Q. Define a Company. Explain the essential features of a Company.

Section 3(1) of the Companies Act, 1956 defines a company as “An association of individuals form for some purpose and registered under the present Companies Act or an earlier Indian Companies Act.”

The following are the essential features of a company

1) **Separate Legal Entity** - A company on registration has a separate identity of its own which is different and distinct from the members who constitute it. This principle of independent corporate personality was laid down in the case of **Salomon vs. Salomon & Co. Ltd.** In this case Mr. Salomon was carrying on shoe manufacturing business on proprietorship basis. He sold his business to a company Salomon & Co. Ltd. for 30,000 pounds. Salomon received consideration in the form of shares for 20,000 pounds of one pound each and got debentures worth 10,000 pounds. The company had seven members, consisting of Mr. Salomon, Mrs. Salomon, four sons and a daughter. All the other members of the company had only one share each. After sometime the company had to be wound up on account of financial difficulties. The assets realized were 6,000 pounds while the liabilities were 10,000 pounds to Salomon as a secured creditor and 7,000 pounds to outsiders who were unsecured creditors. The creditors claim priorities over Salomon (Secured Creditor) on the ground that Salomon and Salomon & Co. were one and the same. It was however, observed that the company on incorporation has a different personality different from the subscribers. Therefore the identity of the subscriber is immaterial. Hence Mr. Salomon was paid first as he was a secured creditor.

2) **Limited Liability –** The liability of the shareholders is limited to the face value of the shares held by them. Once the full amount of the shares is paid, they cannot be called upon to bare the loss from there personal property.

3) **Artificial Legal Person –** Company on registration becomes a legal person capable of entering into contracts in its own name.

4) **Perpetual Succession –** A company enjoys perpetual existence. Its is created by law and can be put to an end only by the process of law. Professor Grover highlights these feature by saying that even a bomb cannot destroy a company.

5) **Holding and Disposal of Property –** A company can hold and dispose of property in its own name. Property of the company cannot be treated as members property and vice versa.

6) **Transferability of Shares –** The shares of a company are freely transferable in case of a public limited company.

7) **Capacity to sue and to be sued –** A company having its own independent existence, can sue in its name to enforce any of its statutory or contractual rights and be sued in its name by others, if it commits breach of contract or fails to discharge its duties.

Q. Explain the various types of Companies

The companies may be classified into the following :-

1) **Chartered Companies** :- These are the companies which are incorporated under a special charter granted by the King or Queen or the Head of the State. For e.g. East India Company these are no longer present in India.

2) **Statutory Companies** :- These are companies which are created by a special act of the legislature. For e.g. Reserve Bank Of India.

3) **Registered Companies** :- These are companies which are formed and registered under the Companies Act, 1956 or some earlier Companies Act. They are :-
   a) **Companies limited by shares** :- In these companies there is a share capital and each share has a fixed value. The liability of each member is limited to the face value of the share he holds. A company limited by shares may be a public company or a private company.
   b) **Companies limited by guarantee** :- Where the liability of a company is limited by the memorandum to such an amount as the members undertake to contribute to the assets of the company in the case of its winding up, the company is called a company limited by guarantee. Companies limited by guarantee are not formed for the purpose of profit but for the promotion of art, science, culture, charity or for similar purpose. They may or may not have share capital.
   c) **Unlimited companies** :- Where the liability of the members of a company is unlimited, it is known as an unlimited company. Every member of such a company is liable for its debts, as in an ordinary partnership, in proportion to his interest in the company. Such a company may be a public company or a private company.

Q. Distinguish between Private Limited Company and Public Limited Company.

Points	Private Limited Company	Public Limited Company
1. Number of Members	A private company cannot have less than two and more than fifty members	A public Company cannot have less then seven members; no maximum has been fixed for it.
2. Restriction on transfer of shares	If a private company has a share capital it imposes some restrictions on the right of its members to transfer their shares it the company.	In a public company there need not be any such restriction.
3. Restriction on invitation to public	A private company cannot invite the public to buy its shares or debentures	A public company may do so.
4. Restriction on name	A private company must add the words, “Private Limited” at the end of its name (Section 13).	There is no such restriction.
5. Prospectus or a statement	A private company has not to file a prospectus or a statement in lieu of prospectus, with the Registrar [Section 70(3)]	A public company must file a prospectus, or a statement in lieu of prospectus, with the Registrar.
6. Issue of New Shares	A private company can issue new shares to outsiders.	A public company must offer new shares first to the existing equity share holders pro rata, unless the members in a general meeting decide otherwise.
7. Privileges	It enjoys a number of privileges, i.e. exemptions from certain provisions of the Companies Act, 1956.	It does not enjoy any privileges.
8. Number of directors	It must have a minimum of two directors.	It must have a minimum of three directors.
9. Legal Controls	There are less legal controls.	There are too many legal controls.
10. Remuneration to directors	Restrictions are far less.	Remuneration of directors are restricted to not more than rupees six lakhs per annum.
11. Borrowing of loans	Directors can borrow fro private companies.	Directors cannot borrow from public companies.

Q. Write short notes on

A] Foreign Companies

Any company incorporated outside India and having a place of business within India is called a Foreign Company. The following are the rules applicable to a foreign companies :-

1. **Documents –** ***Section 592*** requires that every foreign company which establishes a place of business in India shall within thirty days of the establishment of such place of business, file with the registrar; a) A certified copy of the charter, statute, Memorandum and Articles of the company b) The full address of the Registered or Principle Office of the company c) A list of Directors and Secretary of the company d) The name and address of any person resident in India authorize to accept notices on behalf of the company e) The full address of the principle place of business in India.

2. **Accounts –** The provisions of ***Section 209*** regarding Books of Accounts to be kept by a company shall also apply to a foreign company so far as it concerns its business in India.

3. **Name –** A foreign company shall display on the outside of its office the name of the company, together with the name of the country where it is incorporated in English and in one local language.

4. **Registration of Charges –** The provisions relating to the registration of charges ***(Sections 124 to 145)***, Annual Returns ***(Section 159)***, Books of Accounts ***(Section 209A)***, Special Audit in certain cases ***(Section 233A)***, in so far as they apply to its Indian business shall apply to foreign companies also.

5. **Requirements as to prospectus –** Section 603 specifies the following particulars to be mentioned in prospectus. a) Name of the company in English b) Name of country in which it is incorporated c) Whether the liability of the members is limited d) Particulars regarding its constitution, Date and Country of incorporation and the law under which it was incorporated abroad e) The address of its registered office or principle place of business f) Other matters required to be included in prospectus of any Indian company.

6. **Winding Up –** if a foreign company ceases to carry on such business in India it may be wound up as an unregistered company.

B] Government Companies

A Government Company means any company in which not less than 51 percent of the paid-up share capital is held by the Central Government, and or by any State Government or Governments, or partly by the

Central Government and partly by one or more State Governments. The subsidiary of a government company is also a Government company (Section 617).

The following are special rules for government company:-

1) **The appointment of Auditor** :- The auditor of a government company is appointed or reappointed by the Central Government on the advise of the Comptroller and Auditor General of India. The auditor is required to submit a copy of his audit report to the Comptroller and Auditor General of India who has aright to review and comment on the audit report. Any such comments must be placed before the Annual General meeting of the company.

2) **Audit Report to be placed before Parliament** :- Where the Central Government is the member of the government company, an annual report on the working and affairs of the company must be prepared within three months of its Annual General meeting before which the Audit Report is placed. The report must also be submitted to both houses of parliament. Similar provisions are present in case of Trade Government.

3) **Applicability of Section 619** :- The provisions of ***Section 619*** shall apply to a company in which not less than 51% of paid-up share capital is held by one or more of the following or any combination thereof i.e. the Central Government, State Government, Government Companies, Corporations owned or controlled by Central Government or State Government.

4) **Certain Provisions not to apply** - The Central Government may notify that any of the specified provisions of the companies act shall not apply to any government company.

C] Illegal Association

No company, association or partnership constituting of more than 10 persons for the purpose of carrying on banking business and of more then 20 persons for the purpose of carrying of any other business that has for its objects the acquisition of gain, can be legally formed unless it is registered as a company under the companies Act, 1956 ***(Section 11)***. Thus any organization having more than 10 persons in case of banking or 20 person in case of other business as owners has to be register as a company. Any association or partnership in violation of the above mentioned provision is termed as illegal association.

A Joint Hindu Family carrying on a business which has more than 20 members is not termed as illegal association as it is governed by Hindu Law.

The following are the consequences or disabilities of an illegal association;

1. It cannot sue or be sued of debts due to it or from it from carrying the business.

2. Every member of an illegal association is personally liable for all liabilities incurred in the business and is punishable with fine extending upto Rs. 1,000/-
3. It cannot enter into any contract as it has no legal existence.
4. It cannot be wound up under the companies act.

Q. What do you mean my Memorandum of Association and what are its contents?

Section 2 (28) of the act defines Memorandum as "Memorandum means the Memorandum of association of a company as originally framed or as altered from time to time in pursuance of any previous companies law or of this act".

Memorandum of association is the document which contains the rules regarding constitution and activities and objects of the company. It is fundamental charter of the company. Its relation towards the members and the outsiders are determined by this important document.

Section 13 of the act lays down the contents or the clauses required in the memorandum of association which are as under :-

1. **Name Clause** : - the memorandum must specify the full name of the company with "limited" as the last word of the name in case of public company and with "private limited" as the last word of the name in case of private company.

2. **State Clause** : - the state in which the registered office of the company is to be situated must be mentioned in the memorandum of association.

3. **Object Clause** :- the object of a company should be clearly set forth in the memorandum. The clause must be divided in to 2 major portion viz.
   (a) The main object of the company to be pursued by the company on its incorporation and objects incidental or ancillary to the attainment of main object.
   (b) The other object of the company not included in the above clause.

4. **Capital Clause** :- the capital clause in the memorandum of a company, having share capital, must state the amount of the share capital with which the company is to be registered and the division of the share capital into shares of a fixed amount. This share capital is called Authorised or Nominal capital.

5. **Liability Clause** : - this clause states the nature of liability of the members incase of a company with limited liability, it must state the liability of the members is limited whether by shares or by

guarantee. In absence of this clause in the memorandum the liability of its members shall be unlimited.

6. **Association Clause** : - this clause is a declaration made by the subscribers who have signed the memorandum of their intention to form a company. This clause is also called subscription clause.

Q. Explain the doctrine of '*Ultra Vires*'.

The Object Clause of the Memorandum specifies the activities which a company can under take everything else is ultra vires to the company. Ultra means beyond and vires means power. The term ultra vires means the doing of the act which is beyond the legal powers of the company. Any thing that a company does which is ultra vires i.e. beyond the object clause is null and void. This doctrine was laid down in **Ashbury Railway Carriages and Iron Co., Vs. Riche**. In this case the objects of the company provided to make and sell or lend or hire railway carriages and wagons and all kinds of railway plants, to carry on the business of mechanical engineers and general contractors etc., the company contracted with Riche to finance the construction of railway line in Belgium. The directors repudiated the contract on the ground that it was ultra vires. Riche brought an action for damages containing that the contract fell within the scope of the words "General Contractors" and further the contract was ratified by a majority of share holders. It was observed by the House of Lords that the memorandum of association has tow fold effect – an ***affirmative*** which states the extent of power of the company and ***negative*** that nothing shall be done beyond that ambit. It is to be specific and the term general contractors cannot be so widely interpreted. Since the act was ultra vires even majority of shareholders cannot ratify the said act.

Effect of Ultra Vires Transactions

1. **Contract Void** : - Ultra vires transactions render the contract void giving no legal rights to the company or the outsiders. Such contracts can never be ratified.

2. **Property acquired under ultra vires transaction** : - if a company acquires property under an ultra vires transaction, the company's right over the property shall be protected because assets so acquired represents corporate capital.

3. **Injunction** :- Any member obtain an order of injunction from the court to restrain the company from persisting in ultra vires act.

4. **Ultra vires borrowing** : - in case of an ultra vires borrowing, the lender has no right of action in respect of he loan to the company. But he has certain rights in respect of money received by the

company. But he has certain rights in respect of money received by the company provided the same is traceable. But the money lent by a company not authorized to lend can be recovered by it because the debtor will be stopped from pleading that the company had no power to lend.

5. **Directors personally liable** : - Directors who part with the company's money or property for ultra vires object will be personally liable to restore to the company the funds used for such purpose.

6. **Liabilty for torts** :- A company can be made liable for any tort, if the following two conditions are satisfied viz.
   (a) in course of which the tort has been committed, falls within the scope of the Memorandum of Association.
   (b) The servant of the company must have committed the tort within the course of his employment.

Q. Define the Articles of Association and explain its contents.

Section 2 (2) of the companies act defines articles as "<u>Articles means Articles of Association of a company as originally framed or altered from time to time in pursuance of any previous law or of this act including so far as they apply to the company the regulations contain as the case may be in Table A to Schedule I of this act</u>"

The Articles contain rules and regulations for the internal management of the company. They are framed with the object of carrying out the aims and object of the memorandum of association and also to monitor that the same are carried as prescribed.

The Model contents of the Article of association as per Table 'A' are as under

1. the business of the company;
2. the amount of capital issued and the classes of shares into which the capital is divided; the increase and reduction of the share capital;
3. the rights of each class of shareholders and the procedure for variation of their rights;
4. the execution or adoption of a preliminary agreement, if any;
5. the allotment of share; calls and forfeiture of shares for non – payment of calls;
6. transfer and transmission of shares;
7. company's lien on shares;
8. exercise of borrowing powers including issues of debentures;
9. general meeting, notices, quorum, proxy, poll, voting, resolution, minutes;
10. number, appointment and powers of directors;

11. dividends –interim and final – and general reserves;
12. accounts and audits;
13. keeping of books – both statutory and others;
14. regulations as to seal;
15. regulation as to winding up.

Q. Distinguish between Memorandum and Articles of Association

Criteria	Memorandum	Articles
1. Fundamental Conditions or internal regulations	The Memorandum contains the fundamental conditions upon which alone company is allowed to be incorporated. The conditions are introduced for the benefit of the creditors, the shareholders and the outside public.	The Articles of Association are internal regulations of the company. They provide the manner, in which the company is to be carried and its proceedings disposed of.
2. Dominant or subordinate	The memorandum is a dominant instrument as its states the purpose for which the company has come into existence.	The Article are always held to be subordinate to Memorandum because they are mere internal regulations of the company.
3. Methods of Alteration	Section 13 provides that some of the conditions of incorporation, contained in the Memorandum, such as the object clause, cannot be alerted except by the special resolution of the company and with the sanction of the Company Law Board or of a Court of Law.	Section 31 on the other hand, provides that the Articles of Association can be altered simply by a special resolution. It does not require the sanction of the Company Law Board or of a Court of Law.
4. Effect of acts done in contravention	If a company does something outside the scope of its objects stated it the Memorandum, it is absolutely null and void and incapable of ratification.	If a company does something in contravention of the provisions of its Articles, it is only an irregularity and can always be confirmed by the shareholders, and thus rectified.

Q. Define a ‘member’ and explain the modes of acquisition of membership of a company.

Section 41 of the companies act defines a member as Member of a company means a person –

(a) Who has subscribed his name to the memorandum.
(b) Any other person who has agreed in writing to become a member and whose name is entered in the register of member.
(c) Every person holding Equity share capital of a company and whose name is entered as beneficial owner in the records of the depository.

The modes of acquisition of membership are as under : -

1. **Membership by Scribing**: - the subscribers to the memorandum of association are deemed to have agreed to become members of the company on its incorporation. When the company is registered there names are automatically entered in the registered of members.

2. **Membership by Qualification Shares –** before a person can be appointed as a director of a public company he must take, and pay for the qualification shares if required by the articles.

3. **Membership by application and allotment –** an application for share is an offer to take shares and allotment is the unconditional acceptance of that offer by the company which results in a contract between the applicant and the company.

4. **Membership by transfer -** A person who takes shares from an existing member by the sale, gift or from some other transactions, acquires membership on his name appearing in the requester of members.

5. **Membership by transmission –** on the death of the share holder shares are transmitted to his or her legal representatives who becomes members of the company on their names being entered in the register of members.

