CHAPTER

3(A) Law of Contracts

Learning Outcome

Students will be able to

- Understand the formation of agreements and contracts.
- Understand the essential elements of a contract.
- Distinguish between the types of contracts based on enforceability
- Understand and analyse illegal, void and voidable agreements.
- Elaborate the process of discharge of contract.
- Critically analyse the remedies awarded for Breach of Contract as Damages.

Amritlal was in need of 5 kg rice and exchanged them for 10 kg mangoes with his next-door neighbour to avoid going to the market. He soon realised that he has given a rare commodity, as it was not the mango season, at a cheap exchange. It has been a common practice to exchange things of utility in the ancient times. However, with the advent of money as a common medium of exchange that is fair and uniformly valued at a given place, it has become easy to enter into transactions that are definite. In the modern times, these definite transactions are known as 'contract'. The contracts regulate the business transactions among parties placed both domestically and internationally.

A. Introduction to Contracts

Contracts are an important part of commercial law because all commercial law transactions usually begin with an agreement or a contract. To understand the concept, we may take example of some of our everyday activities like buying groceries, booking a cab, eating at a restaurant, paying for internet, purchasing clothes in a sale or otherwise and likewise.

These business transactions involving sale-purchase or exchange of services have become an integral part in day-to-day activities that involve contracts. In such instances, an agreement or a contract is necessary for determining the rights, obligations and liabilities of parties when they enter into any business transaction. The Indian Contract Act is the law governing contracts in India.

B. Formation of Contract

According to the Indian Contract Act, 1872, (referred to as the ICA) an agreement that is enforceable by law is a contract [Section 2(h)]. This implies, all agreements *per se* are not contracts. Agreements must meet certain criteria stated as under- An agreement is the result of a proposal or an offer by one party and its acceptance by the other.

1. **Competent parties:** the parties to the agreement must be competent to enter into a contract.
2. **Lawful consideration and lawful object:** There must be lawful object and lawful consideration in respect of the agreement.
3. **Free consent:** there must be free consent of the parties that is free from coercion, undue

influence, fraud, misrepresentation and mistake, when they enter into the agreement.

4. **Not expressly declared as void by the law:** the agreement must not be the one, which has been declared as void by the law in force at the time of entering into the agreement.

It is therefore true by virtue of provisions of section 10 I CA that all contracts are enforceable agreements while the vice-versa may not be true when an agreement is not enforceable by law for want of lawful consideration or lawful object. Thus it is correct to generalise that:

"All contracts are agreements but all agreements are not contracts"

C. Intention to Contract

In a leading case *Balfour v. Balfour* (1919, 5 KB 571), the validity of an agreement entered between a husband and wife was in question. The husband and wife went on leave to England and the wife fell ill in England. The doctors who treated the wife advised her to take full bed rest and remain in England in order to continue the treatment. The wife stayed in England. When the leave was over, the husband went to Ceylone where he was employed and promised to send a sum of £30 to the wife every month for her stay in England. He sent the amount for some time and later on due to differences and misunderstanding between them, the husband stopped sending the amount. The wife initiated action to recover the arrears due to her. The Court dismissed it on the ground that the agreement entered into between the husband and wife was not a contract. The arrangement between the husband and wife was only a moral obligation and the parties never intended to create any legal relationship.

The decision clearly shows that agreements that create a legal obligation are only contracts and those agreements that do not intend to create legal relationship are not contracts.

Offer / Proposal and Acceptance

The offer or proposal is the first step in the formation of a contract. When one person signifies to another his willingness to do or not to do certain things, it is called an Offer. [Section 2(a) of ICA]. The person making the proposal or offer is called the offeror and the person to whom the offer is made is called the offeree. The offer given must be with an intention to create a legal relationship.

An assent or consent given to an offer by the offeree is known as Acceptance [Section 2(b) of ICA]. By saying 'yes', 'ok' or clicking on 'I agree' on an offer on a website also amounts to acceptance. An offer when accepted becomes an agreement. An agreement is also called as promise.

Offer + Acceptance = Agreement

Illustration

A expresses his willingness to sell his cottage to B for Rs. 5 lakhs. Here, A's willingness is called offer. A is the offeror and B is the offeree. B accepts the offer to purchase the cottage. This is called Acceptance. A's offer when accepted by B becomes an Agreement.

An offer and acceptance must be definite and certain. If the offer or acceptance is not clear enough to conclude a contract, it is considered invalid. Also, an offer and acceptance must be communicated to the other person in order to be valid. A communication in electronic form or over emails also amount to communication of offer and acceptance. An offer lapses by revocation or withdrawal. Any offer can be revoked before acceptance.

General offer

In an English case *Carlill v. Carbolic Smoke Ball Co.* (1893, 1 QB 256), the company was the manufacturer of a medicine called smoke ball which was used for the treatment of influenza. The company believed that the medicine completely cured influenza. An advertisement was put up

offering a reward of £100 to anyone who got influenza again after using the smoke ball medicine continuously for fifteen days. In the advertisement, it was also stated that £1000 was deposited in a Bank, namely, Alliance Bank for paying the reward if such situation arose. Seeing the advertisement, Mrs. Carlill bought the smoke ball medicine and used it as per the directions provided. Mrs. Carlill got a fresh episode of influenza. Mrs. Carlill sued the company for the reward of £100. The manufacturing company stated that: (1) there was no intention to enter into a legal relationship with anyone through the advertisement, and the advertisement was put up only to boost the marketing of the smoke ball medicine; (2) the advertisement was not an offer as it was not made to any particular person and an offer cannot be made to the public at large or to the whole world; (3) acceptance by the offeree had not been communicated, and so there was no binding contract. The Court rejected these contentions of the company and allowed Mrs. Carlill's claim for £100. The Court also stated that deposit of £1000 in the Alliance Bank by the Smoke Ball Company was evidence that the company had real intention to enter into a legal relationship with anyone who accepted the offer. An offer can also be made to the world at large. It is called a general offer and it is valid. In the case of general offer, there is no need for communicating acceptance to the offeror. Merely fulfilling the conditions of the offer itself is treated as acceptance to create a contract.

D. Consideration

Consideration is an important element in a contract. A contract without consideration is not valid. Consideration means 'something in return' for the offer. Consideration can be in the nature of an act or forbearance. The general rule is that, an agreement without consideration is void and not enforceable by law because in such cases, one party is getting something from the other without giving anything to the other. There should always be a mutual consideration. In other words, each party must give and also take. There are exceptions to this general rule in certain situations such as a written and registered agreement out of natural love is not void, even if it is without consideration. Consideration need not be adequate, but should be real. It may be past, present or future and should not be illegal, immoral or opposed to public policy.

Illustration:

A offers to sell his car for ₹ 50,000/- to B. B accepts the offer. In this case, the consideration of A is his car and the consideration of B is ₹ 50,000/.

Illustration:

A, for natural love and affection, promises to give his son, B, ₹ 1,000/- to Bin writing and registers it. This is a contract and absence of consideration does not make it void.

In an Indian case - *Durga Prasad V. Baldeo* (1880, 3All 221), the plaintiff constructed some shops at the request of the District Collector in a town. The constructed shops were given on rent for doing business to the defendant, the shopkeeper. The defendant, apart from the rent, promised to give 5% commission to the plaintiff on all articles sold through the shop in consideration of the huge amount spent by the plaintiff in the construction of the building. The defendant failed to pay the commission and the plaintiff initiated action to recover the commission. The Court rejected the action of the plaintiff on the ground that the construction of shop was done at the desire of the District Collector and not on the desire of the defendant and hence there was no consideration to give commission. Accordingly, there is no valid contract to pay commission to the plaintiff.

E. Capacity to Contract

One of the essentials of a valid contract as mentioned under section 10 ICA is that the parties must be competent to contract. Following are not competent to contract :

- Minor - Persons who are less than 18 years of age;
- Persons with unsound mind
- Persons disqualified by law - Alien enemies, Foreign sovereign etc.

Who is a minor under Indian Law?

It was the Indian Majority Act that laid down the age of majority as 18 years except in cases where guardian has been appointed by the Court, it was 21 years. An amendment to the said Act has amended the majority age to 18 years for all cases.

Illustration:

A (major) offers to sell his coat for ₹ 3,000/- to B (minor). B accepts the offer and pays ₹ 3,000/-. A states that the contract is entered into with a minor and hence void. In this case, even if the contract is entered into with a minor, it is enforceable because it is beneficial to the minor and the minor has performed his part of the obligation in the contract.

Interesting Facts

A minor is incompetent to contract because he is below 18 years of age. Indian Contract Act does not answer whether an agreement by a minor is void or voidable? Nature of minor's agreement has been analyzed by the courts from time to time based on the facts and circumstances of the case in light of general principles of equity and natural justice. Initially, the controversy was set at rest by the decision of Privy Council in **Mohori Bibee v Dharmodas Ghose**. The minor Plaintiff mortgaged his property in favour of the defendant who was a money lender, to secure his loan. The money lender had knowledge about the minority of the Plaintiff. The court held against the contentions of the defendant that no estoppel could apply against the Plaintiff as both the parties were aware of the minor's minority. Also, the defendant asked for the refund of loan taken under the provisions of ICA if mortgage is cancelled. Court held that an agreement by a minor is *void ab initio*.

