



LAW OPTIONAL TEST PAPER NO: 07
UPSC MAINS 2024

Question one and five contain Five parts of 10 marks each. Other questions consist of three Parts each with 20, 15 and 15 marks Respectively.

Section - A

Q.1(a). A minor is liable to pay out of his property for necessities supplied to him. Discuss with the help of decided cases. (10 Marks, 150 words)

Q.1(b). "Public policy was a very unruly horse and when once you get astride it you never know where it will carry you." (Burroughs, J.) Examine relevancy of this statement under the Indian Law. (10 Marks, 150 words)

Q.1(c). Define the terms "agreement" and "contract" and explain the difference between the two. (10 Marks, 150 words)

Q.1(d). Differentiate between conditions and warranties under the Sale of Goods Act. What are the implied conditions and warranties in a contract of sale? (10 Marks, 150 words)

Q.1(e). 'Jurisdiction of a court to decide disputes arising out of contractual relations cannot be ousted by an agreement between the parties.' Discuss. (10 Marks, 150 words)

Q.2(a). What do you mean by 'Consideration'? Can a contract be valid without consideration? If yes, Elucidate with help of case laws (20 marks)

Q.2(b). What are the major principles governing the Contract of insurance? (15 marks)

Q.2(c). All contracts in restraint of trade are prima facie void, but are valid if they are reasonable. Explain how the reasonableness of restraints can be tested. (15 marks)

Q.3(a). Discuss the concepts of "coercion" and "undue influence" in the context of consent under Contract Act. (20 marks)

Q.3(b). Discuss the role and importance of the arbitration agreement under the Arbitration and Conciliation Act, 1996. What are the essential elements that constitute a valid arbitration agreement? Is stamping of agreement essential? (15 marks)

Q.3(c). How is an agency relationship created according to the Indian Contract Act? What are the general duties of an agent towards the principal? (15 marks)

(1) Express App. (2) Implied (3) Estoppel (4) emerg.

Q.4(a). Explain the doctrine of 'frustration' of contracts. Examine the statement: Cases of frustration of contracts are not simply cases of initial or supervening physical or legal impossibility of performance of contracts. (20 marks)

Q.4(b). Explain the relationship between the transfer of property and the transfer of risk. What constitutes delivery of goods under the Sale of Goods Act? (15 marks)

Q.4(c). What is agency by ratification, and what are its essential conditions? Discuss the effects of ratification on the relationship between the principal, agent, and third parties. (15 marks)



Section - B

Q.5(a). Explain the concept of "communication of offer" and "communication of acceptance.(10 Marks, 150 words)

Q.5(b). "The individual deserves to be protected against the possibility of exploitation inherent in 'Standard Form of Contract.'" Explain. (10 Marks, 150 words)

Q.5(c) "Law as well as justice should try to prevent unjust enrichment. Critically examine this statement in relation to quasi-contracts." (10 Marks, 150 words)

Q.5(d). Discuss the law Related to Acceptance and Communication Under Contract Act, 1872. How 'offer' is different from 'invitation to Offer'? (10 Marks, 150 words)

Q.5(e). What are the essential elements required to form a valid partnership? Differentiate between a "partnership at will" and a "particular partnership.(10 Marks, 150 words)

Q.6(a). Every contract contains a 'core' or fundamental obligation which must be performed, if one party fails to perform this fundamental obligation, he will be guilty of a breach of contract whether Or not any exemption clauses has been inserted which purports to protect him. (20 marks)

Q.6(b). Explain the key differences between a contract of indemnity, guarantee, and Contract of insurance.(15 marks)

Q.6(c). What are the essential elements of a contract of sale under the Sale of Goods Act? Differentiate between a "sale" and an "agreement to sell" under the Act. (15 marks)

Q.7(a). Critically evaluate the recent landmark judgment of the Supreme Court of India in "Vidya Drolia & Others v. Durga Trading Corporation". How does this judgement impact the framework of the Arbitration and Conciliation Act, 1996(20 marks)

Q.7(b). What constitutes a breach of contract under the Indian Contract Act? Discuss the legal remedies available for breach of contract. (15 marks)

Q.7(c). "Minority can only be claimed as a shield but not as a sword." Explain the statement and mention the situations when a minor is liable under the law of contract. (15 marks)

