LL.B. (3 Yrs.) IInd Semester
Paper-II- Law of Contract -II (lfonk fof/k&AA)

Unit – I

(Syllabus)

Unit-I	**A. Indemnity and Guarantee (Sec. 124-147) –** Indemnity & Guarantee-the concept, Definition, Methods. Commencement of liability of the indemnifier. Nature of indemnity clauses, Distinction between indemnity and Guarantee. Right/Duties of Indemnifier, Indemnified and Surety. Discharge of Surety's liability, Kinds of Guarantee.

Q.1- Define a contract of Indemnity. What are the essential and legal rules for a valid contract of indemnity?

Ans.-

Contract of Indemnity

"Indemnity" in English law means a promise to save a person harmless from the consequences of an act. The promise may be express or it may be implied from the circumstances of the case. Thus, for example, in **Dugdale Vs. Lovering:-** The plaintiffs were in possession of certain trucks which were claimed both by the defendants and one K.P. Co The defendants demanded delivery and the plaintiffs asked for an indemnity bond, but received no reply. Even so they delivered the trucks to the defendants.

K.P. Co, having successfully sued the plaintiffs for conversion of their property, the plaintiffs were held entitled to recover indemnity from the defendants on an implied promise as evidenced by the fact that by demanding an indemnity, they made it quite clear that they had no intention to deliver except on indemnity. Similarly, in ***Shefield Corporation Vs. Barclay***, a corporation, having registered a transfer of stock on the request of a banker, was held entitled to recover indemnity from the banker when the transfers were discovered to be forged.

The English definition of indemnity is wide enough to include a promise of indemnity against loss arising from any cause whatsoever, e.g., loss caused by fire or by some other accident. Indeed, every contract of insurance, other than life assurance, is a contract of indemnity. But the definition of "indemnity" in Section 124 of the Indian Contract Act is somewhat narrower. It is like this:

Contract of Indemnity (Section 124):-A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor, or by the conduct of any other person, is called a "contract of indemnity".

Illustration

A contracts to indemnify B against the consequences of any proceedings which C may take against B in respect of a certain sum of 200 rupees. This is a contract of indemnity.

The only illustration appended to the section says that if a person promises to save another from the consequences of a proceeding which may be commenced against him it is a contract of indemnity.

The person who gives the indemnity is called the "indemnifier" and the person for whose protection it is given is called the "indemnity-holder".

Thus the scope of "indemnity" is by the very process of definition restricted to cases where there is a promise to indemnify against loss, caused: (a) by the promisor himself, or (b) by any other person. The definition excludes from its purview cases of loss arising from accidents like fire or perils of the sea. Loss must be caused by some human agency. Contracts of insurance against loss are covered by the chapter on Contingent Contracts.

Secondly, situations like those in Adamson Vs. Jarvis where cattle were sold under the instruction of a wrongful owner, are also outside the scope of this definition. Such cases and the case of a loss arising from an act done at the request of the promisor are covered by Section 223 of the Act which provides for indemnity between principal and agent.

The promise of indemnity, as envisaged by the section, may be express or implied. An illustration of implied indemnity is the decision of the Privy Council in Secretary of State Vs. Bank of India Ltd.

A note with forged endorsement was given to a bank which received it for value and in good faith. The bank sent it to the Public Debt Office for renewal in their name. The true owner of the note recovered

compensation from the State and the State was allowed to recover from the bank on an implied promise of indemnity.

Extent of Liability:- Section 125 lays down the extent of liability.

Section - 125. Rights of indemnity-holder when sued.- The promisee in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor -

(1) All damages which he may be compelled to pay in any suit in respect of any matter to which the promise of indemnity applies;

(2) All costs which he may be compelled to pay in such suits if, in bringing or defending it, he did not contravene the order of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or, if the promisor authorized him to bring or defend the suit;

(3) All sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorized him to compromise the suit.

A person who enchases an indemnity bond which is in the nature of a bank guarantee can retain only that part of the amount of the bond which represents the damager or loss suffered by the bond-holder as a result of the contracting party's breach. Anything more would be undeserved windfall for one party and penalty of the other.

Where a motor vehicle (truck) was under indemnity insurance for Rs. 2,00,000 and it was stolen with no chances of recovery, it was held that the proper amount of indemnity was as fixed by the surveyor at Rs. 1,87,492 and that it was payable with 18% interest for the delay period. The settlement of claim at lesser amount by insurance authorities was arbitrary and unfair under Article 14 of the Constitution.

Commencement of Liability:- An important question in this connection is when does the indemnifier become liable to pay, or, when is the indemnity-holder entitled to recover his indemnity? The original English rule was that indemnity was payable only after the indemnity-holder had suffered actual loss by paying off the claim. The maxim of law was: "you must be indemnified before you can claim to be indemnified.

Q.2- There can be no valid contract of guarantee unless there is someone primarily liable in the light of this statement explains the essentials of a contract of guarantee. What will be position of surety if the principal debtor is a minor?

Ans.-

Contract of Guarantee:- "Contract of guarantee" is defined in Section 126 of the Act as follows:

Section - 126. "Contract of guarantee", "Surety", "principal debtor" and creditor"- A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety"; the person in respect of whose default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor". A guarantee may be either oral or written.

Economic functions of guarantee:- The function of a contract of guarantee is to enable a person to get a loan, or goods on credit, or an employment. Some person comes forward and tells the lender or the supplier or the employer that he (the person in need) may be trusted and in case of any default, "I undertake to be responsible". For example, in the old case of ***Birkmyr Vs. Darnell*** the Court said:

"If two come to a shop and one buys, and the other to give him credit, promises the seller, 'If he does not pay you, I will."

This type of collateral undertaking to be liable for the default of another is called a "contract of guarantee". In English law a guarantee is defined as "a promise to answer for the debt, default or miscarriage of another. It is a collateral engagement to be liable for the debt of another in case of his default. "Guarantees are usually taken to provide a second pocket to pay if the first should be empty.

Parties:- The person who gives the guarantee is called the "surety", the person in respect of whose default the guarantee is given is called the "principal debtor" and the person to whom the guarantee is given is called the "creditor".

Independent liability different from guarantee:- There must be a conditional promise to be liable on the default of the principal debtor. A liability which is incurred independently of a "default" is not within the definition of guarantee. To refer again to **Birkmyr Vs. Darnell.**

Essential Features of Guarantee:- Recoverable Debt Necessary

The purpose of guarantee being to secure the payment of a debt, the existence of a recoverable debt is necessary. It is of the essence of a guarantee that there should be someone liable as a principal debtor and the surety undertakes to be liable on his default. If there is no principal debt, there can be no valid guarantee. A contact of guarantee is a tripartite agreement which contemplates the principal debtor, the creditor and the surety. This was so held by the House of Lords in the Scottish case of **Swan Vs. Bank of Scotland** decided as early as 1836.

The payment of the overdraft of a banker's customer was guaranteed by the defendant. The overdrafts were contrary to a statute, which not only imposed penalty upon the parties to such drafts but also made them void. The customer having defaulted, the surety was sued for the loss.

But he was held not liable. The court said that "if there is nothing due, no balance, the obligation to make that nothing good amounts itself to nothing. If no debt is due, if the banker is forbidden from having any claim against his customer, there is no liability incurred by the co-obligors".

Guarantee for Void Debt, when Enforceable:- But sometimes a guarantee even for a void debt may be held enforceable. Where, for example, the directors of a company guaranteed their company's loan which was void as being ultra virus, the directors were nevertheless held liable. the reason "may be that the voidness of a contract to guarantee the debt of a company acting ultra virus is different in its consequence from the voidness brought about by the express and emphatic language of a statute".

Guarantee of Minor's Debt:- A similar problem arises when the debt of a minor has been guaranteed. The debt being void, is the surety liable? The Court of King's Bench considered the question in **Coutts & Co. Vs. Brown Lecky** and held that no liability should be incurred by the surety. The head to the report says:

"A loan, by way of overdraft made by a bank to an infant void under Section 1, of the Infants' Relief Act, 1874, the guarantors of the loan, where the fact of infancy is known to all parties, cannot be made liable in an action on the guarantee."

OLIVER J said: "Apart from authority is would certainly seem strange if a contract to make the debt default or miscarriage of another, could be binding where by statute, the loan guarantee is, in terms, made absolutely void. Looking at the matter broadly, how, in these circumstances, can the omission by an infant to pay what is made void by statue be described as either a debt, a default or a miscarriage? There is no debt here because the Act of 1874 says so; there is no default, for the infant is entitled to omit to pay, and there is no miscarriage for the same reason."

In India it has been held, following earlier English authorities, that where a minor's debt has been knowingly guaranteed, the surety should be held liable as a principal debtor himself. In **Kashiba Vs. Sharipat** the Bombay High Court observed.

"A surety to a bond passed by a minor for moneys borrowed for purposes of litigation not found to be necessary, is liable to be sued on it whether the contract of the minor is considered to be void or voidable. We see no reason why person cannot contract to guarantee the performance by a third person of a duty of imperfect obligation. If the debt is void, the contract of the so-called surety is not collateral, but a principal contract."

Consideration:-Like every other contract, a contract of guarantee should also be supported by some consideration. A guarantee without consideration is void. But there need be no direct consideration between the surety and the creditor. Section 127 clearly says that :-

Section - 127. Consideration for guarantee - Anything done, or any promise made, for the benefit of the principal debtor, may be a sufficient consideration to the surety for giving the guarantee.

Illustration

(a) B requests A to sell and deliver to him goods on credit. A agrees to do so, provided C will guarantee the payment of the price of the goods. C promises to guarantee the payment in consideration of A's promise to deliver the goods. This is a sufficient consideration for C's promise.

(b) A sells and delivers goods to B. C afterwards requests A to forbear to sue B for the debt for a year, and promises that, if he does so, C will pay for them in default of payment by B. A agrees to forbear as requested. This a sufficient consideration for C's promise.

(c) A sells and delivers goods to B. C afterwards, without consideration, agrees to pay for them in default of B. The agreement is void.

Thus where a loan is given or goods sold on credit on the basis of a guarantee that is sufficient consideration. Similarly, where a credit has already been given and the payment having become due, the creditor refrains from suing the principal debtor, that would be a sufficient consideration for giving a guarantee.

Guarantee for Past Debt:- But a guarantee for a past debt should be invalid. The section says that "anything done..... for the benefit of the principal debtor" is good consideration.

But will the words "anything done" include things done before the guarantee was given? The Oudh High Court in **Gulam Husain Vs. Faiyaz Ali** answered this question in the affirmative.

