or benefit accruing to one party, or some for **bearance**, detriment, loss, or responsibility given, "suffered, or so, or undertaken by the other". Again **something** given or obtained is called consideration. A consideration may be past, present or future. It may be valid when it is lawful.

(4) Lawful object—An indispensable element of contract is that the object of an agreement must always be lawful and connot be immortal or opposed to public policy.

(5) Capacity to contract—It is necessary that persons entering into agreement must be lawfully capable of entering into the contract failing which the agreement cannot be enforceable by law persons suffering from minority, drunkenness, idiocy, lunacy or insanity, etc. cannot be parties to the agreement and therefore they cannot perform a contract. If they do so, the contract will not be lawfully acceptable.

(6) Free consent—When an agreement is consented by all the parties to the agreement, it is then enforced by law. Agreement persuaded by coersion, undue influence, fraud, etc. does not become enforceable by law.

(7) Certainty—The agreement must be unambiguous so that its meaning can be certain and ascertainable. A vague agreement cannot be enforceable by law.

(8) Possibility of performance—It is necessary that agreement shall have to be performable. Any agreement that is impossible to be performed, cannot be enforced by law.

(9) Written and Registered—There may be oral, written or registered agreements. An oral agreement can be lawfully acceptable, if in the law there is no provision that it must be written or registered. But if it is required by law that agreement must be written or registered, in that case an agreement not being written or registered, cannot be enforceable by law. Example—agreement concerning sale of immovable property.

In conclusion, it is found that an agreement, in which all the essential elements discussed above are not present cannot be enforceable by law and as such the agreement cannot be acceptable as a contract. It can, therefore, be said that "All contracts are agreements, but all agreements are not contracts".

Offer—An offer requires the necessity of making a "proposal". According to the contract Act, a proposal is defined as follows—"When a person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assert of that other to such an act or abstinence, he is said to make a proposal"—Sec. 2(a). Virtually there is no distinction between an offer and a proposal. A proposal is also called an offer.

When the person to whom the proposal is made indicates his consent or concurrence to the proposal, it is said to be accepted. When the proposal is accepted, it then becomes a promise—Sec. 2(b).

The person making the proposal is called the "promisor" and the person who accepts it (proposal) is called the promisee—See. 2(c).

To be effective, offer and acceptance together shall have to be considered because separately they are not active and cannot lead to the formation of a contract. The contract Act considers the undermentioned rules in respect of offer or proposal :

1. An offer may be express or implied, when an offer is made in words, it is called an Express offer. But when an offer is made otherwise than in word, it is then called implied offer. 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 promise—Sec.9.

2. An offer may be constructed to a definite preson or to some certain class of person or to all people. An offer made to a definite individual or to a class of individuals, it is called specific offer, but when it is made to all the people, it is called general offer.

3. The terms of the offer must be certain, definite, not ambiguous and not vague.

4. A mere declaration of intention or statement is not an offer. Because mere experession of intention and also an invitation for an offer cannot be considered as an offer. For example an advertisement for a tender, vacancy price-lists, etc. cannot be considered as an offer.

5. The conditions of an offer must be fixed. Indefinite offer cannot be considered as an offer.

6. Offer may be conditional. The conditions of an offer must be communicated to the offeree. In case a person accepts an offer without clear knowledge about the conditions, then the person making the offer (i.e. offeror) cannot demand for the accomplishment of the conditions of the offer.

7. Communication of the offer to the offeree—The offer must be communicated to the person (offeree) for whom it is intended, Because if the offeree does not know about the existence of the offer, he cannot accept the offer and as such the offer cannot be considered as an offer. Therefore an offer must be communicated to the offeree, otherwise it will not become complete. Moreover in the absence of such communication, the offer is of no effect so far as the offeree is concerned.

Example—If prize is declared through an advertisement for the receipt of lost articles, the person who does not know about this announcement, therefore, cannot claim the prize.

ACCEPTANCE

Definition : Section 2(b) of the contract Act defines Acceptance as follows—"When the person to whom the proposal is made signifies his assent to the proposal is said to be accepted."

Who can accept the offer : An offer can be accepted only by the person or persons for whom it is meant. Offer person or persons cannot accept the offer. If an offer is made to a certain individual, only that individual can accept the offer. If an offer is made to a class of individuals, only any one of the class can accept the offer. Again when an offer made to all persons or to all the people, in that case any person can accept the offer. Example—Karim sold his business to Rahim without letting his customers know about this deal. Rahman sent to Karim an order for goods by name. Rahim received the order and sent a letter of acceptance. It can be held that there is no contract between Rahim and Rahman, the reason being that Rahman did not make any offer to Rahim.

Rules concerning acceptance : The following rules shall have to be satisfied in the acceptance of an offer, in order to make the acceptance legally effective or enforceable.

1. According to section 7(1) of the contract Act, an acceptance must always be unqualified and absolute. Acceptance to all the conditions given in an offer, is considered as an acceptance. But an acceptance with a little modification of the conditions prescribed in an offer, is not considered as an acceptance; it then simply becomes a counter—offer or proposal. Example—an offer to sell a machine for Tk. 1000/- will not be considered as accepted if the offeree agrees to buy it for Tk. 700/-.

2. It is essential that an acceptance must be in usual and reasonable manner. That is, if there is no indication of special manner of giving acceptance to an offer, in that case acceptance can be given in the usual or reasonable manner. Sec. 7(2). In the usual manner acceptance may be given-by word of mouth, telephone, or by post.

Acceptance to an offer can be given by conduct also. According to section 8 of the contract Act, performance of 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.

3. Acceptance must be made in the manner as indicated by the offer. If the offerer indicates in his offer that the offeree

must accept it by making telegram. In this case, the acceptance by the offeree must have to be done by making telegram to the offerer, otherwise, the acceptance in any other manner will not be accepted by law.

4. It is essential that acceptance of an offer must be made within the time prescribed by the offerer in his offer. Acceptance beyond the prescribed time will not be accepted. In the absence of mention of time in the offer, the acceptance shall have to be given in the reasonable time.

5. Mental acceptance or uncommunicated assent will not be legally accepted. If some one gets agreed to an offer but he keeps it into his mind and does not communicate to the offerer, in that case the acceptance will not be accepted. It is therefore, essential that the news of acceptance must be communicated to the offerer.

6. If the communication of an acceptance of an offer is not complete, the acceptance cannot be legally accepted. In the case of an offerer, the communication of acceptance is complete when it is put in a course of transmission to him and in the case of an accepter the communication of an acceptance will be complete when it is brought to the knowledge of the proposer. Thus a mere mental acceptance not evidenced by words or conduct is in the eye of law no acceptance.

Revocation of offer. Section 5 of the contract Act lays down that an offer or proposal may be revoked at any time before communication of its acceptance is complete as against the proposer, but not after wards. According to section 6 of the contrnct Act in the undermentioned circumstances : (1) By notice—If the offerer communicates to the offeree or the other party, the matter of revocation by way of notice, in that case it has to be done before the acceptance. Of course, this has no meaning unless the notice of revocation reaches the offeree.

(2) If the offerer prescribes time for acceptance, then in that case, the proposal or offer lapses after the expiry of the time.

(3) If the offerer does not prescribe any time for acceptance in that case the offer will come to an end after the expiry of a

reasonable time and this reasonable time will depend on the circumstances of the case.

(4) If the proposer has prescribed any condition for acceptance, in that case the proposal will lapese if the offeree fails to fulfil the condition.

(5) In case the proposer dies or becomes insane and it comes to the knowledge of the offeree before the acceptance of the offer, the proposal will then lapse.

(6) Once the proposal is revocated, then it cannot be revived by giving acceptance to the offer.

Communication of revocation. Revocation of an offer or an acceptance can be made by any act of the party by which he intends to make it communicated. Sec.3. Communication of revocation will be complete in the case of a person making 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 making it and as against the persons to whom it is made when it comes to his knowledge. Sec. 4 of the Contract Act.

Intention to create legal relations. An agreement in which if there is no intention of legal relation, cannot be a binding contract. The parties in an agreement must intend that the transaction included in the agreement is attended by legal consequences and create legal relations, otherewise the agreement will not be treated as a contract. A contract is an agreement enforceable by law. As such an agreement which does not create any legal obligation cannot be enforced by law. Therefore, the agreement cannot be a contract. Example—A proposes to play cards with B for the purpose of pleasure and B accepts the proposal. But later on A refuses to play cards with B. Here B cannot enforce his promise in the courts of law and as such the proposal cannot created a contract. The courts deal with legal obligations and not with enforcement of social obligations.

CONSIDERATION

Definition—In English law consideration has been defined as "Some right, interest, profit, or benefit accruing to the one party, or some forbearance, deteriment, loss, or

responsibility given, suffered, or undertaken by the other". In the contract Act consideration has been defined as "when at the desire of the promisor, the promisee or any other person has done or abstained from doing, 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. Sec. 2 (d).

Example—Hossain agrees to sell his car for Tk. 5,00,000/= to Hassan, For Hossain's promise, the consideration is Tk. 5,00,000/=. For Hassan's promise, the consideration is the car only.

Note : Consideration is used in the sense of quid pro quo. It means something in return. It is very essential ingredient of a contract which is an agreement enforceable by law and each party in the agreement gets something and this is called consideration.

Classification of consideration—It may be classified into the following types—(1) Past—A past consideration is one when the consideration was given before the date of the promise.

(2) Present—When consideration goes along with the promise, this is called present consideration. This is also called executed consideration. Example—Rahim purchases a 'watch' from a shop and pays the price immediately. The consideration, therefore, moving from 'Rahim' is a present or executed consideration.

(3) Future—Future consideration is one when consideration moves at a future date, This is also called executory consideration. Example—A agrees to sell his house to B. B's consideration here is executory if he is to pay the money at a future date.

Rules about consideration. Following are the rules for consideration :

1. It is necessary that consideration should be according to the desire of the promiser. No one should do or not do an act according to his own wishes or according to the wishes of other person. If some one does so, it will not be treated as a consideration. An act done without the desire of the promiser

will be voluntary act and as such will not be within the definition of consideration. Example – Karim's house cought fire. Rahim saw it and helped to put out the fire. Karim did not request for Rahim's help. As uch Rahim cannot claim for payment for his job.

2. According to the contract Act promise or any other person can give consideration. But there is no mention in the Act about giving consideration to the promisee.

3. Consideration must be real—consideration must have some value in the eye of law. It cannot be false, uncertain, impossible or fictitious. Example—Hassan promises to give Hossain Tk. 500/= on condition that there will be no consideration for that. This is not a real contract and as such no consideration.

4. Consideration need not be adequate. It is not possible for the court to decide the adequacy of the considertion. The parties to the contract will decide the amount of consideration. The court will only enforce an agreement, if consent was freely given to the agreement. Section 25—explanation 2 of the contract Act lays down that—"An agreement to which the consent of the party is freely given is not void merely because the consideration is inadequate; but inadequacy of the consideration may be taken into by the court in determining the questions whether the consent of the promiser was freely given."

5. Consideration must be legal and not immoral or opposed to public policy. If the object or consideration of an agreement is illegal, it cannot be enforceable by law. If the consideration is illegal, immoral or opposed to public policy, in that case no contract based on that will be enforceable by law.

6. Consideration may be past, present or future. According to the definition of consideration given in the contract Act for any act or abstinence of the past, present or future, promise is treated as consideration.

Promise to charities : For a promise for making contribution to a charity there cannot be any consideration. Therefore, on such promise will not be enforceable by law.

Example—Jadu promises to denate some money to Madu. He already gives a portion of it and keeps the remaing portion as oustanding. Subsequently Jadu performs a handletter for the outstanding amount. This sort of handletter is nothing but a repetition of the voluntary promise only. So, it cannot be enforceable by law.

Diffenence between Bangladesh and English law on consideration.

The differences between the two laws on consideration are discussed as under :

(1) Under English law a distinction is created between formal contract and simple contract. But under Bangladesh law no such distinction is made. In Bangladesh law with few exceptions to the rules relating to consideration, all contracts ask for consideration.

(2) In English law past consideration is treated as no consideration. But according to Bangladesh law a past consideration is treated as a good consideration.

(3) Under Bangladesh law considerations may proceed from the promisee or any other person.

Exceptions to the Rules of consideration—

A contract must be established on consideration for its validity. But there are exceptions to this. The exceptions are discussed below:

(1) An agreement made without consideration is treated as valid if it is in writing and registere'd and if it is made for natural and affection. Sec. -25 (1)

(2) A promise made without consideration is treated as valid, if it is a promise to compensate wholly or in part, a person voluntarily doing something for the **promisor.** Sec. 25(7).

(3) A promise to pay a time—barred debt under law of limitation can be enforced. The condition being that the promise has to be signed by the debtor and is in writing. Sec. 25(3).

Stranger to a contract : According to the contract Act of Bangladesh, a person who is not a party to the contract cannot sue upon it for its enforcement.

Example—A contract between Karim and Rahim cannot be enforced by Hassan. But there are few cases in which exceptions are seen. They are mentioned as follows—

(1) Trust—A contract to create a trust can be enforced by the beneficiaries to the contract.

(2) Family settlement—When conditions of settlement of family dispute on the basis of mutual agreement are documented in writing, it is termed as family settlement. Agreements like these can be enforced by the members of the family who were not originally members of the agreement.

(3) Transfer—In some special cases a party to a contract can transfer his rights in the contract to a third party. Example—a holder of 'Bill of Exchange" can transfer it to a third party. In this case the transferee can sue upon the contract in the court of law, if the Bill of Exchange comes returned even though he was not originally a party to the contract.

DEFINITIONS OF AGREEMENTS

(1) Voidable agreement—According to section 2(i) of the contract Act, "An agreement which is not 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 agreement."

(2) Void agreement—"An agreement not enforceable by law is said to be void".—Sec. 2(g). A void agreement has no lawful effect and it does not confer any right to the parties to it.

Example—An agreement entered into by minor, agreement made without consideration, agreement made against public policy, etc.

(3) Unenforceable agreement—Agreements which cannot be enforceable in a court of law because of technical defects are called unenforceable agreements. Examples—Agreements made without registration or non-payment of necessary stamp duty.

(4) Illegal Agreement—Agreements made against the law in force in Bangladesh, are called illegal agreements.

Example—An agreement made for performing a murder or robbery, is an illegal agreement.

(5) Valid contract—An agreement that fulfils the essential elements of a contract and becomes lawfully enforceable, is called a valid contract Parties to a valid contract violating obligation become subject to legal actions.

CAPACITY TO CONTRACT

One of the significant conditions of a valid agreement is that all the persons entering into it must have capability of performing contracts. That is, they will have to have capacity to enter into contracts. Under section 11 of the contract Act it has been stated that "Every person competent to contract who is of the age of majority according to the law to which he is subject and who is of sound mind and is not disqualified from contracting by any law to which he is subject." From the definition of the contract Act it is found that a person is capable of entering into contracts under the conditions mentioned below—(1) if he has attained the age of majority according to the law of his country; (2) if he is of sound mind i.e if he is not a lunatic or an iditot or suffering from disability of similar nature; (3) if he is not disqualified from entering into contract according to the law of his country." Definition of minor. Under the Majority Act, 1875 of our country a minor has been defined as "one who has not completed his or her 18th year of age". It appears from this definition that a person becomes a major only when he has completed 18th year of his life. But there are some exceptions to this rule which are as follows—(1) if a guardian is appointed by the court of law for the minor's person or property, and (2) if the property of the minor is entrusted in the care of the court of wards for management purpose. In both the cases the minority period can be extended upto 21 years.

Law for minor's contracts. The rules for minor's contracts are discussed below:

(1) Except in special cases, a contract by a minor is completely void and is not operative. The reason being that a

minor cannot come to a right decision about advantage or disadvantage of the contract.

(2) Ratification—A minor's agreement is void ab-initio and as such the agreement cannot be validated. Therefore, a minor cannot ralify a contract even on attaining majority.

(3) If a minor receives a benefit from a sale or Mortgage of property, in that case the minor cannot be compelled for refunding the money and his property also cannot be held liable for that.

(4) There can be no estoppel against a minor. It means that if a minor represents himself as a major by way of falsification and enters into an agreement with another one by inducing the latter, in that case the minor can nevertheless plead minority as a defence in an action on the agreement.

(5) As per section 30 of the partnership Act a minor cannot enter into a contract of parnership. However with the consent of all the partners, the minor can enjoy all the benefits of a partnership.

(6) A minor can work as an agent of someone. But for that he will not be held liable to the employer or to the principal. He cannot also be held liable to a third person for this.

(7) A minor cannot enter into an agreement but an agreement intered into by a guardian or by a superviser of the minor's property on his minor) behalf will be enforceable by law. The conditions which are to be fulfilled in this regard are the following. The guardian or the superviser did not exceed his rights or powers, and (2) that the agreement has been entend into by the guardian or supervisor for the benefit or interest of the minor or for the legal necessity of the minor. In this case, the powers or rights of the guardian will be determined by the Guardian and Wards Act.

(8) A minor can be a promisee. According to the contract, an agreement under which a minor has received a benefit can be enforced as against the other party. If a mortgage is executed in favour of a minor, in that case the minor can get a decree for the enforcement of the mortgage.

(9) An agreement performed by a minor is considered void, and as such the court cannot direct specific performance of such agreement by the minor.

(10) A minor can execute a negotiable instrument and also endorse it by making the other party liable but not himself.

(11) The property of a minor is held liable for payment of a reasonable price for the necessaries (these being goods, service rendered, loans) supplied to the minor or to any one whom the minor is legally bound to support.

Persons of unsound Mind

'Sound mind' defined—In order to make a valid contract it must be ensured that each party to it is of sound mind. Section 12 of the Bangladesh contract Act lays down about what a sound mind means which is as follows—"A person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgement as to its effect upon his interests."

According to section 11 of the contract Act, if contracts are made by persons of unsound mind, such contracts will be considered as void. A person generally being of unsound mind, but being of sound mind at lucid intervals may enter into contract when he is of sound mind and such contract will be treated as valid contract.

A person generally being of sound mind, but being of unsound mind on occasions may perform contract when he is of sound mind and such contract will be valid contract.

A person generally being of sound mind but seasonally of unsound mind may not perform contract when he is of unsound mind. If he does so, the contract so performed by him will be treated as void.

Unsoundness of mind may be caused due to the following reasons—(1) Idiocy—when a person cannot understand anything meaning fully, he is then called a person suffering from idiocy. Idiocy is created for want of developed brain. This is congenital and cannot be treated or cured.

(2) Lunacy or Insanity—It is a disease of brain. The mental power of a lunatic person is so deranged that he cannot take a reasonable decision. This kind of disease is curable in some cases.

(3) Drunkenness—It is camed by excessive drinking of wine. This causes the mental feculties of a person so obscured that he cannot form a rational decision.

Effects of contracts performed by persons of unsound mind : Contracts performed by persons of unsound mind are void. But in circumstances, if the contracts made by persons of unsound mind are for supply of necessaries for themselves or for persons whom they are bound to support, in such cases the contracts are considered valid as quasi-contracts. Sec. 68. For such contracts the persons of unsound mind do not personally remain liable. Only their estates are liable. If persons of unsound mind enter into contracts for their own benefit, such contracts are enforceable by law.

If a guardian enters into contract on behalf of a lunatic person, he can then make binding the estate of the lunatic. The mode of appointment of the guardian and his powers are laid town in the Lunatic Act.

Persons disqualified for making contracts : The following persons are incompetent for making contracts.

(1) Alien—Alien is a citizen of another country. When peaceful relations are maintained by Bangladesh with a foreign country, then an alien can enter into contract with a citizen of Bangladesh. Of course, if the Bangladesh government so wishes it can impose restrictions on such contract. When Bangladesh is at way with any foreign country, then an alien being a citizen of that country will be regarded as an enemy and as such he (alien) cannot enter into any contract with a citizen of Bangladesh.

(2) Foreign sovereigns or Ambasadors enjoy special privileges in all countries. But they cannot be sued in the courts of Bangladesh unless they voluntarily submit to the jurisdiction of any local court here in the country. They can enter into contracts with citizens of Bangladesh through their

agents and in order to make the contracts enforceable they can take the shelter of courts in Bangladesh. In such cases the agents will remain personally responsible for the performance of the contracts.

(3) The directors of corporations and companies can sue for and against them. Corporations have the right to enter into contracts. Since the corporations have no physical existence but separate entities, they can make contracts through their agents. They can-not enter into contracts on personal matters—Example marriage. The companies cannot make contracts on matters beyond the objectives stated in their Memorandum of Association. Other statutory corporations cannot enter into contracts beyond the powers stated in the statute written for them.

Contracts by married women : In Bangladesh there is no special difference between women and men in respect of making contracts. A woman—married or unmarried, can make contracts and use her properties the way she likes on condition that she is a major and is not incapable to enter into contracts by law. That is, if she is a lunatic or idiot, in that case she is barred by law from entering to contracts.

A married woman in Bangladesh can enter into contracts by binding her husband's properties for the supply of necessaries to her. However, she cannot make contracts for the necessaries excepting for the pressing ones and without the consent of her husband. If she does so, her husband or his properties will not be liable for that. The reason being that no one will be liable for the offence of being husband of a woman for her entering into contracts.

Free consent : According to section 10 of the contract Act all agreements are contracts if they are made by the "free consent" Of all the parties of them (agreements), for a lawful consideration with a lawful object, and are not expressly declared as void.

Section 13 of the contract Act defines consent as follows—"two or more persons are said to consent when they agree upon the something in the same sense."

Section 14 of the contract Act lays down that consent is not free if it is caused by coercion, undue influence, fraud, misrepresentation and mistake.

Coercion : Coercion defined—Section 15 of the contract Act defines coercion as under "Coercion is committing or threatening to commit, any act forbidden by the Bangladesh 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."

From the definition given above the undermentioned features come up :

(1) Committing or threatening to commit an act prohibited by the Bangladesh Penal Code, or the unlawful detaining or threatening to detain any property will generate coercion.

(2) The act of coercion can be directed to any person, irrespective of other party to the agreement.

(3) The act of coercion has to be done with the object of compelling a person for entering into a contract.

(4) It is immeterial if the Bangladesh Penal Code is in force or not at the place where the coercion has taken place. An example of coercion is given below—Karim threatens to kill Rahim if he does not give him a loan of Tk. 1,00,000/-. Fearing this Rahim agrees to give the loan. The agreement is thus caused by coercion.

Consequences of coercion : It has been stated under the section 19 of the contract Act that a contract caused by coercion is voidable at the option of the party who has so consented to it. The affected party can cancel it or he can refuse to perform the contract. He can defend the contract if the other party wanted to enforce it. The affected party may perform the contract and maintain its execution by the other party if he so wishes.

Undue Influence : Section 16(c) of the contract Act defines undue influence as "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 obtain an unfair-advantage over the other.

According to section 16(2) of the contract Act undue influence is assumed to be in presence in the cases mentioned below :

(1) Where one party has an apparent authority over the other or where he is in a fiduciary relationship to the other. Fiduciary relationship exists in cases of father and son, doctor and patient, guardian and ward, solicitor and client, etc.

(2) Where one party enters into a contract with a person who is mentally affected because of age, illness or mental or bodily distress. Mental capacity may be affected temporarily or permanently.

Example—Father gave some money to his son when he was minor. When the son came of age father misused his parental influence and obtained from his son a bond for money which was greater than the amount father had advanced. Here father employed undue influence.

Consequences of undue Influence : It has been stated under section 19A-that a contract is voidable at the option of the party who has given consent to an agreement being persuaded by undue influence. The affected person/party can cancel such agreement completely. If the party so affected has received any benefit by such contract, in that case the court can set aside on the basis of terms and conditions as considered just. Of course, the affected party may, at his option, treat the agreement as binding and enforceable.

Undue influence distinguished from coercion : In both the cases (undue influence and coercion), one party is at the influence of the other party. In the case of coercion influence originates from committing or threatening to commit an offence that is treated as punishable under the Bangladesh Penal Code. The influence may also originate from detaining or threatening to detain property illegally. In the case of undue influence, because of special relations existing among the parties to the contract, the influence originates from the domination of the will of one party over another. In the case of coercion will is influenced, by physical force or by threatening while in the case of undue influence will is influenced by

mental pressure. Again, there may not be any relations among the parties to the contract whereas such relations will exist, in the case of undue influence, among the parties to the contract. The relations in this case may be other than blood relations.

Example—Doctor and his patient.

Mis representation : Definition—When one party induces or instigates another party to enter into contract by giving him a false statement or assertion about some fact relating to the contract at the time of the contract or before then the statement or assertion is called misrepresentation. A misrepresentation originates from inaccurate representation. Of course, inaccuracy is not due to the intention of defrauding the other party to the contract.

Under section 18 of the contract Act misrepresentation is classified into the following groups :

(1) Unwarranted Assertion—An assertion, made positive but not warranted by the information received by the person making it, is of that which is not true though he delieves it to be true. Example—Karim says to Rahim that his land produces 12 quintal of paddy per bigha. Karim's assertion was not warranted by his information but he believed to be true. Believing this assertion Rahim purchased the land. Subsequently, it was found that the land produces only 7 quintal of paddy. This is a case of misrepresentation.

(2) Breach of Duty—A person committing breach of duty with the intent of not deceiving, gains advantage by misleading another to his prejuduce or to the prejudice of anyone claiming under him. In cases where a person is under a duty to disclose certain facts but does not do so and thereby misleads the other party. Such cases are called conservative fraud under the English law.

(3) Innocent Mistake. It means causing, however innocently, a party to a contract to make a mistake as to the substance of the subject of the contract.

Consequences of Misrepresentation Consequences are discussed below:

(1) The affected person can avoid the contract.

(2) He can get the contract performed and that he shall be put in the position in which he would have been, had the representation been true. But if the person who consented by misrepresentation had the ways of discovering the truth with ordinary diligence, in that case he has no remedy.

Note : "Ordinary diligence" indicates such diligence which a prudent man would consider essential, keeping care to the nature of the transaction

Fraud : All acts of a person committed for deceiving another person are included in fraud. Deceiving means persuading a man to believe a false thing as true. According section 17 of the contract Act Fraud includes the under mentioned acts :

(1) False statement—It means suggesting a fact, which is not true, by a person who does not believe it to be true. A statement intentionally made false is called fraud.

(2) Active concealment—It means a fact concealed by a person who has the knowledge or belief about the fact.

(3) Intentional non-performance—It means a promise which is made with the intention of not performing it. Buying something without a mind for paying its price is un example.

(4) Deception—It means any act designed to commit deception.

(5) Fraudulent act or omission—Any act or omission which is fraudulent under the law of the land. This refers to the provisions in certain Acts which make it obligatory to disclose material facts.

Consequences of Fraud : A person who has given consent to a contract being persuaded by fraud can treat the contract as voidable at his option. Section 19. That is, he can apply the following measures :

(1) If he wishes, he can avoid the contract.

(2) He can get the contract performed and that he shall be put in the position in which he would have been had the representation been true.

(3) The affected party can sue for damages. Since fraud is a civil wrong or tort, the other party shall be liable for payment of compensation.

Conditions of relief for Fraud : Relief for fraud can be gained only on the fulfilment of undermentioned conditions :

(1) A party of the contract himself or at his indulgence or his agent has committed the act by fraud.

(2) The act has been done with the object of deception and the other party has been really influenced.

(3) If the consent of the affected party was obtained by frandulent act of the other party, he can then becomes entitled to take remedies.

(4) In the case of fraudulent silence, if the aggrieved party had the means of exposing the truth by ordinary diligence, in that case the contract will not be voidable.

(5) The contract will not be cancelled or resceided in cases of approval (i.e acceptance of the agreement) and laches (negligence) or undue delay in taking action.

Distention between Fraud and Misrepresentation :

Fraud can be distinguished in the following cases—

(1) In the case of misrepresentation there is intention of deception, but this is not the case in case of fraud.

(2) The distinction between fraud and misrepresentation is a matter of belief, that is, if the statement of the person making it is honest it is a case of misrepresentations. If the statement is dishonest it is a case of fraud.

(3) In fraud the affected party can cancell the contract and sue for damages. But in misrepresentation the affected party can rescind the contract but cannot sue for damages.

(4) In misrepresentation if the aggrieved party would have uncovered the truth by ordinary diligence, the contract cannot be avoided. But this is not the defence especially in other cases of fraud.

Mistake : Definition : A wrongful belief about something may be called a mistake. A party to a contract must have appropriate knowledge about the nature, subject-matter and

other party of the contract. A consent cannot be considered as free if it is given under the mistaken idea about these issues and in the absence of free consent no contract can be enforceable by law. When both the parties of a contract agree upon the same thing in the same sense only then an agreement becomes lawfully enforceable.

Classification of Mistake : According to the contract Act mistake is mainly of two kinds :

(1) Mistake of law

(2) Mistake of fact

Mistake of law may again be classified into two categories— (a) Mistake as to a law in force in Bangladesh, (b) Mistake as to a law not in force in Bangladesh.

(1) Mistake of Law—Under section 27 of the contract Act it is stated that, for a mistake on a point of law in force in Bangladesh, the contract will not be treated as void. But a mistake on a point of law in force in a foreign country will be treated as equivalent to 'Mistake of fact' and as such the contract will be treated as void. That is, mistake of law is not excused—Ignorantia juris none excusat. Example—A debt has been barred by the Bangladesh Law of Limitation. In this condition A has entered into a contract with B. In this case the contract will be a valid contract, because a mistake relating to the law in Bangladesh will not be lawfully accepted.

(2) Mistake of fact—Under section 20 of the contract Act it has been stated that "Where both parties to an agreement are under a mistake as to matter of fact essential to the agreement, the agreement is void."

"Explanation to section 20—"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."

Legality of object and consideration of contracts : Definition : For a contract or an agreement to be valid it is necessary that its object and consideration must both be lawful, otherwise the contract or the agreement will be void. In section 23 of the contract Act, it has been stated that the

consideration and the object of an agreement are unlawful in the cases mentioned as under.

(1) If the agreement is forbidden by law—An act is foriedden by law when it is punishable by ciriminal law of the country. If the object or consideration of a contract is forbidden by law of the country, the agreement is void.

(2) If it is of such a nature that, if permitted it would defeat the provisions of any law. That is, if the object or consideration of agreeiment is of such nature that law will be violated due to that, and as such the agreement is void.

(3) If it is fraudulent—An agreement becomes void if its object defrauds others.

(4) If it causes injury to the person or property of another, that is, an agreement is void if its object is to cause injury to the person or property of another.

(5) If the court considers it as immoral or opposed to the public policy.

Agreements against public policy : An agreement or a contract will be treated as void if it is said to be opposed to the public policy. Defining public policy is a difficult job. Despite, it can be generally said that those agreements which are against the interests of the society or of the state, or which are injurious to the public are considered as opposed to the public policy, Agreements such as trading with foreign enemy, agreement to settle prosecution, miseuse of legal process, traffic in public offices, creating an interest opposed to duty, interfering with parental rights, interfering with marital duties, marriage brokerage, restraint of personal freedom are said to be against public policy. These are discussed as under :

(1) Trading with foreign enemy—Entering into agreement or doing trade with foreign enemy without the permission from the Government will be treated as illegal.

(2) Agreement to settle prosecution—If a person commits a serious criminal offence, he should be prosecuted in the court. But an agreement seeking to prevent the prosecution of such person is opposed to public policy and as such the agreement will treated as void.

(3) Misuse of legal process—In many cases some person agrees, without interest, to help another person by money for carrying on litigation. When such thing is so done, it is called Maintenance. Again, if some person helps another one by money to carry on litigation for having a portion of the gains, if any from winning the litigation, it is then called champerty.

(4) Traffic in public offices — If agreements are made with tendency to injure public services, these are then considered as opposed to the public policy and as such agreements are treated as void.

(5) Agreement restraining personal freedom—Every person has the right to enjoy personal freedom. If this right is frustrated by an agreement, it is then treated as against public policy and thus will be void.

(6) Interfering with parental duties—Agreements creating impediments on the authority of the parents are considered void. Reason being that every father and in his absence mother has the usual authority over children and this authority is exercisable for the welfare of the children. Such authority of a father cannot be alienated irrevocably. Any agreement intending to do so is void.

(7) Interfering with marital duties—Agreements which create interference in the matters concerning marriage or authority of the husband or wife are opposed to the public policy and therefore these agreements are treated as 'void'.

(8) Creating an interest opposed to duty—If a person enters into an agreement under which he will follow a course of action that is against his public duty, the agreement then is treated as against the public policy and will be void.

(9) Marriage brokerage—In Bangladesh law marriages are negotiated is most cases by the parents of the parties. Of course, in this system custom is in vouge for appointing marriage agents or brokers for negotiating marriage for the parties. But in Bangladesh law nobody can litigate for the realization of remuneration for negotiation of marriage. If parents or guardians being sempted for money make agreements to hand over their daughters to unsuitable

bridegrooms by ignoring their welbeing, then such agreements are treated as void in Bangladesh law. Again whereas marriage ornaments are given to the other party, in that case in the absence of marriage i.e. if marriage is not held litigation can be filed for the return of these ornaments. It is mentioned here that in English law agreements for payment of brokerages for negotiation of marriages are void because this is against public policy. Marriages in this system are negotiated by the parties themselves according to their own likings or choices and no third parties can interfere with these choices as brokers.

Void Agreements : Under section 2(g) of the Bangladesh Contract Act it has been stated that the agreements which cannot be enforced by law will be declared as void. Some-ones in here think that void agreements are void contracts. But the fact that the question of void contract cannot arise if the agreement is void ab initio. In the contract Act the undermentioned agreements are declared as void and the contracts established on such agreements will also be treated as void :

(1) Agreements made by mistake.

(2) Agreements with illegal objects and considerations.

(3) Agreements without competency to contract.

(4) Agreements in restraint of marriage.

(5) Agreements in restraint of Trade.

According to section 27 of the contract Act "Every agreement by which anyone is restrained from exercising a law profession trade or business of any kind is to that extent void."

Validity of agreements in restraint of trade in Bangladesh : In the following cases agreements in restraint of trade are valid in Bangladesh—

(1) Sale of good will—A person selling the good will of his business may agree with the buyer to refrain from carrying on the similar business within specified local areas where the buyer carries on like business.

(2) Partner's competing business

(3) Partner's similar business on dissolution.

(4) Rights of outgoing partner—A partner may agree with the other partners that on ceasing to be a partner he will not carry on a similar business within a certain period or within certain local limits.

(5) Conditions of employment—In many cases the conditions of employment are such that the employees will not be employed in similar jobs elsewhere during the period of their employment.

Agreements in restraint of legal proceedings : Under section 28 of the contract Act it has been stated that "Every agreement by which any party there to restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent. The exceptions to this are discussed below—An agreement by the parties to a contract to refer to future disputs to arbitration is valid and binding. An agreement in writing to refer a pending dispute to arbitration is not represented as illegal.

Uncertain Agreement : According to section 29 of the contract Act, Agreements the meaning of which is not certain or capable of being certain are void. Example—Karim agrees to sell to Rahim "100 maunds of rice", but there was no mention about the kinds of rice in the deal. The agreement is, therefore, void for lack of certainty.

Agreements by way of wagers : Wager defined—A wager may be defined as an agreement by which money is payable by one person to another on the happening or non-happening of a future, uncertain event. In section 30 of the contract Act it has been stated that "Agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to be won by wager or entrusted to any person to abide by the result of any game or other uncertain event on which any wager is made.

The main characteristics of wagering agreement are the following :

(1) Consideration for the promise of a wagering contract is to pay or get money.

(2) Money is payable on happening or non-happening of an event.

(3) Agreement depends on a future and uncertain event.

(4) Essence of wagering agreement is that one party is to win and the other lose.

(5) There is no control over the event by any party in the wagering contract.

Effects of wagering contract : Wagering agreements are void. The Courts cannot enforce such agreements. Section 30 of the contract Act states that "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 by the result of any fame or other uncertain event on which any wager is made. It is mentioned here that along with the void agreements, collateral agreements are valid. That is, agreements that are subsidiary or incidental to the main agreement are valid. As such, despite wagering agreements are void, transactions collateral to such agreements are valid. Example—If money is given as loan for the purpose of gambling or for paying a gambling debt, in that case the debt can be recovered.

Impossible Act : According to section 56 of the contract Act "An agreement to do an act impossible in itself is void."

Example—Karim agrees with Rahim to discover treasure by magic. In this case the agreement is treated as void.

Object or consideration unlawful in part : When the consideration or object of an agreement is unlawful in part then the rules that will be applied are discussed as under.

(1) As per section 24 of the contract Act "If any part of a single consideration for one or more objects or any one or any of several considerations for single object, is unlawful, the agreement is void."

(2) If there is single object of the agreement but several considerations, the agreement will be void in case any one of the considerations is unlawful. Sec. 24. In cases where the agreement cannot be divided into different parts and one part

of the agreement is illegal, the other part is legal the two above rules will be applicable.

(3) In cases where a promise is given for doing illegal things along with legal things and the legal part of the promise can be separated from the illegal part, in that case the legal part is a legal contract and illegal part is void agreement. Sec. 57.

(4) In case, one branch of an alternative promise is legal and the other illegal, in that case only the legal branch will be enforceable by law. Sec. 58.

Contingent contracts : Definition : Under section 31 of the contract Act contingent contract has been defined as follows—"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. Example—Karim enters into a contract with Rahim and agrees to pay Rahim Tk. 20000, if Rahim's house is burnt. This is a contingent contract. A conditional promise is comprised in a contingent contract. An absolute or unconditional promise taxes place when the promiser accepts to perform it in any event. A conditional promise takes place when performance is due only if an event, collateral to the contract does or does not happen. "Collateral" means, "Subordinate but from same source, connected but aside from main line."

Collateral event : Pullock and Mull defines collateral event as an event which is neither a performance directly promised as part of the contract, nor the whole of the consideration for a promise".

Example : Karim promises to pay Tk. 1000/= to any person who recovers some property lost by him. In this example, there will be no contract until and unless someone finds the lost property. It is thus not a contingent contract. The characteristics of contingent contracts are the following :

(1) Performance of contingent contracts depends on the happening or non-happening of the future event.

(2) The event of a contingent contract is collateral to the contract.

(3) The contingency is uncertain.

Rules of contingent contracts : The rules of contingent contracts are written in the sections 32 to 36. These are discussed below—(1) Contingent contracts depending on the happening of future uncertain event, cannot be enforced by law until & unless the event has happened. If the event happens to be impossible, the contingent contrects are treated as void. Sec. 32.

(2) Contingent contracts depending upon the non-happening of an uncertain future event, can be enforced when the happening of that event becomes impossible and not before Sec. 33.

(3) "If the future event on which a contract is contingent is the way in which a person will act at on 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". Sec. 34.

(4) Contracts contingent upon the happening of an event within a fixed time become void if, at the expiry of the fixed time, such event has not happened, or if, before the time fixed, such event becames impossible contracts contingent upon non-happening of an event 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. Sec. 35.

(5) Contingent agreements for doing or not doing anything are void, if an impossible event happens, whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made. Sec. 36

Example—Karim agrees to pay Rahim Tk. 1000/- if Rahim marries Karim's daughter Mina. Mina was dead at the time of the agreement. The agreement is void.

Performance of contracts : Definition. Performance of a contract means carrying out of the obligations created by the contract. Section 37of the contract Act lays dows that, "The parties to a contract must either perform or offer to perform their respective promises unless such performance is dispensed

with or executed under the provisions of this Act, or of any other law."

Offer to perform. The offer to perform the contract is called Tender. Tender is an attempted performance. In order to be legally valid a tender is required to fulfil certain conditions which are discussed below : (1) The tender is to be unconditional, because a tender together with a condition is no tender.

Example —Karim travelling in a Bus offered a ten taka note for the fare of only one taka. This is not a valid tender because it ascribes a condition on the Bus contractor for the return of the balance of the ten taka note. Besides, a tender of money must be of the exact amount due.

(2) It is a must that the tender be made in the right place and in the right time. What is right place and time depends on the intention of the parties and the provisions of sections 46-50 of the contract Act. It is mentioned here that if the tender is made before the due date or in the place and time other than that agreed by the parties, it will not be a valid tender.

(3) The tenderer must have to give reasonable opportunity to the person to whom the tender is to be made so that he can determine that the tenderer is able and willing, there and then to perform the whole of what the latter promised to do.

(4) Tender money must be in legal tender money. It will not be lawful if the tender money is provided by foreign money, handnote or cheque.

(5) If a promise is given to supply certain products, in that case the other party (Promisee) must be given opportunity so that he can examine if the products delivered are in conformity with the promise made by the promiser.

(6) If there are more than one promises in a contract, then an offer to any of them to perform the promise will be regarded as valid tender.

If the promiser makes an offer of performance to the promisee and if the offer is not accepted by the promisee, an that case the promiser will not be responsible for the

performance of his promise. However in that case his rights in the contract will not be affected.

Who will perform the contract : Under sections 40-43 of the contract Act the rules regarding who will perform contracts have been indicated which are discussed as under :

(1) Personal performance—In the cases where the promiser has personal skill, taste, or credit, the contracts will be performed by the promiser himself. Sec. 40.

(2) Performance by representative—In all other cases the promiser or a competent representative employed by the promiser may perform the contracts. Sec. 40.

Example—Karim promises to pay Rahim Tk. 5000/-. Karim himself may perform the promise by paying the money to Rahim or getting it paid to Rahim by another.

(3) Performance by a third party—If a promisee accepts performance of the promise by a third party, in that case the promisee cannot enforce the performance of the promise against the promiser. Sec. 41.

(4) Performance by promiser's Heir or legal representative—If the promiser dies before the performance of the promise, in that case the responsibility of performing the promise falls on the promiser's Heir or legal representative. Of course, Heir's or representative's liabilility will be limited by deceased person's property. They will not be personally liable for this.

If the promiser's personal skill is involved in the performance of the promise, in that case the contract will be terminated along with the death of promiser. In this Heir or legal representative will not be bound of for performance of the contracts. If the promisee dies, his Heir or legal representative will demand the performance of the promise.

Devolution of Joint Rihgts and Liabilities : Two or more persons may enter into joint agreement with one or more persons. Example—Karim and Rahim jointly promise to pay Tk. 5000/- to Hashem and Hossain. In these cases question may arise as to who is liable to perform the contract and who can demand the performance: The rules in this regard are discussed below. Sec. 42-45.

(1) 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 must jointly fulfil the promise. If one of the joint promisers dies then his liability devolves on his legal representatives who become liable to perform the contract jointly with the surviving parties. In case all of the promisers die, then the liability will devolve upon their legal representatives jointly. Sec. 42.

(2) Performance of promise of the joint promisers—If two or more persons make a joint promise then the promisee can compel any one of the joint promisers for performance of the promise completely on condition that there is no difference of opinions in the contact. If one or more joint promisers become unable to perform the promise then the other joint promisers must have to bear the loss resulting from the inability. Sec. 43.

(3) If the promisee releases one of the joint promisers from the performance of the promise, despite that the remaining promisers cannot be free from being liable and the person so released from responsibility shall be liable to the other promisers. Sec. 44.

(4) Effect of the death of the promisee—In some cases when a person makes a promise to several persons jointly, then in those cases the right to claim performance rests on all the promisees on condition that there is no contrary condition in the contract. When one of the promisees dies, then his legal representative together with other surviving promisees gain the right to claim performance of the promise. Again when all the promisees die then the legal representatives of all of the dead promisees will have the right to claim performance of the promise. Sec. 45.

Example—Karim promises Rahim and Azim to repay them the money with interest on a certain day, in consideration of Tk. 5000/- lent to Karim by Rahim & Azim. In this situation Rahim dies. Now the right to claim the performance falls on Rahim's representative jointly with Azim during Azim's life and after the death of Azim with the representative of Rahim and Azim jointly.

Reciprocal Promises : Definition—When one party makes a promise in consideration of a promise from another party to do or not to do something in future, then it is called reciprocal promise. Therefore, a contract of reciprocal promise is an exchange of promises.

Example—Karim and Rahim enter into a contract on condition that the former will give 10 maunds of rice to the latter after six months and Rahim will repay the price after 3 months. This is therefore a reciprocal agreement or contract.

In the sections 51-54 of the contract Act the rules regarding performance of the reciprocal promises have been laid down. These are discussed below—

(1) Necessity of performance of promise—In case when both the promiser and the promisee are bound in a contract to perform the promise at the same time, then promiser is not bound to perform his own promise if the promisee is not prepared and agreed to perform his own promise. Sec. 51.

(2) Order of performance of promise—If the order of performing the reciprocal promises is expressly indicated in the contract, then the reciprocal promises will be performed in that order. And if the order of performance of reciprocal promises is not clearly indicated in the contract, then these promises will be performed according to the nature of transactions. Sec. 52.

(3) Consequence of preventing performance—When contracts consist of reciprocal promises and one party in the contract prevents other party of the contract prevents other party of the contract to perform the promise, in that case the contracts will be treated as void according to the intention of party prevented and the prevented party will be entitled to claim compansation from the other party for non-performance of the contract.

(4) When contract is established on the mutual promises and is such that one party cannot perform his promise and as a result performance of the promise by the other party is not possible or that its performance cannot be claimed, in that case if the first-party does not fulfil his promise, the other

party cannot claim the performance of the promise and because of non-performance of the contract the other party sustains any loss, in that case the first party to the contract must make compensation for the loss to the other party. Sec. 54.

(5) Agreement to do impossible act—If an act is usually impossible, then its promise will be treated as void. Sec. 56.

(6) Promises for doing legal as well as illegal acts or things—If there are promises for doing both legal and illegal things in the reciprocal contracts, then the promise of legal thing will be enforceable contract, but the promise of the illegal thing will be treated as void. Sec. 57.