Q. Enumerate the instances in which the membership of a company ceases.

A person may cease to be a member of a company in the following cases :

(a) If he transfers the shares to another person.
(b) If his shares are forfeited by the company.
(c) If the company sells his shares under some provisions in its articles as for example in the exercise of its rights to enforce a lien.
(d) If he validly surrenders shares to the company where surrender of shares is permitted.
(e) If he is adjudicated as insolvent and his shares vest in the official receiver or assignee.
(f) If he dies. The deceased member's estates liable until the shares are registered in the names of his

legal representatives.

(g) If redeemable preference shares are redeem.

(h) If he rescinds the contract to take shares on the ground of misrepresentation in the prospectus or of irregular allotment.

(i) If his shares are sold in execution of a Decree of the court.

(j) If the company is been wound up, a member remains liable as a contributor and is also entitle to share in the surplus assets, if any.

Q. What are the rights and liabilities of a member?

Rights of a Members

The following are the rights of a member :

(a) **Statutory Rights –** this are the rights which are conferred on the members by the Companies Act, 1956. This rights cannot be taken away or modified by the memorandum or article of association. Some of the statutory rights are as under :-

1. A member has a right of priority to have shares offered incase of increase of capital.
2. Right of receive notices of meeting, attend and vote at meeting.
3. Right to transfer share
4. Right to receive share certificate
5. Right to receive annual accounts of the company.
6. Right to inspect the register of members, debenture holders and copies of annual returns.
7. Right to apply to the central government for calling and annual general meeting if the board of directors fails to call such meeting.
8. Right to apply to the court for calling an extra ordinary general meeting.
9. Right to participate in appointments of directors and auditors in the annual general meeting.
10. Right to petition to the central government for ordering an investigation into the affairs of the company.
11. Right to petition to the High Court for relief in case of Opperation and mismanagement
12. Right to petition to the High Court for winding up of company.

(b) **Documentary Rights –** this are the rights given to the members by the memorandum or articles of associations.

(c) **Proprietary Rights –** Proprietary rights include the following rights

1. Right to be registered as a share holder
2. Right to be registered as a member in the register of member, subject only to valid and

authorize transfer of shares.

3. Privilege of immunity from personal liability of companies debt.
4. Right to participate in dividend distribution if ordered in the discretion of the directors
5. Right to participate in the distribution of assets in case of liquidation of the company

(d) **Remedial Rights –** Remedial rights includes the following rights.

1. Right to information and inspection of companies record.
2. right to bring representative suits on companies cause of action to prevent or remedy mismanagement or unauthorized act and to compel the company to enforce its right, and
3. common law, equitable and statutory remedies for infringement of individual rights.

<u>Liabilities of Members</u>

Liabilities of the Member depend upon the kind of company.

1. In case of a limited company, the liability of each member is linked to the face value of the share he has agreed upon.
2. In case of a company limited by guarantee, the liability of each member is to the extent of the guarantee agreed upon.
3. In case of a company with unlimited liability the liability of each member is unlimited.

Q. Define the term 'prospectus'. Explain the liability for mis-statements contained in prospectus.

Section 2 (36) defines a Prospectus as " Any document described or issued as prospectus and includes any notice, circular, advertisement or other documents inviting deposits from the public or inviting offer from the public for the subscription or purchase of shares in or debenture of a body corporate".

Any document containing offer of shares or debenture for sale shall be deemed to be prospectus for and all the provisions shall apply. A document to be prospectus must have been issued to the public.

A Prospectus is a document which holds out to the public as to what the company is and what it proposes to do and what is its future prospectus.

<u>Mis- statement in the Prospectus</u>

The obligations imposed on those responsible for the issue of a prospectus are not only but to state accurately all the relevant facts but not to omit any fact which may be relevant. This is the Golden rule as to framing of prospectus which was laid down in **New Brunswick Rail. Co. Vs. Muggeridge.** If there is any misstatement of a material fact in a prospectus or if the prospectus is wanting in any material then the following liabilities could arise:

I] CIVIL LIABILITIES

1. **Remedy against the company –** If there is a misstatement or withholding of any material fact in a prospectus and if it has induced any shareholder to purchase the shares then he can –

    a) **apply to the Court for the rescission of the contract –** The Contract can be rescinded if the following conditions are satisfied :
        (i) The statement must be a material misrepresentation of fact.
        (ii) It must have induced the applicant to take the shares or debentures.
        (iii) It must be untrue.
        (iv) The applicant must have relied on the statement in the prospectus.
        (v) The omission of a material fact must be misleading before rescission must be granted.
        (vi) The proceedings for rescission must be started as soon as the shareholder or debenture-holder comes to know of a false or misleading statement in the prospectus.

    b) claim damages from the company – Any person induced by fraud to take shares or debentures is entitled to sue the company for damages. But before he does so, he must surrender the shares or debentures to the company. He cannot do both i.e. retain the shares or debentures and get damages against the company.

2. **Remedies against the directors, promoters and experts –** The persons who are liable to pay compensation for any loss or damage to persons who subscribe for shares or debentures on the faith of a prospectus containing untrue statements are :
    (a) Directors at the time of the issue of the prospectus
    (b) Promoters and
    (c) Persons who have authorized the issue of prospectus or who have authorized themselves to be named as directors in the prospectus.

3. **Liability under general Law –** Under the general law, a shareholder or debenture holder can hold all or any of the persons responsible for the issue of prospectus liable for mis-statement or fraud on their or his part if he was actually deceived by reason of his having acted on the faith of the mis-statement or fraud on the prospectus. But a person can only be liable in fraud where he makes a statements to be acted ipen by others, which is false and is made (a) knowingly or (b) without belief in its truth or (c) recklessly, not caring whether it was true or false.

II] Criminal liabilities – Where a prospectus contains any untrue statement, every person who authorized the issue of the prospectus is punishable with imprisonment, which may extend to 2 years, or with fine which may extend to Rs. 5,000/- or both. He will be discharged from the charges if he proves either –

(i) that the statement was immaterial or

(ii) that he had reasonable ground to believe, up to the time of the issue of prospectus, that the statement was true.

Q. Write short notes on

A] Director in a Company

Company is an artificial person incapable of acting by itself.

A company has no mind of its own, it has no eyes to see, no ears to hear, no hands to sign and no brain to think and take decisions.

Therefore directors are appointed to act on behalf of the company.

Separation of ownership from management.

The members do not participate in the management of the company since –

(a) they cannot interfere in day-to-day management of the company,
(b) they have neither time nor expertise to manage its day-to-day affairs;
(c) a large-sized company may numerous shareholders who are scattered throughout the country.

Therefore, directors are appointed by the members to manage the affairs of the company.

Meaning of Director [Section 2(13)]

"Director" includes any person occupying the position of director, by whatever name called;

The main criteria to determine whether a person is a director or not is to refer to the nature of his office, functions performed and discharged by him.

Shadow director –

A person in accordance with whose directions or instructions the Board of directors is accustomed to act is called as ‘deemed director’ or ‘shadow director’.

However, if the directions are given in professional capacity such person shall not be treated as director.

Only individuals to be directors (Section 253)

No body corporate, association or firm can be appointed as director.
Only an individual shall be appointed as director.

Position of directors

- Directors are appointed by the shareholders. Shareholders are also empowered to remove the directors.
- Overall control and supervision of affairs of the company is entrusted to directors.
- The Board of directors is entitled to exercise all the powers of the company except those powers which the Companies Act requires a company to exercise in General Meeting only.
- However, the power of directors can be restricted by articles of the company.
- Shareholders are authorized only to take decisions only to the extent specified in the Companies Act. They cannot interfere in day-to-day management of the company. The only thing they can do is to remove directors and appoint new ones; or to alter the articles to restrict the powers of the Board in respect of future transactions.
- Directors owe a duty to the shareholders to exercise care, skill and diligence in discharge of their functions.
- All the powers vested in the directors are exercisable by the directors collectively. (i.e. by passing a resolution at a Board meeting or by circulation). As an individual director, no director has the power to act on behalf of the company unless such powers have been delegated to him.

B] Director appointed by small shareholders

Small shareholder means a shareholder holding shares of nominal value of Rs 20,000/- or less. The Companies Act contains provisions regarding appointment of ***Small Shareholders' Director*** ('SSD').

1. **Applicability –** Conditions
   Nature of Company – Public Company;
   Paid up Capital – Rs 5 crores or more;
   Number of Small Shareholders – 100 or more

2. **Mode of Appointment**
   The Company may Suo motu appoint a SSD.
   If Notice is given by 1/10th or more small shareholder, the company shall be bound to act on such notice for appointment of SSD.

3. **Notice by small shareholders –** requirements

   The Notice shall be given at least 14 days before the AGM.

   The Notice shall specify the name, address & number of shares held & folio number of shareholders proposing the resolution; and the person whose name is proposed as SSD.

4. **Requirements and conditions**
   - SSD has to be a small shareholder.
   - A person can not become a SSD for more than 2 companies.
   - SSD cannot be appointed as a Whole Time Director/ Managing Director.

5. **Tenure of SSD**

   The tenure of the SSD is for 3 years he has right for re-election for a maximum period of 3 years and he is not liable to retire by rotation.

6. **Disqualification of SSD**

   The grounds of disqualifications as applicable to other directors (i.e specified u/s 274) shall also apply to SSD and the grounds mentioned u/s. 274(1)(g) does not apply to the SSD.

7. **Grounds for vacation of office**

   The ground for vacation of office as applicable to any other director specified u/s 283 shall also apply to SSD.

8. **Exceptions**

   SSD shall vacate office if he ceases to be small shareholder.

   He is not required to obtain the qualification shares.

C] Nominee Directors

1. **Appointment**

   Nominee Directors are Directors appointed by Central Government u/s 408 or Financial institutions constituted under an Act of parliament.

   Following provisions shall apply to nominee directors appointed by Central Government u/s 408 and financial institutions constituted under the Act of Parliament:

- they are not required to retire by rotation
- they are not counted in the total number of directors
- they may be appointed even if there is no provisions in the articles for their appointment
- their appointment may result in increasing the strength of the Board beyond the 'Maximum number

of directors' as specified in the articles

- they are not required to hold qualification shares
- they can be removed only by the authority appointing them

2. **Other provisions**

   All the provisions of Companies Act, 1956 shall apply to such directors, specifically, the following provisions must be checked:

- the articles of the company must specifically provide that nominee directors may be appointed
- the appointment of nominee directors must not result in a contravention of Section 255.

D] Removal of a Director

Procedure for removal of a director

1. Notice of removal of a director is given by a member to company. The notice must be a special notice.
2. A copy of notice is given by company to director.
3. Representation is given by director to company. The director ha a right to make representation to the company.
4. Representation given by company is sent by the company to every member. The company shall give a copy of the representation made by the director to every member. If the representation was not sent to the members, the representation shall be read at the GM.
5. The GM shall be held.
6. The director has right to be heard at the meeting. The right to make an oral representation is in addition to written representation.
7. The director shall be removed if an ordinary resolution is passed for his removal.
8. Any other person may be appointed at the place of the director removed, only if special notice of the new appointee was given to the company.

Director who cannot be removed u/s. 284

1. A director appointed u/s. 408.
2. A director appointed u/s. 265
3. A director of a private company holding office for life as on 1.4.1952
4. Nominee director appointed by a financial institution constituted under a special Act of Parliament.

Q. What are the disqualifications of Directors in a company?

The Grounds of disqualification of Directors applicable to every company are as under -

Following persons are disqualified to become a director:

(a) A person who has been found to be of unsound mind by a court of competent jurisdiction
(b) A person who is an undischarged insolvent.
(c) A person who has applied to be adjudicated as an insolvent
(d) A person who has been convicted by a court and the following conditions are fulfilled :
   (i) He is convicted for an offence involving moral turpitude.
   (ii) He is sentenced to imprisonment for 6 months or more
   (iii) 5 years have not elapsed from the expiry of sentence.
(e) A person who has not paid any call on shares and the default has continued for 6 months.
(f) A person who is disqualified by an order of court u/s 203 on the ground of fraud or misfeasance in relation to a company.

The Grounds of disqualification applicable to a public company are as under [section 274 (1) (g)] –

A director of a public company shall be disqualified from being appointed as a director in any other company, if the public company of which he is already a
director –

(b) does not file the annual accounts and annual returns for any continuous 3 financial years commencing on or after 1.4.1999 or
(c) fails to repay its deposits or interest thereon on due date or redeem its debentures on due date or pay dividend and such failure continues for 1 year or more.
(d) Where a public company fails to repay its deposit or interest thereon on due date or redeem its debentures on due date or pay dividend on the due date, all the persons who has been directors from the due date till the expiry of one year after the due date, shall be disqualified.

The disqualification u/s. 274)1)(g) shall remain in force for a period of 5 years. Even where the default made u/s 274(1)(g) is subsequently cured by the directors shall continue to remain disqualified.

Additional Grounds

The Articles of Association of a private company may provide additional grounds of disqualification of a director.

Q. Define the term "Consumer" under the provisions of the Consumer Protection Act, 1956.

Section 2 (1) (d) of the Consumer Protection Act, 1986 defines the term "consumer". It says 'consumer' means any person who-

(i) **buys any goods for a consideration** which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and **includes** any user of such goods **other than the person who buys such goods for consideration** paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or

(ii) **hires or avails of any services for a consideration**, which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and **includes any beneficiary of such services other than the person who hires or avails of the services for consideration** paid or promised, or partly paid and partly promised, or under any system of deferred payments, when such services are availed of with the approval of the first-mentioned person;

Explanation :

For the purposes of sub-clause (i), "commercial purpose" does not include use by a consumer of goods bought and used by him exclusively for the purpose of earning his livelihood, by means of self-employment;

Thus the term "Consumer" defined under section 2 (1) (d), is divided in two parts – First, a Consumer who purchases goods and Second, a person who hires services.

The Supreme Court in **Lucknow Development Authority V/s. M.K. Gupta** noted that, the word "Consumer" is a comprehensive expression. It extends from a person who buys any commodity to consume either as eatable or otherwise from a shop, business house, corporation, store or fair – price shop to use fro private or public purposes.

The term "Consumer" also includes any person who uses the goods with the permission of the buyer, though, he is not himself a buyer.

The next important term to consider is what do you mean by 'commercial purpose'. The National Commission in **Western India State Motors V/s. Sobhag Mal** held that, the plying of a taxi for hire is clearly a commercial purpose. But this decision requires to be considered in the light of the amendment of 1993 adding an explanation to the definition, to the effect that, purchase for self employed business is not a commercial purchase.

In contrast to the decision above, the purchaser of a tempo, which was also for commercial purpose, was allowed to enforce his right to have the defects in the machine rectified. **(D.R. Joshi V/s. Motor Industries Co.)**

The distinction between commercial purpose and domestic purpose was expressed in the case of **Super Engg. Corpn V/s. S.V. Pant** wherein the National Commission expressed the view that, the purchase of a

Offset printing machine to be used for profit-making activity on a large scale, would be a commercial purpose, but it would not be so, if the machine is to be used in small venture in order to make a living.

The second category of the consumer is, that of user of services for consideration. **“Service”** would include all kinds of professional services, be it the routine service of a barber or of the technical services of a highly qualified person like medical or legal practitioner etc. Supply of electricity has been held to be a service and not sale of goods **(Haryana Sate Electricity Board V/s. Dinesh Kumar).**

Where, free air tickets were offered by a lucky draw alongwith purchase of thing, the National Commission held that, that portion of the contract which was concerned with the free award was without consideration and therefore, the winner of such award was not a consumer. The direction of the State Commission that the tickets should be delivered or their value paid along with compensation was set aside. **(Byford V/s. S.S. Srivastava)**

Who is not a consumer?