A lessee agreed to pay the sum due under a lease by certain installments and after a few days a person executed a surety bond binding himself to pay a certain amount in default of the payment of installments.

The court held that the bond was not without consideration. The decision has been criticized in Pollock and Mulla. The learned editors observe:

"This seems to attribute an unnatural meaning to the word, which, it is submitted and as the rest of the section shows, refers to an executed as distinguished from an executory consideration.

Misrepresentation and concealment:- A contract of guarantee is not a contract ***uberrimaefides*** or one of absolute good faith. Thus where a banker received a guarantee with knowledge of circumstances seriously affecting the credit of the customer, it was held that there was no duty to disclose this fact to the surety. Yet "it is the duty of a party taking a guarantee to put the surety in possession of all the facts likely to affect the degree of his responsibility; and if he neglects to do so, it is at his peril. A surety ought to be acquainted with the whole contract entered into with his principal. Sections 142 and 143 provides that:

Section - 142. Guarantee obtained by misrepresentation, invalid.- Any guarantee obtained by means of misrepresentation made by the creditor or with his knowledge and assent, concerning a material part of the transaction, is invalid.

Section - 143. Guarantee obtained by concealment, invalid- Any guarantee which the creditor has obtained by means of keeping silence as to material circumstances is invalid.

Illustration

(a) A engages B as clerk to collect money for him. B fails to account for some of his receipts, and A in consequence calls upon him to furnish security for his duly accounting. C gives his guarantee for B's duly accounting. A does not acquaint C with B's previous conduct. B afterwards makes default. The guarantee is invalid.

(b) A guarantees to C payment for iron to be supplied by him to B to the amount of 2000 tons. B and C have privately agreed that B should pay five rupees per ton beyond the market price, such excess to be applied in liquidation of an old debt. This agreement is concealed from A. A is not liable as a surety.

Guarantee for the good conduct of a servant have invited more frequent applications of this principal. A very illustrative case is **London General Omnibus Co. Vs. Hollway.**

The defendant was invited to give a guarantee for the fidelity of a servant. The employer had earlier dismissed him for dishonesty, but did not disclose this fact to the surety. The servant committed embezzlement.

The surety was held not liable. "The surety believed that he was making himself answerable for a presumably honest man, not for a known thief". Every surety undertakes the risk of default, which is more in some cases and less in others depending upon circumstances. If the creditor is aware of circumstances. If the creditor is aware of circumstances affecting the risk, he should make the surety equally aware. Similarly, in a case before the Lahore High Court, fresh guarantees were obtained for the fidelity of a manager of a bank without disclosing his previous defalcation, the sureties were held not liable for further defalcation.

Writing not necessary:- Section 126 expressly declares that a guarantee may be either oral or written. But in England under the provisions of the Statute of Frauds a guarantee is not enforceable unless it is "in writing and signed by the party to be charged".

Q.3- Difference between contract of indemnity and contract of guarantee? Discuss the rights of surety and liability of co surety?

Ans.-

Indemnity and Guarantee distinguished:- Indemnity and guarantee have this common feature that both are devices for providing protection against a probable loss. In either case the loss may arise due to human conduct. However, the technique of providing protection, the need and occasion for protection and the number of parties involved mark some differences between them. "Guarantees and indemnities, which are also described as securities, are distinct arrangements under which a third party, the surety, agrees to assume liability if the debtor defaults or causes loss to the creditor. The former arrangement is a guarantee, the latter involves in indemnity".

1. The liability under a contract of indemnity is contingent in the sense that it may or may not arise. Under a guarantee, on the other hand, the liability is subsisting in the sense that once a guarantee has been acted upon, the liability of the surety automatically arises, though it remains in suspended animation till the principal debtor commits default.
2. The undertaking in a guarantee is collateral, in an indemnity it is original. The purpose of a guarantee is to support the primary liability of a third person. In an indemnity, there being no third person, the indemnifier's liability is in itself "primary".
3. In a contract of indemnity there are only two parties, namely, the indemnifier and the indemnity- holder. But there are three parties to a guarantee, the creditor, the principal debtor and the surety. It is a tripartite arrangement.
4. In an indemnity there is only one contract, that is, the contract of indemnity against loss between the indemnity-holder and the indemnifier. But in a guarantee there are three contracts, namely, a contract

of loan between the principal debtor and the creditor; a contract of guarantee between the creditor and the surety and finally an implied contract of indemnity between the principal debtor and the surety.

Right of Surety

Rights against Principal Debtor:- Following are the rights of the surety against the principal debtor:

1. Right of Subrogation (S. 140)
2. Right to Indemnity (S. 145)

1. Right of Subrogation (S. 140):- Section 140 provides for the right of subrogation:

Section - 140. Rights of surety on payment or performance - Where are guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor has against the principal debtor.

When the surety has paid all that he is liable for he is invested with all the rights which the creditor had against the principal debtor. The surety steps into the shoes of the creditor. The creditor had the right to sue the principal debtor. "If the liability of the surety is coextensive with that of the principal debtor, his right is not less coextensive with that of the creditor after he satisfies the creditor's debt. The surety may, therefore, sue the principal debtor in the rights of the creditor. For examples in **Lampleigh Iron Ore Co Ltd. Re:**

A director of a company in liquidation guaranteed and paid the rents due from the company before the date of the liquidation. It was held that he was entitled to stand in the place of the creditor, and to use all remedies, if need be, in the name of the creditor in any action to obtain indemnification from the principal debtor for the loss sustained.

The Supreme Court has laid down that "the surety will be entitled to every remedy which the creditor had against the principal debtor; to enforce every security and all means of payment; to stand in the place of the creditor; to have the securities transferred to him, through there was no stipulation for that; and to avail himself of all those securities against the debtor. This right of a surety stands not merely upon contract, but also upon natural justice. The language of Section 140 which employs the words "is invested with all the rights which the creditor had against the principal debtor" makes it plain that even "without the necessity of a transfer, the law vests those rights in the surety.

This may not always be to the advantage of the surety. Where the principal debtor becomes insolvent, the surety cannot ask the creditor first to pursue his remedy against the principal debtor.

2. Right to Indemnity (S. 145):-

Section - 145. Implied promise to indemnify surety- In every contract of guarantee there is an implied promise by the principal debtor to indemnity the surety; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully.

(a) B indebted to C, and A is surety for the debt. C demands payment from A, and on his refusal sues him for the amount. A defends the suit, having reasonable grounds for doing so, but is compelled to pay the amount of the debt with costs. He can recover from B the amount paid by him for costs, as well as the principal debt.

Thus in every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety. The right enables the surety to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but not sums which he paid wrongfully. An example of wrongful payment is a case where a surety had guaranteed the payment of four motor vehicles delivered on hire-purchase. The surety contended that he had paid Rs. 4000 in discharge of his liability, but he failed to give an account of the price which he motor vehicles might have realized on resale. He was not allowed to recover his indemnity.

3. Right to Securities (S. 141):-

Section - 141. Surety's right to benefit of creditor's securities:- A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of surety ship is entered into, whether the surety knows of the existence of such security or not; and, if the creditor loses, or, without the consent of the surety, parts, with such security, the surety is discharged to the extent of the value of the security.

Illustration

(a) C advances to B, his tenant, 2000 rupees on the guarantee of A. C has also a further security for the 2000 rupees by a mortgage of B's furniture. C cancels the mortgage. B becomes insolvent, and C sues A on his guarantee. A is discharged from liability to the amount of the furniture.

(b) C, a creditor, whose advance to B is secured by a decree, receives also a guarantee for that advance from A. C afterwards takes B's goods in execution under the decree, and the, without the knowledge of A. withdraws the execution. A is discharged.

On paying off the creditor the surety steps into his shoes and gets the right to have the securities, if any, which the creditor has against the principal debtor. The right exists irrespective of the fact whether the surety knows of the existence of such security or not. "It is the duty of the creditor to keep the securities intact; not to give them up or to burden with further advances.

The difference between the English law and the principal laid down in Section 141 was explained by the Supreme Court in **Amritlal Vs. State Bank of Travancore.**

"It is true that Section 141 has limited the surety's right to securities held by the creditor at the date of his becoming surety and has modified the English rule that the surety is entitled to the securities given to the creditor both before and after the contract of guarantee. But subject to this variation, Section 141 incorporates the rule of English law relation to discharge from liability of a surety when the creditor parts with or loses the security held by him.

The creditor may at his will release any of the co-sureties from his liability. But that will into operate as a discharge of his co-sureties. However, the released co-surety will remain liable to the others for contribution of default.

4. Right to Contribution (Ss. 146- 147):

Section - 146. Co-sureties liable to contribute equally - Where two or more persons are co-sureties for the same debt or duty, either jointly or severally, and whether under the same or different contracts, and whether with or without the knowledge of each other, the co-sureties, in the absence of any contract to the contrary, are liable, as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains unpaid by the principal debtor.

Illustration

(a) A, B and C as sureties to D, for the sum of 3000 rupees lent to E. E. makes default in payment. A, B and C are liable, as between themselves, to pay 1000 rupees each.

(b) A, B and C are sureties to D for the sum of 1000 rupees lent to E, and there is a contract between A, B and C that A is to be responsible to the extent one-quarter. B to the extent of one-quarter and C to the extent of on-half. E makes default in payment. As between the sureties. A is liable to pay 250 rupees, B 250 rupees and C 500 Rupees.

Liability of co-surety

Where two or more persons are co-sureties for the same debt or duty, either jointly or severally, and whether under the same or different contracts, and whether with or without the knowledge of each other, the co-sureties, in the absence of any contract to the contrary, are liable, as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains unpaid by the principal debtor.

Illustrations - A, B and C are sureties to D for the sum of 3,000 rupees, lent to E. E makes default in payment. A, B and C are liable, as between themselves, to pay 1,000 rupees each.

Co-sureties who are bound in different sums are liable to pay equally as far as the limits of their respective obligations permit.

Release of one co-surety does not discharge other – Where there are co-sureties, a release by the creditor of one of them does not discharge the others, neither does it free the surety so released from his responsibility to the other sureties.

Unit – II

(Syllabus)

Unit-II	**Bailment and Pledge (Sec. 148-171 and 172-181) –** a) Meaning and Distinction b) Rights and Duties of Bailor / Bailee, Pownor / Pawnee c) Lien d) Termination of Bailment. Commercial Utility of pledge transactions.