Assignment of contracts :

The meaning of assignment is transfer. The rights and liabilities of a party of a contract can be assigned in some certain cases. Contract can be assigned by act of a party or by operation of law. The rules about assignment of contracts are discussed as under.

(1) If there are personal skills, ability or other personal qualifications in contracts then in that case the contracts cannot be assigned.

Example—A contract of marriage, etc.

(2) The liabilities under contracts cannot be assigned.

Example—If Karim owes Rahim Tk. 500/- he cannot assign the liability to Azim and compel Rahim to collect the money from Azim.

(3) The promiser himself will perform the promise. In the absence of any such condition in the contract, the promiser can perform the promise by a competent representative.

(4) In the absence of personal skills or volition involved in contract, the rights and benefits can be transferred.

(5) A contract may be established in such a way that a party to the contract can realize his beneficial interest or right from the contract by making litigation. This sort of claim is called actionable claim or choice in action.

Example—Book debts, a money debt, an option to repurchase a property already sold etc.

(6) If a party to a contract dies or is declared insolvent, the contractual right can be assigned by operation of law. When a party to a contract dies, his rights and liabilities under the contract devolve upon his heirs and legal representatives except in the case of personal skill or qualification. If a party to a contract is declared insolvent, then his rights and liabilities under the contract will pass to the official Assignee or the official Receiver.

Time and place of performance : Generally the time and place of performance of promise are determined by the concerned parties of the contract. The general rules regarding this have been laid down in the sections 46 to 50 of contract Act. These are, therefore, discussed as under :

(1) Where, by contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time. The question what is a reasonable time is in each particular case a question of fact. Sec. 46.

(2) Where a promise is to be performed on a certain day, and the promiser has undertaken to perform it without application by the promisee, the promiser 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. Sec. 47.

(3) When a promise is to be performed on a certain day, and the promiser 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. The question what is a proper time and place is, in each particular case, a question of fact. Sec. 48.

(4) 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 promiser to apply to the promisee to appoint a reasonable place for the performance of the promise, and perform it at such place. Example—Karim agrees to supply 100 maunds of paddy to Rahim on a certain day. For the purpose of determination of reasonable place Karim is to make

application to Rahim and on that fixed place he is to supply the goods.

(5) The performance of any promise may be made in any manner or at any time which the promisee prescribes or sanction. Sec. 50.

Example—Karim owe Taka. 1000/- to Rahim. Rahim gives some goods to Karim in order to reduce the amount of debt and Karim accepts it. The delivery of the goods here works as part payment of the debt.

Performance of promise within stipulated time : In many times there are indications in the contracts that the contracts are to be performed within stipulated time. In such case the court will decide on the basis of the nature of transactions, if the time prescribed in the contract is the essence of the contract. Only if there is stipulated time in the contract for the performance of the contract, then time will not be considered as essence of the contract. This question is to be judged on the basis of nature, formation, objective, etc. of the contract. Generally in the commercial contracts for supply of goods, time is treated as the essence of the contract. But in the case of payment of price fixed time is not the essence of contract.

Rules for appropriation of payment :

In many times it is found that one person owes several distinct debts to another person. In this regard question may arise, at the time when payment in part is made, as to which debt the payment is to be appropriated. In Bangladesh contract Act the rules in this respect have been laid down in the sections 59-61. These rules are discussed in summarised way as follows :

(1) If the debtor at the time of making payment clearly tells the creditor that the payment has been made for the discharge of some particular debt in that case the payment if accepted, will be appropriated as according to the intention of the debtor. Sec. 59.

(2) In the absence of express information, but if it can be implied from the circumstances that the debtor has intended

the appropriation to a particular payment, in that case if the payment is accepted the appropriation is to be applied according to the debtor's intention or as according to the prevailing circumstances.

(3) In the absence of express or implied appropriation by the debtor, the creditor may appropriate the money given by the debtor, to any lawful debt. The creditor may also appropriate the payment according to his intention, to such debt as is barred, by the law of limitation. It is because that for the debt which has been barred, the creditor does not get any remedy from the court, rather his demand becomes obsolete. Sec. 60.

(4) In case the debtor has not expressed his intention about the appropriation of the money and the creditor also has not appropriated the money in some day or other, in that case the money shall be appropriated first for the discharge of debts in order of time, it does not matter if the debts are barred or not, and the remaining money (surplus) shall be appropriated for the subsequent debts in order of time. If the debts are of the same date, in that case the payment shall be appropriated for the discharge of all debts in order of time. The debts which have been barred will be considered as included in other debts. Sec. 61.

Termination of Contracts Method of termination : If the concerned parties to legally established contracts are not released from the performance of the promises stated in the contracts, in that case the parties of the contracts will be bound to perform their promises accordings to the conditions of the contracts—When the obligations created by a contract conclude, the contract then is said to be terminated or discharged.

In any of the following ways a contract may be terminated :

(1) By performance of the promise.

(2) By a new agreement in place of the old one with the consent of both the parties of the contract.

(3) By impossibility of performance of the contract.

(4) By operation of law in cases of death, insolvency, etc.

(5) By very significant alteration of the contract.

(6) By lapse of time.

(7) By breach of contract.

The rules about termination of contracts are described as follows :

(1) Discharge or termination by performance—When a party to a contract performs his promise his obligations conclude. If all the parties of the contract perform their respective promises, the contract ends completely. This is called normal mode of termination. The offer of performance has the same effect as performance. If a party to a contract offers to perform his promise, his obligations will be discharged if the offer is not accepted by the other party. Sec. 38.

(2) Termination by mutual new agreement—By consent of all the parties of a contract if a new agreement is made in place of the old one, that is Rescission, Alteration or Novation of the contract can cause the termination of the old contract. It has been stated in section 62 that "If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the orginal contract need not be performed". Generally a contract may be terminated by mutual agreement of both the parties in the undermentioned cases :

(a) **Novation**—According to Lord Selborne—Novation occurs when a new contract is substituted for an existing one, either between the same parties or between different parties. Novation cannot be compulsory. Novation, therefore, occurs in two ways namely, change of parties and a substitution of a new contract in place of the old one.

(b) **Alteration**—The meaning of alteration is change. Therefore alteration of a contract means change in one or more of the terms of a contract. Alteration is said to be valid if it is made with the consent of all the parties of the contract. In alteration there is only change in the terms of the contract. But there is no change in the parties of the contract. In Novation as stated above there may be change in the parties.

(c) **Remission**—It has been stated in section 63 of the contract that the 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." So in Bangladesh a promisee may remit or give a part of his daim and a promise to do so is binding even though there is no consideration for doing so.

(d) **Rescission**—The term "Rescission" means cancellation of all or some of the terms of a contract. The concerned parties to a contract may with their own mutual agreement, rescind the old contract. As a result the parties of the old contract are released from all the obligations of the contract.

(3) Termination by impossibility of performance—It has been stated under section 56 of the contract act that a contract of performing an impossible act will be treated as void. Therefore, this type of contract is void ab initio and does not create rights and obligations. Example—a promise for riding a horse to the sun. If a contract which was capable of being performed at the time it was made but later on becomes impossible for performance, then it is treated as void and this is known as doctrine of supervening impossibility. This supervensing impossibility occurs in the following ways :

(1) Change of law—This means the performance of a contract may become unlawful when there is subsequent change of law.

(2) Supervening impossibility may occur by destruction of an object which is necessary for the performance of a contract.

(3) If a contract is made on condition that there will be continued existence of a certain state of things, then the contract will be terminated when a change occurs in the state of things. Example—Karim & Hasina enter into a contract for the purpose of marriage. But on the day before the marriage Hasina becomes mad. In this case the contract will be void.

(4) Personal incapability—If there is occurrence of personal incapacity of a party which is the basis of the contract, then the contract will be terminated or discharged.

(5) War—Because of outbreak of war, in many cases it becomes impossible to perform an act according to the contracts and as a result the contract is terminated. Besides during war contract entered into with a citizen of enemy country is void ab initio. And even after the war such contract cannot be made effective.

Doctrine of Frustration : Definition—When the object of a contract can no longer be performed, then the court may declare that the contract has been terminated. This is called the Doctrine of Frustration. According to Anson "Most legal systems make provisions for the discharge of a contract where, subsequent to its formation, a change of circumstances renders the contract legally or physically impossible of performance". In English Law before 1863 a contract not being illegal agreement was enforced literally. All the parties of a contract had obligations to perform the contract. The Doctrine of Frustration emerged from the decisions of the courts after 1863. In English Law there are certain limits of the Doctrine of Frustration which are as follows :

(1) If the Frustration is self-induced by the party the contract is not frustrated.

Example—Negligent acts.

(2) The Frustrating event should defeat the common intention of the parties. There cannot be frustration on one side only.

In Bangladesh law—The doctrine of frustration of contract comes into play when a contract becomes impossible of performance, after it is made, on account of circumstances beyond the control of the parties. It comes within the purview of section 56 of the Bangladesh contract. The word "Impossible" in this section 56 has not been used in the sense of physical or literal impossibility. The performance of act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view.

And if an untoward event or change of circumstances totally upset the very foundation upon which the parties

rested their bargain it can be said that the promiser finds it impossible to do the act which he promised to do.

(4) Discharge by operation of law—Contract is terminated by operation of some law. Example—If a person is declared insolvent under insolvency Act, he will get exempted from all the obligations of his contracts and all the contracts entered into by him will be terminated or discharged. Similarly if a party of the contract dies, then in some cases contracts are terminated. And the contracts depending on the ability, reputation and personal skill of a party will be terminated if death occurs of that party.

(5) Termination by significant alteration—If the important terms of a contract are significantly altered by a party to the contract without taking consent of the other parties, in that case the contract will be terminated and will not be enforced.

Significant alteration means a change that affects substantially the rights and liabilities of the parties. Contracts with tampered changes are naturally treated as unenforceable.

(6) Termination by lapse of time—In many cases contracts are terminated by lapses of time. For instance, in many times contracts are discharged by 'laws of limitation'. According to Laws of limitation a debt cannot be realized after 3 years. After that time the debtor becomes released from debt and the contract under which the debt was taken is also terminated. The different timings (durations) relating to the different contracts and claims have been stated in the Laws of Limitation.

(7) Discharge by breach of contract—If a party commits breach of contract, then the contract will be terminated. In cases where the promiser has not performed the promise or has not offered for the performance of the contract or the promise has not remitted the performance of the contract by his consent or has not remitted the performance of the contract, or that the performance of the contract has been defective, in those cases the contract will be considered as broken by the promiser.

There are two ways in which breach of contract can take place.

(1) Actual Breach—This occurs when during the performance of the contract or at the time when the performance of the contract is due, one party to the contract either fails or refuses to perform his obligations under the contract. Refusal of performance may be express or anplied or abstaining from doing something.

Example—Karim agrees to deliver to Rahim 10 mounds of rice on first July. Karim fails to do so on that date (first July). This is a breach of contract by Karim.

(2) Anticipatory Breach—This type of breach takes place when a party repudiates or denies his liability under the contract before the time for performance is due or when a party by his own act disables himself from performing the contract.

Example—Karim entires into a contract to supply Rahim with 10 tons of rice on 1st July. But before that Karim intimates Rahim that he is unable to supply the rice. This is anticipatory breach of contract.

Consequences of anticipatory breach : If contract is broken before, then the affected or aggrieved party can take the undermentioned steps : (1) He can treat the contract as terminated. In that case he will not have to perform the obligations under the contract. (2) He can immediately take legal remedies for brech of contract. That is, he can file a suit in the court by claiming compensation for damages or specific performance or injunction. It is not the case that the contract will be terminated when the anticipatory breach of contract occurs. The contract will be terminated only when the affected or aggrieved party will consider the breach of contract as equivalent to real treach of contract. In that case also he can file suit in the court for the breach of contract before the stipulated time for the performance of the contract. But if the aggrieved party does not consider the anticipatory breach of contract as equal to real breach of contract, the contract continues to exist and the other party can perform the

contract according to his convenient time. It is mentioned here that in this case if before the fixed time for the performance of the contract it is not possible to perform the contract for any legal reason *e.g.* supervening impossibility, in that case the aggrieved party will lose his right for claiming compensation for damages. However, it is to be remembered here that the promisee can file a suit in the court for the non-performance of the condition precedent imposed by the promisee. Example—Karim agrees to employ Rahim as a messenger on condition that service will commence on 1st July. But on 1st June he intimates Rahim that his services will not be required. On 15th June Rahim files a suit for damages. Rahim is entitled to do so even though the date of performance of the contract has not arrived.

Remedies of Breach of contract : When a contract is broken, then the affected or aggrieved party is entitled to the undermentioned remedies :

(1) Suit for damages—If the aggrieved party suffers any loss or damage because of the breach of contract, he is then entitled to claim compensation for such loss on damage caused to him and he can also file a suit in the court for a decree for damages.

(2) Suit upon quantum Meruit—When breach of contract occurs after the party performance of the contract, then in some cases the aggrieved party can file suit for the price of the servies performed before the breach of contract.

(3) Specific performance—In some special cases the aggrieved party can file suit for the performance of the contract on the basis of the terms agreed upon by the parties.

(4) Injunction—In few cases the court may direct the order concerned party of the contract to abstain from such activities which may cause breach of contract upon the application made by the aggrieved party.

(5) Rescission of contract—The aggrieved party can treat the contract as void from his side and he is freed as well from all the obligations under the contract. Sec. 67. In addition the

affected party can file Declaratory suit—in the court against the breacher of the contract for the purpose of getting released from all the obligations under the contract.

The methods of legal remedies that are entitled to the aggrieved party because of breach of contract are discussed in detail as under :

Damages : The money that is received by the affected party as compensation from the party committing breach of contract is called damage. The damages that are allowed by the courts are of the following types :

(1) Compensatory Damages—Damages that are allowed to compensate the loss suffered by the aggrieved party are called compensatory damages.

(2) Nominal Damage—Where the court finds that the damage suffered by the party is not of substantial amount or when the courts is their opinion find that the plaintiff has not suffered any loss at all in that case the court grants a trifling amount of money for damages to the plaintiff. These are called nominal damages. They are also called contemtuous damages.

(3) Punitive, Exemplary or vindictive Damages—Damages that are allowed by the courts in excess of the actual loss suffered on account of punitive steps or actions are called punitive, exemplary or vindictive damage. These damages are generally granted in cases of breach of contract of marriage and against the bankers who refuse to pay the customers' cheques despite that there are sufficient amount of money of the customers in the banks.

Rules Regarding the Amount of Damage—The rules for ascertaining the amount of damages have been stated is the sections 73-75 of the Contract Act. Under section 73 it has been laid down that "when a contract has been broken, party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach or which the parties knew when they made the contract to be likely to result from the breach of it."

The rules, therefore, are discussed in summarised form as follows :

(1) Actual amount of loss—Usually, the affected party is entitled to claim as compensation only the actual amount of loss suffered by him.

(2) Usual loss—In ascertaining the actual loss, the court will consider only that kind of loss which is fair and reasonable and which virtually has arisen from the usual course of things.

(3) Going back to the previous position—It means—"If a contract is broken law will endeavour, as far as money can do it, to place the injured party in the same as if the contract has been performed."

(4) Damages for remote loss —Generally the court does not grant damages for remote loss. But the court may allow remote damages if such damages were supposed to be in the comtemplation of the both the parties at the time they entered into contract. It is mentioned here that remote damages mean damages that do not arise naturally from the breach.

(5) Expenditure incurred in getting decree—The amount of expenditure incurred by the aggrieved party in obtaining decree for damages may also be realised by the aggrieved party from the other party.

(6) Minimization of loss—The aggrieved party must have to take all necessary steps to minimize the amount of damage or loss, if he is to realize damage. But if there is any loss caused by the negligence of the aggrieved party, then in that case he cannot claim any damage for that.

(7) If in the contract a sum of money is mentioned as the amount to be paid in the case of breach of contract then the court will allow reasonable compensation which will not be in excess of the sum mentioned or named in the contract.

(8) Difficulty of assessment—Difficulty faced in ascertaining or calculating the damages cannot be a ground for refusing damages. The court must make an assessment of loss and pass a decree for it. The aggrieved party will get the damage by dint of this decree.

A-65262

Liquidated Damages and Penalty : In some cases there is a provision in the contract as to the amount of money that will be payable in the case of breach of contract. Question in this respect arises as to what will be the actual damage. The principles that are followed in this regard are discussed below :

English Law—The amount of money payable is termed either as liquidated damages or as penalty. If the amount is fixed by the parties on the basis of a rational estimate of the actual loss, then it is called liquidated damage. But when the amount is ascertained not on the basis of rational estimate of the actual loss but by way of punishment, it is then called penalty. The courts in English law allow only the stipulated amount and not more or less of it. Penalty is treated as invalid. The courts allow only the reasonable amount of damage.

Bangladesh law—The Bangladesh law does not make any distinction between liquidated damages and penalty. Under section 74 of the contract Act in Bangladesh it has been stated that if the parties have fixed what the damage will be the courts will never allow more of it, rather the court may allow less of it.

There is, ofcourse, exception to section 74, it is that any person entering into any bail bond for the performance of any public duty shall be liable to pay the whole sum indicated in the bond, if there is breach of condition of the bond. For this purpose actual less is not to be ascertained.

Example—Karim contracts with Rahim to pay Tk. 500 if he fails to pay Tk. 300 on a certain date. Karim fails to pay Rahim Tk. 500 on the date. Now Rahim is entitled to realize from Karim an amount of compensation that does not exceed Tk. 500 and which the court considers reasonable.

Quantum Meruit : If some person is paid the money earned by him, that is when that person is given a payment in proportion to the work done by him, it is then called quantum Meruit.

The Rules for the Doctrine of Quantum Meruit are described as under : (1) If a party breaks contract, the aggrieved

party then can claim reasonable compensation for the amount of work he has done under the contract.

(2) If for any legal reason a contract becomes unenforceable and if one party has done something under the contract, then he is entitled to reasonable compensation for that something. This has been stated under section 65 of the contract Act.

(3) "Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of or to restore, the thing so done or delivered." Section 70.

Example : Karim, by mistake, has left some goods to Rahim. And Rahim has used those goods thinking them as his own. In this case Rahim is bound to pay Karim the price of the goods.

(4) If a contract cannot be divided into different parts and considerable amount of money is agreed to be paid for the complete or whole work, then part performance of the work will not make the principle of Quantum meruit.

(5) Where there is no evidence of express or implied promise to pay for the work done or completed before, in that case the principle of the Quantum Meruit will not be applicable.

(6) A person responsible for the breach of contruct cannot claim any payment under the principle of Quantum Meruit.

Specific performance : Performance of the promise by the concerned parties of the contract according to the terms of the contract is called specific performance. Under certain cases of the breach of contract, the aggrieved person/party can file suit for specific performance of what was promised to be done. The court may give order for specific performance if it considers it necessary. Act of giving order for specific performance is entirely discretionary matter for the court. Usually, specific performance is directed in the cases where monetary compensation is not an adequate remedy.

In the following cases specific performance is not allowed :

(1) In cases where monetary compensation is an adequate remedy.

(2) In cases of contructs of personal nature e. g. a contract marry.

(3) In cases where it is not possible for the court for supervising the performance of the contract.

Injunction : Under special cases the court can give order to the person breaking the contract when a representation is made by the aggrieved party of the breach of contract. This order of the court is called Injunction. The court grants injunctions in such cases where the court considers the monetary compensation is not adequate remedy for damage for the breach of contract. The injunction is specially appropriate in the circumstances where "anticipatory breach" takes place.

Example—Karim agreed to buy a plot of land from a company, which is required for his business purpose. Karim promised, in this regard, that he would not buy land from any other company. Karim was therefore restrained by an injunction from buying land from any other company.

Restitution : The rules regarding 'Restitution' have been stated under sections 64 & 65 of the contract Act. Under section 64 it has been stated that when a person, at whose option a contract is voidable, rescinds such contract, he must restore to the other party any benefit which he has received from him. For example— If a contract for sale of machine is avoided because of undue influence then any money received as price of the 'machine' must be refunded. According to section 65, if an agreement which is discovered to be void or if a contract which becomes void then any person receiving any advantage under the agreement or contract is bound to restore it or to make compensation for it, to the person from whom he received the advantage.

The provisions of the section apply to the contracts 'discovered to be void' and contracts which 'become void.' Example—If Karim pays Tk. 500 to Rahim to beat Hassan, the money is not recoverable. The term 'become void' is interpretted literally as when one party rescinds a contract for the default of another party he is entitled to damages but he must restore to the other party any advantage he has received under the

contract. Example—Karim pays Tk. 500 to Rahim in consideration of Rahim's promise to marry Hasina, Karim's daughter. Hasina dies at the time of the promise. The agreement is void. But Rahim must repay Tk. 500 to Karim.

Quasi-contract : Definition—Quasi-contracts are contracts which are not created voluntarily, but in which the relations among the parties resemble the relations which are created virtually by contracts. The court treats Quasi-contracts as real contracts and compels payment which is promised under such contracts. In cases of Quasi-contract the parties are put in the same position as they would have occupied had there been a contract between them. Therefore, the contracts which exist in law only but not in fact, are called Quasi-contracts. In the Bangladesh Contract Act, the Quasi-contracts are described as the relations resembling those of contract.

The Bangladesh Contract Act under its section 68-72 describe the cases which are treated as Quasi-contracts :

(1) Supply of necessaries to incapable persons—under section 68, it has been stated that "If a person incapable of entering into a contract or any one whom he is legally bound to support is supplied by another person with necessaries suited to his condition in life, the person who has furnished such 'supplies is entitled to be reimbursed from the property of such incapable person.

(2) Reimbursement of a person meeting debt—In this case section 69 provides as follows "A person who is interested in the payment of money which another is bound by law to pay and therefore pays it, is entitled to be reimbursed by the other."

(3) Liability of persons enjoying benefits of non-gratuitous acts—In this case under section 70 it has been stated that "where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

(4) Finder of goods—In this regard section 71 says—"A person who finds goods belonging to another and takes them into his custody, is subject to the same responsibility as a bailee".

(5) Money paid by mistake or coercion—In this case section 72 provides that "A person to whom money has been paid, or anything delivered by mistake or under coercion, must repay or return it".

Example—Karim and Rahim jointly owe Tk. 2000 to Hassan. Karim alone pays the amount to Hassan, and Rahim, not knowing this fact, pays Tk. 2000 over again to Hassan, Hassan is bound to repay the amount to Rahim.

CONTRACT OF INDEMNITY AND GUARANTEE.

Contract of Indemnity : Definition—Under section 124 of contract Act, a contract of indemnity has been defined as a contract by which promises to save the other from loss caused to him by the conduct of the promiser himself or by the conduct of any other persons, is called a contract of indemnity.

Example—Karim contracts to Indemnify Rahim against the consequences of any proceeding which Hassan may take against Rahim in respect of a certain sum of Tk. 500. This is called a contract of Indemnity. Karim is called the Indemnifier and Rahim the Indemnity-holder.

Characteristics of contract of Indemnity are the following :

(1) A contract of guarantee must satisfy all the essential elements of a contract.

Example—The object must be lawful, there must be free consent, etc.

(2) The contract may be express or implied. An express contract is by word or by waiting. An implied contract of Indemnity comes from the circumstances of the case or the relationship between the parties.

(3) Section 69 implies a promise of indemnify.

Section 124 of the contract Act has not given an exhaustive definition of contracts of indemnity. It includes only express promises to indemnify and the circumstances where the loss arises from the conduct of the promiser or from the conduct of any other person. Implied promises to indemnify and cases where loss arises from accidents are not included in section 124.

Right of the Indemnity-holder according section 124 of the contract Act the indemnity-holder has the right to obtain the following matters from the indemnifier :

(1) all damages that he is compelled to pay in any suit —regarding any matter to which the promise to indemnity applies.

(2) all costs that he may be compelled to pay in suits.

(3) all sums which he might have paid upon compromise of suits.

It is mentioned here that the rights of the indemnity-holder are not exhaustive under section 125. He is rather entited to other allied reliefs also.

Contracts of Guarantee—Under section 126 of the contract Act a contract of guarantee has been defined as a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the surety. The person in respect of whose default the guarantee is given is called the 'Principal Debtor', and the person to whom the guarantee is given is called the 'Creditor', A guarantee may be either oral or written". Example—Karim lends Tk. 500/-to Rahim and Hassan promises to Karim that if Rahim does not pay the money Hassan will pay the sum. This is a contract of guarantee. Rahim is called the Principal Debtor, Karim the Creditor, and Hassan the Guarantor or the Surety.

Classification of contracts of Guarantee : Contracts of guarantee are of three types namely—(1) for payment to the creditor to the principal Debtor by Guarantor, (2) Payment of price for goods sold, and (3) fidelity guarantee. That is, guarantee by discharge of the liability of a person for good

conduct of a service holder. There can be a contract of guarantee for future debt or for an existing debt Guarantee can be categorised into–(1) simple guarantee, or (2) conditional guarantee.

Vital elements of a valid Guarantee : The vital ingredients of a valid Guarantee are discussed below :

(1) A contract of valid guarantee shall have to fulfil all the vital ingredients of a contract, that is the object should be lawful and there should be free consent,

(2) according to section 126 a contract of guarantee should be either oral or written,

(3) a contract of guarantee must consist of three parties namely, the creditor, principal debtor and the surety,

(4) the principal debtor has the primary liability in a contract of guarantee and the surety becomes liable if the principal debtor fails to perform his promise,

(5) a minor may be the principal debtor for in a contract of guarantee. The surety is liable to pay even if the minor may not be liable. And the contract shall be enforced between the surety and the creditor,

(6) The consideration as received by the principal debtor is to be sufficient for the surety in the contract of guarantee. In this regard it has been stated under section 127 of the contract Act as follows–'Anything done or any promise made, for the benefit of the principal debtor, may be a sufficient consideration to the surety for giving the guarantee.'

Example–Karim requests Rahim to sell and deliver to him goods on credit, Rahim agrees to do it, on condition that Hassan will guarantee the payment of the price of goods. Hassan promises to guarantee the payment in consideration of Rahim's promise to deliver the goods. This is sufficient consideration for Hassan's promise.

Invalid contracts of guarantee the under mentioned contracts of guarantee will be treated as invalid :

(1) Misrepresentation–Under section 142 of the contract Act it has been stated that–"Any guarantee which has been obtained by means of misrepresentation made by the creditor,

or with his knowledge or assent, concerning a material part of the transaction, is invalid."

(2) Concealment—According to section 143—"Any guarantee" which the creditor has obtained by means of keeping silence as to material circumstances is invalid".

(3) Absence of co-surety—If a person makes guarantee upon a contract that the creditor will not act upon it until another person has joined in the contract as co-surety, in that case the guarantee will not be valid if that other person does not join. Section 144.

(4) Lack of vital ingredients—A contract of guarantee will not be valid if the contract lacks one or more of vital ingredients of the contract namely free consent or lawful object, that is if there is want of free consent or if the object is illegal.

Contract of Indemnity distinguished from contract of Guarantee.

Contract of Indemnity	Contract of Guarantee.
1. There are two parties in the contract of indemnity, namely indemnifier and the Indemnity-holder.	1. There are three parties in the contract of Guarantee namely the creditor, the surety, and the principal Debtor.
2. In the case of contract of Indemnity the liability of indemnity arises only on the happening of a certain event in future. That is in this case liability of indemnity is created only on the happening of a contingency.	2. In the case of contract of Guarantee there is existence of same debt or liability and surety is given for the payment of the debt.
3. In the case of contract of Indemnity the indemnifier is primarily responsible for the performance of the	3. In the case of contract of guarantee the surety is secondarily responsible for the performance of his

contract. The reason being that in this case the performance of contract does not depend on the performance of promise of the other party.	promise despite he is liable for the performance of his promise. It is because the liability of the surety is created only when the principal debtor fails to perform his obligation in the case of contract of guarantee.
4. In the case of contract of indemnity, the indemnifier must have to bear the losses excepting in some special cases.	4. In the case of contract of guarantee the surety can realize the money which is due to him from the principal debtor after discharging the debt owing to the creditor.
5. The contract of Indemnity may not necessarily be in writing.	5. The contract of guarantee must necessarily be in writing according to the statuse of frauds in English law.

Continuing Guarantee : Definition—Section 129 of the contract Act defines continuing guarantee as "A guarantee which extends to series of transactions is called a continuing guarantee." Example—Rahim in consideration that Karim will employ Hassan for collecting rents of Karim's Zamindari, promises Karim to be responsible, upto the amount of Tk. 10,000, for the due collection and payment by Hassan of those rents. This is a continuing guarantee.

Revocation of continuing guarantee : The circums tances in which a continuing guarantee can be revoked are mentioned below :

(1) Notice of revocation—The surety may revoke his liabilities, by giving notice to the creditor, for the transactions made after the notice. But he will remain responsible for the transactions made prior to the notice. Section 130.

(2) Death of Surety —When the death of surety occurs then the continuing guarantee will be treated as revoked for the future transactions, unless there is a contract to the contrary. Section 131. In this the estate of the surety shall be liable for the transactions made before the death of the surety. The creditor must not have the notice of death. The termination of the continuing contract occurs under the same conditions under which the liability of the surety is discharged.

Liability of the surety : Under section 128 of the contract Act it has been stated that "The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract."

The creditor if he so wishes can sue against the surety first without doing the same against the principal debtor; or he can sue against both the surety and the principal debtor If the principal debtor is a minor, then only the surety will be liable to the creditor.

Discharge of Surety : Under the following conditions the liability of a surety may be discharged :

(1) Notice of Revocation—A contract of guarantee can be revoked by a notice of revocation. In the case of continuing guarantee the surety can revoke the guarantee for the future transactions by serving a notice of revocation to the creditor. Section 130.

(2) Death of surety—In the absence of any contract to the contrary, continuing guarantee can be revoked as regards the future transactions at the death of the surety. Section 131.

(3) Variation of contract—According to section 133 of the contract Act 'Any variance, made without the surety's consent, in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance.'

(4) Release of the principal debtor—In this case it has been stated under section 134 that 'The surety is discharged by any contract between the principal debtor and the creditor, by which the principal debtor is released or by any act or

omission of the creditor the legal consequence of which is the discharge of the principal debtor'.

(5) Compounding or arrangement—If there is a contract entered into as between the creditor and the principal debtor on the basis of which the creditor makes a compounding or arrangement with, or promises to give time to, or not to sue, the principal debtor, then such contract discharges the surety, without the consent of the surety. Section 135. But according to section 136 if a contract is made by the creditor with a third person but not with the principal debtor, by which time is given to the principal debtor, in that case the surety will not be discharged. Example—Karim, a holder of an over due bill of exchange drawn by Hassan as a surety for Rahim and accepted by Rahim, contracts with Hakim in order to give time to Rahim. In this case Hassan is not discharged.

(6) Eventual remedy—Surety is discharged by an act or omission of the creditor which impaires the surety's eventual remedy. Section 139.

(7) Loss of security—If any security given to the creditor by the principal debtor is lost by the latter at the time of the contract of guarantee without the consent of the surety as to the release of such security, the surety will be discharged to the extent of the value of the security. Section 141.

(8) Invalidation of contract—A contract of guarantee is treated as invalid if the guarantee is earned by means of misrepresentation (section 142), silence as to material facts (Section 143) or if a co-surety fails to join according to the terms of the contract (Section 144).

Right of the surety : The rights of the surety are discussed as under—(1) Right against the creditor—In this regard section 140 provides that "the surety upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor."

It has been stated under section 141 that "a surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of surety ship is entered into, whether the surety knows of the

existence of such security or not; and if the credit or losses of without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security."

(2) Right against the principal debtor—In this context section 145 provides that "In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully." Example—A surety settled with the creditor by paying a sum smaller than the amount guaranteed. In this case the surety can recover only what he paid.

Liability of co-sureties : If some persons guarantee a debt or responsibility, then they are called co-sureties. The liabilities of the co-sureties are discussed below—

(1) Equal sharing of the liabilities by the co-sureties—The co-sureties contribute equally towards their liabilities. In this regard it has been stated under section146 that "Where two or more persons are co-sureties for the same debt or obligation, either jointly or severally, and whether under the same or different contracts and, whether with or without the knowledge of each other, the co-sureties in the absence of any contract to the contrary, are liable as between themselves, to pay each an equal share of whole debt, or of that part of it which remains unpaid by the principal debtor."

Example—Karim, Rahim and Hassan are sureties to Iqbal for a sum of Tk. 6000/= which has been lent to Matin. Matin fails to make the payment. So, here Karim, Rahim and Hassan are liable as between themselves to pay Tk. 2000/- each.

(2) Liability of co-sureties within the limits of their obligations—Section 147 provides that "co-sureties who have guaranteed for different sums, are liable to pay equally as far as the limits of their respective obligations permit."

Example—Karim, Rahim and Hassan as sureties for Iqbal, enter into three several bonds, each in a different penalty, namely Karim in the penalty of Tk. 15000, Rahim in the

penalty of Tk. 20,000, Hassan in the penalty of Tk. 30,000 on condition that Iqbal will' duly pay the sums to Matin. Iqbal fails to pay Tk. 30,000/- in due time, i.e. Iqbal makes default to the extent of Tk. 30,000/-. Here Karim, Rahim and Hassan are each liable to pay Tk. 10,000.

Bailment : Definition. Under section 148 of the contract Act 'Bailment' has been defined as "A bailment is the delivery of goods by one person to another for some purposes, upon a centract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of person delivering them. The person delivering the goods is called the bailor. The person to whom they are delivered is called bailee." Example—Karim gives Rahim his watch as security for a loan. In this case Karim is the bailor and Rahim is the bailee.

Features of Bailment : The following are the features of bailment—

(1) If a person delivers movable goods to another person, then it is called bailment. But the transaction of money or of immovable goods is not called bailment.

(2) Delivery of goods must be for a purpose.

(3) If the purpose is accomplished the goods are returned or otherwise disposed of according to the direction of the bailor.

(4) Bailment is accomplished by express or implied contracts.

(5) In the case of the goods received, bailment is effected by implication of law.

(6) In the case of bailment the bailor will remain the owner of the goods. Therefore bailment does not involve transfer of ownership of the goods.

(7) A person who is already in possession of the goods may be a bailee by subsequent agreement (express or implied). According to section 149 "the delivery of goods to the bailee may be made by doing anything which has the effect of putting the goods in the possession of the intented bailee or of any person authorised to hold them on his behalf."

Classification of Bailment : Bailment may be classified into two categories which are as follows—

(1) Gratuitous Bailment—In this category of bailment neither the bailor nor the bailee is entitled to' remuneration— Example—Karim left his motor cycle to his friend Rahim for safe custody. In this case Rahim will not receive any remuneration, etc.

(2) Non-gratuitous bailment—In this type of bailment either the bailor or the bailee is entitled to remuneration. Example—Motor car let out for hire.

Again bailment has been divided into the following categories :

(1) Bailment for safe custody

(2) Bailment for use

(3) Bailment of pledges

(4) Bailment of lost goods

(5) Carriage of goods.

Duties of the Bailor : The following are the duties of the bailor to the bailee—

(1) Under section 151 it has been stated that "The bailor is bound to disclose to the bailee faults in the good bailed, of which the bailor is aware and which materially interfere with the use of them, or expose the bailee to extraordinary risk, and, if he does not make such disclosure, he is responsible for damage arising to the bailee directly from such faults. If the goods are bailed for hire, the bailor is responsible for such damage, whether he was or was not aware of the existence of such faults in the goods bailed".

Example—Karim hires a carriage of Rahim. The carriage is faulty even though Rahim is not aware of the fault and as a result Karim is injured. Therefore, Rahim is responsible to Karim for the injury.

(2) Section 158 of the contract Act provides that "Where by the conditions of the bailment, the bailee is to receive no remuneration, the bailor shall repay to the bailee the

necessary expenses incurred by him for the purpose of the bailment."

(3) The bailor is responsible for the loss sustained by the bailee. In this regard section 164 provides that "The bailor is responsible to the bailee for any loss which the bailee may sustain by reason that the bailor was not entitled to make the bailment, or to receive back the goods or to give direction respecting them."

Example—Karim gives Rahim's Motor Cycle to Hassan for use without Rahim's knowledge of permission. Rahim sues Hassan and receives compensation. Hassan is entitled to recover his losses from Karim.

Bailor's Rights : The bailor is has the undermentioned rights—

(1) The bailor if he so wishes, can enforce all the duties and liabilities of the bailee with the help of law.

(2) Section 153 provides that "A contract of bailment is voidable at the option of the bailor, if the bailee does any act with regard to the goods bailed, inconsistent with the conditions of the bailment."

Example—Karim lets to Rahim for hire, a horse for his own riding. Rahim drives the horse in carriage. This is, at the option of Karim, a termination of the bailment.

(3) The rights as laid down under section 159 are as follows —When goods are lent gratuitous by, the bailor can demand their return whenever he pleases, even though he lent it for a specified time or purpose. But if the bailee in such cases had acted in such a manner that the return of the goods before the stipulated would cause loss greater than the benefit which he has received, the bailor must indemnify him for the loss if he compels an immediate return.

Duties of the Bailee : The bailee shall have to comply with the undermentioned duties regarding the goods bailed to him—

(1) Care of goods bailed.—In this regard the duties of the bailee have been stated in section 151 of the contract set as "In all cases of bailment the bailee is bound to take as much

care of the goods bailed to him as a man of ordinary prudence would, under similar circumstance, take of his own goods of the same galk quality and value as the goods bailed."

If the bailee takes such care as stated under section 151 he will not be held responsible for loss, destruction or deterioration of the goods bailed, unless anything specially stated in the contract. Section 152.

(2) Unauthorised use of goods bailed.—In respect of this duty section 154 provides that "If the bailee makes any use of the goods bailed, which is not according to the conditions of the bailment, he is liable to make compensation to the bailor for any damage arising to the goods from or during such of them." The bailee will also be responsible for the period of such unauthorised use of goods bailed, even if the bailee is not guilty of any negligence and even if the damage is the result of accident.

(3) Mixture of bailor's goods with bailee's.—For this duty of the bailee the rules that will apply are discussed as under : (a) If the bailee, with the consent, of the bailor, mixes the goods of the bailor with his own goods, the bailor and the bailee shall have interest in proportion to their respective shaws in the mixture thus produced. Section 155. (b) If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, and the goods can be separated or divided, the property in the goods remains in the parfics respectively but the bailee is bound to bear expenses of separation or division, and any damage arising from the mixture. Section 156. (c) If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods in such a manner that it is impossible to separate the goods bailed from the other and deliver than back, the bailor is entitled to be compensated by the bailee for the loss of the goods. Section 157. Example —Karim bails superior flour worth Tk. 75/- to Rahim who without Karim's consent mixes the flour with inferior flour of his own worth only Tk. 35/-. Here Rahim must compensate Karim for the loss of his flour.

(4) Return of goods bailed—In case of this duty, the following rules will apply : (a) It is the duty of the bailee to

return or deliver according to the bailor's divisions, the goods bailed without demand, as soon as the time for which they were bailed has expired or the purpose for which they were bailed has been accomplished. Section 160.

(b) If, by the default of the bailee, the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time. Section 161.

(5) Return of accretion to the goods bailed—In the absence of any contract to the contrary, the bailee is bound to deliver to the bailor, or according to his directions, any increase or profit which may have accrued from the goods bailed. Section 168. Example— Karim leaves a cow in the custody of Rahim to be taken care of. The cow has a calf. Rahim is bound to deliver the calf as well as the cow to Karim.

(6) Bailee's liability for negligence of servants—A bailee is liable for damages caused by the negligence of the servants about the use or custody of the things bailed, when acting in course of their employment. The bailee is not liable for damages caused by the acts or default of third person which cannot be prevented by ordinary prudence. The bailee is also not liable for unauthorised acts of his servants outside the scope of their employment.

(7) Liabilities of Innkeepers and Hotelkeepers— According to England's law the owners of Inns and Hotels are regarded as insurers. Because loss of or damages to customers goods had to be fully compensated by the owners like insurers. Of course, there are certain exceptions to this. In Bangladesh the duties and liabilities of the Innkeepers and Hotelkeepers are governed by the provisions of sections 151 & 152 of the contract Act like those of the bailees.

Rights of the bailee :

According to the contract Act the bailee has the following rights : (1) The bailee can compel the bailor to perform all his duties by making suit.

(2) Bailment by joint owners—In this regard section 165 provides that "If several joint owners of goods bail them, the

bailee may deliver them back to or according to the directions of one joint owner without the consent of all, in the absence of any agreement to the contrary."

(3) The bailee has no liability over the goods without title—In this case under section 166. It has been stated that, "If the bailor has no title to the goods, and the bailee, in good faith, delivers them bought or according to directions of the bailer, the baileoe is not responsible to the owner in respect of such delivery."

(4) Bailee's lien—Lien means the rights to retain property until some debt is paid. Law has recognized the right of lien in the contract Act. It is of two types, namely general lien and particular lien. The former means the right to retain all the goods of the other party until all the claims of the holder are paid. The latter (*i.e.* particular lien) means the right to retain particular goods until claims for these goods are paid. According to section 120 a bailee has a particular lien in case he has put any labour upon an article and for this he is allowed remuneration according the conditions of the contract between him and the other party. But there are some limitations upon the bailee's particular lien which are discussed as under : (1) The lien is available only when the bailee has put labour in respect of the goods bailed, (2) The lian can be exercised only upon the complete performance of the labour. For part performance of the contracted work the bailee is not entilled to lien, (3) For agreement to pay money on future date lien cannot be claimed, (4) Lien can be exercised for as long as the goods are in possession of the bailee. That is, no possession no lien general lien of the bailee—General lien means the right to retain all the goods of the bailor at the possession of the bailee until all the claims of the latter are paid. As regards this general lien section 171 of the Contract Act provides that "Bankers, factors, wharfingers, attorneys of a High Court and policy brokers may, on the absence of a contract to the contrary, retain a security for a general balance of account any goods bailed to them but no other person have a right to retain as a security for such balance, goods bailed to them, unless there is an express contract to that effect."

Termination of Bailment : Under the undermentioned conditions there may be termination of bailment—

(1) Expiry of time—If the bailment is done for a fixed time, it will terminate after the expiry of that time.

(2) Fulfilment of purspose—If the bailment is effected for a specific purpose, the bailment will terminate when this purpose is fulfilled.

(3) Act contrary to the conditions of bailment—If the bailee does an act which is contrary or inconsistent to the conditions of bailment, then the bailment will terminate according to the intention of bailor. Section 153.

(4) Gratuitous bailment—The bailor can terminate any time the bailment which has been made gratuitously. But if because of termination of the bailment before the stipulated time, there is caused any loss to the bailee, the bailor must indemnify the bailee for the loss. Section 159.

(5) Death—At the death of either the bailor or the bailee a gratuitous bailment terminaters. Section 162.

Right and duties of finder of goods : Under section 171 it has been stated that the legal status of the finder of goods will be equivalent to that of a bailee. Therefore, the rights of the finder of goods have been stated under section 168 and 169. These are discussed as under :

(1) Possession—The finder of goods can refuse delivering them to any one other then the true or real owner of the goods.

(2) Damage—The finder of goods will be entitled to compensation if he has put labour and incurred expenses for the maintenance and finding of the owner of the goods. He can refuse to deliver the goods untill the owner is not found out. But he cannot sue for the goods except that he can only retain the goods until the claims he is entitled to are paid.

(3) Reward—If the owner of the goods lost declares any reward for finding out the goods and refuse to give the rewards to the finder of goods, the finder of goods then can sue for the realization of the reward and can retain the goods until the reward is realized.

(4) Sale—The finder of goods has no right to sell them. But if the owner of the goods cannot be found out or if he refuses to pay the lawful charges of the finder, the finder then can sell the goods provided that the undermentioned conditions are fulfilled :

(a) If the goods are likely to perish or lose greater part of their value.

(b) If the lawful charges of the finder are equal to two of their value.

Duties and obligations : The finder of goods is a bailee. He has, therefore, the following duties and obligations: (a) He is to take reasonable care of the goods. Section 151, (b) he is not to mix the finders goods with his own goods. (Section 155-157), (c) the goods shall have to be returned to the true owner of the goods (Sections 160 & 161), (d) any accretion to the goods bailed must be given to the true owner (section 163), (e) he is not to use the goods for his own purpose, and (f) he must make effort to find out the true owner of the goods.

Bailment by way of pledger or pawn : Section 172 of the contract Act has defined pledge or pawn as follows—" The bailment of goods as security for payment of a debt or performance of promise is called pledge or pawn. The bailor in this case is called the pledger or pawner. The bailee is called the pledgee or the pawnee".

Rights of the pledgee or pawnee : according to the Contract Act the pledgee or pawnee has the following rights :

(1) Retaining—In respect of this right section 173 provides that "The pawnee can retain the goods not only for payment of the debt or the performance of the promise but also for the interest of the debt and all necessary expenses incurred by them in respect of the possession or for the preservation of the goods pledged".

(2) Retaining of new debt —The pawnee has particular lien over the goods bailed. He cannot retain the goods for any debt other than the debt for which security was given, if there is no contract to the contrary in this respect ofcourse, if

subsequently the pawnee gives fresh advance or debt to the pledger or pawner, in that case it will be presumed that the pledger or pawner has agreed to create on the goods already pledged a lien for the fresh debt. Section 174.

(3) Additional expenses—If for the preservation of the goods bailed as pledge or pawn additional expenses of special type are incurred, the pawnee is entitled to receive such expenses from the pledger or partner. Section 175.

