

## UNIT – IV

### PASSING OF PROPERTY IN GOODS

A contract of sale can be performed by the two ways.

1. Property in goods or ownership of goods and
2. Possession of the goods.

A person may have possession of goods but he may not be the owner e.g. a servant, agent etc. On the other hand, a person may be the owner but may not have the possession of goods. In the contract of sale, when the ownership of goods is transferred to the buyer from the sellers, he becomes the owner of the goods.

As per general rule, the transfer of ownership depends on the intention of the parties to the contract. But sometimes the intention of the parties cannot be ascertained from the contract. In that case, the intention of the parties is ascertained on the basis of provisions laid down in Sections 18 to 24 of the Sale of Goods Act. These provisions are discussed as under—

- 1) Incase of the unascertained goods (Section 18 and 23);
- 2) Incase of specific goods (Section 20 to 22) and
- 3) Incase of sale on approval (Section 24)

#### TRANSFER OF OWNERSHIP IN CASE OF UNASCERTAINED GOODS:

a) Unascertained Goods: Under Section 18 of the Sale of Goods Act, the unascertained goods are not transferred unless the goods are ascertained. These goods are not specifically identified at the time of contract of sale. It is identified and is set apart for the purpose of delivering to the buyer.

b) The Intention of the parties: Under section 19 the transfer of ownership depends upon the intention of both the parties and ownership transfer from the seller to the buyer at the time fixed by the parties.

c) Unascertained or future goods: Under section 23, in sale of unascertained or future goods, goods are passed to the buyer by description. When goods of that description in a deliverable state are unconditionally appropriated to the contract, then the property in goods passes to the buyer. It is to be done by the seller with the assent of the buyer or by the buyer with the assent of the seller.

Example: “A” agrees to sell “B” 200 kg of Rice out of a large quantity of A’s godown, whatever the price that is to be paid on the specific day under the contract. Otherwise the 100 kg of Rice that was separated from the godown of ‘A’ will not pass from A to B.

#### TRANSFER OF OWNERSHIP IN CASE OF SPECIFIC GOODS:

a) Specific goods: - Under Section 20, the goods are deliverable state and the ownership transferred from the seller to the buyer at the time of making of contract of sale.

b) When seller has something to do:- Under Section 21 in case of sale of specific goods if the goods are not in a deliverable state and the seller has to do something to put the goods in a deliverable state, the ownership does not pass until such thing is done and the buyer has notice thereof.

c) When goods are to be measured, tested: Under Section 22, in case of a contract of sale of specific goods and the goods are in a deliverable state but, the seller has to weight, measure, test or perform some other act or thing with reference to the goods for ascertaining the price, the ownership does not pass until such act or thing is done and the buyer has noticed thereof.

### **TRANSFER OF OWNERSHIP IN CASE OF SALE ON APPROVAL:**

a) Goods sent on approval: - In case of sale on approval or sale on return, the buyer has an option to return the goods to the seller within a reasonable period of time. Thus, the ownership transferred to the buyer when he accepts the goods. If the buyer does not return the goods within the reasonable time, the seller can recover the price of the goods from the buyer.

In case of sale on approval, the ownership to the buyer is transferred in three ways:

- When the goods are accepted by the buyer, or
- When the buyer performs some acts which indicates implied acceptance of the buyer, or
- The buyer fails to return the goods within a reasonable time

Under Section 24, when goods are sold under a contract of sale or return or on approval, the sale is a conditional sale. As a result of significance of the buyer's approval, the goods will pass to the buyer.

b) Reservation of Right of Disposal: Under Section 25, reservation of the right of disposal is defined as any action made by the seller, where it is expressed that an intention on his part not to part with control over the goods until certain condition are fulfilled. Then, the property will be passed subject to fulfillment of these conditions.

Example: 'A' supplies 100 bags of Rice to 'B' by a truck, where no reservation of the right of disposal was there. In this case, the rice will pass to B immediately after goods are handed over to the carrier.

### **TRANSFER OF TITLE BY NON-OWNERS**

According to the general rule, "the seller cannot transfer to the buyer of goods a better title than he himself has." If the title of the seller is defective, then the buyer's title will also become defective. Under Section 27, it is laid down that. "Where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner the buyer acquires no better title to the goods than the seller had..." The rule is expressed by the maxim "Nemo Det Quod Non Habet", which implies that "no one can give what he has not got".

Of course, there are some exceptions to the above rule. So, though a person is not the owner of the goods, he may sell the goods and pass a better title than he himself has. Following are the exceptions to this rule.

1. Sale by a mercantile agent: If a mercantile agent is authorized by the owner of the goods sell on his behalf, then such sale shall be valid. In such cases, the buyer can acquire a good title of the goods. This exception will be implemented subject to fulfillment of the following conditions:-

- i) The person must be in possession of goods or documents of title to the goods in his capacity as a mercantile agent and with the consent of his owner.
- ii) The person must sell the goods while acting in the ordinary course of business.
- iii) The buyer must act in good faith without having any notice, at the time of contract that the mercantile agent has no authority to sell the goods.

2. Transfer of title by Estoppels: This exception is based on the principle of personal estoppels. Sometime, the real owner may lead the buyers by virtue of his conduct or words or by act to believe that the seller is the owner of the goods or has the authority to sell them. In such case, he may not thereafter deny the seller's authority to sell.

3. Sale by a joint owner: If there are several joint owners of goods, one of them if has sole possession of the goods by permission of the co-owners, then the property in goods is transferred to any person who buys them from such joint owner. In order to apply this exception following conditions must be fulfilled.

- i) One of the several owners must be in sole possession of the goods.
- ii) The joint owner must have permission of co-owners.
- iii) The buyer must purchase goods in good faith.
- iv) The buyer should not have notice regarding the matter that the seller has no authority to sell.

4. Sale by person in possession under voidable contract: - According to the Section 29 a person in possession of goods under a voidable contract which is not rescinded, can transfer a good title to the buyer. The buyer should purchase the goods in good faith and without notice of the seller's defective title.

5. Sale by seller in possession after sale: - Under Section 30 (1) it is laid down that where a person has sold goods but he continues in possession of goods or of the documents of title to the goods, he may sell them to a third person and if such person obtains delivery thereof in good faith and without notice of the previous sale, the person can get a good title to them. In order to apply this exception, the seller must be in possession after sale of goods and there must be delivery or transfer of the goods or documents of title by the seller.

6. Sale by buyer in possession after sale:- Under Section 30 (2), it is laid down that where a buyer having bought or having agreed to buy goods, obtains with the consent of the seller the possession of the goods or documents of title to the goods and resells the goods to a bona fide transferee. If at the time of this sale, the buyer was not in possession, then this exception will not apply.

7. Sale by an unpaid seller: - If the unpaid seller has exercised right of lien or stoppage in transit, resells the goods, then the buyer acquires a good title as against the original buyer, even though the resale is not justified in the circumstances.

8. Exception under other Acts: - According to some Acts, a person although he is not the owner of the goods may sell the goods and pass a better title than he himself has. As for example-

- i) Under Section 169 of the Contract Act, a finder of the goods has the right to sell.
- ii) Under Section 176 of the Contract Act, a pawnee of goods has the right to sell the goods pawned subject to satisfying some conditions.
- iii) In certain cases, a special right of sale is given to officers of court, liquidators of the companies, receivers of insolvents estate, custom officers for duties remaining unpaid etc.
- iv) A person who takes a negotiable instrument in good faith and for value becomes the true owner even if he takes it from a thief or finder.

9. Sale in market overt: According to the English law, there is an exception of the rule that a person cannot make a valid sale of goods, which does not belong to him.

## **PERFORMANCE OF CONTRACT OF SALE**

Under section 2 (2) of the Sale of Goods Act, the term 'delivery' is defined as a voluntary transfer of possession from one person to another. According to Sir Frederick Pollock delivery is voluntary dispossession in favour of another. There are three modes of delivery, such as actual, symbolic and constructive delivery. Actual delivery is occurred in case of goods are delivered themselves physically to the buyer. Symbolic delivery is occurred where the goods are not physically delivered but delivered by indicating or giving a symbol, e.g. delivery of documents of title to the goods etc. Constructive delivery is occurred where the third person acknowledges the holding the goods on behalf of the buyer, e.g. A sold to B 50 bags of tea where P holds bags which is a warehouse and it is ordered by A to P to do so.

Rules regarding delivery:  
Various rules regarding and other matters relating to the performance of the contract of sale are provided under different Sections, which are as below-

1. Mode of Delivery: Under Section 33, 'deliveries of goods' may be done by performance of anything which, the party's agreement shall be treated as delivery or the effect of the putting of goods in the possession of the buyer or of any person authorized to hold them on his behalf. Thus the delivery of goods may be either actual or symbolic or constructive.

2. Delivery and payment are concurrent condition:- Under Section 32, payment of price and the delivery of the goods is a concurrent conditions unless otherwise agreed. If the buyer is not willing to pay the price, no delivery will be given or no need to pay the price by the buyer unless the seller is ready and willing to give delivery. Example: P agrees to supply goods to Q, where Q will have to pay on delivery. So, P, unless Q is ready, need not delivery the goods.

3. Effect of party delivery: Under Section 34, a part of delivery of goods sold may be equal to the delivery of the whole, if it is so intended and agreed. But, in case of the fact where the part is intended to serve the whole, then the delivery of that part does not equal to delivery of the whole.