Q.8(a). What are the rights of the surety against the creditor, principal debtor, and co-sureties? Discuss the extent of the surety's liability and the concept of co-extensive liability with the principal debtor. (20 marks)

Q.8(b). Discuss the significance of the Supreme Court's judgement in "MSR Leathers vs. S. Palaniappan & Anr." (2012) in the context of multiple presentations of a dishonoured cheque. How does this judgement impact the interpretation of Section 138? (15 marks)

Q.8(c). What are the major rights and duties of a partner under partnership act? Discuss the concept of "holding out" and its implications.(15 marks)

Q.1

(a)

An agreement with a minor is void ab initio under Sec 10 of the Contract Act since a minor is not deemed to be competent to enter into a contract. (Mohori Biebi case)

Liability For Necessaries

Chapter - V A of the Contract Act contains provisions of Quasi-contract wherein under Sec 68 a minor is liable to pay out of his property for necessaries supplied to him.

What constitute 'Necessaries'

1. A thing which is a reasonable requirement in ordinary pursuits of life

Illustration : In a case where a minor purchase furniture, the court held this not to be a necessary.
This was also upheld in Ajudhia Prasad case.

2. must not have enough supplies already

In Nash v. Inman, a minor was delivered 11 waistcoats and hence naturally it was held to be necessary.

3. supplier must not have idea of minor hiding age : if such information is there, he can't sue for restitution 6 (payment).
(Mohori Bibee case)

This, liability is in furtherance to the principle of Quantum meruit and Equity Justice.

Q.1(b)

Public Policy is an important consideration to ascertain validity of a contract under common law.

Public Policy as unruly horse

1. Not clearly defined heads
2. Subject to interpretation of courts
3. Changing dynamics of society and values; Burroughs, J.

Relevance under Indian law

Under Section 23 of the Indian Contract Act, lawful object is mentioned for an agreement to be enforceable by law.

→ One such object which is mentioned under it is of

1. 'Public Policy', heads of which are given thereunder:

1. Trading with enemy

Illus: Agreements of supply of goods with a rival country in war is against public policy.

2. Maintenance in Public Office

• stirring up litigation without a just cause (maintenance by 'Lord Denning')

• champerty: Filing suit for property with an agreement to share receipts.

3. Immoral Cohabitation

Agreements for such cohabitation in lieu of money are against Public Policy.

4. Against interests of vulnerable sections e.g. Paradaxhin women

→ Contrary
However, Public Policy is 5/2 Indian law is also developing such as bar darme has been not held to be against public policy lately by courts.

Q.1(c)

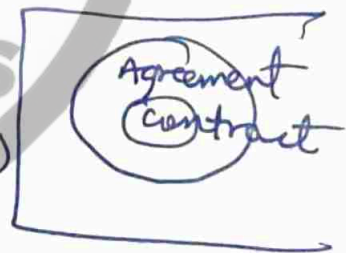
"Agreement" and "contract"

are defined under Section 2(e)
and Section 2(h) of the Contract
Act, 1872.

• Agreement — Sec. 2(e)

Every agreement promise and
every set of promises forming
the consideration of each
other.

• ~~Contract~~ Contract — Sec. 2(h)



An agreement enforceable by
law is a contract.

What Agreements are Contract

Section 10 prescribes the condition
for an agreement to be a
contract.

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1. lawful consideration
i.e. the price in return of promise
(Chinnaya v. Ramaya)

2. Lawful object
- any agreement which is illegal,
void e.g. Restraint of trade
(Raj Coomar case) are
not lawful.

3. Competence
Under Section 11, every person
is competent except:

→ minors → Unsound mind
(Void agreements (Sec. 12)
↳ Mohori Beebi case)

4. Free consent
i.e. - consent not founded upon
coercion (S. 15), Undue Influence
(S. 16),
Misrepresentation and Fraud (Sec. 17, 18)
and Mistake (Sec. 20).

Any agreement with above four
conditions becomes a contract
enforceable by law.

Q.1(c)

Conditions and warranties are certain stipulations in regard to performance of an agreement of sale of goods under the Sale of Goods Act, 1930.

Differences

Condition	Warranty
1. <u>Definition</u> A stipulation <u>essential</u> to the main purpose of <u>contract</u>	A stipulation which is <u>secondary</u> to the main purpose of contract.