(4) Selling or sale of goods for non-payment of debt or non-performance of obligation—If the pawnor fails to pay the debt or perform the promise, at the stipulated time, for which the goods were pledged the pawnee then can sue against the pawnor and retain the goods of pledge as collateral security, or he can sell the goods pledged by giving reasonable notice about the sale. If the proceeds of the sale become less than the amount of the debt, the pawnor of the pledge must have to pay the balance to the pawneor or pledgee. On the other hand if the proceeds are found to be greater than the amount of the debt, the pawnee then shall come to pay the surplus to the pawnor. Section 176.

Rights of the pledger or pawnor : The rights of the pledger are discussed as follows—

(1) Redemption—Regarding this right section 177 of the contract Act provides that "If a time is stipulated for the payment of the debt, or performance of the promise, for which the pledge is made, and the partner makes default in payment of the debt or performance of the promise at the stipulated time he may redeem the goods pledged at any subsequent time before the actual sale of them; but he must, in that case, pay, in addition, any expenses which have arisen from the default."

(2) Maintenance—The pledger can enforce the proper maintenance of the goods bailed as pledge or pawn.

(3) Protection of a trust—The pledger will have all the rights given by those acts or statutes which are in vogue for the protection of the interests of the debtors e.g., money lenders' Act.

Distinction between lien, pledge and Mortgage. The differences between these three terms are discussed below : On the case of lien, the person entitled to lien can retain the goods under lien until his claims are paid. But he cannot claim ownership for the goods, i.e. in this case the ownership of the goods cannot be transferred. In the case of pledge, the general property of the goods pledged for the performance of a promise or payment of a debt remains with the pledger, but despite that the pawnee has a special right over the goods. If debt is paid or promise is performed, the right is redeemed. In the case of mortgage, the right of the property is transferred to the mortgagee for the period of mortgage and this is final right. Ofcourse, if the debt is paid, the right has to be returned to the mortgager. Generally pledge is applicable in the case of movable property, whereas mortgage is applicable in the case of immovable property. In the case of pledge, the property remains in the possession of the pledgee, i.e. the person providing the debt, whereas in the case of mortgage the mortgaged property may be in the possession of either the mortgager or the mortgagee. In the case of pledge, the same property cannot be pledged for several times, whereas the mortgaged property can be mortgaged for several times. If some goods are pledged the pledgee then is entitled to be in the possession of them. But in many times debt is provided on the security of movable property even though the right of the property is given to the pledgee. In this case the pledgee will be entitled only to realize the debt from the property and this is called "Hypothecation".

CHAPTER-2
LAW OF AGENCY

Definition of Agent—Under section 182 of the contract Act an Agent has been defined as "a person employed to do any act for another or represent another in dealings with third person. The person for whom such act is done, or who is so represented is called principal." The relationship between the principal and the Agent is called Agency. Example—Karim appoints Rahim to buy 100 bales of cotton on his behalf. Here Karim is the principal and Rahim is his Agent.

According to section 183 of the contract Act "Any person who is of the age of majority according to the law to which he is subject and who is of sound mind, may employ an agent."

Under section 184 of the Act any person may become an agent but one who is a minor or of unsound mind cannot be appointed to act as an agent to a principal so as to be personally liable to the latter.

When a minor is appointed as any agent, he can bring about a contractual relation between the principal and a third party, but personally he is not responsible to the principal like other adult agents.

Functions of Agents—The main function of an agent is to establish relation between the principal and a third party. Generally at the time of appointing an agent his power is indicated and he is authorised to act within the scope of his power Acts of the agent within the scope of his power bind the principal as if he has done them by himself. In this regard there is a legal maxim which means—"He who does through another does by himself. The act of an agent is the act of the pincipal.

Test of Agency—Agency exists whenever a person can bind another by acts done on his behalf. When his power does not exist the relationship is not one of agency. Therefore, a wife is not an agent of the husband excepting under special circumstances and for some special purposes. A constituted attorney of a person is his agent for the purposes indicated in the power of attorney. When an agent is appointed by the

principal by executing a document in writing and stamped, the document then is called "power of attorney". Power of attorney is of two types—namely General and Special. When an agent is given an authority to accomplish certain objectives, it is called general power of attorney. For example—managing a business. On the otherhand a special power of attorney is one by which an agent is appointed and given authority to do a specific thing, e.g. selling goods.

Agent and servant :

1. The agent exercises his power according to the directives of the principal, but he is subject to the direct control of the principal. A servant is to work according to the orders of the master in every particular matter.

2. An agent is appointed to establish contractual relationship of the third party with the principal. A servant is not appointed to establish contractual relationship of the third party with the principal.

3. The agent can establish the principal's relationship of rigidity with the third party. But a servant can not do it.

4. An agent's remuneration depends on the nature of his work done. The agent is provided with commission as the remuneration on the basis of the sale proceeds. A servant is given remuneration at certain rate weekly, monthly or yearly.

5. An agent remains liable for wrong deeds or doings within the limits of his power. A master is liable for all wrong doings of his servant during the period of his (servant) employment.

6. An agent can work for several principals, but a full-time servant may remain employed only for one master. An agent cannot be employed for the work of a servant, but some times a servant may be employed for the works of an agent in special circumstances.

Difference between Agent and Bailee : The differences between an agent and a bailee can be highlighted on the following cases—

(1) The agent cannot have the right of possession over the property or goods of the principal. A bailee has the right of possession over the goods of the bailor.

(2) The agent has the right of establishing contractual relationship with the third party. But a bailee is not entitled to any right to establish contractual relationship of any time with the third party.

(3) In special cases an agent can not do the work of a bailee. But a bailee can do the work of an agent.

Agent and an Independent Contrator : An independent contractor is a person who undertakes to do something for another, provided the manner of doing that something is left with him. He does not represent other contracting party. He also cannot bind him by making contracts with others. An agent is a person who works according to the directives of his principal. He can bind the principal for the contracts entered into by him with other persons within the scope of his authority.

Consideration in Contract of Agency : Section 185 of the contract Act provides that "No consideration is necessary to create an agency. The acceptance of the office of an agent is treated as a sufficient consideration for the appointment. The agency contract provides for the amount of remuneration payable by the principal to the agent.

Who can appoint an Agent : According to section 183 "Any person who is of the age of majority according to the law to which he is subject, and who is of sound mind, may employ an agent."

Who may be an agent : Section 184 provides that "Any person may be an agent, even a minor. A minor acting as agent can bind the principal to third parties. But a minor is not himself liable to his principal."

Joint principals : Several primcipal can jointly appoint one agent who can work in the affairs in which all the joint principals have interests. Power of Attorney is to be strictly construed and its authority will depend on the terms and purposes for which it was executed.

Types of Agents : Agents may be of different types. The relationship between the principal and agent and the power of the latter are determined by agreement made by the parties.

But in many cases in the absence of contract the terms of agency are determined by usage and custom of trade recognized by law. The agent is classified in to the following categories according to the classification of the Agency contract :

(1) Broker—The agent who does not buy and sell in his own name and does not keep under his possession, the goods or property of the principal, but only maintains liaison between buyer and seller in return for a commission, is called broker. In this case the contracts are directly made by the buyers and sellers and after the contracts are made, the broker receives his remuneration or commission.

(2) Factor—A mercantile agent is called a factor. The principal keep their goods or proprietary documents in his possession for the purpose of sale. The factor, can sell these goods at his name in his own discretion and without the disclosure of the name of principal. If the factor wishes he can sell the goods on credit or he can mortgage them. He is entitled to general lien over the goods remaining in his possession as an agent.

(3) Commission agent—The commission agent can sell the goods in the market in his name on behalf of the principal at convenient market price or at a fixed price. On many cases these agent receive possession of the goods from the principal.

(4) Del Credere Agent—A Del Credere Agent is an agent who gives guarantee for the performance of the contract entered into by the other party. Ofcourse he claims extra remuneration for this job. In case the other party fails to make payment of the price or otherwise causes damage to the principal, the del credere agent must have to pay compensation to the principal.

(5) Auctioneer—The agent who sells the principal's goods in the open auction at the highest bid is called "Auctioneer". Goods are preserved at his custody and he can work as agent for both the buyer and seller. Till the moment before the sale of the goods he remains the agent of the principal (the owner of the goods) He acts as the agent of the buyer after the sale of the goods. The auctioneer gets particular lien over the goods

for his remuneration. He can sue the buyer in his own name for the purchase price.

(6) Agent—General and particular—An agent who represents his principal in all matters relating to a particular business is called a general agent. On the other hand an agent who is appointed for a particular purpose is called a particular agent. His powers are limited only for that specific job. For appointment of general agent General Power of Attorney and for appointment of particular (special) agent special power of Attorney are performed. It is the responsibility of the third party to know about the power of the special agent.

Creation of Agency : Agency is created or agent is appointed on the basis of express or implied contract. 'No consideration is necessary to create agency. Section 185.

Agency may be created in the following methods —

(1) By express contract—Agency may be created by oral or written contract. A written contract of agency is generally made by General power of Attorney. Power is provided to the agent to act on behalf of the principal by this General Power of Attorney and the agent is bound to comply with the written terms of the General power of Attorney.

(2) By implied contract—A contract of agency may be implied amongst the parties by their conduct, condition, relationship and surrounding events.

(3) By holding out or estoppel—A contract of agency may be created by estoppel. Estoppel means a conclusive admission which is undeniable by the party whom it affects. If a person has, by his conduct or statements persuaded others to believe that a certain person is his agent, he is prevented from subsequently denying it. Therefore, an agency may be created by implication of law.

Example—Karim allows his servant Rahim to buy goods for him on credit on a regular basis. Rahim does it accordingly but on one occasion he buys some goods without any permission from his Master Karim on credit. Here Karim is responsible to shopkeeper for the price of the goods because Rahim will be deemed to be his agent by estoppel.

(4) Of necessity—In many circumstances a person is forced to act as agent for another person. In such circumstances agency of necessity is created. Generally agency of necessity is created upon the fulfilment of three condition which are as follows :

(1) It was impossible for the agent to get the directives from the principal.

(2) It was of dire necessity to act as agent for another person.

(3) The agent of necessity acted reasonably and with trustworthiness in conformity with the prevailing circumstances.

Example—The captain of a ship ran short of money being in a distant pest. It was not possible for him to communicate with the owner of the ship. In this case the captain can pledge the ship for getting money. In this case the captain will be considered as agent of the owner of the ship by necessity.

(5) By ratification—If for a person another person acts without the knowledge or authority from the former, the first person may adopt and accept the act or refuse it by ratification, if he so wishes. Therefore, ratification means the subsequent acceptance of an act done without directive or authority. In this regard section 196 provides that "where acts are done by one person on behalf of another, but without his knowledge or authority, he may elect to ratify or to his own such acts. If he ratifies them, the same effects will follow as if they had been performed by his authority". There may be express or implied ratification (section 197).

Example—Karim buys goods for Rahim without authority from the latter. Subsequently Rahim sells them to Hassan on his own account. Here the conduct of Rahim implies a ratification of the purchase made by Karim for Rahim.

Ratification becomes valid generally if the following conditions are fulfilled :

(1) The agent must clearly perform contract as an agent. No person by entering into contract in his own name can shift it subsequently to a third party.

(2) For the purpose of ratification the act must be lawful. In case of a void or illegal act there cannot be any ratification.

(3) Ratification must be done in a reasonable time.

(4) According to section 198 ratification by a person will not be valid if he is not in the complete know of the facts relating to the contract.

(5) The whole contract has to be ratified. Partial ratification or rejection of a contract cannot be made. Section 199.

(6) The principal must have contractual capacity at the time the contract was made and at the time when the contract was ratified.

(7) Ratification will not be valid if the ratification causes damage to a third person or terminates any right or interest of a third person. Section 200.

Example—Karim holds a lease from Rahim which is terminable on three months' notice. Hassan an unauthorized person gives notice if termination to Karim. In this case the notice cannot be ratified by Rahim so as to be binding on Karim.

Agent's Authority : According to section 186 of the contract Act the authority of an agent may be express or implied. When an oral or written authority is given it is called express authority. When an authority is implied from the neighbouring circumstances, then it is called implied authority. Section 187. About extent of authority section 188 provides that "an agent having an authority to do an act has authority to do every lawful thing which is necessary in order to do such act. An agent having an authority to carry an a business has authority to do every lawful thing necessary for the purpose, or usually done in the course of conducting such business. (2) Section 189 of the contract Act provides that "an agent has authority, in an emergency, to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence, in his own case, under similar circumstances."

Example—an agent for sale may have goods repaired if it is necessary.

Consequenses when the agent goes beyond the limit of his authority : The consequences are discussed as follows :

(1) Under section 227 it has been stated that "When an agent does more than he is authorised to do, and when the part of what he does, which is within his authority, can be separated from the part which is beyond his authority so much only of what he does as is within his authority is binding as between him and his principal."

(2) Section 228 provides that "Where an agent does more than what he is authorised to do and what he does beyond the scope of his authority cannot be separated from what is within it, the principal is not bound to to recognize the transaction

(3) The principal will be bound by unauthorised acts of the agent in the undermentioned cases : (1) Where the principal is prevented from refusing the authority of the agent by the rule of estoppel :

(2) When the other concerned parties have not received the notice of determination of the agency even though the agency has been terminated.

Misrepresentation and Fraud by Agents : Regarding misrepresentation and fraud by agents it has been clearly stated under section 238 that "Misrepresentations made, or fraud committed by agents acting in the course of their business for their principals, have the same effect on agreements made by such agents as if such misrepresentations or frauds had been made or committed by the principals. But misrepresentation made, or frauds committed by agents, in matters which do not fall within their authority, do not affect their principals."

Example—Karim is an agent of Rahim for the sale of goods. Karim persuades Hassan to buy the goods by a misrepresentation. Karim is not authorized to do so by Rahim. As such the contract is voidable, as between Rahim and Hassan, at the option of Hassan.

Sub-Agent and Co-Agent :

Sub-Agent—The general rule of agency is that a man in-charge of a work cannot delegate the responsibility of that work. This has been stated under section 190 that "An agent cannot lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform personally." Ofcourse there are exceptions to this. That is, a sub-agent can be appointed in the following cases :

(1) If it is done according to existing custom of trade, and (2) If it is done when necessary according to the nature of the agency. Section 191 has defined a sub-agent as "a person employed by and acting under the control of, the original agent in the business of the agency." Under sections 192 and 193 the effects of appointment of sub-agent have been stated as follows :

(a) The sub-agent may represent the principal and is responsible for his acts as if he was an agent appointed by the principal.

(b) The agent is responsible for the acts of the sub-agent.

(c) He is responsible for his acts to the agent, but he is not responsible to the principal unless it is a case of fraud and wilful wrong.

(d) If a sub-agent is improperly appointed by an agent, the agent will be responsible for his acts to the principal as well as the third party. The principal in these cases is not represented by the sub-agent and as such he (Principal) is not responsible for the acts of the sub-agent.

Co-agent—Section 194 of the contract Act has defined a co-agent as "a person appointed by the agent according to the express or implied authority of the principal, to act on behalf of the principal in the business of the agency." The co-agent is an agent of the principal and he is responsible to the principal. A co-agent is also called a substituted agent. There is direct privty of contract betweent the principal and the co-agent, whereas there is no such privity between the principal

and the sub-agent excepting the cases of fraud and wilful wrong doing.

Example—Karim advises Rahim, Karim's Solicitor, to sell his estate by auction, and to employ an auctioneer for the purpose. Rahim names Hassan as an auctioneer to conduct the sale. Here, Hassan is not a sub-agent, but is Karim's agent for the conduct of the sale. In appointing a co-agent an agent must have to exercise the same amount of discretion as a man of ordinary prudence would exercise in his own case. If this is done the agent will not be responsible to the principal for the acts of negligence of the co-agent. Section 195.

Example—Karim advises Rahim (a merchant) to buy a ship for him. Rahim employs a ship surveyor to choose a ship for Karim. The surveyor chooses the ship negligently and as a result the ship becomes unseaworthy and is lost. Here Rahim is not responsible to Karim, but the surveyor is responsible to Karim.

Duties of Agent to principal : As stated in the contract Act, the following are the duties of an agent to his principal :

(1) Conducting business according to the principal's directives or in the absence of such directives according to the prevailing custom—In this regard section 211 provides that "An agent is bound to conduct the business of his principal according to the directions given by the principal or in the absence of any such direction, according to the custom which prevails in doing business of the same kind at the place where the agent conducts such business. When the agent acts otherwise and if any loss be sustained, then he must make it good to his principal and, if any profit accrues, he must account for it."

(2) Conducting business according to skill and diligence—In respect of this duty of the agent the rules as stated under section 213 are as follows —"An agent is bound to conduct the business of the agency with as much skill as is generally possessed by persons engaged in similar business unless the principal has notice of his want of skill. the agent is always bound to act with reasonable diligence, and to use such skill as he possesses and to make compensation to his

principal in respect of the direct consequence of his own neglect, want of skill or mis-conduct, but not in respect of loss or damages which are in directly or remotely caused by such neglect, want of skill, or misconduct."

Example— Karim is an agent for sale of goods and he has authority to sell on credit. He, therefore, sells goods to Rahim on credit without having any knowledge about the solvency of Rahim. Rahim is insolvent at the time of such sale. Karim must make compensation to his principal for any loss thereby caused to the principal.

(3) Rendering accounts—According to section 213 an agent is bound to render proper accounts to his principal on demand.

(4) Communication to the principal—The provision in respect of this duty has been stated under section 214 which is as follows —"It is the duty of an agent in cases of difficulty to use all reasonable diligence in communicating with his principal, and in seeking to obtain his instruction."

(5) No transaction on own account—Section 215 provides in respect of this duty that "If an agent deals on his on own account in the business of the agency, without first obtaining the consent of his principal and acquainting him with all material circumstances which have come to his own knowledge on the subject, the principal may repudiate the transaction, if the case shows either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him."

(6) Giving back of the profit accruing from the transactions on own account—Regarding this duty of the agent section 216 provides that "If an agent, without the knowledge of his principal, deals in the business of the agency on his own account, instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction." The agent can not make hidden profits.

Example—Karim advises his agent Rahim to buy a machine. Rahim informs Karim that it cannot be bought, and

buys the machine for himself, Karim may on discovering that Rahim has bought the machine, compel him to sell it to Karim at the price he paid for it.

(7) Paying the principal the money received—Section 218 provides that "the agent is bound to pay to his principal all sums received on his account after deducting therefrom his dues on account of remuneration and expenses".

(8) Death of principal or his insanity—In this regard section 209 provides that "when an agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him.

(9) Miscellaneous—The agent has other duties also. He must inform to the principal. He must not delegate his authority. He must have to avoid the clash between his duty and self-interest. He is to be loyal to the principal. He is not to set up an adverse title or against the principal. He is not entitled to remuneration in certain circumstances.

Duties of Principal to Agent : According to the contract Act the principal has the following duties to agent.

Duties of Principal to Agent : According to the contract Act the following are the duties of the principal to the Agent :

(1) Section 222 provides that—"The employer of an agent is bound to in demnify him against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him." That is according to the provision of section 222 an agent is to be indemnified against all lawful acts.

(2) Pricipal is to indemnify the agent for all acts done on good faith—As to the duty of the principal section 223 provides as follows—"Where one person employs another to do an act, and the agent does this act on good faith, the employer is liable to indemnify the agent against the consequences of the act, though it causes an inquiry to the right of the third person."

(3) The principal is not liable for criminal acts—If an agent is employed to do a criminal act, the principal (the employer) in that case will not be responsible to compensate the agent against the consequences of that act despite there is an express or implied promise for that. Section 224.

Example—Karim employs Rahim to kill Hassan. Karim promises to compensate Rahim against all consequences of the act. Rahim as such kills Hassan. Rahim is therefore, to pay damages to Hassan for this doing. Karim, in this case, is not liable for compensating Rahim for such damages.

(4) The principal is liable for compensation for his neglects—If the agent suffers any injury which is caused by any neglect or want of skill of the principal, the latter them must have to compensate the agent for such neglect.

Example—Karim engages Rahim as a mason to build a house and makes the stage by himself. The stage is defective and as a result Rahim gets hurt. Karim must compensate Rahim in this case.

Rights of Agent : The following are the rights of the agent against the principal as laid down in the contract Act—

(1) Right of remuneration—Unless there is a special condition in the contract, the agent's remuneration will be due only when he has completed the act for which he was engaged agent. But the agent may detain the money received by him against the sale of the goods even though the total amount of the goods sent to him may not have been sold or even though the sale of, the goods may actually remain in complete. Section 219.

(2) Right of retaining—The agent has the right to retain all the moneys due to him for advances made or expenses incurred by him in running the business out of the total amount of money received by the agent on the account of the principal in the agency business. The agent may also retain such remuneration which is payable to him for rendering service as agent. Section 217.

(3) The agent has the right to put into force all the duties of the principal. It is because the duties of the principal are the rights of the agent.

(4) Lien of agent—If there is nothing contrary to the contract, the agent has the right to retain all the movable or immovable property (goods, papers and other property) of the principal until the dues of the agent in respect of commission, disbursement and the services rendered are paid. Section 221.

(5) Right of indemnification—The agent has the right to be indemnified by the principal for any expense incurred or loss suffered by the agent for any lawful doing during the period of the agent's work for the principal. Section 222. Again the agent has also right to claim compensation from the principal for any loss caused to the agent for want of the principal's conduct or skill. Section 225.

Rights of the principal : The rights of the principal against the agent are stated as follows :

(1) If the agent commits any breach of contract, the principal has the right to claim compensation for this.

(2) The principal has always the right to enforce the duties of the agent.

(3) The principal can cancel the authority given by him to the agent provided that there are some special conditions for that.

Effects of Agency of contracts with Third Person : Under section 230 it has been provided that, unless there is any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf his principal, nor he is personally bound by them. But if an agreement (express or implied) is made to that effect, the agent then can inforce it and in this case he may also be personally liable for the contract which is presumed to exist in the undermentioned cases :

(1) Where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad.

(2) Where the agent does not disclose the name of his principal.

(3) Where the principal, though disclosed cannot be sued.

(4) When an agent appoints a sub-agent without having proper authority from the principal then the agent shall be personally liable to the principal and the third party. (5) Where a person pretends to be an authorised agent of other and

persuades a third person to deal with and the principal does not ratify his acts, in that case the pretended agent shall be liable to the third party if that party suffers only loss or damage by the acts of the pretended agent section 235. Contracts with an undisclosed principal.

When an agent makes a contract without disclosing the name of his principal, then such contract is called contract of undisclosed principal. In case of such contracts the Rights and Duties of the Agent, the principal and the third party are determined in the undermentioned cases—

(1) Under section 231 it has been laid down that "If an agent makes a contract with a person who neither knows nor has reason to suspect that he is an agent, his principal may require the performance of the contract, but the other contracting party has, as against the principal, the same rights as he would have had as against the agent if the agent had been principal."

(2) Section 231 also provides that "If the principal discloses himself before the contract is completed, the other contracting party may refuse to fulfil the contract, if he can show that, if he had known who was the principal in the contract, or if he had known that the agent was not a principal, he would not have entered into the contract".

(3) Section 232 provides that "Where one person makes a contract with another, neither knowing nor having reasonable ground to suspect that the other is an agent, the principal, if he requires the performance of the contract, can only obtain such performance subject to the rights and obligations subsisting between the agent and the other party in the contract."

(4) In contracts with an undisclosed principal, the agent is, in the absence of a contract to the contrary, personally liable on the contract. The other party may hold either the agent or the principal or both liable. Section 233.

Example—Karim enters into a contract with Rahim to sell him 500 bales of jute and afterwards discovers that Rahim was acting as agent for Hassan. Karim may sue either Rahim or Hassan, or both, for the price of the jute.

TERMINATION OF AGENCY

There may be termination of agency contracts like other contracts. Contracts of agency may be terminated (a) by the act of the different parties of contract namely the principal and the Agent; or (b) by the operation of law. The rules regarding the termination of Agency have been laid down in the sections 201-210 of the contract Act and these are, therefore, discussed as follows—

(A) Termination by the act of the parties—(1) Agency contract may be terminated at any time by agreement of both the principal and the agent. (2) The agent may terminate the agency by renouncing his authority received by him. (3) The principal may terminate the agency by revocating the authority given by him to the agent. Under section 205 it has been stated that "if the agent by renouncing the authority received by him or the principal by revocating the authority given to the agent by him causes termination of agency before the stipulated time, the other party shall be liable to pay compensation to the affected or the aggrieved party." It has been stated in the contract Act that the principal cannot revoke the authority given to the agent in the undermentioned cases.

(1) If the agent has an interest of his own in the subject-matter of the contract, in that case, unless there is any condition contrary to the contract, the principal cannot cause termination of the agency by revocating the agent's authority so as to prejudice the interest of the agent. Section 202.

Example—Karim authorises Rahim to sell Karim's land to pay himself out of the proceeds, the debts due to him from Karim. In this case Karim cannot revoke this authority nor can it be terminated by his insanity or death.

(2) The principal cannot revoke the agent's authority, if the agent has already exercised his authority in order to bind the principal. Section 203. (3) If the agent has partially exercised his authority, then the principal cannot revoke the agent's authority given by him (Principal) on the subjects relating to the acts and obligations accruing from the acts partially done

under the agency. Remuneration of the authority by the agent or by the principal or the revocation of the authority by the principal may be express or implied.

Example—Karim gives authority to Rahim to let his house. Subsequently Karim lets it himself. In this case it is an implied revocation of Rahim's authority.

(B) Termination by operation of law—In the undermentioned ways agency may be terminated by operation of law :

(1) The agency will terminate after the expiry of the stipulated time for which the agency is created irrespective of whether the object of the agency has been accomplished or not.

(2) The agency will terminate if the agency has been created for a specific object and that object has been performed or this performance is considered to be impossible.

(3) The agency will terminate upon the destruction of its subject-matter.

(4) The agency will terminate if death or insanity of the principal or the agent occurs or takes place.

(5) The agency will terminate if the principal is insolvent or if he is an alien and war is declared between the country of the alien and that of the agent.

Termination of Agent's Authority : Under section 208 it has been stated that the termination of the agent's authority takes effect in respect of the agent from the time it is known to him and in respect of the third parties when it comes to be known to them.

Example—Karim gives directive to Rahim for sale of his goods and gives guarantee for payment of 5 percent commission from sale preceeds of the goods. Subsequently Karim revokes Rahim's authority by letter. Rahim, before receiving the letter but which has been sent, sells the goods for Tk 1000/-. In this case the sale is binding on Karim and Rahim is entitled to 5% of the sale price as commission.

CHAPTER–3

LAW RELATING TO SALE OF GOODS.

Introduction : The sale of goods is presently regulated in Bangladesh by the sale of Goods Act, 1930. Contract of sale of Goods is a kind of contract like other general contracts. The different rules applicable to general contracts are generally also applicable to this kind of contract. Till before the sale of Goods Act, 1930, was passed, the sale of goods in the Bangla-Bharat sub-continent was controlled according to the 1872 contract Act. The sale of Goods Act, 1930 was created based on the subject matters relating to the sale of goods under the contract Act, 1872. The sale of Goods Act came into force on 1st July 1930. The contract of sale of goods can be distinguished with the other general types of contract in few cases as mentioned under :

(1) contract of sale of goods is a contract of general movable goods. But general contract may be made for any subject-matter.

(2) By contract of sale of goods ownership of goods is transferred to the buyer against price. This may not be the case for general contract.

(3) For sale of goods consideration will always be the money paid or the money promised to be paid. This may not be case for general contract.

Because of such differences the sections (76-129) relating to the sale of goods are revoked from the contract Act, 1872 in 1930 and an independent Act was created and this independent act came to be known as the sale of Goods Act, 1930. The Act is presently enforceable in Bangladesh. The Act in Bangladesh was created by following the sale of Goods Act 1813 of England.

Definitions : Definitions of different terms relating to the sale of goods are provided in Sale of Goods Act, 1930 as applicable in Bangladesh. These definitions are discussed as under :

(1) Buyer—The person who buys goods or agrees to buy goods is called buyer, Section 2(i).

(2) Seller—the person who buys goods or agrees to buy goods is called seller. Section 2(13).

(3) Price—The money consideration for sale of goods is called price. Section 2 (10).

(4) Property—The general property on the goods is called property. Section 2(11).

(5) Delivery—The voluntary transfer of possession by a person to another person is called 'delivery'. Section 2(2).

(6) Goods—All the movable goods excepting money and actionable claim are called goods. Section 2(7) provides that "Goods means every kind of movable property other than actionable claims and money; and includes stocks and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before or under the contract of sale." Actionable claim means all debts or monetary claims which can be recovered by suit. Money means legal tender money. Only movable goods are considered as goods. Immovable property are not treated as goods. But despite land is an immovable property, the growing crops and grass on land, fruits of trees are included in the goods as they can be treated to be separated during the period of sale.

Classification of Goods : Goods can be classified into three types, namely (1) existing goods, (2) future goods, and (3) contingent goods.

(1) Existing goods—These are goods which are in existence and which are in the possession and ownership of the seller during the period of making the contract. Existing goods can be divided into two categories, namely

(i) Specific or ascertained goods, and

(ii) Unascertained goods. Section 2(14) defines specific goods as "specific goods mean good identified and agreed upon at the time a contract of sale is made".

Example—a contract for sale of a particular picture by a painter, a ring with differentiated features, etc.

(2) Unascertained goods—Goods that cannot be identified, but only can be explained by description at the time

of making contract for sale of goods, are called up as certained goods.

Example—Karim (seller) consents to supply one bag of rice from his godown to Rahim (buyer). In this case it is not ascertained which bag will be supplied. Therefore, it is a sale of unascertained goods.

(3) Future goods—Section 2(6) defines future goods as "goods which will be manufactured or produced or acquired by the seller after the making of the contract of sale.

Example—Karim agrees to sell to Rahim 10 mds. of potatoes that will be produced next year. This is an agreement for the sale of future goods.

(4) Contingent goods—According to section 6(2) of the sale of goods Act "there may be a contract for sale of goods, the acquisition of which by the seller depends upon contingency which may or may not happen". The goods sold in this case are called contingent goods. These goods are included in the future goods.

Example—Karim consents to sell to Rahim a wrist-watch' on condition that he is able to buy it from its present owner. Here it is a case of contract for sale of goods.

Contract for sale of Goods : Definition : Section 4(1) of the Sale of Goods Act defines contract for sale of goods as "A contract of sale of goods is a contract where by the seller transfers of agrees to transfer the property in goods to the buyer for a price." Upon the analysis of the definition the following elements are noticed :

(1) Under a contract of sale of goods there will a transfer of the proprietory ownership of the goods from the seller to the buyer.

(2) In a contract of sale of goods the seller transfers or agrees to transfer the property in the concerned goods to the buyer. Therefore, it is found that the transfer of the property in the concerned goods sold is not the only measuring rod of sale, but the agreement for the transfer of such property is also considered to be a sale.

(3) The contract of sale of goods will always be for movable property. Immovable property are left outside the jurisdiction of the sale of goods Act.

(4) The consideretion for sale of goods will always be in the money paid or agreed to be paid as a price.

Sale and Agreement to sell : Sale—When under a contract of sale the ownership of the goods is transferred immediately to the buyer from the seller, it is called a 'sale'. In the case of sale, price of the goods may be payable or the delivery of the goods may be given at a future date, but the property in the goods sold is to be transferred along with the contract from the seller to the buyer.

Example—Karim has purchased 100 maunds of rice on credit from Rahim. This is a case of sale.

Agreement to sell—When under a contract of sale of goods, if an agreement is reached that the ownership of the goods sold will be transferred at a future date or upon the fulfilment of some conditions, it is called an Agreement to sell.

Example—There will arrive a some amount of powdered milk belonging to Karim in a certain ship and Rahim will buy 1000 K.Gs. out of that. This is a case of agreement to sell because the delivery of the goods here depends on the arrival of the ship i.e. the ownership of the milk will be transferred to the buyer (Rahim) by the seller (Karim at a future time.

Distinction between Sale and Agreement to Sell : The differences between sale and agreement to sell are highlighted as under :

(1) In the case of sale, the property in the goods is transferred along with the contract from the seller to the buyer. Therefore, seller's creditor cannot seize the goods against a decree from a court. But in the case of an Agreement to sell, the ownership of the goods sold remains with the seller until the stipulated time expires or the agreed conditions are fulfilled. Therefore, the goods can be seized in execution of a decree against the seller.

(2) In the case of sale, the buyer is the owner of the goods. Therefore, even after the sale if the goods remain with the seller and if there is any loss or destruction is caused to the goods, the buyer must have to bear it. But in the case of agreement to sell, the seller shall have to bear the risk until

the goods are transferred to the buyer. 'Sale' is an executed contract.

(3) By this not only the contract is performed (executed), but also along with that the conveyance of the property in the goods sold takes place. But an agreement to sell is called an executed contract.

(4) In the case of 'sale' the seller can sue for realization of the price of the goods even though the goods may remain in the possession of the seller. But in the case of 'Agreement to sell' if the buyer does not accept the goods and does not pay for them, the seller can only sue by claiming damage for the performance of the contract.

(5) The buyer, in the case of 'sale' can file a suit for specific performance of the contract, i.e. for the collection of the goods. But in the case of Agreement to sell only damage can be claimed and nothing else.

Essentials of contract of Sale of Goods : The indispensable elements of contract of Sale of Goods are discussed below—

(1) Transfer of goods for money—Contract for sale of goods must be a contract for transfer of goods in exchange for money. Transaction of goods against goods will not be treated as sale of goods. But for transaction of part of the gfoods will be treated as sale.

(2) Sale of goods means transfer of ownership of goods from one person to another person. Therefore, it can be supported that the seller and the buyer must be two different persons. One man cannot sell goods to himself because a sale is a bilateral agreement. Ofcourse, one part-owner can sell goods' of his own share to another part—owner. section 4(1).

(3) Offer and Acceptance—In this regard section 5(1) of the sale of goods Act provides that "A contract of sale is made by an offer to buy or sell goods for a price and the acceptance of such offer. The contract may provide for the immediate delivery of the goods or immediate payment of the price or both or the delivery on payment by instalment or delivery or payment or both shall be postponed."

(4) Performance of contract—Under section 5(2) it has been stated that "subject to the provisions of any law for the time being in force, a contract of sale may be made in writing or by word of month or partly in writing and partly by word of month, or may be implied from the conduct of the parties."

(5) Conditions of contract—The parties of the contract of sale may decide upon terms relating to time, place and method of delivery for sale of goods by agreement among themselves. These terms are of two types, namely (1) Essential and (2) Non-essential Terms. Essential terms are called conditions and Non-essential conditions are called warranties.

(6) Promise for payment of price—Money consideration of sale of goods is called price, payment of price is an essential element for sale of goods. In the contract of sale of goods price may remain fixed or price may be determined by an agreed method by an agreement among the parties or it may be determined according to the nature of the transactions amongst the parties to the contract. Section 9(1). Where price cannot be determined according to above stated rules, in that case the buyer shall be liable to pay reasonable price. What is reasonable price will depend on, in every case surrounding circumstances section 9(2). Section 10(2) provides that "Where third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain a suit for damages against the party in fault.

(7) Void contract—In this regard section 7 provides that "Where there is a contract for the sale of specific goods, the contract is void if the goods, without the knowledge of the seller have, at the time when the contract was made, perished or become so damaged as no longer to answer to their description in the contract".

(8) Elements of other contracts besides the elements of contract of sale of goods will be applicable to this contract. The reasons being that the parties to the contract of sale of goods must be competent to make contracts, they must have free consent, the object and consideration of contract must be legal, etc.

(9) Void contract (continued)—Section 8 provides that "Where there is an agreement to sell of specific goods and subsequently the goods without any fault onthe part of the sell or buyer perish or become so damaged as no longer to answer to their description in the agreement, before the risk passes to the buyer, the agreement is thereby avoided."

Hire purchase Agreement : Definition—Hire-purchase agreement is an agreement under which the buyer pays the price of the goods by a certain number of installments. The seller gives delivery of the goods to the buyer, but until full payment of the price is made the property in the goods is not transferred to the buyer. The buyer promises to pay hire charges for using the goods along with the instalments until full payment of the price of the goods is made. If the buyer wishes, he can get the property in the goods by paying full payment of the price. On the other hand the buyer may also return the goods to the seller, if he (buyer) so wishes. The seller may if he so wishes, take back the goods' from the buyer if he fails to pay any of the instalment price, because the property in the goods remains with the seller. From the discussion above it appears that hire purchase agreement is a bailment plus an agreement to sell. The property in the goods will pass to the buyer upon the payment of the last of the instalments. Since the buyer does not have the property in the goods, if any person buys the goods from him before the full-payment of the price of the goods, that person will never get the ownership of the goods.

Sale and Hire-Purchase : In the case of sale the property is transferred to the buyer who can deal with the property the way he likes and the transferee of the purchase gets a good title even if the price is not paid. In the case of hire—purchase agreement the purchaser does not get the ownership of the goods until the full price of the goods is paid and as such the transferee from a person who has not paid the full-price, gets no title.

Sale and Bailment : Bailment does not involve the transfer of the ownership of the goods. But sale insolves the transfer of the ownership of the goods. In bailment, the party

delivering the goods can get back the goods delivered. In sale the seller gets the price of the goods sold. Therefore, question does not arise to get back the goods sold.

Price : Definition—Section 2(10) of the Sale of Goods Act, 1930, defines price as "the money consideration for a sale of goods." The price may be fixed (determined) in a contract of sale. It may also be fixed in an agreed manner also. The price may be determined by the subsequent dealings among the parties. In the absence of any provision in the contract regarding the price, the buyer must pay a reasonable price. What is a reasonable price is a question of facts and it depends on the circumstances of the case. Section 9. Goods may be sold on a condition that a third party will determine the price. In such case if the third party does not determine the price, then the contract of sale will become void. But if any part of the goods has been delivered and the buyer has accepted it, the buyer in that case, shall pay a reasonable price for the goods. Section 10(1). Again section 10(2) provides that "where such third party is prechuded from making the pricing of the goods by the fault of the seller or buyer the party not in fault is entitled to damages."

Earnest Money : The payment of earnest money to mark the formation of an agreement for sale is a long-standing custom in our country. The usual objective of payment of earnest money is that if the buyer breaks the contract, the seller will retain the earnest money as compensation. Earnest money is paid as a security for the fulfilment of the contract. Section 74.

Conditions and Warranties : According to section 12 of the Sale of Goods Act a stipulation or term in a contract of sale with reference to goods which are the subjects there may be a condition or a warranty. Section 12(2) defines condition as "Stipulation essential to the main purpose of contract, the breach of which gives rise to a right to treat the condition as repudiated : Under section 12(3) a warrnaty has been defined as "A stipulation collateral to the main purpose of the contract the breach of which gives rise to a claim for damages but not a right to reject the goods and treat the contract as

repudiated." Whether a stipulation in a contract of sale is a condition or a warranty depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract section 12(4).

The court will decide if a particular condition will be a condition or a warranty by considering the formation of the contract and the circumstances under which the contract was entered into. It has been stated under section II that in the absene of any such things in the contract the term about the time for payment of the price will never be considered as a 'condition'. Conditions and warranties may be stated in a document in writing or may be implied from the circumstances of the formation of the contract.

Distinction between condition and warranty : In the case of a contract for sale of goods the distinction between condition and warranty may be noticed in the following cases :

(1) In a contract of sale condition is a very significant term and it is highly essential to the main purpose of the contract. For this reason if a party to the contract fails to fulfil this condition of the contract, the other party can treat the contract as void and he can also claim compensation for this. On the other hand, warranty is a collateral term i.e. it is subsidiary to the main purpose of the contract. That is why, the breach of this condition i.e. the breach of warranty by a party to the contract gives right to the other party to claim damages only, but the other party cannot treat the contract as void.

(2) For compliance of the contract fulfilment of 'condition' is essential. On the otherhand, even if the warranty term of the contract is not essential for the fulfilment of the contracts, the fulfilment of this term is a responsibility of the concerned parties of the contract.

(3) If a term or stipulation in a contract of sale will be a 'condition' or a 'warranty' will, in everysuch cases, depend on the formation of the contract. In some cases 'warranty' may be treated as 'condition' even though there is mention of 'warranty' in the contract. On the other hand in the case of

'warranty' the court will determine, on the basis of the attitude of the parties of the contract, subject matters of the contract and other collateral circumstances of the contract as to which term will be a condition and which term will be a warranty.

(4) Under certain circumstances a 'condition' may be treated as 'warranty'. But a warranty cannot become a 'condition.'

Treatment of condition as Warranty : In the undermentioned cases a 'condition' may be treated as a 'warranty' :

(1) Where there is a term in the contract of sale of goods for fulfilment of any 'condition' by the seller and the buyer revokes it or the buyer does treat the condition as a warranty but does not treat it as a ground for making the contract void.

(2) Where a contract of sale of goods cannot be severed and the buyer has accepted all the goods or a part of the goods or in the case of sale of certain goods the property in the goods has been transferred to the buyer, in that case if the seller does not fulfil any 'condition' it may be treated as a warranty.' That is, in case the seller does not fulfil any 'condition' in that case the 'condition' may be treated as 'warranty.' But this cannot be treated as a reason for the revocation of the contract and for the return of the goods unless there is any rule express or implied to that effect in the contract.

Breach of condition : Where there is a breach of condition, the following may be effects :

(1) Section 12(2) provides that "If a 'condition' is broken : there generates a right to abandon the contract and to revoke the goods."

(2) Where any party to the contract of sale repudiates the contract before the delivery of the goods, in that case the other party may treat the contract as continuing to exist and wait till the date of delivery of goods or he may treat the contract as cancelled and can sue for the damages caused by the breach of contract. Section 60.

Breach of Warranty : Where there is a breach of Warranty the consequences of such breach may the following–

(1) In case of a breach of warranty, damages can be claimed only by making suit, but goods cannot be rejected and the contract cannot be revoked. Section 12(3).

(2) In only a few cases 'condition' may be treated as 'Warranty'. Sections 13(2) & 13(1).

(3) In case some elements necessary for the fulfilment of the contract are destroyed and the fulfilment of contract becomes illegal by reasons of changes in law in both cases, it will not be a case of breach of warranty. Section 13(3).

(4) Where there is a breach of warranty of the contract by the seller, or where the buyer is compelled to treat any breach of a 'Condition' on the part of the seller as a breach of 'Warranty' in that case the buyer can not only go with rejecting the goods for brech of 'Warrenty' but he can make a reduction from the price of the goods against the damage caused by the breach of Warranty or the buyer, if he so wishes can suc against the 'seller for compensation for breach of warranty. Section 59.

Implied conditions and Warranties : In the absence of any rule in the contract to the effect there may be implied conditions and warranties in the contract of sale in the following cases according to the sale of Goods Act :

(1) Title of goods—In this respect it has been stated under section 14(a) that "There is an implied 'condition' on the part of the seller that, in the case of a sale, he has a right to sell the goods and that, in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass."

(2) Section 14(b), provides that "There is an implied 'warranty' that buyer shall have and enjoy quiet possession of goods."

(3) According to section 14 (c) there is an implied 'warranty' that the goods shall be free from any charge or encumbrance in favour of any third party not declared or known to the buyer before or at the time when the contract is made."

(4) Fitness of goods —In this respect section 16(3) provides that "A warranty as to fitness for a particular purpose may be annexed to a contract of sale by a custom or usage of trade."

(5) Sale by description—Section 15 provides that "Where there is a contract for sale of goods by description there is an implied 'condition' that the goods shall correspond with the description and if the sale is by sample as well as by description it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description."

(6) Sale by sample—The following conditions are implied if the good are delivered according to agreed sample—

(a) The bulk of the goods shall correspond with the sample in quality.

(b) The buyer shall have reasonable opportunity of comparing the goods with the sample.

(c) There will not be any defect in the goods which will render them (the goods) unmerchantable and a reasonable examination of the sample will not be apparent or discoverable. If the defect of the goods can be easily discoverable on inspection and the buyer accepts the delivery of the goods after the inspection, in that case the buyer will not be entitled to any remedy. Section 17.

Doctrine of Caveat Emptor : The general custom of business is that the seller is not bound to disclose to the buyer the fact that the goods are defective. It is the duty of the buyer to buy the goods after satisfying himself of their quality and fitness. The buyer should do this for his own interest. It is because in the case of buying and selling of general nature the buyer cannot return the goods even if defects are detected in the goods after their sale. The buyer cannot even claim compensation from the seller. For these reasons the buyer must always buy goods cautiously. This is called the doctrine of Caveal Emptor. The term 'Caveal Emptor' is a latin expression meaning "buyers beware". Probably in ancient times the rule originated when goods were mostly sold in open market and the buyer had every opportunity to examine by himself about the quality of the goods and their fitness. But presently the processes of buying and selling became

complicated and as a result some exceptions to the rule are noticed. In Bangladesh under section 16 of the sale of goods Act, the rules of the principle (Caveal Emptor) have been laid down. Where the buyer is purchasing goods by applying his skill and judgement, only in such cases. Caveat Emptor principle will be applicable. It has been stated in the exceptions as laid down under section 16 that only in the following cases the Caveal Emptor Principle will not be applicable. That is, in the following cases implied condition will prevail as to the quality and fitness of the goods : (1) Where the buyer of other goods except patents relied, on the seller's judgment and has intimated the seller about the object of the goods.

(2) Where according to the prevailing custom of business an implied condition as to the quality or fitness of goods is annexed.

(3) Where the goods are purchased by description and the seller deals in such goods.

(4) Where the seller sells goods by fraud or misrepresentation.