In another case, **Kalus Mittelbachert v East India Hotels Ltd.**, there was a contract between Lufthansa, a German airline and Hotel Oberoi, New Delhi that crew of the airline will stay in latter's hotel. The plaintiff, a co-pilot of the airline stayed in the hotel and sustained serious head injuries on diving in the swimming pool of the hotel. This resulted in paralysis and after a battle of 13 years with his health conditions he died. Though he had no direct contract with hotel but he succeeded as a beneficiary and was awarded compensation for the damage caused. Being a 5-star hotel extra care and caution was expected out of the hotel and thus exemplary damages of 50 lac were awarded.

F. Consent

Consent is an important criterion while entering into a contract. When two persons agree on the same thing in the same sense (*consensus ad idem*), it is termed as consent (Section 13). Consent should be free and not caused by coercion, undue influence, misrepresentation, fraud or mistake. If consent is obtained by the influence of any one of the above said, then the consent so obtained is not free. It becomes voidable (avoid enforcement of contact) for the person whose consent is not free.

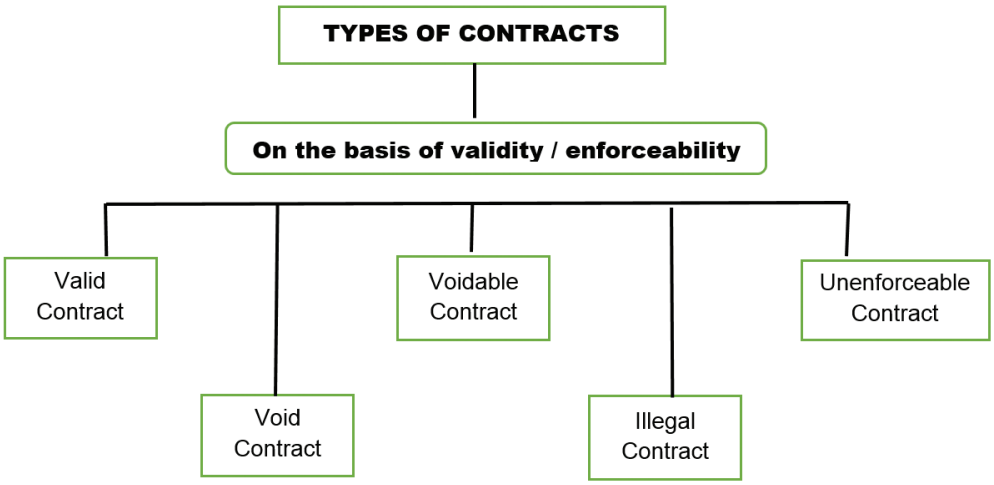
Illustration:

A threatened to kill B if he does not sell his house to A. B out of fear signs the contract for selling his house to A. Here, the consent of B is not free. B can later avoid the sale on the ground that he was compelled to agree to the sale and the consent given was not free consent.

G. Types of Contracts/ Agreements

As discussed above, all agreements may not be contracts and vice versa. There are situations when agreements turn into contracts at their inception but at a later stage due to change in any of the essential conditions of a contract, a contract ceases to be enforceable under the law and thus becomes void at the option of any of the parties to the contract. Also, when the consent obtained for the agreement is not free, it is voidable.

The concept of validity or enforceability of a contract is not defined in Indian Contract Act however, it



is through the various judgements of the courts that enforceability of contracts was decided based on their validity. Some important valid and enforceable contracts are explained as under:

a. Void and Voidable Contracts

BASIS OF DIFFERENCE	VOID CONTRACT	VOIDABLE CONTRACT
LEGAL PROVISION	Section 2(j) ICA	Section 2(i) ICA
MEANING	A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable	It is a contract which may either be affirmed or rejected at the option of one of the parties to the contract on ground of coercion, undue influence, fraud or misrepresentation.
NATURE	It is valid at its inception but later culminates into a void contract	It remains enforceable till it is not declared void by a competent court
CLAIM FOR DAMAGES	It is allowed only to the extent to restore any benefit received by the party, on the grounds of equity	The injured has the right to initiate action for damages
VALIDITY	Any contract when turns void, cannot thereafter become valid	A voidable contract may become valid upon lapse of time, affirmation, ratification, waiver of right, acquiescence of the party whose consent was not free

b. Contingent and Wagering

BASIS OF DIFFERENCE	CONTINGENT CONTRACTS	WAGERING AGREEMENTS
LEGAL PROVISION	Contingent contract is defined under section 31 of ICA.	ICA does not define wagering agreements.
MEANING	A contingent contract is a contract to do or not to do something depending upon the happening or non-happening of a future uncertain event.	Section 30 ICA does not define wagering agreements but declares them to be void. The parties have opposite views regarding an uncertain event and equal chances of gain or loss. There is no other interest of the parties in the agreement except for winning or loosing it.
ENFORCEABILITY	A contingent contract is enforceable under the law	A wagering agreement is not enforceable under the law
UNCERTAIN FUTURE EVENT	The uncertain future event does not determine the outcome of the contract. It is only collateral to the contract.	The uncertain future event decides who wins the wager.
RECIPROCAL PROMISE	There may or may not be reciprocal promise.	It is a bet and is thus based on reciprocal promise.
EXAMPLE	For example, A promises to buy B the Indian cricket team's jersey, if they win the match today. Now, this is a contingency as there's no guarantee whether India will win the match. In the same example, A promises to buy B the jersey if he pays him the money, then this will be a promissory condition that depends on the performance of a duty.	For example, X enters into a wager with Y. If X's food tech start-up gains at least 50,000 customers in 6 months, then Y shall pay X a certain monetary sum, and if it doesn't hit the target, then X shall pay Y the same amount.

c. Illegal / Unlawful Agreements

According to section 10 ICA, a contract must be made for a lawful consideration and lawful object. If either the consideration or the object is an action or omission prohibited by law, it results into an illegal contract. The agreements entered into for any unlawful or illegal object or consideration cannot be enforced under the law and are thus void (sec. 24 ICA). However, there is a possibility that the object or the consideration with which the contract was formed initially later turns unlawful or illegal, in which case it becomes void.

Ilustration:

A enters into an agreement with B to share the profits by giving false assurance to the public to get them a job in Singapore. The agreement involves cheating which is a fraudulent act. The agreement is unlawful and hence it is void.

Illustration:

A agrees to give Rs 1,000/- to B as penalty if minor daughter is not given to A in marriage. This agreement is opposed to public policy and not enforceable.

H. Discharge of Contract

Mutual obligations of parties are created in a contract. When the mutual obligations of the parties are fulfilled, the contract comes to an end. When the contract is ended, it is said to be discharged. In other words, Discharge means termination of the contractual relations of the parties to the contract.

Discharge of a contract may be done by the following ways:

- Discharge by Performance;
- Discharge by Agreement or Consent;
- Discharge by Impossibility of Performance;
- Discharge by Lapse of time;
- Discharge by Operation of law;
- Discharge by Breach of contract.

a. Discharge by Performance

When parties to a contract perform their obligations and fulfil their promises, the contract gets discharged by performance.

Illustration:

An offer to sell his dining set to B for Rs 10,000/-. B pays Rs. 10,000/- to A and A delivers his dining set to B. Here the contract gets discharged by performance as both the parties fulfilled their promises.

b. Discharge by Agreement or Consent

When parties to the contract do not perform their obligations and fulfil their promises in full or in part, as the case may be, the contract gets discharged by novation, rescission, alteration, merger, waiver and remission.

(i) Novation - A new contract is substituted for an old contract.

Illustration:

A is indebted to B and B to C. By mutual agreement B's debt to C and A's debt to B is cancelled and C accepts A as his debtor. This is new contract substituting the old one and hence, novation.

(ii) Rescission - Certain terms or all terms of a contract are cancelled.

Illustration:

A enters into an agreement with B for buying certain machine parts for their project. Before the agreement ends, A and B change certain terms of the agreement and include those terms in the agreement.

(iii) Remission - Acceptance is made to a promise but not on the complete terms

Illustration:

A owes B Rs 5,000/-. A pays to B and B accepts Rs 2,000/- in full satisfaction to the whole debt. The old debt is discharged but to a lesser fulfilment of the promise.

(iv) Merger - Certain terms of a contract or all the terms of a contract are merged into another contract with the consent of the parties.

Illustration:

A enters into a contract with B for the supply of 50 bags of wheat on a specified date. Later it was realised by A that he needs 10 bags of mixed pulses also at the same time. A and B merge the two contracts to supply 50 bags of wheat and 10 bags of mixed pulses on the same date and at the same place.