Year Wise Question Paper of Lucknow University

LL.B. (Hons.) IVth Sem. Year – 2013

Q.1- Define Bailment. Explain the essential of a valid bailment with suitable examples?
Ans.-

Contract of Bailment

Bailment implies a sort of relationship in which the personal property of one person temporizing goes into the possession of another, the ownership of the articles or goods is in one person and the possession in another.

Sec. 148 essential features of Bailment:-

There are thee essential features of bailment:-

1. Delivery of goods.
2. Contract between the parties.
3. Return of goods or their disposal as per directions of the bailer.

The person is delivering the goods is called the bailer and the person to whom goods are delivered is called the bailee.

1. Delivery of goods:-Bailment entails the delivery of goods by one person to another for some purpose. The delivery of goods is an essential ingredient of bailment. The goods must be handed over to the bailee for the purpose of bailment. Once it is done, bailment arises, irrespective of the manner in which this happens.

Kaliaperumal Pillai Vs. Visalakshmi (1938 Madras) Where a lady was getting certain jewellery made by a goldsmith and each evening the half made jewels were put into a box in the gold smiths room and the lady kept the keys to the box in her possession, it was held that there was no bailment. **Reaves Vs. Capper (1838)** where the goods are handed over to a servant they are in the mere custody of the servant and no relationship of bailment arises.

Constructive delivery (149):-The essential of the bailment is the delivery of goods to the bailee, but the delivery of the goods need not be actual, i.e. entailing the actual give and take of the goods and may be symbolic or constructive. The delivery of goods the bailee may be made by doing anything which has the effect of putting the goods in the possession of the intended bailee or of any person authorized to hold them on his behalf.

The most common example of the constructive delivery is the delivery of a railway receipt which is considered as a delivery of the goods therein.

constructive delivery may also arise when the goods are already in possession of 4 person in some capacity than that of bailee.

Explanation of Sec. 148 Says: where a person already in possession of the goods of another, contracts no hold them as a bailee, in there by becomes the bailee, and the owner becomes the bailor of such gods, although they may not have been delivered by way of bailment.

Vitzen Vs. Nicolls (1804 Q.B.):- Where a waiter at a restaurant took the coat of the customer and hung it at the place of his desire, a bailment was said to have occurred and the owner of the restaurant was held liable as a bailee for the loss of the coat.

2. Contract between the parties:- Delivery of goods should be made for some purpose and upon a contract that where the purpose is accomplished the goods shall be returns to bailer. The contract may be either experss or implied.

Governor General of India Council Vs. Jubilee Milles Ltd. (195 B. Bom.)

Where with the content of the station master goods were stored on a railway company's platform wagons belong not available, the company was held liable when they were damaged by fire caused by a spark emitted by a passing engine and an implied bailment was inferred.

State of Gujrat Vs. Memon Mohammed (1967 S.C.):- Certain motor vehicles and other goods belonging to the plaintiffs were ..... by the state in exercise of its powers under law. The goods while in the custody remained to tally uncured for. It was held that although state were not bailees but he would be liable.

Basuvva K.D. Patil Vs. State of Mysore (1977 S.CC.) the plaintiffs ornaments having been stolen were recovered by the Police, while in police custody were stolen again. The state was held liable to pay the value of the ornaments to the victim of the theft.

3. Return of goods:- Bailment of goods is always mode for some purpose like safe custody repairs, carriage etc. and is subject to the condition that when such purpose is accomplished the goods will be returned to the bailer or disposed off according to his directions. In every bailment the thing has to be returned in the same form or in an altered form.

Secretary of state of India Vs. Shiv Singh (1880 All.): The plaintiff delivered to the treasury officer hire govt. promissory notes for cancellation and consolidation into a single note bankers misappropriate the notes. It was held that there can be no bailment unless there is a delivery of goods and a promise to return the govt. was not bound to return the same notes, her was it bound to dispose off the notes in accordance with the plaintiff directions.

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Q.2- Define pledge and discuss the element of pledge? Explain pawnee and pawnar right and duty?

Ans.-

Bailment of Pledge

Pledge: A pledge is the delivery of goods by one person to another to provide a security for a loan or for the fulfillment of an obligation to be returned when the purpose is accomplished.

The person pledging the goods is known as the pawnor and the person with whom the goods are pledged is a pawnee.

Essentials:-

A pledge essentially consists of these basic features:-

1. Delivery of possession.
2. In pursuance of contract of pledge.
3. For the purpose of security.
4. Return of articles.

1. Delivery of Possession:- Since pledge is essentially a bailment is requires delivery of possession of goods to the pawnee. Under bailment, the delivery of possession may be actual or constructive. Thus delivery of documents of title, or delivery of the key of the go down where the goods are stored amounts to constructive delivery.

Morvi mercantile bank Vs. U.O.I. (1985 S.C.):- Certain goods were consigned with railway from Bombay to transit okhla. The consigner endorsed the railway receipts to the applicant bank against an advance of Rs. 20,000. The goods having been lost in transmit the bank as an endorsee of the railway receipts and pledgee of the goods sued the railway for the loss of the goods were worth Rs. 35,000.

Court held that delivery of railway receipt was the same thing as delivery of goods, the pawnee will recover upto Rs. 20,000 only.

Although delivery of goods is essential but some times the possession with the pawnor may also constructive a valid pledge.

Bank of Chithor Vs. Narasimhulu (1956 A.P.):- The bailor of a cinema projector and other accessories requested the bailee bank to allow be pledged goods to remain in his possession and promised to hold the same in trust for the bailee and also further promised to hand over the possession of the same to the bank whenever demanded, it was held that there was a constructive delivery. Delivery by adornment to the bailee and bailor's possession was in fact the possession for the bailee.

2. Under a Contract:- Delivery should be for the purpose of creating a contract of pledge. A and it is essential to constitute a valid pledge that delivery of the goods shall be made by the pledge to the pledgee in to the pledgee in pursuance of the contact of pledge but delivery and advance need not be simultaneous and a pledge may be perfected by delivery after the advance in made.

Blundell Vs. Attenborough (1921 K.B.):- In this case plaintiff handed her jewellery to a gold merchant miller to know what offer he could make as lending her money. On the same day miller pledged with a defendants for 1000 $ next day miler advanced miler advanced 500$ and he was died after plaintiff paid the amount to court and said the defendant for return of her jewellery could held that he pledge was valid delivery was made for creating a pledge.

3. As Security:-The purpose of pledge is delivery of goods for providing a loan security or for the fulfillment of an obligation goods can only be used where is non- payment of dept or non fulfillment of promise.

4. Return of goods:- Once the purpose of pledge is achieved the goods are to be returned back to the pawnor or disposed of according to his direction.

Right of Pawnee:-

1. Right of Retainer (Sec. 173/174):-

The pawnee has the right to retain the good's till the time his debt is paid or the performance of the promise is carried out by the pawnor. The goods can only be retained for the debt or promise towards which they were tendered and cannot be retained for the purpose of recovering any other debt or promise.

Bank of India Vs Binod Steel Ltd. (1977 M.P.) has been held that when certain immovable have been pledged by a company to a bank they can not be attached and sold for satisfaction of claims of other creditors of the company without first satisfying the claim of the bank.

2. Right to recover extra ordinary expenses (175):-The pawnee is entitled to recover the extra ordinary expenses incurred by him for the preservation of the goods pledged. Than for the recovery of such expenses pawnee only has a right to sue with any right of retention.

3. Right of sale (176):- Where the pawner makes a default in making the payment of the debt or performance fo the promise the pledge gets the following rights to recover his dues.

4. Sale of goods after reasonable notice:- The pawnee has the right to sell the goods after giving the reasonable notice of sell to the pawnor.

Prabhat Bank Vs. Babu Ram (1966 All.):- Right of sale can only be exercised by the pawnee after giving the reasonable notice of sale to the pawnor. The purpose of a notice is to give an opportunity the pawnor to redeem the pledge a sale made without a reasonable notice is void an ineffectual.

5. Retain the goods as collateral security:- The pawnee may instead of selling the goods retain there is collateral security and sue the pawnor for the recovery of amount. The right of sale and the right to sue while maintaining the pledged goods as collateral and alternative.

In SBI Vs. Smt. Neelu Ashok Naik:- On FDR was pledged as collateral security towards bank loan. It was held that the bank may opt to retain the FDR and file a suit for recovery of loan. It was further observed that the bank was not obliged with the installments on FDR be coming due every month towards the loan.

6. Pawner's right to redeem (Sec. 177):- Sec. 177 provides that the pawner may redeen the goods at any subsequent time before the actual sale of them. So long as the sale does not take place to pawner is entitled to redeem the goods an payment of the debt.

Jaswant Rai Manilal Vs. State of Bombay (AIR - 1956 SC)- The right to redeem continues till the actual sale of the goods and where the sale has already occasioned the right is also lost.

Q.3. Difference between pledge and mortgage and discuss rights of Bailee or duity of Bailor?
Ans.-

In M.R. Dhawan v. Madan Mohan, Khanna, J. of the Delhi High Court pointed out the distinction between a pledge and a mortgage in the following words:-

"……. Pledge is a kind of bailment and security. Its principal purpose is to put the goods pledged in the power of the pawnee to reimburse himself for the money advanced when on becoming due it remains unpaid by selling the goods after serving the pawner with a due notice. The pawnee at no time becomes the owner of the

goods pledged. He has only a right to retain the goods until his claim for the money advanced thereon his been satisified, with a power to sell the goods pledged agfter due notice in case of default by the pawner. It is only a special property in the goods pledged, which is acquired by the pawnee, leaving the general property intact with the pawner. In this case of a mortgage, however, an interest in the mortgaged property is transferred in favour of the mortgage subject to the right of redemption in the mortgagor."

Whether a transaction is one of 'pledge' or a 'mortgage' is not often free from difficulty. As observed by Mulla, the Transfer of Property Act refers to mortgages of immovable property and the Indian Contract Act refers to pledges of movable property but neither Act deals with mortgages of movable property

Duties of bailee -

The act imposes various duties on the bailee: There duties are, provided form Sec. 151 to 167 of the act. There are :-

1. Duty of reasonable care (Sec. 151):

Sec. 151 lays down the duty on bailee to take care as the man of ordinary prudence would do under the similar circumstances. The standard cure required is of a reasonable man placed under a similar situation.

Blount Vs. the War Office (1953 All. ER):

A house belonging to the plaintiff was requisite and by the war office. The plaintiff was allowed to those articles in a strong room in the home which he locked of the troops not kept. Proper control goods were stolen. State was held liable.