Transfer of Ownership : Section 2(11) of the Sale of Goods Act defins ownership as "the general property in the goods. It does not mean any special property". The property or ownership of the goods is transferred from the seller to the buyer by effecting the sale of the goods. The transfer of the property or ownership of the goods is very significant, because the different rights and obligations of the buyers and sellers of goods depend on the transfer of propety in the goods. Under the sections 18-25 of the sale of Goods Act of Bangladesh the 'rules' as to the transfer of the property of the goods have been laid down. These rules, therefore, are discussed as lender :

(1) Unascertained goods—In this regard section 18 provides that "Where there is a contract for sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained."

Example—Karim enters into a contract with Rahim to sel 1000 maunds of rice out of his godown. But unless and until

the goods of (1000 maunds of rice) have been separated out from the other rice in the godown, the transfer of the property in the goods (rice) cannot be transferred to Rahim. That is, unless and untill the goods are ascertained their ownership will not be transferred to the buyer.

The rules as to how the unascertained goods will be ascertained have been laid down under section 23. These rules are as follows—

(1) Where there is a contract for sale of unascertained or future goods by description and the goods of that description in a deliverable state are unconditionally appropriated to the contract either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such an assent may be express or implied and may be given either before or after the appropriation is made. Section 23 (1).

Where in pursuance of the contract the seller delivers the goods to the buyer or to a carrier or other bailee, whether named by the buyer or not, for the purpose of transmission to the buyer and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract. Section 23 (2). And in this case the property in the goods will be transferred to the buyer. Ofcourse, if the right of disposal is not given up the ownership of the goods will not be transferred to the buyer.

(2) Specific or ascertained goods—If there is a contract for the sale of specific or ascertained goods the property in the goods will be transferred to the buyer at the time agreed by the concerned parties to the contract, i.e., at the time which the concerned parties to the contract intend it to pass. In this case for ascertaining the intention of the parties the terms of the contract, conduct of the parties and the circumstances of the case shall have to be considered (section 19). If the intention of the parties cannot at all be ascertained, then in the following cases their intention shall have to be determined—

(i) If there is an unconditional contract for the sale of specific goods which are in a deliverable condition,

then the property in the goods is transferred to the buyer at the time when the contract is made and in this case it will be unimportant if the time for the payment of the price or the time of the delivery of the goods, or both is postponed. Section 20.

(ii) Section 21 provides that "Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state the property does not pass until such thing is done and the buyer has notice thereof."

(iii) According to section 21 if in a contract for the sale of specific goods the seller is to weigh, measure, test or do some other thing to the goods to ascertain their price, the property shall not pass until such acts or things are done and the buyer has notice of it.

(iv) Section 24 provides that "When goods are delivered to the buyer on approval or on sale or return or other similar terms, the property therein passes to the buyer (a) when he signifies his approval or acceptance to the seller or does any other act adopting the transaction; (b) if he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and if no time has been fixed, on the expiration of a reasonable time.

(3) According to section 25 if there is reservation of the right of disposal, the property in the goods passes to the buyer upon the fulfilment of the stipulated conditions or terms there in. In the following cases the right of the disposal of goods will be assumed to be reserved : (1) If the Bill of Lading is payable to the seller or to his representative according to the seller's instructions. (2) When the Bill of Lading and the Bill of Exchange together are sent and if the Bill of Exchange is accepted or if it is paid then the Bill of Lading will be payable to the buyer.

Passing of Risk : Rules for passing of risk have been laid down under section 26. The general rule is that goods remain at the seller's right until the ownership is transferred to the buyer. After the passing of the property in the goods to the buyer, the risk of the goods is with the buyer. In this case it is not important if the goods have been delivered or not "Risk follows ownership". Exceptions to the rule are discussed below :

(a) If because of the fault of the buyer or the seller, there has been delay in the delivery of the goods, the risk of the goods is with the party in fault as to the loss which would not have happened had there been no such fault.

(b) If the parties agree that the risk and ownership will pass at different times, i.e. risk passes at a time which is different from the time at which ownership passes.

Example—The seller may in a certain case, agree to become responsible for the goods even after the passing of the ownership to the buyer.

Transfer of Title by Non-Owner : The general rule of sale of goods is that only the owner or the proprietor of the goods can give the buyer the property in the goods by selling them. No seller of goods can give the buyer of goods a better title to those goods then he himself has. The principle can be expessed by the Latin phrase, "Nemo quod qui non habet", which means "none can give who does not himself possess." This rule applies to movable and immovable property. As regards the movable goods under the sections 27-30 of the sale of goods Act exceptions have been laid down. In these cases without being the owner of the goods a person can give the buyer a valid title to the goods. The exceptions are discussed as under–

(1) Title by Estoppel—Under certain circumstances the owner of the goods is, by his conduct, prevented from denying the seller's authority to sell.

(2) Sale by Mercantile Agent—In respect of this section 27 provides that sale of goods by a mercantile agent gives a

good title to the purchaser even in cases where the agent acts beyond his authority, it the following conditions are satisfied— (a) the agent is in the possession of the goods or of a document of title to the goods; (b) such possession is with the consent of the owner, (c) the agent sells the goods in the ordinary course of business, (d) the buyer acts in good faith and has no notice that the agent had no authority to sell.

(3) Sale by joint owner—In this case section 28 states that "If one of the several joint owners of goods has the sole possession of them by permission of the co-owners, the property in the goods is transferred to any person who buys them from such joint owner in good faith and has not at the time of the contract of sale noticed that the seller had no authority to sell."

(4) Sale by seller in possession of goods after sale— Regarding this exception section 30 (1) states that "where a person, having sold goods, continues to be in possession of the goods or of the documents of title to the goods, a transfer of title to him or his agent by way of sale or pledge, gives a good title to the buyer on condition that the buyer was acting in good faith and had no knowledge of the seller's want of title."

(5) Sale by person in possession under voidable contract—when the seller of goods has obtained passession thereof under a voidable contract but the contract has not been rescinded at the time of sale, the buyer obtains a good title to the goods on condition that he buys them in good faith and without notice of the seller's defect of title. Section 29.

(6) Sale by buyer in possession of goods over which the seller has some rights—In this case section 30(2) states that When goods are sold subject to some lien or right of the seller the buyer may sell, pledge, or otherwise dispose of the goods to a third party and give him a good title on condition that the following conditions are fulfilled :

(a) the first buyer is in possession of the goods or of the documents of title to the goods with the consent of the seller,
(b) the transfer is by the buyer or by a mercantile agent acting for him.

(7) Sale by unpaid seller—Under section 5 it has been stated that an un paid seller of goods can, under certain circumstances, re-sell the goods. The buyer of such goods gets a valid title of the goods.

(8) Sale under the contract Act—According to section 176 of the contract Act a pawnee may sell the goods of pawner if the latter makes a default of his dues. The buyer under such a sale gets a good title (b) A finder of goods can sell the goods under certain circumstances and the buyer gets a good title. Section 169 of the contract Act.

Performance of the Contract of sale

Rules of Delivery of Goods ; Section 2(2) of the Sale of Goods Act defines delivery as follows—"Delivery means voluntary transfer of possession from one person to another." According to Sir F. Pollock Delivery means "Voluntary dispossession in favour of another". The mode of making delivery is determined by the parties to the contract. The rules for the delivery of goods and for the performance of the contract of sale have been laid down in the Sale of Goods Act. These rules are discussed as under :

(1) Possession of buyer—The parties to the contract determine the mode of giving the possession of goods to the buyer. The parties may decide to make the delivery of the goods by any act or they may deliver the goods at the possession of the buyer or of any authorized person of the buyer as a result of any act. Section 33.

(2) Part delivery—If the parties agree and with their intention, part delivery of goods may have the some effect as a delivery of the whole. But where a part of the goods is completely severed from the whole of the goods and delivered, in that case delivery of the remaining goods cannot be operated. Section 34.

(3) Application of delivery—Except on special terms, the seller is not bound to deliver the goods before the buyer applies for the delivery of the goods. Section 35.

(4) Place of delivery—In the absence of a contract to the contrary, goods sold are to be delivered at the place at which

they lie at the time of the sale and goods agreed to be sold are to be delivered at the place at which they lie at the time of the agreement to sell, or if not then in existence, at the place at which they are menufactured or produced. Section 36.

(5) Time of delivery—

(a) Where according to the contract of sale the seller is bound to send the goods to the buyer, but no time for this is fixed, in that case the seller is bound to deliver the goods to the buyer within a reasonable time. Section 36 (2).

(b) Where at the time of sale the goods are in the possession of a third person, in that case until the third person acknowledges to the buyer that he holds the goods on his behalf the seller is not to make the delivery of the goods to the buyer. Section 36 (3).

(c) If demand of goods or the demand for the delivery of the goods is not made within any normal working hours of the day and night, such demand of goods or of their delivery will not be effective. That is normal working hour is a question of facts. Section 36(4).

(6) Expenses of delivery—In the absence of an agreement to the contrary, the seller must bear the expenses and contingent charges of putting the goods in a deliverable state. Section 36(5).

(7) Delivery of wrong quantity—

(a) If the seller delivers goods to the buyer less than the quantity contracted to sell; in that case the buyer may reject them but if he accepts the goods already delivered, the buyer must pay for them at the contracted price. Section 37(1).

(b) If the seller delivers to the buyer the amount of goods that are larger than the quantity contracted to sell, the bayer may accept the portion contracted to buy and reject rest of the amount of goods. If the buyer accepts all the goods delivered to him, the buyer shall have to pay for them at the contracted price. Section 37 (2).

(c) If the seller delivers to the buyer the goods contracted for sale, mixed with goods of a different description not included in the contract the buyer may accept the goods, included in the contract and reject rest of the goods or he may accept whole of the goods. Section 37(3).

(8) Delivery by instalments—

(a) The buyer is not bound to accept the delivery of the goods by instalments, unless there is an agreement to that effect. Section 38(1).

(b) If there is an agreement for instalment delivery and separate payment for each instalment, but either party fails to fulfil his obligations for one of the instalments, then this failure may lead to

(i) a repudiation of the whole contract or

(ii) a severable breach and for this damages can be claimed but the contract cannot be rejected. The decision in this case will be taken on the basis of the terms of the contract and circumstances of the case. Section 38(2).

(9) Delivery to carrier or whar finger—In this respect section 39 states that delivery of goods to a carrier for transmission to the buyer or to the whar finger for safe custody, is *prima facie* deemed to be delivery to the buyer. The seller makes contract to this effect with the carrier or whar-finger, unless otherwise authorised by the buyer. This is very significant because if he does not do so the seeler will be responsible for the loss or damage of the goods. The buyer also may refuse such delivery to himself. In cases of set transit, where it is necessary to insure the seller will notify the buyer to do so. Failing to do this, the goods remain at the risk of the seller during the transit.

10. Risk of deterioration in the goods—In this case section 40 states that where the seller agrees to deliver them at a place other than that where the goods were sold, the buyer

shall never the less, unless otherwise agreed, take any risk of deterioration in the goods incidental to the transit.

11. Examining the goods—If the buyer has not examined the goods before in that case the buyer shall have the right to examine the goods before accepting them in order to be sure that the goods conform to the terms of the contract. If the buyer is denied of this right, he will not be considered to have accepted the goods. Section 41.

12. Acceptance—In the following cases the buyer will be considered to have accepted the goods— (a) when the buyer intimates the seller that he has accepted the goods, (b) when the goods have been delivered to the buyer and he has done any act in relation to the goods which is inconsistent with the ownership of the seller, (c) when after the lapse of a reasonable time, the buyer retains the goods without intimating the seller that he has rejected the goods. Section 42.

(13) Return of the rejected goods—In this respect section 43 states that unless otherwise stipulated, while lawfully rejecting the goods, the buyer is not bound to return them to the seller. But in such a case, the buyer must inform the seller of his refusal to accept the goods.

(14) Liability of buyer—In this regard under section 44 it has been stated that the buyer is liable to the seller for any loss caused by his neglect or refusal to take delivery and also for charges for care and custody of the goods.

Unpaid seller : Section 45 (1) of the Sale of Goods Act has defined an unpaid seller as follows –

"The seller of goods is deemed to be an unpaid seller within the meaning of this Act

(a) When the whole of the price has not been paid or tendered;

(b) When a Bill of Exchange or other negotiable Instrument has received as conditional payment and the condition on which it was received has not been

fulfilled by reason of the dishonour of the instrument or otherwise."

From the above definition it appears that whole of the price of the goods has not been received on a fixed date, and negotiable instrument (in the form of paryment) has been received but the instrument is dishonoured. Under such circumstances seller (who also includes an authorized agent of the seller) will be deemed to be an unpaid seller.

An unpaid seller has been given some rights in the Sale of Goods Act. The seller is entitled to these rights even though the property in the goods has been transferred to the buyer. These rights are of two types, namely (a) Rights against the goods and (b) Rights against the buyer personally. Under section 46 the unpaid seller has been given the following three rights under the rights against the goods, namely (1) Unpaid seller's lien, (2) Stoppage in transil and (3) Resale. These rights are discussed :

(1) Unpaid seller's lien—A lien means "the right exercised by one to retain possession of something, the property in which belongs to some one else." A seller's lien arises only when the property in the goods has passed to buyer. The unpaid seller of the goods who is in possession of them, is entitled to retain possession until payment or tender of the price in the following cases : (a) When the goods have been sold on credit but the term of credit has expired. (c) Where the buyer has become insolvent. (Section 47(1). The unpaid seller may exercise this right of him if he is in possession of the goods. Ofcourse, the seller is entitled to right of lien as an gent or bailee of the buyer. Section 47(2). But this right can be exercised only for the price of the goods. This right cannot be exercised for any other charges such as godown rent expenses for transportation of the goods, etc. The seller's right of lien ceases when the price of the goods is paid or tender of the price has been submitted. "Where an unpaid seller made part delivery of the goods, he may exercise his right of lien on the

remainder unless such part delivery has been made under such circumstances to show an agreement to waive of lien" Section 48.

An unpaid seller's lien is lost or terminated in the cases which are as follows—(i) When he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving his right of disposal of the goods. (ii) When the buyer or his agent lawfully obtains possession of the goods. (iii) When the seller waives his right of lien. That is, when the seller agrees with the buyer expressly or by implication that he would not exercise the right.

(2) Stoppage in transit—Under section 50 of the Sale of Goods Act it has been stated that "subject to the provisions of this Act when the buyer of goods becomes insolvent the unpaid seller who has parted with the possession of the goods, has the right of stopping them in transit, that is to say, he may resume possession of the goods as long as they are in the course of transit and may retain them until payment or tender of the price." From the above section it is found that the unpaid seller will not have the right of stopping the goods in transit unless the following conditions are fulfilled :

(a) the buyer has become insolvent,

(b) the goods are in transit,

(c) the price is not paid fully or partly, and

(d) no other section the Sale of Goods Act creates obstacle for the right of the seller.

Insolvency—Insolvency of the buyer does not mean that the buyer should actually be adjudged an insolvent. It is enough if he "has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due". It is immaterial if he has done any act of being insolvent (Section 218). Therefore, a person, who has not been declared insolvent according to an Insolvency Act, will be considered as insolvent under section 50 of the sale of Goods Act. Thus the evidence of general inability of the buyer to pay debts is

enough to constitute insolvency for the exercise of the right of stoppage in transit.

Explanation—When the buyer of goods becomes insolvent, and the goods are in course of transit to the buyer the seller can resume possession of the goods from the carrier. This is known as the right of stoppage in transit.

The general rules regarding the course of transit have been stated in detail under section 51 of the Sale of the Goods Act. The rules are discussed as under :

(i) Goods are deemed to be in the course of transit from the time when they are delivered to a carrier or other bailee for the purpose of transmission to the buyer and continues to be so until the buyer or his agent in that behalf takes delivery of them from such carrier or other bailee. Section 51(1).

(ii) If the buyer or his agent gets the possession of the goods before their arrival at the appointed destination, in that case the right of stoppage in transit will come to an end. Section 51(2).

(iii) If after the arrival of the goods at the appointed destination the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf, the transit is terminated evern though the buyer indicates to send the goods again to a further destination. Section 51 (3).

(iv) If the goods are rejected by the buyer and the carrier or other bailee continues to be in possession of them the transit will not be terminated even though the seller has refused to receive them back. Section 51(4).

(v) When goods are delivered to a ship chartered by the buyer, in that case if the master of the ship will be considered as carrier or agent of the buyer will depend on the circumstances of the particular case. Section 51(5).

(vi) If the carrier or other bailee wrongfully refuses to deliver the goods to the buyer or his agent the transit is deemed to be at an end. Section 51(6).

(vii) Where part delivery of the goods has been made to the buyer or his agent, the remainder of the goods may be stopped in the transit unless such part delivery has been given in such circumstances as to show that an agreement was made to give up possession of the whole of the goods.

The right of stoppage in transit is to be exercised by the seller by taking actual possession or by giving notice to the carrier to redeliver the goods to the seller. The carrier then is bound to redeliver the goods to the seller or his agent. The expenses of redelivery must be borne by the seller.

(3) Re-Sale—The exercise of the right of lien or stoppage in transit does not rescind the contract of sale. It has been stated under section 54 that the unpaid seller is entitled to resell the goods in the following cases :

(i) Where the goods are of perishable nature, the goods may be resold without giving any notice to the buyer.

(ii) Where the unpaid seller has exercised the right of lien or stoppage in transit and where he has notified to the buyer his intention of reselling the goods, but despite the buyer has not paid or tendered the price of the goods, in that case the unpaid seller may resell the goods.

If in the above two cases there arises profit from the resale of goods, the unpaid seller will enjoy it. But if there is any loss from such resale of the goods, the unpaid seller may realize it from the buyer. Secondly if the goods are resold without giving any notice and if from such resale there arises loss, the original buyer in that case will not be held responsible for such loss and on the other hand there accrues only profit from the resale, the original buyer will receive the profit.

(iii) Where the buyer defaults to pay the price of the goods and the right of the seller is preserved by the contract

of Re-sale, in that case the unpaid seller will definitely get the right of resale and the original buyer will be liable for any loss which arises from the resale. In the case of resale it is immaterial if the original buyer is notified or not, the new buyer will always get good title of the goods.

(iv) There are detailed discussions under sections 55-56 regarding the right of the unpaid seller against the buyer personally.

(1) Suit for the price—In respect of this section 55(1) states that "where under a contract of sell the property in the goods has passed to the buyer and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract the seller may sue him for the price of the goods. " Section 55(2) provides that "Where under a contract of sale the price is payable on a certain day irrespective of delivery and the buyer wrongfully neglects or refuses to pay such-price, the seller may sue him for the price although the property in the goods has not passed and the goods have not been appropriated to the contract."

(2) Damages for non-acceptance of goods—In this case section 56 states that "Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may sue him for damages for non-acceptance.

CHAPTER : 4
THE LAW OF PARTNERSHIP

Introduction : Where more than one person get united and carry on a business by agreement or contract, for those businesses the Partnership Act was established in the year, 1932, in the Bengal-Bharat Sub-continent. In our country (Bangladesh) all partnership business are formed, conducted and controlled by the Partnership Act of 1932. The partnership business is established on the basis of contract. The key of the partnership business established on the basis of contract is matual confidence and final belief among the partners themselves.

Definition of Partnership : Section 4 of the Partnership Act of 1932 defines partnership as the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. Persons who have entered into partnership with one another are called individually partners' and collectively a firm, and the name under which their business is carried is called the 'firm name'.

Elements of Partnership : A partnership, as defined in the Partnership Act, must have three essential elements. All of the elements must, therefore, be present at the same time to constitute a partnership. These elements are discussed below—

(1) There must be an agreement between two or more persons. Partnership is established by voluntary agreement or contract express or implied between two or more persons. Partnership is not created by operation of law. A partnership cannot be formed with more than ten persons in the case of banking and twenty persons in the case of other types of business. A partnership constituted with persons exceeding the above mentioned limits must be registered under a companies Act. Partnership is not created by status. In this regard section 5 of the partnership Act states that "The relation of partnership arises from contract and not from status."

(2) The agreement must be to share the profits of a business—The fundamental element of partnership is that there must be existence of a business for the creation of partnership. It is necessary that the business should be organized. All the partners must agree to share the profits of the business amongst themselves. The business is to be carried on with a view to earning of profit. The business must be legal and the contemplated profits are net profits. Business includes any trade, occupation or profession.

Example—If two or more persons join together and form a music club, it is not a partnership because there is no business in this case. But if the persons (two or more) join together to render musical performance to the public with a view to earning profit. It is then a business or a partnership is created (formed).

(3) The business must be carried on by all or any of them acting for all—This element is most important feature of partnership. All partners of the partnership are agents (one for another) as well as principals. The business in a partnership is carried on by all partners or by any one of them on behalf of all. Every partner has the authority or right of participation in the management of the business. On the other hand all the partners instead of taking part together in the business may authorise one or more from them to carry on the management of the business on behalf of all of them. In that case one or more than one partner can act on behalf of all and can bind all the other partners by his or their actions. Each partner is the agent of the others in all matters concerned with the business of the partnership. This is called mutual agent. That is the law of partnership is called a branch of the law of agency.

Characteristics of a Partnership Business : The following are the characteristics of a partnership business—

(1) Formation—Formation of a partnership business is simple. According to the Partnership Act in Bangladesh two or more partners may form a partnership business by a contract (verbal or written) among themselves. The maximum number

of persons shall not exceed 10 in the case of banking firm and 20 in the case of other types of business.

(2) Contractual relation—Contract is the main characteristic of a partnership business. The partnership business is formed on the basis of contract. Two or more persons from a partnership business bound by contract which may be oral or written. The object of the contract must be legal or lawful. The parties to the contract must be competent to make contract as per law. The main object of a contract should be earning of profil and fixation of proportions for distribution of the profits amongst the partners. Registration of the contract is not compulsory.

(3) Numbers of partners—The minimum number of partners in a partnership business is two and its maximum number of partners is fixed in different countries according to the law of those countries. In Bangladesh the maximum number of partners is twenty in the general types of partnership business and in the case of banking partnership firm the maximum number of partners is ten.

(4) Capital—In the case of partnership business capital is collected from all the partners. But the partners are not bound to contribute equal amount of capital. The partners contribute capital according to the terms of the contract. Furthermore some persons can be partners without contributing any capital.

(5) Distribution of profit—In partnership business profit and loss are distributed amongst the partners according to the terms of the contract. In the absence of any contract about distribution of profits and losses, all the partners will share profits and losses in equal proportions.

(6) Conduct and management—According to the Partnership Act the right of control and management of partnership business is entrusted to every partner. But since it is not possible for every partner for full time participation in the management, therefore one or more of the partners are authorized to handle the control and management of the partnership business.

(7) Liabilities—According to the Partnership Act all the partners jointly and every partner individually or separately are liable for all the debts of the partnership business. Legally in the case of general types of business of the partnership firm any partner is regarded as a general agent of all the other partners. For this reason a partner can bind other partners, if he does any work on good faith for the interest of the business and in the name of the business.

(8) Object of business—The main object of business is to earn profit and distribute it amongst the partners. Except for earning of profit a partnership business cannot be formed.

(9) Entity—In the eye of law the partnership business has no separate entity. The significance of this is that in matters of business or in a contract the names and signatures of the partner are used but the name of the business cannot be used.

(10) Mutual trust and confidence—It is necessary that there should be mutual trust and confidence amongst the partners. Without mutual trust and confidence amongst the partners, the partnership business cannot be permanent. When a partner acts on behalf of all the partners, he is then considered as agent of all the partners and all partners are liable for his acts.

(11) Hindrance in the way of transfer of share—A partner cannot transfer his share in the business to another one without the consent of other partners.

Partnership Deed : The Deed by which the partners set up partnership business is called Partnership Deed. A partnership is created by agreement amongst the partners in the business particular or general. The agreement to carry on business in partnership may be oral or written. Generally where the business is large, the partnership agreement is reduced into writing.

If it is in writing, the terms by which it is to be governed are embodied or incorporated into a written document. This written document is called Partnership Deed or the Articles of Partnership. Partnership Deed usually contains exhaustive provisions regarding matters concerning the business and the

relationship between the partners. The following matters are generally included in the Partnership Deed–

(1) Name of business;
(2) Head Office of business;
(3) Location of business;
(4) Objects and subject-matters of business;
(5) Name and address of the partners;
(6) Firm name;
(7) Nature of business;
(8) Place of business and the business address;
(9) Duration of the partnership business and the mode of operation;
(10) Mode of dissolution;
(11) Amount of capital to be contributed by each partner;
(12) The share of profits to be taken by each partner;
(13) Mode of management;
(14) The powers of the partners;
(15) Terms of a partner's retirement;
(16) Expulsion of partners;
(17) Introduction of new partners, etc.

Tests of Determining the Existence of Partnership : Section 6 of the Partnership Act lays down that "In determining whether a group of persons is or is not a firm or whehter a person is or is not a partner in a firm regard shall be had to the real relation between the parties, as shown by all relevant facts taken together." If all the relevant facts are analysed and if it is found that all the essential elements of partnership (i.e. two or more persons enter into contract, sharing of profits and persons carrying on business in partnership are agents as well as principals) are present, only then the group of persons carrying on the business will be called a 'partnership'. The second element out of the three elements, namely sharing of profits is very significant, but it is not crucial. Profits of a business may be shared even under circumstances where there is no existence of partnership.

The Partnership Act lays down some exceptions where the sharing of profits is not a crucial determinant of the existence of a partnership–

(1) If a person engaged in business borrows money from a lender on condition that the latter will accept a share of the profits out the business instead of interests, in that case the lender will not thereby become a partner.

(2) An employee receiving bonus as remumeration will not considered as a partner.

(3) If a share of profits is given to the widoW or child of a deceased partner as anuity widow or the child of a deceased partner as enmity delete the widow or the child in that case will not become a partner.

(4) If a previous owner or partner of a business is given some money as share of profit arising from the sale of goodwill, the owner or the partner in that case will not be considered as partner. In all the above cases of examples it is found that one essential element of partnership is lacking. This element is agency. That is a creditor or an employee, or the widow or child of a deceased partner cannot bind the firm by any act done on behalf of the firm. Those who have the authority to bind the firm by their acts can only become partners i.e. Those having authority in binding the firm or its partners by their acts can only be called partners. The tests of determining the existence of a true partnership were first laid down by the House of Lords in England in the case of Cox V. Hichman. The summary of the case is that here a debtor transferred his business to some trustees with directives that they will carry on the business and use the profits in payment to his creditors. In the case it was as such held that the creditors were not partners of the business. The rule laid down in this case has been comprehensively inserted in section 6 of the Partnership Act in Bangladesh.

In determining the existence of partnership by the court, the circumstances which are taken into consideration by the court are discussed—

(1) The terms of the agreement, if any,

(2) the conduct of the parties,

(3) the mode of doing business,

(4) who controls the property,

(5) the mode of keeping accounts,

(6) the manner of distribution of profits, etc.

As regards the sharing of losses of the partnership business—It is not a test of existence of partnership. It is rather a consequence of partnership. Losses are not referred to in the definition of the partnership (Section 4). But in determining the existence of a partnership by the court, it takes into account as to how the losses are shared. In a case (between Ragenandan V. Hormasji) it was held that partners may agree that one or more of them shall not be liable for losses. But such an agreement will be binding only among them selves. All the partners will be liable to the third parties for the debts of the firm.

Kinds of partnership : The following are the classes of partnership :

(1) Partnership at will. Under section 7 of the Partnership Act partnership at will has been defined as follows : "Where no provision is made by contract between the partners for the duration of their partnership or for the determination of their partnership, the partnership is partnership at will." In case of partnership at will, duration of partnership is not determined or when it will be dissolved, no mention is made about it. This type of partnership can be dissolved whenever any partner chooses to dissolve it.

(2) Particular Partnership (Joint Venture). When a partnership is formed for a particular venture or a particular undertaking, it is called a particular partnership (Section 8). This type of partnership is generally dissolved on the completion of the venture or undertaking.

(3) Limited partnership. In England under the provisions of the Partnership Act of 1907, a partnership may be constituted with limited liability of all partners except one that is, there must be at least one partner whose liability will be unlimited. In case of partnership in Bangladesh there is no such provision. That is in Bangladesh according to the provisions of the Partnership Act of 1932 the liability of all the partners of a partnership are unlimited.

Partnership property : Section 14 of the Partnership Act states that "Subject to contract between the partners, the

property of the firm includes all property and rights and interests in property originally brought into the stock of the firm or acquired by purchase or otherwise, by or for the firm, or for the purposes or in course of the business of the firm, and includes also the goodwill of the business." From the analysis of section 14 it appears that the partnership property means (i) property originally brought in by the partners; (ii) Property acquired in the course of business of the firm and (iii) the goodwill of the firm.

Goodwill of a firm is an asset of the firm. As regards goodwill, unless there is any provision express or implied the rule is that the share of a deceased partner, including goodwill, falls upon his legal representatives. In the absence of a contrary impression, the property and rights and interests in property acquired with money belonging to the firm are deemed to have been acquired for the firm. Section 15 of the Partnership Act provides that subject to contract between the partners the property of the firm shall be held and used by the partners exclusively for the purposes of the business. Under section 44 of the Partnership Act, it has been stated that from the property of the partnership the debts of the firm i.e. the joint debts of the partners will be met first, then if necessary the partners' own debts will be paid out of the surplus, if any. The surplus property of the firm will be made available to all the partners. It has also been stated under section 49 that from the property of the partners their own debts will be met first and then if necessary the surplus part of the property will be applied (used) in the payment of the debts of the partnership firm.

Registration of Partnership : The registration of a partnership is not compulsory under the Partnership Act. In that sense an unregistered firm is not an illegal association. Despite registration of partnership is indispensable for the following grounds–

(1) Registration is the crucial evidence of the existence of partnership. The partners of the registered firm cannot deny the partnership to avoid liability.

(2) Section 69 of the Partnership Act places certain disabilities on an unregistered firm. That is, an unregistered firm suffers from these disabilities.

Formalities of Registration : The registration of a firm may be brought about at any time by making application to the Registrar of Firms. The application for registration must be in the prescribed form and accompanied by the prescribed fees and a statement stating therein the following particulars–

(i) the firm name;

(ii) the place or principal place of the business of the firm;

(iii) the names of any other places where the firm carries on business;

(iv) the date when each partner joined the firm;

(v) the names in full and permanent addresses of the partners; and

(vi) the durtion of the firm. Section 58.

The statement is to be signed and verified by all the partners or their authorized agents. On receipt of the statement and the fees, the registrar records an entry of the statement in the Register of the Firm and the firm is thereupon considered to be registered. Any subsequent alterations in any of the particulars of the statement have to the intimated to the Registrar and accordingly the Registrar will record it in the Register. The Register of Firms can be inspected and copies of entries taken by any person on payment of the necessary fees.

Consequences of Non-registration : As stated above an 'unregistered firm' and the partners of it suffer from certain disabilities as imposed by section 59 of the Partnership Act. These are discussed as under–

(1) A partner of an unregistered firm cannot file a suit against the firm or any partner of the firm in order to enforce a contractual right or a right conferred by the Partnership Act.

(2) A firm cannot bring a suit against a third party to enforce a contractual right if the firm is not registered and if the persons filing suit in the court are not shown in the register of the firms or partners in the firm.

(3) An unregistered firm cannot claim a set-off in a suit. 'Set-off' means a claim by the defendant which would reduce the amount of money payable by him to the plaintiff.

There are some exceptions to the rules stated above even if the partnership firm is not registered. These exceptions are as follows–

(1) A partner of an unregistered firm can file a suit for the dissolution of the firm and for the accounts of the dissolved firm.

(2) The partners have the right to file suit to claim their own shares from the property of the dissolved partnership firm. Section 69 (3A).

(3) If a partner commits a breach of trust, in that case other partners can file suit against him.

(4) The official assignee or the Receiver as appointed by the court can realize the properties of the insolvent partner of an unregistered firm.

(5) The partners of an unregistered firm under the jurisdiction of small cause court can file suit against third parties for claiming a sum not exceeding Tk. 100.00.

(6) It has been stated under section 69 (4A) that if according to section 56 there is an announcement by the government as to the fact that there is no need for registration of a partnership firm in some Area on Region, in that case section 69 will not be applicable. That is, suit can be filed by a firm not being registered against the third parties for the contractual right and the partners can file suit against the firm or other persons for establishing their rights.

Minor as a partner : Contract is the basis of partnership business. According to section 11 of the Partnership Act (Bangladesh) a minor (less than 18 years old) cannot enter into a contract of partnership. Because an agreement by a minor is void. Therefore, a minor cannot be a partner. It has been stated under section 30 (1) that "A person who is a minor according to the law to which he is subject may not be a partner in a firm, but with the consent of all the partners for

the time being, he may be admitted to the benefits of partnership.

The rights and liabilities of a minor partner are described below :

Rights : (1) The minor has the right to share the property and profits of the partnership firm as agreed by the partners.

(2) The minor has the right to inspect the accounts of the firm. He can also take a copy of the accounts of the firm.

(3) The minor cannot file suit for realization of his share of the property and profits of the firm. But the minor may file suit for maintaining liaison with the firm.

(4) The minor after attaining majority may sever his relation with the firm or the minor can join as a partner in the firm. Within six months of his attaining majority, or of his obtaining knowledge that he had been admitted to the benefits of partnership, whichever date is later, the minor may give public notice that he has elected to become or that he has elected not to become a partner in the firm. Such notice shall determine his position as regards the firm. If he gives no notice he shall become a partner of the firm on the expiry of the said six nonths.

Liabilities : (1) A minor is not personally liable for the actions of the firm. Only his share in the profits or property of the firm may be liable for the actions of the firm. His personal property will never be liable for the acts of the firm which may occur in the general cases of partner's relations.

(2) If decisions is taken by the minor for joining as partner, from the date the minor has been admitted to the benefits of the firm, the minor shall be liable to third party for all acts and liabilities of the firm from that date.

Express or Implied Authority : The authority of a partner to act on behalf of the firm may be of two types, namely Express Authority and Implied Authority.

Express Authority—Express Authority may be defined as any authority which is given to a partner by the agreement of partnership. The firm is bound by all acts done by a partner by exercising any express authority which is given to him.

Implied Authority—The authority to bind the firm which originates by implication of law from the facts of partnership is called implied authority. That is any authority that is created for the partners by law is called implied authority. This authority is inferred from the facts of partnership. It flows from or implied by the relationship of partners. Section 19 of the Partnership Act lays down that the act of a partner which is done to carry on, in the usual way, business of the kind carried on by the firm, binds the firm. Under section 22 it has been stated that in order to bind a firm, an act or instrument done or executed by a partner or other person on behalf of the firm shall be done or executed in the firm name, or in any other manner expressing or implying an intention to bind the firm.

Example—Karim, a partner of a firm of confectioners, buys sugar on credit in the firm's name. In this case the firm is bound to pay for the sugar. The following acts are considered as within the implied authority—

(1) Making contract relating to the business of the firm.

(2) Employment of general servants and agents of the firm.

(3) Drawing cheques in the name of the firm.

(4) Settlement of accounts with the persons having transactions with the firm.

(5) Realization of the money owing to the firm

(6) Payment of debts on behalf of the firm.

(7) Filing suits on behalf of the firm and if there are suits filed against the firm, supporting & defending them;

(8) Taking necessary actions or steps for the proper conduct or management of the business of the firm.

(9) Taking similar steps which a knowledgeable person would take in his own case for the purpose of saving the firm from in curring losses in emergent case. Under section 19(2) of the Partnership Act the limitations of the exercise of implied authority have been indicated. In the absence of any usage or custom of business to the contrary, a partner is not empowered by implied

authority to do the following acts or to be on behalf of the firm—

(a) Referring a dispute relating to the business of the firm to arbitration;
(b) Opening account in the bank on behalf of the firm in his own name;
(c) Relinquishing or compromising any claim or a portion of it by the firm;
(d) Withdrawing a suit or proceeding if it is filed on behalf of the firm;
(e) Admitting any liability in a suit or proceeding if such suit or proceeding is filed against the firm.
(f) Acquiring immovable property on behalf of the firm;
(g) Transfer of immovable property which belongs to the firm;
(h) Entering into partnership on behalf of the firm. It is noted in a partnership that the implied authority of a partner may be extended or contracted by agreement between the partners. But a third party, i.e. the party contracting with the partner will not be bound by that unless the party knows about the extension or contraction of the authority.

Rights and Liabilities of the Members of a Partnership Firm :

Rights of Partners : In the absence of any contract to the contrary the rights of partners have been recognized by the Partnership Act. These are discussed as under :

(1) Every partner has right for participation in the conduct of the business. Section 12(A).

(2) Every parnter can express his opinion. That is every partner shall have the right to express his opinion.

(3) Every partner has right of access to, inspection of, and copying any of the books of the firm. Section 12(d).

(4) The partners have rights of equality of profits. That is, they are allowed to share equally in the profits earned. Section 12(b).

(5) No parnter shall have the right for claiming remuneration for participation in the management of the business. Section 13(A).

(6) Unless it is mentioned in the contract, no partner has right to receive interest on his capital. Section 13 (c).

(7) The partners shall have the right to get interest at the rate of 6% per annum on the advances made by them to the firm beyond the amount of capital. Section 13 (d).

(8) A partner shall have the right to receive reasonable amount of compensation from the firm, if the partner has spent any money or has incurred any liability in the management of the business in general situation.

(9) A partner shall have the right to be indemnified by the firm in respect of payments made and liabilities incurred by him, in the ordinary and proper conduct of the business and in doing such act, in any emergency. Section 13 (e).

Liabilities of Partners : Liabilities of partners may be described in the following categories—

(1) Liability of a partner for Acts of the Firm—"Every partner is liable, jointly with all the other partners and also severally for all acts of the firm done while he is a partner." Section 25.

It is found that the liability of a partner is unlimited for the acts of the firm. The third party, if he so wishes, may realize all his money due to him from any one partner. The partner in this case may realize from the other partners after deducting his own share according to lawful proportions (rates). The debt can also be realized according to the rates based on the terms of the contract. The third parties shall have the same right against all the sleeping or dormant partners. The dormant partners also are liable to an unlimited extent for all debts of the firm.

(2) Liability of the firm for wrongful acts of a partner—Where, by the wrongful act or omission of a partner acting in the ordinary course of the business of the firm, or with the authority of his partners, loss or injury is caused to any third party, or any penalty is incurred the firm is liable to the same extent as the partner. Section 26.

(3) Liability of firm for misapplication by partners. Where a partner acting within his apparent authority receives money or property from a third party and misapplies it, or a firm in the course of its business receives money or property from a third party, and the money or property is mis-applied by any of the partners while it is in the custody of the firm, the firm is liable to make good the loss. Section 27.

Relations of Partners to one another and to Third Parties.

Relations to one another—Section 11(1) of the Partnership Act provides that "Subject to the provisions of this Act, mutual rights of the partners of a firm may be determined by contract between the parties, and such contract may be expressed or may be implied by a course of dealing. Such contract may be varied by consent of all the partners and such consent may be express or may be implied by a course of dealing." The Partnership Act lays down the following general rules for determining the relations of partners to one another : (1) Section 9 of the Act lays down that "partners are bound to carry on the business of the firm to the greatest common advantage, to be just and faithful to each other and to render true accounts and full information of all things affecting the firm to any partner or his legal representative."

(2) Section 10 of the Act provides that "Every partner shall indemnify the firm for any loss caused to it by his fraud in the conduct of the business of the firm."

(3) The partners can hold and use the property of the partnership business only and exclusively for the purposes of the business of the firm. Section 15.

The partners may divide the work of the management among themselves according to their convenience and in any way of their liking. It is found in most cases that one or more partners never participate in the work of the management of the partnership business. These partners are called sleeping partners. Section 11(2) provides that under the partnership contract a partner cannot carry on any business different from that of the firm while he is partner. Such an agreement is not void on the ground of restraint of trade."

Relations to third parties—Under section 18 of the Partnership Act it has been stated that "subject to the provisions of this Act a partner is the agent of the firm for the purposes of the business of the firm." For this reason a Partnership Act is called a branch of the law of Agency. If a partner does any act or transaction in the general work of the business, he can bind the partnership firm and other partners to the third parties by that act or transaction. In this the following conditions shall have to be necessarily present :

(a) The work or transaction shall be required to be under the normal business.

(b) The transaction is to be within the normal rules of the management of the business.

(c) Transaction shall always be necessarily made in the name of the partnership firm or the partner shall enter into contract in such way, so that the intention of binding the partnership firm expressly or impliedly can be apparently understood. Section 22.

(d) It is essential that the partner has the express or implied authority in doing the transaction.

Dissolution of Firm : Definition : According to section 39 of the Partnership Act, the dissolution of a partnership between all the partners of a firm is called the "dissolution of the firm".

GROUNDS OF DISSOLUTION OF A PARTNERSHIP FIRM.

A partnership firm may be dissolued in any of the following ways :

(1) According to contract—"A firm may be dissolved with the consent of all the partners or in accordance with a contract between the partners". Section 40.

(2) By giving notice—In respect of this ground section 43(1) provides that "Where the partnership is at will the firm be dissolved by any partner giving notice in writing to all the other partners of his intention to dissolve the firm". The

dissolution will take effect from the date as given in the notice of the dissolution of the firm.

(3) On happening of contingent events—Regarding this ground of dissolution section 42 provides that "subject to the contract between the partners a firm is dissolved—

(a) if constituted for a fixed term, by the expiry of that term,

(b) if constituted to carry out one or more advantages or undertakings, by the completion thereof,

(c) by the death of a partner, (d) by the adjudication of a partner as an insolvent." In this case it is mentioned that if there is a condition in the partnership contract under any of the above stated cases the firm will not be dissolved, in that case the contract will be valid and it will be effective as well.

(4) When the dissolution is compulsory—As regards this ground, section 41 provides as follows—A firm may be dissolved—(a) by the adjudication of all the partners or of all the partnerss but one as insolvent Section 41(a), or (b) by the happening of any event which makes it unlawful, for the business of the firm to be carried on or for the partners to carry it on the partnership [Section 41(b)].

(5) By order of the court—The court may order for the dissolution of the firm on any of the following reasons, on the basis of a suit filed by a partner :

(a) On the mental derangement of a partner. In this case the suit may be filed by a friend of the mentally deranged partner or by any other partner.

(b) If any partner (other than the one filing the suit to the court) becomes ineffective for ever to perform his duties as a partner (e.g. in capacity by incurable disease).

(c) If a partner (other than the one filing the suit) is guilty of conduct which may affect the carrying on of the business, regard being had to the nature of the business.

(d) If a partner wilfully and persistently commits breach of the partnership agreement (regarding management), or

otherwise conducts himself in such a way that it is impossible for the other partners, for carrying on the partnership business with him.

(e) If a partner has transferred the whole of his interest in the firm to an outsider or has allowed his interest to be sold in execution of a decree.

(f) If the business of the firm cannot be carried on except at a loss.

(g) If the court considers it just equitable to dissolve the firm.

Consequences of Dissolution : The rights and liabilities of partners after dissolution of the partnership firm have been indicated in the Partnership Act of 1932. These are discussed as under—

(1) Liability of partners—Even after the dissolution of a firm, the partners shall remain liable for all acts done in respect of the affairs of the firm until public notice is given about dissolution.

(2) Right of winding up—Upon the dissolution of a partnership firm, its affairs must have to be wound up on the basis of the rules of the Act. The assets of the firm will be collected and these will be utilized for payment of the debts and liabilities of the firm. Then the surplus, if any, will be distributed among the partners according to their rights. Section 46.

(3) Right of the partners in the affairs of winding up—Inspite of the dissolution, the authority of each partner to bind the firm and other mutual rights and obligations of partners continue—

(a) so far as may be necessary to wind up the affairs of the firm, and

(b) to complete the transactions begun before dissolution but remaining unfinished at the time of the dissolution, subsequent to dissolution, a partner cannot bind the firm in any case other than the two cases discussed above. A partner on being adjudged

insolvent cannot bind the firm in any case after passing of the order of adjudication. Section 47.

(4) Profit earning after dissolution—Subsequent to the dissolution, if any partner earns any profit from the transactions concerning the firm, then he must have to distribute the profit along with other partners. Section 50.

(5) Payment of premium—If a partner paid any premium for being a partner in a partnership formed for a fixed term and dissolved before the expiry of the term, the partner in that case, will be entitled to get back the premium or a reasonable part of it for the unexpired period of the partnership. But in the following three cases he will not get back the premium—

(a) if the dissolution occurs mainly due to his punishable misconduct, or

(b) if the dissolution occurs in the absence of any contract to the contrary, or

(c) if the dissolution occurs due to death of a partner. Section 51.

(6) Right of restraining from use of firm name or firm property—After dissolution, every partner or his representative may, in the absence of a contract between the partners to the contrary, restrain any other partner or his representative from carrying on a similar business in the firm name or from using any of the property of the firm for his own benefit, until the affairs of the firm have been completely wound up. But a partner who has purchased the goodwill of the firm, cannot be restrained from using the firm name. Section 53.

Mode of Adjusting of Accounts on Dissolution : The manner of adjusting the accounts of the partnership firm on its dissolution has been written on the partnership agreement (contract). In the absence of any such manner in the partnership contract, the accounts will be settled according to the provisions of the sections (48 & 49) of the Partnership Act. The provisions (Rules) are discussed as under :

(1) Losses will be paid first out of the profits and next from the capital. Finally, if there is deficiency of capital, the partners will individually pay the shortage of the losses in their agreed

proportions of sharing profits. In this case the capital deficiency will be considered as loss. Section 48(a).

(2) The various assets of the firm as well as the money contributed by the partners together will be utilized in the following manner and order : (a) For payment of the debts of the firm to third parties, (b) for payment of the advances made by the partners beyond their capital in proportional rates, (c) for payment of the money contributed by the partners on account of capital which is due to them in proportional rates,. (d) if there remain any surplus after these payments, it will be distributed among the partners in the agreed proportions of sharing profits. Section 48(b).