2. Provisions

Sec. 12(2)

Sec. 12(3)

3. violation

violation of a condition makes the contract void

Violation of a warranty only implies suit for damages.

4. Waiver

A condition cannot be waived but can be converted into warranty upon acceptance of goods.

A warranty can be waived.

~~5. Illustration~~

Agreement to supply milk of Nissin Brand, some other brand was sent.

→ Breach of condition (Niblett confectioners case)

Agreement to purchase a car for touring purposes, there are some scratches found on it. Buyer can seek damages.

Implied Conditions [Sec. 16]

1. Reasonably fit for buyer's purpose (1)
- in a case where heat bottle which was defective was supplied causing injury, it was held to be violation of condition. (Priest v. Last)

2. Merchantable Quality (1)
i.e. fit for personal use and also for resale. (Rodley v. Perry)

3. Express Provisions (1)

Hence, this way sanctity of sale of goods contracts are ensured. (6)

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Q.1(c)

There is dictum of a court to decide disputes arising out of contractual relations cannot be ousted by an agreement because such an ouster would amount to Restraint of legal Proceedings under section 28 of the Act.

Conditions for Restraint of Trade

1. 'Absolute' Restraint

This entails that condition imposed by the agreement must ouster all avenues to seek redressal from courts. (Continental Ltd. case)

2. Limitation Period Restraint

An agreement imposing condition to sue for example only after 3 years is violation of limitation Act and hence is not valid under section 28.

3. / Concurrent Jurisdiction

In agreements where condition of jurisdiction is imposed for a particular place only is valid.

Illus. : Concurrent Jurisdiction of two high courts, agreement requiring disputes to be heard ~~to~~ in one of them only is valid.

② ~~Choverdhandas Kedia case~~

Exceptions to such Restraint

1. Reference of existing disputes to Arbitration —

such an arbitration clause has been upheld multiple time.

(KK Modi v. KN Modi)

2. Reference of future disputes to arbitration — Such an agreement is also held to be part of exception under Sec. 28.

Hence, these exceptions are in furtherance of endeavour to Alternative Dispute Resolution revolution in India.

Q. 2

Ans. 'Consideration' is defined under Sec. 2(d) of the Indian Contract Act. As per salmond, consideration is the price paid in return for a ~~promise~~.

[Sec. 2(d): Definition of consideration]

"When at the desire of the promisor, the promisee or any other person does or abstains from doing something, such an act or abstinence is the ~~consideration~~.

Rationale: As per Cheshire and Fifoot, in legal systems where consideration is not an essential part of contract formation, therein Intention to contract has to be established and hence consideration represents Intention to contract (Balfour v. Balfour)



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Validity of a contract without consideration

Under Sec. 10 of the Contract Act, a lawful contract is one which has

- (1) lawful consideration (2) lawful object
(3) free consent (4) competence

Hence, consideration is an essential and integral part of an agreement
(Chinnaya v. Ramayaa)

Exceptions to consideration

Section 25 of the Contract Act enlists three exceptions wherein an agreement can be enforced without having the necessary consideration as upheld in

Rose Fernandez v. Joseph Gonsalves
judgment.

C1) Natural Love and Affection (Sec-25(1))

Wherein promises are made in personal relations of love and affection

→ In case of handing over property to son with a ~~consider~~ promise to share it with illegitimate son, any other ~~consideration~~ is not required. (Bhina v. Shivram)

• However, not for quarrels and disputes between husband and wife:

In a case where husband promised wife to separately reside in lieu of maintenance, the court held that this agreement was not based on any love and affection and hence was not covered under Sec-25(1).

C2) Past consideration for an act done - Past Act at Request (Sec-25(2))
wherein a promise is made to

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compensate for a past act done
at request, then such an agreement
is valid without any other consideration.

→ In a case where a prisoner
requested a lawyer to defend him,
afterwards the lawyer sued
him for legal charges. The court
held this to be a valid agreement
despite past consideration.
(Ramchandra Chintman v. Kaluraj)

(3) Promise to pay a time-barred
debt: Sec-25(3)

Wherein a promise is made to
pay a debt which is barred by limitation,
it is a valid agreement.