Example: X has sold 100 kg of wheat to Y. The wheat are remaining in the godown of X. After selling, Y again sold 20 kg of wheat to Z and as per desire of X; Y sent this 20 kg of wheat to Z. This is a legal effect of delivery of the whole.

4. Buyer to apply for delivery: - Under Section 35, the seller is not bound to deliver goods, unless agreed otherwise till the buyer applies for delivery.

5. Place of Delivery: Under Section 36 (i), at which place the delivery is to be made will be mentioned in the agreement between the parties. Apart from any such contract the goods will be delivered at the place at which they are sold.

6. Time of Delivery: Under Section 36 (2) and (4), of the Contract of Sale of Goods Act, where the seller is bound to send the goods to the buyer , but no time for sending them in fixed the seller is bound to send them within a reasonable time and at a reasonable hour.

7. Manner of Delivery: Under Section 36(3), at the time of sale, if the goods are in the possession of a third person then there is no delivery by the seller to buyer till such third person acknowledges to the buyer that he holds the good on himself. The transfer of document of title of goods operates as delivery inspite of possession of goods by third party and this will not apply in such case.

8. Expenses of delivery: Under Section 36 (5) the buyer is to bear the expenses of or incidental to receive the delivery. But, any expense of putting the goods into a deliverable state is to bear by seller. If there is any agreement between the parties with respect to the cost of putting the goods in a deliverable state or of expenses incidental to putting into the deliverable state, then this agreement will determine the right of the parties.

9. Delivery of wrong quantity: Under Section 37, it is a duty of seller to comply with the order of the buyer regarding kind, quality and quantity of goods. Delivery should be according to the specification of order. In case of defective delivery, the buyer can reject the goods.

10. Installments of deliveries: - Under Section 38, the buyer is not bound to receive the goods

of delivery by installments unless otherwise mentioned in the agreement. The performance of the contract can be split up with mutual consent. Where payment is made in installments in a contract, than failure of such payment of installment breach the contract.

11. Delivery of carrier: Under Section 39, it is provided that if the seller is authorized to send the goods to the buyer, then the seller must take all safety measure to protect the goods. It is the duty of seller to contract with the carrier. In case of sending goods by sea route, the seller must inform the buyer to insure them against sea perils.

12. Goods delivered at a distance place: Under Section 40, in case of agreement, where seller agrees to deliver the goods at his own risk the buyer shall bear the loss of deterioration of the goods in transit.

13. Examining the goods on delivery: Under Section 41, if the buyer had not examined the goods, the seller will not deliver the goods until the buyer has avail the opportunity of examining the goods. The buyer must give a reasonable opportunity of examining the goods in order to determine whether they are as per contract otherwise the buyer may reject the goods.

14. Acceptance complete on delivery: Under Section 42, the buyer has to be deemed to have accepted the goods in case of the buyer intimates to the seller that he accepted that goods or goods was delivered to the buyer and he perform anything pertaining to them. More over, the buyer retains the goods beyond a reasonable time without intimation of rejection to the seller.

15. Buyer not bound to return rejected goods: Under Section 43, it is laid down that in case of goods delivered to the buyer and if the buyer refuses to accept the goods, then he may not return the goods to the seller. This intimation to seller is sufficient that he refuses to accept the goods. This rule will be applicable subject to the condition of contract between the parties.

16. Liability of buyer for neglecting or refusing delivery of goods: Under Section 44, for any loss occurred due to neglect of buyer or a reasonable charge for the care and custody of the goods, the buyer will be liable, where the seller is willing to deliver the goods and request the buyer to accept his delivery. It is further-provided by Section 44, that the seller can exercise the right mentioned above inspite of the neglect to refusal made by the buyer to receive the delivery and it will amounts to a repudiation of the contract.

LET US KNOW  
A contract sale involves reciprocal promises, because, the seller promising to deliver the goods and the buyer to undertake to pay for the goods. The delivery of goods and payment of price are concurrent conditions; on the contrary, there are implied promises on the part of the seller to deliver goods without delay and an undertaking on the part of the buyer to accept the goods and pay the price. So, it is the duty of seller to deliver the goods to the buyer. Of course, he cannot do so until the buyer applies for delivery.

## **RIGHTS OF UNPAID SELLER**

The seller of goods is called unpaid seller, when the whole of the price has not been paid or tendered or where a bill of exchange or other negotiable instrument is received as a conditional payment. After all, the seller remains unpaid till the price or any portion of the price remain the unpaid.

The rights of an unpaid seller can be classified mainly into two categories. Such as-

- I. Right of unpaid seller against the goods.
- II. Right of unpaid seller against the buyer personally.

A. The right of unpaid seller against the goods: In spite of passing the property in the goods to the buyer, the unpaid seller has the following rights against the goods.

- a. Right of Lien: Lien implies such type of right, which can retain possession of goods and refuse to deliver them to the buyer till the price is paid. The unpaid seller can exercise his right of lien in three cases as mentioned below-
- i) Where the goods are sold without any stipulation as to credit.
  - ii) Where the goods are sold on credit, but the term of credit has expired.
  - iii) Where the buyer becomes insolvent, but the time of credit is not expired.

If the buyers become insolvent, the lien exists in spite of goods is sold on credit and period of credit is not yet expired. In case of goods sold on credit, it is presumed that the buyer shall keep his credit good. So, before payment if the buyer becomes insolvent, the seller will be entitled to play this right and hold the goods as security for the price.

b. Right of stoppage of goods in Transit: The right of stoppage implies the right of stopping the goods while they are with a carrier for the purpose transmission to the buyer. So right of stoppage can be defined as an extension of the right of lien as because it entitles the seller to retain the possession of the goods even the seller has parted with the possession. According to Section 50, unpaid sellers can exercise this right only on the following conditions.

- i) When the buyer becomes insolvent.
- ii) When the property has passed to the buyer.
- iii) When the goods are in the course of transit.

Further, under Section 51, it is laid down that the right of stoppage in transit can be exercised only so long as the goods are in the course of transit. But, the right of stoppage cannot be exercised when the transit comes to an end. As per section 51 the goods are deemed to be in course of transit from the time when they are delivered to a carrier or other bailee for the purpose of transmission to the buyer. Until the buyer or his agent takes delivery of them. On the other hand, the transit is deemed to be at an end in the following cases-

- i) When the buyer takes the delivery after the goods have reached destination.
- ii) When the buyer obtains delivery of goods before arrival of the goods at the appointed destination.
- iii) When the goods have arrived at the destination and the carrier acknowledges to the buyer that he holds the goods on his behalf.
- iv) When the goods are arrived at their destination but the buyer requests the carrier, instead of taking delivery request the carrier to carry the goods to some further destination and if the

carrier agrees to take them to the new destination.  
v) When the carrier wrongly refuses to give delivery of the goods to the buyer.

c. Right of Resale: Besides the above two rights, the unpaid seller can also exercise the right of resale. Under Section 54, some circumstances are provided where the right of resale can be exercised.

- These are-
- i) Goods must be of a perishable nature.
  - ii) The unpaid seller must exercise the right of lien and stoppage in transit.
  - iii) The seller must give a notice to the buyer regarding his intention to resale.

The seller can recover the loss of resale if any, from the defaulting buyer. The seller can keep a surplus on the resale with him. The unpaid seller has a right of withholding delivery of goods which are the subject matter of the contract. This right can be exercised by the unpaid seller even if the sale was on credit or in case of specific and unascertained goods.

II. Rights of unpaid seller against the buyer personally: The right of unpaid seller can be discussed as follows-

a. Suit for price: Under Section 55 in case of property of goods passing to the buyers and wrongfully the buyer neglects or refuses to pay for the goods, then the seller may sue with for price of the goods.

Under Section 55 (2), in case of the price of goods is payable by the buyers to the seller on a certain day irrespective of the delivery of goods and the buyer neglects or refuses to pay such price, then the seller can sue him for the price of goods, even though the ownership of the goods are not transferred to the buyer.

b. Suit for damages for non-acceptance: In case, where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may sue him for damages for non-acceptance. Under the provision laid down in the Section 73 of the Indian Contract Act, such damages are measured. These provision are given below-

- i) In case of having available market for the goods in question, the difference between the contract price and the market price on the date of breach will be measure of damages.
- ii) In case of having no such availability of market, the measures will be the estimated loss suffered directly or indirectly resulting in the ordinary cause of events from such breach.

## **BREACH OF CONTRACT OF SALE**

In case of contract of sale, where one party repudiates the contract by refusing to perform his obligation, then he is said to have committed a breach of the contract. As soon as party commits a breach of the contract; the other party becomes entitled to any one of the following remedies.

Remedies to seller:

In case of breach of contract of sale, the following remedies are available to the seller-

- i) Suit for price.



- ii) Suit for damages for non-acceptance of the goods
- iii) Suit for interest.
- iv) Suit for damages for repudiation of contract by the buyer before the due date.

Moreover, the seller has two more remedies, if a contract of sale is repudiated by the buyer before the due date of delivery.

- i) The seller may treat the contract as subsisting and he can wait till the date of delivery.
- ii) The seller may treat the contract as rescinded and he can sue for damages for the breach.