Houghland Vs. R.R. Low (Luxury coaches) Ltd. the plaintiff was a passenger in one of the defendants coaches. She had her suit case put in the boot of the coach from were it was lost court held that railway will be liable.

- If the bailee employs servants he is responsible for all acts done by them with in the scope of their employment.

Martin Vs. London Country Council (1947 KB): The plaintiff was admitted to a hospital on her history the officials took charge of his jewellery and gold cigarette case. They were subsequently stolen. It was held that the act was done by servant so they will be liable.

2. Duty not to make unauthorized use (153-154):- This section impose the duty on the bailee that when the goods have been bailed for particular purpose the bailee is supposed to use them only for that purpose and not for else. The duty of the bailee is not to make the unauthorized use of the goods bailed to him. If the bailer makes the unauthorized use of the goods bailed there are two remedies available to be bailer-

1. To terminate the bailment (Sec. 153).
2. To recover compensation for the 1053 caused due to the unauthorized use of goods (154).

According to Sec. 153 if the bailer finds that the bailee is making such use of the goods which is inconsistent with the conditions of bailment he may terminate the bailment and claim back the goods.

According to Sec. 154 a bailer can claim the damages from the bailee if bailee makes the unauthorized use of the goods bailed to him and the bailee is liable to pay the compensation to the bailer.

3. Duty not to mix (Sec. 155-157):

According to this rule bailee has duty of not mixing the goods of the bailer within own goods. The bailee should maintain the separate identity of the bailers goods. He should not mix his own goods with those. If the goods are mixed here will three conditions arises:-

1. With the Bailer's consent (155):- If the goods are mixed with Bailers consent in such case the bailer and the bailee shall have on interest, in proportion to their respective shares.

2. Without bailers consent:

(a) Where goods can be separated - Sec. 156 deals with the situation when the goods of the bailer are mixed by the bailee with his own goods without the consent of the beiler and the goods can be separated in this case bailee is bound to bear the expense of separation or division and any damage arising from the mixture.

Illustration:

(b) **Where goods cannot be separated:-**

Sec. 157 provides for a situation in which the goods of the bailer can not be separated goods of the bailer and the bailer thus recover the compensation for the same.

Illustration:

4. Duty to return goods (Sec. 160-161): After the expiry of the period or attainment of the purpose for which the goods were bailed the bailee has to return the goods of bailer or deal with them according to his directions-

- Sec. 160 provides for the duty to return the goods on expiration of time of bailment or as per directions of the bailer.
- If the goods are not returned by the bailee to the bailer on time, then he is liable to the bailer for any loss.
- Destruction or deterioration of the goods from that time (161).
- The liability is absolute and admits of no exception and it is no defence or mitigating factor that the loss or destruction occurred despite proper care by the bailee.

In Shaw & Co. Vs. Symmons & Sons (1917 K.B.): Binding were not returned despite demand. The [plaintiffs was held entitled to damages for the loss of the books despite the books having been destroyed in an accidental fire.

Rampal Vs. Gourishankar (AIR 1952, Nag.): If a Pawnee refused to return the goods even after the tender of the debt by the pawner and the goods having been subsequently stolen he was held laible

5. Duty to return increase and accretions (163):

The bailee is not only bound to return the articles originally bailed but any accretion to such articles during the period when the articles were so bailed.

6. Duty not to set up title in third person (166-161):

A bailee is under a duty return the goods to the bailer and he can not refuse to do so by challenging the title of the bailer to the goods bailed. He is thus stopped from denying the title of the bailer and can not set up for that goods.

- It the bailee the good faith delivers them back to the bailer or according to his direction the bailee is not responsible to the owner in respect of such delivery. (166)

Juggilal Kamlapat Oil mills Vs. UOI (1976 SCC):

Oil was consigned with the railways from Kanpur to Calcutta. It reached Calcutta intact the sender however instructed the railways to bring it back to Kanpur. The oil was seized by a food inspector who found it adulterated and had it. Destroyed under the order of the High Court, court held that a bailee is excused from returning the subject matter of the bailment to the bailer where it was taken away from him by an authority of law.

Right of Bailee

The rights of the bailee recognized by the act are:-

1. Right to expenses or remuneration (Sec. 158).
2. Right to compensation (164).
3. Right to lien on goods (170-171).
4. Right to sue wrong doers (180).

1. Right to recover expenses (158):-

A bailee is entitled to recover his agreed charges but where there is no such agreement at all Sec. 158 comes into play. This sec. says that where the bailee is required by the terms of bailment to keep or carry the goods or to do some work upon them for the benefit of the bailer, and the contract provides for no reward. The bailee has a right to ask the bailer for payment of necessary expenses. Incurred by him for the purpose of the bailment.

2. Right to compensation (164):-

If the bailer has no right to bail the goods, or to receive them back or to give directions respecting some loss, the bailer is responsible for the same.

3. Right of lien on goods (170-171):

If the bailee's lawful charges are not paid he may retain the goods. The right to retain any property until the charges due in respect of the property are paid is called the right of lien.

4. Particular lien (170):

A bail is entitled only t particular lien which means the right to retain only that particular. Property in respect of which the charge is due.

The essentials are here:-

1. The bailee must have tendered some service involving the exercise of labour or skill in respect of the goods bailed and the labour or skill exercised by the bailee must be that it improves the goods. If there is no improvement in the article but the article is merely maintained in its original condition there is no lien.

Hutton Vs. Car Maintenance & Co. (1915 CB):

A motor car was given for maintenance for three years on a fixed annual payment, the company was held not entitled to any lien on the car for recovering the payment.

2. The right of lien is available only in the goods bailed. Only such goods can be retained on which the bailee has created by his labour and expense. He cannot retain any other goods belonging to the bailer which are in his custody.
3. The right of lien relates to the goods and continues only as long as the goods are in the possession of the bailee. Once the bailee parts with the possession of the goods the right of lien is lost and it is not revived even if the bailee gets its possession again.

Eduljee Vs. Cafe John Bxos (1943 Nag.):-

The delivery of refrigerator was given after repairs but some repair charges remained unpaid. Two parts of the refrigerator were again given for repairs and vendor claimed lien on these parts until the out standing repair charges were paid. It was held that the delivery of possession after repairs put on end to the lien which could not be revived.

4. The right to lien may also be defeated or excluded by an agreement to the contrary, the bailee may thus exclude his right to lien on goods.

Example:

Where A gives cloth to B, a tailor to make a coat and B promises A to deliver the coat as soon as it is finished, and to give a three months credit for the price. B is not entitled to retain the coat until he is paid.

General lien (Sec. 171):-

A general lien entitles the bailee to retain the goods of the bailer even other than those on which he has exercised labour or skill.

Element:-

1. Exercise of labour/ skill which improves the goods.
2. It must be accordance to the contract.
3. Goods on which labour/skill bestowed trouble or expense.
4. Must not be any agreement against in it.

It these gives him a right to hold the goods bailed on security for general balance of account. General lien is a right in one man to retain possession of goods belonging to another until certain demands of the person in possession are satisfied.

The right of general lien is only conferred on certain special kinds of bailees only and not on every one. The recognized bailees are-

(i) Bankers (ii) Factors (iii) What fingers (iv) Attorneys of a High Court.
(v) Policy brokers.

1. Bankers - A banker has a general lien over all from of commercial papers deposited of a customers in the ordinary course of banking business in respect of any balance that may be due from such customer. It has been considered as an implied pledge. It attracts to all goods and securities deposited with them as bankers by a customer or by a ..... person on a customers account.

S.B.I. Vs. M.P. Iron & Steel Works (1998):-

Sect. 171 of contract does not apply to cases of deposit of money. The bank can not claim lien on money which belongs to it. Therefore, the application of sec. 171 should be properly conferred to cases where the papers, securities and other goods of the debtor are lying with the bank under bailment.

2. Factors:-

A factor is an agent entrusted with possession of goods for the purpose of selling ..... for his principal.

E.H. Pakash Vs. King Emperor (1926 Oudh):-

A motor car belong to a estate was delivered to a firm for sale. The management of the estate was taken over by the ..... of words who asked for the return of the car from the firm. The firm however sought to exercise right of lien for payment of charges. It was held that firm was entitled to retain the car until charges were paid.

3. What Finger:-

What fingers means a place along side water used for the purpose of loading and unloading goods and what finger is the one who owns or keeps a what fingers. A what finger has general lien on the goods bailed to him until his charges for the use of his what finger are paid.

- The lien under this Sec. is in terms conferred by the High Court and not on advocates.
- The position of a pleader differs from that of a solicitor or attorney in matters of lien. It has been repeatedly held that a pleader cannot be said to have a general lien and that he is not entitled to retain moneys realized in one suit against his dues in another suit.

4. Attorney of a High Court:-

An attorney or a solicitor who is engaged by a client is entitled to general lien until the fee for his professional service and other costs incurred by him are paid. The right is available for goods that come into his hands while acting as attorney. Although Sec. 171 only applied to solicitors but all advocates have a right of general lien as available under the common law.

R. D. Saxena Vs. Balram Rasad Sharma (2000):-

the S.C. held that advocates have no right over clients papers for their unpaid fee. Files containing copies of records cannot said to be 'goods' referred in Sec. 171.

Right to Sue Wrong Duets (Sec. 180:-

If a hired person wrongfully deprives a bailee of the use or possession of the goods bailed or causes any injury to them he can sue the third party for the wrong done to the good's. This right is available to the bailer as well and the bailees right are analogs to such right.

Purshotham Das Vs. U.O.I. (1967 All.):-

Where the goods were fraudulently received from the railways on production of forged railway receipts the railway company being a bailee was held entitled to sue and recover the goods from a person with whom they were subsequently pledged.

Types of lien covered by the Act:-

The Act provides for the following types of lien:-

1. Lien of finder of goods (168)
2. Bailee's lien - Particular (170)
   - General (171)
3. Lien for pledge or pawnee. (173, 174)
4. Lien of agents (221)

Finder of goods (Sec. 168, 169):-

A person who finds goods belonging to another is in the same position as that of bailee. He is bound by the duty of reasonable care (ISI). He does not have the right to sue the owner for compensation for trouble and expanse voluntarily incurred by him to preserve the goods and to find out the owner. Section 168 and 169 protect the intend of a finder in two ways. Sec. 168 allows the finder to retain the goods, against the owner until the receives compensation for trouble and expense. Further where the owner has offend a specific reward for the return of the goods lost the finder may sue for such reward and may retain the goods until the receives.