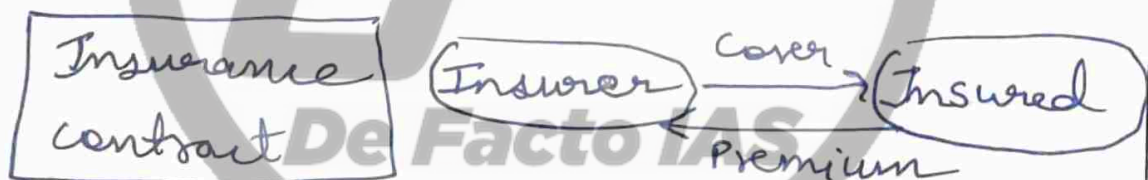
→ In a case where tenant wrote a
letter to owner to pay arrears to
landlord, such promise was held
enforceable under Sec-25(3).

(Appa Rao v. Suryaprasad Rao)

This way agreements like above can
be enforced without consideration.

Q. 2(b)

Insurance contracts are in some way wagering agreements wherein a promise is made to cover for any prospective risk, damage to life or property. Hence, Insurance contracts seek to indemnify a person from prospective loss in lieu of the premium paid as consideration.



Constituents of an Insurance Agreement :

1. Insurable Interest

There must be something which has to be subject of protection.

Illus. - In fire insurance, property safety from fire is an insurable

interest.

2. Underlying Risk ↗
such risk & which poses danger
of loss of life or property.

Illus: - Health insurance in case of
a heart disease - this is the risk

3. Premium - It forms the
consideration of the insurance
agreement. [Sec. 2(d)]

↳ New India Assurance Limited case

Principles governing contract
of Insurance

1. Uberrima Fides / Good faith

As per this principle the insured
person has to disclose in good
faith all such information which
is relevant for the insurer
to decide upon entering into
the insurance agreement.



Illustration : In a case where a person seeking life insurance had ~~the~~ hidden his condition of terminal illness, the insurance contract was repudiated due to lack of uberrima fides.

2) Direct and Proximate Nexus
The damage caused ~~to~~ to person or property must have proximate nexus with the insurable risk that was the underlying basis of the contract.

3) Burden of Proof : The insurance holder must satisfy the surveyors as to the damage causes is in consonance to insurance contracts.

Hence, Insurance contracts are uberrima fides.



→ Core
→ Contract
→ Contract

Q. 2(c)

Agreements in order to be contract must have a lawful object under Sec 10 of the Indian contract Act. An agreement in restraint to trade are void under section 27 of the above act.

Agreement in Restraint to trade are Prima facie void

1. Partial Restraint

In madhub Chander v. Raj Kumar, rival shopkeepers entered into agreement to not open shops in vicinity.

The court held that such a partial restraint is also void under Sec 27 since this provision unlike section 28 doesn't mention 'absolute.'

2. Reasonable conditions

In Nordenfelt maxim Ammunition company case, a gun manufacturer imposed some conditions on an employee:

- (i) not to join a rival company for some period
- (ii) not to do a competing business

The court held the second condition to be unreasonable and violative of Section 27.

Reasonableness of Restraints

1. Statutory exceptions:

Under Sec. 27 itself, strategic combination in form of trade unions imposing certain conditions on the members are deemed reasonable and hence not violative of Sec. 27.

- Partnership Act : Sec. 11, Sec. 36

2. Judicial exceptions

• Salus or exclusive dealing agreements

Wherein to preserve brand value, a particular product is exclusively dealt by a trader.

Illus.: A contract of manufacturing Dhotis was given to a vendor with a condition that it would not be supplied to any other person. It was held to be valid.

• Conditions upon employees

- to keep secrets of the company;
 - to have a buffer period before joining a competitor,
- (Raj Coomra case)

