3. The loss must be fortuitous or *accidental.*
4. The loss must not be catastrophic.

The four elements of an insurable risk are characteristics of certain risks that permit the successful operation of the insurance. If a given risk lacks one of these elements, the operation of the insurance mechanism is impeded. From the discussion above it is quite obvious that every risk cannot be insured against. *Whether a particular risk can be insured against or not, is determined by the following five criteria:*

(i) the risk must arise out of the ordinary course of business and it should not be one which is artificially created by the parties;

(ii) the risk must be common enough to justify its spreading at a nominal cost;

(iii) the aggregate incidence of risks must be capable of fair estimation.

(iv) there must be an element of uncertainty as to the occurrence of risk or the time of its occurrence; and

(v) the party must have some real interest in avoiding the risk which should not be of a trifling nature.

Types of Insurance

The three most important types of insurance are Life, Fire and Marine insurance. In addition to these three, there are various miscellaneous types of insurance, e.g. accident, motor vehicles, burglary etc. The insurance contracts may also be classified into four types depending upon the nature of the event on which the contract is based as :

1. **Personal or Life Insurance :** This includes life, accident, health and sickness insurance. In this contract, the insurer agrees to pay on the happening of the event (such as reaching a certain age or death whichever is earlier) a certain absolute sum determined before hand. This is so because the actual loss cannot be calculated or measured in the case of human life.
2. **Property Insurance :** This includes all such contracts where the subject-matter is property of any kind. In this case, the insurer agrees to pay the actual loss of property insured under a risk. This includes fire, marine, motor and miscellaneous risk.
3. **Liability Insurance :** Where a person is liable to a third person owing to the provisions of law or to his employee under an Act, it can be covered under liability insurance. Workmen's Compensation Insurance and Third Party Insurance are examples in this case.
4. **Guarantee Insurance :** It is an agreement whereby the insurer agrees to indemnify the insured for a fixed amount against loss arising through dishonesty or fraud or a breach of contract. The examples of this are Fidelity Insurance and Credit Insurance.

Fundamental Principles of Insurance

1. **Essential elements of a Valid Contract :** *A contract of insurance is specie of the general contract.* There must be contract between the parties i.e., insurer and insured. The contract must be in writing. Usually the insurance policy is printed, stamped, signed by the insurer and handed over to the insured. It must have, like other contracts, all the essential elements of a valid contract such as offer, acceptance, consideration, free consent, contractual capacity, lawful object etc.,

the contributions (in the form of premiums) that he received. Of course the circumstances affecting the risk in a particular case are also taken into account. The insurer also keeps a margin for his overhead expenses and profit.

11. **Causa Proxima :** The assured can recover the loss only if it is proximately caused by any of the perils insured against.

12. **Mitigation of Loss :** In the event of some mishap to the insured property, if the assured does not take all the necessary steps to mitigate the loss, the insurer can avoid the payment of loss which is attributable to the assured's negligence.

13. **Contribution :** Where there are two or more insurance on one risk, the principle of contribution applies as between different insurers. The aim of contribution is to distribute the actual amount of loss among the different insurers who are liable under different policies in respect of the same subject-matter.

If an insurer pays more than his rateable proportion of the loss, he has a right to recover the excess from his co-insurers, who have paid less than their rateable proportion. *The essential conditions required for the application of the doctrine of contribution are as follows:*

(a) There must be double insurance, i.e., there must be more than one policy from different insurers covering same person the same interest, the same subject matter and the same risk which has caused the loss.

(b) Each of them must be in force in the relevant time.

(c) There must be either over-insurance or only partial loss. If the amount of different policies is just equal to the value of the subject matter destroyed, the different insurers are liable to contribute towards the loss upto the full amount of their respective policies and as such the question of contribution as between themselves does not arise.

(d) The assured must recover the whole of his loss from one or more of the insurers, and not from all the concerned insures in proportion to the amount assured by each.

If all the above conditions are fulfilled then the doctrine of contribution comes into operation which enables the insurer, who pays more than his rateable proportion of loss (because he meets the whole claim), to enforce proportionate contribution from the other insurers.

Illustration. A building is insured against fire for Rs. 20,000 with insurer X and for Rs. 10,000 with insurer Y. There occurs a fire and the damage is estimated at Rs. 15,000. X and Y should share the loss in proportion to the amount assured by each of them, i.e., in the proportion of 2:1 X should pay Rs. 10,000 and Y should pay Rs. 5,000. The policy-holder can sue both insures together or insurer X only. Suppose that he sues X only and recovers from him the full amount of loss, i.e., Rs. 15,000. X is entitled to claim contribution from Y to the extent of Rs. 5,000.

14. **Subrogation**: The doctrine of subrogation is a corollary to the principle of indemnity. According to it the insurer who has agreed to, indemnify the assured on making goods the loss, is entitled to succeed to all the ways and means by which the assured might have protected himself against the loss.

In case the loss to the property insured has arisen by chance without any fault on anybody's part, the insured can make the claim against the insurer only. In case the loss has arisen out of tort or mischief by some third party, the insured becomes entitled to proceed against both the

insurer as well as the wrongdoer. But since a contract of insurance is a contract of indemnity, the insured cannot be allowed to recover from both and thereby make a profit from his insurance claim. He can make a claim against either the insurer or the wrong doer. If the insured elects to be indemnified by the insurer, the doctrine of subrogation comes into play and as a result the insurer shall be subrogated to all the rights and remedies of the insured against third parties in respect of the property destroyed or damaged. The following points are worth noting in connection with the doctrine of subrogation.

(a) This doctrine will not apply until the assured has recovered a full indemnity in respect of his loss from the insurer. If the amount of the insurance claim is less than actual loss suffered, the assured can keep the compensation amount received from any third party with himself to the extent of deficiency, and if after full indemnification there remains some surplus he will hold it in trust for the insurer, to the extent the insurer has paid under the policy.

(b) In case something more is recovered under subrogation right, the excess shall belong to the policy-holder because the insurer is entitled to the assured rights in respect of the subject-matter insured, in so far as he has indemnified the assured *(Attorney General Vs Glen Line Ltd.).*

(c) The insured should provide all such facilities to the insurer which may be required by the insurer for enforcing his rights against third parties. Any action taken by the insurer is generally in the name of the insured, but the cost is to be borne by the insurer.

(d) The insurer gets only such rights which are available to the insured. He gets no superior rights than the assured. As such the insurer can recover under this doctrine, only that which the assured could himself have recovered.

Illustration : R owned two ships, A and B and got them insured with different insurers. The ships collided due to the fault of the crew of the ship B, as a consequence of which ship A was damaged. The insurers of the ship A indemnified the owner and then sued him as owner of the ship B for negligence, claiming the amount they had paid in respect of the ship A. Held, the insurers could not recover, as both vessels were owned by one and the same person, no remedy has been transferred to the insurers, because a person cannot file a suit against himself (Simpson Vs Thomson).

15. **Reinsurance** : If an insurer has insured a venture in which the risk involved is beyond his capacity, he may insure the same risk either wholly or partially with other insurers. This is called *re-insurance*. Re-insurance can be resorted in all kinds of insurance. The insurer has an insurable interest in the subject-matter insured to the extent of the amount insured by him because a contract of re-insurance is also a contract of indemnity. Other principles of insurance like insurable interest utmost good faith, subrogation etc, are also applicable to reinsurance.

Rights of Reinsurers : Reinsurer is entitled to get a proportionate part of the premium. He gets the benefits of the conditions and terms of the original policy and is entitled to subrogation. If for any reason the original policy lapses, the reinsurance comes to an end.

Liabilities of the Reinsurer : Reinsurer is liable to pay the portion of the risk transferred to him. Reinsurer is liable only to the first insurer because there is no provity to contract between the insurer and the originally insured person.

12. What are contracts of uberrima fidei?
13. With reference to the law of insurance, distinguish contribution from subrogation.
14. When is the premium in a contract of insurance returnable?
15. What is a contract of re-insurance?
16. Distinguish re-insurance from double insurance.
17. Is the re-insurer liable to the criginal assured?
18. Is the re-insurer entitled to question the validity of the original policy?
19. What is a cover note?
20. "Risk must attach" What does it mean in insurance law?

Section - B (Descriptive Answer Questions)

1. Define a contract of insurance and state its different kinds.
2. "Insurance is a contract of speculation". Discuss
3. Is a contract of insurance a wager? What is the distinction between a contract of insurance and a wagering agreement?
4. "Insurance is a contract of indemnity" Comment.
5. "A contract of insurance is a contract of uberrimae fidei". Explain.
6. What do you understand by insurable interest in connection with Insurance?
7. Examine the scope of non-disclosure and misrepresentation insurance?
8. What is the meaning of "proximate cause? in law of insurance?
9. Explain the circumstances under which 'premium' of a policy becomes refundable?

PRACTICAL PROBLEMS

Attempt the following problems, giving reasons for your answers

1. B effected an insurance on his goods against loss or damage by fire. B and his wife quarrelled and the excited wife set fire to and destroyed the goods. Can B recover under the policy? If yes, can the insurer sue the wife under the doctrine of subrogation?

   [Hint : Yes, B can recover under the policy as the wife had set fire to the goods without his connivance. But the insurer cannot sue the wife under the principle of subrogation because there can be no subrogation of those rights which the insured himself does not have (the husband himself cannot sue his wife for her tort). (Midland Insurance Co. Vs. Smith)].

2. P contracted to build a shop for R for Rs. 25,000. All the materials were to be supplied by R. Can P get the materials insured for the period of construction?

   [*Hint :* Yes, P can get the materials insured because he has insurable interest therein as he would suffer financial loss on the destruction of the material].

3. A's goods in a warehouse are insured against loss by fire. B is the insurer. The goods are destroyed by fire. A recovers their full value of Rs. 10,000 from B. Then A sues the warehouse-keeper and recovers Rs. 10,000 from him. B claims this amount from A but A refuses to hand over the amount to B. Can B recover the amount from A?

   [Hint : Yes, B can recover the amount of Rs. 10,000 from A because A has already made good his loss from B and the amount which he received from the warehouse-keeper makes his receipt in excess of the loss actually suffered by him. A contract of fire insurance being a contract of indemnity, the insured person cannot be allowed to make a profit of his ioss.]