Remedies to buyer:-

In case of breach of the contract of sale by the seller, the buyer has the following remedies-

- i) He can sue for damages for non-delivery of the goods.
- ii) He can sue for specific performance.
- iii) He can sue for breach of warranty.
- iv) He can sue for damages for repudiation of contract by the seller before due date.

In case of breach of condition the buyer can reject the goods. Of course he cannot reject the goods under the following cases.-

- i) Buyer waives the breach of condition and elects to treat it as a breach of warranty.
- ii) If the contract is not reversible and the buyer has accepted the goods or part of the goods.
- iii) The contract is for specific goods and the property has passed to the buyer.

On the other hand, in case of breach of warranty, the buyer can do any one of the following—

- i) Set up against the seller the breach of warranty in diminution or extinction of the price or
- ii) Sue the seller for damages for breach of warranty (Section 59)

In case of breach of warranty damages are measured by estimating loss arising directly and naturally from the breach.

## **Rights and Duties of the Buyer and Seller according to the Sale of Goods Act-1930**

### **Rights and Duties of The Buyer**

1. To have delivery of the goods as per contract. (Sec. 31 & 32)
2. To reject the goods when they are not of the description, quality or quantity as specified in the contract (Sec 37).
3. To repudiate the contract when goods are delivered in installments without any agreement to that effects [ Sec. 38 (1)]
4. To be informed by the seller, when the goods are to be sent by sea route, so that he may arrange for their insurance [Sec 39 (30)]
5. To have a reasonable opportunity to examine the goods for ascertaining whether they are in conformity with the contract. (Sec. 41)
6. To sue the seller for recovery of the price, if already paid, when the seller fails to deliver

the goods.

7. To sue the seller for damages if the seller wrongfully neglects or refuses to deliver the goods to the buyer ( Sec 57)

8. To sue the seller for specific performance

9. To sue the seller for damages for breach of a warranty or for breach of a condition treated as breach of a warranty ( Sec 59)

10. To sue the seller the damages for anticipatory breach of contract ( Sec 60)

11. To sue the seller for interest where there is a breach of contract on the part of the seller and price has to be refunded to the buyer ( Sec 61)

## **DUTIES**

1. To accept the delivery of goods, when the seller is willing to make the delivery as per the contract (Sec. 31)

2. To pay the price in exchange for possession of the goods

3. To apply for delivery of the goods. (Sec. 35)

4. To demand delivery of the goods at a reasonable hour [Sec 36 (4)]

5. To accept delivery of the goods in installments and pay for them, in accordance with the contract. [(Sec. 38 (2)]

6. To bear the risk of deterioration in the course of transit, when the goods are to be delivered at a place other than where they are sold ( Sec 40)

7. To inform the seller in case the buyer refuses to accept or rejects the goods ( Sec 43)

8. To take the delivery of the goods within a reasonable time after the seller tenders the delivery (Sec. 44)

9. To pay the price, where the property in the goods are passed to the buyer, in accordance with the terms of the contract ( Sec 55)

10. To pay damages for non-acceptance of goods ( Sec 56)

## **Rights and Duties of The Seller**

### **RIGHTS**

1. To reserve the right of disposal of the goods until certain conditions are fulfilled. ( Sec 25 (1)]

2. To assume that the buyer has accepted the goods , where the buyer
3. To deliver the goods only when applied for by the buyer ( Sec 35)
  - i) Conveys his acceptance;
  - ii) Does an act adopting the sale; or
  - iii) Retains the goods without giving a notice of rejection, beyond specified date (or reasonable time), in a sale on approval. (Sec 24)
4. To make delivery of the goods in installments, when so agreed (Sec 39 (1))
5. To exercise lien and retain possession of the goods, until payment of the price ( Sec 47 (1))
6. To stop the goods in transit and resume possession of the goods, until payment of the price ( Sec 49 (2) and 50]
7. To resell the goods under certain circumstances ( Sec 54)
8. To withhold delivery of the goods when the property in the goods has not passed to the buyer (Sec 46 (2))
9. To sue the buyer for price when the property in the goods has passed to the buyer or when the price is payment on a certain day, in terms of the contract, and the buyer fails to make the payment (Sec 55)

## **DUTIES**

1. To make the arrangement for transfer of property in the goods to the buyer.
2. To ascertain and appropriate the goods to the contract of sale
3. To pass an absolute and effective title to the goods, to the buyer.
4. To deliver the goods in accordance with the terms of the contract ( Sec 31)
5. To ensure that the goods supplied conform to the implied / express conditions and warranties.
6. To put the goods in a deliverable state and to deliver the goods as and when applied for by the buyer ( Sec 35)
7. To deliver the goods within the time specified in the contract or within a reasonable time and a reasonable hour. [ Sec 36 (2) and (4)]
8. To bear all expenses of and incidental to making a delivery ( i.e. up to the stage of putting the goods into a deliverable state [Sec 36 (5)]
9. To deliver the goods in the agreed quantity. (Sec. 37 (1))
10. To deliver the goods in installments only when so desired by the buyer. [Sec 38 (1)]

11. To arrange for insurance of the goods while they are in transmission or custody of the carrier. [Sec. 39 (2)]

12. To arrange for insurance of the goods while they are in transmission or custody of the carrier. [Sec. 39 (2)]

### **Rights of an unpaid seller**

Section 45 lays down that a seller is unpaid :

(1) When the whole of the price has not been paid or tendered.

(2) When a negotiable instrument or a bill of exchange has been received as conditional payment and the condition in which it was received has not been fulfilled by reason of the dishonor of the instrument or otherwise.

The seller remains as unpaid seller as long as any portion of the price, however small, remain unpaid. Where the whole of price has been tendered, and the seller refused to accept such a tender, seller ceases to be an unpaid seller. In such a case the seller loses all high right against the goods.

If there is a period of credit then the seller is not unpaid until the price become due. Against if there is a condition attached to payment it must be fulfilled.

The unpaid seller's right can be exercised by an agent of the seller to whom the bill of lading has been endorsed, or a consignor or an agent who has himself paid, or is directly responsible for the price.

### **Rights of an unpaid seller**

The sale of Goods Act has expressly given two kinds of right to an unpaid seller of goods, namely :

#### **(1) Against the goods**

(a) When property in the goods has passed

(i) Right of lien

(ii) Right of stoppage of goods in transit

(iii) Right of re-sale

(b) When property in the goods has not passed

(i) Right of withholding delivery.

#### **(2) Against the buyer personally**

(i) Right to sue for price

(ii) Right to sue for damages

(iii) Right to sue for interest.

### **Responsibility of finder of goods**

#### **1.Introduction:**

Under contract act finder of lost goods have some responsibilities and duties. His position is as a bailee. He becomes responsible for the custody of lost goods when he takes charge of the goods.

#### **2. Definition:**

According to Sec. 71.

**“A person who find goods belonging to another, and takes them into his custody, is subject to the same responsibility as a bailee.”**

### **3. Responsibilities or duties of the finder of lost goods.**

(I) Duty to find out the owner:

He should find out the true owner of the lost goods.

(II) Duty to take care:

It is duty to finder of goods to take care as bailee should take care of his own goods.

(III) Duty not to use the goods:

The finder of lost goods should not use the goods.

(IV) Duty not to mix the goods:

He should not mix the goods to his own goods.

(V) He must restore the goods to owner:

If real owner is found he should restore the goods to him on demand.

### **4. Rights of finder of goods:**

Following are the rights of finder of the lost goods.

(I) **Right to retain:**

He can retain possession of goods against every body until the true owner is found out.

(II) **Right to sue for reward:**

He can file suit against the owner to recover any reward which was offered by the owner for the return of the goods.

(III) **Right of sale when owner is not found:**

He has right of sale when owner is not found on the following circumstances.

(a) **When owner is not found:**

When owner is not found, he can sell the goods.

(b) **When owner refuse to pay the expenses:**

When owner is found but he refuses to pay lawful charge borne by the finder of lost foods.

(c) **Perishable goods:**

He can sell the goods if they are perishable.

(d) **When charges of goods amount to two thirds:**

When the lawful charges of the finder amount to two thirds or more of the value of the goods found.

(IV) **Suit for recovery of damages:**

If any one deprives finder of the lost good the possession of goods, he can file a suit for recovery of damages.

### **5. Conclusion:**

To conclusion it can be said that, no one is bound to take lost goods but once he take the lost goods he becomes liable for them. Finder of lost goods is bound to take reasonable care of the goods and to find out the owner of the lost goods. So the responsibility of finder of lost goods is same as bailee.

## **NEGOTIABLE INSTRUMENTS ACT, 1881**

Section 13 of the Negotiable Instruments Act defines that a negotiable instrument means a promissory note, bill of exchange or cheque, payable either to order or bearer.

### **FEATURES**

1. The property in it passes either by mere delivery or by endorsement and delivery
2. The holder in due course is not affected by the defect in the title of his transferor or any previous party.

3. The holder in due course, can sue in his own name. He need not give notice to the debtor that he has become the holder.
4. He is not affected by certain defects like fraud to which he is not a party
5. Consideration is presumed to have passed
6. It is convenient method of discharging payments

The Act does not stipulate that only bills of exchange, promissory notes and cheques are only the negotiable instruments. So, other instruments may also be added to the list of negotiable instruments provided.