Sec. 169 allows the finder right to sell to sell the goods in certain circumstances. Where the thing found is commonly the subject sale and if the owner cannot be found to the reasonable diligence, or if he refuses to pay the lawful charges of the finder, the finder may sell the goods in the following cases -

1. When the thing is in danger of perishing or of losing greater part of its value.
2. When the lawful charges of the finder in respect of the thing found amount to two respect of the things of in value

Unit – III

(Syllabus)

Unit-III	**Agency (Sec. 182 to 238) –** Definitions of Agent and Principal, Essentials of relationship of agency. Creation of Agency: by agreement, rectification and law. Relation of principal/ agent, subagent and substituted agent, Termination of agency.

Q.1- Write a short notes on any two of the following:

(a) Creation of agency

(b) Different kinds of Agent

(c) Element of agency

(d) Right of an agent

Ans.-

(a) Creation of agency

The relationship of agency arises whenever one person called the 'agent' has authority to act on behalf of another called the 'principal' and consents so to act. The relationship has its genesis in a contract.

The relationship of principal and agent may be created in any of the following ways:

(a) By express appointment or express agency;

(b) By the conduct or situation of the parties or agency by estoppels;

(c) By necessity of the case or agency by necessity.

Express Agency:

A person who is competent to contract and who is of sound mind may appoint an agent. Such an appointment may be expressed in writing or in may be oral. Where a principal authorized his brother-in-law manage his property in his absence, it is an express authority.

Under the Indian law an agent cannot only be appointed by the person himself but by the authority authorized by law to make such appointment. Thus, a person appointed under the provisions of a statute for the protection of the interests of quarrelling co-owners and of third persons is an 'agent'.

(b) Implied Agency:-

An agency that is created not by the express words of the principal is called an implied agency. Implied agencies may arise from the conduct, situation or relationship of parties. Whenever a person places another in a situation in which that other is understood to represent or to act for him, he becomes an implied agent. The principal is thereafter, stopped from denying the agent's authority.

If a person authorizes another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority. He may bind the principal within the limits of authority with which he has been apparently clothed by the principal; and there could be no safety in commercial transactions if he could not. where permission is granted to person for a particular purpose, that person is an agent for that limited purpose so as to create liability for consequences of act during that permission.

(c) Agency by Necessity:-

Where owing to emergency of the situation an agent has to assume special powers, the action in such case shall be binding on the principal and this is known as 'agency by necessity'. The principal of agency of necessity was first applied to cases of marine adventure where under the unforeseen emergencies the master got the power to sell the goods in order to save their value but now it has become a principal of general application.

(b) Different kinds of Agent

Kinds of Agents:- There are various types of agents depending on the authority given to them to act on principal's behalf.

(a) Auctioneer:- An 'auctioneer' is an agent whose business is to sell goods or others property by auction, i.e. by open sale. An auctioneer has implied authority to sign contract of both the buyer and seller. The authority vested in him is to sell the goods only, and not to give warranties on behalf of the seller, unless expressly authorized in that behalf. He is a mercantile agent within the meaning of section 2(9) of the Sale of Goods Act.

(b) Factor:- A 'factor' is a mercantile agent who is entrusted with the possession of goods for the purpose of sale. Further, the factor is authorized to sell the goods in his own name on reasonable credit at such times and at such prices to the best of his discretion, to receive the payment of the price where he sells them in his own name, and to warrant the goods sold, if in the ordinary course of business it is usual to warrant that particular kind of goods.

(c) Broker:- A 'broker' is an agent who has an authority to negotiate the sale or purchase of goods on behalf of his principal with a third person. Unlike a factor, he himself has no possession of the goods. A broker is authorized in sell goods on reasonable credit, to receive payment of the price if he does not disclose the name of his principal, and to act on the usages and regulations of the market in which he deal, except where such usages or regulations are unlawful or unreasonable. He makes the two parties enter into a contract and gets his commission whenever any transaction materializes through his efforts.

(d) Estate Agent:- As 'estate agent' is appointed by the principal to find purchaser for property. He only negotiates a sale and finds purchaser and does not bind himself so as to be a purchaser. Where he duly negotiates a sale he is entitled to his commission whether the transaction goes through or not, or the principal sells the property at a lower price.

(e) Del Credere Agents:- Generally, the function of an agent is over after a contract is entered into between his principal and a third person and he is not answerable to his principal for the failure of the third person to perform the contract. A del credere agent constitutes an exception to this rule. He is a mercantile agent, who, on the payment of some extra commission known as del credere commission, guarantees the performance of the contract by the third person. If in such a case the third person, for instance, fails to pay for the goods supplied to him, the principal can bring an action against the del credere agent for the same. The liability fo the del credere agent like that a surety, is secondary and the same arises if the third person fails to pay to the principal what is due under the contract. A del credere agent incurs only a secondary liability towards the principal. His legal position is partly that of an insurer and partly that of a surety for the parties with whom be deals to the extent of any default by reason of insolvency or something equivalent. His liability does not go to the extent of making him responsible to the principal where there can be no profit by reason of any stringency in the market. A del credere agent is, however, not liable to the buyer for any default on the part of his principal. Nor is be liable for any disputes between the principal and the buyer relating to the contract or sum the due.

(b) Element of agency

An 'agent' is a person employed to do any act for another or to represent another to dealings with third persons and the person for whom such an act is done, or who is so represented, is called the 'principal'. In an agency, one person (principal) employs another person (agent) to represent him or to act on his behalf in dealings with a third person. The emphasis is on the power of the agent to power of the agent to represent has principal in dealing he does that act himself. The agent is only a connecting link between his principal and the third person. Contracts entered into through an agent and obligation arising from acts done by an agent may be enforced in the same manner, and will have the same legal consequences as if the contract has been entered into and the acts done by the principal person.

Features of Agency:- The features of agency are laid down in sections 183 of the Act:

(1) Principal should be competent to contract (Section 183);
(2) Agent may be not competent to contract (Section 184);
(3) Consideration not required for formation of agency (section 185).

(1) Competency of Principal:- Any person who is a major ad of sound mind can appoint an agent. Thus, for being a principal a person should be competent to contract. An agency being a contract of employment to bring the principal into legal relations with a third party the first requisite is that the principal should be competent to contract. Unless and until principal is competent to contract, any act done by an agent will be void and furthermore, the appointment of an agent will itself be void.

(2) Competency of agent:- Any person is competent to be appointed as an agent. All persons including infants and other persons either with limited or no capacity to contract are competent to act as agents so as not to be responsible to their principals but to bind them. However, a minor should have sufficient understanding to consent to the agency and to do the act required.

Ordinarily, an agent incurs no personal liability while contracting for his principal and therefore, it is not necessary that he should be competent to contract. A person may contract though a minor agent, but minor will not be responsible to his principal.

(3) Consideration:- Although as a general rule all contracts require consideration as their basis but a contract of agency does not require any consideration. Generally, an agent is remunerated by way of commission for services rendered, but no consideration is immediately necessary at the time of appointment.

Agency and other relationship:-Agency and Master-Servant Relationship

Through an agent occupies a position which in many respects is similar to that of a servant, but it is not so actually. The basis difference lies in the authority enjoyed by an agent to bind the principal. In **Lakshminarayan Ram Gopal & Sons Vs. Hyderabad Government,** the court stated the difference between an agent and a servant.

(i) An agent has the authority to act on behalf of his principal and to create contractual relations between the principal and third party. This kind of power is not generally enjoyed by a servant.

(ii) A principal has the right to direct what the agent has to do, but a master has the right to say how it is to be done'. 'A servant acts under the direct control and supervision of his master and is bound to conform to all reasonable orders given to him in the course of his work. But an agent, though bound to exercise his authority in accordance with all lawful instructions is not subject in its exercise to the direct control or supervision of the principal.

(iii) The mode of remuneration is generally different. A servant is paid by way of salary or wages, an agent receives commission for the work done.

(iv) A master is liable for the servant's wrong if it occurs in the course of employment. A principal is liable for his agent's wrong done within the 'scope of authority'.

Agency and Bailment:- In the relationships of both agency and bailment there might be entrustment of property and thus, at certain times in two relationships may resemble each other and may seem to overlap. There are two basic differences between the relationships:

(a) As long as the bailee holds some goods belonging to the bailor, the bailment contract subsists, i.e. the relationship between the bailor and tailee remains till the bailee holds the goods belonging to the bailor. But this is not necessary for the subsistence of agency relationship.

(b) An agent is a representative with a power to contract on behalf of his principal. A bailee does not have that power.

(d) Right of an agent

The following are some of the important right of an agent:

(1) Right to remuneration (section 219);
(2) Right to retainer (Section 217);
(3) right of lien (Section 221);
(4) Right to indemnity (Section 222-223);
(5) Right to compensation (Section 225);
(6) Right to accounts.

(1) Right to Remuneration (Section 210):- An agent is entitled to be remunerated at the terms and conditions agreed between him and the principal. Even where no remuneration is agreed upon he is entitled to a reasonable remuneration.

(a) Completion of task:-In the absence of any special contract between him and principal the agent' remuneration is payable only after the completion of the appointed task. Thus, where an agent was engaged to negotiate for the purchase of a house at a commission of 2 per cent on the purchase price, he was held not entitled to any commission till the completion of the purchase.

(b) Detaining Money Received:- Although an agent is not entitled to remuneration till the completion of task but he may detain money received by him on account of goods sold, although the whole of the goods consigned to him for sale may not have been sold, or although the sale may not be actually complete.

(c) Remuneration only for ServiceDirectly Accomplished by Agents:- Where the agent's services are only remotely connected with the transaction, his remuneration is not earned. Thus, to be entitled to remuneration for a particular task it must have been accomplished due to the direct result of his service. An agent was appointed to sell a house and held an auction but failed to find a purchaser. One of the person attending the auction obtained from him the address of the principal and purchased the house from him without intervention of the agent, but nonetheless it was held that the transaction was a result of the agent's effort entitling him to his commission.

(d) Effect of Misconduct on Right to Remuneration:-An agent losses his right to remuneration where he has mis-conducted himself. Where the task assigned to him is divisible he is not entitled to any remuneration only for that part which he has misconducted. Not only is he not entitled to remuneration in case of misconduct but the principal is entitled to recover compensation for any loss caused by the misconduct. Where A employs B to recover 1,000 rupees from C and though B's misconduct the money is not recovered. B is entitledto no remuneration for his services, and must make good the loss.