(c) Discharge by Impossibility of Performance

Performance of a contract can become impossible with or without the knowledge of the parties to the contract. A contract may later become unenforceable under the law due to impossibility of performance.

It can become impossible to perform the contract subsequently after the parties have entered into the contract, this is known as supervening impossibility [Section 56 ICA]. Supervening impossibility takes place by the following:

- Destruction of the subject matter;
- Death or incapacity;
- Non-existence of state of things having an effect directly or indirectly on the contract;
- Outbreak of war;
- Change or amendments in law.

Illustration:

X agreed to sell his car to Y for Rs. 1 lakh and deliver it after two months. After a week, X met with an accident and car got completely destroyed. The contract gets discharged by impossibility of performance as the car was completely destroyed.

(d) Discharge by Lapse of Time

Time is very significant while entering into a contract. If the contract is not performed within the specified time and the other party does not resort to any action within the limitation period, then he is deprived of his remedy and the contract gets discharged by lapse of time.

(e) Discharge by Operation of Law

The following are instances where a contract gets discharged by operation of law:

- Death of either of the parties;
- Insolvency;
- Merger;
- Unauthorized alteration of the terms of the agreement.

(f) Discharge by Breach of Contract

Breach means failure to perform the obligation by a party. When a party to a contract does not perform his part of the obligation due to which the contract becomes broken, the person who suffers because of the breach is entitled to receive compensation or damages from the party who has breached the contract (Section 73).

Illustration:

A agrees to supply 20 litres of oil to B on 1st June 2014. On 1st June 2014, A does not supply the oil. Then A has breached the contract. Suppose A has supplied the oil but B does not accept the oil, then B has breached the contract. In the first instance, B is entitled to receive compensation from A. In the latter instance, A is entitled to receive compensation from B.

I. REMEDIES IN CASE OF BREACH

A remedy implies a relief given by law to ensure the enforcement of contractual rights or to provide sufficient compensation for the non-performance. In the matters of breach of contract, the remedies available are:

- Damages
- Specific performance

Damages are the most common remedy available to the injured party. It entitles them to recover the money compensation for the losses suffered due to the breach. In India it is covered in section 73 ICA.

The purpose of a contract is to enforce the rights of parties, in event of breach the promisee can request the performance of specific obligations.

Illustration:

A agrees to deliver 40 bags of rice to B for Rs. 20,000/- on 15th July 2022. On 15th July 2022, A delivers only 20 bags of rice to B. B is entitled for damages from A for the loss that he suffered because of A (non-delivery of 20 bags of rice).

Illustration:

A contracts to repair B's house in a certain manner, and receives payment in advance. A repairs the house but not according to the contract. B is entitled to recover from A the cost of making the repairs conform to the contract.

Exercise

Based on your understanding, answer the following questions:

1. Ramesh sells his bike to his friend Suresh for a consideration of Rs. 50,000/-, whereas the market price of the said bike is Rs. 65,000/-. Examine if the agreement is enforceable under Law of Contrcat.
2. 'D' , a minor borrowed a sum of money from M by executing a mortgage of his property in favour of M. Subsequently, D sued for cancellation of mortgage. Is the contract of mortgage valid? Can M recover the sum advanced to D?
3. Apexx Chemicals entered into an agreement with Moonled Pharma ltd. to supply them with 16units calcium and 8 units of magnesium powder for its medicine unit. By the time Apexx Chemicals supplied 12 units of calcium and 4 units of magnesium the government restricted free sale of chemicals for life saving drugs. Every dealer was supposed to get his supply sanctioned from the government to a maximum of 10 units of each chemical. Apexx chemicals found it difficult to complete the order of Moonled Pharma Ltd., Moonled Pharma Ltd. brings a suit for breach of contract against Adarsh Chemicals. Will it succeed? Analyze by referring to relevant provisions.
4. X enters into a contract with Y to pay him 10000 rupees if the books are delivered to him by Friday. This is an example of contingent contract. Explain why?

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CHAPTER

3(B) Law of Torts

Learning Outcomes:

Students will be able to

- Understand the meaning of Torts
- Differentiate between civil and criminal laws
- Differentiate between Tort and Breach of Contract
- Identify the sources of Tort law
- Explain the different types of wrongful acts in Torts
- List the types of Intentional Torts
- Explain the components of the Tort of Negligence
- Understand the concept of Strict Liability and its components
- Differentiate between Strict liability and Absolute liability
- . Summarise the different types of harm in torts

A. Introduction

Concept

'Tort' essentially means a 'wrong'. It is derived from the Latin word 'tortum', which means 'twisted' or 'crooked'.

In law, tort is defined as a civil wrong or a wrongful act, of one, either intentional or accidental, that results in injury or harm to another who in turn has recourse to civil remedies for damages or a court order or injunction.

According to Sir John Salmond, an English legal scholar, Tort is a civil wrong for which the remedy is a common law action for unliquidated damages, and which is not exclusively a breach of contract, or a breach of trust, or other merely equitable obligation In the words of M.C. Setalvad, the first Attorney General of India, "law of torts is an instrument for making people adhere to standards of reasonable behaviour and respect the rights and interests of one another.

Damages under law of torts are essentially compensatory and seek to place the defendant in the position that he would have been had the wrongful act not been performed. The remedy is often in the nature of 'unliquidated damages'. Unliquidated damages can be defined as **the sum of money that cannot be foreseen or assessed by a fixed or predecided formula.** Damages may be categorised as unliquidated when the amount of damages is unidentifiable or subject to an unforeseen event that makes the amount not calculable.

It must be mentioned that tort is a civil wrong as distinguished from criminal wrong; both the substantive elements and the procedures are different in civil law and criminal law. In a criminal case, the state initiates legal proceedings in a criminal court on behalf of the victim and is punished if found guilty by the court. A civil action, like the tort suit, is pursued in a civil court where the person aggrieved or his representatives or survivors prosecute the wrong-doer usually for compensation in the form of monetary damages and also at times for other relief or injunction. Generally, tort cases aim at compensating the victim while criminal lawsuits often result in punishments, for example, prison sentences. Injunctions are court orders that, for example, may prohibit the wrong-doer from harming the victim or prevent the former from trespassing the latter's property. Occasionally, courts may also grant punitive damages, which are costs or damages in excess of the compensation.

It is also important to mark the distinctions between tort and breach of contract.

Tort	Breach of Contract
A Tort is a civil wrong in which the remedy is action for damages.	Breach of contract is a breach of a promise the primary remedy of which is performance of the contract.
Damages are always unliquidated.	In breach of contract the damages are liquidated.
In tort motive may be taken into consideration	In breach of contract the motive is irrelevant.
In tort duty is bound towards the persons generally.	In breach of contract the duty is bound towards a specific person or persons.
In tort the damages may be compensatory or even exemplary damages may also be awarded.	In breach of contract, nature of damages is compensatory

A tort can be intentional or accidental. It includes wrongful acts such as battery and assault (physical or mental injury to the claimant), nuisance (an act which is harmful or offensive to the public or an individual), defamation (where claimant's reputation is injured), property damage, trespass (to claimant's land or property), negligence (careless behaviour), and others; some of these are discussed below.

The three fundamental elements of a tort are:

1. Wrongful act;
2. Damage;
3. Remedy.

These tortious wrongs may also have aspects which overlap with other fields of law like criminal law and contract law, examples of which may be found in the chapters on criminal law and contract law. In this chapter, we are concerned only with some of the basic features of law of torts in relation to these wrongs.

Sources of Law of Torts

Tort is mostly a Common Law subject. The law of torts did not develop from a statute or an act passed by the Parliament, but from centuries of judicial decisions – based on case decisions in English courts as well as in courts of other countries following the Common law system such as that of India, Canada, Australia or the United States of America.

In India as well as in other jurisdictions both criminal law and contract law are based on statutes, for example, the Indian Penal Code and the Indian Contract Act respectively. However, there is no single statute or a group of statutes that comprehensively deal with tort law as a separate area of law.

It is easy to explain this difference. A lawyer focusing on contract matters would ordinarily look at the Contract Act or the Sale of Goods Act to find out the rules which might apply to a given fact situation. On the other hand, a tort lawyer cannot merely look at the statute to find out the law that could apply to a given fact situation. A tort lawyer has to pore through the case law including the applicable precedents in other jurisdictions to examine the existence of a tortious wrong. To summarise, the law of torts includes both statutes and case laws and cannot be traced to a single source.

However, in many jurisdictions, including in India, there is a move to enact statutes concerning tortious wrongs which were hitherto governed only by case laws. In India, for instance, automobile accidents as well as harm caused to consumers of goods and services are covered by the Motor Vehicle Act of 1988 (as amended) and the Consumer Protection Act of 1986(as amended) respectively.

B. Kinds of Wrongful Acts

In tort cases, the victim or the plaintiff claims that the defendant or the wrong-doer has conducted a wrongful act or is liable for injury incurred by the plaintiff. Primarily, there are three kinds of wrongs in tort law. The wrongful act can occur:

1. either intentionally, or
2. negligently on part of the wrong-doer, or
3. the defendant is strictly liable for the wrongful act.