(3) Where the firm has debts, *i.e.* the joint debts of the partners of the firm and a partner has separte debts, then first of all the joint debts will be paid from the property of the firm and any surplus remaining from the property of the firm will then be applied in the payment of the separate debts of the partner. Section 49.

Goodwill : Definition—Goodwill is not defined in the Partnership Act. Goodwill is virtually the advantage which is acquired by firm the connections it has built up with its customers and the reputation it has gained. According to Halisbury—"The goodwill of a business is the whole advantage of the reputation and conneciton formed with customers together with the circumstances, whether of habit or otherwise, which tend to make such connection permanent. It serenest, in connection, with any business or business product the value of the attraction to customers which the name and reputation possesses."

Sale of Goodwill after Dissolution Goodwill is a part of the property of the firm. Section 55 of the Partnership Act provides that in settling the accounts of a firm after dissolution, the goodwill shall, subject to contract between the parnters, be included in the assets and it may be sold either separately or along with other property of the firm.

The buyer of the goodwill gets exclusive rights to represent himself as carrying on the old business. He can also use the name of the old firm.

The sellers of the goodwill, i.e. the partners of the firm, or any one or more of them may carry on a business competing with that of the buyer and may advertise the business. Sections 55(2) of the Partnership Act gives this right because of the general principle that a man may adopt any trade, occupation, or profession that he chooses. For safeguarding the buyer of the goodwill in competition with the partners of the old firm, section 55(2) provides that such a partner or partners cannot –

(a) Use the firm name,

(b) represent himself as carrying on the business of the firm, or

(c) solicit the custom of persons who were dealing with the firm before its dissolution, unless there is an agreement with the buyer of goodwill permitting any of these.

The purchaser of the goodwill may also protect himself from the competition of old partners by making a contract with any partner preventing him from carrying on any business similar to that of the firm within a specified period or within a specified local limits. This contract will be valid if the restrictions are reasonable despite the fact that contract may amount to restraint of trade. Section 55(3).

CHAPTER-5

LAW RELATING TO NEGOTIABLE INSTRUMENTS

Definition : Section 13(1) of the Negotiable Instrument Act of 1881 has defined Negotiable Instrument as "Negotiable Instrument means promissory Note, Bill of Exchange or Cheque payable either to order or to bearer." From the definition it appears that in Bangladesh only three kinds of instruments are recognised in the Act as negotiable instruments, namely promissory notes, Bills of Exchange and cheques. Despite some documents such as Hundi, Bill of Lading, Dividend Warrant, etc., have also been accepted as Negotiable Instruments. The law relating to negotiable instruments is contained in the Negotiable Instrument Act of 1881. The Act is based on English Law. It is more or less a codification of the English common law rules on the subject. In Bangladesh the various negotiable instruments are controlled by the Negotiable Instrument Act, 1881.

Characteristics of Negotiable Instruments

The following are the characteristics of Negotiable Instruments–

(i) Property in the instrument passes from hand to hand by mere delivery.

(ii) The holder in due course is not affected by defects in the title of his transferor or of previous holders

(iii) The holder in due course can sue in his own name.

(iv) The holder in due course is not affected by certain defenees which might be available against previous holders, e.g, fraud to which he is not a party.

(v) It passes from hand to hand like cash and can be conveniently assigned in discharge of duties.

Promissory Note : Definiton–Section 4 of the Negotiable Instrument Act, 1881 has defined promissory note as "An instrument in writing (not being a Bank Note or a Curreney Note) containing an unconditional undertaking, signed by the maker, to pay a certain some of money only to or to the order of a certain person, or to the bearer of the instrument." There are two parties in a promissory note, namely promisor and

promisee. Promisor is one who makes the promissory note. The promisee is one who receives the money mentioned in the promissory note.

ESSENTIAL ELEMENTS OF PROMISSORY NOTE.

The following are the essential elements of Promissory Note : (1) The instrument must be in writing

(2) The instrument must be signed by the maker of it. The signature in ink pencil or by a rubber stamp of facsimile is alright. Illiterate person may use a mark or cross instead of writing out his name.

(3) The instrument must contain a promise which must be express. It cannot be implied. Mere acknowledgement of indebtedness is not enough.

(4) The promise to pay must be unconditional otherwise the promise will not be considered as promissory note.

(5) The amount of money promised to be paid must be certain.

Example—Karim promises to pay Rahim Tk. 1000 and all other sums which shall be due to Rahim. This is not a promissory note because the sum of money to be paid is uncertain.

(6) The promise to pay must be certain. That is promise to pay money must be to a certain person.

(7) The maker of the instrument must be certain and definite.

(8) A promissory note must be stamped according to Bangladesh Stamp Act.

(9) The payment of the money promised to pay must be in the legal tender money of Bangladesh.

(10) The promissory note may be payable on demand or after a certain definite period of time.

SPECIMENS OF PROMISSORY NOTES ARE GIVEN BELOW :

(i) "On demands promise to pay Rahim of 2/M, Azimpur Estate, Dhaka, Bangladesh or order Tk. 5000 (Taka Five

Thousand only) with interest at 6 per cent per annum, for value received in cash", Sd/Karim.

Date .....

Address .....

(ii) "One year after date I promise to pay Hossain or Order Tk. 7000" Sd/Karim.

Date .....

(iii) "On demand I promise to pay Hamid or order Tk 10000." Sd/Yasin.

(iv) "I acknowledge myself to be indebted to Hanif for Tk. 5000 to be paid on demand, for value received in cash" —Sd/K. Ali.

BILL OF EXCHANGE

Definition : Section 5 of the Negotiable Instrument Act defines a Bill of Exchange in the following way-"A Bill of Exchange is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of a certain person or to the bearer of the instrument."

Drawer —The maker of a Bill of Exchange is called drawer.

Drawee—Drawee is a person who is directed to pay.

Payee — Payee is a person who receives the money.

Holder — Payee having the custody of the Bill is called Holder.

Acceptor—When the drawee signifies his acceptance by signing on the bill presented to him by the Holder for acceptance, is called the Acceptor.

When the original drawee does not accept the bill, then another person whose name is mentioned in the bill accepts it and, therefore, he is called Drawee in case of need.

Characteristics of Bill of Exchange the following are the characteristics (essentials) of the Bill of Exchange. These essentials are required to be fulfilled for the instrument to be valid.

(1) The bill must be in writing.

(2) The bill is to be signed by the drawer. If it is not signed, it will not be considered as a complete bill of Exchange.

Signature means a mark signifying evidence or impression or it should be signed by authorized agent of the writer of the instrument.

(3) In the bill there must be an express and unconditional order to pay money. This element contains three things, namely–

(i) There must be an order (not request).

(ii) The order must be for paying money. It is not for giving any material or thing.

(iii) The order should be unconditional.

(iv) The amount of money payable must be certain and it must be in the legal tender money of Bangladesh.

(v) The drawer, drawee and the payee must be certain and definite persons. If the instrument contains wrong name of the payee or his official designation in that case also the instrument will be considered a valid bill.

(vi) The bill must be properly stamped otherwise it will not be accepted as a proof. If any of the above discussed elements is not present in the instrument in that case no bill will be treated as lawful bill of exchange.

Specimens of a Bill of Exchange are given below :

(i) One year after date pay Ram or order Tk. 1000. Sd/Karim.

Stamp– Date.....

(ii) Six months after pay to Hamid or bearer (or order) Tk. 5000. Sd/Karim

Stamp– Date .....

Difference between Bill of Exchange And a Promissory Note :

(1) A promissory note is a written promise from the debtor to the creditor. Whereas a Bill of Exchange is an order given by creditor over debtor to pay money.

(2) In a promissory Note there are two parties, namely promisor (Maker) and promisee (Payee), but in a Bill of

Exchange three parties are there, namely drawer, drawee and payee.

(3) In a promissory note acceptance is not necessary, but in a bill of exchange acceptance is required, otherwise the drawee is not liable to pay the money of the bill.

(4) In a promissory note notice of dishonour is not necessary. But in a bill of exchange, if the bill is dishonoured the parties responsible for the dishonour must communicate the subjects of dishonour through Notary Public.

(5) In a promissory note the promisor or the maker is primarily liable to pay the money of the instrument. In the case of Bill of Exchange, the primary liability to pay money is of the drawee, but if he drawee refuses to pay the money then only the drawer is liable to pay the money.

CHEQUE

Definition : Under section 6 of the Negotiable Instrument Act cheque has been defined as follows. "A cheque is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand."

FEATURES OF CHEQUE

(1) A cheque must fulfil the essential elements of a bill of exchange.

(2) A cheque may be payable to bearer or to order, but it is always payable on demand in either case.

(3) The signature must tally with the specimen signature of the drawer kept in the bank; (4) The cheque must be dated, otherwise it may be refused by the banker. A cheque becomes due for payment on the date specified on it.

(4) Cheques may be written by hand. There is no legal bar for this.

(5) Cheque must be validly drawn and the drawer must have sufficient funds to his credit in the bank otherwise the banker named may not pay the cheque when it is presented to him for payment.

(6) In some certain circumstances the bank is not bound to pay the cheque.

(7) A cheque may be presented for payment even after the due date, but in cases of too much delay the bank may refuse to honour the cheque.

A specimen form of cheque is given below—

To Agrani Bank

Date .....

Pay Rahim or order (or bearer) the sum of Taka Ten thousand only. Tk. 10000

Sd/Karim.

TYPES OF CHEQUES

There are three types of cheques which are discussed as under :

(1) Bearer cheque—A bearer cheque is one in which after the name of the payee the words "or bearer" are written. Sometimes the name of the payee is not mentioned in the cheque. But the words "or bearer" must be in the cheque. If one person gives it to another person, then the cheque is treated as transferred. It does not require any endorsement.

(2) Order cheque—This is a kind of cheque in which after the name of the payee the words "or order" are written. This cheque will not be enforced if it contains only the words "or order" but not the name of the payee. The name of the payee and the words "or order" after the name of the payee must be written or printed. Endorsement is necessary in order to transfer the cheque. When the cheque is signed on its back by the payee, it then becomes bearer cheque.

(3) Crossed cheque—A crossed cheque is one in which two short parallel lines are marked across its face. Between the parallel lines the following words (remarks) may or may not be written—'And company', 'Account payee', not negotiable, etc. or their abreviations. A crossed cheque can be paid only in another bank. That is, a crossed cheque can only be cashed through a bank of which the payee of the cheque is a customer. Naturally a crossed cheque will not be paid across

the counter. The advantage of the crossed cheque is that the danger of unauthorized persons having possession of a cheque and cashing it is greatly reduced. That is, since crossed cheque is paid only through bank, the crossed cheques cannot be stolen and misused.

Distention between Bill of Exchange and cheque.

The differences which can be noticed between the Bill of Exchange and cheque are discussed as follows :

(1) By a bill of exchange any person (including bank) may be given an order to pay money. But by a cheque only bank is ordered to pay money.

(2) Except in special cases the bill of exchange does not always require acceptance. In case of cheque acceptance is not necessary at all.

(3) Bill of exchange may be payable on demand or it may be payable after a certain period of time. But a cheque is payable always on demand.

(4) In the case of a bill of exchange the acceptor of a bill of exchange is allowed a grace period of three days after the maturity of the bill to make the payment. But in the case of a cheque no grace period is allowed. It is always payable on demand.

(5) The drawer of a bill of exchange is discharged from liability if the bill is not presented to the acceptor for payment at the due time. But the drawer of a cheque is discharged from his liability only if he suffers damage owing to delay in presenting the cheque for payment.

(6) If a cheque is dishonoured by a bank then it is necessary to give a notice of dishonour to the drawer for making him liable for paying compensation to the payee. But in a bill of exchange, notice of such dishonour is not required to be given. But in certain special cases it is necessary.

(7) A cheque may be crossed, but there is no system (Provision) of crossing a bill of exchange.

(8) In the case of a cheque the payment may be countermanded by the drawer, but this cannot be done in the case of a Bill of Exchange.

(9) Stamp is not necessary in the case of a cheque, but in the case of a bill of exchange stamp is required. That is, a bill of exchange must be stamped except in certain cases.

Crossing of cheque

A crossed cheque is one in which two short parallel lines are drawn across its face. This type of cheque can only be cashed through a bank of which the payee of the cheque is a customer. It cannot be cashed at the counter of the drawee bank. The advantage of crossing is that the cheque cannot be stolen or misused since the amount of the cheque is paid only through the bank of the payee.

Modes of crossing a cheque.

There are different modes of crossing a cheque. When a cheque is crossed by drawing two parallel lines across the face of the cheque, it is called general crossing. A cheque of general crossing is paid to any bank through which it is presented. Under section 123 a cheque crossed generally has been defined as follows—Where a cheque bears a cross on its face in addition to the words and company or any abbreviation thereof, between two parallel transverse lines or of two parallel transverse lines simply, either with or without the words not negotiable that addition shall be deemed a crossing and the cheque shall be deemed to be crossed generally."

When the name of the bank is written between parallel lines, it is called special crossing. A cheque of special crossing will be paid only when this cheque is presented by the bank named between the parallel lines. This type of crossing provides a substanial measure of protection against loss. Section 124 of the Negotiable Instrument Act defines a specially crossed cheque as fellows—"Where a cheque bears a cross on its face in addition to the name of a bank, either with or without the words' not negotiable, that addition shall be deemed a crossing, and that shall be deemed to be crossed specially, and to be crossed to that banker."

Besides general or special crossing, a cheque may have various remarks written on it. The effect of such remarks is to restrict payment in certain ways. These remarks are "Account

Payee" and "Not negeotiable" "Account payee only." The words account payee" on a cheque is interpreted as a direction on the banker to credit the amount of the cheque to the account of the payee. Such a cheque is transferable because its negotiation is not prohibited. The usual principle about negotiable instruments is that if the cheque is negotiable in its origin, the words "Account payee only" prohibiting transfer or indicating an intention of not to transfer will not defeat the transferability or negotiability of the cheque.

Not Negotiable—A cheque bearing words "not negotiable" can be transferred or assigned by the payee. The transferee will get the same rights as regards payment, as the transferor had. But the transferee will not get the same of holder in due course. Section 130 in this has provided that "A person taking a cheque crossed generally or specially, bearing in either case the words not negotiable, shall not have, and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had." From this it follows that the transferee of such a cheque takes it at his risk. Section 125 provides as follows (regarding crossing after issue) :

(i) Where a cheque is uncrossed, the holder may cross it generally or specially.

(ii) Where a cheque is crossed generally the holder may cross it specially.

(iii) Where a cheque is crossed generally or specially, the holder may add the words "not negotiable."

(iv) Where a cheque is crossed specially the banker to whom it is crossed specially may again cross it specially to another Banker, his agent, for collection.

Those who can cross a cheque—A cheque can be crossed by the drawer, the Holder and Bank (for collection). The Holder and the Bank can cross the cheque under the circumstances specified under section 125. The Drawer can cross a cheque generally or specially before issuing it.

ACCEPTANCE

Definition—Acceptance means acknowledgement of the sum mentioned in a bill of exchange by the drawee or any other person on his behalf. When the drawee puts his signature on the bill, it means he acknowledges his liability under the bill. Under certain cases the bill need not be accepted. The drawee is not liable on the bill unless the it is presented to him for acceptance and he actually accepts it.

Those who can accept a bill :

The following persons can only accept a bill of exchange :

(a) The drawee of a bill.

(b) The drawee in case of need.

(c) The legal representative, when the drawee is dead. Section 75.

(d) The official Assignee or official Receiver, when the drawee has become insolvent. Section 75.

(e) Where there are several drawers of a bill of exchange who are not partners, each of them can accept it for himself, but none of them can accept it for another without his authority. Section 34.

When the several drawees are partners, acceptance by one will bind all others. It is because in a partnership there is an implied authority of every partner to act for every one else.

Kinds of Acceptance :

There are two kinds of acceptance. These are as follows—

(1) General Acceptance—When an acceptance is unconditional and unqualified, it is called general acceptance. That is, when the drawee accepts liability to pay the amount of the bill in full without any condition, this is called general acceptance.

(2) Qualified Acceptance—A qualified acceptance is one where the drawee or any one on behalf of the drawee accepts the bill subject to some conditions. For example—the bill can be accepted for an amount less than that of the bill; stipulating a place of payment other than that as indicated in the bill, etc.

The holder of a bill may refuse qualified acceptance. He can treat the bill as dishonoured for non-acceptance and take legal steps to recover his dues from the parties liable. But if he wishes, the holder may accept the qualified acceptance. In that case subject to conditions, he will be liable only to the extent as mentioned in the qualified acceptance.

Acceptance not necessary :

Acceptance is not necessary in the following cases—(1) When the bill of exchange is payable on demand.

(2) When a bill is payable at sight.

(3) When the bill is payable after certain number of days from the date when the bill is made.

(4) When the bill is payable on a certain day.

However, if there is a condition that in the above bills acceptance will be necessary, in that case the bills shall require acceptance.

Presentment for Acceptance :

Presentment means presenting or placing a negotiable instrument either for purpose of acceptance or for the purpose of payment. Thus presentment may be of two kinds, namely (i) presentment for acceptance, and (ii) presentment for payment.

(i) Presentment for acceptance—This type of presentment is necessary only in the case of a bill of exchange payable after sight, *i.e.* not payable at sight or on demand. It does not apply to cheques or promissory notes. When time or place is not indicated for presentment, a bill, which is payable after right, is to be presented to the drawee for his acceptance. A person entitled to demand—acceptance, must present the bill within a reasonable time and before the payment after the bill is drawn. The presentment of the bill must be within business day. When a particular place of presentment is mentioned the bill is to be represented to the drawee at that particular place. A bill of exchange may be presented through post office if it is allowed by agreement or usage. Where the drawee cannot be found after a reasonable search the bill is to be treated as dishonoured. If a bill requires acceptance but it is not presented for acceptance as per a foresaid rules, the

drawee and other parties thereto are discharged from their liability to the holder. Section 61.

It is not compulsory for the drawee to accept the bill of exchange just on presentment. The drawee is allowed 48 hours time to deliberate over the matter. That is, the drawee is given 48 hours' time to think if he will accept the bill or he will not accept it. However, when given time of 48 hours is over, the drawee shall have to return the bill to the holder. He will do either with or without acceptance, i.e. he can do it either way., If during the period in which the drawee is in custody of the bill, the bill is mutilated, destroyed or lost, the drawee must pay compensation to the holder for such loss or destruction. If the holder is given additional time over 48 hours for deliberation, all the prior parties to the bill are discharged from their liabilities to the bill of exchange. Section 63.

NO NECESSITY OF PRESENTMENT FOR ACCEPTANCE OF A BILL OF EXCHANGE

In the follwing cases presentment for acceptance of a bill of exchange is not necessary : (1) When the drawee cannot be found after a reasonable search (section 61). (2) Where the drawee is a person, who is not existing or fictitious, on whom the bill of exchange is drawn, (3) When the drawee is not a competent person to enter into contract.

For example– the drawee is a minor or a person of unsound mind. Section 91. (4) Where the drawee becomes insolvent or he is dead. Section 75.

Presentment for Payment :

The Negotiable Instrument Act has laid down rules for presentment for payment of the amount of the bill of exchange. The rules are as follows–(1) "Promissory Notes, Bills of Exchange and cheques must be presented for payment to the maker, acceptor, or drawee thereof respectively by or on behalf of the holder as thereafter provided. In default of such presentment, the other parties thereto are not liable therein to such holder. Where authorized by agreement or usage a

presentment through post office by means of a registered letter is sufficient."

Exception—Where Promissory Note is payable on demand and is not payable at a specified place, presentment is necessary in order to charge the maker thereof. Section 64.

(2) Section 65 provides that "presentment must be made during the usual hours of business and if at a banker's, within banking hours."

(3) Under section 66 it has been stated that "A promissory note or Bill of Exchange made payable at a specified period after date or sight thereof must be presented for payment at maturity."

(4) Section 67 provides that—"A promissory note payable by instalment must be presented for payment on the third day after the date fixed for payment of each installment and non-payment on such presentment has the same effect as non-payment of a note on maturity."

(5) Section 68 provides that " A promissory note, bill of exchange or cheque made, drawn or accepted payable at a specified place and not elsewhere must, in order to charge any party thereto, be presented for payment at that place."

(6) According to section 69, "A promissory note or bill of exchange made drawn or accepted payable at a specified place must, in order to charge the maker or drawer thereof, be presented for payment at that place."

(7) Section 70 provides that " A promissory note or bill of exchange, not payable as mentioned in sections 68 and 69, must be presented for payment at place of business (if any), or at the usual residence, of the maker, drawee or acceptor thereof, as the case may be."

(8) Under section 71 it has been provided that "If the maker, drawee or acceptor of a Negotiable Instrument has no known place of business or fixed residence, and no place is specified in the instrument for presentment for acceptance or payment, such presentment may be made to him in person wherever he can be found."

(9) A cheque must, in order to change the drawer, be presented at the bank upon which it is drawn before the relation between the drawer and his banker has been altered to the prejudice of the drawer. Section 72.

(10) Section 73 provides that " A cheque must, in order to charge any person except the drawer, be presented within a reasonable time after delivery thereof by such person."

(11) "A negotiable instrument payable on demand must be presented for payment within a reasonable time after it is received by the holder. Section 74.

(12) Section 75 provides as follows —"Presentment for acceptance or payment may be made to the duly authorized agent of the drawee maker or acceptor, as the case may be, or where the drawee, maker or acceptor has died to his legal representating or where he has been declared insolvent, to his assignee."

(13) Section 75(A) provides that "delay in presentment for acceptance or payment is excused if the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate presentment must be within a reasonable time.

Circumstances under which presentment for payment of negotiable instrument is not necessary.

Section 76 of the Negotiable Instrument Act has laid down the rules that in the following cases presentment of negotiable instrument for payment is not necessary :

(1) If the maker, drawee, or acceptor intentionally prevents the presentment of the negotiable instrument.

(2) If the negotiable instrument being payable at his place of business, he closes such place on a business day during the usual business hours.

(3) If the instrument being payable at some other specified place, neither he nor any person authorized to pay it attends at such place during the usual business hours.

(4) If the instrument not being payable at any specified place, he cannot be found after due search.

(5) Where the maker, the drawee or the acceptor has agreed to pay without presentment of the negotiable instrument.

(6) Where the maker, the drawee or the acceptor, as the case may be makes a part payment of the instrument or promises to pay in whole or in part with knowledge that the instrument has not been presented even after maturity of the instrument or otherwise waives his right to demand presentment.

(7) Where the drawer could not suffer damage for not presenting the instrument.

In each of the above cases the instrument is deemed as dishonoured at the due date for presentment.

ENDORSEMENT

Definition : Section 15 defines endorsement as follows "When the maker or holder of a negotiable instrument signs the name, otherwise than as such maker, for the purpose of negotiation, on the back or face thereof, or a slip of paper annexed thereto, or so signs for the same purpose a stamped paper intended to be completed as negotiable instrument, he is said to endorse the same and is called the endorser."

Effect of Endorsement (Indorsement)

The indorsement of a negotiable instrument followed by the delivery thereof, transfers to the endorsee the property therein with the right of further negotiation. But the right of further negotiation may be restricted or excluded by express words. Section 50.

Kinds of Endorsement.

Endorsement can be done mainly in the following six types.

(1) Endorsement in blank—When the endorser endorses the instrument only by signing his name, this is said to be endorsement in blank. (Section 16(1)).

Example—"Pay....." Sd/Karim.

When the endorsement is "in blank" the instrument passes by delivery like a bearer note. A transferee by mere

delivery of the instrument is not a party to it. The payee is neither liable under the instrument nor he is allowed the privileges of the same. A negotiable instrument which is endorsed blank is payable to the bearer thereof even although originally payable to order (Section 54). Of course, this is not applicable to crossed cheques.

(2) Endorsement in full—When the endorser endorses the instrument by mentioning the name of the person who is to be paid the amount of money mentioned in the instrument this endorsement is said to endorsement in full. (Section 16(1).

Example—"Pay to Karim or order" Sd/Rahim. The holder of an instrument which is endorsed in blank is allowed to convert it to an endorsement in full by signing his name or the name of any other person above the endorsement. In this case the amount of the instrument cannot be claimed from the endorser in full except by the person to whom the instrument is endorsed in full or a person who gets title from such endorser in full. Section 55.

(3) Restrictive Endorsement—When the endorser, by express words endorses an instrument and restricts it's further negotiation or only allows the indrosee of the instrument to receive the amount of the money mentioned in the instrument, the indrosement then is called 'Restrictive Endorsement. Example—"Pay To Karim Tk. 500 for my use" etc.

(4) Facultative Endorsement—When, by express words, the endorser endorses an instrument by abandoning some right or by increasing his liability under ft, the endorsement than is called Facultative. Example— An endorsement bearing a remark "Notice of dishonour waived."

(5) Conditional Endorsement—When an endorser endorses a negotiable instrument by excluding his own liability thereon and restricts the right of the indorsee on the happening of an event, this endorsement is called conditional.

(6) Partial Endorsement—When an endorsement is made by transferring only a part of the amount of a negotiable instrument, then it becomes invalid. But when a negotiable instrument is partly paid and the instrument can be

negotiated for the amount remaining on condition that the fact of part-payment has been mentioned on the instrument, this type of endorsement is then called partial endorsement. Section 56.

NEGOTIATION

When the ownership of an instrument is transferred from one person to another, the process by which this is done is called negotiation. Section 14 of the Act has defined negotiation as follows "when a Bill of Exchange, cheque or a Promissory Note is transferred to any person, so as to constitute that person, the holder, thereof, the instrument is said to be negotiated."

The making, acceptance or endorsement of a negotiable instrument (Note, bill or cheque) becomes complete by actual or constructive delivery. Section 46. Section 47 of the Negotiable Instrument lays down that if an instrument is payable to bearer, then it can be negotiated by mere delivery. For example—Karim, the holder of a negotiable instrument payable to bearer, delivers it to Rahim. The instrument is therefore, negotiated to Rahim. But where the negotiable instrument is payable to order, then negotiation will require both endorsement and delivery as necessary. Section 48 of the Act provides that "Subject to the provision of section 58, a promissory note, bill of exchange or cheque payable to order, is negotiable by the holder by endorsement and delivery thereof."

According to section 51 of the Act the maker, drawer, payee or endorsee and if there are several makers, payees, drawers or endorsees, all of them jointly can negotiate an instrument, provided its negotiability has not been restricted or excluded by a term used in the instrument" Section 60 of the Act provides that "A negotiable instrument may be negotiated (except by the maker, drawee or acceptor after maturity) until payment or satisfaction thereof by the maker, drawee or acceptor at or after maturity, but not after such payment or satisfaction."

ASSIGNMENT

Definition : When some property or right of a claim is transferred by deed or by any other method according to the Transfer of Property Act, this is called assignment.

NEGOTIATION

Definition : Negotiation means the process by which the ownership of an instrument is transferred from one person to another according to the Negotiable Instrument Act.

Difference Between Negotiation and Assignment.

(1) Negotiation is the procedure on the basis of which a negotiable instrument is transferred under the Negotiable Instrument Act. That is, if a negotiable instrument is payable to bearer, it is transferred by delivery only. Where a negotiable instrument is payable to order, it is then transferred by delivery and endorsement. Assignment means transfer. That is, assignment means the transfer of a right or an actionable claim by deed or by any other method according to the procedure of the Transfer of Property Act.

(2) In the case of negotiation of a negotiable instrument, the transferee is called the 'holder in due course' if he has received the instrument bonafide and for value. The holder in due course is not affected by any defect in the title of the transferor. Rather the transferee may have a better title than the transferor. Whereas in the case of assignment, the person to whom right or dain is transferred (called assignee) acquires the rights of the assignor and nothing more than that. The title of the assignee will be defective if the title of the assignor was defective.

(3) In the case of an assignment it is a must for the assignee to give notice to the debtor. But the transferee is not required to give notice to the debtor in the case of a negotiation.

(4) In the case of negotiation, it is to be assumed that the negotiation has been made in return for a valuable consideration. But in the case of an assignment, consideration

is not taken as presumed. Instead the claiming party has to prove consideration.

(5) Negotiation becomes complete only by delivery or by delivery and endorsement. But assignment does not become complete except through written deed.

HOLDER

Definition : Section 8 of the Act defines' Holder as follows "The holder of a promissory note, bill of exchange or cheque means any person entitled in his own name to possession thereof and to receive or recover the amount due thereon from the parties thereto." Where a negotiable instrument is lost or destroyed, its holder is the person so entitled at the time of such loss or destruction (Section 8). From the above definition it appears that the holder must have two rights—(i) Right to the possession of the instrument, (ii) Right to recover the money due on the instrument. It is mentioned here that a person who obtains possession of the instrument by illegal means is not a holder.

Holder in Due course

Under section 9 of the Negotiable Instrument Act Holder In Due Course' has been defined as follows—"Holder in due course means any person who, for consideration, became the possessor of a promissory note, bill of exchange or cheque, if payable to bearer, or the payee or endorsee thereof, if payable to order before the amount mentioned in it becomes payable, and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title."

From the definition it appears that the 'holder in due course' must fulfil the following conditions—

(i) he obtains the possession of the instrument in return for a valuable consideration,

(ii) he is to have possession of the instrument payable to bearer,

(iii) the payee or indorsee will be considered as 'holder in due course' in the case of instrument payable to order,

(iv) the indorsee obtains the possession of the instrument before its maturity i.e. before the amount mentioned in the instrument became payable,

(v) he had no cause to believe that any defect existed in the title of the person from whom he derived his title.

Rights of a Holder in Due Course. Under the Negotiable Instrument Act the Holder in Due Course has the following rights :

(1) He gets a good title to the instrument despite the fact that the transferor's title was defective section 48.

(2) Under section 20 it is stated that he (holder in due course) get a good title despite the instrument has originally an inchoate instrument (stamped) and the transferor completed the instrument for a sum greater than what was intended by the maker.

(3) He can make liable the prior parties after obtaining the conditional instrument, but other holders cannot do it. It is because the ownership of a conditional instrument cannot be negotiable. Sections 46 & 47.

(4) He can file a suit in his own name, against the parties liable to pay the amount of the instrument.

(5) All the prior parties to the instrument remain liable to the holder in due course until the amount due in the instrument is paid. Section 36.

(6) The acceptor of a bill of exchange which is written in a fictitious name and is payable according to the order of the drawer is liable to pay to the holder in due course if the signatures of the drawer of the fictitious bill and his first or only endorser are same. Section 42.

(7) Under section 121 it has been laid down that the maker of a promisory note and no acceptor of a bill payable to order shall be permitted to deny the payee's capacity, at the date of the note or bill to endorse the same if the holder in due course has filed a suit thereon.

Difference Between Holder And Holder In Due Course.

The differnces that are noticed between Holder and Holder in due course are discussed as under :

(1) Any person who is entitled in his own name to the possession of the instrument can be a holder. One can be holder without consideration. But in the case of Holder in Due Course—Any person who, for consideration, becomes possessor of an instrument, can be a holder in due course.

(2) If the instrument is obtained by endorsement, in that case the holder cannot get a better title to the instrument than the endorser. That is, if the endorser's title is defective, the holder's title also will be defective. But in the case of holder in due course, if the holder in due course does not receive a notice regarding such defect in the title or if had no cause to believe that any defect existed in the title of the instrument at the time of his accepting it, then he can get a good title to the instrument.

(3) In the case of instrument which is false or incomplete or which contains conditional endorsement, the holder may enjoy some special privileges. But in the case of incomplete false or conditional instrument, the holder in due course cannot enjoy any special privileges.

Rights and liabilities of the parties to the Negotiable Instruments.

Regarding capacity of the parties to the Negotiable Instrument section 26 of the Act provides that "every person capable of contracting according to the law to which he is subject may bind himself and be bound by the making, drawing, acceptance, endorsement, delivery and negotiation of a promissory note, bill of exchange or cheque. From the analysis of the above definion it appears that some of the parties to the negotiable instrument can make contract while others cannot. The parties capable of contracting are bound and the parties not capable of contracting are not bound. The various rules or provisions of the law regarding the different cases of incapacity of the different parties to the negotiable instruments are discussed below :

(1) Section 26 provides that "A minor may draw, endorse, deliver and negotiable such instrument so as to bind all parties except himself."

(2) The position of lunatic, idiot and drunken persons as parties to the negotiable instruments is same like that of a minor under the law. However, a lunatic can bind himself by a negotiable instrument if he signs it during a lucid interval.

(3) If a person is adjudicated, i.e. if a person is declared insolvent by the court, then his (insolvent) properties are put in the custody of the official Assignee. He (insolvent) therefore, cannot draw, make, accept or endorse a negotiable instrument. Before becoming insolvent if a bill is drawn upon him, it may be presented to the official Assignee for acceptance. If an instrument is carried into effect in favour of the insolvent after insolvency, the instrument then will be entrusted to the Official Assignee.

(4) Under section 26 of the Act, it has been stated that a corporation can be party to the negotiable instrument i.e. a corporation can incur liabilities under negotiable instrument if the corporation is given specific authority by the corporation's Memorandum and Articles of Association. A trading company can borrow by virtue of its implied powers and by so performing negotiable instrument. On the otherhand a non-trading company does not have implied powers to borrow. However, the company can perform negotiable instruments if the company is given specific authority to do so.

(5) Section 27 provides that "every person capable of binding himself or of being bound, by a negotiable instrument, may so bind himself or be bound by a duly authorized agent acting in his name." For executing negotiable instruments there must be specific authority. Because general authority for acting as agent does no authorize for performing negotiable instruments. An authority to draw bills of exchange does not of itself import an authority to endorse. Section 27.

(6) An agent when signing a negotiable instrument must clearly indicate that he signs it (instrument) as an agent. If he does not do so the agent will be personally liable on the instrument except to those who induced him to sign upon the belief that the principle only would be held liable. Section 28.

(7) Under section 29 of the act it has been laid down that a legal representative of a deceased person who signs his name

to a negotiable instrument must use words to indicate that he is not personally liable. If he does not use any such words, he becomes personally responsible."

(8) The karta of a Joint Hindu Family can bind the family by performing a negotiable instrument, the condition being that the transaction is for the interest or legal necessity of the family. The other members become bound to the extent of their share in the properties of the joint family. But these members are not personally responsible.

(9) Entering into contract with an alien enemy is against the law of country and its population policy. Therefore, if a country is at war with another country, then there cannot be any transaction relating to bill of exchange or promissory note between the citizens of these two countries.

Liability of the Parties to Negotiable Instruments.

The rules that have been provided under the Negotiable Instrument Act regarding the liability of the parties (Maker, Acceptor, Drawer, Endorser to a negotiable instrument are discussed as under :

(1) Maker and Acceptor : section 32 of the Act states that "in the absence of a contract to the contrary, the maker of a promissory note and acceptor of a bill of exchange before maturity are bound to pay the amount thereof at maturity according to the apparent tenor of the note or acceptance respectively. The money must be paid at or after maturity to the holder as required. In default of such payment, the maker and the acceptor is bound to compensate the party to the note or bill for any loss or damage sustained by him and caused by such default."

(2) Drawer—In respect of this section 30 of the Act provides that—"The drawer of a bill of exchange or cheque is bound, in case of dishonour by the drawer or acceptor thereof, to compensate the holder, provided due notice of dishonour has been given to or received by the drawer as there in after provided."

(3) Bank or Drawer of cheque—In this regard section 31 lays down that "The drawee of a cheque having sufficient

funds of the drawer, in his hands, properly applicable to the payment of cach cheque must pay the cheque when duly required to do so, and, in default of such payment, must compensate the drawer for any loss or damage caused by such default."

(4) Endorser—Regarding endorser Section 35 provides as follows—"the endorser of a negotiable instrument is liable to all subsequent parties in case of dishonour of the instrument, provided

(i) there is no contract to the contrary,

(ii) the endorser had not limited or qualified his liability by using appropriate words and expressions for the purpose, and

(iii) due notice of dishonour had been given to or received by, such endorser as hereinafter provided." However if the holder of the instrument without the permission from the endorser destroys his (latter) right of getting damage from any prior party, in that case the endorser will be relieved of his liabilities to the holder of the instrument. Section 40.

General Rules Regarding Liability of the parties.

The general rules as provided in the sections 36-38 regarding the liability of the different parties of the negotiable instruments are highlighted as under :

(a) "Every prior party to a negotiable instrument is liable thereon to a holder in due course until the instrument is duly satisfied". Section 36.

(b) "The maker of promissory note or cheque, the drawer of a bill or cheque until acceptance, and the acceptor, in the absence of a contract to the contrary, respectively are liable thereon as principal debtors, and the other parties thereto are liable thereon as sureties for the maker, drawer and acceptor as the case may be." Section 37.

(c) "As between the parties so liable as sureties, each prior party, is in the absene of a contract to the contrary also liable thereon as a principal debtor in respect of each subsequent party." Section 38.

EXTENT OF LIABILITY

Under section 117 it has been stated that the compensation payable if a negotiable instrument is dishonoured by any party liable on the instrument, is determined in the following ways–

(a) The holder will get the amount of the instrument. He will also be entitled to the amount of the expenses incurred in presenting, noting and protesting the instrument.

(b) In case the provider and receiver of the amount of the instrument are not citizens of the same country in that case the holder is entitled to get the sum at the current rate of exchange between the two countries.

(c) If an endorser has paid the amount of money of the instrument, he is then entitled to receive back the sum paid along with interest at 3%. He will also get back the expenses incurred on account of dishonour and payment.

(d) When the person charged and the endorser are citizens of different countries, the endorser then is entitled to receive the sum at the current rate of exchange between the two countries.

(e) If a party is entitled to receive compensation, he may then draw a bill upon the party responsible for payment of compensation. The bill is payable at sight or on demand and will include the amount due as well as the expenses incurred by the party entitled to compensation. The bill is required to be accompanied by the dishonoured instrument and the protest thereof (if any). If such bill is dishonoured, the party responsible for the dishonour of the bill is liable to make compensation in the same manner as in the case of the original bill. The new bill given under clause (e) is known as 'Redraft.'

Rights and liabilities of specialized parties.

There are specialized parties to the instrument besides the general parties of the Negotiable Instruments. The definitions, rights and liabilities of these parties are discussed in detail as under :

(1) Drawee in case of Need—Sometimes a name of another person is mentioned in a Bill of Exchange. This another person accepts the bill in case the original drawee does not accept the bill. This person is called "Drawee in case of Need". The bills of exchange in which the name of the 'Drawee in case of need is mentioned/written. will not be considered as dishonoured until the bills are presented to him for his acceptance and the drawee in case of need refuses to accept the bills. Sections 15. "A drawee, in case of need, may accept and pay the bill of exchange without previous protest." Section 116.

ACCEPTOR FOR HONOUR

Section 108 of the Act has defined Acceptor for Honour as follows—"When a Bill of Exchange has been noted or protested for non-acceptance or for better security any person not being a party already liable thereon, may, with the consent of the holder by writing on the bill, accept the same for honour of any party thereto." Therefore, the person who as such, accepts a bill of exchange, is called 'Acceptor for Honour'.

The rules as provided under Negotiable Instrument regarding the acceptance for honour' are discussed as under :

(1) It is necessary to take the consent of the holder of the bill before acceptance for honour. Section 108.

(2) Section 109 provides that "A person desiring to accept for honour must, by writing on the bill under his hand, declare that he accepts under protest the protested bill for the honour of the drawer or of the particular endorser whom he names, or generally for honour."

(3) Under section 110 it is laid down that "Where the acceptance does not express for whose honour it is made, it shall be deemed to be made for the honour of the drawer."

(4) The acceptor for honour must provide acceptance for the whole of the amount. of the bill before making its payment.

(5) More than one person cannot accept a bill for honour for one and the same person, consecutively. But if the first 'acceptor for honour' dies or becomes insolvent, in that case only a person can accept a bill for honour of the same person.

Liabilities and Rights of the Acceptor for Honour.

According to the Negotiable Instrument Act, the following are the liabilities and rights of an Acceptor for Honour :

(1) An acceptor for honour binds himself to all the parties coming after the party for whose honour he accepts to pay the amount of the bill if the drawee does not; and such party and all prior parties are in their respective capacities to compensate the acceptor for honour for all loss or damage sustained by him in consequence of such acceptance.

But an acceptor for honour is not liable to the holder of the bill unless it is presented, (or in case the address given by such acceptor on the bill is a place other than the place where the bill is made payable) forwarded for presentment, not eater than the day next after the day of its maturity. Section 111.

(2) An acceptor for honour cannot be charged unless the bill has, at its maturity, been presented to the drawee for payment, and has been dishonoured by him, and noted or protested for such dishonour. Section 112.

PAYMENT FOR HONOUR

When for non-payment a bill of exchange is noted or protested, in that case any person may pay the amount of the bill for honour of any party who is liable to pay the amount. This type of payment is called 'payment for honour'. According to section 113 the person who pays for honour or his agent must give a declaration before a Notary Public about the name of the party for whose honour he is paying. Section 114 provides that "any person paying for honour is entitled to all the rights of the holder of the bill at the time of the payment. He may recover from the party for whose honour he pays, all sums so paid, with interest thereon and with all expenses properly incurred in making such payment.

NOTARY PUBLIC

A Notary public is a senior officer appointed by the government. Generally a lawyer or any other person is appointed Notary Public. The Notary Public mainly exercises

the functions, as laid down in the Negotiable Instrument Act, for a Notary Public. His major functions are the following :

(1) Presentment of instrument demanding acceptance or payment or better security of a promissory note, a bill of exchange or a Hundi.

(2) Noting and protesting when the acceptance or payment of the instrument has been dishonoured or the demand for better security of the instrument has been refused.

(3) Forwarding a notice of noting and protesting to the concerned party of the instrument.

DISHONOUR OF A NEGOTIABLE INSTRUMENT

A Negotiable Instrument may be dishonoured when the drawee either refuses to accept it or to make payment upon it. Dishonour causes action for suit against the drawer or previous holders. Notice of dishonour must be given to the drawer or previous holders if they are to be made liable on the dishonoured instrument. However, in certain cases notice of dishonour is not required to be given. A negotiable instrument may be dishonoured in two ways—(1) by non-acceptance, and (2) by non-payment. Only bills of exchange can be dishonoured by non-acceptance because the bills need acceptance. On the other hand notes, bills and cheques can be dishonoured by non-payment.

(1) Dishonour by Non-Acceptance—According to the provisions of sections 91 of the Act a bill of exchange is dishonoured by non-acceptance in the cases as follows—

(a) When the drawee or one of several drawees who are not partners has not accepted the bill within 48 hours of the bill's presentment for acceptance;

(b) Where the presentment of bill is excused and the bill as such remains unaccepted;

(c) When the acceptance of the bill is conditional the holder may treat the bill as dishonoured;

(d) When the drawee of the bill is a fictitous person or the drawee cannot be found after reasonable search for presenting the bill to him for acceptance, the bill then may be treated as dishonoured for non-acceptance;

(e) Section 115 in this regard provides that "Where a drawee in case of need is named in a bill of exchange or in any endorsement thereon the bill is not dishonoured until it had been dishonoured by such drawee."

(2) Dishonour by non-payment—Under section 92 of the Negotiable Instrument Act it lays down as follows—"A promissory note, bill of exchange or cheque is said to be dishonoured by non-payment when the maker of the note acceptor of the bill or drawee of the cheque makes default in payment upon being duly required to pay the same. Besides under section 76 of the Act it has been stated in the rules as provided thereunder that where there is no necessity of presentment for payment in that case even if the time fixed for payment of the bill has expired the instrument is not paid the bill then will be treated as dishonoured for reasons of non-payment of the bill.

CONSEQUENCES OF DISHONOUR

When a negotiable intrument is dishonoured, the holder—

(i) becomes entitled to file suit for the recovery of the amount due from the parties liable to pay,

(ii) he must, subject to certain exceptions, give notice of dishonour to the parties against whom he intends to proceed,

(iii) he may note and protest the instrument before a Notary Public.

NOTICE OF DISHONOUR

A notice which is to be given by the holder of a dishonoured instrument to all the parties who are liable to pay the amount of the instrument, is called notice of dishonour.

According to section 93 when an instrument (note, bill or cheque) is dishonoured the holder of the instrument must give notice of dishonour to all the parties liable thereon excepting the maker, the acceptor or the drawee of a note, bill or cheque whom the holder of the instrument wants to make liable. If

the notice of dishonour is not given, all the parties excluding the maker, the acceptor and the drawee, will not be liable on the instrument. A party receiving notice of dishonour must, with a view to making any prior party liake to himself, give notice of dishonour to such party within a reasonable time.

MODE OF GIVING NOTICE

Section 94 of the Act provides the rules as to the mode of giving notice of dishonour which are discussed as under :

(1) Notice of dishonour is to be given to the person for whom the notice is required to be given or to his authorized agent or to his legal representative in case of his death or to his assignee when he is declared insolvant. The notice may be written or oral. If the notice is written, it may be sent by post. If a notice is duly addressed and directed, it is then a valid notice even though it may be miscarried. The notice may be in any form. But it must indicate, by the diction used in it, that the instrument has been dishonoured and that the party to whom the notice is being sent will be held liable thereon. The notice is to be sent at the place of business of the party unless such prior party desires to receive the notice otherwise. The notice is also to be sent within a reasonable time after dishonour.

The effects of not giving notice of dishonour are that any person who is not given a notice of dishonour is discharged from his liabilities under the instrument. He is not liable for payment and he cannot be sued under the instrument.

On the following cases the notice of dishonour is not required to be given according to section 98 :

(1) To the maker of pro-note. section 93.