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CHAPTER - 16

LIFE INSURANCE

CHAPTER OUTLINE

CONTRACT OF LIFE INSURANCE

(INSURANCE POLICY)

- **KINDS OF LIFE POLICIES**
- **PROCEDURE FOR EFFECTING LIFE POLICY**
- **POLICY CONDITIONS**
- **ASSIGNMENT OF LIFE POLICIES**
- **NOMINATION**
- **SETTLEMENT OF CLAIM IN LIFE INSURANCE CONTRACT**
  - **MATURITY CLAIM**
  - **DEATH CLAIM**

LIFE AND NONLIFE INSURANCE

period, the amount of the policy is paid by the insured company. The policy is useful for redemption of debentures or replacement of assets.

11. **Janta Policy :** It is policy which covers risk of death by accident for one year only. The premium charged is very nominal and a fixed amount is payable in case of death by accident.
12. **Limited Payment Life Policy :** In this case, premiums are payable for a specified number of years (i.e., upto the assured attaining a certain age, e.g., 60 years) or until death if it occurs earlier, but the sum assured becomes payable only on the death of the assured. This policy resembles partly to endowment policy (as the premiums are payable for a fixed term after which the obligation to pay premium ceases), and partly to whole life policy (as the policy amount becomes payable only on the death of the assured).

Procedure for effecting a Life Policy

Any person, who has attained majority and who can enter into a valid contract can take out a life insurance policy on self and on those in whom he has insurable interest.

A person desiring to take out a policy of life insurances has to fill in a *Proposal* Form supplied by the insurer (e.g., the Life Insurance Corporation of India). There are different types of proposal forms for each type of policy. The proposal form requires information with regard to the health of the proposer, his family history, age, habits, the amount, and term of policy. The proposer should answer all the questions in the good faith. He must disclose all the material facts truly and fully. The proposer is also required to undergo a *medical examination.* No medical examination is, however, required (i) if the proposer is a government or semi-government employee in the age group of 18-45 years and the policy amount does not exceed Rs. 4 lakhs and (ii) if the proposer is not a government or semi-government employee in the age group of 18-45 years and the policy amount does not exceed Rs. 1 lakhs. The proposal form is accompanied by the first premium amount and if the insurer accepts the same unconditionally and issues the *First Premium Receipt* (which acts as the *acceptance letter*), there comes into existence a binding contract and the risk commences from the date of issuing the Receipt. In due course the insurer issues the *Insurance* Policy which evidences the contract of insurance which has already been made between the insured and the insurer. In the Policy the contract is completely expressed. The terms and conditions of the policy can be altered during its currency by the mutual consent of the parties.

The proposal form is the basis of the contract of insurance. Life insurance being a contract *uberrimae fidei*, i.e., of utmost good faith, if any statement in the proposal form is false, or there is concealment of material facts, the insurer can avoid the policy. Of course, in case of innocent misrepresentation the premium is returnable on the avoidance of the policy.

Proof of Age : The age of assured is a material fact. It is particularly important in endowment policies under which the money is payable on the assured attaining a certain age. Age may be proved by any satisfactory evidence which is accepted. e.g. the production of horoscope or a birth certificate (where available) or any family record or document. The age is recorded in the policy. After satisfactory evidence is given of the age the insurer generally writes on the policy, "*age admitted*" or similar words. Once the age is admitted in this manner it cannot be challenged, except in cases of fraud.

Check on the power of insurer to avoid policy : Section 45 of the Insurance Act, 1938 provides that no policy of life insurance after two years from the date on which it was effected on the ground that a statement made in the proposal for insurance, or in any other document leading

to the issue of the policy, was inaccurate or false, unless the insurer shows that statement was on a material matter or suppressed facts which it was material to disclose and that it was fraudulently made by the policy-holder. Of course, this does not prevent the insurer from calling for proof of age at any time if entitled to do so.

Policy Conditions

There are several policy conditions on which the contract is based. The observance of the conditions is very necessary or else the policy becomes lapsed. The main conditions are :

(i) **Premium :** This is the price of insurance to be paid by the insurance. It is to be paid in advance and paid regularly. The amount of premium depends upon the amount of policy, age of entry, occupation, residence, etc. It may be paid yearly, half-yearly, quarterly or monthly.

(ii) **Days of Grace :** Days of grace is the extra period of days given to pay the premium and the policy does not lapse on the ground of non-payment of premium on or before the due date. Usually, 30 days of grace are allowed to pay the premium from the due date. It is only 15 days if premium is to be paid by monthly instalments. Days of grace are counted from the next day on which the premium falls due. In case the assured dies within the days of grace without paying the premium, then the full amount of the policy is payable after deducting the premium due.

(iii) **Proof of Age :** Premium depends charged upon the age at entry. Therefore, proof of age is necessary. The date of birth should be endorsed on the policy. If the date of birth is not admitted at the inception of the policy it will have to be proved to the satisfaction of the insurer at the time of the claim.

In the following cases, the proof of age must invariably accompany the proposal form, as the proposal will not be completed unless the age is proved.

(a) where the life to be assured has not completed 20 years of age.

(b) where the life to be assured has completed 50 years of age;

(c) where the proposal is under the Children's Deferred Endowment Assurance Plan, proof in support of (a) the age of the life to be assured and (b) the age of the proposer, if the premium waiver benefit' is desired;

(d) where a Supplementary Benefit is desired under a Multi-purpose Policy, proof in support of the age of the beneficiary child;

(e) where the proposal is under the immediate annuity, Deferred Annuity Plans or Retirement Annuity.

(f) where the proposal is under Salary Saving Scheme.

Acceptable proofs of age : These proofs will generally be accepted : (1) Certified Extract from Municipal or other Records made at the time of birth; (2) Certificate of Baptism or Certified Extract from School or College Records if age or date of birth is stated therein; (4) Certified Extract from Service Register in the case of Government employees and employees of quasi Government Institutions; (5) Original horoscope.

If no proof is available, then an affidavit on oath is acceptable. When the insurer is satisfied with the proof of age furnished, an endorsement is made on the policy that age is admitted, or

The assignment is the mode of transferring the rights of the transferor in respect of the policy to the assignee. A life policy, being an actionable claim cannot be transferred by mere delivery like a personal chattel. It needs assignment for transfer. The rules relating to the assignment of life policies have been laid down in Section 38 of the Insurance Act, 1938, which are as follows.

1. **Procedure :** A transfer or assignment of a policy of life insurance, whether with or without consideration, may be made only by an endorsement upon the policy itself or by a separate instrument, signed in either case by the transferor or by the assignor or his duly authorised agent and attested by at least one witness, specifically setting forth the fact of transfer or assignment.
2. **Notice :** The assignment or transfer become binding upon the insurer only after a notice in writing of such assignment together with certified (by both the transferor and transferee) copy of the endorsement or the deed of assignment is delivered to him by the assignee or the assignor. The insurer recognises the rights of the assignee (as the only person entitled to benefit under the policy) from the day of the receipt of the notice, but his rights shall be no better than those of the assignor, i.e., the assignee shall be required to pay premium etc., in future and if premiums shall not be paid, the policy shall be alive upto its paid-up value only.
3. **Priority :** If the policy has been assigned to more than one assignee under separate deeds of assignment, the priority of the claims of the assignees shall be governed by the order in which the said notices to the insurer are delivered. Thus, where a policy of Rs. 20,000 is assigned to P, Q and R under separate instruments of assignment, as security for the loan given by them to the tune of Rs. 10,000, 8,000 and 4,000 respectively and the notices are delivered to the insurer by the three assignees in the same order, the insurer will be liable to pay in full to P Rs. 10,000 Q Rs. 8,000 and R the balance of Rs. 2,000.
4. **Record and Recognition :** Upon the receipt of the notice referred to above, the insurer shall record the fact of such transfer or assignment together with the date and name of the assignee. The insurer is bound to grant a written acknowledgment of the notice on the request of the person by whom the notice was given or of the transferee or assignee on payment of a fee not exceeding Rupee one.
7. Where the policy matures for payment during the lifetime of the person whose life is insured, or where the nominee or, if there are more nominees than on all the nominees die before the policy matures for payment, the policy money shall be payable to the policy-holder or his heirs as the case may be.
8. Where the nominee survive the policy-holder, the amount secured by the policy shall be payable to the nominee.

Distinction between Assignment and Nomination

1. **Passing of title in the policy :** On assignment of life policy, all the rights of the policy-holder pass to the assignee. The title to the policy passes to the assignee by reason of the assignment. Nomination does not divest the policy-holder of his rights in the policy and he retains disposing power over it. Nomination simply gives the nominee a right

to receive the policy money from the insurer in the event of death of the policy-holder before the maturity of the policy.

2. **Consideration :** For a valid assignment some consideration is essential unless it is made by way of a gift. But nomination does not require any consideration.
3. **Subsequent changes or cancellations :** Unlike assignment, nomination may be changed or cancelled at any time before the policy matures for payment. Moreover, an assignment automatically cancel a nomination except in case of a loan where it shall affect the rights of a nominee only to the extent of insurer's interest in the policy.
4. **Right to collect the policy amount :** In case of assignment, money under the policy shall be paid to the assignee even if the policy-holder is alive on the date of maturity. But in the case of nomination, the nominee shall be paid the policy money only if he survives the assured. The nominee has no right to collect the policy amount during the life-time of the assured.
5. **Form and Procedure :** Assignment can be effected either on the policy itself on by a separate deed. Nomination is made by endorsement on the policy. Nomination cannot be made by noting it on any piece of paper other than policy itself.
6. **Attestation** is required in case of assignment. But no attestation is prescribed in the case of nomination.

Settlement of Claim in Life Insurance Contract

A life insurance contract is not a contract of indemnity. An insurer agrees to pay the insured amount to the insured after the completion of the term, or to the legal dependent or nominee in the case of premature death of the insured. The first type of claim is known as *maturity claim* and second type and second type is known as *death claim.*

Maturity Claim : In case of a maturity claim the insurer will send the Maturity Claim settlement form to the insured after the last premium is paid. On receiving the form the insured will have to furnish all the details and enclose his insurance policy with the form and sent it to the insurer which would enable him to settle the claim on the date of closure of his contract. In the event of policy being assigned to any other financial agency as a security for loan, a notice is served to the assignee to submit the policy so that claims is settled. On receiving the policy the insurer would pay the amount to the assignee who has to appropriate the amount and pay the balance to the insured the same procedure is applied when a policy is assigned to the insurer.