- An applicant for a passport, has been held to be not a consumer, because the duties of the passport officer do not fall in the category of services for consideration.
- An applicant for ration card is not a consumer.
- The beneficiaries of municipal services has been held to be not in the category of consumers. **(Parab Chand Jain V/s. C.E.O. NagarPalika)**

Q. Write short notes on.

A] Complainant

Section **2 (1) (b)** of the Consumer Protection Act, 1986 defines the term "complainant" as ---

Complainant means-

(i) a consumer; or

(ii) any voluntary consumer association registered under the Companies Act, 1956 (1 of 1956), or under any other law for the time being in force; or

(iii) the Central Government or any State Government,

(iv) one or more consumers, where there are numerous consumers having the same interest;

(v) who or which makes a complaint;

A person seeking redress before the Consumer Redressal Forum must come within any of the four categories stated above, otherwise he has no *locus standi* to proceed with his case. The ‘Complainant’ among others means a ‘consumer’ generally.

The expression ‘complainant’ as defined in section 2 (1) (b), is comprehensive to enable consumer as well as any voluntary consumer association. This definition is very suitable in a country like India, where majority of the people are illiterate and therefore, power to file a complaint is given to the voluntary consumer associations. The only restriction laid down under the Section in this regard is that, the association must be registered under the Companies Act, 1956 or any other law for the time being in force.

However, a consumer association cannot file a complaint on behalf of unspecified or unidentified number of consumers. In the Case of **Upbhokta Sanrakshan Samiti V/s. Winsard foods Ltd.,** the consumers association found that, the biscuit packets sold by a food company were less in weights. A complainant demanding compensation for the public of the State of Rajasthan was not maintainable.

The act contemplates an identified consumer in order to make the application of its provisions or any consumer association to represent it. An act also contemplates an action in representative capacity, by providing that, when there are numerous consumers having same interest, one or more consumers must file complaint on behalf of others.

B] Complaint

In **Section 2 (1) (c)** "complaint" means any allegation in writing made by a complainant that-

(i) an unfair trade practice or a restrictive trade practice has been adopted by any trader;

(ii) the goods bought by him or agreed to be bought by him suffer from one or more defect;

(iii) the services hired or availed of or agreed to be hired or availed of by him suffer from deficiency in any respect;

(iv) a trader has charged for the goods mentioned in the complaint a price in excess of the price fixed by or under any law for the time being in force or displayed on the goods or any package containing such goods;

(v) goods which will be hazardous to life and safety when used, are being offered for sale to the public in contravention of the provisions of any law for the time being in force requiring traders to display information in regard to the contents, manner and effect of use of such goods.

With a view to obtaining any relief provided by or under this Act;

The essential features of a “Complaint” are -

1. The complaint must be in writing;
2. The complaint must be made with a view to obtain any relief under the Act;
3. The Complaint must make any of he five allegations stated under section 2 (1) (c), against a trader or manufacturer;
4. The complaint must be filed in a manner prescribed under law i.e. under section 12 of the Act.
5. The complaint must be filed before appropriate consumer commission having jurisdiction to entertain complaint. Section 17 & Section 21.

Ordinarily, the complaint must contain name, description and address of the Complainant and the purpose for which he bought the goods. It must also contain the name, description and address of the trader or manufacturer. It must state clearly, the facts of he case eg. When the things was purchase? For what purpose? when the things were consumed or used? Defects in goods or deficiency in the service etc., what injury suffered etc. These facts must be supported by all relevant and proper documents. Lastly, the complaint must mention the relief or relief’s asked for against the trader or manufacturer i.e. the opposite party.

C] Consumer Dispute

Section 2 (1) (e) provides "consumer dispute" means a dispute where the person against whom a complaint has been made, denies or disputes the allegations contained in the complaint;

A Consumer dispute would arise when there is a complaint by a consumer and the person against whom the complaint has been made denies or disputes the allegations contained in the complaint.

When a material proposition of fact or law is affirmed by one of the party and denied by the other, the issues arise and Court frames those issues in the form of questions. Each of such allegations made by the Complainant and denied by the defendant becomes a “consumer dispute

D] Defect and Deficiency

Under **Section 2 (1) (f)** "defect" means any fault, imperfection or shortcoming in the quality, quantity, potency, purity or standard which is required to be maintained by or under any law for the time being in force or under any contract, express or] implied, or as is claimed by the trader in any manner whatsoever in relation to any goods;

Such a defect must be in relation to the goods and not its title.

Defect means lack or absence of something essential for completeness. When there is a shortage in the quality of goods it amounts to defect in the goods.

If, seller fails to deliver the goods which he agreed to sell, it will be treated as a defect. There are certain legislative enactment eg. Foods & Drugs Adultration Act, which require the goods to be particular standard, and any shortcoming in such a standard, would amount to a ‘defect’.

A contract between the buyer and seller may prescribe for particular quality, quantity or purity, standard etc. in such a case, if that prescribed quality, quantity etc. falls short as required by their contract, it may amount to a defect.

Even when the trader makes a particular claim about the product, whether by means of advertisement or by labels on the package or inside the package, and the goods fall short of that claim, it would amount to ‘defect’ in goods.

Section 2 (1) (g) further provides the definition of deficient. "Deficiency" means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service;

The distinction between the ‘defect’ as defined under section 2 (1) (f) and the term ‘deficiency’ as defined under section 2 (1) (g) is that, the former is used in relation to goods i.e. when goods can be said to be ‘defective goods’ whereas, the term ‘deficiency’ is used in relation to ‘services’ i.e. there can be ‘deficiency in services’.

E] Service and Deficiency in service

Under **Section 2 (1) (o)** "service" means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, 6[housing construction], entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service;

The above definition can be divided in three parts :

- **What it means ?**

It means a service of any description. The service is not restricted only to actual users, but is also made applicable to potential or prospective users. i.e. the persons who are likely to use the services in future.

- **What it includes?**

It includes the provisions of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, boarding or lodging or both, entertainment, amusement or the purveying of news or ther information. Housing construction is also included in the definition of “Service”

- **What it excludes?**

The services which is rendered free of charge, and the personal service e.g. master and servant have been excluded. Therefore, if, services rendered in the hospital are totally free, then no complaint under this Act is maintainable against the hospital.

"Deficiency" under **Section 2 (1) (g)** means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service;

Following are the cases in which it was held that there is a deficiency in the service :

1. Delay in delivery of possession of the flat.
2. Use of substandard material in house construction.
3. Fault or negligence in setting the claim by the insurance company.

4. Fault on the part of the carrier of goods.
5. Disconnection of electric supply on account of arbitrary and excessive billing and without giving notice.
6. Bank dishonouring the bank draft or cheque despite sufficient funds in the account.
7. Failure on the part of the courier to deliver cover within stipulated period.
8. Unreasonable delay in shifting of telephone.
9. Delay by the examining body to publish the results.

F] Central Consumer Protection Council

Section 4 (1): Establishment of the Central Consumer Protection Council:
provides that the Central Government may, by notification, establish with effect from such date as it may specify in such notification, a council to be known as the Central Consumer Protection Council (hereinafter referred to as the Central Council).

Section 4 (2): Membership of the Central Council :
"The Central Council shall consist of the following members, namely,-

a) the Minister in charge of consumer affairs in the Central Government, who shall be its Chairman, and
b) such number of other official or non-official members representing such interests as may be prescribed."

Section 6 : Objects of the Central Council
The objects of the Central Council shall be to promote and protect the rights of the consumer, such as ,-

a) the right to be protected against the marketing of goods and services which are hazardous to life and property;
b) the right to be informed about the quality, quantity, potency, purity, standard and price of goods or services, as the case may be, so as to protect the consumer against unfair trade practices;
c) the right to be assured, wherever possible, access to a variety of goods and services at competitive prices;
d) the right to be heard and to be assured that consumers' interests will receive due consideration at appropriate forums;
e) the right to seek redressal against unfair trade practices or restrictive trade practices or unscrupulous exploitation of consumers; and
f) the right to consumer education."

Q. "All contracts are agreements, but all agreements are not contracts." Discuss

Section 2 (h) defines '**Contract**' as an agreement enforceable by law.

If we analyse the definition it has two components viz. (i) an agreement and (ii) its enforceability by law.

Section 2 (e) defines '**agreement**' as "every promise and set of promises forming consideration for each other"

For a contract to be enforceable by law there must be an agreement which should be enforceable by law. To be enforceable, the agreement must be coupled with obligation. Obligation is a legal duty to do or abstain from doing what one promised to do or abstain from doing.

All contracts are agreements but for agreement to be a contract it has to be legally enforceable.

Section10 of the Act provide " All agreements are contracts if they are made by the free consent of the parties competent to contract for lawful object & are not hereby expressly declared void."

All contracts are agreements but for an agreement following essential element are required –

a) **Offer & Acceptance** :- There must be two parties to an agreement i.e one making the offer & other party accepting it. Acceptance of must be unconditional & absolute. A part of an offer cannot be accepted. The terms of an offer must be definite. The acceptance must be in the mode as prescribed & must be communicated. The acceptor of an offer must accept it in the same way & same sense & at the same time as offered by the offeror i.e there must be *consensus ad idem.*

b) **Intention to create legal relationship** :- When two parties enter into a contract their intention must be to create legal relationship. If there is no such intention between the parties there is no contract between them. Agreements of a social or domestic nature to do, not constitute contracts. For e.g. in Balfour Vs. Balfour a husband working in Ceylon had agreed in writing, to pay a housekeeping allowance to his wife living in England. He found out that she was unfaithful to him, he discontinues the allowance. *Held*, he was entitled to do so. This was merely a domestic arrangement & not with an intention to create legal relationship, so it was not a contract.

c) **Lawful consideration** :- An agreement to be enforceable by law must be supported by consideration. "Consideration" means an advantage or benefit which one party receives from another. It is the essence of bargain. The agreement is legally enforceable only when both parties give something or get something in return. An agreement to do something without getting anything in return is not a contract. Contract must be in cash or kind. It may be an act to do something or abstaining from doing something in return. Consideration may be past, present or future.

d) **Capacity to Contract – Competency** :- The parties competent to contract must be capable of contracting i.e they must be of the age of majority, they must be of sound mind & they must not be disqualified from contracting by any law to which they are subject to. An agreement with minors, lunatics, drunkards, etc. are not contract & does not get a legal title.

e) **Free & Genuine Consent** :- It is necessary between the contracting parties to have a free & genuine consent to an agreement. The consent of parties is said to be free when the contracting parties are of the same mind on the materials of a contract. They must mean the same thing at the same time the parties must not enter into a contract under undue influence, coercion, misrepresentation etc. If these flaws are present in an agreement it does not become a contract.

f) **Lawful object** :- The object of an agreement must be lawful. It should not be illegal, immoral or it should not oppose public policy. If an agreement suffers from a legal flaw with respect to object it is not enforceable by law & so it is not a contract.

g) **Agreement not declared void** :- For an agreement to be a contract it is necessary for the agreement must not be expressly declared void by any law in force in the country.

h) **Possibility & Certainty of performance** :- The terms of an agreement must not be vague or indefinite. It should be certain. The agreement must be to do a thing which is possible. For e.g An agreement to sell a car for Rs. 100/- if sun does not rise tomorrow. This agreement is impossible & so not enforceable by law.

Thus, *agreement is the genus of which contract is the specie.*

Q. Define the term 'Offer' and explain Rules thereto.

Section 2 (a) defines a proposal as "When one person signifies to another his willingness to do or abstain from doing anything with a view to obtaining the asset of that other to such act or abstinence."

The person making the offer is known as the ***Offeror or Promisor*** and the person to whom it is made is called the ***Offeree*** or ***Promisee*** [**Section 2(c)**]

For e.g. A says to B, "Will you purchase my flat at Andheri for Rs.20 Lacs? Here A is the promisor and B is the promises.

<u>Rules as to Offer</u> –

1. **Intention to create legal relationship –** The Offeror while making the offer must do it with the intention to create legal relations. Offeror must be conscious that a contract will arise, if the Offeree accepts the same.

2. **Certain or Unambiguous –** The terms of the Offer to be valid must be certain, clear and unambiguous.

   For eg. A offers to sell B, ten tones of oil. A is a dealer of various oil. Here the offer is ambiguous as the offer does not specify the type of oil. However, if A was a dealer only in Parashute Coconut oil then the offer is unambiguous.

3. **Offer must be distinguished from –**

(i) **A declaration of intention –** A declaration by a person that he intends to do something gives right of action to another. Such a declaration only means that an offer will be made or invited in future and not that an offer is made now.

For eg. H telephones to F asking the latter to inform him whether he would sell Bumper Hall Pen and if so, at what price. F informed H that the lowest price was $900 without stating that he was willing to sell at that price. H telegraphed that he would buy at that price. F gave no reply to the telegram. It was held that there was no contract because there was no offer from F to H. ***[Harvey v. Facey]***.

(ii) **An invitation to make an offer or do business –** Display of goods by a shopkeeper in his window, with prices marked on them, is not an offer but merely an invitation to the public to make an offer to buy the goods at the marked prices. A buyer, in case the prices of the goods are marked, cannot force the seller to sell the goods at those prices. He can, at the most, ask the seller to sell the goods to him, in which case he is making an offer to the seller and it is upto the seller to accept the offer or not. Likewise, quotations, menu card, catalogues, prospectus issued y a company for subscribing to shares are all example of an invitation to make an offer.

4. **Offer must be to a definite person –** The words of an Offer must apply to definite persons or class of persons to create a legal relationship.

5. **Offer must be communicated –** An offer, to be complete, must be communicated to the person to whom it is made. Unless an offer is communicated, there can be no acceptance of it.

For eg. Gauri Dutt's nephew absconded from home and could not be traced. She sent Lalman Shukla, his servant, to Haridwar to look for the boy. Meanwhile she offered a reward of Rs.501/- to the finder of the boy. L traced the boy in ignorance of the offer. Later when he came to know of the reward, he claimed it. *Held*, he was not entitled to the reward as he was not aware of the offer. ***[Lalman Shukla vs Gauri Dutt***].

6. **Offer must be made with a view to obtaining the assent –** The offer to do or not to do something must be made with a view to obtaining the assent of the other party addressed and not merely with a view to disclosing the intention of making an offer.

7. **Special Terms to be made clear in the Offer –** The offer may be conditional but the conditions or special terms must be clearly communicated in the offer. Whenever an offer has special terms attached to it, these special terms and conditions must be effectively communicated to the offeree to bind him.

8. **Offer should not contain a term, the non-compliance of which may be assumed to amount to acceptance –** A person cannot say that if acceptance is not communicated within a certain time, the offer would be considered as accepted. For eg. A writes to B, "I will sell you my horse for Rs.500, and if you do not reply, I shall assume you have accepted the offer," if B does not reply there is no contract. The promise has to expressly convey his/her acceptance.

Q. Define the term 'Acceptance' and explain Rules thereto.

Section 2(b) defines acceptance as – "When a person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal when accepted becomes a promise." Acceptance is an expression by the Offeree of his willingness to be bound by the terms of the offer.

Acceptance may be ***express*** or ***implied***. It is express when it is communicated by words spoken or written or by doing some required act. It is implied when it is to be gathered from the surrounding circumstances or the conduct of the parties.

For eg. At an auction sale, S is the highest bidder. The auctioneer accepts the offer by striking the hammer on the table. This is an implied acceptance.

When an offer is made to a particular person it can be accepted by him ***alone***. If it is accepted by any other person, there is no valid acceptance. When an offer is made to the world at large (eg. Advertisement in newspaper by A to give prize to the person finding his son), any person or persons with notice of the offer may come forward and accept the offer.

Rules as to Acceptance –

1. **It must be absolute and unqualified –** An Acceptance, in order to be binding, must be absolute and unqualified of all the terms of the offer, whether material or immaterial, major or minor.

   For eg…A offers to sell his land for Rs.10 Lacs. B accepts the offer and encloses a cheque for Rs.5 Lacs and promise to pay the balance by 10 monthly installments of Rs. 50,000 each. *Held*, there was no contract between A and B as the acceptance was not unqualified.

2. **It must be communicated to the Offeror –** The acceptance must be communicated in some acceptable form to the person making offer to conclude a contract. A mere mental determination or communication to some third party does not constitute communication.

   For eg. A draft agreement relating to supply of coal was sent to a manager of a Railway Company for his acceptance. The manager wrote the word 'approved" and put the draft in the drawer of his table intending to send it to the Company's solicitor for drawing up a formal contract. Due to oversight the document remained in the drawer. *Held*, there was no contract. ***[Brogden v. Metropolitan Rail. Co,***].