B.1 Intentional Tort

An intentional tort requires the claimant to show that the defendant caused the injury on purpose. The claimant must also show that he or she suffered a particular consequence or injury, and that the defendant's actions caused the consequence or injury. Different intentional torts deal in different consequences and intents. Depending on the contexts and situations, there are various kinds of intentional torts. These include assault, battery, false imprisonment, unlawful harassment, invasion of privacy and so on. These may also have aspects of criminal law, but treating them also as torts increases the possibility of higher compensation. The kinds of intentional torts are explained below.

Battery and Assault

The tort of battery occurs when the defendant shows an intentional and direct application of physical force of the claimant with the intent to cause harm or offense. Both 'intent' and 'causation' are required for the tort of battery to occur.

The act of touching doesn't necessarily have to be done with the defendant's hands always, it could be anything touching the plaintiff such as throwing hot water at someone.

The tort of assault occurs when the defendant intends to cause in the claimant's mind a reasonable apprehension (feeling of anxiety or fear) of an imminent harmful or offensive touching to the claimant; and when this causes the claimant to suffer a reasonable apprehension of an imminent harm.

For example, if the defendant throws an iron ball at the claimant and misses his head as the claimant moves his head away from the direction of the iron ball, this amounts to assault. The perception of the claimant is important.

If the defendant points an unloaded gun at the claimant who does not know that it is unloaded and he thinks he is about to get shot, this amounts to assault, which can take place without battery.

Likewise, battery can take place without assault; for example, someone may hit another person from behind.

False Imprisonment

The intentional tort of false imprisonment is satisfied whenever there is an intent to unlawfully confine or restrain the claimant in a bounded area and when this actually causes the claimant to be knowingly confined or restrained in a bounded area unlawfully. This leads to the total restraint of liberty of a person. For example, the defendant intentionally locks the claimant in the classroom without having the legal authority to do so, and the claimant knows he is trapped.

Sometimes courts allow the actual harm to substitute for the awareness of the imprisonment - so even if the claimant is unaware that he is trapped but suffers injury, the tort of false imprisonment is satisfied. However, the claimant should not be trapped willingly and consensually.

Trespass to Land

The tort of trespass to land occurs when the defendant has the intent to interfere with the possession of land belonging to the claimant.

This is done by physically invading property of the claimant without the claimant's approval or consent. The invasion can happen with objects or by people. It includes invasion of some area of air above the land and some area below the land. For example, the defendant may litter the claimant's land, or may create a drainage outlet below the land of the claimant.

Trespass to Chattels

The tort of trespass to chattel occurs when the defendant has the intent to and does interfere with the lawful possession of goods belonging to the claimant.

This is done when the defendant uses or intermeddles with a chattel (moveable personal property), which was in the possession of the claimant and causes significant or perpetual dispossession, deprivation of use, or damage as to condition, quality, or value of the chattel, or causes some other harm to claimant's legally secured interest.

For example, if the defendant paints the car of claimant that was parked on the side of the street, without the consent of the claimant while the claimant was away, this amounts to trespass to chattels.

Conversion

The tort of conversion is somewhat related with the tort of trespass to chattels. Conversion is defined as an act of wilful interference, without lawful justification, with any chattel in a manner inconsistent with the right of another, whereby that other is deprived of the use and possession of it.

It occurs when the defendant intentionally uses or intermeddles with the chattel of the claimant in such a serious way that it becomes fair to ask for compensation or money payment for the total prior value of the chattel. In other words, the defendant is forced to buy the chattel for a purchase price based on the original value. Thus, the remedy in conversion is forced sale. Conversion is applicable in many situations including where the chattel is taken, transferred to someone else, changed, misused or damaged.

Unlawful harassment and Intentional Infliction of Emotional Distress

Defendant may be held liable for any act of deliberate physical harm to the victim even when no battery or assault is involved. For example, if the defendant lies to the claimant that the latter's son met with a road accident, which causes nervous shock to the claimant resulting in illness, this constitutes tort of unlawful harassment.

Sexual harassment may also amount to tort of unlawful harassment. For example, if one follows another person, sends unwanted messages or phone calls; although there is no violence or threat of violence involved, this act amounts to a tort of harassment.

Defamation

Defamation is defined as the publication of a statement which tends to lower a person in the estimation of the right-thinking members of society generally, and tends to make them shun or avoid that person. It can be defined as any intentional false communication, either written or spoken, that harms a person's reputation; decreases the respect, regard, or confidence in which a person is held; or induces disparaging, hostile, or disagreeable opinions or feelings against a person.

It is interesting to note that Defamation can be both a tort as well as a crime.

Criminal Defamation: The act of offending or defaming a person by committing a crime or offence. For criminal defamation, the liable person can be prosecuted. It is studied in IPC as a criminal act.

Civil Defamation: Civil defamation involves no criminal offence, but the claimant can sue the wrongdoer for compensation. It is studied under law of torts as a civil wrong.

English law divides actions for defamation into Libel and Slander.

Libel refers to causing defamation in a permanent form, i.e. writing or pictures. It is recognized as an offence under the English Criminal Law.

On the other hand, slander refers to causing defamation in a transient form such as spoken words or gestures. Slander is actionable under law of torts in the English law.

B.2 Negligence

Negligence is defined as the breach of the duty to take care which results in damages. Basically, it can be said that the wrong-doer or the defendant has been careless in a way that harms the interest of the victim or the claimant. For example, when the defendant carries out an act of constructing something on her premises, she owes a duty of care towards the claimant (and anyone in proximity) and the standard of duty of care depends on whether the claimant was on the site or in the neighbourhood as well as whether the claimant was a lawful visitor or a trespasser. Generally, in order to argue successfully that the defendant has been negligent, the victim or the claimant must establish three elements against the defendant in a tort of negligence case –

1) the defendant owes a duty of care to the victim;

2) there has been a breach of duty of care on part of the defendant; and

3) the breach of the duty to care resulted in the harm suffered by the claimant.

Let us consider these elements here.

Duty of Care

The duty of care principle can be explained by citing an actual case. In **Donoghue v Stevenson**, a case decided in England, the plaintiff Donoghue drank a soft drink (ginger beer) manufactured by the defendant Stevenson. The drink had a decomposed snail in the bottle that made the claimant ill. The court held that the manufacturer owed duty of care to those who are 'reasonably foreseeable' to be affected by the product.

> *"In a case like the present, where the goods of the defenders are widely distributed throughout Scotland, it would seem little short of outrageous to make them responsible to members of the public for the condition of the contents of every bottle which issues from their works. It is obvious that, if such responsibility attached to the defenders, they might be called on to meet claims of damages which they could not possibly investigate or answer."*

Thus, the duty of care is owed to those whom one can reasonably foresee as being potentially harmed. This principle is applicable to numerous fact situations. To give another example, a landlord owes a duty of care with reasonable foresight to his tenants and should ensure that no hazardous substance like petrol is stored by him in the basement of the apartment where tenants stay.

Breach of Duty of Care

Once the duty of care is proven the claimant then must establish that the duty of care was broken; i.e., the defendant was unsuccessful in fulfilling the duty of care in accordance with the standard of 'reasonableness'. The standard is that of 'reasonable conduct' or 'reasonable foresight'; however, the act need not be flawless. In the case of Donoghue v Stevenson discussed above, the court held that the manufacturers of products owe a duty of reasonable care to the consumers who use the products. Similarly, the standard of duty of reasonable care will vary based on the peculiar fact situation of every case.

Harm to the Claimant

In the case of Donoghue v Stevenson, the negligence on part of the manufacturer of the soft drink resulted in the illness or injury to the claimant. Or, in the second example, the apartment catches fire because of petrol being stored in the basement causing damage to the tenants.

In **MacPherson v. Buick Motor Co. (1914)**, a famous American case, the Plaintiff bought a car from a retail dealer, and was injured when a defective wheel collapsed. The Plaintiff sued the Defendant, Buick Motor Co. (Defendant), the original manufacturer of the car, for negligence. The wheel was not made by the defendant; it was bought from another manufacturer. The Defendant, however, failed to inspect the wheel.

It was observed by the court that the defendant was responsible for the finished product. It was not at liberty to put the finished product on the market without subjecting the components to tests.

In order to establish duty of care in relation to ultimate purchasers, it must be proved that-

a. nature of the product must be such that it is likely to place life and limb in danger if negligently made. This knowledge of danger must be probable, not merely possible.

b. there must be knowledge that in the usual course of events, the danger will be shared by people other than the buyer. This may be inferred from the nature of the transaction and the proximity or remoteness of the relation.

The court held that the manufacturer of the product placed this product on the market to be used without inspection by its customers. If the manufacturer was negligent and the danger could be foreseen, a liability will follow.

What is No-Fault Liability?