(2) Right of Retainer (Section 217):- Although an agent is under a duty to remit all the sums received on behalf of the principal, but he has the right to retain his principal's money until his claims, if any, in respect of his remuneration or advances made or expenses incurred in conducting the business of agency are paid. The right can be exercised on 'any sums received on account of the principal in the business of the agency. He can retain only such money as is in his possession. He is not entitled lien, that is, the right to have his claims satisfied in preference to other creditors out of the principle's money not in his possession.

(3) Right Lien (Section 221):-An agent is entitled to retain the property of the principal received by him till he is paid. The agent's lien is subject to a contract to the contrary and therefore, does not exist where the agent has by his agreement with the principal excluded, it.

For the exercise of this right of lien the agent should be lawfully entitled to receive from the principal a sum of money by way of commission earned or disbursements made or services rendered for the proper execution of the business of agency.

The property over which the lien is to be exercised should belong to the principal and the agent should have received it in his capacity and during the course of his ordinary duties as agent. Where possession of the property is obtained without the principal authority or by fraud or misrepresentation, there is no lien. The property is considered to be sufficiently in the possession of the agent where he has been dealing with it.

The agent has only a particular lien and not a general lien. While in case of general lien a person retain any property in his possession, a particular lien attaches only to that specific subject matter in respects of which the charges are due and no other property can be retained.

(4) Right to Indemnity (Section 222-223):- An agent has a right to be indemnified by the principal against the consequences of all lawful acts does by him in exercise of the authority conferred upon him by the principal. The right to indemnity extends to all losses and expenses incurred by the agent in the conduct of the business. B. at Singapore, under instructions from A of Calcutta, contracts with C to deliver certain goods to him. A does not send the goods to B, and C sues B for breach of contract. B informs A of the suit, and A authorizes him to defend the suit. B defends the suit, and is compelled to pay damagers and costs, and incurs expenses. A is liable to B for such damages, costs and expenses. And where B, a broker at Calcutta, by the order of A, a merchant there, contracts with C for the purpose of 10 casks of oil for A. Afterwards A refuses to receive the oil, and C sues B. B informs A, who repudiates the contract altogether, B defends, but unsuccessfully, and has to pay damages and costs and incurs expenses. A is liable to B for such damages, costs and expenses.

(5) Right to Compensation (Section 225):- A principal is liable to compensate an agent for injury caused by principal's own neglect. Thus, every principal owes to his agent the duty of care not to expose him to unreasonable risks. Where A employs B as a bricklayer in building a house, and puts up the scaffolding himself. The scaffolding is unskillfully put up, and B is in consequences hurt. A must make compensation to B.

(6) Right to Accounts:- Although the Act does not provide any specific provision for the accounts to be demanded by the agent from the principal but this right has been recognized by the courts in the case where the remuneration and counter claims of the agent were under issue.

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Q.2- Describe agent's duties to Principal? And also discuss the relation between the principal and third person?

Ans.

Duties of an agent

The relationship of the principal and agent may be wholly provided for in their contract Principal and agent can bind themselves to a particular contract and abide by those terms and conditions. But in the absence the terms in the contract or unless they are modified or excluded by special contract the following duties and rights of general nature are provided by law which will be applicable on every principal and agent.

An agent owes certain general duties to the principal. If the agent fails in his duties the principal can call upon the agent for accounts and demand payment of secret and illicit profits earned by him as an agent. He can also seek damages for disregard of the terms of agency as also for want of skill and care. The principal can also resist the claim of the agent for commission and indemnity by the plea that the agent had acted for himself.

The general duties of an agent are as under:

(1) Duty of follow instructions or customs (Section 211).
(2) Duty of reasonable care and skill (Section 212)
(3) Duty to communicate (Section 214)
(4) Duty not to deal on his own account (Section 215)
(5) Duty not to make secret profit (Section 216)
(6) Duty to remit sums (Section 218)
(7) Duty not to delegate (Section 190)

(1) Duty to follow instructions or customs (section 211):- An agent is bound to conduct the business of his principal according to the directions given by the principal and he must keep himself within the confines of the authority conferred on him by the principal. If there are no instruction then agent is to act as per the general custom. If neither any instructions of the principal are available nor is there any general customs to guide the agent, he has to act reasonably in the best interest of the principal.

Any deviation from the instruction of the principal would make the agent liable whether the loss occasioned can be attributed to him or not. In **Lilley Vs. Dubey** the defendant was to store goods in his own warehouse but stored some of them in another warehouse where they were destroyed due to fire. The agent was held liable despite the fact that there was no negligence on his part since he had failed to follow the specific instructions as to storage in his own warehouse.

(2) Duty of reasonable care and skill (section 212):- An agent is bound to carry on the business of agency with reasonable care and skill. the standard of care and skill which an agents to bestow depends upon the nature of his profession. An agent should have goods legal knowledge to sufficiently and adequately safeguard the interests of the principal in the course of the agency.

If the principal suffers any loss owing to the agent's want of care or skill, the agent must compensate to the principal for such loss which is occasioned due to its direct consequences.

Illustrations:

(a) A, an agent for the sale of goods, having authority to sell on credit, sells to B on credit, without making the proper and usual enquiries as to the solvency of B, B. at the time of such sale, is insolvent. A trust make compensation to his principal in respect of any loss thereby sustained.

(b) A, an insurance broker employed B to effect an insurance on a ship, omits to see that the usual clauses are inserted in the policy. The ship is afterwards lost. In consequence of the omission of the clauses nothing can be recovered from the underwriters. A is bound to make good the loss B.

`**In Keppel V. Wheeler,** an estate agent was instructed to find a buyer for an estate and he communicated an offer. Before the sale could be completely he received a higher offer from another buyer but did not communicate it to the principal. It was held that the agent did not act with skill and care as he failed to communicate higher offer to the principal and was thus liable to pay damages.

(3) Duty to Communicate (section 214):- An agent in case of difficulty should be diligent in communicating with principal about the execution of the task assigned as per his instruction. It is the duty of every agent to carry out the mandate of his principal. He should perform the work which he has been appointed to do. Any failure in this respect would make the agent absolutely liable for the principal.

(4) Duty not to Deal on his Own Account (Section 215):- An agent occupies a fiduciary position qua the principal and therefore, it is his duty not to do anything, which would bring his personal interest, and duty to the principal in conflict with each other. If an agent deals on his own account without obtaining the consent of his principal and acquainting him about material circumstances, the principal may repudiate the transaction if he shows that any material fact has been dishonestly concealed from him or that the dealings have been disadvantageous to him. Thus, where A directs B to sell A's estate. B buys the estate for himself in the name of C, A, on discovering that B has bought the estate for himself, may repudiate the sale. If he can show that B has dishonestly concealed any material fact, or that the sale has been disadvantageous him.

In **Armstrong Vs. Jacksen,** the principal instructed his agent sold him shares, which he himself owned instead of purchasing them from the open market without disclosing that he was himself the seller of shares. It was held that there was dishonest concealment of material fact and hence the principal was allowed to get the sale set aside.

(5) Duty not to Make Secret Profit (section 216):- It is the duty of the agent not to make any secret profit in the business of agency. His relationship with the principal is of fiduciary nature and this requires absolute good faith in the conduct of agency. When an agent deals with another person, in regard to the business of the agency without the knowledge of the principal, the principal is entitled to claim any benefit, which may have resulted to him from the transaction.

The agent has a duty to be honest to his principal. It is necessary that the agent should not disclose my confidential information received by him from his principal. If he does so, the principal may terminate the contract and hold the agent liable for damages fort his loss, if any. However, knowledge which is acquired by an agent in the course off the business of agency and he converts into advantage does not require accountability if the agent neither uses the principal's property in the process nor diverts his business opportunities.

(6) Duty to Maintain Accounts (Section 213):- An agent is under a duty to maintain regular and proper accounts to the principal on demand. Maintenance of proper and regular accounts is an essential and all pervasive duty of an agent. Account are necessary for the proper performance of the agent's other duties, like the duty to sums to the principal it is only on the basis of the accounts maintained by the agent that the principal an come to know whether his instructions are being property followed and that the agent is fulfilling the mandate of his agency. The agent thus has to account for all the receipts and expenditure undertaken and these should be supported by relevant documentary proofs. They duty to provide access to the records survives the termination of the contract.

(7) Duty to Remit Sums (Section 218):- The agent is bound to pay all sums of money received on account of his principal. the agent is, entitled to deduct his lawful charges, but subject to this right, the principal's money must be remitted to him. The agent has to perform this duty even if his earnings for the principal flow out of void or illegal transactions.

(8) Duty not to Delegate (Section 190):- Ordinarily, the agent cannot further delegate the work, which has been delegated to him by his principal and which he has undertaken to perform personally. The maxim delegatus non potest delgate is used to describe this duty of the agent which means the person who is himself a delegatee cannot further delegate. The relationship of principal agent is based on trust and faith. An agent might have been chosen because of his special skills or because the principal has trust and confidence in his integrity and competence which he might not have in any other person. When a principal has thus reposed faith in a person as an agent that person cannot substitute someone else in his place.

Q.3. Discuss the mode of termination of agency and describe agency between husband and wife?

Ans-

Termination of Agency (Section 201-210)

An agency may be terminated as to cease the relationship between the principal by various modes prescribed by section 201. The modes of termination are:

(1) Termination by revocation.
(2) Termination by renunciation.
(3) Termination by expiry of term;
(4) Termination on death of term;
(5) Termination on insolvency;
(6) Termination by discharge of contract.

(1) Termination by Revocation (Section 203):- A principal can revoke the agency any time before the agent has exercised the authority so as to bind the principal, and such revocation puts an end to the agency.

(i) Revocation may be express of implied:-Revocation for terminating the agency need not be express and may be implied from the conduct of the principal or the agent. Thus, where A empowers B to let A's house and afterwards A lets in himself this is an implied revocation of B's authority.

(ii) Revocation possible before authority has been exercised:- An agency can only be revoked before the authority given has bee exercised by the agent so as to bind the principal. thus, where the agent has already exercised the authority conferred on him in a manner so as to bind the principal, the agency cannot be revoked.

(iii) Revocation where authority has been partly exercised:- Where a part of authority has been exercised the principal cannot revoke the authority as regards such acts and obligations as arise from acts already done. Where A authorizes B to buy 1,000 bales of cotton on account of A, and to pay for it out of A's money remaining in B's hands. B buys 1,000 bales of cotton in his own name, so as to make himself personally liable for the price. A cannot revoke B's authority so far as regards payment for the cotton.