   However, in some cases the offeror may dispense with the communication of acceptance. It happens when the performance of certain conditions takes place or some required act is done,

   For eg, Carbolic Smoke Ball Co. advertised in the newspaper that it would pay 100$ to anyone who contracts influenza after using the smoke balls of the company according to the printed instructions. Mrs. Carlill bought the smoke balls and used it as per the instructions yet contracted influenza. She filed a suit for recovery of the advertised 100$. *Held*, she was entitled to the amount as she had accepted the offer by fulfilling the terms of the offer. [***Carlill vs. Carbolic Smoke Ball Co.,***]

3. **It must be expressed according to the mode prescribed or usual and reasonable mode –** If the acceptance is not according to the mode prescribed, the offeror may, within a reasonable time after the acceptance is communicated to him insist that his proposal shall be accepted in the prescribed mode. However if no mode is prescribed the acceptance may be in a usual or reasonable mode.

4. **It must be given within a reasonable time –** If no time is specified the acceptance must be within a reasonable time. The reasonability of the time shall depend on the ordinary course of trade and business. However if a time limit is prescribed acceptance must be within the specified time.
5. **It cannot precede an offer –** Acceptance always follows an offer. Without the knowledge of offer there is no acceptance.
6. **Mere silence is not acceptance –** The acceptance of an offer cannot be implied from the silence of the offeree or his failure to answer. For eg. A writes to B, "I will sell you my horse for Rs.500, and if you do not reply, I shall assume you have accepted the offer," if B does not reply there is no contract. The promise has to expressly convey his/her acceptance.
7. **It must show an intention on the part of the acceptor to fulfill the terms of the promise –** The acceptor of the offer must be ready and prepared to be bound by the conditions of the offer and to fulfill the offer. If no such intention is present the acceptance is not valid.

Q. What is consideration ? Explain & state in particular whether inadequacy of consideration shall make a contract invalid.

Section 2 (d) of Indian Contract Act, 1872, defines consideration as "When at the desire of the promisor the promise or any other person has done or abstained from doing or does or abstains from doing something, such act abstinence or promise is called a consideration for the promisor."

Consideration is an advantage or benefit which moves from one party to another. It is the essence of bargain. It is the reciprocal promise i.e to do something or abstain from doing something in return of a promise. It is necessary for an agreement to be enforceable by law. In consideration both the parties give something & get something in return. It may be in cash or kind.

The following are the rules related to the consideration :-

1) Consideration must move at the desire of promisor. If it is done at the instance of a third party without the desire of the promisor, it is not consideration. Act done at the desire of a third party is not a consideration. Act must be done voluntarily at the desire of the promisor.
2) It may move from the promisee or any other person in the Indian Law so that a stranger to the consideration may maintain a suit. A consideration may move from the promise or any other person. Consideration from a third party is a valid consideration. Under English Law, however, consideration must move from the promisee only.
3) Consideration may be past, present or future. The words used in Section 2(d) are "has done or abstained from doing (past), or does or abstains from doing (present), or promises to do or to abstain from doing (future) something" This means consideration may be past, present or future.
4) There must be mutuality in consideration.

5) It must be real & not illusory, infinite or vague. Although consideration need not be adequate, it must be real, competent and of some value in the eye of law. Physical impossibility, legal impossibility, uncertain consideration & illusory consideration.
6) Consideration must not be unlawful, illegal, immoral or opposed to public policy. The consideration given for an agreement must not be unlawful. Where it is unlawful, the courts do not allow an action on the agreement.
7) Consideration need not be adequate. Consideration as already explained means “something in return”. This “something given”. The law simply provides that a contract should be supported by consideration. So long as consideration exists, the courts are not concerned as to its adequacy, provided it is of some value. “The adequacy of the consideration is for the parties to consider at the time of making the agreement, not for the court when it is sought to be enforced.”

Q. ‘A stranger to a contract cannot sue or be sued’. Explain with exceptions.

As a general rule of law only those persons who are parties to contract may sue or be sued on that contract. There are two consequences on this rule :
1) A doctrine of ‘privity of contract’ which means relationship subsisting between the parties who have entered into contractual obligations.
2) A contract cannot confer rights or impose obligations arising under it on any person other than the parties to it. Thus, if there is a contract between A and B, C cannot enforce it..

In ***Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & co. Ltd.,*** S bought tyres from the company on the condition that S will not sale below company’s sale price failing which S will pay damages. S sold the tyres to B a sub-dealer who sold the tyres below the stipulated price. Company sued B for damages. It was held that the Company was stranger to the contract and therefore, could not maintain the suit.

Exceptions – Under Indian Law, the following are the exceptions wherein a stranger to a contract can sue or be sued :
1. **A trust or charge –** A person in whose favour a trust or other interest in some specific immovable property has been created may enforce it even though he is not party to the contract.

For e.g. A has created a trust for granting ten scholarships yearly for students going abroad for further studies. Merit being only the criteria for selections. X qualifies for the scholarships but is rejected on the basis of community. He can bring an action as a beneficiary under the trust.

2. **Marriage settlement, partition or other family arrangements –** Where an agreement in connection with marriage, partition or other family matters and a provision is made for the benefit of the person , he may sue although he is not the party to the agreement.
   For e.g. A had a son SA and B had a daughter DB. A agreed with B that in consideration of the marriage of DB with SA, he would pay to DB, the daughter-in-law, an allowance of Rs.500 a month in perpetuity. He charged certain properties with the payment. *Held*, DB, although not a party to contract, was entitled to file a suit and recover the arrears of the allowance. (***Khawja Mohd. Khan v. Hussaini Begum)***.

3. **Acknowledgement or estoppel –** Where the promisor by his conduct , acknowledges or otherwise constitutes himself as an agent of third party, a binding obligation is thereby incurred towards him.

For e.g. A gives to B Rs.10,000 to be given to C. B informs C , that he is holding the money for him. Later on B refuses to pay the money to C. C is entitled to recover the money from B. B would be estoppeled from denying his liability as he has already acknowledged the same.

4. **Assignment of a contract –** The assignee of the rights and benefits under a contract not involving personal skill can enforce the contract subject to the equities between the original parties.

For e.g. the Official Receiver can realize money from the debtors of the firm, though he is not a party to the credit agreement between the debtors and the firm.

5. **Contracts entered into through an agent –** The principal can enforce the contracts entered into by his agent provided the agent acts within the scope of his authorities and in the name of the principal.

Q. Explain the exceptions to the rule 'No consideration no contract'.

The general rule is that an agreement made without consideration is void. Section 25 deals with the exceptions to this rule. In such cases the agreements are enforceable even though hey are made without consideration. These cases are :-

a) **Love and Affection [Section 25(1)] –** Where an agreement is expressed in writing and registered under the law for the time being in force for the registration of documents and is made on account of natural love and affection between the parties standing in a near relation to each other, it is enforceable even if there is no consideration.

   For eg. *F*, for natural love and affection, promises to give his son *A*, Rs. 1 Lac. *F* puts this promise in writing and registers it. This is a contract.

   S Hindu husband, after referring to quarrels and disagreement between him and his wife executed a registered coument in favour of his wife agreeing to pay her for maintainence, but no consideration moved from the wife. *Held*, the agreement was void for want of consideration as the essential condition 'natural love and affection' was missing. ***(Rajlukhy debee V. Bhootnath)***

A man makes an agreement with a prostitute for giving her Rs. 1 Lac, puts it in writing and registers it. He maintains that he has done so on account of natural love and affection. *Held*, there is no natural love and affection for the prostitute and the contract is void.

b) **Compensation for voluntary services [Section 25(2)]–** A promise to compensate wholly or part a person who has already voluntarily done something for the promisor, is enforceable, even though without consideration. A promise to pay for a past voluntary service is binding.

For eg. A says to B' At the risk of your life you saved me from a serious accident. I promise to pay you Rs.1,000." There is a contract between A and B even though there is no consideration.

c) **Promise to pay a time barred debt [Section 25(3)] –** A promise by a debtor to pay a time barred debt is enforceable provided it is made in writing and is signed by the debtor or by his agent generally or specifically authorized in that behalf. The debt must be such "of which the creditor might have enforced payment but for the law for limitation of suits"

For eg. D owes C Rs.1,000 but the debt is barred by the Limitation Act. D signs a written promise to pay C Rs.500 on account of the debt. This is a valid contract.

d) **Agency (Section 185) –** No consideration is necessary to create an agency.

e) **Completed Gift (Explanation 1 to Section 25) –** The rule 'No consideration no contract' does not apply to completed gifts. This rule shall not affect the validity, as between donor and donee, of any gift actually made.

Q. Explain the rules relating to Contracts by a minor.

The position of minor as regards his agreements may be summed up as under :-

1. ***An agreement with or by a minor is void and inoperative ab initio-*** The Privy Council affirmed this view most emphatically in *Mohiri Bibi v. Dharmodas Ghose*, in this case, a minor mortgage his house in favour of a money-lender to secure a loan of Rs. 20,000 out of which the mortgagee (the money-lender) paid the minor a sum of Rs.8,000. Subsequently the minor sued for setting aside the mortgage, stating that he was underage when he executed the mortgage. *Held*, the mortgage was void and. Therefore, it was cancelled. Further the money lender's request for the repayment of the amount advanced to the minor as part of the consideration for the mortgage was also not accepted.
2. ***He can be a promise or a beneficiary*** - Incapacity of a minor to enter into a contract means incapacity to bind himself by a contract. There is nothing which debars him from becoming a beneficiary, e.g. a payee [*Sharafat Ali v. Noor Mohd.*], endorsee or a promise in a contract. Such contracts may be enforced at his option, but not at the option of the other party. The law does not regard him as incapable of accepting a benefit.
3. ***His agreement cannot be ratified by him on attaining the age of majority***. "Consideration which passed under the earlier contract cannot be implied into the contract into which the minor enters on attaining majority." [*Nazir Ahmed v. Jiwan Dass*]. Thus consideration given during minority is no consideration. If

it is necessary a fresh contract may be entered into by the minor on attaining majority, provided it is supported by fresh consideration.

4. ***If he has received any benefit under a void agreement, he cannot be asked to compensate or pay for it. Sec. 65 which provides for restitution in case of agreements discovered to be void does not apply to a minor.***
5. ***He can always plead minority* –** Even if he has, by misrepresentation tenting his age, induced the other party to contract with him, he cannot be sued either in contract or in tort for fraud because if the injured party were allowed to sue for fraud, it would be giving him an indirect means of enforcing the void agreement.
6. ***There can be no specific performance of the agreement entered into by him as they are void ab ignition***. A contract entered into on his behalf by his parent/guardian or the manager of his estate can be specifically enforced by or against the minor provided the contract is (a) within the scope of the authority
7. ***He cannot enter into a contract of partnership***. But he may be admitted to the benefits of an already existing partnership with the consent of the other partners. For a detailed discussion of minor as a partner refer to the chapter on Law of Partnership.
8. ***He cannot be adjudged insolvent***. This is because he is incapable of contracting debts.
9. ***He is liable for 'necessaries'*** supplied or necessary services rendered to him or minor dependants. This is discussed under the next heading in this chapter.
10. ***He can be an agent***. An agent is merely a connecting link between his principal and a third party. As soon as the principal and the third party are brought together, the agent drops out. A minor binds the principal by his acts without incurring any personal liability.
11. ***His parents/guardian are/is not liable for the contracts entered into by him***, even though the contract is for the supply of necessaries to the minor. But if the minot is acting as an agent for the parents/guardian the parents/guardian shall be liable under the contract.

Minor's liability for necessaries – Section 68 provides that a minor is liable to pay out of his property for 'necessaries' supplied to him or to his minor dependants whom is legally bound to support. It is important to note here that it is only the minor's property which is liable for meeting the liability arising from such contracts and the minor is not personally liable. Necessaries would include –

a) necessary goods that are (i) suitable to the position and financial status of the minor, and (ii) necessaries both at the time of sale and at the time of delivery. For eg. An engagement ring may be a necessary, but not a vanity bag bought for the minor's fiancée.

b) Services rendered that are required for the living and maintenance of the minor. eg. Education, training for a trade, legal advice, etc.

Q. Define 'consent' and explain when a consent is 'free consent'?

Section 13 defines consent as "Two or more persons are said to consent when they agree upon the same thing in the same sense." Consent of the parties means, the aprties to a contract must mean the same thing in the same sense. It means *'Consensus ad idem'*. For eg. A has 2 cars – Maruti 800 and Maruti Zen. A offers to sell the Maruti 800 while B accepts the offer thinking the car to be sold is Maruti Zen. Here there is no consent.

Free consent refers to consent which has been rendered by free will of the parties i.e. consent is voluntary. Section 10 of the Act, specifically states that a contract is valid and enforceable if it is made with the free consent of the parties.

Section 14 defines 'Free Consent' as –

Consent is said to be free consent when it is not caused by –

1) Coercion, as defined in Section 15, or
2) Undue influence, as defined in Section 16, or
3) Fraud as defined in Section 17, or
4) Misrepresentation as defined in Section 18, or
5) Mistake, subject to the provisions of Sections 20, 21 and 22.

From the above definition, a consent of either party if obtained by any one of the above factors, will result in flaw in the consent.

Q. Write short notes on

A] Coercion

When a person is compelled to enter into a contract by the use of force by the other party or under a threat, 'coercion' is said to have been employed. **Section 15** of the Indian Contract Act, 1872 defines coercion as – "committing or threatening to commit, any act forbidden by the Indian Penal Code or the unlawful detaining, or threatening to detain any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement."

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

Coercion includes fear, physical compulsion and menace of the goods.

For eg. A threatens to shoot B if B does not release A from the debt which he owed. B releases A under the threat. The release has been brought about by coercion and therefore voidable at the option of B.

The essential features of coercion are :-

1. **Committing or threatening to commit any act –** In order to establish coercion, there must be an act of force or a threat of force.

For eg. An agent refused to hand over the account books of the principal, unless the principal released him from all liabilities. This amounted to committing an act of coercion.

2. **The act must be forbidden by the Indian Penal Code –** All acts committed or threatened to be committed would not amount to coercion. Eg. A parent unplugging the T.V. would not amount to coercion. Only those acts which are not permitted by IPC alone if used or threatened to be used amount to coercion.
3. **Coercion may be exercised over person or property –** Coercion may be directed against person or property.
4. **Coercion can be exercised even by stranger** - The threat amounting to coercion need not necessarily proceed from a party to the contract. It may proceed even from a stranger to the contract.
5. **Coercion can be against the contracting or some other person –** Coercion may be directed against anybody and not necessarily on the other contracting party.
6. The act of coercion must be done with the intention of causing the other party to enter into a contract.

B] Undue influence

Undue influence is the term used to demonstrate unfair use of one's position or power. There is once party who is in a dominant position, while the other party is in a sub-ordinate position. The dominant party exercising its influence over the subordinate party and getting an unfair advantage. Unlike Coercion where there is physical pressure, in undue influence, there is mental pressure.

Section 16 defines as **–** " Where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other."

A person is deemed to be in a position to dominate the will of another :

1. Where he holds a real or apparent authority over the other. For eg. The relationship between master and servant.
2. Where he stands in a fiduciary relation (relation of trust and confidence) to the other. It is supposed to exist, for eg. Between father and son, solicitor and client.
3. Where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily distress. For eg. The medical attendant and a doctor.

C] Fraud

Fraud means cheating. It is intentionally stating something untrue as true. **Section 17** defines Fraud as "Fraud means and included any of the following acts committed by a party to a contract or with his connivance, or his agent, which intent to decided another party thereto or his agent, or to induce him to enter into a contract."

The essentials conditions of Fraud :

1. **The fraudulent act must be committed by a party to the contract –** The act of fraud must be committed by the party to the contract or with his connivance or by his authorised agent. Fraud committed by third party will not affect the validity of the contract.
2. **False representation –** There must be a false representation. This false representation must be made intentionally. A person making a false statement is not guilty of fraud if he honesty believes in its truthfulness.
3. **Representation as to fact –** The false representation must be of fact. Mere opinion, expression of intention will not amount to fraud. For eg. A says to B that the house is lucky and worth Rs. 10 Lacs. B buys the house but later on comes to know that the house is worth only Rs. 9 LAcs. B wants to bring an action against A. Held, it was expression of opinion and not a fact and therefore not a fraud.
4. **Actually deceived –** In order to constitute fraud, the innocent party must have been actually deceived. If not deceived than the act would not amount to fraud.
5. **Suffered Losses –** The party who has been deceived must suffer a loss. If there is no loss, it will not give rise to an action for fraud.