In fault-based liability, the legal right of the claimant is violated due to a mistake of the defendant, and the defendant is liable to pay compensation. However, there are certain situations where the defendant is liable to pay compensation even if the violation of the claimant's right is not done by the defendant, but there is a violation of the claimant's right. This is known as no fault liability. In short, liability arising without any fault is a no-fault liability. It covers two kinds of liability:

- Strict Liability
- Absolute Liability

Strict Liability

Strict liability is a standard of liability under which a person is legally responsible for the consequences

of an activity even in the absence of fault or criminal intent from the defendant. Under the strict liability law, if the defendant possesses anything that is inherently dangerous, as specified under the 'ultrahazardous' definition, the defendant is then strictly liable for any damages caused by such possession, no matter how careful the defendant is in safeguarding them. The claimant does not have to establish any sort of or level of blame attributable to the defendant based on the intention or the degree of carelessness

The rule of strict liability evolved in the year 1868, in the case of **Rylands Vs. Fletcher** which took place in England. Rylands and Fletcher were neighbours. Rylands owned a mill for whose energy requirement he constructed a water reservoir on his land. The work of construction was done by an independent contractor who was negligent in his work. Due to this negligence, the water escaped and leaked into Fletcher's mines, causing heavy losses to him. Fletcher sued Rylands for the damage caused.

Rylands took the defence that the construction work was carried out by an agency and was inspected by an engineer. It was contended that Rylands was not a part of the work and was also not informed about the security regarding the construction. The court held that it does not matter what care the appellant took but he was responsible for the damage as he brought such an article to his premises which could be dangerous if it escapes.

Rylands was thus held liable for the loss incurred by Fletcher and had to pay compensation.

In the above case, three basic principles regarding strict liability were established:

1. DANGEROUS THING - non-natural use of the land
2. ESCAPE - the escape of water from Rylands land
3. LIABILITY -as the thing escaped, it caused damage

*If someone brings on his land something that is dangerous and **it escapes and because of this escape damage is caused,** the person is strictly liable.*

The general rule with respect to ultra-hazardous activity is that when the defendant carries out or keeps an unusually hazardous situation or activity on his or her building or involves in an activity that offers an inevitable danger of injury to the claimant or his or her property, the defendant could be responsible for the damage caused even if the defendant has exercised reasonable care to prevent the harm.

Exceptions to Strict Liability:

1. **Plaintiff's Own Fault:** When the cause of the damage is an act or default of the claimant himself, no remedy would be available to the plaintiff in that case.
2. **Act of God:** When the escape is caused directly by natural causes without any human intervention, then the defendant can use 'act of God' as a defence.
3. **Mutual Benefit:** When there is express or implied consent of the plaintiff to the presence of the source of damage or danger. Also, there is no negligence on the part of the defendant. In such a case the defendant will not be held liable.
4. **Act of Stranger:** When the cause of harm is the act of a stranger or third party. Here, it should be noted that this third party is neither the servant of the defendant nor he is having any control over that person.
5. **Statutory Act:** If it is an act of the government or corporation, then it is also a defence.

Absolute Liability

In India, a related principle of Absolute Liability was introduced by the Supreme Court in the aftermath of the two instances of gas leaks from factories killing thousands and injuring lakhs.

The first case was the infamous Bhopal gas leak disaster of 1984 where a factory of the Union Carbide Corporation located in Bhopal had a major leakage of the gas methyl isocyanate that killed 2260 and injured around 600,000 people.

In the second incident of 1985 in Delhi, a factory of the Shri Ram Foods and Fertilizer Industries leaked oleum gas that killed one person that had few others hospitalized and created huge panic among the residents.

The then Chief Justice of India P.N Bhagwati, in the famous 1987 case of M.C. Mehta v. Shri Ram Foods and Fertilizer Industries, held:

"We are of the view that an enterprise, which is engaged in a hazardous or inherently dangerous industry, which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to any one on account of hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm is done on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part."

If an industry/enterprise is engaged in some inherently dangerous activity from which it is deriving commercial gain and that activity is capable of causing catastrophic damage then the industry officials are absolutely liable to pay compensation to the aggrieved parties. The industry cannot plead that all safety measures were taken care of by them and that there was no negligence on their part. They will not be allowed any exceptions neither can they take up any defence like that of 'Act of God' or 'Act of Stranger'.

The basic principles of absolute liability as emerged above are:

1. Enterprise (commercial objective)
2. Hazardous or inherently dangerous activity
3. Escape is not necessary

Differences Between Strict Liability and Absolute Liability

1. Strict Liability arises in cases in which the court holds the defendant liable to pay compensation for the loss incurred by the claimant, even if such losses are neither intentionally nor negligently suffered. However, when there is an injury caused to a workman in the course of employment, the court holds the employer responsible for providing compensation. Here it is immaterial who caused the injury. In most cases, the employer has to pay the liability. This is called absolute liability.
2. Strict liability is applicable to persons whereas absolute liability is applicable to enterprises, i.e., commercial undertakings.
3. In strict liability, the escape of hazardous or dangerous components from the premises of the owner is necessary. But escape is not necessary in absolute liability.
4. In the case of strict liability, the defendant has got certain exceptions that he/she can use to prevent himself from the liability. But no exceptions are provided in the case of absolute liability to the defendant. This means that, if any person faces damages due to the hazardous element, then the defendant would be absolutely liable for the same.

5. The compensation is as per the nature and quantum of damages incurred in case of strict liability. In absolute liability, the quantum of damages relies on the magnitude and financial capability of the organization.

BASIS FOR COMPARISON	STRICT LIABILITY	ABSOLUTE LIABILITY
Meaning	Strict Liability implies the legal responsibility of a person for compensating the injured or aggrieved, even when he or she was not at fault or negligent.	Absolute Liability arises from inherently hazardous activities like keeping dangerous animals or using explosives.
Talks about	Person	Enterprise
Escape	Necessary	Not Necessary
Exceptions	Yes	No
Payment of compensation	Nature and quantum of damages	Exemplary in nature

C. Summary of the Kinds of Harms

Here is the summary of the examples of the many ways in which the claimant may suffer injuries that have been discussed in this chapter.

a. **Property interests in land-** The law of tort protects the claimant's interests in her landed property by preventing intentional intrusions or trespass of the property by the defendant or the wrong-doer. The claimant may also suffer harm by the damage caused due to carelessness or negligence of the defendant. When the defendant interferes with the claimant's right to enjoy his/her land, the defendant commits the tort of nuisance.

b. **Other types of Property-** Tort law prohibits taking away of tangible property deliberately, which amounts to the tort of 'conversion'. The damage to the property may also occur due to carelessness or negligence.

c. **Bodily Injury-** Tort law protects the claimant against any harm to his/her interests of bodily integrity. Tort of battery and assault applies to any intentional harm caused to the body. Harm may also be caused by negligence as well as any breach of statutory duty like, traffic laws, health laws and so on. Mental distress is an element in bodily injury which raises any compensation to the victim.

d. **Economic Interests-** To a lesser extent, the economic interests are also protected by the law of tort. Injury caused by both intentional act as well as negligence can cause economic harm to the claimant.

Conclusion

To conclude, it can be said that unlike a crime, law of torts does not aim to punish the wrongdoer. Rather, it aims to help the aggrieved person reach the position he/she was in before the cause of action arose.It thus seeks to provide restorative justice.

Exercise

Based on your understanding, answer the following questions:

1. Define what is law of tort? What is the difference between tort law and criminal law?
2. What are the sources of tort law?
3. What is intentional tort? Explain at least three different kinds of intentional tort?
4. What is tort of negligence and how does duty of care relate with negligence?
5. What is strict liability principle? Give one example.
6. Some basic principles regarding strict liability were established in Ryland V Fletcher. Discuss these principles.
7. There are certain exceptions to strict liability which are not available in a case of absolute liability. List these exceptions.
8. Discuss the main differences between strict liability and absolute liability, with the help of relevant case law.
9. What are the objectives behind having tort law?
10. Explain the meaning of the following terms:
    a. Unliquidated damages
    b. Defamation
    c. Conversion

CHAPTER 3(C)

Property Law

Learning Outcomes :

Students will be able to

- Understand the meaning of the term property and transfer of property
- Understand the types of property under the Transfer of Property Act 1882 and Sale of goods Act 1932
- Distinguish between the types of property and its transfer
- Describe the Doctrine of Election and Doctrine of Lis pendense
- Elaborate the process of transfer of property
- Explain the different modes in which an immovable property can be transferred

I. INTRODUCTION

Before the advent of the British kingdom, each community in India was governed by its respective customary law in matters relating to transfer of property. With the establishment of the formal litigation system and in absence of any legislation in this area, to begin with, the English judges applied the common law of England and the rules of equity, justice and good conscience with respect to disputes relating to transfer of property. The unsuitability of these provisions to the Indian conditions; the resulting conflict and the need for clarity of rules relating to this important branch of law necessitated the enactment of legislation. Drafted in 1870, the Transfer of Property Act saw the light of the day in 1882 and provided the basic principles for transfer of both movable and immovable properties. Based primarily on the English law of 'Real Property', it attempted to mould these principles to suit the Indian conditions , moreover, a separate enactment titled the 'Sale of Goods Act, 1930' was passed to deal with transfer of movable property by sale. The Transfer of Property Act, 1882 contains the general principles of transfer of property and detailed rules with respect to specific transfer of immovable property by sale, exchange, mortgage, lease and gift.