- They are transferable by mere delivery and
- The holder in due course can sue in his own name

Hence, Dividend Warrants, Port Trust or Improvement Trust Debentures, Railway Bonds, payable to bearer or Railway Receipts having the feature of negotiability are all negotiable instruments. So, a negotiable instrument is an ordinary chattel for chose-in-action clothed with the feature of negotiability.

## **PARTIES TO NEGOTIABLE INSTRUMENTS**

The parties to a bill of exchanges, a promissory note and a cheque are as follows:

**Parties to a Bill of Exchanges:** (1) Drawer, (2) Drawee, (3) Acceptor, (4) Payee, (5) Holder, (6) Indorser, (7) Indorsee, (8) Drawee in case of need, and (9) Acceptor for honour.

**Parties to a Promissory Note:** (1) Maker, (2) Payee (3) Holder, (4) Indorser and (5) Indorsee

**Maker, Drawer:** The person who makes a promissory note is called the “maker”. The person who makes or draws a bill of exchange or cheque is called the “drawer”.

**Drawee, Acceptor:** The person on whom the bill of exchange or cheque is drawn and who is directed to pay is called the “drawee”. In case of a cheque, the drawee is always a banker. In case of a bill of exchange, the drawee becomes the “acceptor” when he accepts the bill, i.e. signs his accent upon the bill and delivers the same or gives notice of such signing to the holder or to some person on his behalf A cheque does not require acceptance as it is intended for immediate payment.

**Payee:** The person named in the bill, note or cheque, to whom or to whose order the money is to be paid, is called the “payee”. In a bill or cheque, the drawer may himself be the payee. Where the payee named in a bill is a fictitious or non-existing person, the bill is treated as payable to bearer.

**Indorser:** The person who endorses the bill, note or cheque to another is called the “indorser”.

**Indorsee:** The person to whom the bill, note or cheque is endorsed is called the “Indorsee”.

## **MATERIAL ALTERATION**

Material alteration refers to changes introduced on a cheque which affects its fundamental character. In other words, “any change in any instrument which makes it speak a different language, for all legal purposes from what it spoke originally” would constitute a material alteration. If the alteration is material, it renders the cheque invalid.

### **Examples of Material Alteration**

There is material alteration when

- The date of the instrument is altered
- The time of payment is altered
- The amount is altered
- The rate of interests altered
- The place of payment is altered
- The name of payee is altered
- A new party is added etc.

There is no material alteration when

- A mistake corrected
- Alteration is made with the consent of all the parties
- Alteration is made to carry out the common intention of the parties
- Blank indorsement is converted into full indorsement
- An inchoate instrument is completed etc.

### **EFFECT OF MATERIAL ALTERATION**

According to Sec. 87 of the Negotiable Instruments Act, if a cheque is materially altered it cannot be regarded as a cheque at all. Therefore material alteration renders the cheque void.

### **CROSSING OF CHEQUES**

Crossing means drawing two parallel transverse lines across the face of the cheque with or without the words “and company” in between the lines. It is a direction to the drawee bank not to pay the amount at the counter, but only through a bank. It is made to guard payment against forgery by unscrupulous persons.

### **KINDS OF CROSSING**

Is of two kinds (1) General Crossing and (2) Special Crossing

#### **1. General Crossing**

Sec. 123 of the Negotiable Instruments Act defines General Crossing as, “where a cheque bears across its, face an addition of the words “And Company” or any abbreviation thereof between

two parallel transverse lines or of two parallel transverse lines simply, either with or without the words 'not negotiable', that addition shall be deemed to be a crossing and the cheque shall be deemed to be crossed generally".

Two parallel transverse lines across the face of the cheque with or without the words, "& Co.", "Account Payee only", "Not Negotiable", constitute general crossing. The cheque which is crossed generally, is payable only to banker.

Specimens of General Crossing

## **2. Special Crossing**

Sec. 124 of the Negotiable Instruments Act defines Special Crossing as, "where a cheque bears across its face an addition of the name of a banker, with or without the words "not negotiable", that addition shall be deemed a crossing and the cheque shall be deemed to be crossed specially and to be crossed to that banker". When a cheque is crossed specially, the amount is payable by the drawee only, only to the bank named in the crossing.

Specimens of Special Crossing

### **"Account Payee Crossing"**

When the words "Amount Payee", "Account Payee only" are added to the general or special crossing, it is called account Payee Crossing. The collecting banker must collect the amount of the cheque for the account of the payee only and none else.

Otherwise, it is not a collection in due course and the banker is liable if the title of the person for whom the bank collects, turns out to be defective

### **"Not Negotiable" Crossing**

When the words "not negotiable" are added either in general or special crossing, the person taking the cheque cannot have and cannot give a better title than what his transferor has. So, a 'not negotiable' cheque is transferable. But the transferee gets no better title than what the transferor has.

## **RULES OF CROSSING**

1. An uncrossed cheque may be crossed generally or specially by the drawer or the holder.
2. A cheque crossed generally, may be crossed specially by the holder.
3. The holder may add the words "not negotiable".
4. The banker to whom the cheque is crossed specially, may re-cross it, but only to another bank as his agent for collection.
5. Where an uncrossed cheque or a cheque crossed generally is sent to a banker for collection, he may cross it specially to himself. But he cannot enjoy Statutory protection against being sued for conversion.



## **INDORSEMENTS**

It means the writing of a person's name (otherwise than as maker) on the face or back of a negotiable instrument or on a slip of paper (called allonge) annexed thereto, for the purpose of negotiation (Sec. 15). The person who signs the instrument is called the "indorser". The person to whom the instrument is indorsed is called the 'indorsee'.

### **KINDS OF INDORSEMENTS**

#### **1. Bank Indorsement or General Indorsement**

When the indorser signs his name only, it is called blank indorsement. An instrument endorsed in blank is payable to bearer. The holder of an instrument may write above the indorser's signature, a direction to pay the amount to or to the another person. When the holder does so, he does not become liable as an endorser on the instrument, as he had not signed it.

#### **2. Special or Full Indorsement**

If the indorser signs his name and adds a direction to pay the amount to or to the order of a certain person, it is called full indorsement.

Illustration : A bill made payable to Smith, may be endorsed in full by him as "Pay A or order".

[Sd.] Smith

An instrument having been endorsed in blank is indorsed in full the indorser in full is liable to the person to whom it is indorsed in full or to others who derive title through such person.

#### **3. Restrictive Indorsement**

It is one which prohibits or restricts further negotiation or which constitute the indorsee an agent to receive its contents for his indorser.

Example: (1) "Pay C only" (2) "Pay D for my use" (3) "Pay D on account of E" (4) "Pay E or order for collection."

#### **4. Partial Indorsement**

When a part of the amount of the instrument is endorsed, it is called partial indorsement. It is void:

Example: A holds a bill for Rs. 800 A endorses thus

"Pay Rs. 400 to B or order" (or)

"Pay B or order Rs. 400 and to C or order Rs. 400"

But if the part of the amount of the instrument is already paid, the unpaid balance may be endorsed thus. "Pay B or order Rs. 400, being unpaid residue of the bill".

#### **5. Conditional or Qualified Indorsement**

This is one which negotiates or limits the indorser's liability, in the following ways:

- (a) By Sans Recourse Indorsement: The indorser excludes his liability by express words in indorsement.

Examples: (1) "Pay A or order

Sans Recourse”  
(Sd) B

(2) “Pay A at his own risk”  
(Sd) B

(1) “Pay A without recourse to me”

(Sd) B

(b) By making his liability depend upon the happening of a specified event, though such event may never happen.

Example : “Pay A or order on his marrying B”

(c) By making the right of the indorsee to receive the amount, depend upon the happening of a specified event, though it may never happen.

(d) By Facultative Indorsement: This is one which extents the liability of the indorser.

Example: “Pay A or order

Notice of dishonor waived”

(Sd.) B

## **PAYMENT AND COLLECTION OF CHEQUE**

The paying banker should use reasonable care and diligence in paying a cheque so as to abstain from any action likely to damage his customer’s credit.

## **PRECAUTIONS BEFORE HONOURING A CHEQUE**

In order to safeguard his position, the paying banker has to observe the following precautions before honouring a cheque.

### **(1) Presentation of Cheque**

First of all a paying banker should note whether the presentation of the cheque is correct. It can be found out by noting the following factors.

- (a) *Type of Cheque:* Cheques may generally be of two types – open or crossed. If it is open one, the payment may be paid at the counter. If it is crossed, the payment must be made only to a fellow banker.
- (b) *Branch:* The paying banker should see whether the cheque is drawn on the branch where the account is kept.
- (c) *Banking Hours:* The paying banker should also note whether the cheque is presented during the banking hours on a business day.
- (d) *Multination:* If the cheque is from into pieces or cancelled or mutilated, then the paying banker should not honour it.

### **3. From of the Cheque**

Before honouring a cheque, a banker should see the form of cheque and find out whether it is regular or not.