Mere silence as to facts, likely to affect the willingness of a party to enter into a contract is not fraud, as no party is under obligation to disclose the whole truth to the other party. However there are some exceptions to the rule ‘mere silence is not fraud’. They are

a) If there are such circumstances which requires full disclosure then it is the duty of the person to speak and not remain silent. This duty exist in case fiduciary relationship.
b) Where silence is equivalent to speech.

D] Misrepresentation

Section18 defines misrepresentation as **–** “a false representation a fact made innocently or non disclosure of a material fact without any intention to deceive the other party.”

The essential features of misrepresentation are

1) **Party to the contract making misrepresentation –** The false statement must be by the party to the contract or by his agent or by his connivance. Further it must be addressed to the party who is misled. If not address to the party who has been misled it will not be misrepresentation.

   For e.g. X who had purchase shares from the first allottee, sued the company on the ground of having purchase shares on the basis of false statement in the prospectus. *Held*, the prospectus was addressed to the first applicants for shares. It could not be supposed to extent to the other. Hence no misrepresentation (*Peek v. Gurny).*
2) **False representation –** The statement made by the party must be false, but the person making statement must honestly believe it to be true.
3) **Representation as to fact –** it is very important that the false statement made must be of material facts. A mere expression of once opinion is not statement of facts.

4) **Object** – The representation must be made with the view to inducing the other party to enter into a contract but having no intention to deceive the other.
5) **Actually acted upon** – The innocent party must have actually acted on the basis of the statement which turns out to be false.

Q. Explain briefly the contracts specifically declared to be void under the Indian Contract Act.

The following kinds of agreements are expressly declared to be void :-

1) Agreement made by incompetent person, For e.g. minor, a person of unsound mind
2) Agreement made under mutual mistake as to matter of fact essential to the agreement.
3) Agreement made under mistake as to a law not enforce in India.
4) Agreement, the consideration or object of which is unlawful in part or in full.
5) Agreement made without consideration.
6) Agreement in restraint of marriage – Every agreement in restraint of the marriage of any person other than the minor is void. Every adult person has a right to get married and that to has a right to exercise his choice.
7) Agreement in restraint of trade – Every agreement by which anyone is restraint from exercising a lawful profession, trade or business of any kind is to that extent void.
8) Agreement in restraint of legal proceedings – Every agreement which restricts, whether wholly or partly, the enforcing of rights in a court of law or every agreement limiting the time allowed by Law of Limitation shall be void. Every individual has a right to sue in any court and enforce his rights within the time allowed by the limitation act. The following are the exceptions to this rule :-
    a) An agreement to refer any dispute to arbitration is permissible.
    b) An agreement restricting the right of other party to sue in a particular court is permissible.
9) Agreement, the meaning of which is uncertain.
10) Agreements by way of wager.
11) Agreements contingent on an uncertain future event, if the event becomes impossible.
12) Agreements contingent on an impossible event.
13) Agreements to do the impossible act.
14) Agreements to do an act which subsequently becomes impossible.

Q. Explain the various modes of discharge of a contract?

A Contract is said to be discharged when the rights and obligations created by it come to an end. A contract may be discharged in the following modes:-

1. **Discharge by performance –** Discharge by performance takes place when the parties to a contract fulfill their obligations arising under the contract within the time and in the manner prescribed. Performance may be actual performance or attempted performance.

2. **Discharge by Agreement or Consent –** A Contract comes into existence by an agreement and it may be discharged also by an agreement. The following are modes of discharge of a contract by an agreement –
   a) By Waiver – Waiver takes place when the parties to a contract agree that they shall no longer be bound by the contract. For eg. A an actor promised to make a guest performance in the film made by B. Later B forbids A from making the guest appearance. B is discharged of his obligation.
   b) By Novation – (Explained in detail in the next answer)
   c) By Rescission – Rescission of a contract takes place when all or some of the terms of the contract are cancelled. It may occur by mutual consent or where one party fails in the performance of his obligations, the other party may rescind the contract.
   d) By alteration – Alteration of a contract may take place when one or more of the terms of the contract is/are altered by mutual consent of the parties to the contract.
   e) By Remission – Remission means acceptance of a lesser fulfillment of the promise made, Eg. Acceptance of a lesser sum than what was contracted for, in discharge of the whole of the debt.
   f) By Merger – Merger takes place when an inferior right accruing to a party under a contract merges into a superior right accruing to the same party under the same or some other contract. For eg. P holds a property under a lease. He later buys the property. His rights as a lessee merge into his rights as an owner.
3. **Discharge by impossibility of performance** – If a contract contains an undertaking to perform an impossibility, it is ***void ab initio***. As per Section 56, impossibility of performance may fall into either of the following categories –
   (i) Impossibility existing at the time formation of the contract – This is know as pre-contractual impossibility. The fact of impossibility may be –
   a) known to the parties – Both the parties are aware or know that the contract is to perform an impossible act. For eg. A agrees with B to put life into dead wife of B, the agreement is void.
   b) unknown to the parties – Both the parties are unaware of the impossibility. The contract could be on the ground of mutual mistake of fact. For eg.A contract to sell his house at Andaman to B. Both the parties are in Mumbai and are unknown to the fact that the house is actually washed away due to Tsunami.
   (ii) Impossibility arising subsequent to the formation of the contract – Where impossibility of performance of the contract is caused by circumstances beyond the control of the parties, the parties are discharged from further performance of the obligation arising under the contract.
4. **Discharge by lapse of time** – The Limitation Act, 1963 lays down certain specified periods within which different contracts are to be performed and be enforceable. If a party to a contract does not perform, action can be taken only within the time specified by the Act. Failing which the contract is terminated by lapse of time.

   For eg. A sold a gold chain to B on credit without any period of credit, the payment must be made or the suit to recover it, must be instituted within three years from the date of delivery of the instrument.

5. **Discharge by Operation of Law –** A contract may be discharged independently of the wished of the parties i.e. by operation of law. This includes discharge –
   a) **By death –** In contract involving personal skill or ability, the contract is terminated on the death of the promisor. In other contracts the rights and liabilities of a deceased person pass on to the legal representatives of the deceased person.
   b) **By insolvency –** When a person is declared insolvent, he is discharged from all liabilities incurred prior to such declaration.
   c) **By unauthorized material alteration of the terms of a written agreement –** Any material alteration made by a party to the contract, without the prior permission of the other party, the innocent party is discharged.

   d) **By rights and liabilities becoming vested in the same person –** When the rights and liabilities under a contract vests in the same person.
6. **Discharge by Breach of Contract –** A breach of contract occurs when a party thereto without lawful excuse does not fulfill his contractual obligation or by his own act makes it impossible that he should perform his obligation under it. A breach to a contract occurs in two ways :-
   a) **Actual Breach –** When a party fails, or neglects or refuses or does not attempt to perform his obligation at the time fixed for performance, it results in actual breach of contract. For eg. A promises to deliver 100 packs of ice-cream to B on his wedding day. A does not deliver the packs on that day. A has committed actual breach of the contract.
   b) **Anticipatory Breach** - Anticipatory Breach is a breach before the time of the performance of the contract has arrived. This may take place either by the promisor doing an act which makes the performance of his promise impossible or by the promisor , in way showing his intention not to perform it.

Q. Define the term 'negotiable instrument' and explain its characteristics.

The term 'negotiable' means transferable and the word 'document' means 'in writing'. Therefore, negotiable means a written promise or order to pay money which may be transferred from one person to another.

Section 13 of the Negotiable Instruments Act, 1881 states – "A negotiable instrument means a promissory note, bill of exchange or cheque payable either to order or to bearer." A negotiable instrument may be made payable to two or more payees jointly, or it may be made payable in the alternative to one of two, or one or some of several payees. [Section 13(2)].

The characteristics of a Negotiable Instrument are:

1. **Witting and Signature according to the rules –** A Negotiable Instrument must be in writing and signed by the parties according to the rules relating to (a) promissory notes, (b) Bills of Exchange and (c) Cheques.
2. **Payable by Money –** Negotiable Instruments are payable by the legal tender money of India. The Liabilities of the parties are governed in terms of such money only.
3. **Unconditional Promise –** If the instrument is a promissory note, it must contain an unconditional promise to pay. If the instrument is a bill or cheque, it must be an unconditional order to pay money.
4. **Freely transferable –** A negotiable instrument is transferable from one person to another by delivery or by endorsement and delivery.
5. **Acquisition of Property** – Any person who possesses a negotiable instruments, becomes its owner and entitled to the sum of money, mentioned on the face of the instrument. When it is payable to bearer, the property in its passes from one holder to another by mere delivery. If it is payable to order, the property passes by endorsement, i.e. by the signature of its holder on its back and its delivery.
6. **Acquisition of Good Title** – The holder in due course, i.e. the transferee of a negotiable instrument in good faith and for value, acquires a good title to the instrument even if the title of the transferor is defective. Further his title will not be affected, by any defect in the title of the transferor.
7. **No Need of Giving Notice –** There is no need of giving a notice of transfer of a negotiable instrument to the party liable to pay the money.
8. **Right of the Holder in Due Course –** The holder in the due course remains unaffected by certain defences, which might be available against previous holders, as for example , fraud, to which he is not a party.
9. **Certain Presumptions** – Unless contrary proved certain presumptions are in the made case of all negotiable instruments. Consideration, date, signature of holder in due course, for example, is presumed in the case of all instruments. The presumptions from Special rules of Evidence under section 118 to 119.

Q. SHORT NOTES

A] PROMISSORY NOTE

"A promissory note is an instrument in writing (not being a bank-note or a currency-note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument.." **[Section 4]**

Illustrations

A signs instruments in the following terms:

(a) "I promise to Pay B or order Rs.500".

(b) "I acknowledge myself to be indebted to B in Rs.1,000, to be paid on demand, for value received."

(c) "Mr B I.O.U Rs.1,000."

(d) I promise to pay B Rs. 500 seven days after my marriage with C.

(e) I promise to pay B Rs.500/- on 01-10-2005.

(f) "I promise to pay B Rs. 500 and all other sums which shall be due to him."

(g) "I promise to pay B Rs. 500 first deducting thereout any money which he may owe me."

The instruments respectively marked (a), (b) and (e) are promissory notes. The instruments respectively marked (c), (d), (f) and (g) are not promissory notes.

The essentials of a valid Promissory note are :-

1. **Writing –** A Promissory note must be in writing.
2. **Express promise to Pay –** The promissory note must contain an express promise to pay. A mere implied promise to pay or an acknowledgement of debt is not a promissory note. Therefore illustrations at (c) is not a Promissory note.
3. **Promise to pay unconditional** – The promise to pay an amount must be unconditional. However, a Promissory note conditional on an event bound to happen is a valid promissory note. Therefore illustrations at (d) is not a valid Promissory note while (e) is a valid Promissory note.
4. **Promise to pay in terms of money** – The instrument must be payable in terms of money and money only.
5. **Sum payable to be certain –** The amount payable must be certain. Therefore instrument at (f) and (g) are not valid promissory note.
6. **Parties certain –** The parties to the instrument must be certain. The person making the payment and the person receiving the payment must be identifiable.
7. **Must be signed –** The instrument is complete only when it is signed by the maker.
8. **Must bear the stamp –** A promissory note must be properly stamped in accordance with the Indian Stamp Act, 1899 and must also be properly cancelled.
9. **Other formalities –** Formalities such as date, place, consideration, etc. are usally found in a promissory note.
10. **Requisites of a contract to be complied with** – All requisites of a valid contract like capacity to contract, consideration, free consent, lawful object must be present.

Specimen of a Promissory note

Rs.1,000 Mumbai, July 2, 2005

Three months after date I promise to pay Shyam Sunder or order the sum of one thousand rupees, for value received.

To,
Shyam Sunder
222, D.N.Nagar,
Andheri(W),
Mumbai – 400 053.

Stamp
sd/-

B] BILL OF EXCHANGE

As per **Section 5** 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."

The **essentials of a Bill of Exchange** are :-

1. **Number of parties** - A bill of exchange has 3 parties –
   a) the drawer, who draws the bill of exchange
   b) the drawee, who has to make the payment
   c) the payee, who is entitled to the payment.

   Sometimes the drawer and the payee can be one and the same person.
2. **Must be writing** – The Bill of Exchange must be in writing.
3. **Express order to pay** – This is the essence of a bill of exchange. There must be an 'order by the drawer to the drawee to pay'. The order must be a command and not an excessive request.
4. **Order must be unconditional** – The order to pay must be unconditional. In other words the happening of the condition must be certain.
5. **Order to pay money only** – Just as a promissory note, the instrument must be for money only.
6. **Sum payable to be certain –** The amount payable must be certain. There should be no ambiguity in the amount to be paid through the Bill of Exchange.
7. **Must be signed –** The instrument is complete only when it is signed by the drawer and the drawee.
8. **Must bear the stamp –** A Bill of Exchange must be properly stamped in accordance with the Indian Stamp Act, 1899 and must also be properly cancelled.
9. **Other formalities –** Formalities such as date, place, consideration, etc. are usally found in a Bill of Exchange.

10. **Requisites of a contract to be complied with** – All requisites of a valid contract like capacity to contract, consideration, free consent, lawful object must be present.

Specimen of a Bill of Exchange

Rs.5,000		Mumbai, July 20, 2005
Three months after date I promise to pay Ramkumar Tripathi or order the sum of five thousand rupees, for value received.		
To, Ramkumar Tripathi 20, D.N.Nagar, Andheri(W), Mumbai – 400 053.	Accepted Ram Kumar Tripathi Sd/-	Stamp sd/-

C] HUNDI

A local instrument – Hundi is an indigenous instrument similar to Negotiable Instrument. The term is derived from Sanskrit word 'hund' which means 'to collect'. If it is drawn in local language, it is governed by local usage and customs.

D] CHEQUE

A Cheque is a special type of Bill of Exchange. It is drawn on banker and is required to be made payable on demand.

Provisions

A "cheque" is defines as "a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand." **[Section 6]** 'Cheque' includes electronic image of a truncated cheque and a cheque in electronic form. The definition is amended by Amendment Act, 2002, making provision for electronic submission and clearance of cheque. The cheque is one form of Bill of Exchange. It is addressed to Banker. It cannot be made payable after some days. It must be made payable 'on demand'.

The **essentials of a Cheque** are :-

1. **Essentials of Bill of Exchange** – As a cheque is a bill of exchange, it must contain the essentials of a bill of exchange. In addition there are few more essentials as below.
2. **Drawn on a specified banker –** The drawee in case of a cheque is always a specified banker.
3. **Payable on demand –** The cheque is always payable on demand.
4. **No Stamp –** A Cheque does not require a stamp.
5. **Acceptance –** No acceptance is necessary by the draw before the demand for payment.
6. **Payable to bearer** – A cheque can be made payable to bearer.

Specimen of a Cheque

………., 20…

Pay ……………………………………………………………………………
……………………………………………………………… OR BEARER
Rupees………………………………………………………… Rs.
A/C No……….. L.F…………

ICICI Bank Ltd.
Andheri (W)
Mumbai – 400 058.

E] Payment in due course

As per **Section 10** "Payment in due course" means payment in accordance with the apparent tenor of the instrument in good faith and without negligence to any person in possession thereof under circumstances which do not afford a reasonable ground for believing that he is not entitled to receive payment of the amount therein mentioned.

Payment in due course, which results in discharge of a negotiable instrument, must satisfy the following conditions:

1. The payment must be in accordance with the apparent tenor of instrument.
2. The payment must be made by or on behalf of the drawee or acceptor.
3. The person to whom the payment is made should be in possession of the instrument and should also be entitled to receive the payment on it.
4. The payment should be made in good faith, without negligence and under bonafide circumstances.
5. There should not exist any ground for believing that the possessor is not entitled to receive payment.