II. TYPES OF PROPERTY

The word **property** has not been defined in the Act, but it has a very wide meaning and includes properties of all descriptions. It includes movable properties such as cases, books, etc., and includes immovable properties also such as lands or houses. It also includes intangible properties such as ownership, tenancy, copyrights, etc.

As per Section 3, the immovable property does not include standing timber, growing crop and grass.

Standing timbers: standing timbers are trees fit for use for building or repairing houses. The word standing timber includes Babool Tree, Shisham, Peepal, Banyan, Teak, Bamboo, etc. The fruit-bearing trees like Mango, Jackfruit, Jamun, etc., are not standing timber, and they are immovable properties (**Fatimabibi v. Arrfana Begum**, AIR 1980 All 394).

Growing Crop: It includes all vegetable growths which have no existence apart from their produce such as pan leave, sugarcane etc

Grass: Grass is a movable property, but if it is right to cut grass it would be an interest in land and hence forms immovable property.

Whether trees can be regarded as movable or immovable depends upon the circumstances of the case. If the intention is that trees should continue to have the benefit of further sustenance or nutriment by the soil (land), e.g., enjoining their fruits, then such tree is immovable property. But if the intention is to cut them down sooner or later for the purpose utilizing the wood for building or other industrial purposes, they would be timber and accordingly be regarded as movable property (**Shantabai v. State of Bombay**, AIR 1958 SC 532)

As per Section 3(25), General Clauses Act, 1897 Immovable property shall include land, benefits to arise out of land and things attached to the earth, or permanently fastened to anything attached to the earth.

In the case of **Sukry Kurdepa v. Goondakull** (1872) court has explained that movability may be defined to be a capacity in~ a thing of suffering alteration. On the other hand, if a thing cannot change its place without injury to the quality it is immovable.

In **Marshall v. Green** (33 LT 404), there was a sale of trees where they were cut and taken away. The Court held that the sale was not that of immovable property.

Section 2(c) of the Benami Transactions (Prohibition) Act, 1988 defines property as:

"Property" means property of any kind, whether movable or immovable, tangible or intangible, and includes any right or interest in such property.

Section 2 (11) of the Sale of Good Act, 1930 defines property as:

"Property" means the general property in goods, and not merely a special property.

Basis	Movable Property	Immovable Property
(a) Movement of property	The movable property can easily be transported from one place to another, without changing its shape, capacity, quantity or quality.	The immovable property cannot easily be transported from one place to another.
(b) Transfer	Mere delivery with intention to transfer the movable property completes the transfer	Mere delivery does not sufficient for a valid transfer. The property must be registered in the name of the transferee
(c) Registration	Registration of movable property is optional under the Registration Act 1908	Registration of immovable property is compulsory/ mandatory under the Registration Act 1908, subject to the condition that its value exceeds Rs.100
(d) Legal provision	Transfer of movable property is regulated by Sales of goods Act 1932	Transfer of immovable property is regulated by Transfer of Property Act 1882

III. TRANSFER

Transfer of property is an act of conveying property from one person to another, in the present or future. Matters relating to the property are governed by the Transfer of Property Act, 1882 in India. The object of the Transfer of Property Act is to regulate the transfer of property between living persons. It shall also serve as the code of contract law governing immovable property.

The Transfer of Property Act, 1882 provides clarity on the subject: it is a systematic and uniform law on the transfer of immovable property in India.

The transfer of property may also take place by inheritance and succession. The laws relating to such transfer are governed by the respective religious laws or practices, as the case may be.

Who can transfer property?

Any person who is competent to contract (person above 18 years of age, having a sound mind and not disqualified by any law in force) and authorized to dispose of property viz., owner of the property or any person authorized to sell the property, can make a transfer. The person who transfers the property is called the transferor and the person to whom the transfer is made is called the transferee. According to section 8 of the Transfer of Property Act 1882 (The Act), by transferring property, the transferor transfers all rights in a property.

Essentials of a valid transfer

With regard to the law of property, a transfer is a process of conveying the rights and liabilities with respect to a property by one person to another. It is therefore with the formation of an agreement culminating into a contract that the transfer of property takes place.

(Transfer may be by agreement between parties i.e. by contract- explained in upcoming chapter of contracts- transfer by will or succession- here in this chapter we are dealing with transfer by agreement between parties)

The following are the essentials for a valid transfer of property:

- In a transfer of property, the transfer should be between two or more living persons.
- The property that is going to be transferred should be free from encumbrances (hindrances of any form) and be of a transferable nature.
- The transfer should not be: - for an unlawful object or an unlawful consideration (for a detailed understanding, refer the chapter on Contracts);
  - involving a person legally disqualified to be a transferor or transferee.
- The transferor who transfers the property must:
  - be competent to make the transfer;
  - be entitled to the transferable property;
  - be authorized to dispose off the property if the property is not his own property.
- The transfer should be made according to the appropriate mode of transfer. Necessary formalities like registration, attestation, etc. should be complied with.
- In the case of a conditional transfer, where an interest is created on the fulfillment of a condition, the condition should not be illegal, immoral, impossible or opposed to public policy.

How can property be transferred?

1. Mode of transfer:

The mode of transfer of property varies according to the value of the property. If the value of the property is more than Rs. 100/-, then transfer has to be made only by a registered instrument. If the property is tangible where the value of the property is less than Rs. 100/-, then transfer has to be made only by delivery, whereas for intangible property, transfer has to be made only by registered instrument. (A registered instrument contains the records of the owner of the property- for example: shares, bonds, etc.)

2. Attestation:

A registered instrument must be attested at least by two witnesses to the transfer. The definition of attestation is given in section 3 of the Transfer of Property Act 1882. Attestation means affixing the signature to the instrument for the transfer of property. The witnesses should mark their signature too on the instrument with the intention to attest. The intention behind including this provision was to ensure that transfer was done with the free will of the executant.

3. Registration:

Registration of the instrument is an essential legal formality. During registration, the parties to the transfer must be present to affix their signatures to the document and complete the transaction with regard to immovable property. While doing so, the document for transfer must mention clearly the rights, obligations and liabilities of the parties to the transfer.

Registration shall take place by finally affixing a seal of the Registrar's office which shall be subsequently included in the official records.

Indian Registration Act is an act to consolidate the enactments relating to the registration of documents. Registration means recording of the contents of the document. Section 17 of the Indian Registration Act 1908, deals with the documents that are compulsory to be registered.

4. Mutation:

Once a property has been transferred by way of relinquishment, sale, or gift deed in the "name" of the recipient. It is also important to have the transfer recorded in the municipal records by way of mutation.

5. Payment of fee:

Stamp duty on transfer is payable as per applicable state laws.

In **Madam Pillai V. Badar Kali** (45 Mad 612 (FB), the plaintiff being the first wife made a claim for maintenance to her husband. The husband orally transferred his lands of the value of Rs. 100/- to the plaintiff. Later, he executed an instrument of sale in favour of the defendant for the same property. The plaintiff initiated a suit stating that the transfer was initially made in her favour and the subsequent sale to the defendant was not valid. The defendant stated that the transfer in favour of the plaintiff failed for want of a registered instrument. The Court held that - the plaintiff acquired a title by way of oral transfer and she is entitled to the property though the instrument of sale was not registered.

IV. DOCTRINE OF ELECTION

According to the principle of Doctrine of Election [Section 35 of the TPA], if a person to the transfer gets two selections (a benefit and a burden), then he has to accept both the benefit and the burden

or none. He cannot accept the benefit and reject the burden in a single transaction. In other words, while claiming advantage of an instrument, the burden of the instrument should also be accepted.

Illustration: A sells his garden as well as his house through one instrument to B. Whereas, B wants to retain only the house and wants to cancel the transfer regarding the garden. According to the Doctrine of Election, B has to retain the garden if he wants to retain the house, or cancel the whole transaction. B cannot retain the house and cancel the transfer regarding the garden.

The doctrine of election is based on the principle of equity that one cannot take what is beneficial to him and disapprove that which is against him under the same instrument. The Latin maxim "quod approbo non reprobo" means that 'no one can approbate and reprobate.' In other words, a person cannot accept a thing and reject another in the same instrument. This maxim is one of the underlying principles of doctrine of election. In simple words, where a person takes some benefit under a deed or instrument, he must also bear its burden.

"quod approbo non reprobo" - Approbate and reprobate means to approve and disapprove. This principle is based on the maxim 'quod approbo non reprobo' which translates to **'that which I approve, I cannot disapprove'**. Therefore, an individual has to either accept the whole contract, order etc. or reject the whole thing.