- (a) **Printed Form:** The customer should draw cheques only on the printed leaves supplied by the bankers failing which the banker may refuse to honour it.
- (b) **Enconditional Order:** The cheque should not contain any condition

- (c) **Date:** Before honouring a cheque, the paying banker must see whether there is a date on the instrument. If a cheque is ante dated, it may be paid if it has not exceeded six months from the date of its issue otherwise it will become stale one. If a cheque is post dated, he should honour it only on its due date.
- (d) **Amount:** The paying banker should see whether the amount stated in the cheque both in words and figures agree with each other.
- (e) **Material Alteration:** If there is any material alteration the banker should return it with a memorandum "Alteration requires drawer's confirmation".
- (f) **Sufficient Balance:** If the funds available are not sufficient to honour a cheque, the paying banker is justified in returning it.
- (g) **Signature of the Drawer:** It is the duty of the paying banker to compare the signature of his customer found on the cheque with that of his specimen signature.
- (h) **Endorsement:** The banker must verify the regularity of endorsement, if any, that appears on the instrument.
- (i) **Legal Bar:** The existence of legal bar like Garnishee order limits the duty of the banker to pay a cheque.

### **CIRCUMSTANCES UNDER WHICH A CHEQUE MAY BE DISHONoured**

A paying banker is under a legal obligation to honour his customer's mandate. He is bound to do so under his contractual relationship with his customer. A wrongful dishonor will have, the worse effect on the banker. However, under the following circumstances, the payment of a cheque may be refused.

- a) **Countermanding:** Countermanding is the instruction given by the customer of a bank requesting the bank not to honour a particular cheque issued by him. When such an order is received, the banker must refuse to pay the cheque.
- b) **Upon receipt of notice of death of a customer:** When a banker receives written information from an authoritative source, regarding the death of a particular customer, he should not honour any cheque drawn by that deceased customer.
- c) **Upon the receipt of notice of insolvency:** Once a banker has knowledge of the insolvency of a customer he must refuse to pay cheques drawn by him.
- d) **Upon the receipt of notice of insanity:** Where a banker receives notice of a customer's insanity, he is justified in refusing payment of the cheque drawn by him.
- e) **Upon the receipt of notice of Garnishee order:** Garnishee order refers to the order issued by a court attaching the funds of the judgment debtor (i.e. the customer) in the hands of a third party (i.e. the banker). In such a case, the banker may refuse payment.
- f) **Upon the receipt of notice of assignment:** The bank balance of a customer constitutes an asset and it can be assigned to any person by giving a letter of assignment to the banker. In such case also the banker may refuse payment.

- g) ***When a breach of trust is intended:*** In the case of trust account, mere knowledge of the customers intention to use the trust funds for his personal use is a sufficient reason to dishonor his cheque.
- h) ***Defective Title:*** If the person who brings a cheque for payment has no title or his title is defective, the banker should refuse to honour the cheque presented by him.
- i) ***Other Grounds:*** A banker is justified in dishonouring a cheque under the following circumstances also:
- a conditional one,
  - drawn on an ordinary piece of paper,
  - a stale one,
  - post-dated one,
  - mutilated,
  - drawn on another branch where the account is not kept,
  - presented during non-banking hours.
  - If the words and figures differ,
  - If there is no sufficient funds,
  - If the signature of the customer is forged,
  - If the endorsement is irregular and,
  - If a crossed cheque is presented at the counter.

## **COLLECTING BANKER**

A collecting banker is one who undertakes to collect the amount of a cheque for his customer from the paying banker.

## **DUTIES OF COLLECTING BANKER**

1. ***Exercise reasonable care and diligence in his collection work:*** As an agent, he should exercise reasonable care, diligence and skill in collection work. He should observe utmost care when presenting a cheque.
2. ***Present the cheque for collection without any delay:*** If there is any delay in presenting the cheque for presentment by the banker, the customer may suffer losses due to the insolvency of the drawer or insufficiency of funds in the account of the drawee or insolvency of the banker himself. Hence the collecting banker has to present the cheque for collection without any delay.
3. ***Notice to customer in case of dishonor of cheque:*** If the cheque he collects has been dishonoured, he should inform him customer without any delay.

## OBJECTIVES

After reading this lesson, you should be able to-

- Understand meaning, essential characteristics and types of negotiable instruments;
- Describe the meaning and marketing of cheques, crossing of cheques and cancellation of crossing of a cheque;
- Explain capacity and liability parties to a negotiable instruments; and
- Understand various provisions of negotiable instrument Act, 1881 regarding negotiation, assignment, endorsement, acceptance, etc. of negotiable instruments

## INTRODUCTION

The Negotiable Instruments Act was enacted, in India, in 1881.

Prior to its enactment, the provision of the English Negotiable Instrument Act were applicable in India, and the present Act is also based on the English Act with certain modifications. It extends to the whole of India except the State of Jammu and Kashmir. The Act operates subject to the provisions of Sections 31 and 32 of the Reserve Bank of India Act, 1934. Section 31 of the Reserve Bank of India Act provides that no person in India other than the Bank or as expressly authorised by this Act, the Central Government shall draw, accept, make or issue any bill of exchange, hundi, promissory note or engagement for the payment of money payable to bearer on demand. This Section further provides that no one except the RBI or the Central Government can make or issue a promissory note expressed to be payable on demand or after a certain time. Section 32 of the Reserve Bank of India Act makes issue of such bills or notes punishable with fine which may extend to the amount of the instrument. The effect or the consequences of these provisions are:

1. A promissory note cannot be made payable to the bearer, no matter whether it is payable on demand or after a certain time.
2. A bill of exchange cannot be made payable to the bearer on demand though it can be made payable to the bearer after a certain time.
3. But a cheque {though a bill of exchange} payable to bearer or demand can be drawn on a person's account with a banker.

### 1.2 MEANING OF NEGOTIABLE INSTRUMENTS

According to Section 13 (a) of the Act, "Negotiable instrument means a promissory note, bill of exchange or cheque payable either to order or to bearer, whether the word "order" or "bearer" appear on the instrument or not."

In the words of Justice, Willis, "A negotiable instrument is one, the property in which is acquired by anyone who takes it bonafide and for value notwithstanding any defects of the title in the person from whom he took it".

Thus, the term, negotiable instrument means a written document which creates a right in favour of some person and which is freely transferable. Although the Act mentions only these three instruments (such as a promissory note, a bill of exchange and cheque), it does not

exclude the possibility of adding any other instrument which satisfies the following two conditions of negotiability:

1.the instrument should be freely transferable (by delivery or by endorsement. and delivery) by the custom of the trade;  
and

2.the person who obtains it in good faith and for value should get it free from all defects, and be entitled to recover the money of the instrument in his own name.

As such, documents like share warrants payable to bearer, debentures payable to bearer and dividend warrants are negotiable instruments. But the money orders and postal orders, deposit receipts, share certificates, bill of lading, dock warrant, etc. are not negotiable instruments. Although they are transferable by delivery and endorsements, yet they are not able to give better title to the bonafide transferee for value than what the transferor has.

### **1.3 CHARACTERISTICS OF A NEGOTIABLE INSTRUMENT**

A negotiable instrument has the following characteristics:

**1.Property:** The possessor of the negotiable instrument is presumed to be the owner of the property contained therein. A negotiable instrument does not merely give possession of the instrument but right to property also. The property in a negotiable instrument can be transferred without any formality. In the case of bearer instrument, the property passes by mere delivery to the transferee. In the case of an order instrument, endorsement and delivery are required for the transfer of property.

**2.Title:** The transferee of a negotiable instrument is known as 'holder in due course.' A bona fide transferee for value is not affected by any defect of title on the part of the transferor or of any of the previous holders of the instrument.

**3. Rights:** The transferee of the negotiable instrument can sue in his own name, in case of dishonour. A negotiable instrument can be transferred any number of times till it is at maturity. The holder of the instrument need not give notice of transfer to the party liable on the instrument to pay.

**4.Presumptions:** Certain presumptions apply to all negotiable instruments e.g., a presumption that consideration has been paid under it. It is not necessary to write in a promissory note the words 'for value received' or similar expressions because the payment of consideration is presumed. The words are usually included to create additional evidence of consideration.

**5.Prompt payment:** A negotiable instrument enables the holder to expect prompt payment because a dishonour means the ruin of the credit of all persons who are parties to the instrument.

### **1.4 PRESUMPTIONS AS TO NEGOTIABLE INSTRUMENT**

Sections 118 and 119 of the Negotiable Instrument Act lay down certain presumptions which the court presumes in regard to negotiable instruments. In other words these presumptions need not be proved as they are presumed to exist in every negotiable instrument. Until the contrary is proved the following presumptions shall be made in case of all negotiable instruments:

**1.Consideration:** It shall be presumed that every negotiable instrument was made drawn, accepted or endorsed for consideration. It is presumed that, consideration is present in every negotiable instrument until the contrary is presumed. The presumption of consideration, however may be rebutted by proof that the instrument had been obtained from, its lawful owner by means of fraud or undue influence.

**2.Date:** Where a negotiable instrument is dated, the presumption is that it has been made or drawn on such date, unless the contrary is proved.

**3.Time of acceptance:** Unless the contrary is proved, every accepted bill of exchange is presumed to have been accepted within a reasonable time after its issue and before its maturity. This presumption only applies when the acceptance is not dated; if the acceptance bears a date, it will prima facie be taken as evidence of the date on which it was made.

**4.Time of transfer:** Unless the contrary is presumed it shall be presumed that every transfer of a negotiable instrument was made before its maturity.

**5.Order of endorsement:** Until the contrary is proved it shall be presumed that the endorsements appearing upon a negotiable instrument were made in the order in which they appear thereon.

**6.Stamp:** Unless the contrary is proved, it shall be presumed that a lost promissory note, bill of exchange or cheque was duly stamped.