(2) To the Drawee or Acceptor of bill or cheque. Section 93.

(3) When it is written on the endorsement by the endorser that "No notice of dishonour required," in that case notice of dishonour is not to be given to the party entitled thereto Section 98 (a).

(4) In order to charge the drawer when he has countermanded payment. Section 98(b).

(5) When the party charged could not suffer damage for want of notice. Section 98(c).

(6) When the party to whom the notice is required be given cannot be found after reasonable search; or the party who is required to give the notice is unable to give the notice without any fault of his own for reasons such as death or serious illness. Section 99(a).

(7) To charge the drawer when he draws bill on himself or his agent. That is, where the acceptor is also the drawer. Section 98(e).

(8) In the case of a promissory note which is not negotiable. Section 98(f).

(9) Where the party (entitled to notice) having complete knowledge about the facts, promises unconditionaly to pay the amount due on the instrument Section 98(g).

Difference between Noting and Protesting.

Noting means authentication of the fact of dishonour of an instrument. On the otherhand when the Notary Public issues a certificate stating therein the particulars of the fact of dishonour of an instrument, it is called a protest.

CHAPTER 6
COMPANY LAW

From 1st October, 1994, the Companies Act, 1994, enacted by the Government of Bangladesh on the basis of the amendments of the Companies Act of 1913, governs the law relating to the companies and certain other associations in Bangladesh. The Act mainly consolidates and amend the law relating to companies in Bangladesh.

Under section 2(c) of the Act a company has been defined as follows :

"Company" means a company formed and registered under this Act or an existing company.

According section 2(h) of the Act 'existing company' means a company formed and registered under any law relating to companies inforce at any time before the commencement of this Act, and is in operation after commencement of this Act. From the definitions above it appears that the Act also applies to the companies formed and registered under former Companies Act. That is the 'Companies' formed and registered under the Companies Act, 1913 are still in force and thus are included in the definition of existing company under this Act of 1994.

Definition : According to Companies Act, 1913, "Company is an artificial person created by law with a perpetual succession and common seal."

According to lindley a company is as follows "By a company is meant an association of many persons who contribute money or money's worth to a common stock and employ it for a common purpose. The common stock so contributed in money is the capital of the company, the persons who contribute or to whom it belongs are members. The proportion of capital to which each member is entitled to his share." A company is regarded by law as a single person, having specified rights and obligations. The Law confers on it (company) a distinct legal personality, with perpetual succession and a common seal. Therefore, a company, when formed and registered, becomes a separate legal entity—an

artificial prson in the eye of law, separate in existence from the people who are its shareholders. That is, a company is different from its members and the individuals composing it.

PRIVATE COMPANY

Section 2(q) of the Companies Act, 1994 has defined a private company as follows—"Private company" means a company which by its articles—

(i) restricts the right to transfer its shares, if any;

(ii) prohibits any invitation to the public to subscribe for its shares or debentures, if any;

(iii) limits the number of its members to fifty not including persons who are in its employment.

Provided that where two or more persons hold one or more shares in a company jointly, they shall, for the purposes of this definition be treated as a single member.

Public company—Under section 2 (r) of the Companies Act, 1994, public company has been defined as follows—"Public company" means a company incorporated under this Act or under any law at any time inforce before the commencement of this Act and which is not a private company.

Differences between a Private Company and a Public Company. The main differences that are found to exist between the two types of companies are discussed as under :

(1) The minimum member of members in private companies two and its maximum number of member is fifty not including persons who are in its employment. The minimum number of members in a public company is seven and its maximum member of members is limited by shares.

(2) A private company is not allowed by its Articles of Association to invite the public to subscribe for its shares or debentures. Where as a public company can invite the public to subscribe for its shares and debentures.

(3) It is not obligatory for a private company to issue a prospectus or a statement in lieu of prospectus but a public company must issue a prospectus or a statement in lieu of prospectus.

(4) A private company needs two promoters for its formation. Whereas, at least seven promoters are necessary for the formation of a public company.

(5) It is not compulsory for a private company for holding the statutory Meeting and filing the statutory Report. But for a public company it is compulsory to hold the statutory Meeting and to file the statutory Report.

(6) In a private company the right to transfer shares is limited by the Articles of Association of the company. Where as in a public company there are no restrictions for transfer of shares.

(7) A private company can commence its business after obtaining certificate of incorporation from the Registrar. Where as a public company cannot commence its business until the company obtains certificate of commencement from the Registrar.

(8) There must be the words "Private Limited" at the end of the private company's name. But a public company will have only the word "Limited" at the end of its name.

(9) There must be appointed at least two directors in a private company, but a public company must have at least three directors.

(10) The method of holding meeting in a private company is not very complicated, but a public company must abide by the rules of Companies Act regarding holding of its Meeting.

(11) It is not compulsory for a private company to publish its Profit and Loss Account and its Balance Sheet to the public, while a public company must publish its Profit and Loss Account and its Balance Sheet to the public and file them to the Registrar.

(12) It is not compulsory for a private company to appoint its Auditor, but for a public company it is compulsory to appoint a suitable and qualified 'Auditor.'

Privileges of private company :

The main privileges that a private company enjoys over public company are ememerated below :

(1) The method of formation of private company is more easier than public company. It is because there is no so much complication about the lawful formalities for its formation.

(2) It is not compulsory for a private company to issue prospectus or a statement in lieu of prospectus and deliver it to the Registrar.

(3) Only two members are sufficient for the formation of private company.

(4) Private company can commence its business just after obtaining the certificate of in corporation from the Registrar.

(5) Holding of statutory Meeting and filing of statutory Report are not compulsory for a private company.

(6) None except a member can ask for the Profit and Loss Account furnished/delivered to the Registrar.

(7) Holding of Meeting and control can be handled by the Rules as inserted in the Articles of Association of the private company.

(8) Good relations can be maintained among the members of the private company because of its lesser number of members.

(9) The employees maintain their direct relations with the owners of the private company. As a result the employees feel couraged in their work and by that their skill/efficiency develops and finally, because of this, the owners become gainer.

Privileges of public company

The public limited company enjoys the following special privileges over the private limited company :

(1) The company can sell shares and debentures to the public.

(2) The shares of public limited company are transferable. Any member may sell his shares at any time and any person may become member of the company by purchasing the shares.

(3) The number of members may be unlimited. As a result huge amount of capital may be raised and with this capital

large-scale industries/industrial establishments may be built-up.

(4) The management of public company is more competent and skilful than the private company.

Conversion of Private Limited Company Into Public Limite Company.

A private limited company faces some major problems because of a number of legal restrictions imposed upon it. The number of members of private company is limited and this creates impediment in the way of raising more capital. The private limited company cannot invite the public to subscribe for its shares. Moreover, its shares are not transferable. For all these reasons the amount of capital of a private limited company is comparatively less. As a result the scale of business cannot be increased and as a consequence a private limited company cannot enjoy the advantages of large-scale business. Ofcourse, private limited company has many other facilities and advantages of business. But despite that the scale of business cannot be increased only because of shortage of capital and because of this hindrance takes place in the management of business. In such circumstances a private limited company is converted into public limited company. According to the provisions of section 154 (1) of the Companies Act 1913 (amended upto 1972) in some special procedures a private limited company can be converted into a public limited company. After a private company is converted into a public limited company, the following rules are to be complied with :

(1) First of all, the private limited company must have passed a special Resolution and with that changes must have to be brought-in under the following sections of the Articles of Association :

(a) Limitation of the maximum number of members,

(b) rule about restrictions on the transfer of shares,

(c) rule on prohibition of invitation to the public to buy shares and debentures.

(2) Secondly, after the above alterations the New Articles of Association shall have to be delivered to the Registrar of companies along with the following documents—

(a) prospectus or a statement in lieu of prospectus;

(b) a list of the names of the Board of Directors.

It is mentioned that only after compliance of the above statutory rules and regulations the minimum number of members must be seven for a private limited company if it is to be converted into a public limited company.

When the above documents become acceptable by the Registrar of companies, then he will write the new name of the company in the register of registration in place of the company's old or previous name. And also the Registrar will provide an altered certificate of incorporation to the company. After having received this certificate of incorporation, the private company will be considered as converted into public company.

Formation of Company

Stages in the formation of a company :

(1) First stage—In this stage the promoters (persons who initially plan the formation of a company and bring it into existence) plan the company's formation in order to bring it into existence so that a joint stock business can be carried on.

(2) Second stage—In this statge, the promoters decide to form a company and accordingly settle the following :

(a) Objects the company is formed for achieving certain objects;

(b) Name of the company;

(c) Place of carrying on the business of the company;

(d) Extent of members responsibility to the liabilities of the company;

(e) The amount of capital that will be necessary for the carrying on of the business of the company. These points are recorded in the "Memorandum of Association".

(3) Third stage—In this stage the promoters determine the method of carrying on the business of the company, virtually this stage involves the following activities—

(i) appointment of the directors of the company.

(ii) division and allotment of shares, meetings of the members (shareholders) and such other activities as are necessary for the internal administration of the company. These activities are expressely written in the "Articles of Association".

(4) Fourth stage—In this stage the required informations are submitted by the promoters to the Registrar of companies, regarding the Memorandum, the Articles, the names and addresses of the directors and such other informations for the purpose of incorporation of the company. With the accomplishment of these formalities the company gets registered.

(5) Fifth stage—In this stage a company gets incorporated by registration. After that the company commences its business. A private company can commence its business immediately after the company gets registered. But a public company must have to accomplish some further preliminary formalities before its commencement of business. These formalities are as follows—

(a) The prospectus or a statement in lieu of prospectus must be issued and it shall have to be registered with the Registrar of companies.

(b) The minimum subsecription must be raised and then the allotment of the shares is be made.

(c) For commencement of business the company must have to obtain a certificate from the Registrar of companies. It is stated here that the certificate issued by the Registrar after a company is registered is called the Certificate of Incorporation.

Memorandum of Association.

Section 2 (n) of the Companies Act, 1994, has defined Memorandum as follows—"Memorandum" means the memorandum of association of a company as originally framed

or as altered in pursuance of the provisions of this Act. Under section 6 of the companies Act, 1994, the Memorandum in the case of a company limited by shares

(a) shall state–

(i) the name of the Company with "limited" as the last word in the name;

(ii) the address of the registered office;

(iii) the objects of the company, and, except in the case of trading companies, the territories to which they extend;

(iv) that the liability of the members is limited;

(v) the amount of share capital with which the company proposes to be registered and the divisions thereof into shares of a fixed amount;

(b) each subscriber of the memorandum shall take at least one share;

(c) each subscriber shall write opposite to his name the number of shares he takes.

Memorandum in the case of a company limited by guarantee–(a) shall state (Section 7)

(i) the name of the company, with 'limited' as the last word in its name;

(ii) the address of the registered office;

(iii) the object of the company, and, except in the case of trading companies, the territories to which they extend;

(iv) that the liability of the members is limited;

(v) that each member undertakes to contribute to the assets of the company in the event of its being wound up while he is a member or within one year afterwards, for payment of the debts and liabilities of the company contracted before he ceases to be a member, and of the charges and expanses of winding up and for adjustment of the rights of the contributories among themselves, such amount as may be required, not exceeding a specified amount;

(b) if the company has a share capital—

(i) the memorandum shall also state the amount of share capital with which the company proposes to be registered and the division thereof into shares of a fixed amount;

(ii) each subscriber of the memorandum shall take at least one share;

(iii) each subscriber shall write opposite to his name the number of shares he takes.

Memorandum in the case of an unlimited company (Section 8) –

(a) shall state—

(i) the name of the company,

(ii) the address of the registered office of the company,

(iii) the objects of the company, and, except in the case of trading companies, the territories to which they extend.

(b) if the company has a share capital—

(i) each subscriber of the memorandum shall take at least one share.

(ii) each subscriber shall write opposite to his name the number of shares he takes.

Alteration of Memorandum (Section 12)—(1) Subject to the provisions of the Companies Act (1994), a company may, by special resolution, alter the provisions of its memorandum with respect to the objects of the company, so far as may be required to enable it—(a) to carry on its business more economically or more efficiently; or (b) to attain its purpose by new or improved means; or (c) to enlarge or change the local area of its operations; or (d) to carry on some business which under the existing circumstances, may conveniently or advantageously be combined with the business of the company; or (e) to restrict or abandon any of the objects specified in the memorandum; or (f) to sell or dispose of the whole or any part of the undertaking of the company; or (g) to amalgamate with any other company or body of peresons.

(2) The alteration shall not take effect until and except in so far it is confirmed by the court on petition.

(3) Before confirming the alteration the court must be satisfied–

(a) that sufficient notice has been given to every holder of debentures of the company and to any person or class of persons whose interest will, in the option of the court, be satisfied by the alteration; and

(b) that, with respect to every creditor who in the opinion of the court is entitled to object, and who signifies his objection in manner directed by the court, either his consent to the alteration has been obtained or his debt or claim has been discharged or has been determined, or has been secured to the satisfaction to to the court; provided that the court may, in the case of any person or class, for special reasons, dispense with the notice required by this section.

Articles of Association under section 2(a) of the Companies Act (1994) 'Articles' have been defined as follows–"Articles" mean the articles of association of a company including, so far as they apply to the company, the regulations contained in schedule I to this Act : Provided that the articles of association of a company framed under any law relating to companies at any time inforce before the commencement of this Act shall so far as they are not inconsistent with the provisions of this Act, be deemed to be the articles of association of that company framed in accordance with the provisions of this Act :

(1) A company limited by Registration of Articles [(Section 17) of the Act 1994] guarantee and an unlimited company shall, and a company limited by shares may have an articles of association wherein provision shall be made for regulating the affairs of the company, and the articles shall be signed by the subscribers of the memorandum and be registered together with the memorandum.

(2) Articles of association may adopt all or any of the regulations contained in schedule I, and shall in any event be deemed to contain regulations identical with or to the some effect as regulation 56, 66, 71, 78, 79, 80, 81, 82, 95, 97, 105; 108, 112, 113, 114, 115 and 116 contained in that schedule; provided that regulations 78, 79, 80, 81 and 82 shall not be

deemed to be included in the articles of any private company except a private company which is the subsidiary company of a public company; provided further that regulation 108 shall be deemed to require that a statement on the reasons why of the whole amount of any item of expenditure which may in fairness be distributed over several years, only a portion thereof is charged against the income of the year, shall be shown in the profit and loss account, unless the company in the general meeting shall determine otherwise.

(3) In the case of an unlimited company or a company limited by guarantee, the articles, if the company has a share capital, shall state the amount of share capital with which the company proposes to be registered.

(4) In the case of an unlimited company or a company limited by guarantee, if the company has not a share capital the articles shall state the number of members with which the company purposes to be registered; and on the basis of such number the Registrar shall determine the fees payable on resistration.

ALTERATION OF ARTICLES

Section 20 of the Act (1994) provides that subject to provisions of this Act and to the conditions contained in its memorandum, a company may by special resolution alter, exclude from or add to its articles; and any alteration, exclusion or addition so made shall be as valid as if originally contained in the articles, and be subject in like manner to alteration, exclusion or addition by special resolution.

Distinction Between the Memorandum of Association And Articles of Association.

The distinction between the Memorandum and the Articles is discussed as follows :

(1) The memorandum of association is a 'Sanad' i.e. a charter. The objectives and powers of the company are stated in the memorandum. It determines the relations of the company's different outside parties with the company. That is, memorandum is the basic constitution of the company. Whereas, the articles are the main rules and regulations that

govern the internal management and working of the company. The articles determine the relations of the different internal parties of the company.

(2) The memorandum is the main (chief) document (deed) of the company, whereas the articles being the secondary document work or function within the framework of the memorandum.

(3) Composition and registration of memorandum are compulsory for all classes of companies, but composition and registration of articles are not compulsory, rather intentional.

(4) Alteration of the memorandum requires a special resolution passed by the shareholders of the company. It also requires the permission of the court as well as the government. On the other hand alteration of the 'articles' can be made only by taking a special resolution. It does not require the permision of either the court or the government.

(5) The clauses of the memorandum are controlled by the Companies Act, whereas the clauses of the 'Articles' are governed by both the memorandum and the QCompanies Act.

(6) The memorandum determines the powers of the company and the relationship between the company and the members and also the non-members. The Articles, on the otherhand, define and regulate the relationship between the company and the members and the relationship between the members interse.

(7) Acts beyond the powers of the memorandum (ultravires) are void. Such acts cannot be ratified by the members even by their unanimous decision. But acts performed beyond the powers of the Articles can be ratified by the shareholders if the acts are within the powers of the memorandum.

(8) When an act is within the powers of the memorandum (in travires the memo) but contrary to some provisions of the articles (ultravires the articles) the members can alter the articles and ratify the act.

(9) Articles can be altered easily, but the memorandum can be altered only after the adoption of certain formalities.

PROSPECTUS

Definition—According to Companies Act a prospectus means "any prospectus, notice circular, advertisement or other invitation offering to the public for subscription or purchase of any shares or debentures of a company. But a prospectus shall not include any trade advertisement which shows on the face of it that a formal prospectus has been prepared and filed.

Characteristic features of Prospectus

From the analysis of the definiton of prospectus the undermentioned characteristics can be seen :

(1) It is a document issued as prospectus.

(2) The prospectus includes any notice, circular, or advertisement or other invitation to the public for subscription or purchase of shares or debentures of a company.

(3) It is virtually an invitation to the members of the public.

(4) Through prospectus public is invited for subscribing the shares or debentures of the company.

(5) The invitation to the public does not mean invitation to all of the members of the public. It may be for a section of the public.

(6) Prospectus is the document through which the company raises capital that is necessary for the carrying on of the business.

(7) An advertisement which secures business or trade only is not considered as a prospectus.

Objects of Prospectus

The main objects of prospectus are stated below :

(1) Informing the public about the constitution of a new company.

(2) Motivating the savers for investment in the newly formed company by creating confidence about the success of the company by the efficient directors and officers of the new company.

(3) Preserving the documents through which the members of the public were invited for subscription or purchase of shares or debentures of the company.

(4) Realiling the recognition from the directors about their responsibilities towards the matters stated in the prospectus.

Filing of prospectus

A copy of the prospectus which is dated and signed by all persons named as directors or by their authorized agents has to be filed with the Registrar of the companies "On or before the date of its publication and no such prospectus shall be issued until a copy thereof has been so filed for Registration".

Section 92 (2) of the Companies Act, 1913.

Contents of prospectus.

Part I of Schedule III to the Companies Act, 1994, provides a list of matters (particulars) which are to be specified (included) in the prospectus. Therefore, the major items of particulars are mentioned as follows :

(1) Particulars such as names, addresses, descriptions and occupations of the signatories to the memorandum and the number of shares subscribed by them.

(2) The number and classes of shares (if any) and the nature and extent of the interest of holders in the property and profits of the company.

(3) Particulars about redeemable preference shares.

(4) Number of shares fixed by the Articles as the qualification of a director and the remunertion of the directors as fixed by the Articles.

(5) Particulars (names, addresses, descriptions and occupations) of the directors, managing director, managing agent, manager and contracts of their remuneration and appointments.

(6) Particulars about minimum amount of subscription, purchase price of property, preliminary expenses, repayment of borrowed money, working, etc.

(7) The time of opening of subscription list and amount payable on application and allotment of share.

(8) Particulars about preferential rights of the subscribers of shares, debentures of the company.

(9) Particulars about the number, description and amount of shares issued within two proceeding years as fully or partly paid otherwise than for cash.

(10) Particulars about the amount of premium on shares issued within two years preceding the date of the prospectus, underwriters of shares and debentures.

(11) The names, addresses, descriptions and occupations of the vendors and the amounts payable to them.

(12) Particulars about the amounts paid within proceeding two years as commissions to the under writers and sub-underwriters for subscribing shares or debentures of the company, their names, addresses, descriptions and occupations, etc.

(13) The amount or benefit paid or given within two preceding years or intended to be paid or geven to any promoter, and the consideration for the payment or the giving of the benefit.

(14) The dates of and parties to and general nature of every contract for appointment or fixing of remuneration for Manging Director, Managing Agents or Managers and such other particulars.

(15) The names and addresses of the auditors (if any) of the company.

(16) Particulars about extent of interest of the directors or promoters in the promotion of the company, etc.

(17) Particulars about share capital of the company, its (share capital) division into different classes of shares, voting rights at meetings of the company and the rights in respect of capital and dividends attached to the several classes of shares respectively.

(18) Particulars about the restrictions imposed by the articles of the company upon the members of the company regarding right to attend, speak or vote at meetings of the company or of the right of transferring shares, or upon the directors of the company about their powers of management, the nature and extent of those restrictions, etc.,

(19) Particulars about the length of time during which a company's business has been carried on and also the length of time during which the business (which the company proposes

to acquire and which has been carried on for less than three years) has been carried on.

(20) Particulars of capitalization if reserves or profits of the company or any of its subsidiaries have been capitalized, particulars about the surplus arising from the revaluation of the assets of the company or its subsidiaries during the two years preceding the date of the prospectus and the manner of dealing with the surplus.

(21) Particulars about the inspection of balance sheet and profit and loss account.

According to the provisions of the Part II of the schedule III of the Companies Act, 1994, the following reports are to be annexed (i.e. set out in the prospectus) to the prospectus—(1) Auditor's report (2) Report by Accountant of the company.

Explanation :—'Report' means a report prepared under part II of schedule III of the companies Act (1994) and on the basis of which the Company's balance sheet and profit and loss account is prepared.

Minimum Subscription

(Clause 5, Part I, Schedule III of Companies Act, 1994) Where shares are offered to the public for subscription, the prospectus must mention the minimum amount which, in the opinion of the directors or of the signatories of the memorandum must be raised by the issue of those shares in order to provide the sums, required to be provided in respect of each of the following heads and distinguishing the amount required under each head—

(i) the purchase price of any property purchased or to be purchased which is to be defrayed in whole or in part out of the proceeds of the issue;

(ii) any preliminary expenses payable by the company, and any commission so payable to any person in consideration of his agreeing to subscribe for, or of his procuring or agreeing to procure subscriptions for any shares in the company;

(iii) the repayment of any money borrowed by the company in respect of any purposes mentioned above;

(iv) working capital;

(v) any other expenditure stating the nature and purpose thereof and the estimated amount in each case.

If any part of the amount specified under the clause is defrayed in any manner otherwise than those specified in the clause, then the amount so defrayed and the balance.

If the amounts to be provided in respect of the matters specified under the clause otherwise than out of the proceeds of the issue then the sources out of which those amounts are to be provided.

It is mentioned here that the minimum subscription has to be raised before the commencement of business of the company.

Shares offered to the public cannot be alloted by the directors until the minimum subscription has been subscribed and the sum payable on application has been received by the company. Therefore, minimum subscription is the minimum amount to be raised to meet the items of expenditure as specified under the clause.

Statement in Lieu of Prospectus.

A company having a share capital but which does not issue a prospectus on or with reference to its formation, on which has issued such a prospectus but has not proceeded to allot any of its shares or debentures offered to the public for subscription shall not allot any of its shares or debentures unless within three days after the first allotment of either shares or debentures, there has been delivered to the Registrar for registration a statement in lieu of prospectus, signed by every person who is named therein as director or proposed director of the company or his agent authorized is writing in the form and containing the particulars set out in part I of schedule IV and, in the cases mentioned in part II of that schedule, setting out the reports specified therein, and the said part I and II shall have effect subject to the provisions contained in part III of that schedule. (Section 141 of the Act, '94).

Where a statement in lieu of prospectus delivered to the Registrar includes any untrue statement, any person who

authorized or permitted the delivery of the statement in lieu of prospectus for registration shall be punishable with imprisonment for a term which may extend to two years or with fine which may extend to five thousand taka or with both, unless he proves either that the statement was immaterial or that he had reasonable ground to believe that the statement was true, section 141(5) Companies Act, 1994.

The statement in lieu of prospectus like in the prospectus, constitutes the basis of the contract of purchase of shares between the company and the shareholder. Liabilities of misstatements and false statements are the same as in a prospectus.

Misstatement in Prospectus

Liability for misstatement in prospectus (Section 145 (1) Companies Act (1994).

Subject to the provisions of this section, where a prospectus invites members of the public to subscribe for shares in or debentures of a company, the following persons shall be liable to pay compensation to every person who subscribes for any shares or debentures on the faith on the prospectus for any loss or damage he may have sustained by reason of any untrue statement included therein, that is to say—(a) every person who is a director of the company at the time of issue of the prospectus;

(b) every person who has authorized himself to be named and is named in the prospectus either as a director, or as having agreed to become a director, either immediately or after an interval of sometime;

(c) every person who is a promoter of the company; and

(d) every person who has authorized the issue of the prospectus.

Penalty for untrue statement in prospectus (Section 146).

(1) Where a prospectus issued after the commencement of this Act (1994) includes any untrue statement every person who authorized the issue of the prospectus shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to five thousand

taka or with both, unless he proves either that the statement was immaterial or that he had reasonable ground to believe, and did up to the time of the issue of the prospectus, believe that the statement was true.

Exceptions under section 145(1) Sec. '145(2)—No person shall be liable for misstatement in prospect..., if he proves (a) that, having consented to become a director of the company, he withdrew his consent before the issue of the prospectus, and that it was issued without his authority or consent; or

(b) that the prospectus was issued without his knowledge or consent, and that on becoming aware of its issue he forthwith gave reasonable public notice that it was issued without his knowledge or consent; or

(c) that, after the issue of the prospectus and before allotment thereunder, he, on becoming aware of any untrue statement therein, withdrew his consent to the prospectus and gave reasonable public notice of the withdrawal and of the reason there of; or

(d) that as regards every untrue statement not purporting to be made on the authority of an expert, he had reasonable ground to believe that the statement was ture.

SHARE CAPITAL

Capital defined—By a company's capital is meant the amount of money which the company is authorized by its Memorandum to raise usually by issuing shares. Thus capital of a company may also be called "share capital". Sometimes a company obtains capital by issuing debentures, in which case the the capital is called "debenture capital". That is, the amount borrowed by the company and secured by debentures is called 'debenture capital.' However the capital of a company does not correctly mean borrowed capital.

Classification of Share Capital of a Company.

In the eye of law the share capital of a company may be divided into the following categories.

(1) Nominal capital or Authorized capital or Registered capital—This type of capital means the total face value of the

shares which the company is authorized to issue by its Memorandum. That is, this type of capital is the whole capital of the company which it is authorized to raise by its Memorandum in order to meet investment expenditure.

(2) Issued capital—It means that part of the authorized capital which is actually offered to the public for subscription or for sale.

(3) Subscribed capital—It represents that portion of the issued capital which has actually been taken up by the public and allotted to them.

(4) Called up capital—It represents that portion of the subscribed captital that the shareholders have been called upon by the company to pay.

(5) Paid up capital—It means that part of the called up capital which has actually been received from the subscribers of shares (i.e. shareholders).

(6) Uncalled capital—It is that portion of the subscribed capital for which the shareholders have not been called upon to pay by the company. That is, it represents that portion of the subscribed capital which remains unpaid.

(7) Reserve capital—It represents that portion of the Subscribed capital which has not been called up and which the company, by special resolution, has declared not to be called up except in the event of and for the purpose of winding up.

SHARES

Definition—Section 2(v) of the 1994 Companies Act defines share as follows—share means a share in the capital of the company, and includes stock except when a distinction between stock and shares is expressed or implied.

Some features of shares

A share is not a sum of money. It is rather an interest of a shareholder in the company measured by a sum of money, and made up of various rights contained in the contract.

A share is an interest having a money value and made up of diverse rights specified by the Articles.

According to Companies Act a shareholder has rights, duties and liabilities and these are stated in the Memorandum and the Articles of a company.

Shares are transferable and are movable property and they are numbered.

Classification of shares According to the companies Act the following are the classes of shares : (1) Preference shares— These are those shares the holders of which are entitled to a fixed rate of dividend (for example 5%) before it is paid to the ordinary shareholders. Unless it is mentioned in the Articles a preference shareholder does not receive dividend at more than the rate fixed by the Articles. In the case of winding up of a company, the preference shareholders are given back first the amount paid by them on the share on a priority basis from the surplus assets of the company if such surplus is available. The balance of the surplus is then distributed among the other shareholders, noting right (power) of a preference shareholder is limited.

The different classes of preference shares are discussed as under :

(1) Cumulative preference—In the case of cumulative preference shares, if the profit earned by a company in a particular year is not sufficient to pay divident at the rate fixed for that the shortage can be made up out of the profits of succeeding years. That is, the dividends accumulate and that deficiency in the dividend for one year is made up in the subsequent years.

(2) Non-cumulative preference shares—If the shares are non-cumulative and the dividend is passed, it will not be made up in the subsequent years. That is in case of non-cumulative preference shares dividends do not accumulate rather they lapse if they are not paid.

(3) Redeemable preference shares—These shares can be redeemed (i.e. they can be purchased back) by the company provided that conditions to this effect have been laid down in the Articles and in the Companies Act.

(4) Irredeemable preference shares—These shares cannot be redeemed, i.e. they cannot purchased back by the company.

(5) Participating preference shares—These are those shares the shareholders of which get right in addition to the fixed preference dividend to participate or to share in the surplus profits after all the other shareholders have received dividends at a specified rate. These shareholders may also have a further right to participate in the distribution of surplus assets which may result in the dissolution of the company.

(6) Non-participating preference shares—In this type of share the shareholders are not given right to participate in the surplus profits or in the surplus assets of the company upon its liquidation (dissolution).

(7) Ordinary or Equity Shares—These are those shares whose holders do not enjoy any special privileges. But they are entitled to surplus profits or a portion of the same that may be available after all the preferential rights as to dividend have been met. The rights and privileges of the holders of these shares are laid down is the Articles according to the provisions of the Companies Act.

(8) Deferred or Founders' shares—These are those shares which are usually held by the promoters or founders and sometimes by the vendors, and dividend is paid on them only if the dividend on the ordinary shares reaches a certain amount.

STOCKS

Under section 2(v) of the 1994 Companies Act share has been defined as a share in the capital of the company and includes stock except when a distinction between stock and shares is expressed or implied. When all the shares of a company are fully paid up, the company in the general meeting, if so authorized by the Articles, may convert the fully paid up shares into stock. When a company has converted its shares into stock and filed notice of the conversion with the Registrar all the provisions of the Act (1994) which are applicable to shares only shall cease as to so much of the

share capital as is converted into stock; and the register of the members of the company, and the list of members to be filed with the Registrar shall show the amount of stock held by each member instead of the amount of the shares and the particulars relating to the shares required by the Act (Section 53, 1994 Companies Act). After conversion of shares into stocks, the share capital of the company may be divided into any amounts instead of dividing it into equal parts or shares.

Example—There may be in relation to the capital of a company stocks of Tk. 4.50, though the shares originally were of Tk. 10.00 each.

Distinction between Share and Stock

Shares and stocks are two ways of indicating the interest of a member of a company. The term 'share' as defined under section 2(v) of Companies Act (1994) includes a stock, except where a distinction between them is expressed or implied.

Shares of a company are of equal value. Whereas stock may be divided into unequal value.

Example—A stock worth of Tk. 100 may be divided into parts of Tk. 50 each.

Stock differs from shares in that it may be transferred, split up into any fractional amount, whereas a share can not be sub-divided and transferred into fragments.

Shares are partly paid and they can be converted into stocks only when they are fully paid up. In the formation stage of a company stock cannot be issued, whereas shares are issued when a company is formed. Shares are known by numbering them consecutively, whereas stocks are not numbered, however, the names of the stock-holders are recorded in the books of the company.

Shares are issued directly to the public. Whereas stocks are not issued to the public directly.

Alteration of capital

According to section 53 of the Companies Act (1994)—(1) A company limited by shares if so authorized by its ariticles may alter the conditions of its memorandum as follows that is to say it may—(a) increase its share capital by the issue of the

new shares of amount as it thinks expedient; (b) consolidate and dccide all or any of its share capital into shares of larger amount than its existing shares; (c) convert all or any of its paid up shares of any denomination; (d) sub-divide its shares, or any of them, into shares of smaller amount than is fixed by the memorandum, so that in the sub-division the proportion between the amount paid and the amount, if any, unpaid on each reduced share shall be same as it was in the case of the share from which the reduced share is derived; (e) cancel shares which at the date of passing of the resolution in that behalf, which have not been taken or agreed to be taken by any person, and diminish the amount of its share capital by the amount of the share so cancelled.

(2) The powers conferred by this section can only be exercised by the company in its general meeting.

(3) A cancellation of shares in pursuance of this section shall not be deemed to be a reduction of share capital within the meaning of the other provisions of the Act.

(4) The company shall file with the Registrar notice of the exercise of any power referred to in clause (d) or clause (e), of sub-section (I) within fifteen days from the exercise thereof.

Increase of Capital (Section 56, Companies Act, 1994)

(1) Where a company having a share capital, whether its shares have or have not been converted into stock, has increased its share capital beyond the registered capital, and where a company not having a share capital has increased the number of its members beyond the registered number, it shall file with the Registrar, in the case of an increase of share capital, within fifteen days after the passing of the resolution authorizing the increase and in the case of an increase of members within fifteen days after the increase was resolved on or took place, notice of the increase of capital or members and the Registar shall record the increase.

The notice shall include the partculars of the classes of shares affected and the conditions subject to which the new shares are to be issued.

REDUCTION OF SHARE CAPITAL

(Section 59, Companies Act, 1994)

(1) Subject to confirmation by the court a company limited by shares, if so authorised by its articles may by special resolution reduce its share capital in any way, and in particular the company may, as part of this general power—

(a) extinguish or reduce the liability on any of its shares in respect of share capital not paid up;

(b) either with or without extinguishing or reducing liabilities on any of its shares, cancel any paid up share capital which is lost or presented by available assets;

(c) either with or without extinguishing or reducing liability on any of its shares, pay off any paid up share capital which is in excess of the wants of the company;

(d) so far as is necessary, alter its Memorandum by reducing the amount of its share capital and of its shares accordingly;

(2) A special resolution under this section is in this Act called a resolution or reducing share capital.

Increase and reduction of share capital of a company limited by guarantee (Section 70, Companies Act, 1994).

A company limited by guarantee and registered after the commencement of this Act may, if it has a share capital and is so authorised by its articles, increase or reduce its share capital in the same manner and subject to the same conditions in and subject to which a company limited by shares may increase or reduce its share capital under the provisions of the Act.

DIVIDEND

In the Companies Act the term "dividend" has not been defined. Generally the part of profits which is paid to the shareholders of a company. Dividends are proportions of profits distributed to the shareholders according to their holdings. Dividends may be declared by way of either a fixed

amount per share or a percentage on the capital of the company. Where the members of a trading company, which is virtually, formed for the purpose of earning profits, receive a part of the profits of the company in proportion to their respective shares, the receipt of the profits may also be called dividend. The Companies Act does not have any provision for enforming distribution of profits. The shareholders of a company as such cannot claim the declaration of dividends if the articles of the company do not make it compulsory for its directors to declare dividends. It is not obligatory for the company for distributing the whole of its profits amongst its shareholders unless it is provided for by the Memorandum or Articles of the company. Therefore, question arises as to how much of the profits shall be distributed as dividend and how much of it shall be retained. Decisions on this matter will be taken by the directors and shareholders of the company subject to the provisions of the Memorandum or the Articles. The court in this regard will not interfere with the directors and shareholders. Once the dividend is declared, then it becomes a liability of the company to the shareholders.

RULES REGARDING DIVIDENDS

The Companies Act, 1913, has provided for the following rules for payment of dividends: (1) What portion of the net profits earned by the company during its financial year will be distributed to the shareholders, will be decided by the Board of Directors of the company. (2) When the decision as to the amount of dividend is taken by the Board of directors of the company, it shall have to be approved by the shareholders in the Annual General Meeting of the company. (3) Dividends cannot be distributed out of capital. If the directors intentionally do so, then they will be bound personally to make good the money distributed as dividend. Dividends are to be distributed out of the profits of either the current or previous financial year. In this context profits mean the amount of income remaining after deducting from the income of the company the amount of depreciation of the current year or outstanding depreciation of the previous year. But in a case

(Lee Vs. Neuchatel– 1889, in England) it was decided that the directors may distribute dividends without providing for depreciation or reserve or without making good the capital deficiency. But under the Bangladesh Companies Act the amount of depreciation shall have to deducted before the distribution of dividends and after doing so the dividend may be paid from whatever amount is left over then. (4) Dividends are always payable in cash. (5) If provisions are provided for in the Articles of the company, then by capitalization of profits fully paid up bonus shares can be issued in place of payment of dividend in cash. (6) After dividend has been declared, liability of a company is created towards its shareholders. The shareholders thus can sue against the company for the realization of the dividend. (7) The reserve fund of the company can be treated as retained profits and this can be distributed as dividends even without making good the shortage of the capital. (8) If the directors of the company do not declare dividends except with bad motives, in that case the shareholders cannot create pressure upon the directors for the payment of dividends. (9) If the directors of the company have paid dividends out of the capital then they may be sued for the amount of money which has been distributed as dividend. On the other hand if the shareholder, accept such dividends knowingly that the dividends have been paid out of capital, in that case the directors may realize the dividends from the shareholders.

AUDITORS

Appointment– (1) Every company (Section 210, Companies Act, 1994) shall, at each annual general meeting appoint an auditor or auditors to hold office from the conclusion of that meeting until the next annual general meeting and shall within seven days of the appointment give intimation thereof to every auditor so appointed; the condition being that no person can be appointed as auditor of any company without obtaining his written consent before such appointment or re-appointment.

(2) Every auditor after his appointment shall within 30 days of the receipt from the company of the intimation of his

appointment, inform the Registrar in writing that he has accepted the appointment.

(3) At any annual general meeting a retiring auditor, by whatsoever authority appointed, shall be appointed unless— (a) he is not qualified for re-appointment; (b) he has given the company a notice in writing of his unwillingness to be re-appointed; or (c) a resolution has been passed at that meeting appointing some body else instead of him or providing expressly that he shall not be re-appointed; provided that for the purpose of passing a resolution a notice shall, in accordance with section 211 be issued prior to the meeting and such resolution cannot be passed except on the ground of death, incapacity or deficiency or disqualification of the retiring auditor.

(4) If an appointment of an auditor is not made in an annual general meeting, the government may appoint a person to fill the vacancy.

(5) The company then within seven days of the government power becoming exercisable, shall give notice to the government about the fact; and if it fails to give such a notice, the company and also every officer of the company who is in default, shall be punishable with fine which may extend to 1000 taka.

(6) The first auditor or auditors of a company shall be appointed by the Board of Directors within one month of the date of Registration of the company, and the auditor or auditors so appointed shall hold office until the conclusion of the first annual general meeting : Provided that—(a) the company may, at an annual meeting may remove any such auditor or all or any of such auditors and appoint in his or their place any other person or persons who have been nominated for appointment by any member of the company, and or whose nomination notice has been given to the members of the company not less than 14 days before the day of meeting; and (b) if the Board of Directors fails to exercise its powers, the company in a general meeting, may appoint the first auditor or auditors.

(7) The Board of Directors may fill any casual vacancy in the office of any auditor, but while any such vacancy continues, the remaining auditor or auditors, if any, may act : Provided that where such vacancy is caused by the resignation of auditor the vacancy shall only be filled by company in general meeting.

(8) Any auditor appointed in a casual vacancy shall hold office until the conclusion of the next annual general meeting.

(9) Except as provided otherwise in the process, any auditor appointed under this section may be removed from office before the expiry of his term only by a special resolution of the company in the general meeting.

Remuneration : The remuneration [Section 210 (10)&(11)] of the Companies Act, 1994 a ditors of a company—(a) in the case of an auditor appointed by the Board or the Government, shall be fixed by the Board or the Government respectively; and (b) subject to provisions as at (a) above, shall be fixed by the company in the general meeting or in such manner as the company in the general meeting may determine. Section 210(10).

For the purposes of provisions of section 210 (10), any sums paid by the company in respect of the auditors expenses shall be deemed to be included in the expression "remuneration".

Powers and Duties—(1). Every (Section 213) auditor of a company shall have a right of access at all times to the books and accounts and vouchers of the company either kept at the head office of the company or elsewhere and shall be entitled to require from the officers of the company such information and explanation as the auditor may think necessary for the performance of his duties as auditor.

(2) Without prejudice to the provisions of sub-section (1), the auditor shall in particular inquire into the following : (a) whether loans and advances made by the company based on security have been properly secured and whether the terms on which they have been made are not prejudiced to the interests of the company or its members; (b) whether transactions of the

company represented merely as book entries are prejudicial to the interests of the company; (c) where the company is not an investment company or a banking company, whether so much of the assets of the company consisting of shares, debentures and other securities have been sold at a price less than that at which they were purchased by the company; (d) whether loans and advances made by the company have been shown as deposits; (e) whether personal expenses have been charged to revenue account; (f) where as stated in the books of the company any shares have been allotted for cash, if the cash has been received in respect of the allotment and if no cash so received, whether the position as stated in the account books and the balance sheet is correct, regular and not misleading.

(3) The auditor shall make a report to be presented in annual general meeting of the company on the accounts examined by him, land on every balance sheet and profit & loss account and on every other document declared by this Act to be part of or annexed to the balance sheet or profit and loss accounts which are laid before the company in general meeting during his tenure of office and the report shall state whether, in his opinion and to the best, of his information and according to the explanation given to him, the said accounts give the information required by this Act in the manner so required and give a true and fair view—

(a) in the case of the Balance Sheet, of the state of the company's affairs as at the end of its financial year;

(b) in the case of the profit and loss account of the profit or loss for its financial year.

(4) The auditor's report shall also state :

(a) whether he has obtained all the information and explanation which to the best of his knowledge and belief were necessary for the purposes of his audit;

(b) whether, in his opinion, proper books of account as required by law have been kept for the company so far as appears from his examination of those books and proper returns adequate for the purposes of his audit have been received from branches not visited by him;

(c) whether the company's balance sheet and profit and loss account dealt with by the report are in agreement with the books of account and returns.

(5) Where any of the matters referred to in clauses (a) and (b) of sub-section (3).

MEETINGS

The Companies Act (1994) provides for following types of meetings :

1. Annual General Meeting (Section 81). Every company shall in each year of the Gregorian calendar hold an annual general meeting specifying the meeting as such in the notices calling it. Not more than 15 months shall elapse between the date of one annual general meeting of a company and that of the next.

Provided that a company, may hold its first annual general meeting within a period of not more 18 months from the date of its incorporation. If such meeting is held within that period, it will not be necessary for the company to hold any annual general meeting in the year of its incorporation or in the following year.

Provided further that the Registrar may, on an application made by a company within 30 days from the date of expiry of the period specified for the annual general meeting as aforesaid, extend the time within which any annual general meeting, not being the first annual general meeting shall be held by a period not exceeding 90 days or not exceeding 31st December of the calendar year in relation to which the annual general meeting is required to be held, which is earlier. (Sub-section 1).

If a company defaults in complying with the provisions as mentioned under sub-section 1, the court may on the application of any member of the company call or direct the calling of a general meeting of the company and give such direction as the court thinks expedient in calling holding and conducting of the meeting. (Sub-section 2).

If the company makes default in holding the meeting as per provisions of sub-section (1) or in complying with any

directions of the court under sub-section 2 of Section 81, the company and every officer of the company who is in default, shall be punishable with fine which may extend to ten thousand taka and in case of a continuing default, with a further fine of 250 taka for every day after the first day during which such default continues. (Section 82).

2. Statutory Meeting (Section 83). Every company limited by shares and every company limited by guarantee and heaving a share capital shall, within a period of not less than one month and not more than six months from the date at which the company is entitled to commence business, hold a general meeting of the members of the company. In the Act such meeting is called "The statutory meeting". (Sub-section 1).

The Board of Directors shall in accordance with the other provisions of the Act, prepare a report, in this called "Statutory Report" and shall at last 21 days before the day on which the statutory meeting is not to be held, forward the report to every member of the company provided that the report forwarded later than the required time will be deemed to have been duly forwarded if any member entitled to attend the meeting and vote at it does not object to such forwarding. (Sub-section 2).

The statutory report shall contain the following particulars :

(a) The total number of fully paid up and partly paid up shares allotted.

(b) The total amount of cash received by the company in respect of all the shares allotted.

(c) An abstract of the receipts of the company and of the payments made for commission, brokerage, etc. and classifying according to source.

(d) The names, addresses and occupations of the directors of the company and of its auditors, managers and secretary and changes of the names, addresses, etc.

(e) The particulars of the contracts which are to be submitted to the meeting for its approval together with

the particulars of the modification or proposed modification of such contracts.

(f) The extent, if any, to which each underwriting contract, if any, has not been carried out, and the reasons therefor.

(g) The arrears due on calls from every director, and from others such as managing agent, partner of managing agent, every firm, etc.

(h) Particulars of commissions and brokerages paid to directors, managing agents, managers, etc.

The statutory report shall be certified as correct by not less than two directors of the company, one of whom shall be the managing director where there is one. The Board of Directors shall cause a copy of the statutory report certified according to the Registrar for registration forthwith, after copies thereof have been sent to the members of the company.

The Board of Directors shall prepare a list of names, addresses and occupations of the members of the company and the number of shares held by them and present it in the statutory Meeting. The members of the company present at the meeting shall be at liberty to discuss any matter relating to the formation of the company or arising out of the statutory report, whether previous notice has been given or not. But no resolution may be passed of which notice has not been given in accordance with the provisions of the Act.

The meeting may adjourn from time to time any resolution of which notice has been given in accordance with the provisions of the Act whether before or after the former meeting may be passed.

If default is made is complying with the provisions of the Act, every director or other officer of the Company who is in default shall be punishable with fine which may extend to five thousand taka.