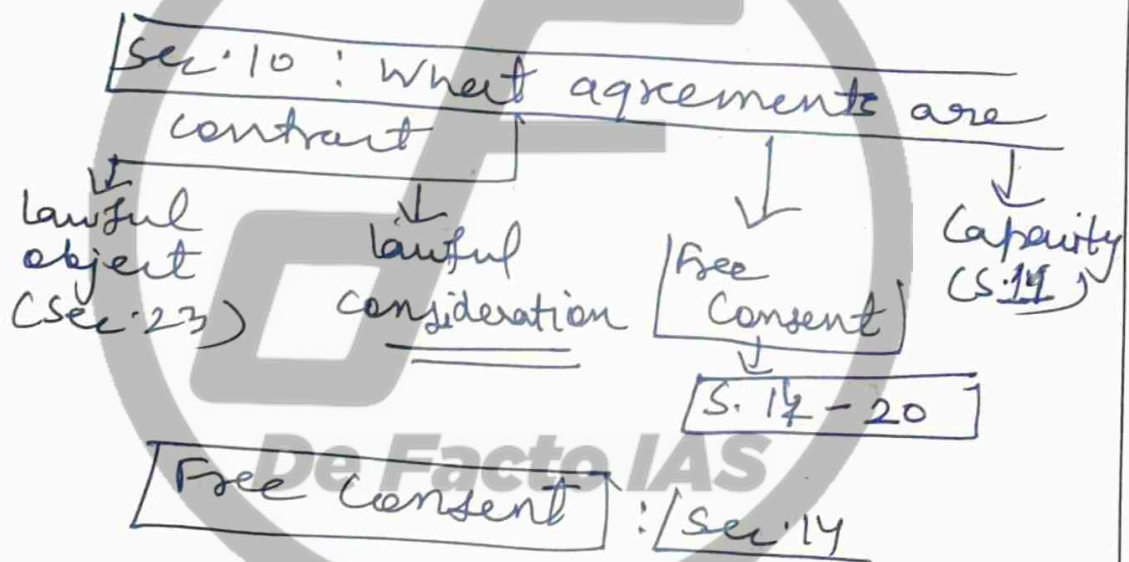
• Conditions while in employment

In Coca Cola Bottling Limited case (2024), Supreme Court held that such conditions during continuance of employment are more or less reasonable and in spirit of principles of business.

Q. 3

(A)

An agreement in order to be a contract must be founded upon free consent under Section 10 of the Indian Contract Act.



An agreement is said to be entered into by free consent if it is not marred by :

1. Coercion (Sec. 15)
2. Undue Influence (Sec. 16)
3. Fraud (Sec. 17)
4. Misrepresentation (Sec. 18)
5. Mistake (Sec. 20)

A. Coercion Sec. 15

An agreement is said to entered into by coercion when it is made under threat of :

(i) an offence committed under IPC

e.g. Sec. 506 - Criminal Intimidation

(ii) threat to detain / false imprisonment

Illustration : There was a quarrel between husband and wife wherein wife wanted to get property transferred in her name from husband. She threatened to commit suicide if husband didn't sign the property papers.

such an act was held to be coercion.
(Inder Singh v. Parmeshwari Singh)

B. Undue Influence: Sec. 16

An agreement is said to be entered into by undue influence when one of the parties owing to superior position, or trust or otherwise exercise authority over the other.

(1) Position to dominate the will of another

In case of spiritual advisers, Gurus etc. when they direct devotees to transfer any property in return for divine intervention, such an act is said to be under influence.

(2) exploiting weakness (Financial) of other party

→ Lloyd v. Thomas Bank

Bank manager took mortgage of Plaintiff's house threatening action against son for loan. This was held to be violative & marred by undue influence.

However, it has also been held that urgent need of money is no distress so as to avoid the contract.

(3) violation of trust / capacity

In a case where agent of an old lady asked her to transfer two properties to him was held to be voidable.

(Dulari Devi v. Janardan Nair)

Presumption of undue influence

In some cases, to protect weaker party, court presumes undue influence.

1) unconscionable bargains e.g. defrauding an illiterate lady / minor to extract benefits out of a contract

2) Contract with Pardnashin woman

These protections are in the best interest of weaker parties in a contract.

Q. 3 (b)

Arbitration and Reconciliation
Act, 1996 is a legislation
founded upon the tenets of
Alternative Dispute Resolution
mechanisms. It is in line with
the idea of Prof. EA Chadler of
Multi-door courthouse wherein
the parties can enter into any
door of their convenience.
Arbitration is one such door.

Role and Importance of
Arbitration Agreement

- mandatory for court to refer
such a dispute to arbitration
(Sec 8)

If there is an arbitration clause
existing in the contract and
one of the parties apply to

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Court for referring such dispute to arbitration not later than presenting first statement, then it is mandatory for the court to refer the matter to arbitration.
(KK Modi v. KN Modi)

- Arbitrability
Such an agreement further leads to the presumption that the dispute in question is arbitrable. (Duke Pvt. Ltd. case)
- Procedure, manner and Appointment of Arbitrators can be decided under it. (Sec. 16).