Q. Distinguish between 'Promissory Note' and 'Bill of Exchange'.

	Promissory Note	**Bill of Exchange**
Parties	There are 2 parties – maker or promisor and payee or promisee	There are 3 parties – drawee, drawer and payee
Nature of payment	It contains an unconditional promise to pay	It contains an unconditional order to pay
Acceptance	It is payable by a person, who is making it. Therefore, no acceptance is necessary	It is payable by the other person directed. Therefore, it should be presented to the drawee for acceptance. It may be accepted conditionally.
Liability	The maker of the Promissory note is	The maker of the bill of exchange is

	primarily and absolutely liable to payee. Promisor stands in the immediate relation to the payee.	secondarily and conditionally liable to payee. He becomes liable to pay only when the drawee refuses to honour the bill. Drawer stands in immediate relation to the drawee or acceptor and not the payee.
Notice	In case the note is dishonoured, no notice of dishonour is necessary to maker.	Notice to dishonour must be given to all the parties liable on the bill.
Maker as payee	A promissory note cannot be made payable to the maker.	The maker or drawer and the payee may be one and the same person.

Q. Distinguish between 'Bill of Exchange' and 'Cheque'.

	Cheque	**Bill of Exchange**
Drawee	Only a banker can be a drawee.	Anyone can be drawee, including a banker.
Acceptance	A cheque requires no acceptance.	It must be presented for acceptance. Drawee is liable only after his acceptance.
Payment	Payable on demand without any days of grace.	A bill is normally entitled to three days of grace after maturity, unless payable on demand.
Presentment	If not presented to the banker for payment, it does not discharge the drawer unless he suffers injury or damages.	Drawer is discharged, if bill is not presented for payment to the acceptor.
Notice	In case of dishonour no notice of dishonour is necessary	Notice of dishonour is to be given to all the parties liable to pay.
Crossing	A cheque may be crossed.	Bill can never be crossed.
Stamp	Cheque requires no stamp.	Bill has to be properly stamped.
Countermanding payment	Payment of cheque may be countermanded by the drawer.	Payment of bill of exchange cannot be countermanded by the drawer.
Noting and protesting	A cheque is not required to be noted or protested for dishonour.	A bill of exchange may be noted or protested for dishonour.
Payable to bearer on demand	A cheque can be dawn payable to the bearer on demand.	A bill of exchange cannot be drawn payable to bearer on demand.

Q. When a banker is justified in dishonouring the cheque

The banker is justified in dishonouring the customer’s cheques in the following cases :-

1. The signature of the drawer on the cheque does not match with the speciment signature in the records of the Bank.
2. Funds are not properly applicable to the payment of cheque. For eg. Funds are subject to lien, or banker is entitled to set-off.
3. Customer becomes insolvent.
4. Death, lunacy or insolvency of the customer and the banker has notice of the same.
5. Cheque presented beyond a period of 6 months from the date of issue.
6. If the banker is not holding sufficient funds of the drawer, unless the banker has agreed to honour the cheque without sufficient funds.
7. If the customer countermands payment and communicates the same to the bank properly.
8. Holder gives notice to the banker of loss of cheque.
9. If the cheque is not presented within the usual banking hours.
10. Where the cheque is drawn on another branch office of the same bank where the customer does not have an account.
11. Where a garnishee order has been issued by the Court attaching customer’s balance.

Q. Explain the various modes of discharge of a party under a negotiable instrument.

Discharge of an Instrument and Parties

The term discharge means release. The term discharge is used in two terms viz (i) Discharge of a negotiable instrument; (ii) discharge of one or more or all the Parties from liabilities thereof.

(i) Discharge of a negotiable instrument :- A Negotiable Instrument is said to be discharge when all rights of action under it come to an end as a result of which, it ceases to be negotiable.

(ii) Discharge of one or more or all the Parties from liabilities:- A Party may be discharged from liability; however, the instrument thereby is not discharged; it may still continue to exist and be negotiable and the other parties continue to be liable for it.

Modes of Discharge of an Instrument

Discharge from liability (Section 82)

The maker, acceptor or endorser respectively of a negotiable instrument is discharged from liability thereon-

(a) By cancellation-to a holder thereof who cancels such acceptor's or endorser's name with intent to discharge him, and to all parties claiming under such holder,

(b) By release- to a holder thereof who otherwise discharges such maker, acceptor or endorser, and to all parties deriving title under such holder after notice of such discharge;

(c) By payment-to all parties thereto, if the instrument is payable to bearer, or has been endorsed in blank, and such maker, acceptor or endorser makes payment in due course of the amount due thereon.

Discharge by allowing drawee more than forty-eight hours to accept (Section 83)

If the holder of a bill of exchange allows the drawee more than forty eight hours, exclusive of public holidays, to consider whether he will accept the same, all previous parties not consenting to such allowance are thereby discharged from liability to such holder.

When cheque not duly presented and drawer damaged thereby (Section 84)

(1) Where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or person on whose account it is drawn had the right, at the time when presentment ought to have been made, as between himself and the banker, to have the cheque paid and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of the banker to a large amount than he would have been if such cheque had been paid.

(2) In determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case.

(3) The holder of the cheques as to which such drawer or person is so discharged shall be a creditor, in lieu of such drawer or person, of such banker to the extent of such discharge and entitled to recover the amount from him.

Illustrations

(a) A draws a cheque for Rs. 1,000, and, when the cheque ought to be presented, has funds at the bank to meet it. The bank fails before the cheque is presented. The drawer is discharged, but the holder can prove against the bank for the amount of the cheque.

(b) A draws a cheque at Umballa on a bank in Calcutta. The bank fails before the cheque could be presented in ordinary course. A is not discharged, for he has not suffered actual damage through any delay in presenting the cheque.

Cheque payable to order (Section 85)

(1) Where a cheque payable to order purports to be endorsed by or on behalf of the payee, the drawee is discharged by payment in due course.

(2) Where a cheque is originally expressed to be payable to bearer, the drawee is discharged by payment in due course to the bearer thereof, notwithstanding any endorsement whether in full or in blank appearing thereon, and notwithstanding that any such endorsement purports to restrict or exclude further negotiation.

Section 85A- Drafts drawn by one branch of a bank on another payable to order Where any draft, that is an order to pay money, drawn by one office of a bank upon another office of the same bank for a sum of money payable to order on demand, purports to be endorsed by or on behalf of the payee, the bank is discharged by payment in due course.]

Parties not consenting discharged by qualified or limited acceptance (Section 86)

If the holder of a bill of exchange acquiesces in a qualified acceptance, or one limited to part of the sum mentioned in the bill, or which substitutes a different place or time for payment, or which, where the drawees are not partners, is not signed by all the drawees, all previous parties whose consent is not obtained to such acceptance are discharged as against the holder and those claiming under him, unless on notice given by the holder they assent to such acceptance.

Explanation: An acceptance is qualified,-

(a) Where it is conditional, declaring the payment to be dependent on the happening of an event therein stated;

(b) Where it undertakes the payment of part only of the sum ordered to be paid;

(c) Where, no place of payment being specified on the order it undertakes the payment at a specified place, and not otherwise or elsewhere; or where, a place of payment being specified in the order, it undertakes the payment at some other place and not otherwise or elsewhere;

(d) Where it undertakes the payment at a time other than that at which under the order it would be legally due.

Affect of material alteration (Section 87)

Any material alteration of a negotiable instrument renders the same void as against anyone who is a party thereto at the time of making such alteration and does not consent thereto, unless it was made in order to carry out the common intention of the original parties;

Alteration by endorsee:

Any such alteration, if made by an endorsee, discharges his endorser from all liability to him in respect of the consideration thereof.

The provisions of this section are subject to those of sections 20, 49, 86 and 125.

Acceptor or endorser bound notwithstanding previous alteration (Section 88)

An acceptor or endorser of a negotiable instrument is bound by this acceptance or indorsement notwithstanding any previous alteration of the instrument.

Payment of instrument on which alteration is not apparent (Section 89)

Where a promissory note, bill of exchange or cheque has been materially altered but does not appear to have been so altered, or where a cheque is presented for payment which does not at the time of presentation appear to be crossed or to have had a crossing which has been obliterated, payment thereof by a person or banker liable to pay, and paying the same according to the apparent tenor thereof at the time of payment and otherwise in due course, shall discharge such a person or banker from all liability thereon, and such payment shall not be questioned by reason of the instrument having been altered, or the cheque crossed.

Extinguishment of rights of action on bill in acceptor's hands (Section 90)

If a bill of exchange which has been negotiated is, at or after maturity, held by the acceptor in his own right, all rights of action thereon are extinguished.

Liability of parties

Basic liability of payment is as follows – (a) Maker in case of Promissory Note or Cheque and (b) Drawer of Bill till it is accepted by drawee and acceptor after the Bill is accepted . They are liable as ‘principal debtors’ and other parties to instrument are liable as sureties for maker, drawer or acceptor, as the case may be. When document is endorsed number of times, each prior party is liable to each subsequent party as principal debtor. In case of dishonour, notice is required to be given to drawer and all earlier endorsees.

Q. Define partnership under the Indian Partnership Act, 1932 and explain its essential features.

Section 4 of the Indian Partnership Act, 1932 defines '**Partnership**' as "Partnership is a relation between persons who have agreed to share the profits of business carried on by all or any of them acting for all."

A contract of Partnership is a special type of contract. The persons entering into the contract are called 'Partners' and the collectively are called a 'Firm'.

From the above definition the following can be drawn as essentials or characteristics of a Partnership Firm.

1) **Association of two or more persons** :- There must be **atleast two** persons to form a partnership. The maximum no. of persons in a partnership is not provided in the Partnership Act but Section 11 of the Companies Act, 1956 provides for the same. Accordingly, if the partnership firm is engaged in a **banking business** the maximum number of partners permissible is **10** and in case the partnership firm is **in any other business** the maximum number of partners permissible is **20**.
2) **Presence of a Contract**:- There is a contractual relationship between the partners. Therefore there must be a agreement between the partners. The agreement may be express or implied. This agreement must fulfill all the essentials of a valid contract under the Indian Contract Act.
3) **To conduct Business** :- The idea of few persons coming together and doing some activity for charitable purpose cannot be termed as partnership. The intention to conduct business is essential for the partnership. The term business is defined in Section 2(b) as 'business includes every trade, occupation and profession.' The word business generally covers the intention of doing transactions to achieve some goal.
4) **Sharing of profits :-** The purpose of partnership should be to earn profits. The term profits means 'net profits'.

Q. "The law of partnership is an extention of the law of principal and agent". Explain

Section 6 of the Partnership Act, specifies that in determining whether a group of persons is or is not a firm, or whether a person, is or is not a partner in a firm, regard shall be had to the real relation between the parties shown b all relevant facts taken together. The intention of the partners will have to be decided with reference to the terms of the agreement and all the surrounding circumstances.

The true test in determining the existence of partnership is 'Agency and Authority'. In determining the existence of partnership, it is essential to find out the real intention of the parties to the agreement and circumstances of the case. The question to be asked is – Whether the relation of principal and agent exists between the parties? **Section 18** also provides that subject to the provisions of Partnership Act a partner is the agent of the firm for the purposes of the business of the firm.

In **Cox Vs. Hickman** it was held that the receipt by a person of a share in the profit is a prima-facie evidence that he is a partner but this is not a conclusive test the question whether a person is a partner or not therefore depends in all cases upon whether or not he has the authority to act for other partners and whether or not the other partners have the authorities to act for him. Thus a partners assumes a dual role; (a) he is an agent of the firm with regards to third parties and can thus bind the firm by his acts. (b) he is principal in respect of the act of the other partners.

Q. Distinguish between Partnership and Hindu Undivided Family.

	PARTNERSHIP	**HINDU UNDIVIDED FAMILY**
1. Definition	Partnership is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all.	A Joint hindu Family which carries on business handed down from its ancestors.
2. Agreement	It can arise only by an agreement of the Partners.	It arises by operation of law. It cannot be created by an agreement of the members.
3. Admission of interest	A new partner can be admitted in the Partnership, only with the consent of all the Partners.	A person becomes the member only by birth in the family.
4. Acquisition of interest	A partner acquires interest in the business only by an agreement.	A person acquires interest in the business by birth in the family.
5. Number	There is a statutory limit on maximum number of Partners i.e. 10 in case of a firm carrying on banking business and 20 in any other business.	There is no statutory limit on maximum number of members.
6. Minor members	A minor cannot become a full fledged partner. He can only be admitted to the benefits of partnership with the consent of all the partners.	A male minor is the full-fledged member. He becomes member merely by birth in the family.
7. Mutual agency	There is a relationship of agency between the partner i.e. all the partners are mutual agents.	There is no such agency relationship between all the members of the family. The Karta (i.e. manager) of the family is the only representative of the family.
8. Implied Authority	Every Partner has an implied authority to bind the firm by his acts done in the ordinary course of the business.	Only the Karta has an implied authority to bind the family by his acts. Other members of the family do not have such authority.

9. Liability	A Partner is personally liable for the business obligations of the firm. The share of each partner in the partnership property and profits alongwith his private property is liable for the discharge of debts of the partnership.	A member is not personally liable for the business obligations of the family. Only his share of property and profits in the family is liable for the discharge of the debts of the family. However, the karta is personally liable for the business obligations of the family.
10. Effect of death/ insolvency	It is dissolved on the death or insolvency of any one partner.	It is not dissolved on the death or insolvency of any member.
11. Right to demand accounts	A Partner has right to demand inspect and copy any accounts of the firm. Moreover, he also has the right to demand the dissolution of the firm.	A member has no right to ask for accounts of the past dealings of the family. There is no concept of dissolution of the family.
12. Dissolution	A partner has right to demand for dissolution.	A member has right to demand the partition of the joint family property.
13. Registration	Registration is not optional but the unregistered firm suffers certain disabilities.	There is no concept of registration of Hindu Undivided family.

Q. Distinguish between Partnership and Company.

	PARTNERSHIP	**COMPANY**
1.Definition	Partnership is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all.	A Company means a company formed and registered under this Act or an exiting Company.
2.A Legal Person	A firm is not a legal Entity.	A Company on the other hand , is a Legal Person.
3. Liability	In a Partnership, the liability of partners is unlimited.	In case of a company, which is limited, the liability of the members is limited to the extent of its share capital.
4.Transfer of Shares	In a firm, a partner cannot transfer or assign the whole of his share without the consent of all the partners of the firm	In a company, a shareholder can transfer his share subject to the provisions of the Articles of the Company.
5.Mutual Agents	In a firm, all partners are mutual agents.	In a company, a member is not an agent of the other member.

6.Registration	Registration of a firm is not compulsory under the Partnership Act, 1932.	Registration of a company is compulsory under the Companies Act, 1956.
7.Management	Management vests in the hands of the Partners except in the case of Sleeping Partners.	Management vests in the board of Directors, elected periodically by the shareholders.
8.Creditors	Creditors of firm are also creditors of the partners individually as well.	Creditors are only the creditors of the company and not of the individual shareholders.
9.Statutory obligations	A partnership has less statutory obligations	A company is strictly regulated under the Companies Act, 1956.
10.Accounts	Accounts of a partnership firm need not be audited by the auditor.	Accounts of a company must be audited by an auditor.
11.To whom property belong.	The property of affirm belongs collectively to the partners.	The property of a company, on the other hand, belongs to the company, and not to the shareholders.
12.Effect of death of partners and members	In the case of a firm, death or insolvency of a partner resolution the dissolution of the firm, unless there is a contract to the contrary.	In the case of a company, death or insolvency of a member of the company does not result in the dissolution of the company.
13.Contract with the firm or company	A Partner cannot enter into a contract with the firm, in which he is a partner, because the firm is not a legal person.	A shareholder, on the other hand, can enter into a contract with the company, of which he is a member, because the company is a legal person.
14.Power to dispose of property	A partner can dispose of the property of the firm.	A Shareholder cannot dispose of the property of the company.
15.Effect of Restrictions on authority	In a partnership firm, when restrictions are imposed on the authority of a partner, they are of no avail against third person who has no knowledge of it.	In the case of a company, the restrictions of a company are absolutely valid, because the memorandum and articles of company serve as a public notice.
16.Limit on number of members	In the case of a firm, the number of partners must not exceed 10 for carrying on banking business and 20 for any other business.	In the case of a company, a Private Company : Minimum 2 and Maximum 50 and in case of Public Company : Minimum 7 and Maximum unlimited.