(iv) Reasonable Prior Notice (Section206):-For the revocation to be effective a notice thereof is required. The requirement of notice is mandatory and a termination without notice is ineffective. If no notice is given then the damage thereby resulting to the principal or the agent must be made good to the one by the other. The notice must also be of a reasonable duration and the same would depend on facts and circumstances of a case. thus, a notice of 3 months was held to be inadequate to determine an agency which had lasted for nearly 50 years during which a very large business had been built up, and great expense had been incurred by the agent.

(v) Liability to compensate for unreasonable termination (Section 205):-Where an agency has been created for a fixed period, compensation would have to be paid for its premature termination, if the termination is without sufficient cause. The liability to pay compensation does not arise where the agency is not for fixed period.

(vi) Termination by Renunciation (Section 206):- The renunciation of agency by an agent is based on similar principles as principal's right of revocation. It need not be expressed and may be implied from the conduct of the agent. He has to serve a reasonable notice of renunciation and if he renounces without proper notice, he shall have to make good any damage thereby resulting to the principal. In case of an agency for a fixed period, the agent would be liable to compensate the principal for any premature renunciation without sufficient cause.

(vii) Termination on Completion of Business (Section 2011):- An agency is generally created for a specific purpose or performance of the task but for a particular task and the accomplishment of task or purpose the agency is no further required and is thus, considered to have been terminated automatically. Thus, an agency is terminated on the completion of business. Where an agency is created for sale of goods, it terminates on the sale of the goods.

(viii) Termination by Expiry of term:-An agency may not be created for the completion of the task but for a particular duration and on the expiry of this duration it would automatically cease to operate. Although section 201 does not specifically provide for termination of agency by such mode but same is nonetheless deducible. Thus, where an agent has been appointed for a fixed term, the expiration of the term puts an end to the agency, whether the purpose of the agency has been accomplished or not.

(ix) Termination on Death or Insanity (Section 201):- An agency is terminated automatically on the death, or insanity, of the principal or the agent. Winding up of a company or dissolution of a partnership has the same effect. Where a counsel is appointed by a principal who subsequently becomes of an infirm mind, the authority conferred on the counsel stand revoked.

(x) Termination on Insolvency of Principal (Section 201):-An agency may also terminate automatically by operation of law on the principal being adjudicated as an insolvent.

(xi) Termination by Discharge of Contract:-An agency being a contract is terminated by any event that terminates a contract. An agency may thus be terminated by events, which result in termination of the contract like frustration. Thus, where a war broke out between the two countries to which the principal and agent belonged, the agency was deemed to have ended.

(xii) Termination When Takes Effect (Section 208):-The termination of agency does not take effect immediately and takes effect only when the effected person come to know about such termination. It takes effect;

(a) as between the principal and the agent when the agent comes to know of the termination. Thus, where a directs B in sell goods for him, and agrees to give B five percent commission on the price fetched by the goods. A afterwards, by letter, revokes B's authority, B, after the letter is sent, but before the received it, sells the goods for 100 rupees. The sale is binding on A and B is entitled to five rupees as his commission.

Even when the agency is terminated by the death of the principal, the termination is effective only when it comes to the knowledge of the agent. Where A directs B, his agent, to pay certain money to C, A dies, and D takes out probate to his will. B, after A's death, but before hearing of it, pays the money to C. The payment is good as against D the executor.

(c) as regards third person, the agency does not terminate until they come to know of the fact of termination. Thus, where A, at Madras, by letter, directs B to sell for him some cotton lying in a warehouse in Bombay, and afterwards, by letter, revokes his authority to sell, and directs B to send the cotton to Madras. B, after receiving the second letter, enters into a contract with C, who knows of the first letter, but not of the second, for the sale to him of the cotton, C pays B the money, with which B absconds. C's payment is good as against A.

Agency between husband and wife

As aptly pointed out by Leake, in case of a husband and wife living together, a legal presumption arises that wife has the authority of an agency for all ‘domestic matters ordinarily entrusted to a wife, as the reasonable supply of goods and service for the use of the husband, his wife, children and the household, such goods and service being suitable in kind and sufficient in quantity and necessary in fact according to the condition in which they live.” The obvious reason for this legal presumption is that so long as people live in house “the wife will normally do the household shopping the husband will pay the bills. It may, however, be noted that for the legal presumption of agency in favour of wife to pledge the credit of her husband for domestic matter certain conditions must be satisified. They are:

(i) First, the husband and wife must be co-habiting together. As a matter of fact, it is the fact, of co-habitation which gives the wife the authority to pledge the credit of her husband for necessaries in domestic matters. If the husband and wife start living apart, the presumption will not arise and the tradesman regarding wife and husband’s agent will be required to establish that she was an agent of necessity or the husband allowed her to pledge his credit.

(ii) Secondly, the husband and wife must be living together in their own domestic establishment. An illustrative English case on the point is Debenham v. Mellon.

In this case, the wife acted as a manageress of a hotel of which her husband was the manager. They had no separate establishment of their own and lived in the said hotel. She pledged the credit of her husband with a tradesman for some clothes. The payment not having been made, the tradesman sued the husband for the price of clothes. The court held that the husband was not liable for the price because he and his wife were not living in a domestic establishment of their own which is a necessary condition for the legal presumption of necessity in favour of the wife.

Lord Selborne observed that if it is now well settled in England that the question, “whether a wife has authority to pledge her husband’s credit is to be treated as one of fact, upon the circumstances, whatever may be the presumption from any particular state of circumstances.”

(iii) Thirdly, the wife has the authority to pledge her husband’s credit only for “necessaries”. A particular thing will be regarded as ‘necessaries’ if it comes within the domestic department usually confined to the wife and is also suited to the style of the living of husband. For example, ‘A’ is a teacher in a Degree College and ‘B’ is his wife ‘A’ goes to Germany on study leave for one year. In A’s absence B maintains herself with the money sent by ‘A’. On times when there is delay in the arrival of

money she takes goods on credit and pays after she gets the money. Thus once she purchased on credit one maund of rice, four sarees and one gold necklace. Fifteen days after 'A' came back. Of which of these goods 'A' is bound to pay the price? A is bound to pay the price of one maund of rice, and four sarees. But he is not bound to pay the price of one gold necklace because it is not the goods that can come under the category of 'necessaries'. The person who supplies the goods has the burden of proving that the goods supplied are necessaries. Where a wife pledged her husband's credit for her bills with an eye specialist, it was held that the husband was not liable. Whether a particular goods supplied is a 'necessity' or not is a question of fact and the onus in this connection lies on the person who supplies the goods to wife.

Fourthly and lastly, the legal presumption of agency in favour of wife or her authority to pledge his credit, cannot e invoked where the husband gives a reasonable allowance to his wife and also duly pays it.

Unit – IV

(Syllabus)

Unit-IV	**Government Contract –** Constitutional provisions, procedural requirement-kinds of Govt. Contracts performance of such contracts, Settlement of disputes and remedies.

Q.1- Discuss the liability of State under the government form of contract? Critically illustrate it with leading cases.

Or

The doctrine of Sovereign immunity has no place in the present era. Comment on the statement with decided leading cases.

Ans.-

Government form of contract (Art. 299, 300)

Liability in contract:

Article 299 authorities the Government of India to enter into contract for any purpose subject to the mode and manner provided for it in Article 209. A contract is binding on the government of India if the following three conditions are fulfilled that -

1. it must be expressed to be made by the President or by the governor of the State as the case may be,
2. it must be extended on behalf of the President or the governor as the case may be, and
3. its execution must be by such person and in such manner as the President or Governor may director authorize.

Failure to comply with these conditions nullifies the contract and renders in void and unenforceable. There is no question of estoppels or ratification of the provisions of Art. 299(1) of the Constitution.

The contractual liability of the State under Indian Constitution is the same as that of a individual under ordinary law of contracts. The legal position in this respect has not change under the present Constitution. The liability of the States is exactly the same as that of East Indian Company before 1858.

Although the contracts are made in the name of the President he is not personally liable in respect of any contract.

Liability in Contract:

Article 300(1) provides that the Government of India may be sued in relation to its affairs in the like case as the Dominion of India, subject to any law which may be made by Act of Parliament. The Parliament has not made any law and therefore the question has to be determined as to whether the suit would lie against the Dominion of India before the Constitution came into force. Thus, so long as the Parliament or the State Legislature do not enact a law on the point, the legal position in this respect is the same as existed before the commencement of the Constitution.

Before present Constitution came into force the East Indian Company, and after Government of India Act, 1858, which transferred the Government of India to Her Majesty with its rights and liabilities, the Secretary of State Council were liable for the tortuous acts of their servants committed in the course of their enjoyment.

The first leading case on the point is the **P. and O. Steam Navigation Co. Vs. Secretary of State for India.** The facts of the case were that a servant of the Plaintiff's (company) was traveling from Garden Reach to Calcutta in a carriage driven by a pair of horse. the accident took place when the coach was passing through the Kidderpore Dockyard which was Government Dockyard. Some government workmen employed in a steamer.

The men carrying the iron-rod were going in the middle of the road. When the carriage of the plaintiff drove up nearer the coachman gave a warning to the men carrying the iron rod and the coachman slowed its speed. The men carrying the iron rod attempted to get out of the way, those in front tried to go the one side of the road while those time, brought the carriage close up to them before they had left the centre of the road. Seeing the horses and carriage they got alarmed and suddenly dropped the iron rod and ran away. The iron rod fell with a great noise resulting in injuries to one horse, which startled the plaintiff's horses which thereupon rashed forwards violently and fell on the iron rod. The Company filed a suit against the Secretary of State in Council for the damages for injury to its horse caused by the negligence of the servants employed by the Government of India.

The Supreme Court held that the Secretary of State for India was liable for the damages caused by the negligence of Government servants, because the negligent act was not done in the exercise of a sovereign function. The Court drew a distinction between acts done in exercise of "sovereign power" and acts done in the exercise of-sovereign "non-sovereign power".

The above principle has been approved and applied by the Supreme Court in the following cases:

In State of Rajasthan Vs. Vidyawati, the driver of a jeep owned and maintained by the State of Rajasthan for the official use of the collector of a district, drove it rashly and negligently while bringing it back from the workshop after repairs and knocked down a pedestrian and fatally injured him. As a result of the injuries the pedestrian died. His widow sued the State of Rajasthan for damages. The Supreme Court held that the State was liable and awarded damages. The accident took place while the driver was bringing it back from the workshop to the Collector's residence. It cannot be said that he was employed on a task which was based on delegation of sovereign or governmental powers of the State. His act was not an act in the exercise of a sovereign function. The Court said that the employment of driver of a jeep car for the use of a civil servant was an activity which was not connected in any manner with the sovereign power of the State at all.