Essential elements that constitute a valid arbitration agreement

1. Arbitrable disputes

matters which arise out of contractual relationship between the parties.
(KK Modi case)

2. manner and Appointment,
Number of arbitrators
(Sec. 11)

Essentially, there must be odd number of arbitrators, one each appointed by either parties and the third one by consensus.

3. Seat of Arbitration

Seat determines lex Arbitri
i.e. the laws and jurisdiction of state which are to be applicable; (Everton case)

4. Terms of Disputes that needs to be adjudicated.

5. Written and signed by both parties.

Stamping of agreement is not essential, however the agreement must be written and signed by both parties. However, stamping puts a legitimacy on the agreement (Vidya Drolia case)

Q. 3(c)

Section 182 of the Indian Contract Act defines contract of agency wherein a person is appointed by one to represent him/herself and authority to enter into agreements and do business on behalf of Principal.

Creation of Agency

1. Express Appointment

Under a contract between the Principle and agent appointing the agent and giving him the authority to represent the principal.

2. Implied Agency

In case a person acts as an agent on behalf of principal without any express appointment.

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Illus.: A asks B his friend to look for a buyer for his car and he does so A would share ^(it) some profits with B. B accordingly finds a buyer and gets the sale done. B is an agent of A.

(3) Estoppel agency

wherein a person acts like an agent on behalf of Principal and Principal doesn't object on it then he/she is estopped from refuting agency.

→ In a case Plaintiff Tehsildar was appointed by defendant to manage land and property of him. Tehsildar sold one of the property. It was an agency and principal was bound by it.
(Kahisnath v. Nisakar Raut)

(4) Emergency

In case of urgent necessity, wherein recourse / communication w, th



Principal is not practicable.
Illus. - A consignment of butter was being delivered, mid way, traffic-jam, since the goods were perishable, they were sold midway. Principal was bound. (Sime v. Midland company)

Duties of Agent

1. ~~Duty to perform conditions in good faith~~ (✓)

2. ~~Duty to execute mandate~~ (✓)

3. ~~Duty Not to make secret profits~~ (✓)

- In a case where an agent bribed a clerk to obtain secret profits, agent was held liable to Principal.

4. ~~Duty to avoid conflict of Interest~~ (6)
- in a case an agent himself purchased property from principal to later sell it at higher price. ⇒ violation of contract

5. Duty of Disclosure (✓)

These constituents ensure that agent's rights are endowed upon by the Principal.

Q.5

(A)

"offer" and "Acceptance" are
integral to formation of a contract.
What is more important is
communication of offer and
acceptance.

1. [Of offer]

Communication of offer is done
by two types of offers:

(1) General offer

i.e. open for any & member of
public to perform the promise
and be a party.

Illus.: A company offered anyone to
take their pill and if they
contract influenza upon it,
will get £100. It amounts
to a general offer. (Carlill v.

Carbolic Company)

(2) Specific offer

made to specific person.

2. Acceptance

Section 4: communication when complete:

1. For Proposer: when it is out of reach of acceptor offeree,
2. For Offeree: when it comes to knowledge of offeror.

Modes of communication

1. In the same way as offer was communicated
e.g. Dunmore v. Alexander
- by Post
2. In a way described by the agreement
3. By performing condition
(Bragden v. Railway Co.)

Instantaneous Communication

via phone / telec, it is complete as soon as it is heard by the offeror,
→ Bhagwandas Kedia case

(b)

Standard form of contract also called as Adhesion contract as they contain various terms and conditions often excluding/limiting liability of offeror.

[Protection from exploitation]

Court have devised certain protective devices for protection of weaker parties:

1. Notice of unusual terms
Clear and reasonable notice of terms must be communicated
(Henderson v. Stevenson)
2. Notice contemporaneous with contract (Olley v. Marlborough Council)
3. Fundamental Breach
when the very 'core' of contract is breached, then exemption

clause would not exclude liability —

A ~~dress~~ ^{carpet} for dry cleaning was lost, clause limiting liability was held to be void.

(Levison v. Patent Steam Co.)