**7.Holder in due course:** Until the contrary is proved, it shall be presumed that the holder of a negotiable instrument is the holder in due course. Every holder of a negotiable instrument is presumed to have paid consideration for it and to have taken it in good faith. But if the instrument was obtained from its lawful owner by means of an offence or fraud, the holder has to prove that he is a holder in due course.

**8.Proof of protest:** Section 119 lays down that in a suit upon an instrument which has been dishonoured, the court shall on proof of the protest, presume the fact of dishonour, unless and until such fact is disproved.

### **1.5 TYPES OF NEGOTIABLE INSTRUMENT**

Section 13 of the Negotiable Instruments Act states that a negotiable instrument is a promissory note, bill of exchange or a cheque payable either to order or to bearer. Negotiable instruments recognised by statute are: (i) Promissory notes (ii) Bills of exchange (iii) Cheques. Negotiable instruments recognised by usage or custom are: (i) Hundis (ii) Share warrants (iii) Dividend warrants (iv) Bankers draft (v) Circular notes (vi) Bearer debentures (vii) Debentures of Bombay Port Trust (viii) Railway receipts (ix) Delivery orders.

This list of negotiable instrument is not a closed chapter. With the growth of commerce, new kinds of securities may claim recognition as negotiable instruments. The courts in India usually follow the practice of English courts in according the character of negotiability to other instruments.

#### **1.5.1 Promissory notes**

Section 4 of the Act defines, “A promissory note is an instrument in writing (note being a bank-note or a currency note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money to or to the order of a certain person, or to the bearer of the instruments.”

### **Essential elements**

An instrument to be a promissory note must possess the following elements:

**1.It must be in writing:** A mere verbal promise to pay is not a promissory note. The method of writing (either in ink or pencil or printing, etc.) is unimportant, but it must be in any form that cannot be altered easily.

**2.It must certainly an express promise or clear understanding to pay:** There must be an express undertaking to pay. A mere acknowledgment is not enough. The following are not promissory notes as there is no promise to pay.

**If A writes:**

- (a) “Mr. B, I.O.U. (I owe you) Rs. 500”
- (b) “I am liable to pay you Rs. 500”.
- (c) “I have taken from you Rs. 100, whenever you ask for it have to pay”

The following will be taken as promissory notes because there is an express promise to pay:

**If A writes:**

- (a) “I promise to pay B or order Rs. 500”
- (b) “I acknowledge myself to be indebted to B in Rs. 1000 to be paid on demand, for the value received”.

**(3) Promise to pay must be unconditional:** A conditional undertaking destroys the negotiable character of an otherwise negotiable instrument. Therefore, the promise to pay must not depend upon the happening of some outside contingency or event. It must be payable absolutely.

**(4) It should be signed by the maker:** The person who promise to pay must sign the instrument even though it might have been written by the promisor himself. There are no

restrictions regarding the form or place of signatures in the instrument. It may be in any part of the instrument. It may be in pencil or ink, a thumb mark or initials. The promote can be signed by the authorised agent of the maker, but the agent must expressly state as to on whose behalf he is signing, otherwise he himself may be held liable as a maker. The only legal requirement is that it should indicate with certainty the identity of the person and his intention to be bound by the terms of the agreement.

**(5) The maker must be certain:** The note self must show clearly who is the person agreeing to undertake the liability to pay the amount. In case a person signs in an assumed



name, he is liable as a maker because a maker is taken as certain if from his description sufficient indication follows about his identity. In case two or more persons promise to pay, they may bind themselves jointly or jointly and severally, but their liability cannot be in the alternative.

**(6) The payee must be certain:** The instrument must point out with certainty the person to whom the promise has been made. The payee may be ascertained by name or by designation. A note payable to the maker himself is not prorate unless it is indorsed by him. In case, there is a mistake in the name of the payee or his designation; the note is valid, if the payee can be ascertained by evidence. Even where the name of a dead person is entered as payee in ignorance of his death, his legal representative can enforce payment.

**(7) The promise should be to pay money and money only:** Money means legal tender money and not old and rare coins.

A promise to deliver paddy either in the alternative or in addition to money does not constitute a promissory note.

**(8) The amount should be certain:** One of the important characteristics of a promissory note is certainty—not only regarding the person to whom or by whom payment is to be made but also regarding the amount.

However, paragraph 3 of Section 5 provides that the sum does not become indefinite merely because

(a) there is a promise to pay amount with interest at a specified rate.

(b) the amount is to be paid at an indicated rate of exchange.

(c) the amount is payable by installments with a condition that the whole balance shall fall due for payment on a default being committed in the payment of anyone installment.

**(9) Other formalities:** The other formalities regarding number, place, date, consideration etc. though usually found given in the promissory notes but are not essential in law. The date of instrument is not material unless the amount is made payable at a certain time after date. Even in such a case, omission of date does not invalidate the instrument and the date of execution can be independently ascertained and proved.

On demand (or six month after date) I promise to pay Peter or order the sum of rupees one thousand with interest at 8 per cent per annum until payment.

### **1.5.2 Bill of exchange**

Section 5 of the Act defines, “A bill of exchange is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of a certain person or to the bearer of the instrument”.

A bill of exchange, therefore, is a written acknowledgement of the debt, written by the creditor and accepted by the debtor. There are

usually three parties to a bill of exchange drawer, acceptor or drawee and payee. Drawer himself may be the payee.

### **Essential conditions of a bill of exchange**

- (1) It must be in writing.
- (2) It must be signed by the drawer.
- (3) The drawer, drawee and payee must be certain.
- (4) The sum payable must also be certain.
- (5) It should be properly stamped.
- (6) It must contain an express order to pay money and money alone.

For example, In the following cases, there is no order to pay, but only a request to pay. Therefore, none can be considered as a bill of exchange:

(a) "I shall be highly obliged if you make it convenient to pay Rs. 1000 to Suresh".

(b) "Mr. Ramesh, please let the bearer have one thousand rupees, and place it to my account and oblige"

However, there is an order to pay, though it is politely made, in the following examples:

(a) "Please pay Rs. 500 to the order of 'A'.

(b) "Mr. A will oblige Mr. C, by paying to the order of 'P'".

(7) The order must be unconditional

### **Distinction Between Bill of Exchange and Promissory Note**

**1.Number of parties:** In a promissory note there are only two parties – the maker (debtor) and the payee (creditor). In a bill of exchange, there are three parties; drawer, drawee and payee; although any two out of the three may be filled by one and the same person,

**2.Payment to the maker:** A promissory note cannot be made payable the maker himself, while in a bill of exchange to the drawer and payee or drawee and payee may be same person.

**3.Unconditional promise:** A promissory note contains an unconditional promise by the maker to pay to the payee or his order, whereas in a bill of exchange, there is an unconditional order to the drawee to pay according to the direction of the drawer.

**4.Prior acceptance:** A note is presented for payment without any prior acceptance by the maker. A bill of exchange is payable after sight must be accepted by the drawee or someone else on his behalf, before it can be presented for payment.

**5.Primary or absolute liability:** The liability of the maker of a promissory note is primary and absolute, but the liability of the drawer of a bill of exchange is secondary and conditional.

**6.Relation:** The maker of the promissory note stands in immediate relation with the payee, while the maker or drawer of an accepted bill stands in immediate relations with the acceptor and not the payee.

**7.Protest for dishonour:** Foreign bill of exchange must be protested for dishonour when such protest is required to be

made by the law of the country where they are drawn, but no such protest is needed in the case of a promissory note.

**8. Notice of dishonour:** When a bill is dishonoured, due notice of dishonour is to be given by the holder to the drawer and the intermediate indorsers, but no such notice need be given in the case of a note

### **Classification of Bills**

Bills can be classified as:

- (1) Inland and foreign bills.
- (2) Time and demand bills.
- (3) Trade and accommodation bills.

#### **(1) Inland and Foreign Bills**

**Inland bill:** A bill is, named as an inland bill if:

- (a) it is drawn in India on a person residing in India, whether payable in or outside India, or
- (b) it is drawn in India on a person residing outside India but payable in India.

#### **The following are the Inland bills**

(i)

A bill is drawn by a merchant in Delhi on a merchant in Madras. It is payable in Bombay. The bill is an inland bill.

(ii) A bill is drawn by a Delhi merchant on a person in London, but is made payable in India. This is an inland bill.

(iii) A bill is drawn by a merchant in Delhi on a merchant in Madras. It is accepted for payment in Japan. The bill is an inland bill.

**Foreign Bill:** A bill which is not an inland bill is a foreign bill. The following are the foreign bills:

1. A bill drawn outside India and made payable in India
2. A bill drawn outside India on any person residing outside India.
3. A bill drawn in India on a person residing outside India and made payable outside India.
4. A bill drawn outside India on a person residing in India.
5. A bill drawn outside India and made payable outside India.

**Bills in sets (Secs. 132 and 133):** The foreign bills are generally drawn in sets of three, and each set is termed as a 'via'.

As soon as anyone of the set is paid, the others become inoperative. These bills are drawn in different parts. They are drawn in order to avoid their loss or miscarriage during transit. Each part is despatched separately. To avoid delay, all the parts are sent on the same day; by different mode of conveyance.