The principle of the doctrine of election was explained by the House of Lords in the leading case of **Cooper vs. Cooper**. In Cooper v. Cooper, Lord Hather explained the principle underlying the doctrine of election in the following words, " …. there is an obligation on him who takes a benefit under a will or other instrument to give full effect to that instrument under which he takes a benefit ; and if it be found that instrument purports to deal with something which it was beyond the power of the donor or settlor to dispose of , but to which effect can be given by the concurrence of him who receives a benefit under the same instrument, the law will impose on him who takes the benefit the obligation of carrying the instrument into full and complete force and effect ." Section 35 of the Transfer of Property Act, 1882 embodied the doctrine of election. The Court also held that the doctrine of election applied on every instrument and all types of property.

V. DOCTRINE OF LIS PENDENS

Doctrine of *lis pendens* is embodied in Section 52 of the Transfer of Property Act, 1882. *Lis pendens* literally means a pending suit.

The doctrine states that a property under a pending suit should not be transferred to a third-party during a pending suit in such a way it affects the rights of any party concerned with the property. That means, no new interest should be created by way of transfer of a property during the pendency of a suit relating to it.

The Doctrine of lis pendens emerged from the Latin maxim 'ut lite pendent nihil innoveteur' meaning 'nothing new should be introduced in a pending litigation'.

The objective of the doctrine of *lis pendens* is to subjugate all parties to a pending litigation of a property, to the authoritative decision of the Court. The doctrine reflects the control which a court acquires over property involved in a pending suit until its final judgment.

When a suit or litigation is pending on an immovable property, then that immovable property cannot be transferred.

To constitute *lis pendens*, the following conditions should be satisfied:

- A suit or proceeding involving the immovable property should be pending;
- The right to the immovable property must be in question in the suit or proceeding;

- The property in litigation should be transferred;
- The transferred property should affect the rights of the other person to the transfer.

Illustration: A has litigation in determining the title of the property with X. During the period of litigation, A initiates a sale of the property in favour of B. According to the Doctrine of Lis Pendens, the property cannot be sold because the property is involved in litigation.

The Supreme Court (SC) in Dev Raj Dogra and others v Gyan Chand Jain and others interpreted the meaning of the Section 52 of the T P Act and laid down the pre-conditions as follows:

1. A suit or a proceeding in which any right to immovable property must be directly and specifically in question, must be pending;
2. The suit or the proceeding shall not be a collusive one;
3. Such property during the pendency of such a suit or proceeding cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the right of any other party thereto under any decree or order which may be passed therein except under the authority of Court. In other words, any transfer of such property or any dealing with such property during the pendency of the suit is prohibited except under the authority of Court, if such transfer or otherwise dealing with the property by any party to the suit or proceeding affects the right of any other party to the suit or proceeding under any order or decree which may be passed in the said suit or proceeding.

(source: India kanoon)

The SC observed that Section 52 of the Act does not declare a *pendente lite* transfer by a party to the suit as void or illegal, but only makes the pendente lite purchaser bound by the decision of the pending litigation. (Hardev Singh V Gurmail Singh)

Thus, if during the pendency of any suit in a court of competent jurisdiction, in which any right of an immovable property is in question, such immovable property cannot be transferred by any party to the suit *so as to affect the rights of any other party to the suit* under any decree that may be made in such a suit.

VI. MODE OF TRANSFER

VI.1.SALE

Sale means a transfer of ownership (right to possess something) of the property in exchange for a price (money) [Section 54 of the TPA]. Seller is the person who transfers the property and buyer is the person to whom the property is transferred. The consideration in a sale is usually money (for a detailed understanding, refer the chapter on Contracts).

Illustration: A sells his house for Rs. 2 lakhs to B. This is called sale. Here, A is the seller and B is the buyer. Rs. 2 lakhs is the consideration which is money.

The following are the essentials for a sale to be valid:

- There should be two different parties- the seller and the buyer;
- Both the parties should be competent to transfer;
- The property to be transferred should be in existence;
- Consideration for the transfer should be money;
- The contract should be in accordance with law.

VI.2. Lease

A lease under the transfer of property act, is a contract by which one party transfer the right to enjoy the land, property, services, etc. to another for a specified time, usually in return for a periodic payment. but does not constitute a sale. It is called a lease. [Section 105 of the TPA]. A lease can be done only of immovable property.

A lease is a transfer of the right to enjoy a property for a specific period of time in consideration of a price. The lessor is the person who lets out the property for lease or transferor, and the lessee is the person to whom the property is leased or the transferee in a lease. The lessee can also sub-let the lease and the relation between the lessee and the sub-lessee will be that of the lessor and lessee.

A sublease is the renting of property by a tenant to a third party for a portion of the tenant's existing lease contract. Even if a tenant subleases a property, the original tenant is still liable for the obligations stated in the lease agreement, such as the payment of rent each month. Subleasing with the consent of the Landlord is legal in India. If the agreement allows the tenant to sublease it, the tenant can sublease a portion of the property to a third party. When a tenant whose name is on the lease rents a room, a portion of the property, or all of the property to another, it is referred to as subleasing (or subletting). The subtenant must pay rent and comply with the lease terms, but the principal tenant remains ultimately responsible for the lease.

Illustration: A for a period of 3 years lets out his property for use to B for a sum of Rs. 50,000/- This is called a lease. A is the lessor and B is the lessee. If B sub-lets the property to C, then B will be the lessee and C will be the sub-lessee. The relation between B and C will be of that relationship that is between A and B.

VI.3. Exchange

When two persons transfer ownership of one thing for the ownership of another, it is called exchange [Section 118 of the TPA]. Transfer of property by exchange can be made only by way of sale. The rights and liabilities of the parties to exchange shall be that of the rights and liabilities of the buyer to the extent of receiving and that of the seller to the extent of giving.

Illustration: A offers to sell his cottage to B. B in consideration of the cottage sells his farm to A. Instead of getting money for his cottage, A has received a farm from B. This is an example for Exchange. The rights and liabilities of A will be that of seller towards the sale of the cottage and will be that of buyer towards the sale of the farm. Similarly, the rights and liabilities of B will be that of buyer towards the sale of the cottage and that of seller towards the sale of the farm.

VI.4. Gift

A transfer of ownership of property that is made voluntarily and without consideration is called Gift [Section 122 of the TPA]. The person making the transfer is called the donor and the person to whom it is made is called the donee. If the donee expires before accepting the gift, it becomes void.

Illustration: A gives his car to B. B accepts the car. But B does not pay anything in return for the car. This is known as Gift. In this case, A is the donor and B is the donee.

Sale, Lease, Exchange and Gift

Basis	Sale	Lease	Exchange	Gift
Transfer	Transfer of ownership for price	Transfer of limited owner ship for rent	Transfer of ownership for some other property	Transfer of ownership without consideration
Consideration	**Price**	**Rent**	**Another Property**	**No consideration**
Mode	Sale deed should be registered	Lease deed should be registered	Sale deed should be registered	Gift of immovable property should be registered.

Exercise

1. X is an owner of mango groves where exceptional quality of mangoes are produced by hybrid mode. He is one of the largest exporters of mangoes. Till the year 2020, he has been into exporting mangoes. Due to setback to his business because of covid, from 2021 he shifted to selling mango wood in local markets. Identify if there is any difference in the type of property he has been dealing with in the year 2020 and in 2021 respectively.
2. A has a matter pertaining to the title of immovable property situated at Bangalore with B. the matter is subjudice in the court of Civil Judge at Bangalore. During the period of pendency of suit, A's mother was to be operated for open heart surgery and to accommodate the financial need, he sold this property situated at Bangalore to C. Decide the validity of the transfer made by A to C. Explain the requisites of principle of law involved.
3. Manan and Ketan enter into an agreement of lease of property for a tenure of 24 months at a consideration of Rs 9000/- per month. Ketan is expected to return the property at the expiry of this term in the condition in which he received it. Ketan was transferred to another city but for a short span. He sub-lets the property to Manoj for a sum of Rs 10,000/-. Manoj carries ou such alterations as would depreciate the property. Decide if Ketan is authorised to make such transfer by sub-lease. Also highlight the remedy available to Manan.
4. Elucidate on the importance of Attestation as an important step preceding Registration.

CHAPTER 3(D)

Intellectual Property Law

Learning Outcomes

Students will be able to:

- Explain the nature and meaning of Intellectual Property
- Explain the meaning of Intellectual Property Rights
- Explain the importance of international conventions on Intellectual Property Rights
- Recall the historical perspective of Intellectual Property
- Analyse the importance of different types of Intellectual Property Rights and its importance in the commercial world
- Appreciate the rights granted to the holder of intellectual property rights

I. Meaning of Intellectual Property

Intellectual property is an intangible property that comes into existence through human intellect. It refers to the creation of the mind or products of human intellect such as inventions, designs, artistic work, names, symbols, images etc.