4. Strict construction

i.e. any ambiguous clause is interpreted in favour of weaker party (Alcorib v. Booth)

5. Tortious liability

exemption clause cannot ~~exempt~~ ^{exonerate} liability for negligence

(White v. McGregor Ltd.)

6. Third Parties

Exemption clause can't benefit a party which is not party to contract. (Oceanic Navigation Co. case)

Hence, standard form of contracts if against public policy (Sec-23) must be read down. (Law Commission, 102nd report)

(c)

Justice, Equity and Good conscience prescribe that no party in a dealing must derive unjust enrichment; it is based on Quantum meruit principle.

[Quasi-contracts]

Chapter V-A of the Indian Contract Act contains provisions on 'Certain Relations Resembling Contract', wherein despite no contract, liability is assumed under equity:

1. Liability For Necessaries (Sec. 68)

- Such as supply of necessities to minors - price can be claimed despite a void agreement.

2. Payment of an interested person
(Sec 69)

— for instance, a buyer of property pays off remaining loan of seller despite having no obligation to pay.

3. Liability for Non-gratuitous Act

An act done without acting gratuitously and benefits of which are enjoyed by other party, quantum meruit applies.

(State of West Bengal v. B.K. Mondal)
[Sec 70]

4. Mistake

Finder of Goods [Sec 71]

— acts as bailee of such goods

5. Mistake [Sec 72]

e.g. incorrect assessment of tax under a deleted Field

— repayment ordered.

Hence, this-way Quasi-contracts protect unjust enrichment.

(d)

In order to make a promise / offer into a contract, there must be valid acceptance to it.

Acceptance - Sec. 3

It must be absolute and unqualified.

In Harvey v. Face, an offer to sell a horse for 1000£ was replied as 950£ which was not accepted. Later on accepting 1000£ was not valid as it formed a counter-offer.

Communication - Sec. 4 - In the same way as offer was made.

- communication has to be to the offeror himself (Kelthouse v. Bindley)

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Invitation to offer

offer on one hand is direct invitation to public to perform certain conditions which are specified in the offer itself, e.g. offer to marry daughter of A to B's son

whereas, Invitation to offer is just an expression of interest in making the offer.

1. Catalogue of goods
2. price tags on products in shop
3. Auction price

All three constitute invitation to offer and someone who wants to take the deal must offer it to the other party and negotiate.

(Winn v. Bull)

(e)

'Partnership' contract are a form of relationship between two or more person who agree to do business together and share profits and act for each other.

Partnership Act

Essentials :

1. Two or more persons
2. Agreement to join together in a venture and share profits
3. While acting one for all and all of them acting for one.

(Col v. Nickman)

Illustration: A and B decide to jointly start a water park

and agree to share profits
in 50:50 ratio. Both are
partners and acts of one kind
the whole partnership. (Sec. 6)

① Partnership at "will"

It is a general partnership
formed between two or more
person by agreement between
them.

Revocation: By Notice (Sec. 40)

② "Particular Partnerships"

These are formed for particular
purposes e.g. purpose to dispose
off a property.

Dissolution: Contingent dissolution
under Sec. 42, once the said
purpose is fulfilled, there
is automatic dissolution
of the partnership.

Q. 6

(A)

In the fast-paced world of quick commerce, standard form of contracts are becoming a commonplace. These type of contracts with exemption clauses which are wide violate essential of acceptance.

Under Sec 2(b), for a valid acceptance, the promisee must have opportunity to be aware of all hidden conditions and clauses existent in the contract.

Doctrines of Fundamental Breach

In order to protect weaker parties (customers) from arbitrary exemption clauses in standard

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contracts, court have developed certain protective devices for the weaker party. One such device is the Fundamental Breach.

Meaning

Lord Wilberforce (J) explained it as:
Every contract has a 'core' obligation around which the contract is based upon. If that very 'core' is taken away by breach, then no exemption clause can protect such a breach on part of promisor.

Constituents of Fundamental Breach:

1. Destruction of subject matter
— in Lily Swamy case a dress for dry cleaning was given which was lost. The exemption clause

restricted the liability upto
15% of the value of object,
the court held it to be a
fundamental breach.

2. Performance contradictory
to duty

In Photo Production v. Securitor Transport
a watchmen kept to guard a
factory himself set the factory
on fire. No exemption clause
could protect such negligence
as held by the court.