Nomination of a life policy : A policy holder who has effected an insurance on his own life, may nominate a person, or persons to whom the money secured by such policy shall be paid in the event of his death. Such nomination can be made at any time but not beyond the time when the said policy matures for payment. A person can nominate only on the insurance of his own life. Thus, the assignee of a policy cannot nominate. It is only in the event of the death of the insured during the term of the policy that the amount secured is payable to the nominee. A nominee cannot be appointed to receive the sum assured when the policy is surrendered or in the event of the insured dying after the maturity of the policy and before he receives the payment. In this connection, the following rules as said down in Section 39 of the Insurance Act, 1938 may be noted.

REVIEW QUESTIONS

Section - A (Short Answer Questions)

1. Define a contract of life insurance.
2. Distinguish between life insurance and fire and marine-insurance as regards indemnity and time of insurable interest.
3. When should insurable interest be present in case of life insurance?
4. In what lives is a person presumed to have insurable interest?
5. To what extent can a person effect an insurance on another persons's life?
6. What is an endowment policy?
7. Can the insurer avoid liability on the ground that the age of the assured is not correct?
8. What do you understand by surrender value?
9. What is the liability of an insurer on a life policy in case of suicide of the assured where the policy is silent?
10. Distinguish between an assignment and a nomination in life insurance.
11. If an assured commits suicide while sane, can the assignee of the policy or the heirs of the assured claim on the policy?
12. John insured his life for the benefit of his wife and was subsequently convicted of having killed her. Can the insurance money be recovered?

Section - B (Descriptive Answer Questions)

1. Define a contract of life insurance. How does life insurance differ from other forms of insurance?
2. Discuss the law relating to 'insurable interest' in the case of life insurance. State the cases where insurable interest is presumed to exist and where it is not presumed to exist.
3. Discuss the procedure for effecting a life insurance policy.
4. What are the different types of life insurance policies? Explain each of them.
5. What is meant by the surrender value of a life policy? Distinguish between surrender value and paid-up value of a life policy.
6. Distinguish between an assignment and a nomination in life insurance, bringing out clearly the rights of the assignee and nominee.
7. Write notes on : (a) Days of grace, (b) Effect of Suicide in life policy, (c) Proof of age.

PRACTICAL PROBLEMS

Attempt the following problems, giving reason for your answers

1. X owes Y Rs. 10,000. Y insures X's life for a like amount. X pays the debt to Y. X then dies. Y claims Rs. 10,000 from the insurance company. Is the insurer liable to pay?

   [*Hint* : Yes, the insurer is liable to pay Rs. 10,000 to Y, because in a life insurance contract insurable interest is necessary only at the time of taking the policy].

2. P takes a policy on his own life on 15th January 1997, and later commits suicide on 24th September 1998. Is the LIC liable?

   [*Hint* : Yes, the LIC is liable, as the policy has already run, on the date of suicide, for more than one year].

3. On 1 February 1992, A assigned his life policy to B for valuable consideration by executing a deed of assignment. On 1 March 1993, A assigned the same policy to C as a gift by separate deed of assignment, and gave notice of the assignment in favour of C to the Life Insurance Corporation in the prescribed manner.

Both B and C claim the amount of the policy on maturity. How would you decide?

[*Hint* : Only C is entitled to claim the amount of the policy because as per section 38 of the Insurance Act an assignment becomes binding on the insurer only after a notice thereof is delivered to him. As to notice of assignment in favour of B was given, the LIC will not recognise the claim of B].

4. A, the holder of a policy of life insurance on his own life assigned it to his wife, B, on the condition that the benefits under the policy are to revert to him should B die during his life-time. A year later A revoked the assignment on the ground that it was conditional. Thereafter A died during the life-time of B. Both B and A's legal representatives claimed the policy money. Whose claim will prevail and why?

[*Hint* : B's claim will prevail. Section 38 of the Insurance Act permits "conditional assignment". Hence the assignment made in favour of B was valid. The assignor cannot revoke an assignment once validly made. As such the policy remained assigned to B and on A's death she is entitled to get the policy money (Bai Lakshmi Vs. Jaswantlal Tribhuvandas, 1947, A.I.R. Bom. 3690].

5. P, the holder of a policy of life insurance on his own life nominates Q as his nominee. Before the maturity of the policy Q dies. On the maturity of the policy Q's heirs claim the policy money. Will they succeed?

[*Hint*. No. Q's heirs will not succeed because as per Section 39 of the Insurance Act where the nominee dies before the policy matures for payment, the policy money shall be payable to the policy-holder or his heirs].

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The contracts of fire insurance are governed by the Insurance Act, 1938 (as amended upto date) and the General Insurance Business (Nationalisation) Act, 1972, besides the judicial decisions of courts in England and India.

Definition of Fire Insurance

Fire insurance means insurance against any loss caused by fire. Section 2(6A) of the Insurance Act defines fire insurance as follows: "Fire insurance business means the business of effecting, otherwise than incidentally to some other class of business contracts of insurance against loss by or incidental to fire or other occurrence customarily included among the risks injured against in fire insurance policies".

Meaning of 'Fire' : The term *fire* in a fire insurance policy is interpreted in the literal and popular sense. There is fire when something burns. In English cases it has been held that there is not fire unless there is ignition. (*Stanley Vs. Western Insurance Co., 1868*) Fire produces heat and light but either of them alone is not fire. Lightning is not fire. But if lightning ignites something, the damage may be covered by a fire-policy. The same is the case with electricity.

No claim without flame : Heating unaccompanied by ignition is not fire. So, unless there is actual ignition and loss be proximately caused by such ignition, the insurers are not liable. Thus, where sugar was polite by great heat caused due to a ventilator in the chimney being closed, but there was not actual ignition, it was held that the assured could not recover [*Austin Vs. Drewer (1816)*]. Similarly, the heat of the sun often contacts timber, but that would not be considered as loss by fire. Note that had the heat might be cause by actual ignition of premises where the sugar or timber was kept, the damage shall be deemed as '*damage by fire*' although the subject matter viz the sugar or timber, has not been actually burnt.

Characteristics of Fire Insurance

1. **Indemnity :** Fire insurance is a contract of indemnity. The insurer is liable only to the extent of the actual loss suffered. If there is not loss there is no liability even if there is a fire.
2. **Good Faith :** A fire insurance is a contract of good faith (*uberrimae fidei*). The policy-holder and the insurer must disclose all the material facts known to them.
3. **Period :** A fire insurance policy is usually made for one year only. The policy can be renewed according to the terms of the policy.
4. **Contract :** The contract of insurance is embodied in a policy called the fire policy. Such policies usually cover specific properties for a specified period. Unlike a Life Insurance Policy, a fire policy does not have any surrender value or paid up value.
5. **Insurable Interest :** A fire policy is valid only if the policy-holder has an insurable interest in the property covered. Such interest must exist at the time when the loss occurs. In English cases it has been held that the following persons have insurable interest for the purpose of fire insurance-owner, tenants, trustee, agent, lien holder, pledgee, bailees including common carriers, mortgagee insurer, warehouse keeper, inn keeper, wharfinger, factor, commission agent, finder of lost goods, etc.
6. **Contribution, Subrogation and Reinsurance :** In case of several policies for the same property, each insurer is entitled to contribution from the other. After a loss occurs and

payment is made, the insurer is subrogated to the rights and interests of the policy-holder. An insurer can reinsure a part of the risk.

7. **Cause Proxima :** Fire policies cover losses caused proximately by fire. The term *loss by fire* is interpreted liberally. In one case, A woman hid her jewellery under the coal in her fireplace. Later on she forgot about the jewellery and lit the fire. The jewellery was damaged. Held, she could recover under the fire policy. (*Harris Vs. Poland, 1941*). Nothing can be recovered under a fire policy if the fire is caused by a deliberate act of the policy-holder. In such cases the policy-holder is liable to criminal prosecution.
8. **Specific Exceptions :** Fire policies generally contain a condition that the insurer will not liable if the fire is caused by riot, civil disturbances, war and explosions. In the absence of any specific exception the insurer is liable for all losses caused by fire, whatever may be the cause of the fire.
9. **Assignment :** According to English Law, a policy of fire insurance can be assigned only with the consent of the insurer. In India such consent is not necessary and the policy can be assigned as a chose-in-action under the Transfer of Property Act, 1882. The insurer is bound when notice is given to him. But the assignee cannot recover damage unless he has an insurable interest in the property at the time when the loss occurs; a stranger cannot sue on a fire policy.
10. **Payment of Claims :** Fire policies generally contain a clause providing that upon the occurrence of fire the insurer shall be immediately notified so that the insurer can take steps to salvage the remainder of the property and can also determine the extent of the loss. Insurance companies keep experts and can also determine the extent of the loss. Insurance companies keep experts on their staff to value the loss. If in a policy there is an intentional over valuation of the property by the policy-holder, the policy may be avoided on the ground of fraud.

Types of Fire Insurance Policies

1. **Ordinary Fire Policy :** In this policy the insured sum is equal to the real value of the property insured and the insurer indemnifies the assured in cash usually the depreciated value at the date of loss, subject to the amount stated in the policy.
2. **Specific Policy :** A specific policy is one under which the liability of the insurer is limited to a specified sum which is less than the value of property (i.e. *under insurance*). Under such a policy, in case of loss, the insurer is liable to indemnify the actual loss in full not exceeding the specified sum in the policy irrespective of under insurance.
3. **Valued Policy :** A valued policy is one under which the insurer agrees to pay a specific sum irrespective of the actual loss suffered. A valued policy is not a contract of indemnity.
4. **Average Policy :** Where a property is insured for a sum which is less than its value, the policy may contain a clause that the insurer shall not be liable to pay the full loss but only that proportion of the loss which the amount insured for, bears to the full value of the property. Such a clause is called the *average clause* and policies containing an average clause are called *average policies*. The phrase *subject to average* is equivalent to the insertion of an average clause. Lloyd's Fire Policies are usually expressed to be "subject to average".

Example: if a policy, containing average clause, is for Rs. 6,00,000 upon a subject matter worth Rs. 8,00,000 and the actual loss is Rs. 2,00,000. The insured will only get (6,00,000/ 8,00,000) x 2,00,000 = Rs. 1,50,000. The balance of Rs. 50,000 will be borne by the insured himself. The purpose of average clause is to check under insurance and to encourage full insurance.

5. **Reinstatement or Replacement Policy :** In such policies the insurer undertakes to pay not the value of the property lost, but the cost of replacement of the property destroyed or damaged. The insurer may retain an option to replace the property instead of paying cash.
6. **Floating Policy :** When one policy covers property situated in different places it is called a *floating policy*. Floating policies are always subject to an average clause.
7. **Combined Policies :** A single policy may cover losses due to a variety of causes. e.g., fire together with burglary, third party losses, etc. A fire policy may include loss of profits i.e. the insurer may undertake to indemnify the policy-holder not only for the loss caused by fire but also for the loss of profits for the period during which the establishment concerned is kept closed owing to the fire.

Clauses in a Fire Policy

Some of the important clauses which are included in a fire insurance policy are as follows:

(a) **Average clause :** This clause provides that if the sum insured under the policy is less than the value of the property on the date of fire, the amount of loss payable will be proportionately reduced, and the insured shall be deemed to be his own insurer for the balance. The object of this clause is to penalise under-insurance by corresponding under payment of claims.

(b) **Alteration clause :** This clause provides that the insurance will cease to attach if, without previous sanction of the insurers, the trade or manufacture carried on the premises is changed, so as to increase the risk, or if the building insured becomes unoccupied or if the property insured is removed to a place other than that stated in the policy.

(c) **Marine Clause :** When goods are insured both under marine and fire policies, this clause in that case, relieves insurers of any liability for loss which is recoverable under a marine policy except in respect of any excess beyond the amount recoverable thereunder.

(d) **Reinstatement clause :** This clause gives an option to the insurer to reinstate the premises instead of paying money to the insured. The object of this clause is to prevent any fraudulent claims being presented.

(e) **Contribution clause :** This clause is inserted when the subject-matter is insured with more than one insurer. It provides that the insured shall claim from each insurer a rateable proportion of his loss.

(f) **Arbitration clause :** It provides for arbitration for settlement of disputes and prescribes the procedure to be followed. It ensures that disputes are settled privately and quickly.

Causa proxima in Fire Insurance

The principle of causa proxima applies in fire insurance. If the proximate cause of loss or damage is fire, the loss is recoverable. The subject-matter of insurance need not have been burnt.

Ignitional (i.e., burning) must be of the goods insured or the premises where it is lying. The expression *'loss or damage occasioned by fire'* means 'loss or damage either by ignition of the article consumed, or by ignition of part of the premises where the article is; in the one case there is loss in the other a damage, occasioned by fire' (1816). Thus, where the 'stock of medicines' was insured against free and there was ignition on the premises of the shop as a result of which most of the medicines was damaged because of excessive heat, it was taken to be a loss or damage caused by fire. Remember that if the medicines are spoiled by high heat of the sum, the damage shall not be deemed as 'damage by fire' as there is no ignition. Hence, in order to cover a particular loss or damage under a Fire Policy, the following three things must be present :

(a) the loss or damage must relate to the subject-matter of policy;

(b) the loss or damage must be caused by ignition of fire; and

(c) the ignition must be either of goods insured or of the premises where it is placed.

It is to be noted that the cause of fires is immaterial for a fire insurance claim to be admitted. If the loss happens by fire, it is recoverable from the insurer, unless it is deliberately brought about by the assured himself or his agent, it matters not how the flame is kindled-whether it be the result of accident or design. Even if it is caused by the negligence of the assured or his servants, the insurer shall continue to be liable [*Dugdeon Vs Pembroke (1877)*].

On the basis of judicial decisions the expression *'loss or damage by fire'* also includes the loss or damage caused by efforts to extinguish fire with a view to mitigating the loss. Thus, the *following losses are covered by fire insurance* :

(a) Property damaged or goods spoiled by water used to extinguish the fire;

(b) fire brigade destroying an adjacent house to prevent the progress of flames;

(c) wages paid to persons engaged for extinguishing fire;

(d) loss arising from efforts to avert damage by fire, e.g., removal of goods from the building where fire is raging. Even the damage caused by throwing furniture out of window is included.

The following types of losses, however, are not covered by a fire policy :

(i) Loss by theft during or after the occurrence of a fire.

(ii) Loss or damage to property occasioned by its own fermentation or spontaneous, combustion, e.g., if a bomb is insured, which explodes itself because of inherent defect, the loss is not covered.

(iii) Loss caused by the burning of property by order of any public authority.

(iv) Loss caused by subterranean (underground) fire.

(v) Loss happening by fire which is caused by earthquake, war, invasion, act of foreign enemy, hostilities or warlike operations (whether war be declared or not), civil war, mutiny, riot, military or unsurped power, marital law, and military rising.

In the above cases the insurer is not liable, unless specially provided for in the Policy.

Successive loses : In case of a fire policy for a fixed period, as is usual the insurer is liable for successive losses, even if the total payment exceeds the policy amount. If partial loss is immediately followed by total loss, then only total loss can be recovered.

Procedure for effecting Fire Insurance

For taking out a fire policy the proposer has to fill a *proposal form* giving necessary description such as location, amount, age, nature of possession, etc., of the property. While filling up the proposal form, the proposer must observe utmost good faith and disclose all the material facts. On receiving the proposal form the insurer assesses the risk to be insured. The property is fully inquired and examined by the surveyors who determine the degree of risk precisely. If the insurer thinks that the property is insurable, he gives his acceptance of the proposal subject to the payment of premium. The risk will commence only when the premium is paid. After the receipt of the premium the insurer will issue a *'cover note'* which is in the nature of an interim protection note and covers the property until the final policy has been issued. If loss occurs before the issue of policy, the 'cover note' will be sufficient to make the insurer liable for payment of the loss. Finally, a fire insurance policy duly stamped and containing the terms and conditions of insurance will be issued by the insurer to the assured.

Assignment of Fire Insurance Policies

Before the occurrence of any loss, a fire policy cannot validly be assigned unless the property insured is also transferred to the assignee, and sanction of the insurer is obtained. The transfer of the property insured to the assignee is essential because for a valid claim against the insurer, the assignee must have an insurable interest in the property insured at the time of loss. The consent of the insurer is necessary for a valid assignment because a contract of fire insurance is regarded as a contract of personal nature. The assignment must be in writing either by endorsement on the policy or by a separate deed of assignment. It is worth nothing that no consent of the insurer is required if the interest in the property insured passes from the insured by 'will' or by operation; of law to his heirs on his death.

After the occurrence of the loss, the policy can be assigned in writing to any person, just like an actionable claim, because in such a case, assignment means that the assignor has transferred his own right of claim to the assignee.

Fire Insurance Claim

On the happening of any loss or damage to the property or goods insured, the assured should follow the following procedure to register and recover his claim under a fire insurance policy.

1. **Notice of Loss :** The insured must forthwith give notice, in writing, of the loss to the insurance company.

RIGHTS OF INSURER

The following are the rights of the insurer:

1. *Right to avoid the policy :* Utmost good faith is an implied condition in an insurance contract and places upon the insured a duty to deal honestly with the insurer when a claim arises. Fraud will avoid the policy, so also wilful fire caused by the insured or with his connivance.
2. *Right of entry and control over the property :* On the happening of any loss or damage to any of the property insured, the insurance company may enter and take and keep possession of the building or premises where the loss or damage has happened. These

rights are necessary for the insurer to ascertain the cause and extent of loss or damage, to minimise the damage and to protect the salvage.

3. *Right of reinstatement :* The insurance company may at its option reinstate or replace the property damaged or destroyed instead of paying the amount of the loss or damage in money. The insured has no right to claim reinstatement. The main object of this right is to have some protection against unreasonable or exaggerated claims.
4. *Right to subrogation :* After the payment of the policy money, the insurer is entitled to ail the rights and remedies which may be possessed by the insured in respect of the subject-matter of insurance. This right of the insurer whereby he steps into the shoes of the assured is called the right of subrogation. The insurer must first pay under the policy of insurance before he can claim the right of subrogation. But the insurers are usually enabled to exercise the right of subrogation even before the payment, by an appropriate policy condition.
5. *Right of contribution :* Where a person has taken out more than one policy, against the same risk with several insurers, the payment of the full amount of the insured's loss by one or more of the insurers will discharge the other insurers from their liability. The insurers who have paid are entitled to call upon the others to contribute proportionately towards the loss. This is called the right of contribution amongst the co-insurers.
6. *Right to salvage :* After a fire has occurred, it is the duty of the assured to hand over the salvage to the insurer. The insurers are entitled to the salvage for whatever it is worth. Where the insurer pays for a loss in full, he is entitled by way of salvage to all that remains of the thing insured. The insurer becomes owner of the salvage as from the date of the fire.

2. **Report to the Police in case of arson :** If the loss has been caused by arson (i.e., miscreants' deliberate act of burning the property), the matter should at once be reported by the insured to the police, and a copy of the report should be sent to the insurance company.

3. **Submitting Statement of Claim :** Within 15 days after the loss or damage, the insured is further required to submit to the insurance company; (a) a claim in writing for the loss or damage containing the particulars of items of property damaged or destroyed, and of the amount of the loss or damage thereto respectively, having regard to their value at the time of the loss or damage thereto respectively, not including profit of any kind, and (b) particulars of all others insurances, if any.

4. **Evidence to Support Claim :** The insured must also at all times at his own expense produce, procure and give to the insurance company all such further particulars, books, vouchers, invoices, documents, duplicates or copies thereto, and information with respect to the claim and the origin and cause of the fire and the circumstances under which the loss or damage occurred and any matter touching the liability of the insurer, as may be required by the insurer together with a declaration on oath of the truth of the claim and of any matters connected therewith.

In case the insured does not comply with the above requirements, or hinders or obstructs the insurance company's values in arriving at fair valuation, no claim under the policy will be admitted e.g., in case he makes a fraudulent claim (i.e., intentional over-valued claim). Of course, if over-valuation is by mistake, the claim shall be paid, because valuation is generally a matter of opinion.

Differences Between Marine Insurance and Fire Insurance

1. **Risks covered :** A marine insurance policy covers risks arising from a marine adventure. A fire insurance covers risks of fire on properties.

2. **Period :** A fire insurance is usually done for one year only. Marine insurance is done for a fixed period or for a fixed voyage.

3. **Reliance :** In fire insurance details of the subject matter have to be given (usually by answering a set of printed questions). This is generally not required in marine insurance where the insurer relies on the policy holder's duty of disclosure.

4. **Assignment :** Marine insurance policies may, under certain circumstances, be assigned even after loss has occurred. This cannot be done in fire insurance.

5. **Disclosure :** A marine policy may be obtained without disclosing the name of the ship. (e.g. floating policy). In fire insurance, the subject matter of the risk has to be disclosed.

6. **Deviation :** Marine insurance contracts can be avoided on many grounds (like deviation) but such cases are not available in cases of fire insurance.

MISCELLANEOUS INSURANCE

Insurance against Personal Accidents : A contract of personal accident insurance is a contract by which the insurer promises to pay a certain sum of money to the insured in case of injury by accident and to the dependent of the insured in case of death by accident. A personal accident insurance is not contract of indemnity because the insurer has to pay a fixed sum of money. He is not required to indemnify the assured. The contract of insurance is made in the same manner as other forms of insurance, i.e., by the payment of premium and taking out a policy. The contract must satisfy all the essential requirements of an insurance contract e.g. there must be no concealment of any material fact. In U.K. accident insurance policies for a specified journey can be effected easily by filling out a form and paying the premium. For railway journeys a coupon for accident can be purchased along with the purchase of the ticket. In India insurance against railway accidents is almost unknown but insurance against accidents during air journeys is very popular.

Accident insurance policies generally contain various conditions safeguarding the interests of the insurer. For example, the policy may provide that the insurer will not be liable for accidents if the assured engages in any unusual trade or occupation involving more than ordinary dangers or if the assured incurs accident while under the influence of drink. Insurance against personal accident may be and usually is, a part of motor car insurance.

The insurer in an accident policy is liable only if the injury or death is due to an accident and not due to natural causes. It is difficult to define what is an accident. Lord Macnaughten has defined an accident as an "unlooked for mishap, or an untoward event which is not expected or designed". *Fenton Vs. Thorlye*. If a man deliberately jumps down from the roof of a house and dies, it is not an accident; but if he slips and falls from the roof without intending to do so, it is an accident.

Burglary Insurance : Goods may be insured against theft or robbery. The policy in such cases lays down what risks are covered. The policy-holders is usually required to take all reasonable precautions against loss by theft or robbery. In burglary and accident notice/information must be given to the insurer immediately or as soon as possible.

Fidelity Insurance : A contract of fidelity insurance promises to indemnify the employer against loss caused by misappropriation of funds or damage to property committed by an employee. Such insurance may be effected by the employee or by the employer with the insurance company. There may be a collective policy covering all employees.

Motor Vehicle Insurance (Motor Vehicles Act of 1988)

The owner of a motor vehicle may and, usually does, insure his vehicle against any damage that it may suffer. He may also insure against personal accident to himself and other occupants of the motor vehicle. He may insure his motor vehicle or may not do so, but he must now insure in respect of the liability which he may incur to others in consequence of the use of his vehicle. This is known as Compulsory Insurance of Motor Vehicles against Third Party Risks which has been provided for in Chapter VIII of the Motor Vehicles Act, 1939.

A policy of motor vehicle insurance, therefore, serves three purposes, in as much as it is an insurance (i) on property-viz the motor vehicle, (ii) against personal accident, and (iii) against liability for accidents. The policy covers loss or damage due to accident, theft, fire, or self-ignition and wilful damage. The personal accident insurance in a motor accident policy covers two classes of accidents, namely (a) if the accident happens in connection with the insured vehicle, the insured is protected along with the other vehicles, the assured is covered to the extent of all accidents happening, while he was travelling in such other vehicles.

The delivery of a certificate of insurance to the assured imposes upon the insurers the duty of satisfying by payment to the third party any judgement subsequently obtained by him against the assured. The effect of this and other provisions in the Act is to compel the insured to satisfy those claims, not withstanding that he may be entitled to avoid or cancel the policy.

Vehicles for the purpose of insurance are classified as (i) private car (ii) commercial vehicles (iii) motor cycles, scooters, autocycles. The proposal form is divided into three parts (i) identification of vehicles eg., register number, horse power, shape, size model etc., (ii) risk information, past insurance, type of policy got previously, equipments etc., (iii) declaration.

The policies under motor insurance are (i) act liability (ii) their party only and (iii) comprehensive policy. A comprehensive policy covers the risks like damage to car parts or body, removal, charge for repairs, third party liabilities, costs and expenses incurred with risk, repair changes, medical expenses etc., Generally the insurer is not liable under the policy in respect of

(i) any accident, loss, damage and liability caused or incurred outside India.

(ii) any claim arising out of any contractual liability.

(iii) any claim arising out of risks while the vehicle is (a) as used for purpose/use other than specified (b) driven by any person other than driver described in the schedule of the policy.

(iv) any claim arising after any variation in or termination of the insured's interest in the vehicles.

(v) any claim directly or indirectly arising from, war, invasion act of foreign enemies driving under intoxication.

(vi) This does not cover use for hire, pace making, speed testing etc.

REVIEW QUESTIONS

Section - A (Short Answer Questions)

1. What is the effect of a average clause in a fire policy?
2. What are the two essential features of a fire insurance contract?
3. What is meaning of 'fire' in a fire policy?
4. Is loss caused in extinguishing a fire recoverable as a loss caused by fire?
5. When should insurable interest be present in case of fire insurance?
6. If goods insured against fire are destroyed by fire after their sale, to whom is the underwriter liable?
7. If loss is the ultimate result of a number of causes, only some of which are covered by the policy how would you determine whether the underwriter should be held liable or not?
8. What is a comprehensive policy of fire insurance?
9. What is the meaning of 'proximate cause' in law of insurance?
10. If theft is committed during the confusion following an outbreak of fire, is the insurer liable?
11. How can a fire insurance policy be assigned?
12. What is a floating policy of fire insurance?

Section - B (Descriptive Answer Questions)

1. Define a fire insurance contract. What are the characteristics of a fire insurance contract?
2. What is the meaning of 'fire' in a fire insurance policy? What types of losses or damages are covered by a fire policy? Also, specify the types of losses not covered under a fire policy?
3. What is Fire Insurance? Explain the different kinds of fire policies
4. What are the different kinds of fire policies?
5. State and explain the different classes in a fire policy.
6. How a fire policy may be effected and assigned?
7. How a claim under a fire policy should be made?
8. What are the rights of insureres in a fire policy?
9. Writes short notes on (i) Burglary insurance (ii) Fidelity insurance (ii) Motor Vehicle Insurance.

PRACTICAL PROBLEM

Attempt the following problems, giving reasons for your answers

1. A house covered by a fire policy catches fire. In the confusion that followed, a theft is committed. Discuss the liability of the insurer.

   [*Hint* : Loss by theft during or after the occurrence of a fire is not covered by a fire policy. As such the insurer is not liable for such loss].

2. P insured his house against loss by fire. Later, while insane, he killed his wife, severely injured his only son, set fire to the house, and died in the fire. The son survived and sued the insurers for the fire loss. Is he entitled to recover?

   [*Hint* : Yes, the son is entitled to recover on the policy, for the insured caused the fire when he was insane, and not deliberately].

3. A, insured his house worth Rs. 60,000 for Rs. 40,000 against risk by fire. There is an "average clause" does not come into operation in the case of total loss. This clause comes into play only if there is a partial loss.

[*Hint* : A, is entitled to recover the whole insured amount of Rs. 40,000, because the "average clause" does not come into operation in the case of total loss. This clause comes into play only if there is a partial loss.

4. P got his goods lying in a godown insured against fire. The goods were destroyed by fire. P recovered full compensation for goods from the insurance company. P then sued the godown-keeper and recover a sum of Rs. 5,000 from him. The insurance company claims this amount of Rs. 5,000 from P. P refuses to pay. Decide.

[*Hint* : P is bound to pay the amount of Rs. 5,000, which he recovered from the godown-keeper, to the insurance company, because a contract of fire insurance is a contract of indemnity and in case of a loss the assured cannot make a profit of his loss. Moreover, after fully indemnifying the assured, the insurer subrogates to all the rights of the assured against the third parties.]

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CHAPTER - 18

MARINE INSURANCE

CHAPTER OUTLINE

CONTRACT OF MARINE INSURANCE

- INSURABLE PROPERTY
- TYPES OF MARINE INSURANCE
- MARINE ADVENTURE
- MARINE PERILS
- MARINE POLICY

CONTENTS OF MARINE INSURANCE POLICY

- INSURABLE INTEREST
- ASSIGNMENT OF POLICY
- DETERMINATION OF INSURABLE VALUE
- EXPRESS AND IMPLIED WARRANTIES
- MARINE LOSSES
- PARTICULAR AVERAGE
- GENERAL AVERAGE

The law relating to marine insurance has been codified by the Marine Insurance Act, 1963. A contract of marine insurance is defined as *an agreement whereby the insurer undertakes to indemnify the assured in the manner and to the extent thereby agreed, against marine losses, that is to say, the losses incidental to marine adventure* (Section 3). It is, thus, a contract to indemnify against loss from marine perils. It may be taken out in respect of ship, cargo, freight or any other subject of a marine adventure. An instrument containing the contract of marine insurance is called a *Marine Policy* or *Sea Policy*. The consideration for the policy is called *premium*. The insurer in marine insurance is known as the *Underwriter* and the person who is thereby indemnified is called the *Insured*.

Ordinarily a marine insurance is effected only against risks at sea. But the contract may by its express terms or by usage of trade be extended so as to protect the assured against loss on inland waters or on any land risk which may be incidental to the sea voyage. [Section 4(i)]. A marine insurance policy may cover a ship in the course of building, or launch of a ship, or any adventure analogous to a marine adventure.

Insurable Property : It means any ship, goods or other movable exposed to maritime perils. [Section 2(c)]. Insurable property is also called the *subject-matter of insurance*. It must be designated in the policy with reasonable certainty.

Types of Marine Insurance

1. **Hull Insurance :** Insurance of vessel and its equipments (i.e., furniture and fittings, machinery, tools, coal and engine stores etc.) are included in hull insurance. The owner of a ship may effect hull insurance.
2. **Cargo Insurance :** The insurance of cargo includes goods and merchandise and not the personal belongings of the crew and passengers.
3. **Freight Insurance :** In many instances, under the terms of contract, the shipping company is unable to earn freight, whether paid in advance or otherwise, if the cargoes are destroyed or the ship is lost of the way, the shipping company loses the freight. To guard against such an eventuality the shipping company may effect freight insurance.
4. **Liability Insurance :** Liability insurance includes liability to a third party by reason of hazards like collision, etc.

It is necessary to specify with certainty the subject-matter insured in a contract of marine insurance. The marine policy may cover the ship or the cargoes or the same policy may cover the ship, cargoes, freight and liability.

Marine Adventure : It is defined to include any adventure, where-

(i) any insurable property is exposed to maritime perils,

(ii) the earning or acquisition of any freight, passage money, commission, profit and other pecuniary benefit, or the security for any advances, loans or disbursements is endangered by the exposure of insurable property to maritime perils;

(iii) any liability to a third party which may be incurred by the owner, of or other person interested in, or responsible for insurable property by reason of maritime perils. [Section 2(d)].

Maritime Perils : It means, the perils consequent on or incidental to the navigation of the sea, that is to say, perils of the sea, fire war perils, pirates, rovers, thieves, captures, seizures, restraints and detainments of princes and peoples, jettisons, barratry and other perils of the like kind or which may be designated by the policy. [Section 2(e)]. The expression *'Perils of the Seas'* does not include every casualty which may happen to the subject-matter of the insurance on the sea. It refers only to fortuitous accidents or casualties of the seas and does not include the ordinary action of the winds and waves.

Freight : It means money payable to the shipowner for the carriage of goods. But the word *freight* has been extended to include any benefit derived by the ship owner from the employment of the ship. It does not include passage money.

Jettison : It means throwing overboard of cargo in order to lighten the ship bonafide and in an emergency. The cargo is thrown in order to avoid the danger of the ship sinking or heeling during storms. Goods may also be jettisoned if they are dangerous.

Barratry : Barratry means wilful act of damage done by the crew in course of a mutiny or fight with the captain and the shipowner or among themselves, intentionally making a hole by cutting the ship to allow sea water to come inside or setting fire to ship or running a ground the ship.

Salvage : When some persons save a ship or any of its appliances or cargo from shipwreck, capture (by enemies or pirate) or loss from any other cause, they become entitled to a reward. The reward is called *Salvage*. The Salvors, i.e., the persons saving the property, have a maritime lien on the ship, cargo and freight for the reward. The amount of salvage is generally determined by the courts, but the parties may settle the amount among themselves.

Marine Policy

An instrument embodying the contract of marine insurance is called a *marine policy*. It is a document which incorporates the terms and conditions on which the contract of insurance is entered into between the parties. All contracts of marine insurance must be embodied in marine policies in accordance with the provisions of the Act. The section further lays down that unless the contract is so embodied in the policy the contract must not be admitted in evidence. A marine insurance policy may be signed or issued either when the contract is concluded or subsequent thereto.

Contents of Marine Insurance Policy (Section 25) : A marine insurance policy must specify the following particulars :

1. the name of the assured, or of some person who effects the insurance on his behalf;
2. the subject-matter insured and the risk insured against;
3. the voyage or period of time or both, as the case may be covered by the insurance;
4. the sum insured;
5. the name or names of the insurer or insurers. A marine policy must be signed by or on behalf of the insurer. Where it is subscribed by or on behalf of two or more insurers, each subscription unless the contrary be expressed, constitutes a distinct contract with the assured (section 26). But the nature and extent of the interest of the assured need not be specified in the policy (section 28). The policy must also be duly stamped under the Indian Stamp Act, 1899.

(1) A *defeasible as well as a contingent interest* is insurable. Where a person has contracted for the purchase of goods, he has an insurable interest not withstanding that he might at his election have rejected the goods or treated them as at the sellers risk by reason of the latter's delay in making delivery or otherwise (Section 9).

(2) A *partial interest* of any nature is insurable (Section 10).

Persons Deemed to have Insurable Interest

(1) An *insurance company* or *underwriter* effecting a contract of marine insurance has an insurable interest in his risk and he may reinsure the said risk. Unless the policy otherwise provides, the original assured has no right or interest in respect for such reinsurance (Section 11).

(2) A person *lending money on bottomry or respondentia bond* has insurable interest in respect of the said loan (Section 12).

(3) The *master or any member of the crew* of a ship has an insurable interest in respect of his wages. (Section 13).

(4) In case of advance freight, *the person advancing the freight* has an insurable interest but such freight is insurable only in far as it is not repayable in case of loss. (Section 14).

(5) A person effecting any insurance shall have an insurable interest in the charges of that insurance. (Section 15).

(6) Where the subject-matter insured is mortgaged, the *mortgagor* has an insurable interest in the full value of the subject-matter mortgaged, while the *mortgagee* has such interest to the extent of the sum due or to become due under the said mortgage. [Section 16(1)].

(7) A mortgagee, consignee or other person having an interest in the subject-matter insured may insure on behalf of himself as well on behalf of and for the benefit of other persons interested therein. [Section 16(2)].

(8) The owner of insurable property has an insurable interest in respect of its full value, not withstanding that some third person may have agreed to be liable to indemnify them in case of loss. [Section 16(3)].

Assignment of Insurable Interest : Where the assured assigns or parts with his interest in the subject-matter insured, it does not automatically transfer to the assignee his rights under the contract of insurance. But this rule will not be applicable when there is a transmission of interest by operation of law. (Sec. 17).

Determination of Insurable Value

The insurable value is the amount of the valuation of the insurable interest for the purpose of insurance. The Act lays down the rules for determining the insurable value of the subject-matter insured. (Section 18).

1. **When the Insurance is on Ship :** In such a case, the insurable value will be the value of the ship at the commencement of the risk. The ship includes her outfit, provisions and stores for the officers and crew, money advanced for seamen's wages and other disbursements, if any, made to make the ship seaworthy for the voyage or adventure, plus the charges of insurance on the whole.

2. **When the insurance is on Freight :** In an insurance on freight, whether such freight is paid in advance or not, the insurable value is the gross value of the risk of the assured plus the insurance charges.

3. **When the insurance is on Goods and Merchandise :** In such a case, the insurable value is : (i) the prime cost of the property insured plus; (ii) the expenses of and incidental to shipping; and (iii) the charges of insurance on the whole.

4. **When the insurance is on any other subject-matter :** In an insurance on any other subject-matter other than those enumerated above, the insurable value is the amount at the risk of the assured when the policy attaches plus the charges of insurance.

Special Clauses usually found in a Marine Insurance Policy

Some special clauses usually found in a (Lloyd's) Policy are explained below.

The Inchmaree clause : Ordinarily the insurer under a marine insurance policy is liable only for loss or damage caused by a sea-peril.

Illustration : The ship "Inchmaree" was lying at anchor at port and her donkey engine was pumping water into the boilers. The engineer in charge was negligent and kept a valve of the engine closed whereas it should have been kept open. As a result water forced into the engine and the pump was broken. The shipowner claimed compensation from the insurer. It was held that the loss was not due to sea-peril and so the insurer was not liable. [*Thames and Mersey Marine Insurance Co. Vs. Hamilton Fraser & Co. (1887)*].

Since the decision in the above case it has become customary to include a clause in all marine insurance policies by which the insurer agrees to pay compensation for loss or damage arising from causes which are not sea-perils or similar to sea-perils. Such a clause is called the *Inchmaree clause.*

The Sue, Labour and Travel for clause : This is a clause in a marine insurance policy which permits the captain to stop the ship, lower boats and engage mariners to sue, labour and travel in order to recover goods fallen overboard accidentally.

The F.C. & S. Clause : A clause in a marine insurance policy may exempt the insurer form liability in case the ship is captured by enemies during war. Such a clause is called a *Free of Capture and Seizure.*

The F.P.A. and the F.P.A. Clause : A policy may exempt the insurer from liability from particular or general average contribution. F.P.A. stands for "*Free from Particular Average*" contribution. F.A.A. stands for "*Free from All Average*" contribution.

The Memorandum or the N.B. clause : The memorandum or the N.B. (*nota bene*) clause exempts insurer from liability for partial losses in the case of perishable goods. In a Lloyd's policy is usually stated that the insurer will not be liable for losses to goods like sugar, hemp, tobacco, etc. unless the loss is 5% or more of the value of the goods. The N.B. clause may limit the liability in any other way.

The Running Down Clause : A clause in the policy may make the insurer liable for negligent actions of the captain and crew of the insured ship. For example, if by negligence a collision occurs the insurer may agree to indemnify the insured. Such a clause is called *Running Down Clause.*

insured, but also that she is reasonably fit to carry them to the destination contemplated by the policy [Sec 41, 42(2)].

2. **Legality of Adventure** : It is implied in every adventure insured that it must be lawful, and must be carried out in a lawful manner so far as the assured can control the matter. This known as *warranty of legality*. (Sec. 43).

3. **Neutrality :** When the ship is expressly warranted neutral there is an implied warranty that the property shall have a neutral character at the commencement of the risk, and that, so far as the assured can control the matter its neutral, character shall be preserved during the risk. Further that she shall carry the documents need to prove it. (Sec. 38).

In the following cases, no warranty is implied by law : (a) There is no implied warranty as to the nationality of a ship, or that the nationality shall be changed during the risk. (b) In a policy on goods or other movables, there is no implied warranty that the goods or movables are seaworthy.

Effects of a Breach of a Warranty : A warranty is a condition which must be exactly complied with. Any failure to so comply with will entitle the insurer to be discharged from liability as from the date of its breach. A breach of warranty entitles the insurer to repudiate his liability irrespective of whether a warranty is material or not.

When Breach of Warranty is Excused : Section 36 provides for certain cases where non-compliance with a warranty can be excused.

1. When by reason of change of circumstance, the warranty ceases to be applicable to the circumstances of the contract;
2. When compliance with the warranty is rendered unlawful by any subsequent law;
3. Where a breach of warranty is waived by the insurer.

When a warranty is broken, the assured cannot avail himself of the defence that the breach has been remedied and the warranty complied with before loss.

Voyage (Section 44 to 47)

Where the subject-matter is insured by a voyage policy, '*at any from*' or '*from*' a particular place, it is not necessary that the ship should be at that place when the contract is concluded, but there is an implied condition that the adventure must be commenced within a reasonable time, and on its failure, the insurer may avoid the contract. This implied condition may be negatived by showing that the delay was caused by circumstances known to the insurer before the contract was concluded, or by showing that he waived the conditions.

Where the subject-matter is insured 'from' a particular place, the risk does not attach until the ship starts on the voyage assured. When the ship is insured '*at and from*' a particular place, and she is at that place in good safety, when the contract is concluded, the risk attaches immediately. If she is not at that place, when the contract is concluded, the risk attaches as soon as she arrives there in good safety.

Where the place of departure is specified by the policy, and the ship instead of sailing from that place, sails from any other place, the risk does not attach. Similarly, where the destination is specified in the policy and the ship instead of sailing for that destination, sails for any other destination, the risk does not attach.

Change of Voyage : A change of voyage occurs when the destination of the ship is voluntarily, after the commencement of the risk, changed from the destination contemplated by the policy.

Change of voyage is also known as *abandonment of voyage*. The consequence of the change of voyage is that the insurer is unless the policy otherwise provides, discharged from liability as from the time of change. A change of voyage occurs as from the time of change.

Deviation : Deviation is said to take place when the ship either takes a different route or touches ports by an order which is different from that allowed under the policy. Deviation takes place under the following circumstances.

(a) Where the course of the voyage is specifically designated by the policy and that course is departed from :

(b) Where the course is not specifically designated by the policy, and the usual and customary course is departed from :

(c) Where several ports of discharge are specified by the policy the ship must proceed to them in the order designated by the policy; if she does not there is a deviation;

(d) Where the policy is to ports of discharge within a given area, which are not named, the ship must proceed to them in their geographical order; if she does not, there is a deviation.

Effect of Deviation : Where a ship without lawful excuse deviates from the voyage contemplated by the policy, the insurer is discharged from liability as from the time of deviation. It is immaterial that the ship may have regained her route before any loss occurs. The intention to deviate is immaterial. There must be a deviation in fact to discharge the insurer from his liability.

Cases Excusing Deviation or Delay

(1) Where it is *authorised* by any special term in the policy; or

(2) Where it is *caused by circumstances beyond the control* of the master and his employer; or

(3) Where it is reasonably necessary in order to *comply with an express or implied warranty*; or

(4) Where it is reasonably *necessary for the safety of the ship* or subject-matter insured; or

(5) Where it is necessary *for the purpose of saving human life* or aiding a ship in distress where human life may be in danger; or

(6) Where it is reasonably necessary *for the purpose of obtaining medical or surgical aid for any person on board the ship*;

(7) Where it is *caused by the barratrous conduct* of the master or crew, if barratry be one of the perils insured against.

When the cause excusing the deviation or delay ceases to operate, the ship must resume her course and prosecute her voyage with reasonable dispatch. (Section 51).

Assignment of Policy (Secs. 52 and 53)

A marine policy may be transferred by assignment unless it contains terms expressly prohibiting assignment. It may be assigned either before or after loss. The assignment may be made either by writing endorsed on the policy or in other customary manner. The insurer or underwriter need not be informed at all, that is, even notice to him is not necessary. A marine policy stands

Abandonment of the subject matter of insurance

Where there is a constructive total loss, the assured may either treat the loss as partial loss or abandon the subject-matter insured to the insurer and treat the loss as if it were an actual total loss. (Section 61)

Notice of Abandonment : Notice of abandonment is a notice by the assured to the insurer that he abandons all interests in the subject of insurance unconditionally to the insurers. Section 62 speaks of the rules regarding abandonment which are as follows :

1. Where the assured elects to abandon the subject-matter insured to the insurer, he must give notice of abandonment. If he fails to do so, the loss can only be treated as a partial loss.
2. Notice of abandonment may be given in writing or by words of mouth or partly in writing and partly by word of mouth. The terms of such notice should be sufficient to indicate the intention of the assured that he has abandoned his insured interest in the subject-matter insured unconditionally to the insurer.
3. The notice of abandonment must be given with reasonable diligence after the receipt of reliable information of the loss, but where the information is of a doubtful character the assured is entitled to a reasonable time to make enquiry.
4. Where notice of abandonment is properly given, and the insurer refuses to accept the abandonment, the right of the assured are not in any way prejudiced thereby.
5. The acceptance of an abandonment may be either express or implied from the conduct of the insurer. A mere silence on his part after receiving notice is not an acceptance.
6. Where notice of abandonment is accepted, the abandonment cannot be revoked. Such acceptance admits liability for the loss, and the sufficiency of the notice.
7. Such notice of abandonment is not necessary, in the following cases-(a) Where at the time when the assured receives information of the loss, there would be no possibility of benefit to the insurer if notice were given to him. (b) Where the insurer has waived the notice of abandonment. (c) Where the insurers has re-insured his risk. (Section 62).

Effect of Abandonment : On valid abandonment, the insurer is entitled to take over the interests of the assured, in whatever may remain of the subject-matter insured and all proprietary rights incidental thereto.

Partial Losses : Partial loss is any loss other than a total loss. It is of two kinds namely, (i) particular average loss and (ii) general average loss.

Particular Average Loss : It may be defined as any partial loss of the subject-matter insured, caused by a peril insured against and which is not a general average loss. In other words, whenever damage is done to any property which is involved in a marine adventure and the damage is not one, which is suffered for general benefit, it is called *particular average loss*. Thus, where a part of the cargo is lost or where the ship is damaged by the peril insured against, such loss or damage when not caused by general average act, is a particular average loss.

Salvage Charges : These are the charges recoverable under maritime law by a salvor, independently of contract. It is in the nature of a reward allowed by law to persons who save ship, cargo or freight from ship wreck, capture or from similar jeopardy. Such expenses where

properly incurred may be recovered as particular charges, or as a general average loss according to the circumstances under which they were incurred.

General Average Loss : It is a loss which is caused by or directly consequential on a general average act. A general average act includes a general average expenditure and the general average sacrifice. So, a general average loss is a general average act, which means that where any extra ordinary sacrifice or expenditure is voluntarily and reasonably made, or incurred in time of peril for the purpose of preserving property involved in a common adventure. The following are some of the instances of the general average loss.

(i) landing or *jettisoning* cargo to lighten ship in distress;

(ii) voluntary *stranding of the ship* in order to avoid a wreck;

(iii) where *water is thrown down a ship's hatches to extinguish an accidental fire*;

(iv) *money paid to pirates* for the purpose of saving both ship and cargo;

(v) *expenses incurred in taking vessel to its destination* with help from outside.

Distinction between Particular Average Loss and General Average Loss

1. In case of a general average loss, the loss is voluntarily incurred for the common safety and is made good by a rateable contribution from all the persons interested in the adventure. In the case of a particular average, the loss is fortuitously caused by a maritime peril and is shared by the person on whom it originally fell.
2. In the case of general average, the expenditure may be in respect of two or more interests, but in a particular average, an expenditure may be vis-a-vis a third interest.

General Average Contribution : Where there is a general average loss, the party on whom it falls is entitled, subject to the conditions imposed by maritime law, to a rateable contribution from the other parties interested. Such a contribution is called a *general average contribution.* All who have benefited by the general average act must share the loss, or the expenditure, i.e. they must all contribute to the same. This liability extends to owners of the ship, the cargo and the freight but not to wages of seamen.

Rights of the Insurer on Payment : Sections 79 to 81 deal with the rights of the insurer on payment. Those are as follows.

1. **Right of Subrogation :** This is a right by which the insurer on paying becomes entitled to all the rights of the insured in or with regard to the subject of insurance. His right to subrogation arises only when he pays for the total loss either of the whole or of any apportionable part in the case of goods. But when he pays for a partial loss, he does not acquire any title to the subject-matter insured or such part of it as may remain, yet he is subrogated to all the rights and ambitious of the assured, in the subject-matter insured in so far as the assured has been indemnified by such payment for the loss. Thus, if after paying for a total loss, the ship is recovered, the insurer becomes the owner of the ship. No right of subrogation accrues to the insurer until he has paid under the policy.

2. **Right of Contribution :** Where the assured is over-insured by double insurance, each insurer is bound as between himself and other insurers, to contribute rateably to the loss, in proportion to the amount for which he is liable under his contract. If any insurer pays more than his proportion of the loss, he is entitled to maintain a suit for contribution against the other insurance and is

CHAPTER - 19

CONTRACT OF SALE OF GOODS

CHAPTER OUTLINE

THE SALE OF GOODS ACT, 1930
FORMATION OF CONTRACT OF SALE OF GOODS
AGREEMENT TO SELL
BAILMENT, MORTGAGE, HIRE PURCHASE
GOODS-PRICE-PAYMENT
DOCUMENT OF TITLE TO GOODS
CONDITIONS AND WARRANTIES
IMPLIED CONDITIONS AND WARRANTIES
DOCTRINE OF CAVEAT EMPTOR

Difference between Sale and Bailment

Sale	*Bailment*
1. *Ownership* in goods is transferred from the seller to the buyer.	There is transfer of possession and not of ownership from the bailor to the bailee.
2. The buyer may *use the goods* in any way he likes.	A bailee can use the goods only according to the directions of the bailor.
3. There is *no return of goods* from the buyer to the seller, unless there is breach.	The goods are necessarily returned after the specified time or accomplishment of the purpose.
4. The *consideration* is the price in terms of money.	The consideration is an undertaking to to return the goods after the accomplishment of purpose.
5. The question of *any charges to be paid* by the seller to buyer or *vice versa* does not arise.	The bailor has to repay the charges which the bailee has incurred in keeping the goods safe.

Difference between Sale and Mortgage

Sale	*Mortgage*
1. The buyer becomes absolute owner of the goods sold.	Ownership of the goods remains vested in the mortgagor.
2. Ownership of the goods as a whole is transferred from the seller to the buyer.	Only the possession is transferred and ownership transfer is limited to some interest only.
3. Consideration is the price.	Consideration is the advance of the loan and the securing of the debt.

Difference between Sale and Hire Purchase Agreement

1. **Transfer of property in the goods :** In a sale, the property in the goods is transferred from the seller to the buyer immediately on the date of contract of sale. But in a hire purchase agreement, the property in the goods passes from the seller to the hire purchaser only when he (i.e., the hire purchaser) pays the last instalment.

2. **Position of the buyer :** In a sale, the buyer becomes the owner of the goods bought, whereas in a hire purchase, the hire purchaser becomes just a bailee till the last instalment is paid by him.

3. **Insolvency of the buyer :** In a sale, if the price of the goods sold is not paid by the buyer and the buyer becomes insolvent, the seller cannot recover the goods from the official assignee or official receiver. He can only claim rateable dividend out of the property of the insolvent buyer. But in a hire purchase, if the price of the goods is not paid and if the buyer becomes insolvent, the seller can take back the goods.

4. **Passing of title by the buyer :** In a sale, as the ownership of the goods sold is with the buyer, the buyer can pass a good title to a bona fide purchaser from him. On the other hand, in a hire purchase, since the ownership will not be passed on to the hire purchaser until the last instalment is paid, the hire purchaser cannot pass any title even to a bona fide purchaser.

5. **Sales Tax :** In a sale, tax is levied at the time of the contract of sale, whereas in a hire purchase, sales tax is not levied till the hire purchase ripens into a sale.

6. **Nature of the contract :** A sale is an *executed contract* (i.e., completed contract) in which the ownership of the goods is transferred from the seller to the buyer as soon as the contract is entered into. But a hire purchase agreement is only an *executory contract* in which the ownership of the goods will be transferred from the seller to the hire purchaser only when the last instalment is paid.

7. **Termination of contract :** In a sale, the buyer cannot terminate the contract of sale and return the goods at any time he likes. But, in a hire purchase, the hire purchaser has an option to terminate the contract and return the goods at any time he likes.

8. **Instalments paid :** In a sale, where the payment is made by the buyer in instalments, the instalments paid by the buyer are regarded as payments made by the buyer towards the price of the goods. But, in a hire purchase, the instalments paid by the hire purchaser are not regarded as payments made by the hire purchaser towards the price of the goods till the option to purchase is exercised by him. If the hire purchase is terminated, the instalments already paid are just regarded as hire charges.

9. **Governing Act :** A sale is governed by the Sale of Goods Act, 1930, whereas a hire purchase is governed by the Hire Purchase Act, 1972.

10. **Taking possession of the goods :** In a sale, as the ownership of the goods is passed from the seller to the buyer immediately on the date of sale itself, the seller cannot take back the possession of the goods, if the purchaser fails to pay the price of the goods. On the other hand, in a hire purchase, as the ownership of the goods is not transferred from the seller to the hire purchaser until the last instalment is paid, the hire seller can take back the possession of the goods, if the hire purchaser fails to pay any of the instalments.

GOODS – the Subject-matter of contract of sale

The term '*subject matter*' means the things for which a contract of sale can be made. Only the goods can be the subject matter of contract of sale. The term '*goods*' means every kind of movable property and includes (a) stocks and shares, (b) growing crops, grass (c) the things attached to or forming part of the land which can be severed (i.e., separated) from the land. It may however, be noted that the things attached to or forming part of the land may be the subject-matter of the contract of sale only if it is agreed that they shall be removed from the earth, e.g., standing crops or trees may be sold if agreed to be removed from the earth.

However, the term *'goods' does not include money and actionable claims*. The term '*money*' means the legal tender (i.e., currency) and not old coins. The terms *actionable claim*, means claim which can be enforced through the court of law e.g., debt due from one person to another is an actionable claim, and cannot be the subject-matter of contract of sale. The goods forming subject-matter of the contract of sale may be classified as under: (i) existing goods, (ii) future goods, (iii) contingent goods. Existing goods may be (a) specific goods (b) ascertained goods and (c) unascertained goods.

Difference between Bill of Lading and Charter Party

	Bill of Lading	*Charter Party*
1.	It is an acknowledgment of receipt of goods and a document of title to goods.	It is neither an acknowledgment of receipt of goods nor a document of title to goods.
2.	It does not amount to a lease of the ship or a part thereof.	It may amount to a lease of the ship or a part thereof.
3.	It is drawn in sets of two or three.	It is not drawn in sets.
4.	It is negotiable to some extent and, therefore, considered to be a quasi-negotiable instruments.	It is not a negotiable instrument.
5.	It is transferable by endorsement and delivery.	It is not so.
6.	Freight is paid in advance generally	Freight is paid after safe delivery at port of destination.
7.	It is always for a particular destination	It may be for a particular voyage or for a particular period of time.
8.	It may or may not be stamped.	It is necessarily to be stamped.

CONDITIONS AND WARRANTIES

A contract of sale of goods contains various terms of stipulations with reference to goods which are the subject matter of sale, e.g., regarding the nature and quality of the goods, the price and the mode of its payment, the delivery of goods and its time and place. But every such term is not likely to be of equal importance. Some of these terms are essential to the contract and their non-fulfillment may seem to frustrate the very basis of the contract. They may be so vital to the contract that their breach may seem to be a breach of the contract as a whole. Such terms are known as *Conditions of the contract of sale goods.* On the other hand, there may be certain terms which are not so vital to the contract that their breach may seem to be a breach of the contract as such. Such terms are known as *Warranties of the contract of sale.* Thus, conditions are more important terms (i.e., major terms) and warranties are less important terms. (i.e., minor terms) in the contract of sale.

Section 12(2) of the Sale of Goods Act, 1930 has defined a condition thus : "*A condition is a stipulation essential to the main purpose of the contract, the breach of which gives rise to a right to treat the contract as repudiated*". From this definition, it is clear that a condition is a stipulation essential to the main purpose of the contract and the breach of which gives the aggrieved party a right to treat the contract as repudiated.

A warranty is defined by Section 12(3) of the Sale of Goods Act, 1930 thus: *"A warranty is a stipulation collateral to the main purpose of the contract, the breach of which gives rise to only claim for damages but not to a right to reject the goods and treat the contract as repudiated".* From this definition, one can say that a warranty is a stipulation which is only collateral or incidental

to the main purpose of the contract, and the breach of which gives the aggrieved party only a right to sue for damages, and not the right to treat the contract as repudiated.

Characteristic features of Conditions

1. A condition is a stipulation or term regarding goods forming part of the contract of sale, and it is not a mere expression of opinion or commendatory statement (i.e., statement of praise).
2. A condition is a stipulation in a contract of sale essential to the main purpose of the contract. It goes to the very root of the contract and forms the very foundation of it.
3. The breach of a condition gives the aggrieved party the right to treat the contract as repudiated, and also entitles him to claim damages.
4. If a condition in a contract of sale is broken, no doubt, the aggrieved party can treat the contract as repudiated and reject the goods. But he has also an alternative option. That is, he can treat the breach of condition as a breach of warranty and can claim only damages without rejecting the goods.

Characteristic features of a Warranty

1. A warranty is a stipulation or term regarding goods forming part of the contract of sale, and is not a mere expression of opinion or statement of commendation or praise.
2. A warranty is a stipulation or term which is not essential to the main purpose of the contract and is only collateral (i.e., incidental, subsidiary or minor) to the main purpose of the contract. In short, it is only of secondary importance.
3. The breach of a warranty gives the aggrieved party only the right to sue for damages, and not the right to repudiate the contract. It may be noted that the measure of damages for breach of warranty is the estimated loss directly or naturally resulting in the ordinary course of events from the breach. *(Bostock & Co. Vs. Nicholson & Sons).*

Normally a statement is made after the contract does not become a warranty unless it is supported by fresh consideration (*Roscorla Vs. Thomas*). Nothing however prevents a buyer from *treating the breach of condition as a breach of warranty*, opting to claim damages instead of enforcing his rights to avoid the contract in toto.

Test to determine whether a stipulation in a contract of sale is a condition or a warranty : There is no hard and fast rule as to which stipulation is a condition, and which one is a warranty. Section 12(4) of the Sale of Goods Act, 1930 lays down to the same effect thus : Whether a stipulation in a contract of sale is a condition or a warranty depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract. The court is not to be guided by the terminology of the parties, but has to look to the intention of the parties of referring to the terms of the contract, its construction and the surrounding circumstances to judge whether a stipulation is a condition or a warranty.

The most suitable test to distinguish between the terms '*condition*' and '*warranty*' is that, if the stipulation is such that its breach would be fatal to the rights of the aggrieved party (i.e., its breach would cause irreparable damage to the aggrieved party) and entitle him to repudiate the contract, it would be a condition, and if the stipulation is such that its breach would not be

Implied Conditions

Implied conditions are those conditions which the law incorporates into a contract of sale of goods unless the parties stipulate to the contrary. Section 14 to 17 lay down implied conditions which are discussed below:

1. **Conditions as the title {Section 14 (a)}**: In a contract of sale, there is an implied condition on the part of the seller that: (a) in the case of a sale, he has a right to sell the goods; (b) in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass.
2. **Sale by description (Section 15):** Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description.
3. **Sale by sample (Section 17):** In the case of a contact for sale by sample, there is an implied condition: (a) that the bulk shall correspond with the sample in quality; (b) that the buyer shall have a reasonable opportunity of comparing the bulk with the sample; (c) that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample. This applies only to *latent defect* i.e., those which are not discoverable on reasonable examination. But if the *defect is patent* i.e., apparent and visible, the seller is not responsible.

Where the contract is severable, the buyer can retain those goods which corresponds with the sample and reject the other part. But where the contract is not severable, the buyer may either reject the whole or accept the whole and claim damages for the portion which is inferior to the given sample. But he cannot retain one part and reject the other part.

4. **Sale by Sample as well as by description (Section 15) :** If the sale is sample as well as description, there is an implied condition that the bulk of the goods shall correspond both with the sample and with the description.
5. **Condition as to fitness or quality (Section 15)**

Priest Vs. Last (1903) : P, a draper, purchased a hot water bottle from a retail chemist. P asked the chemist whether it will withstand boiling water. Chemist told him that the bottle was meant to hold hot water. The bottle burst when water poured into it and injured his wife. It was held that the chemist shall be liable to pay damages to P, as he knew that the bottle was purchased for the purpose of being used as a hot water bottle.

Where the article can be used for only one particular purpose, the buyer need not tell the seller the purpose, for which he requires the goods. But where the article can be used for a number of purposes, the buyer should tell the purpose for which he requires the goods, if he wants to make the seller responsible

Sale under patent or trade name : In the case of a contract for the sale implied condition as to its fitness for any particular purpose. It is so because in such a case, the buyer is not relying on the skill and judgement of the seller but relies on the good reputation of the trade name.

6. **Condition as to merchantability - (Section 16(2)) :** This condition is implied only where the sale is by description. Where goods are bought by description from a seller be of a merchantable quality i.e., the goods are of merchantable quality if: (i) they are