**Rules:** Sections 132 and 133 provide for the following rules:

- (i) A bill of exchange may be drawn in parts, each part being numbered and containing a provision that it shall continue payable only so long as the others remain unpaid. All parts make one bill and the entire bill is extinguished, i.e. when payment is made on one part- the other parts will become inoperative (Section 132).
- (ii) The drawer should sign and deliver all the parts but the

acceptance is to be conveyed only on one of the parts. In case a person accepts or endorses different parts of the bill in favour of different persons, he and the subsequent endorsers of each part are liable on such part as if it were a separate bill (Sec. 132).

(iii) As between holders in due course of the different parts of the same bill, he who first acquired title to anyone part is entitled to the other parts and is also entitled to claim the money represented by bill (Sec. 133).

## **(2) Time and Demand Bill**

**Time bill:** A bill payable after a fixed time is termed as a time bill. In other words, bill payable “after date” is a time bill.

**Demand bill:** A bill payable at sight or on demand is termed as a demand bill.

## **(3) Trade and Accommodation Bill**

**Trade bill:** A bill drawn and accepted for a genuine trade transaction is termed as a “trade bill”.

**Accommodation bill:** A bill drawn and accepted not for a genuine trade transaction but only to provide financial help to some party is termed as an “accommodation bill”.

**Example:** A, is in need of money for three months. He induces his friend B to accept a bill of exchange drawn on him for Rs. 1,000 for three months. The bill is drawn and accepted. The bill is an “accommodation bill”. A may get the bill discounted from his bankers immediately, paying a small sum as discount. Thus, he can use the funds for three months and then just before maturity he may remit the money to B, who will meet the bill on maturity.

In the above example A is the “accommodated party” while B is the “accommodating party”.

It is to be noted that an accommodation bill may be for accommodation of both the drawer and acceptor. In such a case, they share the proceeds of the discounted bill.

## **Rules regarding accommodation bills are:**

(i) In case the party accommodated continues to hold the bill till maturity, the accommodating party shall not be liable to him for payment of the bill since the contract between them is not based on any consideration (Section 43).

(ii) But the accommodating party shall be liable to any subsequent holder for value who may be knowing the exact position that the bill is an accommodation bill and that the full consideration has not been received by the acceptor. The accommodating party can, in turn, claim compensation from the accommodated party for the amount it has been asked to pay the holder for value.

(iii) An accommodation bill may be negotiated after maturity. The holder of such a bill after maturity is in the same position as a holder before maturity, provided he takes it in good faith and for value (Sec. 59)

In form and all other respects an accommodation bill is quite

similar to an ordinary bill of exchange. There is nothing on the face of the accommodation bill to distinguish it from an ordinary trade bill.

### **1.5.3 Cheques**

Section 6 of the Act defines “A cheque is a bill of exchange drawn on a specified banker, and not expressed to be payable otherwise than on demand”.

A cheque is bill of exchange with two more qualifications, namely, (i) it is always drawn on a specified banker, and (ii) it is always payable on demand. Consequently, all cheques are bill of exchange, but all bills are not cheques. A cheque must satisfy all the requirements of a bill of exchange; that is, it must be signed by the drawer, and must contain an unconditional order on a specified banker to pay a certain sum of money to or to the order of a certain person or to the bearer of the cheque. It does not require acceptance.

### **Distinction Between Bills of Exchange and Cheque**

1. A bill of exchange is usually drawn on some person or firm, while a cheque is always drawn on a bank.
2. It is essential that a bill of exchange must be accepted before its payment can be claimed. A cheque does not require any such acceptance.
3. A cheque can only be drawn payable on demand, a bill may be also drawn payable on demand, or on the expiry of a certain period after date or sight.
4. A grace of three days is allowed in the case of time bills while no grace is given in the case of a cheque.
5. The drawer of the bill is discharged from his liability, if it is not presented for payment, but the drawer of a cheque is discharged only if he suffers any damage by delay in presenting the cheque for payment.
6. Notice of dishonour of a bill is necessary, but no such notice is necessary in the case of cheque.
7. A cheque may be crossed, but not needed in the case of bill.
8. A bill of exchange must be properly stamped, while a cheque does not require any stamp.
9. A cheque drawn to bearer payable on demand shall be valid but a bill payable on demand can never be drawn to bearer.
10. Unlike cheques, the payment of a bill cannot be countermanded by the drawer.

### **1.5.4 Hundis**

A “Hundi” is a negotiable instrument written in an oriental language. The term hundi includes all indigenous negotiable instrument whether they be in the form of notes or bills.

The word ‘hundi’ is said to be derived from the Sanskrit word ‘hundi’, which means “to collect”. They are quite popular among the Indian merchants from very old days. They are used to finance trade and commerce and provide a facile and sound medium of currency and credit.

Hundis are governed by the custom and usage of the locality in which they are intended to be used and not by the provision of the Negotiable Instruments Act. In case there is no customary rule known as to a certain point, the court may apply the provisions of the Negotiable Instruments Act. It is also open to the parties to expressly exclude the applicability of any custom relating to hundis by agreement (Indur Chandra vs. Lachhmi Bibi, 7 B.I.R. 682).

## **1.6 PARTIES TO NEGOTIABLE INSTRUMENTS**

### **1.6.1 Parties to Bill of Exchange**

- 1.**Drawer:** The maker of a bill of exchange is called the 'drawer'.
- 2.**Drawee:** The person directed to pay the money by the drawer is called the 'drawee',
- 3.**Acceptor:** After a drawee of a bill has signed his assent upon the bill, or if there are more parts than one, upon one of such parts and delivered the same, or given notice of such signing to the holder or to some person on his behalf, he is called the 'acceptor'.
- 4.**Payee:** The person named in the instrument, to whom or to whose order the money is directed to be paid by the instrument is called the 'payee'. He is the real beneficiary under the instrument. Where he signs his name and makes the instrument payable to some other person, that other person does not become the payee.
- 5.**Indorser:** When the holder transfers or indorses the instrument to anyone else, the holder becomes the 'indorser'.
- 6.**Indorsee:** The person to whom the bill is indorsed is called an 'indorsee'.
- 7.**Holder:** A person who is legally entitled to the possession of the negotiable instrument in his own name and to receive the amount thereof, is called a 'holder'. He is either the original payee, or the indorsee. In case the bill is payable to the bearer, the person in possession of the negotiable instrument is called the 'holder'.
- 8.**Drawee in case of need:** When in the bill or in any endorsement, the name of any person is given, in addition to the drawee, to be resorted to in case of need, such a person is called 'drawee in case of need'.  
In such a case it is obligatory on the part of the holder to present the bill to such a drawee in case the original drawee refuses to accept the bill. The bill is taken to be dishonoured by non-acceptance or for nonpayment, only when such a drawee refuses to accept or pay the bill.
- 9.**Acceptor for honour:** In case the original drawee refuses to accept the bill or to furnish better security when demanded by the notary, any person who is not liable on the bill, may accept it with the consent of the holder, for the honour of any party liable on the bill. Such an acceptor is called 'acceptor for honour'.

### **1.6.2 Parties to a Promissory Note**

- 1.**Maker.** He is the person who promises to pay the amount stated in the note. He is the debtor.
- 2.**Payee.** He is the person to whom the amount is payable i.e. the creditor.
- 3.**Holder.** He is the payee or the person to whom the note might have been indorsed.
4. The indorser and indorsee (the same as in the case of a bill).

### **1.6.3 Parties to a Cheque**

1. **Drawer.** He is the person who draws the cheque, i.e., the depositor of money in the bank.
2. **Drawee.** It is the drawer's banker on whom the cheque has been drawn.
3. **Payee.** He is the person who is entitled to receive the payment of the cheque.
4. The holder, indorser and indorsee (the same as in the case of a bill or note).

### **1.7 NEGOTIATION**

Negotiation may be defined as the process by which a third party is constituted the holder of the instrument so as to entitle him to the possession of the same and to receive the amount due thereon in his own name. According to section 14 of the Act, 'when a promissory note, bill of exchange or cheque is transferred to any person so as to constitute that person the holder thereof, the instrument is said to be negotiated.' The main purpose and essence of negotiation is to make the transferee of a promissory note, a bill of exchange or a cheque the holder thereof.

Negotiation thus requires two conditions to be fulfilled, namely:

1. There must be a transfer of the instrument to another person; and
2. The transfer must be made in such a manner as to constitute the transferee the holder of the instrument. Handing over a negotiable instrument to a servant for safe custody is not negotiation; there must be a transfer with an intention to pass title.

#### **1.7.1 Modes of negotiation**

Negotiation may be effected in the following two ways:

**1. Negotiation by delivery (Sec. 47):** Where a promissory note or a bill of exchange or a cheque is payable to a bearer, it may be negotiated by delivery thereof.

**Example:** A, the holder of a negotiable instrument payable to bearer, delivers it to B's agent to keep it for B. The instrument has been negotiated.

**2. Negotiation by endorsement and delivery (Sec. 48):** A promissory note, a cheque or a bill of exchange payable to order can be negotiated only by endorsement and delivery. Unless the holder signs his endorsement on the instrument and delivers it, the transferee does not become a holder. If there are more payees than one, all must endorse it

### **1.9 ENDORSEMENT**

The word 'endorsement' in its literal sense means, writing on the back of an instrument. But under the Negotiable Instruments Act it means, the writing of one's name on the back of the instrument or any paper attached to it with the intention of transferring the rights therein. Thus, endorsement is signing a negotiable instrument for the purpose of negotiation. The person who effects an endorsement is called an 'endorser', and the person to whom negotiable instrument is transferred by endorsement is called the 'endorsee'.