Q. What are the effects or consequences of non registration of a Partnership Firm?

The Indian Partnership Act does not make registration of a firm compulsory nor does it impose any penalty for non registration. It is optional for the firm to get itself registered or not. However, **Section 69** puts down certain disabilities to a non registered firm which normally forces the partners the partners to get the firm registered. The effects of non registration are as follows:

(a) **No suit by a partner against other partners or firm** – a partner of a unregistered firm cannot sue the firm or any partner of the firm to enforce a right arising from the contract or conferred by the Partnership Act. He can do so only if the firm is registered and the person suing is shown as a partner in the register of firms.

(b) **No suit against any third party –** an unregistered firm cannot sue a third party to enforce a right arising from a contract. The firm can only do so if the firm is registered and the person suing is shown as a partner in the register of firms.

(c) **No right to counter claim or to claim setoff –** an unregistered firm or any partner thereof cannot claim setoff in the proceedings instituted against a firm by a third party to enforce a right arising from a contract. Setoff means a claim by the firm which would reduce the amount of money payable to the claimant.

(d) **Arbitration proceedings –** in **Jagdish Chandra Gupta Vs. Kajaria Traders (India) Limited** it was held that arbitration proceedings were barred if the firm was unregistered.

Non registration of the firm however, does not effect the following rights:

(i) The right of a third party to sue the unregistered firm or its partners.

(ii) The right of a partner to sue for dissolution of a firm or for accounts of a dissolved firm or any right to realise the property of the dissolved firm.

(iii) The Power of a official assignee or court receiver to realise the property of an insolvent partner.

(iv) The right of a firm or partners of a firm having no place of business in India.

(v) The right of a unregistered firm to enforce a right arising otherwise then out of a contract.

(vi) One partner can bring a suit for damages for misconduct against the other partner.

(vii) The right to claim Setoff in a suit for an amount not exceeding Rs.100/- in value.

Q. Explain the different types of Partnership.

The following are the different types of Partnership :

(i) **Partnership for a fixed Term –** Where Partners have agreed to carry on the business for a definite period of time, the partnership is said to be for a fixed period. It shall come to an end only after the expiry of the stipulated period. Where the partners continue the business even after the stipulated time the partnership gets converted into a partnership –at-will.

(ii) **Particular Partnership –** Where two or more persons agree to do a business in a particular adventure or undertaking such a partnership is called a 'particular partnership'. *For example : A and B enter into a partnership for producing of film.*

(iii) **Partnership-at-will –** when no provision is made by the contract between the partners for the duration of the partnership or for the determination of the partnership, the partnership is called partnership-at-will. The partnership-at-will has no fixed or definite date of termination and therefore death or retirement of any of the partner does not affect the existence of the partnership.

A partnership-at-will can be dissolved by any partner by giving notice in writing to all the remaining partners about the intention of such dissolution.

Q. What are the different types of Partners?

The different types of Partners are :

(i) **Active Partner –** A person who is actively, actually or effectively engaged in the conduct of business of the partnership firm is known as an Active Partner. He is the agent of the other partners and has authority to bind the firm and the other partners in the ordinary course of business.

(ii) **Sleeping or Dormant Partner –** A sleeping partner is one who does not take and active part in the conduct of business of the firm. He invests capital and share the profits of the firm and is also equally liable along with other partners for all the liabilities of the firm.

(iii) **Nominal Partner –** A person who lends his name to the firm, without having any real interest in it is called a Nominal Partner. He does not invest any capital in the business nor does he takes any active part in the business nor does he share any profit of the firm. However he is liable along with other partners for all the liabilities of the firm.

(iv) **Partner in Profit only –** Where a partner agrees with the other partners that he shall share only profits and shall not be liable for any losses of the firm he is called Partner in Profit only. However he remains liable to the creditors for the debts of the firm since under the Partnership Act the liabilities of the partners is joint, several and unlimited.

(v) **Sub-Partner –** Where a partner agrees to share his profits earned form the firm with a third person then that third person is known as the sub-partner. A sub-partner has no rights against the firm and cannot represent himself as a partner of the firm. He is in no way connected with the firm and is thus not liable for the liabilities of the firm.

(vi) **Partner by Estoppel or by Holding Out -** Sometimes strangers represents themselves to be partners in a firm and thereby induce third parties to give credits to the firm such strangers are called as partners by Estoppel or Partners by Holding Out . **Section 28** of the Partnership Act prescribes that a person be liable as a partner by Holding out must fulfill the following condition:

(a) he must have by words, written or spoken or by his conduct, represented himself to be a partner or

(b) he must have knowingly permitted himself to be represented as a partner to the other person and

(c) the other person must have acted on the faith of such representation and have given credit to the firm.

(vii) **Minor Partner –** As per **Section 11** of the Indian Contract Act, 1872 a minor cannot enter into an agreement. However **Section 30** of the Partnership Act provides that with the consent of all the partners for the time being a minor may be admitted to the benefits of Partnership.

Q. Enumerate the rights and duties of partners in a partnership Firm.

The Rights of a partner are as under:

(i) **To take active part in the business –** Every partner has a right to take active part in the conduct and management of the business of the firm.

(ii) **To share Profits –** Every partner has a right to share profits earned and are liable to contribute to the losses incurred by the firm.

(iii) **To be consulted** - Every partner has a right to be consulted in all matters affecting the business of the partnership firm before any decision is been taken. In case of difference of opinion it may be settled by decision of majority of the partners.

(iv) **To have access to the accounts -** Every partner has a right to have access, inspect and copy the books of accounts of the firm.

(v) **To be indemnified** - Every partner has a right to be indemnified for the expenses incurred or payments made in the ordinary course of business.

(vi) **To use the property of the firm** - Every partner has a right to use the property of the firm for the purposes of the business of the firm. If the partner uses the firms property of the private purpose then he is liable to compensate the firm for the same.

(vii) **Interest on capital** - Every partner has a right to receive interest on capital at a certain rate as may be specified and agreed in the partnership agreement. Such interest is payable only out of profits, in any, earned by the firm.

(viii) **Interest on loan** - Every partner has a right to receive interest on loan at the rate of 6% p.a. on any loans or advance payments made by him beyond the capital. Such interest is payable not only out of the profits but also from the assets of the firm.

(ix) **To act as agent of the firm** - Every partner has a right to act as the agent of the firm and to bind the firm and other partners for acts done by him in ordinary course of business.

(x) **To retire –** A partner has a right to retire (a) with the consent of all the other partners, or (b) in accordance with the express agreement between the partners or (c) in case of Partnership-at-will by giving notice to all the other partners of his intention to retire.

The duties of a partner are as under :

(i) **To carry on the business to the common advantage –** Every partner is bound to

(a) Carry on the business of the firm to the greatest common advantage.

(b) To be just and faithful to each other in the mutual dealings.

(c) To use reasonable care and skill in the performance of his duties and

(d) Render true accounts and full information of all things, affecting the firm, to any partner or his legal representative.

(ii) **To indemnify –** Every partner is bound to indemnify the firm

(a) For any loss cause to it by his fraud in the conduct of business of the firm.

(b) For any loss incurred due to his willful neglect in the conduct of the business of the firm.

(iii) **To attend diligently to his duties –** Every partner is bound to attend diligently to his duties in the conduct of the business of the firm. He must use his knowledge and skill for the benefit of the firm.

(iv) **To account for private profits –** If a partner derives any benefit, without the consent of the other partners from any transactions of the firm or from any use of the partnership property, name or business connection. He must account for it and compensate it to the firm. There exists a fiduciary relationship between partners and therefore no partner is entitled to make any personal profit.

(v) **To account for profit in competing business –** A partner must not carry a business as of competing nature with the firm. If he does that then he is bound to account for and compensate to the firm all the profits made by him in that competing business.

(vi) **To act within authority –** Every partner is bound to act within the scope of his actual or implied authority.

(vii) **To hold and use the property of the firm exclusively for firms business –** Every partner is bound to hold and use the property of the firm exclusively for the purposes of the business of the firm.

(viii) **Not to assign his rights –** A partner cannot assign rights and interest in the firm to an outsider so as to make him the partner of the firm. He can, however, assign his share of the profit and share in the assets of the firm.

(ix) **To be liable jointly and severally –** Every partner is liable jointly with all the other partners and also severally for all the acts of the firms done during the period he his the partner.

Q. Write short notes on

A] Partnership Property

Property of the firm is taken to mean the joint property of all the partners. The Partners in fact by an agreement amongst themselves may determine, what constitutes the property of the firm. In the absence of such agreement, the following shall constitute the property of the firm.

(i) **Property Originally brought in by the firm –** Any property which is brought by the partners, at the commencement of the partnership and put into joint stock of the firm

(ii) **Property acquired afterwards –** Any property which is acquired by or for the firm, after the commencement of the partnership is the property of the firm.

(iii) **Partner's personal property in the firm's use –** Where the personal property of a partner is used in the business of the firm, it depends upon the intention of the parties whether it has become the property of the firm or not.

Example: A partner's personal car is been used exclusively for firm's purpose, the car becomes the property of the firm and the partner becomes creditor for that amount.

(iv) **Conversion of joint properties into separate property –** Where a property is bought with the money of the firm, but in the name and for the exclusive benefit of a partner, the partner becomes a debtor to the firm for the purchase money; and the property becomes the personal property of the partner. Similarly, where a part of the joint properties is allotted to a partner, on the dissolution of a firm, it becomes his separate, personal property.

***Example*:** Car bought of the joint fund of the firm is used by A, a partner for private use only. The car should become the property of A and he becomes a debtor to the firm for the car amount.

(v) **Goodwill –** The term goodwill has been not been defined in the act. It means every advantage and good representation and reputation which the firm has acquired while carrying out its business. Goodwill is the property of the firm and it can be sold either separately or along with the other property of the firm. Hence goodwill is the part of the property of the firm

B] Partner by holding out

Sometimes strangers represents themselves to be partners in a firm and thereby induce third parties to give credits to the firm such strangers are called as '***Partners by Estoppel or Partners by Holding Out***'. **Section 28** of the Partnership Act prescribes that a person be liable as a partner by Holding out must fulfill the following condition:

(a) he must have by words, written or spoken or by his conduct, represented himself to be a partner or

(b) he must have knowingly permitted himself to be represented as a partner to the other person and

(c) the other person must have acted on the faith of such representation and have given credit to the firm.

It is immaterial whether the person making representation does or does not know the representation has reached the other person.

The commonest example of partner by holding out arises where the partner has retired from a firm and no public notice has been issued regarding his retirement and the continuing partner still use his name as a partner on firms letter heads and other documents. He will be personally liable to the creditors who have acted on the faith of he being a partner.

Section 28 (2) further specifies that the doctrine of holding out does not extend to bind the estate of the deceased partner, where after partners death, the business of the firm is continued in the old firms name.

It does not apply where a partner has been adjudicated as an insolvent. After attaining majority and before giving public notice, a person may be held liable for holding himself as a partner.

Q. Explain the position of a minor in a Partnership Firm.

Minor Partner – As per **Section 11** of the Indian Contract Act, 1872 a minor cannot enter into an agreement. However **Section 30** of the Partnership Act provides that with the consent of all the partners for the time being a minor may be admitted to the benefits of Partnership. This provision is based on the rule that a minor cannot be a promisor but he can be a promisee or a beneficiary.

Rights of a Minor before attending the age of Majority.

(i) He has a right to share the profits and the property of the firm as may be agreed.

(ii) He has a right to have access to and inspect the books of accounts of the firm.

(iii) Right to sue for payments of his share of profit or property in case of his severance of connection with the firm.

(iv) He has a right to elect to become a partner on attaining the age of Majority.

(v) He has a right to elect not to become a partner on attaining the age of Majority.

Liabilities of a Minor before attending the age of Majority.

(i) A minor's share is liable for the acts of the firm.

(ii) He is not personally liable for sharing any liabilities or losses of the firm in his personal capacity nor is his personal property liable.

Position of the Minor on Attending the age of Majority

On attending Majority the minor partner has to decide within six month whether he want to continue as partner in the firm or discontinue as a partner from the firm. The period of six months start from the date of his majority or from the date when he first comes to know that he has been admitted to the benefits of the partnership, whichever is later. Within the said period of six months he should give a public notice of his choice whether to continue as a partner or not to continue as a partner.

If he fails to give a public notice he is deemed to have become a partner in the firm on the expiry of the said six month.

Position of a minor if he elects to become the Partner after attending the age of Majority.

(i) He becomes personally liable to third parties for all acts of the firm done since he was admitted to the benefits of the partnership.

(ii) His share to the profits of the firm is the same as he was entitled to as a minor partner.

Position of a minor if he elects not to become the Partner after attending the age of Majority.

(i) His rights and liabilities of the partner as a minor continue up to the date of the notice.

(ii) His share is not liable for any acts of the firm done after the date of the public notice.

(iii) He is entitled to sue the partners for his share of the profits and property of the firm.

Q. Discuss the rights and liabilities of partners on dissolution of a firm.

The rights of a partner on dissolution of a firm are as under :

(i) **Right to an equitable lien –** Under **Section 46** every partner is entitled to have the property of the firm applied in payment of outside debts and liabilities of the firm and to have the surplus distributed among the partners in accordance with their rights. Such a right of a partner is called as 'equitable lien' of partners.

(ii) **Right of partners to have the business wound up –** The authority of each partner to bind the firm and the other mutual rights and obligations of the partners continue to wind up the affairs of the firm **(Section 47)**.

(iii) **Right to have the debts of the firm settled out of the property of the firm –** When a firm is dissolved, the debts of the firm are settled out of the property of the firm, and if there is any surplus it is utilized towards the payment of the private debts of the partners. Similarly, the separate property of any partner (private estate) shall be applied first in the payment of his separate debts and surplus, if any, in the payment of debts of the firm **(Section 49)**.

(iv) **To account for personal profits after dissolution –** In case of transactions by any surviving partner or by the representatives of a deceased partner undertaken after the firm is dissolved on account of the death of a partner and before its affairs have been completely wound up, he shall account for the profits he derives from such transactions and pay it to the firm. However, this rule will not apply in cases where any partner or his representative has bought the goodwill of the firm on its dissolution. **[Section 16(a) and Section 50].**

(v) **Right to return of premium on premature dissolution (Section 51) –** Where a partner has paid a premium on entering into partnership for a fixed term and the firm is dissolved before the expiration of the term, he is entitled to repayment of the whole or part of the premium. However, no refund shall be paid to him if the dissolution –

(a) Is due to the death of a partner

(b) Is due to the misconduct of the partner who has paid the premium or

(c) Is in the pursuance of an agreement which contains no provision for the refund of the premium.

(vi) **Right where partnership contract is rescinded for fraud or misrepresentation (Section 52) –** Where partnership is rescinded on the ground of fraud or misrepresentation of one of the partners, the partner entitled to rescind has the following rights -

(a) Right to lien on the surplus assets – He has a lien on the surplus assets after the debts of the firm have been paid, for any sum paid by him for the purchase of his share in the firm and for any capital contributed by him.

(b) Right of subrogation – If a partner pays off a creditor from his pocket, he steps into the shoes of that creditor and can claim money from the firm as that creditor.

(c) Right to be indemnified – He also has a right to be indemnified by the partners or partner guilty of fraud or misrepresentation against all the debts of the firm.

(vii) **Right to restrain from use of firm name or firm property (Section 53)** – After the firm is dissolved, every partner may restrain any other partner from carrying on a similar business in the firm's name or from using any of the property of the form for his own benefit, until the affairs of the firm have been completely wound up, unless a partner has purchased the goodwill of the firm.

The liabilities of a partner on dissolution are as under:

(i) **Liability for acts of partners done after dissolution –** Until public notice of dissolution of the firm is given, partners continue to be liable to third parties for any act done by any of them. However this liability does not apply to a partner who is dead or who is adjudged as insolvent or a sleeping partner.