3. Particularly onerous terms
not contemplated by parties

In a case where demurrage
clause charges per day were not
informed to the party, the
charges eventually rose upto
4000 pounds. The court held
this to be a fundamental breach.
(Interfoto pictures Limited case)

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4. violation of duty on part of the Premises

- In a case where a dress for dry cleaning was damaged, the exemption clause restricting liability was struck down and full value of dress was directed to be paid.

Hence, as Lord Denning in Spurling Ltd. v. Bradshaw observed that "more startling a clause it, higher is the need to print it in red ink with red hand!"

And in case such clauses deviate from 'core' of contract, fundamental breach is invoked in the interest of Justice, Equity and Good conscience.

15



Q. 6(b)

Indemnity, Guarantee and Insurance are contracts primarily meant for protection of loss to parties to a contract, however, these three are different in meaning and application.

1. Indemnity

1. Provision

Sec. 124

Indian Contract Act 1872

Sec. 126

2. Definition

• Indemnity is an agreement to pay for the loss of another person

• Guarantee is a promise to pay the debt of a person in case he or she defaults.

Hence, Indemnity comes in when there is loss, whereas Guarantee when default (Birkmyr v. Darnell)

3. Illustration

- | | |
|---|---|
| <ul style="list-style-type: none"> • A note with forged endorsement was filed in bank. Public Debt office got damages from <u>bank</u> since loss was caused by bank's failure. [SBI limited case] | <ul style="list-style-type: none"> • A goes to a moneylender with B and asks the lender to give 10,000 Rs. to B and promises if B doesn't pay, I will pay. (Taylor v. Lee) |
|---|---|

4. No. of Parties

- | | |
|--|---|
| <ul style="list-style-type: none"> • Two parties - Indemnifier and Indemnified | <ul style="list-style-type: none"> • Three parties 1. Principal Debtor 2. Creditor 3. Guarantor |
|--|---|

5. Contracts

- | | |
|--|---|
| <ul style="list-style-type: none"> • one contract | <ul style="list-style-type: none"> • Three <u>contracts</u> among the three parties. |
|--|---|

6. Liability

- | | |
|---|---|
| <ul style="list-style-type: none"> • only on damage i.e. secondary | <ul style="list-style-type: none"> • Substituting liability in case of default |
|---|---|

7. Rights

- | | |
|--|---|
| <ul style="list-style-type: none"> • To recover for loss, litigation expenses | <ul style="list-style-type: none"> • To pay for <u>default</u> and then <u>subrogation</u> |
|--|---|

□ Contract of Insurance

It is also an indemnity contract wherein loss ~~for~~ caused to life / property is protected by the insurer.

Unique features:

1. Parties : Insurer and Insured
2. Based on Uberrima Fides i.e. duty to disclose on part of insured (New India Assurance Limited case)
3. Payment of Premium in form of consideration
4. Insurable Interest
5. Proximate loss

Hence, Insurance contract is a special form of indemnity.

Q. 6(C)

Sale is a contract under Sale of Goods Act, 1930 wherein a person transfers or agrees to transfer certain goods to another for a price.

Essential elements

1. 'Goods' : Before delivery of goods they must be ascertained (Sec. 18)
Also, movable and tangible
2. For a Price
Premise to transfer goods must be based on price which forms the consideration
3. Parties : Buyer and seller
4. Delivery of goods only upon

their ascertainment.

Illustration : A goes to B's Factor of glue and purchases 50 caskets of glue, one, the 50 caskets are kept aside, payment is made and the goods are delivered, a sale of goods is complete.

Sale

Agreement to Sell

Section 3: A person "transfers" (i.e. sale) or "agrees to transfer" goods (i.e. "Agreement to sell")

1. Passing of Property

• Upon delivery, the buyer becomes the owner.

• Seller retains the ownership on goods.

2. Loss

→ will be of buyer's } → Loss will be even if delivery not made. of seller.

3. Rights of Buyer

→ all rights of ownership } → only acts as "bailee" to the goods.

4. Breach

→ Remedies :
(1) avoid the contract
(2) seek damages. } → Remedy is limited to seeking damages.

5. Insolvency of Buyer

→ Goods have to be delivered to official assignee } → Seller can take back the goods

6. Re-sale

→ Buyer has full right to re-sell the goods.

→ cannot re-sell the goods.