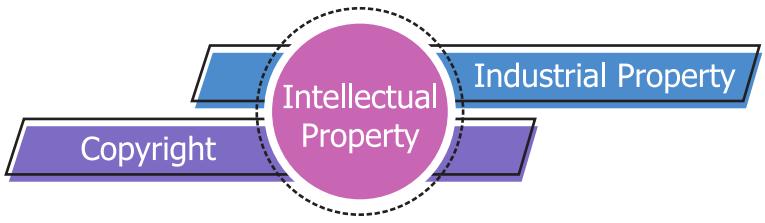
II. Intellectual Property Rights

The term "Intellectual Property Rights" (IPR) refers to the bundle of rights conferred by law on a creator/owner of intellectual property. These rights are the rights given to persons over the creations of their minds. They usually give the creator an exclusive right over the use of his/her creation for a certain period of time.

They seek to protect the interests of the creators by rewarding their mental labour and allowing them to retain property rights over their creations. The creators/ inventors are thus allowed to benefit from their creations.

The main reason for granting these rights is to encourage inventions and creations that promote social, economic, scientific and cultural development of society.

Intellectual property is divided into two categories:



1. **Industrial property -** this includes inventions (patents), trademarks, industrial designs, and geographic indications of source; and
2. **Copyright -** this includes literary and artistic works such as novels, poems and plays, films, musical works, artistic works such as drawings, paintings, photographs and sculptures, and architectural designs.

III. What are the international obligations that have shaped Indian IPR?

Treaty	Year	Principles and Objectives
The Paris Convention for the Protection of Industrial Properties	The Paris Convention was adopted on *20 March, 1883 in* Paris and was enforced on *7 July, 1884.*	**1. National Treatment** In the context of legal protection for industrial property, the principle of National Treatment requires each member country of the Paris Convention to provide equal legal protection for the inventions of nationals from other member countries, as it would for its own nationals. **2. Framework of Priority** The Paris Convention also upholds the principle of "priority framework," allowing an inventor to protect their invention simultaneously in various countries.
The Berne Convention for the Protection of Literary and Artistic Works	The Berne Convention was adopted on *9 September, 1886* and came into force on *4 December, 1887.* The Berne Convention was originally signed in 1886 at Berne in Switzerland.	**1. National Treatment** Stipulated that any work originating in a contracting state, including works of authors who are nationals of that state or works first published in that state, should receive the same legal protection in every other contracting state as the latter state grants to its own nationals. **2. Automatic Protection** Mandated that legal protection should not be subject to compliance with any formalities. **3. Independence of Protection** decreed that legal protection should be independent of the existence of protection in the country of origin of the work.
The Universal Copyright Convention (UCC)	Established in the year 1952.	**1. National Treatment** The UCC adheres to the principle of national treatment rather than automatic protection, which implies that contracting countries are not obligated to provide foreign works with automatic protection if the national requirements are not met.

		2. The term of the Work Under the UCC, original literary, artistic, and scientific works are eligible for protection. To provide reasonable notice of the copyright claim, a copyright notice should accompany the work. The UCC stipulates that protection for a work lasts for the duration of the author's lifetime and an additional 25 years following the author's death. **3. Minimum Rights** As per the UCC's provisions, the contracting countries must provide a specific set of "minimum rights" to the lawful owner of the work, provided they do not create any conflict with the "spirit" of the convention.
World Intellectual Property Organisation (WIPO)	The WIPO Convention, which is the primary instrument of the World Intellectual Property Organisation, was signed on July 14, 1967, in Stockholm. It came into effect in 1970 and was subsequently amended in 1979. In 1974, the WIPO became one of the specialized agencies of the United Nations (UN) system.	The WIPO had two primary objectives, which were: 1. To promote the legal protection of intellectual property worldwide. 2. To facilitate administrative cooperation between the intellectual property unions created by treaties administered by the WIPO.

IV. Brief Historical Perspective

With the establishment of the World Trade Organization (WTO), the importance and role of intellectual property protection was crystallized in the Trade-Related Intellectual Property Systems (TRIPS) Agreement. It was negotiated at the end of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) treaty in 1994.

The TRIPS Agreement came into effect on 1 January 1995 and is the most comprehensive multilateral agreement on intellectual property. It encompasses all forms of intellectual property and aims at harmonizing and strengthening standards of protection and providing effective enforcement of intellectual property rights at both national and international levels.

India being signatory to the TRIPS Agreement has passed several legislations for the protection of intellectual property rights to meet the international obligations. Some of these legislations are listed below:

Trade Mark Act, 1999, Designs Act, 2000, Copyright Act, 1957 (as amended), Patents Act, 1970 (as amended), Geographical Indications of Goods (Registration and Protection) Act, 1999, Protection of Plant Varieties and Farmers' Rights Act, 2001.

The history of Patent law dates back to 1911. Around this time the Indian Patents and Designs Act, 1911 was enacted. The present act governing patents law in India, the Patents Act, 1970 came into force in 1972. It amended and consolidated the existing law relating to Patents in India. The Act, went through an amendment in 2005 to be compliant with the TRIPS agreement and is now known as the

Patents (Amendments) Act, 2005. Through this amendment product patent was extended to all fields of technology including food, drugs, chemicals, and micro-organisms.

V. Copyright

What is copyright?

Copyright is a right given by the law to creators of literary, dramatic, musical and artistic works and producers of cinematograph films and sound recordings. It is a bundle of rights including, rights of reproduction, communication to the public, adaptation and translation of the work. This protection is automatic (upon creation of the work) and does not depend on registration.

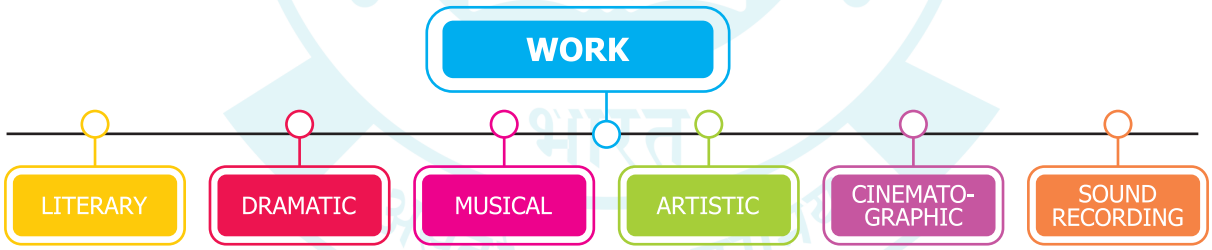
What is the scope of protection in the Copyright Act,1957?

In India, the law relating to copyright is governed by the Copyright Act, 1957. To get the protection of copyright a work must be original. Mere ideas, knowledge or concepts are not copyrightable. Having said that, copyright protects the original expression of information and ideas. Copyright can be claimed by either the creator or the person who has inherited the rights of ownership from the original creator or an agent who is allowed to act on behalf of the creator.

WORK

What is a work?

All subject matters protected by copyright are called protected **works**. Section 2(y) of the Act defines 'work'. It includes the following:



When is a work protected by Copyright?

A work is protected by copyright when:

1. It falls within the category of 'work' under the Act;
2. The work must be recorded/ fixed in material form (tangible form); and
3. The work must be original.

REGISTRATION OF COPYRIGHT

Is it necessary to register a work to claim copyright?

No. Acquisition of copyright is automatic and it does not require any formality. However, certificate of registration of copyright and the entries made therein serve as prima facie evidence in a court of law with reference to dispute relating to ownership of copyright.

What is the procedure for registration of a work under the Copyright Act,1957?

Copyright comes into existence as soon as a work is created and no formality is required to be completed for acquiring copyright. However, facilities exist for having the work registered in the Register of Copyrights.

TERM OF COPYRIGHT

Is copyright protected in perpetuity?

No. It is protected for a limited period of time.

What is the term of protection of copyright?

The general rule is that copyright lasts for 60 years. In the case of original literary, dramatic, musical and artistic works the 60-year period is counted from the year following the death of the author. In the case of cinematograph films, sound recordings, photographs, posthumous publications, anonymous and pseudonymous publications, works of government and works of international organisations, the 60-year period is counted from the date of publication.

RIGHTS OF THE OWNER OF A COPYRIGHT

Economic rights – This allows the rights' owner to derive financial reward from the use of their works by others. Within this category are other rights such as:

1. **Right to reproduce the work -** Reproduction is an act of copying from the previously finished works or giving it a differential form by adding, editing or modifying the same. Such right shall exclusively be exercised by the owner of the work and shall not be infringed by any other person since the act of reproduction of the work may economically make benefits to its owner.
2. **Right to distribute in market -** the owner of the copyrighted work also has a right to distribute in the market and make money out of it. The act of distribution may be in the form of sale, lending for free or for a consideration, rental, or free distribution by the way of gift.
3. **Right to communication to the public -** It means letting or making the product/work available to the public by way of broadcasting, simulcasting or webcasting.