(ii) **Continuing authority of partners for purpose of winding up –** After dissolution of a firm, the authority of each partner to bind the firm and the other mutual rights and obligations of the partners continue, so far as may be necessary –

(a) to wind up the affairs of the firm and

(b) To complete transactions began but unfinished, at the time of the dissolution.

(iii) **Liability to share profits earned after dissolution –** If any partner earns any profit from any transaction connected with the firm, after the dissolution, he must share it with the other partners and the legal representative of any deceased partner.

Q. Define 'Sale' and Distinguish it from 'agreement to sell'.

According to **Section 4** of the Sale of Goods Act, 193, 'A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in the goods to the buyer for a price.'

The term 'Contract of sale' is a generic term and includes both a sale and an agreement to sell. Where under a contract of sale, the property in the goods is transferred from the seller to the buyer (i.e. at once), the contract is called a **'sale'** but where the transfer of the property in the goods is to take place at a further time or subject to some condition thereafter to be fulfilled, the contract is called an **'agreement of sell'. [Section 4(3)]**. An agreement to sell becomes a sale when the time elapses or the condition, subject to which the property in the goods is to be transferred, is fulfilled. **[Section 4(4)]**.

The essentials of a contract of sale are :-

1. **Numbers of parties – In a contract of sale, minimum two parties are** necessary namely the seller and buyer. Sale involves transfer of ownership from one to another.
2. **Goods –** The subject matter of a contract of sale must be goods. Goods mean every kind of movable property other than actionable claims and money. Transfer of immoveable property is not regulated by the Sale of goods Act.
3. **Price –** The consideration for a contract of sale is price. Price means money consideration. If it is anything other than money, it will not be sale. But if the exchange is made partly for goods and partly for price, it will still amount to sale. However, the price may be paid or promises to be paid.
4. **Transfer of property –** In a contract of sale, there must be transfer of property, from the seller to the buyer

	Sale	**Agreement to Sell**
Definition	Where under a contract of sale, the property in the goods is transferred from the seller to the buyer (i.e. at once), the contract is called a **'sale'**.	where the transfer of the property in the goods is to take place at a further time or subject to some condition thereafter to be fulfilled, the contract is called an **'agreement of sell'**
Transfer of ownership	Transfer of ownership of goods takes place immediately.	Transfer of ownership of goods is to take place at a future time or subject to fulfillment of some condition.
Executed contract or Executory contract	It is an executed contract because nothing remains to be done.	It is an executory contract because something remains to be done.
Conveyance of property	Buyer gets a right to enjoy the goods against the whole world including seller.	Buyer does not get such right.

Transfer of risk	Transfer of risk of loss of goods takes palce immediately because ownership is transferred. As a result, in case of destruction of goods, the loss shall be borne by the buyer even though the goods are in the possession of the seller.	Transfer of risk of loss of goods does not take place because ownership is not transferred. As a result, in case of destruction of goods, the loss shall be borne by the seller even though the goods are in the possession of the buyer.
Right of seller against the buyer's breach	Seller can sue the buyer for the price, even though the goods are in his possession.	Buyer can sue the seller for damages only.
Rights of buyer against the seller's breach	Buyer can sue the seller for damages and can sue the third party who bought those goods for goods.	Buyer can sue the seller for damages only.
Effect of insolvency of seller having possession of goods.	Buyer can claim the goods from the official receiver or assignee because the ownership of goods has transferred to the buyer.	Buyer cannot claim the goods, even when he has paid the price because the ownership has not transferred to the buyer. The buyer who has paid the price can only claim rateable dividend.
Effect of insolvency of the buyer before paying the price.	Seller must deliver the goods to the official receiver or assignee because the ownership of goods has transferred to the buyer. He can only claim rateable dividend for the unpaid price.	Seller can refuse to deliver the goods unless he is paid full price of the goods because the ownership has not transferred to the buyer.
Right in rem/personam	It is a ***right in rem*** i.e. right against the whole world.	It creates a ***right in personam*** i.e. right against a person.
In risk of destruction of goods.	Buyer has to bear the risk even if possession is with the seller as ownership has passed.	Seller has to bear the risk, even if possession is with the buyer, as ownership has not passed.

Q. Explain the term 'goods' under the Sale of Goods Act, 1930.

Goods is defined in **Section 2 (7)** as 'Every kind of moveable 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 sale or under the contract of sale.' Trade marks, copyrights, patent rights, goodwill, electricity, water and gar are all considered as goods. In the case of **Badri Prasad V.**

State of M.P., the Supreme Court went to the extent of ruling that trees which are agreed to be severed before sale or under the contract of sale are goods.

Goods may be classified into various types as under :-

1. **Existing goods –** These are goods which are owned and possessed by the seller at the time of sale. Only existing goods can be the subject-matter of a sale. The existing goods may be –

   a) **Specific goods –** These are goods which are identified and agreed upon at the time of contract of sale is made. For eg. A person visit s a Titan showroom and identifies a watch for purchase.

   b) **Ascertained goods –** Though commonly used as similar in meaning to specific goods, these are the goods which become ascertained subsequent to the formation of contract of sale. For eg. From say 10 Sony T.V. a person identifies the particular T.V.

   c) **Unascertained goods –** These are the goods which are not identified and agreed upon at the time of the contract of sale. They are defined only by description and may form part of a lot. For eg. A shopkeeper has a bag containing 50 kgs of sugar. He agrees to sell 10 kg sugar to X out of that bag The 10 kg of sugar is unascertained goods as they are yet to be identified from the bag containing 50 kg.

2. **Future Goods –** These are goods which a seller does not possess at the time of the contract but which will be manufactured, or produced, or acquired by him after the making of the contract of sale. [Section 2(6)]. A contract of present sale of future goods, though expresses as an actual sale, purports to operate as an agreement to sell the goods and not a sale. This is because the ownership of a thing cannot be transferred before that thing comes into existence.

3. **Contingent Goods –** It is a type of future goods but these are goods the acquisition of which by the seller depends upon a contingency which may or may not happen.

Q. Define 'Condition' and 'Warranty'. Distinguish between Condition and Warranty.

Section 12(2) states that a condition is a stipulation which is essential to the main purpose of the contract. The breach of a condition gives rise to a right to treat the contract as repudiated or broken.

Example – *A buys from B a hair oil advertised as pure coconut oil. The oil turns out to be mixed with herbs. A can return the oil and claim the refund of price.*

Section 12(3) states that a warranty is a stipulation which is collateral to the main purpose of the contract. The breach of a warranty gives rise to a claim for damages but not a right to reject the goods and treat the contract as repudiated.

***Example –** A while selling his car to B, stated the car gives a mileage of 12 kms per litre of petrol. The car gives only 10 kms per litre. B cannot reject the car. It is breach of warranty. He can only claim damages for the loss due to extra consumption of petrol.*

	Condition	**Warranty**
Definition	A stipulation which is essential to the main purpose of the contract.	A stipulation which is collateral to the main purpose of the contract.
Remedy	The aggrieved party can terminate the contract, claim damages or treat it as breach of warranty	The aggrieved party cannot terminate the contract but can only claim damages
Treatment	A breach of condition can be treated as a breach of warranty	A breach of warranty cannot be treated as breach of condition.

Q. Enumerate implied warranties and implied conditions.

Implied conditions

1. **Condition as to title –** In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is an implied condition on the part of the seller that –

(a) in the case of a sale, he has a right to sell the goods and

(b) in the case of a agreement to sell, he will have a right to sell the goods at the time when the property is to pass.

2. **Sale by description –** Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description **(Section 15).** If you contract to sell peas, you cannot oblige a party to take beans.

3. **Sale by sample –** In a case of a contract for sale by sample, there is an implied condition –

(a) that the bulk shall correspond with the sample in quality

(b) that the buyer shall have a reasonable opportunity of comparing the bulk with the sample.

(c) that the goods shall be free from any defect, rendering them unmerchantable.

4. **Sale by description as well as sample – Section 15** further provides that if the sale is by sample as well as by description, the goods must correspond both with the sample and with the description.

5. **Condition as to quality or fitness –** Normally, in a contract of sale there is no implied condition as to quality or fitness of goods for a particular purpose. The buyer must examine the goods thoroughly before he buys them in order to satisfy himself that the goods will be suitable for the purpose for which he is buying them. However, in the following instances, the condition as to quality or fitness applied –

(a) Where the buyer, expressly or by implication makes known to the seller the particular purpose for which he needs the goods and depends upon the skill and judgement of the seller whose business it is to supply goods of that description, there is an implied condition that the goods are reasonable fit for that purpose. **[Section 16(1)].** For eg. An order was placed for some lorries to be used "for heavy traffic in a hilly area". The lorries supplied were unfit and broke down. ***Held***, there is a breach of condition as to fitness.

(b) An implied condition as to quality or fitness for a particular purpose may also be annexed by the usage of trade. **[Section 16(3)]**

6. **Condition as to merchantability –** Where goods are bought by description from a seller who deals in goods of that description, here is an implied condition that the goods are of merchantable quality. This means that the goods should be such as are commercially saleable under the description by which they are known in the market at their full value. Thus a watch that will not keep time, a pen which cannot write and tobacco that will not smoke, cannot be regarded as merchantable under such names.

7. **Condition as to wholesomeness –** In the case of eatable and provisions, in addition to the implied condition as to merchantability, there is another implied condition that the goods shall be wholesome. For eg. C bought a bun containing a stone which broke one of C's teeth. Held, he could recover damages.

8. **Condition implied by custom –** An implied condition as to quality or fitness for a particular purpose may also be annexed by the usage of trade in the locality concerned.

Implied warranties

1. **Warranty of quiet possession –** In a contract of sale, unless there is a contrary intention, there is an implied warranty that the buyer shall have and enjoy quiet possession of the goods. If buyer's possession is disturbed because of some defect in seller's title, he can claim damages from the seller.
2. **Warranty of freedom from encumbrances –** The buyer is entitled to a further warranty that the goods are not subject to any charge or right in favour of a third party.
3. **Warranty to disclose dangerous nature of goods –** Where a person sells goods, knowing that the goods are inherently dangerous or they are likely to be dangerous to the buyer and that the buyer is ignorant of the danger, he must warn the buyer of the probable danger, otherwise he will be liable for damages.

Q. Explain the term 'Caveat Emptor'.

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

For eg. H bought oats from S a sample of which had been shown to H. H erroneously thought that the oats were old. However the oats were new. Held, H could not avoid the contract. **(Smith vs. Huges)**

The doctrine of Caveat Emptor has certain important exceptions as under –

1. **Fitness for buyer's purpose –** Where the buyer, expressly or by implication makes known to the seller the particular purpose for which he needs the goods and depends upon the skill and judgement of the seller whose business it is to supply goods of that description, there is an implied condition that the goods are reasonable fit for that purpose. **[Section 16(1)].** For eg. An order was placed for some lorries to be used "for heavy traffic in a hilly area". The lorries supplied were unfit and broke down. ***Held***, there is a breach of condition as to fitness.

2. **Sale under a patent or trade name –** In the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition that the goods shall be reasonably fit for any particular purpose.

3. **Merchantable quality** - Where goods are bought by description from a seller who deals in goods of that description, here is an implied condition that the goods are of merchantable quality. But if the buyer has examined the goods, there is no implied condition as regard defect which such examination ought to have revealed. **[Section 16(2)]**

4. **Usage of trade** – An implied warranty or condition as regards quality or fitness for a particular purpose may be annexed by the usage of trade. **[Section 16(3)]**

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

Q. Define 'Unpaid Seller'. What are the rights available under the Sale of Goods Act to an unpaid seller?

Section 45 define an unpaid seller as "One who has not been paid or tendered the whole of the price or one who receives a bill of exchange or other negotiable instrument as conditional payment and the condition on which it was received has not been fulfilled by reason of dishonour of the instrument or otherwise."

The following conditions must be fulfilled before a seller can be deemed to be an unpaid seller –

a) He must be unpaid and the price must be due.
b) He must have an immediate right of action for the price.
c) A bill of exchange or other negotiable instrument was received but the same has been dishonoured.

The rights of an unpaid seller can be broadly divided under 2 main headings –
I] Rights against the goods and
II] Rights against the buyer

I] Rights against the goods

A] Where the property in the goods has passed to the buyer – Where the ownership in the goods has already been transferred to the buyer the following rights are available to an unpaid seller –

1. **Right of Lien –** The right of lien means the ight to retain the possession of goods until the full price is paid or tendered.

   When can lien be exercised :

   (a) Where the goods have been sold without any stipulation as to credit.
   (b) Where the goods have been sold on credit, but the term of credit has expired, and
   (c) Where the buyer becomes insolvent.

   The right can be exercised even if the seller holds the goods as an agent or bailee. Where part delivery of goods has been made, it can be exercised on the remaining goods, unless circumstances show he has waived his right.

   Termination of lien – The right gets terminated under following circumstances:

   (a) When the goods are delivered to a carrier or bailee but without reserving the right of disposal.
   (b) When the possession is acquired by the buyer or his agent lawfully.
   (c) When the right of lien is waived by the seller.
   (d) When the buyer has disposed of the goods by sale of in any manner with the consent of the seller.

2. **Right of stoppage of goods in transit –** The right of stoppage in transit means the right to stopping the goods while they are in transit, to regain possession and to retain them until the price is paid. The essential feature of stoppage in transit is that the goods should be in the possession of someone intervening between the seller and the buyer.

   The unpaid seller can exercise the right of stoppage in transit if:

   (a) The seller has parted with the possession of the goods.
   (b) The buyer has not taken possession of goods.
   (c) Buyer has become insolvent.

   The unpaid seller may exercise the right to stoppage in transit in any one of the following 2 ways :

   (a) by taking actual possession of the goods, or
   (b) By giving notice of his claim to the carrier or other bailee in whose possession the goods are.

   The right to stoppage in transit is lost under the following circumstances:

   (a) If the buyer or his agent obtains possession.
   (b) If after arrival of the goods at the appointed destination, the carrier or the bailee acknowledges to the buyer that he holds the goods on his (buyer's) behalf.
   (c) If the carrier or bailee wrongfully refuses to deliver the goods to the buyer or his agent.
   (d) Where the part delivery of the goods has been made to the buyer or his agent, the remainder of goods may be stopped in transit. But if such part delivery has been given in such circumstances as to show an agreement to give up possession of the whole of the goods the transit comes to an end at the time of part delivery.

For eg. A, in Mumbai sends goods to a buyer in Pune through a carrier. The goods are in transit when it leaves A's possession and B or his agent has not taken possession

3.
4. **Right of resale –** Where the unpaid seller has exercised his right of lien or resumes possession of the goods by exercising his right of stoppage in transit upon insolvency of the buyer, he can re-sell the goods under the following circumstance –
   (a) where the goods are of perishable nature.
   (b) Where the seller has given notice of his intention to re-sell the goods and yet the price remains unpaid.
   (c) Where the seller expressly reserves a right of resale if the buyer commits a default in making the payment.

B] Where the property in the goods has not passed to the buyer – Where the property in the goods has not passed to the buyer, the unpaid seller can exercise the right to withholding delivery of the goods. This right is similar to and co-extensive with the right of lien and stoppage in transit where the property has passed to the buyer. Other remedies may include the right to claim damages for the loss suffered, special damages, etc.

II] Rights of an unpaid seller against the buyer personally

In addition to the unpaid seller's rights against the goods, he has rights even against the buyer personally. They are as follows :

1. **Suit for Price –** Generally the seller can sue for the price of the goods only when the property in the goods has passed to the buyer and the price is not paid as per the terms of the contract. In cases where the property in the goods has not passed to the buyer, suit for price generally, cannot be maintained, unless under the contract, price is payable on a certain date irrespective of the delivery of passing of the ownership of the goods.
2. **Suit for damages –** The unpaid seller can bring an action for damages where the buyer wrongfully refuses to accept the goods or repudiates the contract.

3. **Suit for interest –** In case of breach of contract on the part of the buyer, the unpaid seller can claim for interest from the date of tender of the goods or from the date, the price becomes payable along with a suit for price.