#### **Essentials of a valid endorsement**

The following are the essentials of a valid endorsement:

1. It must be on the instrument. The endorsement may be on the back or face of the instrument and if no space is left on the instrument, it may be made on a separate paper attached to it called allonge. It should usually be in ink.
2. It must be made by the maker or holder of the instrument. A stranger cannot endorse it.
3. It must be signed by the endorser. Full name is not essential. Initials may suffice. Thumb-impression should be

attested. Signature may be made on any part of the instrument. A rubber stamp is not accepted but the designation of the holder can be done by a rubber stamp.

4. It may be made either by the endorser merely signing his name on the instrument (it is a blank endorsement) or by any words showing an intention to endorse or transfer the instrument to a specified person (it is an endorsement in full). No specific form of words is prescribed for an endorsement. But intention to transfer must be present.

When in a bill or note payable to order the endorsee's name is wrongly spelt, he should when he endorses it, sign the name as spelt in the instrument and write the correct spelling within brackets after his endorsement.

5. It must be completed by delivery of the instrument. The delivery must be made by the endorser himself or by somebody on his behalf with the intention of passing property therein. Thus, where a person endorses an instrument to another and keeps it in his papers where it is found after his death and then delivered to the endorsee, the latter gets no right on the instrument.

6. It must be an endorsement of the entire bill. A partial endorsement i.e. which purports to transfer to the endorsee a part only of the amount payable does not operate as a valid endorsement.

If delivery is conditional, endorsement is not complete until the condition is fulfilled.

### **Who may endorse?**

The payee of an instrument is the rightful person to make the first endorsement. Thereafter the instrument may be endorsed by any person who has become the holder of the instrument. The maker or the drawer cannot endorse the instrument but if any of them has become the holder thereof he may endorse the instrument. (Sec. 51).

The maker or drawer cannot endorse or negotiate an instrument unless he is in lawful possession of instrument or is the holder thereof. A payee or indorsee cannot endorse or negotiate unless he is the holder thereof.

### **Classes of endorsement**

An endorsement may be:

- (1) Blank or general.
- (2) Special or full.
- (3) Partial.
- (4) Restrictive.
- (5) Conditional.

#### **(a) Blank or general endorsement (Sections 16 and 54).**

It is an endorsement when the endorser merely signs on the instrument without mentioning the name of the person in whose favour the endorsement is made. Endorsement in blank specifies no endorsee. It simply consists of the signature of the endorser on the endorsement. A negotiable instrument even though payable to order becomes a bearer instrument if endorsed in blank. Then it is transferable by mere delivery.



An endorsement in blank may be followed by an endorsement in full

**Example:** A bill is payable to X. X endorses the bill by simply affixing his signature. This is an endorsement in blank by X. In this case the bill becomes payable to bearer.

There is no difference between a bill or note indorsed in blank and one payable to bearer. They can both be negotiated by delivery.

**(b) Special or full endorsement (Section 16)**

When the endorsement contains not only the signature of the endorser but also the name of the person in whose favour the endorsement is made, then it is an endorsement in full. Thus, when endorsement is made by writing the words "Pay to A or A's order," followed by the signature of the endorser, it is an endorsement in full. In such an endorsement, it is only the endorsee who can transfer the instrument.

**Conversion of endorsement in blank into endorsement in full:**

When a person receives a negotiable instrument in blank, he may without signing his own name, convert the blank endorsement into an endorsement in full by writing above the endorser's signature a direction to pay to or to the order of himself or some other person. In such a case the person is not liable as the endorser on the bill. In other words, the person transferring such an instrument does not incur all the liabilities of an endorser. (Section 49).

**Example:** A is the holder of a bill endorsed by B in blank. A writes over B's signature the words "Pay to C or order." A is not liable as endorser but the writing operates as an endorsement in full from B to C. Where a bill is endorsed in blank, or is payable to bearer and is afterwards endorsed by another in full, the bill remains transferable by delivery with regard to all parties prior to such endorser in full. But such endorser in full cannot be sued by any one except the person in whose favour the endorsement in full is made. (Section 55).

**Example:** C the payee of a bill endorses it in blank and delivers it to D, who specially endorses it to E or order. E without endorsement transfers the bill to F. F as the bearer is entitled to receive payment or to sue the drawer, the acceptor, or C who endorsed the bill in blank but he cannot sue D or E.

**(c) Partial endorsement (Section 56)**

A partial endorsement is one which purports to transfer to the endorsee a part only of the amount payable on the instrument. Such an endorsement does not operate as a negotiation of the instrument.

**Example:** A is the holder of a bill for Rs.1000. He endorses it "pay to B or order Rs.500." This is a partial endorsement and invalid for the purpose of negotiation.

**(d) Restrictive endorsement (Section 50)**

The endorsement of an instrument may contain terms making it restrictive. Restrictive endorsement is one which either by express words restricts or prohibits the further negotiation of a bill or which expresses that it is not a complete and unconditional transfer of the instrument but is a mere authority to the endorsee to deal with bill as directed by such endorsement.

"Pay C," "Pay C for my use," "Pay C for the account of B" are

instances of restrictive endorsement. The endorsee under a restrictive endorsement acquires all the rights of the endorser except the right of negotiation.

### **Conditional or qualified endorsement**

It is open to the endorser to annex some condition to his own liability on the endorsement. An endorsement where the endorsee limits or negatives his liability by putting some condition in the instrument is called a conditional endorsement. A condition imposed by the endorser may be a condition precedent or a condition subsequent. An endorsement which says that the amount will become payable if the endorsee attains majority embodies a condition precedent. A conditional endorsement unlike the restrictive endorsement does not affect the negotiability of the instrument. It is also some times called qualified endorsement. An endorsement may be made conditional or qualified in any of the following forms:

**(i) 'Sans recourse' endorsement:** An endorser may by express word exclude his own liability thereon to the endorser or any subsequent holder in case of dishonour of the instrument.

Such an endorsement is called an endorsement sans recourse (without recourse). Thus 'Pay to A or order sans recourse, 'pay to A or order without recourse to me,' are instances of this type of endorsement. Here if the instrument is dishonoured, the subsequent holder or the indorsee cannot look to the indorser for payment of the same.

An agent signing a negotiable instrument may exclude his personal liability by using words to indicate that he is signing as agent only. The same rule applies to directors of a company signing instruments on behalf of a company. The intention to exclude personal liability must be clear.

Where an endorser so excludes his liability and afterwards becomes the holder of the instrument, all intermediate endorsers are liable to him.

**Example:** A is the holder of a negotiable instrument.

Excluding personal liability by an endorsement without recourse, he transfers the instrument to B, and B endorses it to C, who endorses it to A. A can recover the amount of the bill from B and C.

**(ii) Facultative endorsement:** An endorsement where the endorser extends his liability or abandons some right under a negotiable instrument, is called a facultative endorsement. "Pay A or order, Notice of dishonour waived" is an example of facultative endorsement.

**(iii) 'Sans frais' endorsement:** Where the endorser does not want the endorsee or any subsequent holder, to incur any expense on his account on the instrument, the endorsement is 'sans frais'.

**(iv) Liability dependent upon a contingency:** Where an endorser makes his liability depend upon the happening of a contingent event, or makes the rights of the endorsee to receive the amount depend upon any contingent event, in

such a case the liability of the endorser will arise only on the happening of that contingent event. Thus, an endorser may write 'Pay A or order on his marriage with B'. In such a case, the endorser will not be liable until the marriage takes place and if the marriage becomes impossible, the liability of the endorser comes to an end.

### **Effects of endorsement**

The legal effect of negotiation by endorsement and delivery is:

- (i) to transfer property in the instrument from the endorser to the endorsee.
- (ii) to vest in the latter the right of further negotiation, and
- (iii) a right to sue on the instrument in his own name against all the other parties (Section 50).

### **1.12 DISHONOUR OF A NEGOTIABLE INSTRUMENT**

When a negotiable instrument is dishonoured, the holder must give a notice of dishonour to all the previous parties in order to make them liable. A negotiable instrument can be dishonoured either by non- acceptance or by non-payment. A cheque and a promissory note can only be dishonoured by non-payment but a bill of exchange can be dishonoured either by non-acceptance or by non-payment.

#### **Dishonour by non-acceptance (Section 91)**

A bill of exchange can be dishonoured by non-acceptance in the following ways

- 1.If a bill is presented to the drawee for acceptance and he does not accept it within 48 hours from the time of presentment for acceptance. When there are several drawees even if one of them makes a default in acceptance, the bill is deemed to be dishonoured unless these several drawees are partners. Ordinarily when there are a number of drawees all of them must accept the same, but when the drawees are partners acceptance by one of them means acceptance by all.
- 2.When the drawee is a fictitious person or if he cannot be traced after reasonable search.
- 3.When the drawee is incompetent to contract, the bill is treated as dishonoured.
- 4.When a bill is accepted with a qualified acceptance, the holder may treat the bill of exchange having been dishonoured.
- 5.When the drawee has either become insolvent or is dead.
- 6.When presentment for acceptance is excused and the bill is not accepted. Where a drawee in case of need is named in a bill or in any indorsement thereon, the bill is not dishonoured until it has been dishonoured by such drawee