The provisions of the section shall not apply to a private company.

Extra-ordinary General Meeting (Section 84).

Notwithstanding anything contained in the Articles, the directors of a company which has a share capital shall on the requisition of the holders of not less than one tenth of the issued share capital of the company upon which all calls or other sums then due have been paid, forthwith proceed to call an extra ordinary general meeting of the company, and in the case of a company not having a share capital the directors thereof shall call such meeting on the requisition of such members as have, on the date of submitting the resolution, not less than one tenth of the total voting power in relation to the issues on which the meeting is called.

The requisition must state the objects of the meeting and must be signed by the requisitionists and deposited at the registered office of the company, and may consist of several documents in like form, each signed by one or more requisitionists.

If the directors do not, within twenty one days from the date of deposit of the requisition, proceed to call a meeting on a day not later than 45 days from the date of the deposit of the requisition, then the requisitionists, or a majority of them in value may themselves call the meeting but any meeting so called shall be held before the expiration of three months from the date of the deposit of the requisition.

Any meeting called by the requisitionists shall be called in the same manner as that in which meetings are to be called by the directors.

Any expenses incurred by the requisitionists by reason of the failure of the directors duly to call a meeting shall be repaid to the requisitionists by the company, and any sum so repaid shall be retained by the company, out of any sums due or to become due from the company by ways of fees or other remuneration for their services to such of the directors as were in default.

Section 85 —Provisions for Meetings.

The provisions are discussed below—

(a) Annual general meeting may be called by 14 days' notice in writing. Any other meeting may be called by 21 days' notice

in writing. A meeting may be called by shorter notice if it is so agreed by all the members of the company entitled to attend and vote in the case of annual general meeting and in the case of any other meeting by the members of the company holding not less than 95% of the paid up share capital of the company and in the case of no share capital of the company, 95% of the total voting power. Notice of every meeting must be given to all members as required by the schedule 1. Two or more members holding $\frac{1}{10}$th or the total share capital paid up and in the case of a company not having share capital 5% of the members of the company may call a meeting. For private company with number of members not exceeding six, two members and if the number exceeds six three members and for any other company five members personally present shall be a quorum. Any member elected by the members at a meeting may be chairman thereof. On a poll, votes may be given either personally or by proxy. If for any reason a meeting is not called, the court may order a meeting of the company to be called, held and conducted as the court thinks fit or in clauses (a), (b) & (c) of sub-section (4) are answered in the negative or with a quantification, the auditors report shall state the reasons for the answer. (6) The government may, by general or special order, direct that in the case of such class or description of companies as may be specified in the order, the auditors report shall also include a statement on such matters specified therein. (7) The accounts of a company shall not be deemed as not having been and the auditors report shall not state that those accounts report shall not state that those accounts have not been properly drawn up or the ground merely that the company has not declared certain matters, of—(a) those matters are such as the company is not required to disclose by virtue of any provision contained in this Act or any other law for the time being inforce; and (b) those provisions are specified to the balance sheet and profit and loss account of the company.

RESOLUTIONS

Ordinary Resolution—The resolution taken by voting at the General Meeting of the share holders is called Ordinary

Resolution. This resolution is passed by majority of the share holders at the Meeting. This is passed in the ordinary way and deals with ordinary business, such as passing of accounts, appointing directors, etc. Excepting rules provided in the Articles, no notice of such resolution is necessary. But for all ordinary resolutions to be proposed at the statutory meeting, notice must be given.

Extra-ordinary Resolution—A resolution shall be an extra-ordinary resolution when it has been passed by a majority of not less than three-fourths of such members entitled to vote as are present in person or by proxy, where proxies are allowed, at a general meeting of which notice specifying the intention to propose the resolution as an extra-ordinary resolution has been duly given (Section 87 (1), Companies Act, 1994). Unless required by the Articles it is not necessary that all extra-ordinary business must be conducted by extra-ordinary resolution. Extra-ordinary resolution, is mainly required for the following issues or businesses (a) Voluntary winding up of a company by shreholders,

(b) Remark of directors if provided by the Articles.

Special Resolution—A resolution shall be a special resolution when it has been passed by such a majority as is required for the passing of an extraordinary resolution and at a general meeting of which not less than twenty-one day's notice specifying the intention to purpose the resolution as a special resolution has been duly given; provided that, if all the members entitled to attend and vote at any such meeting so agree, a resolution may be proposed and passed as a special resolution at a meeting of which less than twenty-one day's notice has been given. (Section 87(2), Companies Act, 1994). Special resolution is required for the following purposes—

(a) to alter the Articles of the company;

(b) to alter the memorandum with the leave of the court;

(c) to change the name of the company;

(d) to reduce the capital of the company with the leave of the court.

Copies of special resolutions shall have to be filed with the Registrar within fifteen days from the date of their passing or adoption.

DIRECTORS

Section 2(f) of the Companies Act, 1994 has defined Director as follows : 'Director' includes any person occupying the position of director by whatever name called.

Directors obligatory—(Section 90) :

(1) Every public company and a private company which is a subsidiary of a public company shall have at least three directors.

(2) Every private company other than a private company mentioned in sub-section (1) shall have at least two directors.

(3) Only a natural person may be appointed a director.

Appointment of directors (Section 91) :

(1) Notwithstanding any thing contained in the articles of a company –

(a) the subscribers of the memorandum shall be deemed to be the directors of the company until the first directors are appointed;

(b) the directors of the company shall be elected by the members from among their number in general meeting; and;

(c) any casual vacancy occurring, among the directors may be filled in by the other directors but the person appointed shall be a person qualified to be elected a director under clause;

(d) and shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last appointed a director.

(2) Despite anything contained in the articles of a company other than a private company not less than one third of the whole number of directors shall be persons whose period of office is liable to determination at any time by retirement of director rotation.

Restriction on appointment of directors (Section 92).

(1) A person shall not be capable of being director of a company by the articles and shall not be named as a director or proposed director of a company in any prospectus issued by or on behalf of the company or in any statement in lieu of prospectus filed by or on behalf of a company unless before the registration of the articles or the publication of the prospectus, or the filing of the statement in lieu of prospectus, as the case

may be he has by himself or by his agent authorized in writing—(a) signed and filed with the Registrar a consent in writing to act as such director; and

(b) in the case of companies having a share capital—

(i) signed the memorandum for a number of shares not less than his qualification shares; or

(ii) taken from the company and paid or agreed to pay for his qualification shares; or

(iii) signed and filed with the registrar a contract in writing to take from the company and pay for his qualification shares; or

(iv) made and filed with the registrar any affidavit to the effect that a number of shares not less than his qualification share are registered in his name.

(2) On the application for registration of the memorandum and articles, if any, of a company, the applicant shall file with the Registrar a list of the persons who have consented to be directors of the company, and, if this list contains the name of any person who has not so consented, the applicant shall be liable to a fine not exceeding two thousand taka; provided that nothing in this section shall apply to the appointment of the chief executive by whatever name called, of any insurance company or a banking company as a director of that company if the articles thereof provides for such appointment.

Section 93—(1) Every person, proposed as a condidate for the office of a director shall sign and file with the company, his consent in writing to act as a director, if appointed.

(2) A person shall not act as a director of the company unless he has, within thirty days of his appointment, signed and filed with the Registrar his consent in writing to act as such director.

Disqualification of directors : (Section 94) :

(1) A person shall not be capable of being appointed director of a company, if—

(a) he has been found to be of unsound mind by a competent court and the finding is in force; or

(b) he is undischarged insolvent; or

(c) he has applied to be adjudicated as an insolvent and his application is pending; or

(d) he has not paid any call in respect of shares of the company held by him, whether alone or jointly with

others, and six months have elapsed from the last day fixed for the payment of the call; or

(e) he is a minor.

(2) A company may in its articles provide additional grounds for disqualification of a director.

DUTIES OF DIRECTORS

The major duites of Directors are may be explained from the judgement of the case of City Equitable Fire Insurance Company as follows :

(1) Every director must have to work with honesty and for the interest of the company.

(2) A director shall have to exercise such degree of skill and deligence as would amount to reasonable care which an ordinary man might be expected to take in the circumstances on his own behalf.

(3) A director must not exhust in performance of his duties greater degree of skill than what can be reasonably expected from a person of his knowledge and experience, in other words he is not liable for mere errors of judgement.

(4) A director is not to give continuous attention to the duties of the company; his duties are of intermittent nature and these are to be performed by him at periodical board meetings and the meetings of any committee to which he is appointed, and even though he is not bound to attend all such meetings, he ought to attend them when reasonably able to do so.

Under the Companies Act the directors are required to perform the duties as are enumerated below :

(1) Where a director is "interested in any contract which is proposed to be entered into by the company, he must disclose the interest to the Board of Directors.

(2) He (director) is to disclose his name, address, occupation, nationality, etc. for their entry into the register of the directors.

(3) He is to disclose the number of shares of the company which he holds.

(4) A director has to send to the Registrar stating his consent to the post of director.

(5) A director must obtain qualification share to be specified in the articles and if he is not already qualified he must obtain his qualification within 60 days after his

appointment or such shorter time as may be specified (fixed) by the articles.

(6) A director must have to pay his share monies according to the call of the Board of Directors.

(7) A director must not participate in the meeting of the Board of Directors when they decide his contract with the company.

If a director fails to perform his above explained duties, he is then guilty of negligence. If on account of such negligence the company suffers any damages the director must compensate the company.

POWERS OF THE DIRECTORS :

The directors obtain their powers and authority from the following two sources namely : (i) The Articles of Association of the company and (ii) the Companies Act. The Articles of Association determine the powers of the directors. The directors cannot do any acts which contradict the objectives as stated in the Memorandum of Association. The directors have all the powers or authority to execute the affairs of the company properly. Even though the powers of the directors are written in the Articles of Association, the directors, despite that, may have to exercise their only discretions in the doing of good jobs for the company. If they really do their jobs in a proper manner, the court then cannot interfere in their activities.

The directors may exercise the undermentioned powers on behalf of the company :

(1) make calls on shareholders;
(2) issue debentures at a discount;
(3) borrowing of moneys otherwise than on debentures;
(4) invest funds of the company; and
(5) make loans.

RESTRICTIONS ON POWERS OF DIRECTORS.

(1) The directors of a company or of a subsidiary company of a public company shall not, except with the consent of a company concerned in general meeting—(a) sellor dispose of the undertaking of the company, and (b) remit any debt due to a director. (Section 10 7C/Act '94).

(2) No Director or firm of which such director is a partner or private company of which such director is a Director shall,

without the consent of the company in general meeting hold any office of profit under the company except that of a managing director or manager or a illegal or technical advisor or a banker. (Section 105 C/Act 1994).

Explanation—For the purpose of this section, the office of managing agent shall not be deemed to be an office of profit under the company.

(3) Except with the consent of the directors, a director of the company, or the firm of which he is a partner or any partner of such firm or the private company of which he is a member or director, shall not enter into any contract for the sale, purchase or supply of goods and materials with the company. (Section 105 C/Act 1994).

(4) The directors of an insolvent company cannot exercise their powers with a view to benefiting themselves in a view of approaching winding up. (Syke's case, 1872).

(5) A director must disclose his interest in any contract and must give notice to other directors. When decision is taken on any such contract in a meeting of the Board of Directors, he cannot vote on it nor shall his presence court for purpose of forming a quorum at the time of any such vote; and if he clues so vote, his vote cannot be counted.

(6) No company (lending company) shall make any loan or give any guarantee or provide any security in connection with a loan made by a third party to—(a) any director of the lending company; (b) any firm in which any director of the lending company is a partner; (c) any private company of which any director of the lending company is a director. (Section 103 C/Act 1994).

RIGHTS OF DIRECTORS

The directors may enjoy the following rights subject to the conditions as provided in the Articles of the company :

(1) The directors have the right to do and get done all that is necessary for the proper conduct of the business of the company.

(2) A director, if he is validly appointed to the Board and if he does not suffer form any disqualification which may prevent him form acting as director is entitled to attend meetings of the Board and participate in the direction of the company's affairs.

(3) Right of allotment of shares to the applicants for shares.

(4) Right of inviting the special meeting and annual general meeting of the shareholders.

(5) Right of excess to the various books and documents of the company.

(6) Right of filling in the casual vacancy of the post of a director.

(7) The directors have the right for appointing the auditors of the company for the period till the first annual meeting of the shareholders after the registration of the company and subsequently to fill up the vacancy in the post of director appointed by the shareholders in the annual meeting of the company.

(8) Right of determination of remuneration for the purpose of giving appointment to one of the directors in the post of Executive Director for the purpose of directing the affairs of the company, subject to the rules contained in the Articles of the company.

(9) The directors have the rights for providing punishment for misconduct (offences), payment of remuneration, removal, appointment, etc., of all the employees and officers of the company.

(10) Rights of determining the duties and responsibilities of all the employees and officers including the Executive Director of the Company.

(11) Rights of determination and application of the policies relating to the business of the company.

(12) Right of declaration and distribution of dividends of the company.

(13) Right of monitoring and evaluation of the activities of the Executive Director and other officers of the company.

(14) Right of making contracts relating to purchase and sale of property and borrowing moneys.

(15) Right of claiming compensation from the company for loss of office or as consideration for retirement from office, or in connection with such loss or retirement. This right will be exercised by a managing director, or a director holding the office of manager or in the whole time employment of the company subject to the provisions of the Companies Act.

LIABILITIES OF DIRECTORS

(1) If any unqualified person acts as a director of the company, after the expiration of the period fixed for obtaining qualification, he shall be liable to a fine of not exceeding two hundred taka for everyday between the expiration of the period of obtaining qualification (sixty days after his appointment or such shorter time as may be fixed by the Articles) and the last day on which it is proved that he acted as director (both days inclusive). (Section 97(2) C/Act, 1994).

(2) If any peson being an undischarged insolvent acts as director or managing agent or manager of any company he shall be liable to imprisonment for a term not exceeding two years or to a fine not exceeding two thousand taka or to both. Company here means a 'company' which includes a company incorporated outside Bangladesh which has an established place of business within Bangladesh (Section 99 C/Act, '94).

(3) The directors will be personally liable for acts done by them beyond the powers as provided in the Articles and memorandum of the companry.

(4) If any director of a company commit or allows to be committed any contravention of any law relating to allotment of shares he shall be liable to compensate the company and the allottee respectively for any loss, damage or costs which the company or the allottee may have sustained or incurred thereby. But if the director can prove that the violation was not due to any misconduct or negligence, in that case he can be excused from the liability. (Section 102(2), C/Act, 1913).

(5) The directors are liable to those persons who apply for purchase of shares by believing the misstatement of the prospectus of the company (Section 101, C/Act, 1913)

(6) The directors will be liable if they commit frauds with the creditors or conduct the business with fraudulent motives at the time of winding up of the company.

However, the directors may get exemption from liabilities in the following cases : (1) If the directors are found to have acted honestly and reasonably in the conduct of the business, in that case they are exempted from the liabilities for negligence, default, etc.

(2) The directors are exempted in cases of errors of judgement.

(3) If frauds are committed by the subordinate employess of the directors and the directors can prove that they had no knowledge about the fraud, then the directors can get relieved of liabilities.

APPOINTMENT OF ALTERNATE DIRECTORS.

The Board of Directors of a company, if authorized by the Articles or by a resolution passed by the company in general meeting, may appoint an alternate director to act for the original director during his absence for a continuous period of three months from Bangladesh.

The alternate director shall not hold office for a period longer than that permissible to the original director in whose place he has been appointed and shall vacate immediately after he receives information that the original director has returned to Bangladesh.

If the term of office of the original director is determined before he so returns to Bangladesh any provision for automatic re-appointment of retiring directors in default of another appointment shall apply to the original director and not to the alternate director. (Section 101 (1-3) C/Act, 1994).

REMOVAL OF DIRECTORS

The company by extraordinary resolution may remove any shareholder director before the expiration of his period of office and may by ordinary resolution appoint another person in his place and the person so appointed shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected director.

A director so removed shall not be re-appointed a director by the Boared of Directors. (Section 106 (1-2), C/Act, '94).

WINDING UP

Definition—The winding up or liquidation of a company means the termination of the legal existence of a company by stopping its business, collecting its assets and distributing the assets among creditors and shareholders, in the manner laid down in the companies Act. Professor Gower defined Winding up as follows—"Winding up of a company represents the process where by its life is ended and its property administered for the benefit of its creditors and members.

MODE OF WINDING UP

(Section 234 (1-2), companies Act, '94)

The winding up of a company may be either –

(a) by the Court; or

(b) voluntary; or

(c) subject to the supervision of the Court.

The provisions of this Act with respect to winding up shall apply, to the winding up of a company in any of these modes, unless anything contrary appears.

Winding up by Court

Circumstances in which company may be wound up by Court– (Section 241, C/Act, '94) A company may be wound up by the Court; if–(i) the company has by special resolution resolved that the company be wound up by the court; or (ii) default is made in filing the statutory report or in holding the statutory meeting; or (iii) the company does not commence its business within a year from its incorporation, or suspends its business for a whole year; or (iv) the number of members is reduced, in the case of a private company below two, or, in the case of any other company, below seven; or (v) the company is unable to pay its debts; or (vi) the Court is of opinion that it is just and equitable that the company should be wound up.

Company when deemed unable to pay its debts (Section 242 (1-2) C/Act, 1994)

A company shall be deemed to be unable to pap its debts– (i) if a creditor, by assignment or otherwise, to whom the company is indebted for a sum exceeding five hundred taka then due, has served on the company, by causing the same to be delivered by registered post or otherwise at its registered office, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor; or (ii) if execution or other process issued on a decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or (iii) if it is proved to the satisfaction of the Court that the company is unable to pay its debts, the Court shall take into account the contingent and prospective liabilities of the company.

The demand shall be deemed to have been duly given under the hand of the creditor if it is signed by an agent or legal adviser duly authorized on his behalf, or in the case of a firm, if it is signed by such agent, or by a legal adviser or by any one member of the firm on behalf of the firm.

PROVISION AS TO APPLICATIONS FOR WINDING UP

(Section 245, Companies Act, 1994)

An application to the Court for the winding up of a company shall be by petition presented, subject to the provisions of this section either by the company, or by any creditor or creditors, including any contingent or prospective creditor or creditors, contributory or contributories, or by all or any of those of parties, together or separately or by the Registrar;

Provided that —(a) a contributory shall not be entitled to present a petition for winding up a company, unless—

(i) either the number of members is reduced in the case of a private company, below two or in the case of any other company, below seven, or

(ii) the shares in respect of which he is a contributory or some of them either were originally allotted or have been held by him, and registered in his name for at least six months during the eighteen months before the commencement of the winding up, or have devolved on him through the death of a former holder.

(b) the Resistrar shall not be entitled to present a petition for winding up a company—(i) except on the ground from the financial condition of the company as disclosed in its balance sheet or from the report of an Inspector appointed under section '95 or, in a case falling within section 204 it appears that the company is unable to pay its debts; and (ii) unless the previous sanction of the government has been obtained to the presentation of the petition;

Provided that no such sanction shall be given unless the company has first been afforded an opportunity of being heard.

(c) a petition for winding up of a company on the ground of default in filing the statutory report or in holding the statutory meeting shall not be presented by any person except by a shareholder, not before the expiration of fourteen days after the last day on which the meeting ought to have been held;

(d) he shall not give a hearing to a petition for winding up of a company by contingent or prospective creditors until such security for costs has been given as the Court thinks reasonable and until a *prima facie* case for winding up has been established to the satisfaction of the Court.

VOLUNTARY WINDING UP

Circumstances in which company may be wound up voluntarily (Section 286 (1-2) C/Act, 1994)

A Company may be wound up voluntarily—(a) when the period fixed for the duration of the company by the articles expires or the event occurs, on the occurrence of which articles provide that the company is to be wound up (dissolved) and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily; (b) if the company resolves by special resolution that the company be wound up voluntarily; (c) if the company resolves by extraordinary resolution to the effect that it cannot by reason of its liabilities continue its business and that it is advisable to wind up.

The expression "resolution for voluntarily winding up" when used hereafter in this Part means a resolution passed under clause (a), clause (b) or clause (c) of this section.

Commencement of voluntary winding up (section 287, C/Act, '94)

A voluntary winding up shall be deemed to commence at the time of the passing of the resolution for voluntary winding up.

Effect of voluntary winding up. (Section 288, C/Act, '94)

When a company is wound up voluntarily, the company shall, from the commencement of the winding up, cease to carry on its business except so far as may be required for the beneficial winding up thereof.

Provided that the corporate state and corporate powers of the company shall, notwithstanding anything to the contrary in its articles, continue until it is dissolved.

There are two categories of voluntary winding up, namely :

(1) Members' voluntary winding up, and

(2) Creditors' voluntary winding up.

A winding up, in the case or which a declaration has been made and delivered in accordance with sub-sections (1) and (2) of section 290, is in this Act (1994) referred to as "members' voluntary windidng up", and, where a declaration has not been made and delivered as aforesaid, is in this Act/1994) referred to as "creditors' voluntary winding up" (Section 290 (3), C/Act, 1994).

MEMBERS' VOLUNTARY WINDING UP

Steps to be taken in this regard are the following :

(a) Notice of any special resolution or extraordinary resolution for winding up a company voluntarily shall be given by the company within 10 days of the passing of the same by advertisement in the official gazette, and also in some news paper, if any, cerculating in the district where the registered office of the company is situate. (Section 289, C/Act, 1994)

(b) Where it is proposed to wind up a company voluntarily, the directors of the company or, in the case of a company having more than two directors, the majority of the directors shall at a meeting of the directors held before the date on which the notice of the meeting at which the resolution for the winding up the company is to be proposed are sent out, make a declaration verified by an affidavit to the effect that they have made a full enquiry into the affairs of the company, and that, having so done, they formed the opinion that the company will be able to pay its debts in full within a period, not exceeding three years, from the commencement of the winding up. Such declaration shall be supported by a report of the company's auditors on the company's affairs and shall have to be delivered to the Registrar for registration before a certain date. (Section 290, C/Act, 1994)

(c) After the above declaration has been delivered the shareholders of the company shall meet and pass a resolution, ordinary, special or extraordinary, as the case may be, for the winding up of the company.

(d) After that the company in general meeting shall appoint one or more liquidators for the purpose of winding up the affairs and distributing the assets of the company, and may fix the remuneration to be paid of him or them.

On the appointment of liquidator, all the powers of the directors shall cease, except so far as the company in general meeting or the liquidator sanctions the continance thereof. (Section 292, C/Act, '94)

(e) In the event of the winding up continuing for more than one year, the liquidator shall summon a general meeting of the company at the end of the first year from the commencement of the winding up and of each succeeding year, or as soon thereafter as may be convenient within 90 days of the close of the year, and shall lay before the meeting an account of his acts and dealings and of the conduct of the winding up during the preceding year and a statement in the prescribed form containing the prescribed particulars with respect to the position of the liquidation. (Section 295, C/Act, '94)

(f) Final meeting and dissolution—(Section 296, C/Act, '94)

As soon as the affairs of the company are fully wound-up, liquidator shall make up an account of the winding up showing how the winding up has been conducted and the property of the company has been disposed of, and thereupon shall call a general meeting of the company for the purpose of laying before it the account, and giving explanation thereof.

The meeting shall be called by advertisement specifying the time, place and object thereof, and published one month at least before the meeting in the manner as specified under section 289 for publication of a notice under that section.

Within one week after the meeting the liquidator shall send to the Registrar a copy of the account and shall make a return to him of the holding of the meeting and of its date and if the copy is not sent or the return is not made in accordance.

with this section the liquidator shall be liable to a fine of 100 taka for everyday during which the default continues;

Provided that, if a quorum is not present at the meeting the liquidator shall in lieu of the said return make a return that the meeting was duly summoned and that no quorum was present there and upon being made, a return of the meeting shall be deemed to have been complied with (i.e. received).

The Registrar on receiving the account and either of the returns mentioned above shall forthwith register them and on the expiration of three months from the registration of the return the company shall be deemed to be dissolved finally—provided that the Court may on the application of the liquidator or of any person who appears to the Court to be interested, make an order deferring the date at which the dissolution of the company is to effect for such time as the Court thinks fit.

It shall be the duty of the person on whose application an order of the Court is made, withing 21 days of the making of the order to deliver to the Registrar a certified copy of the order for registration, failing which he shall be liable to a fine of Taka one hundred for everyday during which the default continues.

CREDITORS' VOLUNTARY WINDING UP

The following steps need to be taken in respect of creditors' voluntary winding up : (a) the company shall cause a meeting of the creditors of the company to be summoned for the day or the day next following the day, on which there is to be held the meeting at which the resolution of voluntary winding up is to be proposed and shall cause the notices of the said meeting of creditors to be sent by post to the creditors simultaneously with the sending of the notices of the said meeting of the company at which such resolution will be proposed.

The company shall also cause the meeting of the creditors be advertised in the specified manner of section 289 for the publication of the notice under that section.

The directors of the company shall cause a full statement of the position of the company's affairs together with a list of

the creditors of the company and the estimated amount of their claims to be laid before the meeting of the creditors to be held as aforesaid. (Section 298, C/Act, '94)

(b) Appointment of meeting's liquidator—The creditors and the company at their respective mentioned in section 298 may nominate a person to be liquidator for the purpose of winding up the affairs and distributing the assets of the company, and if the creditors and the members of the company nominate different persons, the person nominated by the creditors shall be the liquidator and if no person is nominated by the creditors the person nominted by the company shall be liquidator (Section 299, C/Act, '94)

(c) Appointment of committee of Inspection—The creditors at their meeting may appoint a committee of inspection consisting of not more than five persons and if such a committee is appointed the company may, either at the meeting at which the resolution for voluntary winding up is passed or at any time subsequently in general meeting, appoint such number of persons as they think fit to as members of the committee not exceeding five in number. (Section 300, C/Act, 1994).

(d) Fixing of liquidators remuneration and cessation of directors' powers— The committee of Inspection or if there is no such committee, the creditors may fix up the remuneration to be paid to the liquidator or liquidators and where the remuneration is not so fixed it shall be determined by the Court.

On the appointment of the liquidator, all the powers of the directors shall cease, except so far as the Committee of Inspection, or if there is no such committee, the creditors sanction the continuance thereof. (Section 301, C/Act, 1994).

(e) Duty of liquidator to call meetings of company and of creditors at the year end—In the event of the winding up continuing for more than one year, the liquidator shall summon a general meeting of the company and a meeting of creditors at the end of the first year from the commencement of the winding up and of each succeeding year, or as soon there after as may be convenient and lay before the meetings an account of his acts and dealings and of the conduct of the winding up during the preceding year and a statement in the prescribed form containing the prescribed particulars with

respect to the position of the winding up. (Section 304, C/Act, 1994)

(f) Final meeting and disolution—After the winding up of the company's affairs, the liquidator shall make up an account of the winding up showing how the winding up has been conducted and the property of the company has been disposed of, and thereupon shall call a general meeting of the company and a meeting of the creditors for the purpose of laying the account before the meetings and giving any explanation thereof.

Each meeting shall be called by advertisement specifying the time, place and object thereof and publish within one month at least before the meeting in the manner as specified under section 289 for publication of a notice under that section.

Within one week after the date of the meetings, the liquidator shall send to the Registrar a copy of the proceedings of the meetings and the Registrar on receiving the returns of holding of the meetings shall forthwith register them and on the expiration of three months from the registration thereof the company shall be deemed to be dissolved—provided that the Court may on an application made by the liquidator or by any other person make an order deferring the date of dissolution of the company to such time as the Court may deem fit.

The person who made the application for order of the Court shall within twenty one days after the order, deliver to the Registrar a certified copy of the order for registration, failing which he will be liable to a fine of taka one hundred for every day during which the default continues. (Section 305, C/Act, 1994).

Winding Up Subject to the Supervision of the Court :

(1) Power to order winding up subject to supervision— When a company has by special or extraordinary resolution, resolved to wind up voluntarily, the Court may make an order that the voluntary winding up shall continue but subject to such supervision of the Court, and with such liberty for creditors, contributories or others to apply to the court and generally on such terms and conditions as the Court thinks just. (Section 316, C/Act, 1994)

A supervision order is generally made for protection of the creditors and contributories and other interested parties of the

company. In Re Prince of Wales State Quarry Co., it was held that such an order may be passed if (a) the liquidator under voluntary liquidation is partial or is negligent in collecting the asset; (b) the rules relating to winding up are not being observed, or (c) the resolution for winding up was obtained by fraud.

(2) Effect of petition for winding up subject to supervision—A petition for continuance of a voluntary winding up subject to the supervision of the Court shall, for the purpose of giving jurisdiction to the Court over suits, be deemed to be a petition for winding up by the Court. (Section 317, C/Act, '94)

(3) Court may have regard to wishes of creditors and contributories—The Court may, in deciding between a winding up by the Court and winding up subject to supervision, in the appointment of liquidators and in all other matter relating to the winding up subject to supervision have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence. (Section 318, C/Act, '94)

(4) Power of Court to appoint and remove liquidators—Where an order is made for a winding up subject to supervision, the Court may by the same or any subsequent order appoint any additional liquidator.

A liquidator appointed by the Court shall have the same powers, be subject to the same obligations and in all respects stand in the same position as if he had been appointed by the company.

The Court may remove any liquidator so appointed by the Court or any liquidator continued under the supervision order and fill any vacancy occasioned by the removal or by death or resignation. (Section 319 (1-3), C/Act, '94)

(5) Effect of supervision order—Where an order is made for a winding up subject to supervision, the liquidator may, subject to any restrictions imposed by the Court, exercise all his powers, without the sanction or intervention of the Court, in the same manner as if the company were being wound up altogether voluntarily.

Except as provided above and save for the purposes of section 279 of the Act, '94, any order made by the Court for a winding up subject to the supervision of the Court shall for all purposes, including the staying of suits and other proceeding,

be deemed to be an order of the Court for winding up of the company by the Court, and shall confer full authority on the Court to make calls or to enforce calls made by the liquidators and to exercise all other powers which it might have exercised if an order had been made for winding up the company altogether by the Court.

In the construction of the provisions whereby the Court is empowered to direct any act or thing to be done to or in favour of the official liquidator, the expression "Official liquidator" shall be deemed to mean the liquidator conducting the winding up subject to the supervision of the Court. (Section 320 (1-3), C/Act, 1994)

(6) Appointment of liquidators subject to supervision to the office of official liquidators—Where an order has been made for the winding up of a company subject to supervision, and an order is afterwards made for winding up by the Court, the Court may, by the last-mentioned order or by any subsequent order, appoint the liquidators for the first mentioned winding up or any of them either provisionally or permanently, and either with or without the addition of any other person, to be official liquidator in the winding up by the Court. (Section 321, C/Act, '94)

Differences between Members' Voluntary Winding up and Creditors' Voluntary Winding up.

The differences are enumerated as under :

(1) In the case of Members' voluntary winding up, summoning of the creditors' meeting is not required. But in the case of Creditors' voluntary winding up the meeting of the members is held first and then the creditors' meeting is summoned.

(2) In the case of Members' Voluntary winding up, the members of the company appoint the liquidator. But in the case of Creditors' voluntary winding up the creditors and the members (company) at their respective meetings may nominate a person as a liquidator. If they nominate different persons as liquidators, in that case the person nominated by the creditors shall become the liquidator.

(3) In the case of Members' voluntary winding up appointment of Inspection Committee is not necessary. But in the case of Creditors' Voluntary Winding up an Inspection Committee may be appointed.

CHAPTER-7
LAW RELATING TO CARRIAGE OF GOODS.

Common Carrier

Definition : Section 2 of the common carriers Act, 1865, has defined common carrier as follows—"Common carrier denotes a person, other than the government, engaged in the business of transporting for hire property from place to place, by land or inland navigation for all persons indiscreminately".

"Person includes any association or body of persons, whether incorporated or not".

Characteristic Features of Common Carrier.

The characteristics are discussed as follows —(1) It is a person or partnership or joint family business or a company.

(2) Common carrier transports property i.e., goods. It does not transport passengers.

(3) Common carrier transports goods for hire and not gratuitously.

(4) Common carrier carries goods for business and money. A carrier who carries goods occasionally is not a common carrier.

(5) Common carrier must be ready to carry the goods of any person without any discrimination. That is, a common carrier cannot make any discrimination in carrying goods.

(6) Common carrier carries goods by land and inland navigation. That is, the term common is applied only in the case of carriage by land and inland navigation.

(7) Common carrier cannot be a government. That is, a government is not included in the definition of a common carrier.

Duties of a common carrier.

Under the common carriers Act, 1865, the following duties have been laid down for a common carrier—(1) A common carrier is bound to carry goods for all persons indiscriminately on payment of reasonable charges. But there are some exceptions under which a common carrier can refuse to carry goods. The exceptions are enumerated—

(i) If the customer does not express his willingness to pay reasonable charges for the carriage.

(ii) If there is no accommodation for the goods in the carriage.

(iii) If the goods are not of the description which the common carrier is accustomed to carry i.e. if the goods are of dangerous type.

(iv) If the goods are to be transported over a route other than the one with which the common carrier is familiar.

(v) If the goods are to be carried over a route over which the common carrier does not normally carry or transport goods.

If a common carrier excepting any of the above-mentioned reasons refuses to carry goods of a person, in that case the carrier will be liable to be sued by the customer. The customer in such case can recover the damages from the carrier.

(2) The common carrier is required to deliver the goods at the agreed time and place according the contract. In the absence of such agreed time the carrier is to deliver the goods within reasonable time. But the place of delivery of goods will depend on the terms and conditions of the contract.

(3) The common carrier must carry the goods over ordinary and usual route with resonable precautions. But for the safety of the goods the carrier can deviate from the ordinary route in abornal situations.

(4) The common carrier shall deliver the goods to the recipient of the goods (i.e., the consignee). In the absence of any contract, the carrier is not bound to deliver the goods at the house of the consignee. When the goods will reach the destination the carrier will intimate the consignee about the arrival of the goods and will allow him reasonable time to take the delivery of the goods.

Liabilities of a common carrier.

In Bangladesh the liabilities of a common carrier are determined by the common carriers Act, 1865. According to this Act, the goods, that are transported by carrier, are divided in to categories, namely—

(a) Scheduled goods and (b) Non-Scheduled goods. The liabilities of a common carrier are categorized on the basis of the division of the goods.

(a) Scheduled goods—These are the goods which are enumerated in the schedule to the Act. Gold, silver, jewellery, paintings, silk, title deeds, currency notes and coins, etc. are included in this type of goods. The liabilities of a common carrier with respect to this type of goods are the following :

(i) If the value of the scheduled goods exceed Tk. 1000.00 and loss or damage is caused to these goods, the common carrier will be liable for the loss or damage of the goods. The claim for the loss or damage can be made, but for that,

(1) the consignor must disclose the value and the description of the goods to the carrier and he must pay extra or additional charges at the prescribed rates for the goods, or

(2) the loss or damage to the goods must be due to the criminal act of the carrier, his agent or servant. (Sections 3 and 8).

(ii) The common carrier can claim extra charges at additional rates for accepting the increased risk of carrying the scheduled goods. (section 4)

(iii) Where the consignor or his agent has declared the value and description of the scheduled goods and has paid or agreed to pay additional charges, if any, the common carrier then is liable for any such loss or damage to such goods and is bound to return any sum which might have been paid as the charges for carriage and the carrier cannot limit his liability in this respect by any special contract. (Sections 3 and 8).

(b) Non-Scheduled Goods—All other goods except scheduled goods are called Non-scheduled goods. Non-scheduled goods are not included in the schedule to the common carriers Act, 1965. The liabilities of a common carrier with respect to such goods are the following :

(i) By special contract the common carrier can limit his liability with the consignor. But if the loss or damage to the goods is caused due to the criminal act or negligence of the carrier himself or his agent or servant, in that case the carrier will be liable for the loss or damage inspite of being the special agreement.

(ii) The person, who will claim compensation for the loss or damage to the goods, will have to claim it within six months of his getting notice about the loss or damage.

Liabilities of a common carrier under the English and Bangladesh Law —a difference.

Liability of a common carrier under the English law is more or less the same as it is under the Bangladesh law. But despite that some differences are noticed between the two laws with respect to the liability of a common carrier, which are as follows :—

(1) Common carrier under English law is considered as an Insurer. The common carrier therefore, will be liable for the loss or damage caused to the goods (whether the loss or damage is caused by negligence or criminal act of the carrier himself) and he will, as such, be bound to pay compensation to the consignor. However, the liability of the carrier is subject to certain exceptions. The common carrier will not, therefore, be liable in the following cases—

(i) If the damage to the goods is caused by an Act of Goods.

Examples—Floods, natural calamities, earthquakes, etc.

(ii) If the damage to the goods is caused by the enemies of the country.

(iii) When the damage is caused to the goods by some inherent defect in the goods or negligence of the consignor.

(iv) If the liability of the common carrier is limited by a special agreement.

(v) The common carrier will not be liable for the damage after the goods arrive at the destination and after notifying the consignee about the arrival of the goods at the destination.

PRIVATE CARRIER

Definition : When a carrier of goods carries goods occasionally or irregularly for reward or money or freight, but he does not do it as a regular business of a carrier, he is called a private carrier. A private carrier mainly carries his own goods. But on many occasions the private carrier carries goods for

others for freight when he has no sufficient goods of his own for transportation. In such cases the private carrier is not usually bound to carry goods of all indiscriminately. He may only be bound to carry goods for a certain person according to his convenience. The private carrier, if he so wishes, may refuse to carry goods of any person (Belfast Rope Work Co. Vs. Rushell). Justice Avory. In Watkins Vs. Lottell, has defined a private carrier as "one whose trade is not that of carrying goods from one person or place to another but who undertakes on occasions to convey the goods of an other and receives reward for so doing".

Difference between a common carrier and a private carrier.

The following are the differences between a private carrier and a common carrier.

(1) The common carrier carries goods as a regular business of carriage for hire. But private carrier does not do regular business of transporting goods. The private carrier, if he so wishes, can carry goods for freight or money occasionally or irregularly.

(2) A common carrier is bound to carry the goods indiscriminately for the public or the people who are ready to pay the usual freight except in certain special cases. On the other hand a private carrier, if he so wishes, may or may not carry goods of some person. That is, the private carrier has the right to refuse to carry goods of any person.

(3) The common carrier carries goods for money. So according to terms of the contract, the common carrier is bound to carry the goods safely to their destination. The private carrier, on the other hand, may carry goods free of charges. In such cases, he is not liable, except for some special negligence of his own, for the loss or damage caused to the goods.

(4) The rights, duties and liabilities of a common carrier and his relations with the consignor are governed by the common carriers Act of 1865. Whereas the rights and liabilities of a private carrier are governed by the contract Act of 1872.

(5) The relationship between a common carrier and his consignor is almost equivalent to the relationship between a policy-holder and an Insurer.

Liabilities of a private carrier.

The liability of a private carrier is almost like the liability of a bailee. He is liable for the loss or damage to the goods only for his own negligence. But where the owner of the goods (consignor) delivers the goods to the private carrier under his own risk, in that case the private carrier does not become liable for the loss or damage to the goods.

Rights of a common carrier.

The rights are discussed as under :

(1) A common carrier has the right not to carry goods under some circumstances, namely—

(a) he has no accommodation for the goods,

(b) the goods are not of the type and description he is accustomed to carry,

(c) if he is advised to carry the goods to a destination about which the carrier is not familiar i.e. to which he does not usually travel.

(2) He has the right to demand reasonable charges for the carriage of the goods from the consignor.

(3) He has the right of lien on the goods he carries for the charges due to it and can retain the goods till the charges are paid (Skinner Vs. Upshaw, 2 Ld Raym, 752).

(4) He can allow special concessions to some customers for the carriage of goods. However, he cannot charge unreasonable amount as payment from any customer.

Classification of carriers.

Carriers are broadly categoried into two, namely—(a) carrier of goods, and (b) carrier of passenger. The same carrier in many times carries both goods and passengers e.g. Railways.

The carriers of goods may again be divided into three types, namely—(a) Common carrier; (b) Private carrier, and (c) Gratuitous carrier.

Passenger carrier—A passenger carrier may be a common carrier or a private carrier or a gratuitous carrier.

A common carrier of passenger is one who accepts anybody as a passenger.

Example—A bus, a train or a taxi. A private carrier of passenger is one who occasionally carries passengers for hire.

A gratuitous passenger carrier is one who takes a passenger without charge.

Gratuitous carrier—He is in a position of a bailee. If he agrees to carry goods, he then must do the duties of a carrier. If he undertakes to perform a voluntary act, he is liable if he performs it improperly. He is also liable for negligence.

It is to be noted that an agreement of carriage with a gratuitous carrier is void. It is because there is no consideration for such agreement. Therefore, a gratuitous carrier is not liable for his refusing to carry goods.

RAILWAYS

Introduction : The duties and liabilities of Railways in our country are determined by the Indian Railways Act, 1890. The duties of railways are similar to those of common carriers and Railway is virtually a common carrier. But despite that there are differences in certain cases between the lisbilities of a carrier as stated in the common carriers Act and the liabilities of Railways. Under the English Common Law and under the common carriers Act of Bangladesh the common carrier is treated as an Insurer and as such the common carrier is liable for the loss of the transported goods. But the Railways in Bangladesh are held liable for the loss or damage to the goods execpt in a few cases.

DUTIES OF RAILWAYS

The main duties of Railways are to carry goods and passengers without any discrimination as common carriers if necessary freight is paid. Therefore, it is found apparent that there is no difference betweent the duties of Railways and those of common carriers. That is, inrespect to the duties of Railways to the general public, Railways are regarded as common carriers. Under section 28 of the Railways Act of 1890, the rules as laid down about Railways are as follows—"A railway administration shall not make or give any undue or unreasonable performance or advantage to or infavour of any particular person of railway administration or any particular description of traffic in any respect whatsoever, or subject to any particular person or railway administration or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

LIABILITIES OF RAILWAYS

The liabilities, as laid down under the Railways Act, 1890, for Railways are discussed as under :

(1) Unless anything similar is stated in the Railways Act the Railways shall be liable for the loss, damage or destruction or deterioration in the weight of the animals or goods during their transportation by any reasons except the following—

(a) act of Good;
(b) act of war;
(c) act of public enemies
(d) arrest, restraint or seizure under legal process;
(e) orders or restrictions unposed by any authority empowered by the Bangladesh Government in this behalf:
(f) act or omission or negligence of the consignor or the consignee or their agent or servant;
(g) natural destruction or wastage in bulk or weight due to inherent defects, qualityor vice of the goods;
(h) latent defects;
(i) fire explosion or any unforeseen risk.

Of course if because of the above mentioned reasons in cases where loss or damage to the goods has occurred or there has been deterioration in the quality or weight of the goods or it has been proved that the goods have been delivered, in those cases also the Railways will not be free from liability if the Railways fail to prove that reasonable skill or care have been taken regarding the goods in transportation.

(2) Every consignor of goods or animals must execute a Forwarding Note in the Form prescribed by Railway administration and approved by the government. Four types of forwarding notes are in general use. Each type covers a particular kind of goods. Each forwarding note contains (a) particulars of the goods carried and (b) the terms of carriage including a statement of the extent of the liability of the Railway Administration for loss or damage. (Section 72).

(3) Any person delivering to the railway administration, goods to be carried on a railway shall—

(a) if the goods are to be carried by a train intended solely for the purpose of carriage of goods; or

(b) if the goods are to be carried by any other train and consist of articles of any of the following categories, namely—

(i) articles carried at owner's risk rates;

(ii) articles of a perishable nature;

(iii) articles mentioned in the second schedule such as gold, silver, silk, pearls, jewellery, watches, govt & other securities, paintings, engravings, etc;

(iv) articles defectively packed or defective goods;

(v) explosives and other dangerous goods, executive a forwarding note in such a form as prescribed by the railway administration.

The consignor will sign it and provide all necessary details or particulars of the goods therein. If this is done the railway administration will be liable for any loss or damage of the goods as stated in the forwarding note. (Section 72)

(4) Goods can be sent by railway in two ways, namely—(i) at owner's risk comparatively at lesser freight, and (ii) at Railway risk, comparatively at higher freight. The railway administration will not be liable for any loss or damage caused to the goods or animals sent at owners risk unless it is proved that the loss or damage has been caused due negligence or misconduct of the railway administration or of any employee of the railway administration. (Section 74(c).

(5) Where a servant of the railway has booked the luggage of a passenger but did not give the receipt, in that case the railway administration will not be liable for any loss or damage of the luggage. Again where the passenger himself keeps the luggage in his responsibility or charge, the railway administration will not be liable for any loss or damage of the luggage unless it is proved that the loss or damage was caused by negligence or misconduct of the railway administration or any of its servants. (Section 74(1)

* If the goods are carried at Railway risk and if any loss or damage is caused to that, in that case, the railway administration will be liable for the loss or damage.