In Kasturi Lal Vs. State U.P., a person was taken into custody on suspicion of being in possession of stolen property and taken to police station. His property including certain quantity of gold and silver was taken out from him and kept in the Malkhana till the disposal of the case. The gold and silver was misappropriated by a police constable and silver, and in the alternative claimed damages for loss caused by negligence of the Meerut Police. The State contended that no liability would accrue for acts committed by a public servant where such acts were related to the exercise of sovereign power of the State. The Supreme Court held that the State was not liable.

No distinction between Sovereign and Non-Sovereign:

In **N. Nagendra Rao & Co. Vs. State of A.P.** the Supreme Court held that when due to the negligent act of the officers of State a citizen suffers any damage the State will be liable to pay compensation and the principle of sovereign immunity of State will not absolve him from this liability. The court held that in the context of modern concept of sovereignty the doctrine of sovereign immunity stands diluted and the distinction between sovereign and non-sovereign functions no longer exists. The Court noted the dissatisfactory condition of the law in this regard and suggested for enacting appropriate legislation to remove the uncertainty in this area.

The Court further said that sovereign immunity was never available were the State was involved in commercial or private function not it is available where its officers are guilty of interfering with life and liberty of a citizen not warranted by law. In both the cases the State is vicariously liable, to compensate and indemnity to the wronged person. The doctrine of sovereign immunity has no relevance in the present day context when the concept of sovereignty has itself undergone drastic change. The old and archaic concept of sovereignty this does not service. Sovereignty now vests in the people. The legislature, the executive and the judiciary have been created and constituted to serve the people. According to modern thinking the State is treated in performance of its functions like a private company. It is therefore obviously liable for negligence of its officers.

In Common Cause, A Registered Society Vs. Union of India, the Supreme Court again examined the whole doctrine and rejected the sovereign immunity rule. The Court held that the rule of State liability as laid down in **P. & O. Steam Navigation case** is very outmoded. It said that in modern times when the State activities have been considerably increased it is very difficult to draw a line between its sovereign and non-sovereign functions. The increased activities of the State have made a deep impression on all facets of citizens' life, and therefore, the liability of the State must be made co-extensive with the modern concept of a welfare State. The

State must be liable for all tortuous acts of its employees, whether done in exercise of sovereign or non-sovereign powers. In the process longer binding value.

End of Sovereign Immunity Doctrine:

In **State of A.P. Vs. Challa Ramkrishna Reddy,** known as prisoners murder case the Supreme Court held that in teh process of judicial advancement Kasturilal's case has paled into insignificance and no longer of any binding value. In this case a prisoner who had informed the jail authorities that he apprehended danger to his life but no action was taken on this information and no measures were taken for his safety and he was killed in the prison. It was also found that a police officer was a party to the conspiracy to kill the prisoner which was hatched in the prison. The Court held that in case of violation of fundamental right the defence of sovereign immunity which is an old and archaic defence cannot be accepted and the government and the police are liable to compensate the victim.

The Court said that the personal liberty should be given supremacy over sovereign immunity. Such rights cannot be defeated by pleading the old and archaic defence of sovereign immunity which has been rejected in several cases by the Supreme Court.

In a large number of cases the courts have ordered the Government to pay compensation to the victim of torture for violation of their valuable fundamental right to life and liberty guaranteed by Art. 21 of the Constitution.

Defence of State immunity not available where fundamental rights are violated:-

The decision of the Supreme Court in the cases of personal liberty clearly show that the doctrine of state immunity is not available.

In **Rudal Shah Vs. State of Bihar** the court directed the State of Bihar to pay compensation of Rs. 35,000 to the victim of tortuous acts done by government employees during sovereign functions. The petitioner had already completed his sentence but the prison officials did not take care to release him. He was kept in jail for 14 years even after his acquittal by the Court. In **Sebastian M. Hongray** two persons were taken into custody by army authorities in Manipur but they were not produced before the Court in obedience of a writ of habeas corpus and it was presumed that they must have met with unnatural death while in Army custody. The Supreme Court directed the Central Government to pay exemplary damage of Rs. 1 Lakh each to the wives of those person.

In **Bhim Singh Vs. State of Jammu and Kashmir** the Supreme Court awarded a sum of Rs. 50,000 to the petitioner as compensation for violation of his fundamental right of personal liberty under Art. 21 of the Constitution. The petitioner who was an MLA was illegally arrested and detained in police custody and deliberately prevented from attending the session of the Legislative Assembly. In Peoples Union for Democratic Rights Vs. Police Commissioner, Delhi Head Quarter, a labourer was taken to the police station for doing some work. He was severely beaten when he demanded wages and as a result he died. The Court directed the government to pay Rs. 75,000 as compensation to the family of deceased.

Suits by or against the State- Article 300 of the Constitution says that the Government of India may sue or be sued by the named of the Union of India and Government of a State may sue or be sued by the name of the State, or of the Legislature of a State. Thus the Constitution makes the Union and the States as juristic persons business, bringing and defending legal action, just as private individuals. The legal personality of the Union of India, or a State of Indian Union is thus placed beyond doubt by the express language of Article 300. The Government of India can be sued in relation to their affairs in the like cases as the Dominion of India might have been sued if this Constitution had not been enacted. The position in this respect remains the same as it existed before the commencement of the Constitution so long as Parliament does not make a law providing otherwise. [Art. 300]. As the Union of India is a legal person it is not necessary to investigate whether the Government of India was a legal entity before the commencement of the Constitution.

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Q.2- Write short notes on any two of the following:

(a) Government contracts and doctrine of waiver

(b) Difference between contract and Tort

(c) Charges

Ans.- (a) Government contracts and doctrine of waiver

Art. 299- Contracts—(1) All contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President, or by the Governor of the State, as the case may be and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorizes.
(2) Neither the President nor the Governor shall be personally liable in respect of any contract or assurance made or executed for the purposes of this Constitution, or for the purposes of any enactment relating to the Government of India heretofore in force, nor shall any person making or executing any such contract or assurance on behalf of any of them be personally liable in respect thereof.

Art. 300-Suits and proceedings--(1) The Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State and may, subject to any provisions which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of powers conferred by this Constitution, sue or be sued in rrelation to their respective affairs in the life cases as the Dominion of India and the corresponding Provinces or the corresponding Indian State might have sued or been sued if this Constitution had not been enacted.
(2) If at the commencement of this Constitution—
(a) any legal proceedings are pending to which the Dominion of India is a party, the Union of India shall be deemed to the substituted for the dominion in those proceedings; and
(b) any legal proceedings are pending to which a Province or an Indian State is a party, the corresponding State shall be deemed to be substituted for the Province or the Indian State in those proceedings.

Suits

Doctrine of Waiver—Can a citizen waive his fundamental right? The doctrine of waiver has no application to the provision of law enshrined in Part III of the Constitution. It is not open to an accused person to waive or give up his Constitution rights and get convicted.

The question of waiver directly arose in Basheshar Nath vs. Income Tax Commissioner. The peititoner whose case was referred to the Income-Tax Investigation Commissioner under Section 5 (1) of the Act was found to have concealed large amount of income. He, thereupon, agreed a settlement in 1954 to pay Rs.3 lakhs in monthly installments by way of arrears of tax and penalty. In 1955, the Supreme Court in Muthiah v. I.T. Commissioner, held that Section 5 (1) of the Taxation of Income (Investigation Commission) Act was ultra vires of Article 14. The petitioner then challenged the settlement between him and the Income Tax Commissioner. The respondent contented that even if Section 5 (1) was invalid, the petitioner by entering into an agreement to pay the tax had waived his fundamental right guaranteed under Article 14.

The majority expressed the view that the doctrine of wavier as formulated by some American Judges interpreting the American Constitution cannot be applied in interpreting the Indian Constitution. The Court held that, it is not open to a citizen to waive any of the fundamental rights conferred by Part III of the Constitution. These rights have been put in the Constitution not merely for the benefit of the individual but as a matter of public policy for the benefit of the general public. It is an obligation imposed upon the State by the Constitution. No person can relived the State of this obligation because a large majority of our people are economically poor, educationally backward and politically not yet conscious of their rights. In such circumstances, it is the duty of this Court to protect their rights against themselves.

Ans.- (b) Difference between contract and Tort

Contract and Tort—

Tort and contract differ from one another in the following respects—

1- In tort, there is a breach of duty which are primarily fixed by law whereas in contract ther3e is breach of duty which is fixed by the consent of parties, for example, it is my duty not to assault or defame any person.

2- In tort, there is a violation of a right in term, i.e. a right vested in some determinate person and available against the whole world, whereas a breach of contract is an infringement of a right in personam i.e. a right available only t a some definite person and in which the society has no concern. Thus if 'A' assaults 'B' or damages 'B''s property without lawful justification it is tort. In this case the duty is duty imposed by law and that is the duty not to do unlawful harm to the person or property of another. But if 'A' agrees to sell 100 quintals of wheat to 'B' for a price, and if he fails to perform the contract within specified time, 'A' will be liable for breach of contract.

3- In tort, the motive for breach of duty is immaterial. But in case of breach of contract, it is often taken into consideration. This if the defendant does an act with god motive or in good faith to save a person from being harmed then he will not be liable to the plaintiff. But in contract the defendant cannot take the defence of good faith or good motive and he has to pay damages to the plaintiff in every case.

4- In both tort and contract the general remedy is an action for damages. But the purpose for which damages are given in different. In contract the damages are compensatory and punitive or exemplary. In torn, exemplary damages are awarded to punish the defendant but in contract the nature of damages is compensatory and it is generally fixed.

5- In tort the damages are generally unliquidated and are determined by the court on the facts and circumstances of the case. But in contract, the damages are fixed according to the terms and conditions of contract, for example, suppose 'A 'contracted to build a house for 'B' within a year, and on failure to do so he agreed to pay Rs.1000/- to 'B' as damages again if 'A' agrees to sell to 'B' 20 pigs for Rs.10 each by the 10th Oct. 1947 but he fails to do so, there is a fixed and determined measure to ascertain the damages. But in tort the damages are not fixed nor are there any measure by which the plaintiff can estimate it correctly. It is determined by the Court on the basis of facts and circumstances of each case.

Ans.- (c) Charges - Where immoveable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained [which apply to a simple mortgage shall, so far as may be, apply to such charge].

Nothing in this section applies to the charge of a trustee on the trust- property for expenses properly incurred in the execution of his trust, [land, save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge.