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ALLAMA IQBAL OPEN UNIVERSITY, ISLAMABAD

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Assignment No. 2 (Units 5–9)

Total Marks: 100 • Pass Marks: 50

SOLVED ASSIGNMENT GUIDE

(For Study & Reference)

Note: This guide is prepared for study and reference purposes. Students are advised to read the relevant units of the course book, understand the concepts and write the assignment in their own words.

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Question 1: Partnership and the Essentials of a Partnership Agreement (20 Marks)

What is a partnership? Explain in detail the essentials of a partnership agreement under the Partnership Act 1932.

Introduction

Partnership is the classic form in which small and medium business in Pakistan is organised. The cloth merchant of Faisalabad who joins hands with a partner who has capital, the two advocates who open a chamber together, and the family transport business run by three brothers all rest on the law of partnership contained in the Partnership Act, 1932, which governs partnerships throughout Pakistan. Before 1932 the subject formed part of the Contract Act, 1872; the separate Act now supplies a complete code of the creation, working and dissolution of firms. Section 4 of the Act defines partnership, and around that definition the courts and commentators have identified a set of essentials without which a partnership cannot exist, however the parties may describe their arrangement. A partnership agreement — usually recorded in a written partnership deed — must reflect those essentials if it is to create a valid

firm. This answer first explains the meaning of partnership and then examines each essential in detail, with the contents of a sound partnership deed.

Meaning of Partnership — Section 4

Section 4 defines partnership as "the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all." The persons who enter into partnership with one another are individually called "partners", collectively a "firm", and the name under which their business is carried on is the "firm name". The definition contains the whole theory of the institution. Partnership is a relation created by agreement, not by status or by birth: membership of a Hindu joint family business, for example, is not partnership because it arises from status. It is a relation between persons who share the profits of a business, and its heart is mutual agency — business carried on by all or any of them acting for all — so that each partner is at once the agent and the principal of every other partner. In Pakistan a firm is not a separate legal person distinct from its partners in the way a company is; the firm name is only a convenient description of the partners together, and the liability of each partner for the acts of the firm under Section 25 is unlimited.

The Essentials of a Partnership Agreement

1. Agreement Between Two or More Persons

There must be an agreement, express or implied, between at least two competent persons. Because the agreement is a contract, all the essentials of the Contract Act apply: the parties must be competent, consent must be free, and the object must be lawful. One person cannot be a partner with himself. The maximum number is limited by company law: a partnership of more than twenty persons for an ordinary business (and more than ten for banking) cannot

lawfully be formed and must instead be incorporated as a company. A minor cannot be a full partner, because he is incompetent to contract, but with the consent of all partners he may be admitted to the benefits of an existing partnership under Section 30, without personal liability. The agreement need not be in writing for its validity, but a written partnership deed, executed on stamp paper, is the practical necessity: it fixes capital, profit shares and management rights, it is needed for registration of the firm under Sections 56 to 59, and it is required by the income tax authorities and by banks when the firm opens an account.

2. Lawful Business

The agreement must relate to a business, and the business must be lawful and actually in existence or contemplated to be carried on. "Business" is read widely and includes every trade, occupation and profession: retail trade, manufacture, transport, money-lending, law, medicine and accountancy are all businesses. But a charitable association, a religious society or a club formed for pleasure is not a partnership, because it carries on no business for profit. Nor can a partnership be formed for an illegal business — an agreement to smuggle goods or to run unlicensed activities is void and creates no firm. A single venture can also constitute a business: two contractors who join together to build one particular bridge form what Section 8 calls a particular partnership, which dissolves when the venture ends.

3. Sharing of Profits

The partners must agree to share the profits of the business. Profit-sharing is the outward mark of partnership and the consideration for the risks each partner takes. The agreement may fix any ratio — equal shares, shares proportionate to capital, or any other arrangement — but some share in net profits is indispensable. Sharing gross returns is not the same thing, as the

Act itself notes in Section 6. Yet profit-sharing alone does not prove partnership: a lender who receives interest varying with profits, a servant or agent remunerated by a share of profits, a widow receiving an annuity out of profits, and the seller of goodwill paid from profits are all expressly declared by Section 6 not to be partners merely for that reason. Conversely, sharing of losses, though normal and usually implied, need not be expressly agreed: partners may agree that one of them shall not bear losses, but as between the partners and outsiders that partner remains liable, and in the absence of agreement losses are shared in the profit ratio under Section 13(b).

4. Business Carried On by All or Any of Them Acting for All — Mutual Agency

The final and, according to the courts, the decisive essential is mutual agency: the business must be carried on by all the partners or by any of them acting for all. This is the real test of partnership laid down in Cox v. Hickman (1860) and adopted in Section 6, which directs courts to look at the real relation between the parties shown by all relevant facts. Because every partner is an agent of the firm and of his co-partners for the purposes of the business (Section 18), the act of one partner, done in the usual way of the firm's business, binds the firm and all partners (Sections 19 and 22). It follows equally that every partner is a principal liable for the acts of his fellow partners. Profit-sharing is only evidence of this relation; agency is its substance. A person who shares profits but has no authority to bind the others, and is not bound by their acts, is not a partner, while a person who can bind the firm by his acts in the ordinary course of business is a partner even if his share of profit is indirect.

Table 1: What a partnership deed normally contains

Clause	Purpose

Names, firm name and addresses	Identifies the partners and the place of business
Nature of business and capital contributed	Fixes the scope of the firm and each partner's stake
Profit and loss sharing ratio	Prevents disputes over distribution
Interest on capital, drawings and loans; partners' salaries	Regulates financial adjustments between partners
Duties, powers and management roles	Allocates work and authority; states who can bind the firm
Admission, retirement and expulsion of partners	Provides an orderly route for change
Settlement on dissolution	States how accounts are settled and goodwill is valued
Duration and arbitration	States whether the firm is at will or for a term, and how disputes are resolved

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Registration and the Character of the Agreement

Although registration of a firm is not compulsory under the Partnership Act, Section 69 attaches serious disabilities to an unregistered firm: it cannot sue third parties to enforce rights arising from contract, and its partners cannot sue the firm or each other on such rights, until the firm is registered and the suing partner's name appears in the Register of Firms. A prudent partnership agreement therefore contemplates registration with the Registrar of Firms of the district. The agreement must also be distinguished by its flexibility: Section 11 permits partners to determine their mutual rights and duties by contract, and most provisions of the Act apply only subject to that contract, except the overriding duties of good faith in Section 9 and a few others. The essentials discussed above — agreement, lawful business, profit-sharing and mutual agency — cannot be excluded, for without them there is no partnership at all; everything else is machinery the partners may fashion for themselves.

Conclusion

To conclude, partnership under Section 4 of the Partnership Act, 1932 is the relation between persons who have agreed to share the profits of a lawful business carried on by all or any of them acting for all. Its essentials are a valid agreement between two or more competent persons, a lawful business, an agreement to share profits, and mutual agency, which the courts treat as the conclusive test. A well-drawn partnership agreement or deed embodies these essentials and then regulates capital, management, financial adjustments and dissolution, and although writing and registration are not conditions of validity, both are practically indispensable for a firm that wishes to enforce its rights in Pakistan.

Question 2: Rights and Duties of Partners under the Partnership Act, 1932 (20 Marks)

Explain in detail the rights and duties of partners in the partnership under the Partnership Act 1932. Also, list down the rights of partners.

Introduction

A partnership rests on mutual trust, and the Partnership Act, 1932 translates that trust into a set of legal rights and duties. Section 9 states the foundation in one sentence: partners are bound to carry on the business of the firm to the greatest common advantage, to be just and faithful to each other, and to render true account and full information of all things affecting the firm to any partner or his legal representative. This duty of utmost good faith cannot be excluded by agreement. Around it, Sections 9 to 17 and related provisions lay down the duties of partners, while Sections 12, 13 and numerous other sections confer their rights. Most of these rules apply subject to the partnership agreement under Section 11, so partners may

rearrange many of them by their deed; a few, like the duty of good faith and the duty to indemnify for fraud, are absolute. This answer explains the duties first, then the rights, and finally lists the rights of partners in a clear enumerated form as the question requires.

Duties of Partners

1. Duty of Good Faith, True Accounts and Full Information — Section 9

As noted above, Section 9 obliges every partner to work for the greatest common advantage, to be just and faithful to his co-partners, and to render true accounts and full information. A partner who conceals a profitable opportunity from the firm, falsifies the books, or buys the firm's supplies from his own undisclosed company at inflated prices breaks this duty, and the firm may recover the secret benefit from him. The duty continues even after dissolution in respect of the winding up of the firm's affairs.

2. Duty to Indemnify for Fraud and to Bear Losses

Section 10 binds every partner to indemnify the firm for any loss caused to it by his fraud in the conduct of the business — a duty which the partners cannot contract out of, since no one may take advantage of his own fraud. Closely connected are the financial duties collected in Section 13: partners must share losses equally with profits in the agreed ratio (Section 13(b)), bear the ordinary risks of the business, and indemnify the firm for loss caused by their wilful neglect (Section 13(f)). A partner who, against instructions, keeps the day's cash takings at his home from where they are stolen, or who wilfully omits to insure goods as agreed, must personally make good the resulting loss.

3. Duty to Attend Diligently and Not to Claim Remuneration

Under Sections 12 and 13(a), every partner is expected to take part in the conduct of the business and to attend diligently to his duties, but, unless the deed provides otherwise, no partner is entitled to any remuneration — salary or commission — for taking part in the business. The reward of the working partner is his share of profit. Partners must also conduct the business in accordance with the agreement, decide ordinary matters by majority while ensuring that no change in the nature of the business is made without the consent of all (Section 12(c)), and record dissent where a majority decision may harm them.

4. Duties About Private Profits, Competing Business and Firm Property

Section 16 strikes at divided loyalty in two ways. If a partner derives any profit for himself from any transaction of the firm, or from the use of the property or business connection of the firm or the firm name, he must account for that profit and pay it over to the firm (Section 16(a)). If a partner carries on any business of the same nature as and competing with the firm, he must account for and pay to the firm all profits made by him in that business (Section 16(b)); the firm may also claim the benefit of contracts he diverted. Sections 14 and 15 add that property originally brought into the firm's stock, or acquired with the firm's money, is firm property, held and used exclusively for the purposes of the business; a partner who uses firm property for private ends must account for the benefit. Further duties include the duty not to assign one's share so as to make the assignee a partner (Section 29 gives the assignee only a financial interest), the duty to act within one's authority and to carry out the firm's instructions, and the duty to contribute to the firm's liabilities as provided in Section 25.

Rights of Partners

The rights of partners mirror their duties, and, like the duties, are mostly subject to the partnership deed. Section 12 confers the management rights: every partner has the right to take part in the conduct of the business (Section 12(a)); ordinary differences about the business may be decided by a majority, but each partner has the right to be consulted and to express his opinion before the matter is decided (Section 12(c)), and every partner has the right of free access to, and to inspect and copy, any of the books of the firm (Section 12(d)). Section 13 confers the financial rights: a partner who has contributed capital is entitled to interest on it only if the deed so provides, and then only out of profits (Section 13(c)); a partner who makes an advance or loan to the firm beyond his capital is entitled to interest at six per cent per annum (Section 13(d)); and a partner is entitled to be indemnified by the firm for payments made and liabilities incurred in the ordinary and proper conduct of the business, and for acts done in an emergency to protect the firm from loss, as a person of ordinary prudence would do for himself (Sections 13(e) and 21). Further rights scattered through the Act include the right to prevent the admission of a new partner without the consent of all (Section 31(1)), the right of an outgoing partner to carry on a competing business and advertise it, subject to the firm name and holding out (Section 36), the right to share in the subsequently earned profits after retirement or a partner's death until the account is settled (Section 37), the rights of a minor admitted to the benefits of partnership to inspect accounts and to elect on majority (Section 30), and the right to have the firm dissolved and its affairs wound up in the circumstances given in Sections 39 to 44.

List of the Rights of Partners

For convenience, the principal rights of a partner may be listed as follows:

- Right to take part in the management and conduct of the firm's business (Section 12(a)).
- Right to be consulted and to express an opinion on all matters affecting the firm before they are decided (Section 12(c)).
- Right of free access to the books of the firm, and to inspect and copy them (Section 12(d)).
- Right to share the profits of the firm in the agreed ratio, or equally if no ratio is fixed (Section 13(b)).
- Right to interest on capital at the agreed rate, payable only out of profits, where the deed so provides (Section 13(c)).
- Right to interest at six per cent per annum on money advanced to the firm beyond capital (Section 13(d)).
- Right to be indemnified by the firm for expenses and liabilities properly incurred in the business, and for emergency acts done to save the firm from loss (Sections 13(e) and 21).
- Right to prevent the introduction of a new partner without the consent of all partners (Section 31(1)).
- Right to retire in accordance with the deed, or, in a partnership at will, by notice to the other partners (Section 32).
- Right of an outgoing partner to compete and to a share of later profits until final settlement (Sections 36 and 37).
- Right to have the firm dissolved and its property applied to its debts when a statutory ground exists (Sections 39 to 44).

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- Right, in the case of a minor admitted to benefits, to inspect accounts and to elect within six months of majority whether to become a partner (Section 30).

Balance Between Rights and Duties

Rights and duties in partnership are two sides of one coin, and the Act keeps them in balance. The right to manage carries the duty to manage honestly; the right to profits carries the duty to bear losses; the right of one partner to bind the firm by his acts under Section 19 carries the duty to act within authority and to indemnify the firm for fraud and wilful neglect. Where the deed is silent the Act supplies a fair default code, and where the partners wish for different terms — salaries for working partners, interest on capital, restrictions on competition — Section 11 lets them write those terms into their agreement, except that the duties of good faith in Section 9 and indemnity for fraud in Section 10 stand beyond the reach of any agreement.

Conclusion

To conclude, the rights and duties of partners under the Partnership Act, 1932 grow out of the relation of mutual agency and utmost good faith stated in Section 9. The duties require fidelity, honest accounts, diligence, sharing of losses, accounting for private and competing profits and respect for firm property; the rights secure to each partner a voice in management, access to the books, a share of profits, interest and indemnity, control over the firm's composition, and an orderly exit. A firm whose partners know and observe both lists seldom needs a court; the Act's provisions are used less for litigation than as the standard against which partnership deeds in Pakistan are drafted.

Question 3: Endorsement and Holder in Due Course under the Negotiable Instruments Act, 1881 (20 Marks)

Explain in detail the key points of the following concepts under the Negotiable Instruments Act 1881: (i) Endorsement & its types; (ii) Holder in due course & his/her rights and duties.

Introduction

The Negotiable Instruments Act, 1881 governs promissory notes, bills of exchange and cheques in Pakistan. The commercial usefulness of these instruments lies in their negotiability: they can pass from hand to hand like money, carrying the right to the sum written on them. The machinery by which they pass is endorsement, and the person whom the law most strongly protects in this circulation is the holder in due course. Part (i) of this question concerns endorsement — its meaning, essentials and kinds; part (ii) concerns the holder in due course — the conditions he must satisfy, the special rights the Act gives him, and the duties that accompany his privileged position. Both concepts serve a single policy: to make negotiable instruments circulate freely and safely in trade, so that a trader in Sialkot can accept a bill drawn on Karachi with confidence.

Part (i): Endorsement — Meaning and Essentials

Section 15 of the Act defines endorsement (spelt "indorsement" in the Act): when the maker or holder of a negotiable instrument signs the same, otherwise than as such maker, for the purpose of negotiation, on the back or face thereof or on a slip of paper annexed thereto (an allonge), he is said to endorse the same, and is called the "endorser"; the person to whom the instrument is transferred is the endorsee. Endorsement followed by delivery transfers the property in the instrument to the endorsee and gives him the right to sue upon it in his own

name. The essentials of a valid endorsement are: it must be written on the instrument itself (or an allonge) and signed by the endorser; it must be made by the maker or holder, and in the case of a firm, company or person with limited authority, by someone competent to bind them; it must be for the purpose of negotiation, not merely as a witness or guarantor; it must be completed by delivery of the instrument, actual or constructive, to the endorsee; and it must endorse the entire instrument — a partial endorsement, which purports to transfer only part of the amount, is invalid for negotiation under Section 56, though the endorsee may still be a holder for the part paid in the circumstances the section describes. The endorsement must be written in ink or otherwise in a permanent form; a stamped signature is accepted in banking practice where the endorser has authorised it. Where the endorser signs in a name different from that on the instrument, he should sign both names to avoid a break in the chain of title.

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Types of Endorsement

The Act and mercantile practice recognise several types of endorsement, of which the most important are the following. (1) Blank or general endorsement (Section 16): the endorser merely signs his name without naming an endorsee; the instrument becomes payable to bearer and can be transferred by mere delivery, though the holder may convert it into a special endorsement by writing a direction above the signature. (2) Special or full endorsement (Section 16): the endorser signs and adds a direction to pay to a named person or to his order, for example “Pay to Imran Sheikh or order”; the instrument can then be negotiated only by that person’s further endorsement and delivery. (3) Restrictive endorsement (Section 50): it restricts further negotiation, as in “Pay to Sana only” or “Pay to Sana for my use”; the endorsee takes the right to receive payment and to sue, but cannot transfer the instrument further, or can

transfer only as the endorsement allows. (4) Conditional endorsement (Sections 52 and related provisions): the endorser makes payment dependent on an event, as in "Pay to Bilal on his marriage"; the payer may disregard the condition, but as between endorser and endorsee the condition governs. (5) Sans recours endorsement: the endorser writes "without recourse to me" and thereby excludes his own liability on the instrument (Section 52); if the instrument is dishonoured, the endorsee cannot recover from him. (6) Facultative endorsement: the endorser waives some right of his own, for example dispensing with notice of dishonour, thereby increasing his liability. (7) Partial endorsement: an endorsement transferring only part of the sum, invalid for negotiation under Section 56. (8) Sans frais endorsement: "without expense", directing that no protest or noting charges be incurred on dishonour.

Table 1: Main types of endorsement

Type	Form / Example	Effect
Blank (general)	Signature only	Instrument becomes payable to bearer; transfer by delivery
Special (full)	"Pay to A or order" + signature	Payable to A; needs A's endorsement for further transfer
Restrictive	"Pay to A only"	A cannot negotiate it further (Section 50)
Conditional	"Pay to A on his marriage"	Payment tied to the event as between the parties
Sans recours	"Without recourse to me"	Endorser excludes his own liability (Section 52)
Partial	Endorsement for part of the amount only	Invalid for negotiation (Section 56)

Part (ii): Holder in Due Course

Sections 8 and 9 draw the crucial distinction. A "holder" (Section 8) is any person entitled in his own name to the possession of the instrument and to receive or recover the amount due on it; if the instrument is lost or destroyed, the holder is the person so entitled when it was lost or destroyed. A "holder in due course" (Section 9) is a narrower and privileged figure: any person who, for consideration, becomes the possessor of a promissory note, bill of exchange or cheque, if payable to bearer, or the payee or endorsee thereof, if payable to order, before the amount mentioned in it became payable, and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title. Five conditions therefore mark him out: he must be a holder; he must have taken the instrument for value or consideration; he must have taken it before maturity; he must have taken it in good faith and without notice of any defect in the transferor's title; and the instrument must be complete and regular on its face. A holder who takes a cheque after its validity period, or a person who receives a suspiciously altered bill, cannot claim this status.

Rights of a Holder in Due Course

The Act rewards the holder in due course with a better title than his transferor had. Under Section 36, every prior party to an instrument is liable to a holder in due course until the instrument is duly satisfied. Under Section 53, a holder who derives title from a holder in due course has the rights of that holder in due course, even if he himself took with notice, provided he was not a party to the fraud. The specific privileges include: he takes the instrument free from defects of title and from personal defences available between the original parties (Section 58 protects him even where the instrument was obtained by offence, fraud or unlawful

consideration, unless he was himself a party to it); the maker or acceptor cannot set up against him that the instrument was filled up improperly where it began as an inchoate stamped instrument (Section 20) or that it was delivered conditionally (Section 46); no prior party may deny the signature or capacity of an earlier party, the validity of the instrument as originally made, or the payee's capacity to endorse (Sections 120 to 122, the estoppels); and he may sue all prior parties in his own name without giving them the benefit of equities between themselves. A simple illustration: a cheque obtained by a fraudster and endorsed for value to an innocent shopkeeper before maturity — the shopkeeper, as holder in due course, can recover from the drawer even though the drawer was defrauded, because commerce requires that the honest taker be protected.

Duties of a Holder in Due Course

Privilege carries duties, and the holder — including a holder in due course — must observe the Act's machinery of presentment and notice if he wishes to keep all parties liable. He must present the instrument for acceptance where required (bills payable after sight, Sections 61 to 63) and for payment at maturity to the proper person, at the proper place and during business hours (Sections 64 to 77); a cheque must be presented within its validity and within a reasonable time, failing which the holder may lose his remedy against the drawer if the bank fails in the interval. On dishonour by non-acceptance or non-payment, he must give notice of dishonour to all prior parties whom he seeks to make liable, within a reasonable time and in the manner provided by Sections 93 to 98, unless notice is excused under Section 98; he should get the fact of dishonour noted or protested under Sections 99 to 104 where protest is required, particularly for foreign bills. He must also take care in the first instance: taking an instrument

that is visibly irregular, overdue or under circumstances that would give a reasonable man cause to suspect a defect destroys his status under Section 9 itself. Finally, he must deliver up the instrument on payment and is entitled to payment only against such delivery, and he must not deal with the instrument after dishonour in a way that prejudices the parties liable on it.

Conclusion

To conclude, endorsement is the signature-plus-delivery by which negotiable instruments pass under Sections 15, 16, 50, 52 and 56 of the Negotiable Instruments Act, 1881, taking forms that range from the simple blank endorsement to restrictive, conditional and sans recours endorsements. The holder in due course of Section 9 — who takes a complete instrument for value, before maturity, in good faith and without notice of defect — is protected by the Act with a title free from earlier defects and a battery of estoppels against prior parties, provided he performs his own duties of due presentment, notice of dishonour and care. Together the two doctrines give bills, notes and cheques their currency in Pakistani trade.

Question 4: Delivery of Goods under the Sale of Goods Act, 1930 and 'Let the Buyer Beware' (20 Marks)

Discuss in detail the rules regarding the delivery of goods under the Sale of Goods Act 1930. Also, discuss the concept of 'let the buyer be aware'.

Introduction

Delivery is the point at which a contract of sale touches physical reality: the goods pass from the seller's hands to the buyer's. The Sale of Goods Act, 1930, which governs sales of goods in Pakistan, treats delivery alongside payment as the twin performances of the contract, and Sections 31 to 40 contain its rules. Closely connected with delivery is the buyer's duty to look

after his own interests, expressed in the Latin maxim caveat emptor — "let the buyer beware" — which Section 16 of the Act adopts as the starting point while building important exceptions into it. Delivery must be distinguished from the passing of property: property (ownership) may pass at one moment under Sections 18 to 24, while possession passes later by delivery; risk usually follows property under Section 26. This answer explains the meaning and kinds of delivery, works through the statutory rules one by one with examples, and then discusses caveat emptor and the qualifications Parliament has placed on it for the protection of buyers.

Meaning and Kinds of Delivery

Section 2(2) defines delivery as the voluntary transfer of possession from one person to another. Three kinds are recognised. Actual delivery occurs when the seller physically hands the goods to the buyer, as when a shopkeeper in Anarkali hands over a suitcase across the counter. Symbolic delivery occurs when something representing the goods is handed over — the key of the godown in which grain is stored, or a delivery order — so that control, though not the goods themselves, has passed. Constructive delivery occurs without any physical movement: where goods are in the hands of a third person, such as a warehouse keeper or a carrier, who acknowledges that he now holds them on behalf of the buyer (attornment); or where the buyer already holds the goods as bailee and now holds them as owner; or where the seller keeps possession but now holds as bailee for the buyer. In modern commerce constructive delivery is the everyday case: a consignment of cement lying with a clearing agent in Karachi is delivered to the Lahore buyer when the agent attorns and the documents of title are endorsed to him.

The Statutory Rules Regarding Delivery

1. Delivery and Payment Are Concurrent Conditions — Sections 31 and 32

Section 31 states the reciprocal duties: it is the duty of the seller to deliver the goods and of the buyer to accept and pay for them. Section 32 adds that, unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions: the seller must be ready and willing to give possession in exchange for the price, and the buyer ready and willing to pay the price in exchange for possession. Cash-on-delivery trade is the commercial reflection of this rule, and neither party can demand the other's performance without tendering his own, unless credit has been agreed.

2. Delivery of the Goods Contracted For — Section 33 and Part Delivery — Section 34

Where under the contract the seller is bound to send the goods to the buyer but no time for sending them is fixed, Section 33 requires him to send them within a reasonable time. Section 34 deals with the effect of part delivery: delivery of part of the goods, in progress of delivery of the whole, has the same effect for the purpose of passing property as delivery of the whole; but where part delivery is made with the intention of severing it from the whole, it does not pass the property in the remainder. A seller who loads one truck out of a contract lot of ten as an advance consignment does not thereby pass ownership of the other nine.

3. Buyer to Apply for Delivery; Place, Time and Manner — Sections 35 and 36

Unless otherwise agreed, Section 35 provides that the buyer must apply for delivery; the seller is not bound to chase the buyer. Section 36 then gives a detailed code. Rule (1): whether it is for the buyer to take possession or the seller to send the goods depends on the contract. Rule (2): apart from any express contract, goods are deliverable at the place where they are at the

time of sale; goods not then in existence are deliverable at the place of manufacture or production. Rule (3): where goods are in the possession of a third person, there is no delivery until that person acknowledges to the buyer that he holds them on the buyer's behalf, though written notice of transfer of a document of title may operate differently under mercantile documents law. Rule (4): a demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour, reasonableness being a question of fact. Rule (5): unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state are borne by the seller. Time of delivery is generally not of the essence unless the contract shows that intention by its terms or by commercial necessity, such as goods ordered for a seasonal Eid stock.

4. Wrong Quantity and Instalments — Sections 37 and 38

Section 37 protects the buyer against incorrect quantity. If the seller delivers less than he contracted to sell, the buyer may reject the goods, but if he accepts them he must pay at the contract rate. If the seller delivers more, the buyer may accept the quantity ordered and reject the rest, or reject the whole; if he accepts the whole, he must pay for the extra at the contract rate. If the seller delivers the goods mixed with goods of a different description not included in the contract, the buyer may accept those which are in accordance and reject the rest, or reject everything. Section 38 provides that the buyer is not bound to accept delivery by instalments unless so agreed; where instalment delivery is agreed and the seller makes a defective delivery in one or more instalments, or the buyer fails to take or pay for an instalment, the question whether the breach goes to the whole contract or is only severable, giving damages, depends on the terms of the contract and the circumstances of the case.

5. Delivery to Carrier and Risk in Transit — Sections 39 and 40

Section 39 provides that where, in pursuance of the contract, the seller is authorised or required to send the goods to the buyer, delivery to a carrier — whether named by the buyer or not — or to a wharfinger for transmission is prima facie deemed to be delivery to the buyer, provided the seller makes a reasonable contract with the carrier on the buyer's behalf; if he fails to do so and the goods are lost or damaged, the buyer may decline to treat the delivery to the carrier as delivery to himself, or hold the seller responsible. Where goods are sent by sea under circumstances in which it is usual to insure, the seller must give the buyer such notice as enables him to insure, failing which the goods are at the seller's risk during transit. Section 40 completes the scheme: where the seller agrees to deliver at a distant place at his own risk, the buyer still takes the risk of deterioration necessarily incident to the course of transit. Suppose a Gujranwala manufacturer sends fans by truck to Multan under a proper consignment note: delivery to the carrier is delivery to the buyer, and loss by a road accident in transit falls on the buyer unless the carriage contract was unreasonable or the loss was the seller's fault.

Table 1: Delivery rules at a glance

Rule	Section	Substance
Seller to deliver; buyer to accept and pay	31	Reciprocal duties under the contract
Payment and delivery concurrent	32	Neither party need perform without the other's tender
Delivery within a reasonable time	33	Where seller must send goods and no time is fixed
Part delivery	34	Passes property only if made in progress of delivery of the whole
Place, time, attornment,	36	Goods deliverable where they

expenses		are; third party must attorn; seller bears cost of deliverable state
Wrong quantity / mixed goods	37	Buyer may reject, or accept the contract quantity at contract rate
Instalments	38	No instalment delivery unless agreed; effect of breach depends on circumstances
Delivery to carrier	39–40	Prima facie delivery to buyer if carriage contract is reasonable

‘Let the Buyer Beware’ — Caveat Emptor (Section 16)

The maxim caveat emptor, translated in the question as “let the buyer be aware” (more usually, “let the buyer beware”), declares the common-law starting point adopted by the opening words of Section 16: subject to the provisions of the Act and of any other law, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale. The buyer buys at his own risk; his eyes are his bargain. If he selects an article carelessly, without relying on the seller’s skill, and it turns out unfit for his purpose, he cannot complain merely because the thing is useless to him. The old case of a buyer who purchased a motor car that proved defective, where the seller had made no representation and the buyer relied on his own inspection, illustrates the harshness the doctrine can reach. Its justification is the freedom of contract and the buyer’s opportunity to inspect: in an open market each side must protect itself.

Parliament, however, found the pure doctrine too harsh for modern conditions of standardised manufacture and distant selling, and Section 16 itself supplies the exceptions, which in practice

cover most honest trade. First, Section 16(1): where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that he relies on the seller's skill or judgment, and the goods are of a description it is in the course of the seller's business to supply, there is an implied condition that the goods shall be reasonably fit for that purpose — a farmer who tells the dealer he needs a pump that will lift water sixty feet and relies on the dealer's choice may reject a pump that cannot do so; the exception does not apply where a specified article is ordered under a patent or trade name, showing the buyer relied on the brand, not the seller. Secondly, Section 16(2): where goods are bought by description from a seller who deals in goods of that description, there is an implied condition that they shall be of merchantable quality, though if the buyer has examined the goods he takes them with defects which that examination ought to have revealed. Thirdly, Section 16(3): an implied warranty or condition may be annexed by the usage of trade. Fourthly, caveat emptor never protects fraud or active concealment: a seller who paints over rust, conceals a latent defect or misdescribes the goods cannot shelter behind the maxim, and the sale by sample provisions of Section 17 add their own protections. The modern position is therefore balanced: the buyer must be awake, inspect and ask — but where he reasonably relies on the seller, buys by description, or is deceived, the law stands with him.

Conclusion

To conclude, the delivery rules of the Sale of Goods Act, 1930 (Sections 31 to 40) make delivery and payment concurrent, prescribe where, when and how delivery is to be made, regulate part delivery, wrong quantity, instalments and delivery to carriers, and protect the buyer against unreasonable carriage arrangements. The doctrine of caveat emptor in Section 16 begins from

the buyer's responsibility for his own bargain but is qualified by the implied conditions of fitness for a disclosed purpose and merchantable quality on a sale by description, by trade usage and by the law of fraud. Buyer and seller who understand both halves of this answer understand the practical law of delivery in Pakistan.

Question 5: Carriage of Goods by Sea and by Road (20 Marks)

Explain the legal provisions with regard to the: (i) Carriage of goods by sea; (ii) Carriage of goods by road.

Introduction

Few goods reach their buyer without travel. Pakistan's imports and exports move by sea through Karachi and Port Qasim, while its internal trade moves overwhelmingly by road through a vast network of trucks and goods-forwarding agencies. The law must therefore answer the carrier's questions: what documents govern the carriage, what duties does the carrier owe, for what losses is he responsible, and how far may he limit his liability? For carriage by sea the answer lies mainly in the Carriage of Goods by Sea Act, 1925, which enacted the Hague Rules, supplemented by the Bills of Lading Act, 1856 and the general law of charterparties. For carriage by road the answer lies in the Carriers Act, 1865, the bailment provisions of the Contract Act, 1872 (Sections 148 to 171) and the contract between consignor and carrier. This answer deals with the two modes in turn and compares them at the end.

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Part (i): Carriage of Goods by Sea

The Contract and the Bill of Lading

Carriage by sea is effected either under a charterparty, where the whole ship or a substantial part of her is hired for a voyage or a period, or under a bill of lading, where individual consignments are shipped on a general vessel. The bill of lading performs three functions: it is a receipt by the master or the shipping company for the goods shipped, stating their quantity, marks and apparent condition; it is evidence of the contract of carriage and its terms; and it is a document of title, so that endorsement and delivery of the bill transfers constructive possession of the goods and the right to demand them at the destination. The Bills of Lading Act, 1856 provides that every consignee named in a bill, and every endorsee to whom the property in the goods passes upon or by reason of the endorsement, has transferred to him all rights of suit and is subject to the same liabilities as if the contract had been made with himself. Export of textile goods from Karachi to a European port on a “shipped” bill, marked “freight prepaid” or “freight collect”, is the standard illustration of these rules in Pakistani practice.

Duties and Liabilities of the Carrier by Sea

The Carriage of Goods by Sea Act, 1925 applies the Hague Rules to outward shipments from Pakistani ports. Article III imposes two overriding duties on the carrier. First, before and at the beginning of the voyage he must exercise due diligence to make the ship seaworthy, to man, equip and supply her properly, and to make her holds and chambers fit and safe for the reception, carriage and preservation of the goods. Secondly, he must properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried. The shipper, for his part, must give accurate particulars of the goods, is deemed to have guaranteed the accuracy of

the marks, number, quantity and weight he furnishes, and is liable for loss caused by dangerous goods shipped without disclosure. Article IV lists the carrier's immunities: he is not liable for loss arising from unseaworthiness unless caused by his want of due diligence, nor for the act, neglect or default of the master or crew in the navigation or management of the ship, fire (unless caused by his actual fault or privity), perils of the sea, act of God, act of war, strikes, insufficiency of packing, latent defects, or other causes arising without his fault or neglect. His liability is limited, under the Rules, to a fixed sum per package or unit unless a higher value is declared by the shipper and inserted in the bill; the period of responsibility is the tackle-to-tackle period from loading to discharge, and suit must be brought within one year of delivery or of the date when the goods should have been delivered (Article III, rule 6). Freight, the carrier's remuneration, is earned by carrying and being ready to deliver, and the carrier has a lien on the goods for freight and charges duly payable.

Part (ii): Carriage of Goods by Road

Common Carriers and the Carriers Act, 1865

Carriage by road in Pakistan is performed by goods-forwarding companies and truck owners, many of whom are common carriers: persons who carry goods for hire for the public indiscriminately, holding themselves out as ready to carry for anyone who pays. The Carriers Act, 1865 regulates their position. Its policy is twofold. On the one hand, a common carrier is treated as an insurer of the goods: at common law he is liable for loss or damage however caused, except by act of God or the enemies of the state, and he is liable under Section 8 of the Act notwithstanding any special contract where the loss arises from his negligence or a criminal act of himself or his agents. On the other hand, the Act allows a measure of protection: under

Section 3, a carrier is not liable for loss of or damage to certain scheduled articles of special value — such as gold and silver articles, precious stones, jewellery, currency, bills and securities, and works of art — above the statutory value unless the consignor declares their value and nature and pays, or agrees to pay, the extra charge demanded. Section 6 permits the carrier, by special contract signed by the owner of the goods, to limit his liability generally — the clause habitually printed on the goods forwarding receipt (risky) — but Section 8 overrides any such contract where negligence or criminal act is proved. Under Section 9, in a suit against a common carrier for loss, damage or non-delivery, the plaintiff need not prove that the loss arose from the carrier's negligence; the burden effectively falls on the carrier to bring himself within an exception.

Bailment Duties, Documents and Delivery on the Road

Road carriage is also a bailment under Sections 148 onwards of the Contract Act, 1872: the goods are delivered to the carrier for a purpose, upon a contract that they shall be returned or delivered according to the consignor's directions. Section 151 requires the bailee to take as much care of the goods as a man of ordinary prudence would take of his own goods of the same bulk, quality and value; Section 152 excuses him from liability for loss, destruction or deterioration if he has taken that care, and Section 161 makes him responsible if, by his default, the goods are not returned, delivered or tendered at the proper time. The carrier has a particular lien under Section 170 on goods for charges lawfully due for his services, and a general lien is recognised for bankers, factors, wharfingers and similar bailees under Section 171. The contract is evidenced by the consignment note or truck receipt, which records the consignor, consignee, description, weight and freight; delivery at destination is made to the

consignee against that document and payment of any freight due. The consignor owes reciprocal duties: to disclose dangerous or fragile goods, to pack properly, and to pay freight; the carrier owes the duties to carry with reasonable despatch by the agreed route, to take care of the goods, and to deliver to the right person. Private carriers — who carry only for selected customers and not for the public at large — are not insurers; their liability is that of ordinary bailees, measured by the contract and Sections 151 and 152.

Sea and Road Carriage Compared

The two systems differ in technique but share one logic. Both rest on a document — bill of lading or consignment note — which evidences the contract and controls delivery. Both impose on the carrier a core duty of care and of seaworthiness or roadworthiness, and both then define a set of excepted perils and a power to limit liability, by statute in the case of road carriers under Sections 6 and 8 of the 1865 Act and by the Hague Rules package limitation at sea. They differ in the strictness of the starting liability: a common carrier by road starts as an insurer of the goods, whereas a sea carrier's liability is framed by the catalogue of exceptions in Article IV, and suits at sea must be brought within the one-year limit of the Rules. A student advising a Pakistani trader should therefore insist on accurate documents, declarations of value where the goods are precious, prompt inspection and claim at delivery, and insurance, whichever mode of carriage is chosen.

Conclusion

To conclude, carriage of goods by sea is governed principally by the Carriage of Goods by Sea Act, 1925 and the Hague Rules, under which the bill of lading is receipt, contract evidence and document of title, the carrier must exercise due diligence to provide a seaworthy ship and must

carefully carry the goods, and his liability is subject to the Article IV exceptions, package limitation and a one-year time bar. Carriage by road is governed by the Carriers Act, 1865 together with the bailment law of the Contract Act: the common carrier is liable almost as an insurer, may limit liability by signed special contract and is protected for undeclared valuables, but can never contract out of liability for his own negligence or criminal act. Together these provisions allocate the risks of transit in Pakistan's sea-borne and road-borne trade.

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