(6) Generally when goods, which should have been sent in a closed train, are, at the written request of the sender at the forwarding note, sent in open train and as a result if any loss

or damage is caused to the goods, in that case the railway administration will not be liable for that. (Section 74(2)

(7) If for carrying of animals, these are delivered to the railway administration, the railway administration will be liable for any loss or damage caused to them or if the animals are not delivered upto certain amounts of price of the animals. The price of the animals have been mentioned in the 1st schedule of the Railways Act. They are as follows—Elephants—Tk. 1500/= horses (per ched)—Tk. 750/= mules, horned cattle or camels (per head)—Tk. 200/=, land dogs, goats, pigs, sheeps, etc. (per head)—Tk. 30/=. The railway administration may accept higher liability than this if the animal is specially valuable. In such cases the value of the animal has to be mentioned in the forwarding note of the sender and a higher freight is to be paid for additional price. But the railway administration will not be responsible or liable for any loss or damage if it is caused due to fright or restiveness of the animal. (Section 73)

(8) When the package delivered to the railway administration for carriage contains the valuable goods as mentioned in the second schedule of the Railways Act (goods being gold, silver, ornaments, silk, currency, watches, precious stones, deeds, hundis, etc) and if the value of the goods exceeds Tk. 300/= the railway administration shall not be liable for the loss or damage to the goods. But if the consignor notifies the railway administration about the particulars and value of the goods and if the railway administration is paid additional freight (i.e., freight at increased rate) for accepting additional risk of transporting the goods, in that case the railway administration shall be liable for any loss or damage to the goods. (Section 79(3)

(9) When the goods, which are in defective condition or are defectively packed, are delivered or tendered to the Railway Administration for carriage by Railways and the fact is noted in the forwarding note, in that case the railway administration will not be liable for any loss or damage caused to the goods. But the railway administration will be liable for the loss or damage to the goods if the loss or damage is caused by the negligence or misconduct of the railway administration or any of its servants. (Section 74 (A)

(10) Where during travelling by train if a passenger suffers any loss or is injured or is dead, in that case the railway administration is not liable for that. But if the passenger suffers any loss or is dead because of the negligence of any servant of the railway administration, the railway administration, in that case the railway administration will be liable for that and will be bound also to pay compensation for that.

Bangladesh Railways—Are They Common Carriers?

Answer : The duties and liabilities of Bangladesh Railways are governed by the Indian Railways Act of 1890. Duties of Railways are almost similar to those of the common carriers. But from the point of their liabilities, the Bangladesh Railways cannot be called common carriers. According to the Common Carriers, Act of 1865 the common carrier is called an insurer. Because if the goods are lost or damaged by the carrier, the carrier then is liable to pay compensation for that. But in Bangladesh, the Railways are not considered as insurer. Rather the Railway in Bangladesh is considered as a Bailee in the case of transportation or carriage of goods. According to section 72(1) of the Railways Act of 1890 which is applicable in Bangladesh, the Railway Administration will be liable for the loss, destruction or deterioration of animals or goods delivered to it for carriage like a Bailee whose liabilities have been stated under sections 151, 152 and 161 of the Contract Act of 1872 as applicable in Bangladesh. That is, the liabilities of a Bailee as stated under sections 151, 152 and 161 of the Contract Act of 1872 will devolve on the Railways in Bangladesh in the case of carriage of goods or animals by them. There is provision under Common Carriers Act of 1865 on the basis of which the common carrier, if so wishes, may provide some special privileges to the consignor in respect of freight or other subjects. Under section 12 of the Indian Railways Act of 1890 it has been stated that "A railway administration shall not make or give any undue or unreasonable performance or advantage to or in favour of any particular person or railway administration or any particular description of traffic, in any respect whatsoever or subject to any particular person or railway administration or any particular description of traffic to any undue or unreasonable prejudice or disadvantage to any respect whatsoever." Besides Bangladesh Railways not

only carry goods like common carrier but also they (Bangladesh Railways) carry passengers. In addition the Bangladesh Railways are not a common carriers' Establishment like that of the common carriers. However, the Bangladesh Railway can be called a common carrier if considered from its duties, under the following reasons–

(i) The Bangladesh Railway can carry goods of any person from one place to another place if it is paid reasonable freight for carriage of the goods like common carrier.

(ii) Like common carrier the Bangladesh Railway takes adequate security to carry and deliver the goods under carriage to the station of destination.

(iii) Like the common carrier, the Bangladesh Railway must deliver the goods to the consignee within a reasonable time.

From the discussion above, it is apparent that the Bangladesh Railway is, partially, a common carrier i.e. partially it is considered as included within the purview of common carrier. But notwithstanding that the Bangladesh Railway is not, in its absolute sense considered legally a common carrier.

CARRIAGE OF GOODS BY SEA.

The Carriage of Goods by Sea is governed in Bangladesh by the following Acts–(1) The Carriage of Goods by Sea Act, 1925, and (2) The Bills of Lading Act, 1856.

CONTRACT OF AFFREIGHTMENT

Definition : The contract of carrying goods by sea is normally called a Contract of Affreightment. There are two parties in the contract, namely–

(a) The consignor or his agent, and

(b) The ship-owner or his agent. The consideration paid for the carriage is called the Freight.

CHARTER PARTY

Definition–A Charter-Party may be defined as an agreement in writing for the purpose of hiring an entire ship or a part of it with the object of carrying goods. The person who hires the ship or a part of it is called the charterer. When the Contract of Affreightment is incorporated into a document which contains the terms of the agreement between the parties is also called a Charter-Party.

The following are the characteristics of a charter-party :

(1) The contract of charter-party must be in writing.

(2) By charter-party, the complete ship or part of it may be given on hire or on lease.

(3) The ship may be hired in two ways. Namely—(a) for a particular period of time, and (b) for a particular voyage. When a ship is rented for a particular period of time it is called Time Charter. When the ship is put out to hire for a particular voyage it is called voyage charter. The terms of the charter party may be of different types. When the consignor hires the ship for a particular period of time or for a particular voyage in that case he becomes the owner of the ship for either the particular period of time or for the particular voyage and the Employs (captain and crew) of the ship will become his Employs during the charter period. The charterer then bears all the various liabilities of the ship. If the whole ship is not chartered (hired) and the charterer rents a part of the ship, in that case the charterer does not become the owner of the ship for that period. He only gets the right to have his goods conveyed by the ship to their destination.

CLAUSES OF CHARTER PARTY.

The clauses or terms of the charter-party are the following :

(1) Names of the parties (Ship owner and the charterer).

(2) Name of the ship.

(3) Nature of the charter—Voyage Charter or Time Charter.

(4) Name of port where the goods will be loaded, the name of the port where the goods will be unloaded and a statement about the condition of the ship.

(5) In case of the Time Charter, the date in which the ship will be placed under the control of the charterer.

(6) Guarantee from the Ship-owner as to the fitness of the ship for voyage.

(7) Quantity of the goods

(8) The expected perils, i.e., an enumeration of the circumstances under which the ship-owner will not be liable to pay compensation for the loss or damage to the goods.

Examples of perils—Act of Good, activities of enemies during war, attacks of the pirates, perils of the sea, etc.

(9) Terms of freight.

(10) Lay days for loading and unloading of goods and the amount of demurrage if the lay days are exceeded.

(11) Terms about how the voyage will be regulated and about how the goods will be delivered or tendered to the consignee.

(12) Circumstances under which the charter party will be treated as void and the liabilities of the concerned party will be ended.

(13) Penalties to which the parties may be liable for non-fulfilment of the terms of the charter party, etc.

(14) Duties of the Master or Captain of the Ship.

BILL OF LADING.

When goods are delivered to a ship for carrying them to a certain destination then a Receipt of goods signed by the owner of the ship, or its Master or the Representative or agent of the ship-owner is given to the shipper. This Receipt is called. Bill of Lading.

In the bill of Lading mention is made about the name of the ship by which the goods will be carried and also about the terms on which the goods have been delivered to the shipowner and the latter has accepted the goods. But when goods of many persons are tendered to the same ship, in that case separate Bill of Lading for every person (shiper) is provided to every person (i.e. shipper). Virtually the ship-owner (Master or Captain) gives the Bill of Lading to the consignor (sender of the goods) as an evidence of the Contract of Affreightment, stating therein the various particulars, amount of freight, etc., of the goods. It is mentioned here that the Bill of Lading is not contract but only an evidence of the terms of the contract. The Bill of Lading embodies the terms of the contract on which the goods are carried and not the terms of any other contract for any purpose. It states the apparent order and condition of the goods tendered or delivered for shipment. Bill of Lading is not a contract like a charter party. It is an excellent evidence of the terms of a contract.

CHARACTERISTICS OF BILL OF LADING.

The characteristics of Bill of Lading are discussed as under :

(1) Bill of Lading is a Receipt or Document signed by the shipowner or his agent. Generally the Master or Captain of the ship signs the Bill of Lading as the shipowner's agent.

(2) The Bill of lading is not a contract but it is evidence of the contract for the carriage of goods. It works as an example or precedent of the contract of carriage of goods. It is as such necessary that the following particulars are to be written in the Bill of Lading :

(a) The leading marks necessary for the identification of the goods.

(b) The quantity and condition of goods.

(c) Goods and other particulars.

(3) The Bill of lading is considered as a written Receipt and evidence to the Master of the ship for the goods tendered to him for the purpose of their carriage.

(4) The Bill of Lading is treated as Document of Title of the goods stated in it. The owner or proprietor of this document may claim the ownership of the goods mentioned in the document. The owner of the Bill of Lading may perform buying and selling of the goods as stated in the Receipt, in the international trade by delivery and endorsement of the document.

FUNCTIONS OF BILL OF LADING.

A bill of Lading has three important functions which are follows :

(i) It is an evidence of the contract of carriage of goods.

(ii) It is an acknowledgement of the goods from the carrier.

(iii) It is a Document of Title to the goods.

BILL OF LADING—IS IT A NEGOTIABLE INSTRUMENT.

The Bill of Lading has some characteristics of a negotiable instrument. The Bill of Lading is considered as a document of title to the goods. Like Negotiable Instrument the Bill of Lading can be transferred by endorsement and delivery. But despite such similarity because of the undermentioned reasons a Bill of Lading is not considered a true Negotiable Instrument : (1)

Under section 10 of the Negotiable Instruments Act a promissory note, Bill of Exchange or cheque has been considered as Negotiable Instrument. But the Bill of Lading has not been considered as Negotiable Instrument under the Negotiable Instruments Act. That is, Bill of Lading is not included in the definition of the term Negotiable instrument as given in the Negotiable Instruments Act.

(2) The transferee of a Bill of Lading gets only the rights of the transferor of the Instrument. If the title of the transferor is defective, the transferee also gets a defective title. But in the case of a negotiable instrument a bonafide purchaser for value without notice of defect, becomes a holder in due course and he gets a good title in the cases where the title of the transferor is defective.

Differences Between Bill of Lading and Charter Party.

The differences that are found to exist between Bill of Lading and Charter Party are discussed as under :

(1) When some consignor delivers goods to the ship, then the Receipt, which is given by the ship-owner or his agent, is called Bill of Lading. On the other hand, when a complete ship or a part of the ship is leased to a special consignor, then it becomes a contract through charter party.

(2) The Bill of Lading is a Receipt given by the shipowner to the consignor for carriage of goods. This is considered as a 'document of title' to the goods. On the other hand a 'charter party' is not considered a 'document of title' to the goods.

(3) A Bill of Lading is not a contract, but it is an excellent evidence of the existence and terms of the contract for the carriage of goods. On the other hand, a charter party is a contract performed by two parties, namely—Ship-owner and the shipper. That is a charter party is a document containing the terms of a contract between two parties.

(4) There is no classified category of a Bill of Lading. But there are classified categories of charter party, namely—Time charter, and voyage charter.

(5) Bill of Lading has similarity with Negotiable Instruments, even though it is not a true negotiable instrument. Bill of Lading can be transferred by endorsement and delivery. But a charty party has no similarity with Negotiable Instruments.

CARRIAGE BY AIR

In Bangladesh the carriage of goods and pasengers by Air is regulated by the carriage by Air Act of 1934. This Act was passed to give effect to the convention held in Warsaw in 1929 for unification of certain rules relating to International carriage by Air.

Liabilities of the Carrier by Air.

The rules relating to the liabilities of the Carrier by Air in the carriage of passengers or goods as laid down under the Carriage by Air Act are disussed as under :

(1) The carrier will be liable for damage sustained in the event of death or wounding of a passenger, if the accident that caused the damage so sustained took place on board The Aircraft or in the course of embarking or disembarking of passenger.

(2) If the goods are lost or otherwise damaged while the goods are in the custody of the carrier in the Airport or in the Aircraft or else where, then the carrier will be liable for the loss or damage.

(3) Due to delay in the carriage if any loss or damage is caused to the passenger or the consignor or to the consignee, in that case the carrier will be liable for the loss or damage.

(4) In some special cases the liabilities of the carrier have been limited and as such in the following cases the carrier will not be liable for compensation :

(a) If he can prove that, he or his agent took all necessary steps for escape from the loss or that it was impossible on their part to take such steps.

(b) If he can prove that the damage was caused by defective and negligent piloting or negligence in the handling of the aircraft or in navigation and that in all other respects, he and his agent took all necessary steps or measures to avoid the damage.

(c) If he can prove that the damage was caused by the negligence or own fault of the injured passenger.

CHAPTER-8

LAW OF INSOLVENCY

The Provincial Insolvency Act passed in 1920 in Indian Sub-continent is in enforcement in Bangladesh in its amended form. Under the provisions of this Act, the District Courts and also the Subordinate Courts as specially empowered by the government accept and Judge all suits (cases) relating to the insolvency matters.

INSOLVENCY

Definition : Insolvency means such an indebted person who is unable to pay his debts. That is, a person who is unable to pay his debts is called an insolvent. The indebted person, who has no capability of paying his debts but who needs protection or security for his life and property, may himself or any of his creditors may submit application in the Court for the purpose of declaring him as insolvent. But, it is mentioned here that, no man can be called "insolvent" unless a competent Court declares him as 'insolvent' :

When can a person be declared Insolvent?

Before declaring a person as insolvent, the following conditions shall have to be satisfied : (a) The person is a debtor and he has no sufficient amount of property to pay his debts. (b) The debtor has committed an "act of insolvency".

ACTS OF INSOLVENCY

An 'act of insolvency' is some act of the debtor from which it is understood that the debtor is financially embarrased, i.e, he has financial problem or hardship. According to section 6 of the Provincial Insolvency Act, 1920 any of the acts of the debtor as stated below will be regarded as an "act of insolvency" : (1) If he makes a transfer of all his property or a part of it located in Bangladesh or elsewhere for purpose of payment of his creditors' dues i.e., for the benefit of his creditors generally.

(2) If he makes a transfer of all his property or a part of it or if he makes the transfer to another person nominally with the intention to defraud or delay the payment of the dues of the

creditors. When the debtor transfer his property for reasonable value and for consideration and the creditors allege that such transfer has been made for the purpose of defrauding them or delaying the payment of their dues in that case the creditors must have to prove that their such idea or notion is not baseless. The financial condition of the debtor, in this respect, is specially considerable.

A fraudulent intention to defraud the creditors and delay the payment of the creditors' dues is generally inferred from surrounding circumstances and need not be specially proved Yaramati Vs. Chandra Papaya, 20, Mad. 320). But if the debtor makes transfer of his property without consideration, in that case it will not be act of insolvency in the eye of law.

(3) If he makes a transfer of his property or a part of it in such way a that it is considered as void as a fraudulent preference. That is, if he (debtor) makes a transfer of his property or a part of it exclusively to one creditor with a view to paying such creditor in preference to all other creditors.

(4) If with the intention of defrauding his creditors or delaying the payment of the dues of his creditors—

(i) he goes away from Bangladesh or he lives outside Bangladesh;

(ii) he goes away from his dewelling place or usual place of business or otherwise absents himself there;

(iii) he keeps himself so isolated that his creditors cannot maintain liaison with him.

(5) If, for the purpose of execution of any decree of a Court for the payment of money of debt, any of his property is sold or seized within at least 21 days.

(6) If he makes petition to the court for being adjudged insolvent (whether the court accepts the petition or not).

(7) If he gives a notice to his creditors to the effect that he has stopped or he is about to stop payment of the money of his debt.

(8) If he becomes imprisoned in the execution of a decree of the Court for the payment of the money of debt.

(9) If he does not comply with an order or a summons issued by the Court directing him to pay his creditors a certain amount of money within a specified period.

Acts of Insolvency By an Agent

Under Section 6 of the Provincial Insolvency Act, 1920, it has been stated that according to this section an act of agent will be considered as act of the Principal. As such the Principal can be adjudged 'insolvent' for the act of an agent, if the following conditions are fulfilled :

(i) The agent was expressly or impliedly authorised to do the act.

(ii) If the nature of the business of the Principal is such that the act of the agent is considered to the act of the principal.

FRAUDULENT PREFERENCE

Definition : When a debtor among his many creditors intentionally protects the interests of one or more than one but not all of his creditors, it is then called Fraudulent Preference. For the purpose of adjudging a debtor an insolvent, fraudulent preference works as an aid to that. The Doctrine of Fraudulent Preference was first enunciated in the judgement of the case of *Thompson Vs. Freeman (1786)*. Justice Lord Mansfield says "A bankrupt, when in contemplation of his bankruptcy cannot, by his voluntary act, favour any one creditor. If the debtor does so, then the act is regarded as a fraud and the transaction is called fraudulent preference.

Under section 54 of the Provincial Insolvency Act, 1920, the law regarding fraudulent preference has been laid down which is as follows—"Every transfer of property, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, with a view to giving that creditor a preference over the other creditors, shall, if such person is adjudged insolvent on a petition present within three months after the date thereof, be deemed fraudulent and void as against the Receiver and shall be annulled by the Court."

An analysis of the above statement of law indicates that five conditions as discussed below, are to be fulfilled for the purpose of a transfer by a debtor to come within the purview of fraudulent preference :

(a) The debtor at the date of transfer or payment must be unable to pay, from his own money, his debts as they become due.
(b) The transfer or payment must be in favour of a creditor.
(c) The transfer or payment shall be made in preference of one creditor to all others.
(d) The transfer or payment has been made for giving such creditor a preference over other creditors.
(e) The debtor is adjudged insolvent upon a petition presented within three months after the date of the transfer or payment of money.

All the above mentioned conditions are required to be satisfied at one and the same time. If any of the conditions is wanting, the transaction will not be considered as fraudulent preference.

The following are the effects of Fraudulent Preference :

(1) When a debtor makes a transfer of property or payment of money in favour of a creditor by way of Fraudulent Preference, that constitutes an act of insolvency and for that reason the debtor can be adjudged or declared insolvent.

(2) If a debtor makes a transfer of his property or a part of it or payment of money, then after being adjudged insolvent these acts of the debtor may be rejected or void according to the intention of the official Receiver (Ref. *Marks Vs. Fieldman (1870).*

Persons who may be Adjudged Insolvent

The Court, which has been empowered to adjudge insolvent, may only declare or adjudge the following persons as insolvent : (a) Debtors (b) Person who has committed an act of insolvency. Subject to this provision, some special cases are discussed as under :

(1) Foreigners—Unless a person commits an act of insolvency according to the Bangladesh law, then a

Bangladesh Court cannot adjudge a person as insolvent. But if a foreigner commits an act of insolvency during the period he is resident here in Bangladesh, then he can be adjudged insolvent. If he shows ground that at the time of presentation of insolvency petition he was not personally present in Bangladesh, despite that he cannot be exempted from that. Jurisdiction of Court arises from the act of insolvancy but not from a petition.

(2) Minors—In Bangladesh a minor is not personally responsible for his debts. He is also not capable of entering into contracts. As such a minor cannot be adjudged an insolvent.

(3) Lunatics—A lunatic person cannot legally commit an act of insolvency with intention to defraud his creditors. But if he entered into any contract for debt prior to his being lunatic, he can be adjudged insolvent for that.

(4) Married woman—In Bangladesh a married woman does not suffer from incapability or incapacity for making contracts. She can own property and contract debts. Therefore a married woman in Bangladesh can be declared or adjudged insolvent.

(5) Partnership and partner—According to the Provincial Insolvency Act of 1920, no complaint as to insolvency can be brought against a partnership. But it can be done against the individual partners. Those who have committed acts of insolvency without involving all the partners of the partnership, the creditors can only make insolvency petition against them.

(6) Companies—According to the Companies Act of 1913, no registered company can be declared insolvent under Insolvency. If the creditors of the company intend to adjudge a company insolvent in that they can only cause winding up of that company according to the Companies Act.

(7) Joint debtors—When money is borrowed by two or more persons jointly, all of them can be declared insolvent on a single petition provided that some act of insolvency is committed by each of them or jointly by all.

(8) Joint Hindu family—A creditor of a joint Hindu family can present a petition for adjudging all the members of the family as insolvent provided that all the members are responsible for the debt and act of insolvency has been committed by them jointly. But the minor members cannot be adjudged insolvent. In the case of a Joint Hindu Family firm managed by Karta, the members participating in the management and the Karta can be declared insolvent for debts convict due by the firm. On the otherhand if the management is looked after only by the Karta, in that case the Karta only can be declared insolvent. It is because the members are not personally liable for the debts. They are responsible only to the extent of their share in the joint family properties.

(9) Convict—A prisoner in jail can be declared insolvent.

(10) Legal representative—A legal representative of a deceased debtor cannot be adjudged insolvent for a decree obtained against him. It is because a legal representative is not personally responsible for such debts.

(11) Deceased person—A dead person cannot be adjudged insolvent. His debts are paid prorata in the course of the administration of estate. If a debtor dies after the presentation of the insolvency petition, his estate will be administered by the Official Receiver (Assignee) as upon insolvency, unless the Court otherwise directs.

ORDER OF ADJUDICATION

Definition : The order of the Court by which a person is declared insolvent is called the "Order of Adjudication".

Insolvency petition—If a debtor commits any of the acts of insolvency, then the following persons can make petition for adjudication—(i) one or more than one creditor

(ii) the debtor himself (Section 7 of P.I. Act, 1920).

Petition by creditors—According to section 9 of the P.I. Act, a creditor or all creditors can present petition only if—(a) the debt owing by debtor to a creditor or creditors amounts at least to Tk. 500.00, and (b) the debt is ascertained during adjudication or at some fixed time in future, and (c) that the act of insolvency on the basis of which the petition is presented, has occurred within three months before the date of the presentation of the petition.

Petition by debtors—Section 10 of the Provincial Insolvency Act, 1920, provides that for the purpose of

adjudication of a debtor as insolvent, the debtor can voluntarily make a petition in the Court in the following cases :—

(a) If the debtor is unable to pay his debts; or
(b) if his debts amount at least to Tk. 500.00; or
(c) if he is imprisoned in the execution of a decree of the Court for the payment of the money of his debt; or
(d) if there is made an order of attachment for the execution of such decree and the decree is subsisting against his property.

Court—Under section II of the P.I. Act, every insolvency petition is required to be presented to a Court having jurisdiction under this Act in any local area in which the debtor ordinarily resides or carries on business or where he lives in custody if arrested and imprisoned. Under section 3 of the Act, 'The Court having jurisdiction under this Act is the District Court or any Court specially empowered by the government in that behalf.

Effects of Order of Adjudication :

It has been stated under section 28 of the Provincial Insolvency Act, 1920, that if a person is declared insolvent, the effects of the said order of adjudication will be as follows :

(1) During the period of order of adjudication or any time after that the properties of the person who has been adjudged insolvent, wherever they may be situated within the country, will be vested in the hands of official Assignee or Receiver and these properties will be divisible among the creditors.

(2) During the pendency of the insolvency proceedings, that is, during the period in which the debtor continues as insolvent, these creditors whose debts will be proved before the official Assignee or Receiver, cannot file suits against the person adjudged as insolvent without the consent or permission of the concerned insolvency Court.

(3) Before the debtor has been adjudged insolvent, if any suit has been filed against the insolvent, in that case the suits will remain adjourned. However, in special circumstances which are thought to be justified by the Court, the Court may give permission for carrying on the proceedings (suits) in such cases.

(4) The insolvent will be deprived of all the acts of giving and taking related to the property of the insolvent for which the creditors are bound and have sustained loss. And it is for

the reason that the insolvent cannot transfer any property or a part thereof., Despite, if it is done, that will be considered as void and ineffective against the transferee or the official Assignee or Receiver. If the adjudged insolvent transfers any property, the transferee cannot obtain the legal title of that property.

(5) Within two years before being adjudged insolvent, if he (insolvent) transfers any property without valuable consideration or as consideration of marriage, in that case the transfer may be declared void or rejected by the Court at the advice of the Official Assignee or Receiver.

(6) Within three months from the day of being adjudged insolvent, if any property is transferred by the insolvent, the transfer then will be considered as fraudulent preference and as such will become void and ineffective.

(7) During the period of remaining insolvent he (the insolvent) will lose the undermentioned powers–

(a) He cannot continue in the post of an administrator or justic.
(b) he cannot be appointed or continue in the post of a member of the local authority.
(c) He cannot be a candidate or be elected for the post of a Member of the Law or National Council.
(d) He cannot get the voting right. When the adjudication of insolvency against the insolvent is nullified or repealed or if he is declared as free from debt by the Court, in that case he (insolvent) will be freed or exempted from these incapacities or incapabilities.

PROOF OF DEBTS

Debts Provable in Insolvency :

When a person becomes insolvent by an order of adjudication which is made against him, the creditors then are entitled to share proportionately in the distribution of his (insolvent) assets which have already been vested in the hands of the Receiver. The debts and claims for which the creditors have the right to share in the distribution of the assets are called debts provable in insolvency and the method used in setting up the debts and liabilities is called 'proof of debts'. A creditor failing to prove a debt or liability which is provable in insolvency cannot, after the discharge of the insolvent, sue him for it.

Debts provable in insolvency :

With certain exceptions the debts provable in insolvency include all debts and liabilities, present and future, certain and contingent, to which the debtor is subject at the date of the order appointing the receiver or to which he may become subject before his discharge by reason of any obligation incurred before the date of adjudication.

The following debts and claims are, however, excepted—

(i) Demands in the nature of unliquidated damages which arise otherwise than by reason of a contract or breach of trust. These are claims which a person may make on another for tort such as defamation, detention, malicious prosecution, etc. If any decree of the Court has been obtained in respect of such demands so that they have become crystallised into liquidated damages, such damages may be proved in insolvency.

(ii) debts or liabilities contracted by the debtor with any person, who has notice of the presentation of any insolvency petition by or against the debtor, cannot be proved in insolvency.

(iii) Contingent debts and liabilities which in the opinion of the Court, are incapable of being fairly estimated, e.g., alimony to be paid periodically, but which may not last and may be varied.

(iv) The untaxed costs are not provable.

(v) Debts which are against public policy are not provable. Debts due for stifling prosecution or for assisting in the procurement of an official favour are included in this category.

(vi) Debts barred by limitation are not provable.

(vii) the amount of deferred dower is not provable.

MODE OF PROOF

According to Provincial Insolvency Act, 1920, under its section 49, the method proving debts is discussed below :

(1) If an affidavit verifying the debt is delivered or sent by post in a registered cover, to the Court, in that case the debt can be proved.

(2) The affidavit shall be accompanied by a statement of account containing the particulars of the debt and necessary vouchers, if any, which may be needed as supporting documents for proving the debt. The Court may require the vouchers at any time.

Distribution of the property of the Insolvent.

According to section 61 of the Provincial Insolvency Act, 1920 the properties of the insolvent are distributed in the following rule or sequence :

(1) First of all, the preferential payments are to be made i.e., the priority, detbs are to be paid. The following debts are considered as preferential payments or priority debts :

(a) Debts due to the government or to any local self governing institution.

(b) Wages or salaries due to the servants or workers in return for the services rendered by them to the insolvent during the four months from the date of the presentation of the insolvency petition. The amount of wages shall have to be less than Tk. 10.00.

If the properties of the insolvent are sufficient, then the preferential payments or priority debts are to be paid in full, otherwise those debts are to be reduced in proportional rates.

The various other necessary expenses incurred in execution of the acts of insolvency (insolvency related acts) shall be deducted and from the remaining properties (left over after deduction) the preferential payments (priority debts) are to be paid as far as they are covered by the remaining property.

(2) After the preferential payments have been cleared, the scheduled debts i.e. the debts listed in the schedule are to be paid rateably according to their respective amounts. If the listed debts are paid in full, and if some assets remain as surplus then interest at the rate of 6% per annum shall be paid on the debts from the money of the surplus assets for the period from the date of the order of adjudication till the day of payment of the debts.

PROPERTY DEFINED

The term property of the insolvent has been defined in the Insolvency Act. According to the Act the term property includes the properties of which the insolvent is the owner and also the properties over which the insolvent has a disposing power. Some of the properties are distributed and some are exempted from distribution.

Properties that are distributed.

According to section 28 of the Provincial Insolvency Act, 1920, the properties are distributed :

(1) All properties which, from the date of the declaration of the debtor as insolvent, were in the possession, order or disposition of the insolvent in his trade or business, by the consent and permission of the true owner under circumstances that he is reputed owner of the properties.

(2) All properties which may be acquired by the insolvent or which may devolve on him from the date on which he was adjudged insolvent but before the date of his being discharged from insolvency.

Properties exempted from distribution.

Under the Provincial Insolvency Act, 1920, the insolvent is allowed to retain all those properties which are exempted from attachment or sale in execution of a decree, according to the provisions under section 60 of the Civil Procedure Code. Such properties include the following : (a) debtor's tools of trade, (b) his necessary wearing apparel, (c) bedding, cooking vessel and furniture of himself, his wife and child. The total value of these properties as mentioned above shall have to be less than Tk. 300.00 and not more than that.

PROTECTED TRANSACTIONS

According to the Provincial Insolvency Act, 1920, after the issue of the order of adjudication, the transactions taking place between the insolvent and a third party which do not come within the jurisdiction of the Official Assignee or Receiver, are called protected transactions. Such transactions can be classified as follows :

(a) Transactions entered into before the commencement of the insolvency excepting those that are without consideration or are by way of fraudulent preference.

(b) Transactions entered into between the date of filing of insolvency petition and the order of adjudication, if they are bonafide and if the person who deals with the insolvent has no notice or knowledge of the insolvency petition by or against him.

As regards the transactions that are entered into after the order of adjudication, these are not protected and as such the question of any notice of the presentation of insolvency petition does not arise.

CHAPTER-9

THE LAW OF INSURANCE

Insurance defined. Insurance is a contract between two paties whereby the insurer undertakes in consideration of a certain periodical fixed amount called premium, to indemnify the other called the insured against a certain amount of loss arising from the happening of a specific contingency such as the destruction of property by fire or loss arising from accidents, etc. According to Morgan, Insurance is "The agreement of a community to consider the goods of its individual members as common".

Assurance defined. The term assurance is applied to those contracts in the case of which the insured amount becomes payable on the happening of an event which is bound to take place.

Insurance may be distinguished from assurance, in that the word "Insurance" is used in connection with those contracts in the case of which the insured amount becomes payable on the happening of an event which may or may not take place.

Therefore, the term "assurance" applies to life insurance while the term insurance applies to marine, fire and other insurances.

CONTRACT OF INSURANCE

According to justice channel, a contract of insurance is "a contract for the payment of a sum of money or for some corresponding, benefit such as the rebuilding of a house or the repairing of a damaged ship, for some consideration, usually but not necessarily for periodical payments called premiums to become due on the happening of an event which must have some amount of uncertainty about it and must be of a character more or less adverse to the interest of the person effecting the insurance"

CHARACTERISTIC FEATURES OF A CONTRACT OF INSURANCE

The main features of a contract of Insurance are discussed as under :

(1) A contract of insurance shall have to fulfil all the essential requirements (elements) of a contract which have

been laid down in the law of contract, 1872. As such there must be a proposal and acceptance, free consent of the parties, the parties must be competent to contract, lawful consideration and a lawful object, etc.

(2) A contract of Insurance is a contract *uberrimae fidei*. It requires absolute good faith on both sides. That is, a contract of insurance unlike ordinary contracts, is based on good faith. Each party to the contract has an obligation to disclose material facts about the subject matter of the insurance. A material fact is very significant as it may affect the judgement of the other party. As such, if the insured person does not disclose a material fact, or if there is misrepresentation or fraud, the insurer can avoid the contract. The disclosure of facts must be full and accurate. Concealment of material facts may lead to breach of duty. The duty of disclosure exists only at the time when the contract of insurance is entered into. If the material facts come to the knowledge of the insured subsequent to the contract, then such facts need not be disclosed.

It is the duty of the insurer to make such inquiries to the insured as will reduce or draw forth from the insured all material facts. If the insurer does not do so, the insured is not supposed to disclose certain circumstances relating to the enhancing of the risks, ordinary course of the insurer's business, waiving of information by insurer, etc.

(3) In every contract of insurance the policy-holder must possess an insurable interest. Insurable interest means some proprietary or monetary interest. The object of insurance is to protect insurable interest. Without insurable interest there can be no insurance. For exmaple—Karim cannot insure Rahim's house. But if Rahim's house is mortgaged to Karim, in that case Karim has an interest to protect and he may insure the house. A person cannot insure the life of a stranger but he can insure the life of himself and of persons in whose life he has a pecuniary or monetary interest. From above it is found that for validity and enforcement in the Court a contract of insurance must have insurable interest. "By statute it is necessary that at the time of making the contract there should be an insurable interest in the assured" (Prudential Insurance Co. Vs. Inland Revenue). Without insurable interest an Insurance would become a wagering contract.

In the case of life insurance insurable interest must exist at the time when the insurance is effected. Even if the insurable interest does not continue the policy is not affected.

In the case of marine insurance, the insurable interest must exist when the claim is made and not at the time when the policy is taken. In the case of fire insurance, the insurable interest must exist when the policy is taken as well as when the claim is made.

(4) A life insurance is a contingent contract. The money is payable on the happening of a contingency—namely death. The date of occurrence of death is uncertain. In the case of life insurance the insurer is liable to pay the whole insured amount on the death of the insured or on the attainment of a certain age of the insured.

Other forms of insurance namely—marine or fire, are contracts of indemnity. The insurer in these cases promises to indemnify the insured person against the consequences of fire, accident or some mischance or misfortune. The contract of insurance for fire or marine policy is a contract of indemnity only. The insured in this case shall be fully indemnified for the loss against which the policy was taken. But he shall never be more than fully indemnified. (Castellain Vs. Preston).

Example—A house is insured for Tk. 10,000.00. It is burnt down but it is found that Tk. 8,000.00 will restore it to its original condition. Therefore, the insurer is liable to pay only Tk. 8,000.00, unless otherwise ageed under the contract of insurance. But if the contract of insurance provides for the payment of a fixed sum of money on the happening of an event, namely—fire, accident or burglary, in that case the contract will not be a contract of indemnity. It will rather be a contingent contract.

Rights and liabilities of Insurer. The following are the rights of an insurer :

(1) The insurer has the right to get the insurance premiums according to the terms of the insurance contract.

(2) If the same property is insured with more than one insurer against the same risk and if one insurer pays the whole loss, then the insurer paying the whole loss may realize the proportional loss from the other insurers. This is called the right of getting a portion of the proportional loss. That is, this is called the right of contribution.

(3) In the cases of Marine and fire insurance contracts, if after the payment of the indemnity to the insured, in full, there remains a portion out of the damaged property, the insurer becomes entitled to the remnants of the property insured and all rights and claims which the insured may have against the third parties. This is called the Principle of Subrogation. Subrogation is a form of substitution. Therefore, the insurer is substituted to the position of the insured. It is mentioned that this principle will be applicable only when the property insured will be wholly damaged or destructed. The principle will not be applicable in the case of partial damage of the property.

Example—A ship insured against total loss is sunk. The insurer pays the value in full. If the ship is subsequently salvaged, the insurer is entitled to the sale proceeds of the remnant, if any. The same rule is also applicable to goods.

LIABILITIES OF INSURER

The liabilities of the insurer generally depend on the terms of the contract of insurance. When the event mentioned in the contract occurs, then the insurer is bound to indemnify the insured according to the contract. Only in the case of legal insurance contract, the insurer is liable as such. The liabilities of the insurer begin after acceptance of the insurance proposal. When the event mentioned in the contract happens the compensation (indemnity) is payable and the insurer is liable for reasonable and direct consequences of that event only, but not for the distant or very indirect consequences. This principle is expressed in the maxim "cause proxima non-remota spectator. The insurer is also liable to return the premia received when the contract of insurance is set aside on the ground of fraud by the insurer.

DOUBLE INSURANCE

When the same risk and the same subject matter is insured with more than one insurer, then it is called double insurance. That is, when the policy holder makes seperate insurance contracts with more than one insurer for the same risks and subject matter, it is called double insurance. Example—Karim, the owner of a house, insures it against fire for Tk. 15,000.00 with Rahim (insurer) and Tk. 10,000.00 with

Hassan (insurer). Rules that are applied in the case of double insurance are—(1) For life insurance, there may be any number of policies for any amounts. The insured may place any value, if he so wishes, upon his life and on happening of death, all the policies are payable whatever the total amount may be.

(2) A person can insure his property with any number of insurers. When damage or loss is caused to the property, the person then will be allowed to recover only the actual amount of loss or damage from all the insurers. That is he is not entitled to recover more than the actual loss from the insurers.

Example—If the actual value of a house insured with more than one insurer against fire for Tk. 43,000.00 and Tk. 25,000.00 and Tk. 35,000.00 is found to be Tk. 30,000.00 the person insuring the house (the insured) will be allowed to recover Tk. 30,000.00 from the insurers together in the case of the total loss caused to the house by fire. The insurers will share the loss in proportion to the value of each insurer's policy. In case, any one of the insurers pays the total amount of loss, he will then be entitled to contribution from the other insurers.

(3) The insured cannot make a profit out of a fire or any other insurance.

(4) In the case of marine insurance where the assured receives any sum in excess of the indemnity allowed, he is deemed to hold such sum in trust for the insurers (this being according to the right of contribution among the insurers.

RE-INSURANCE

When a transfer of a part of the risk is made by the insurer, it is called Re-insurance.

Example—A ship is insured for Tk. 20,00,000.00. The insurer now thinks that the risk is too heavy for him to bear it alone. If he so wishes he can make a transfer of a part of the risk to another insurer.

In the cases of re-insurance, the re-insurer has certain claims which are as follows—(a) he is entitled to get a proportionate part of the premium, (b) he can claim the benefits of the terms and conditions of the original policy, (c) he is entitled to subrogation, (d) re-insurance ends when the original policy lapses.

The re-insurer has the following obligations—(a) he is liable to pay the part of the risk which has been transferred to him, (b) he has binding only to the first-insurer: The reason being that there is absence of privity to contract between the reinsurer and the person originally insured.

Distinction between Re-insurance And Double Insurance.

The distinction between the two is discussed below : (1) In the case of Double Insurance, the policy-holder insures the same risk and the same subject whereas in the case of reinsurance a part of the risk is transferred by the insurer.

(2) In the case of double insurance the loss of the property insured is shared by all the insurers. For example—In the case of life insurance all the insurers together are liable for the total amount. In the case of re-insurance, the re-insurer is entitled to claim a proportionate part of the premium and will be liable for proportion of a part of the loss.

(3) In the case of re-insurance, the re-insurer has obligation only to the first insurer. On the other hand, in the case of double insurance each insurer is obligated directly to the policy-holder.

(4) In the case of double insurance, it is used as a method of assuring the benefit of the insurance. The insured, in the case of life insurance, may have any number of policies and they may be for any amount. But in the case of re-insurance, it is used as a method of making reduction in the risk of the insurer.

Contract of Insurance and wagering contract.

A contract of insurance appears similar to a wagering contract. In an early case on insurance it was observed that, "Insurance is contract on speculation" [Lord Mansfield in Carter V. Boehn]. But the modern view is that insurance contracts are not speculative or wagering contracts. Therefore, a contract of insurance differs from a wagering contract. The main points of difference between the two are mentioned as under—(1) There is an insurable interest in the contract of insurance. But this does not exist in a wagering contract. (2) In the case of contract of insurance, the object is to protect an

interest. But in the case of wagering contract the object is to gample money. (3) A contract of insurance is a contract of indemnity excepting life and certain other insurances. But a wagering contract is not based on the principle of indemnity as it does not cover any risk. (4) A contract of insurance is based on good faith, but a wagering contract does not have any basis of good faith. (5) A contract of insurance is based on scientific calculation of risks and the premiums payable. But a wagering contract is not based as such. It is a gamble only. That is, it is a betting on some future event. (6) Wagering contract are against public policy and are as such void. But insurance contracts are made in the interest of the public and are therefore valid.

LIFE INSURANCE

Definition : Life insurance is "a contract by which the insurer, in consideration of a certain premium, either in a gross sum, or by annual payments, undertakes to pay to the person for whose benefit the insurance is made, a certain sum of money or annuity on the death of the person whose life is insured."

According to section 2(11) of the Insurance Act, 1938, the contract of insurance which is effected upon human life is called life Insurance. The following are included in the life insurance—

(i) any contract whereby the payment of money is assured upon death (except death by accident only); or the happening of any contingency dependent on human life,

(ii) any contract which is subject to the payment of premiums for a term dependent on human life,

(iii) any contract which includes the granting of disability and double or tripple indemnity accident benefits; the granting of annuities upon human life, and the guaranteeing of super annuation allowances.

Principal kind's of Life Insurance Policies.

These are discussed below :

(1) Whole life policy—A whole life policy is one under which a definite sum is payable on the death of the assured to his executors, administrators or assigns.

(2) Endowment policy—An Endowment policy is one under which the sum insured shall be paid to the assured at the end of a fixed term of years, if the life insured is in existence, or immediately at death if it occurs before expiration of the fixed term, to the assured's heirs or nominees.

(3) Joint life policy—A joint life policy is one under which two lives are insured simultaneously. In this case the policy money is payable on the death of any of the lives insured. For example—If there is a joint life policy of husband and wife. The policy money is payable upon the death of either husband or wife.

(4) Annuity policy—An annuity policy is one under which the policy money is payable to the assured by monthly or annual instalments after he attains a certain age. The assured pays premium up to a certain age or sometimes a lump sum of money. The insurer pays a certain sum monthly or annually to the assured after his attaining a certain age.

ASSIGNMENT OF LIFE POLICY

Under the rules as provided under section 38 of the Insurance Act, 1938, it has been stated that the holder of a life policy may transfer the title of the policy of a life insurance to another person or to some one else. This is calledaAssignment. The assignment may be made by an endorsement upon the policy itself or by a separate instrument. The assignment may be with or without consideration and when it is made by instrument, the instrument is to be signed by the assignor or his duly authorized agent and attested by at least one witness. The person to whom the assignor gives the title is called the assignee. The notice of assignment shall have to be sent to the insurer after the assignment is made. From the date of notice the assignee will be considered as the holder of policy by the insurer. If the insurer does not receive the notice, he is not bound to recognize the assignment.

Nomination by policy-holder.

The holder of a policy of life insurance on his own life may, when effecting the policy or at any time before the policy matures for payment, nominate the person or persons to whom the money secured for the policy shall be paid in the

event of his death. This is known as nomination by the policy-holder. The person named is called the nominee.

If the nomination is done at the time of making the contract of insurance, the name of nominated person is added to the policy. If the nomination is made after the contract of insurance is made, the name of the nominated person is written in the policy by endorsement of the policy. If the nomination is made after the contract of insurance, the fact of the nomination shall be communicated to the insurer by way of a notice, otherwise the insurer shall not be bound to recognize the nomination. The insurer is discharged from his liabilities under the policy by paying the policy money to the nominated person if the death of the policy-holder occurs.

On the other hand, if the policy-holder survives at the time of maturity of the policy, the insurer shall have to pay the policy money to him (policy-holder). A nomination may be cancelled or changed by a further endorsement on the policy or by a will. The insurer will not be bound in such cases if notice is not given to him (insurer) of the cancellation or change.

Difference between Nomination and Assignment.

(1) In the case of assignment the policy-holder transfers all of his rights to the assignee. But in the case of nomination, the policy-holder cannot transfer his rights. The nominee is entitled to benefits of the policy only after the death of the policy-holder.

(2) The assignee is entitled to all benefits of the policy and can sue in his own name. The nominee can sue by his own name. But he (nominee) gets the money only by the constructive transfer on behalf of the beneficiaries of the policy.

(3) A nomination can be changed or cancelled. But an assignment cannot be changed or cancelled. Ofcourse in this case the assignee can re-assign the policy to the policy-holder under certain circumstances.

(4) The object of nomination is such that the nominated person gets the insurance money easily. Morever in the case of nomination, the insurer can pay to the nominee without a succession certificate. But in the case of assignment, the object is to assign someone in the policy and to take loan from him.

(5) Assignment is made with or without consideration. But nomination is made without consideration.

(6) Assignment can be made by an endorsement on the policy or by a separate deed, but a nomination is made only by endorsement on the policy by giving notice of it to the insurer.

FIRE INSURANCE

Definition : Section 2 (6A) of the Insurance Act, 1938, has defined Fire Insurance as follows —"Fire Insurance business means the business of effecting, otherwise than incidentally to some other class of business, contracts of insurance against loss by or incidental to fire or other occurrence customarily included among the risks insured against in fire insurance policies". Fire insurance also means insurance against any loss caused by fire. The term fire in fire insurance policy is interpreted as follows : There is fire when something burns. In English cases it has been held that there is no fire unless there is ignition.

MARINE INSURANCE

Definition : According to the English Marine Insurance Act of 1906, Marine Insurance is a contract of indemnity against losses incident to marine adventure accruing to the ship, cargo, freight or other subject matter of a policy during a given voyage or voyages or during a given length of time. The person who is indemnified is called the "assured" or the "insured", the other party being styled the "insurer" or the "underwriter". The policy may be so extended as to protect the assured against losses on inland waters or on any land risk which may be incidental to a sea voyage. The subject matters of marine insurance may be the ship, the goods connected therewith, the cargo, freight, money lent on bottomry, etc. But as in other contracts, so in marine insurance, there can be no valid agreement with regard to illegal trading.

According to section 2 (13A) of the Insurance Act of 1938 in Bangladesh a contract of insurance relating to ship carrying goods, cargo, frieght and other legally insurable interests (properties) on marine adventure is called marine insurance.

Insurable property, in the case of Marine Insurance, means any ship, goods or other movables which are exposed to marine perils.