Mercantile Laws

Suggested Answer

Roll No……………... Maximum Marks - 25
Total No. of Questions - 2 Total No. of Printed Pages -1
Time Allowed - 1 Hour Marks

Attempt all questions.

1. Answer the following questions:
   a) Distinguish between "Partnership" and "Co-Ownership".  5
   b) What are the duties of partners of a firm? Discuss.  5

Answer:

   a) Followings are the points of distinction between "Partnership" and "Co-Ownership"

   i. **Formation**: Partnership always arises out of contract. Co-Ownership may arise either from agreement or by the operation of law, such as by inheritance.
   ii. **Sharing of profits**: In a partnership, profit must have to be shared, but in the case of Co-Ownership, it does not necessarily involve sharing of profit
   iii. **Agency**: In a partnership, a partner is the agent of the other partners, but in the case of Co-Ownership, a co-owner is not the agent of other co-owners
   iv. **Lien**: A partner has a lien on the partnership property for outlay or expenses or a loan advanced to the firm, whereas a co-owner has no such lien.
   v. **Transfer of interest**: A share in the partnership may be transferred only with the consent of all other partners. Co-owner may transfer his interest in the property without the consent of other co-owners.

   b) Partnership is the creation of agreement between the persons. The partners have to discharge their duties as mentioned in the partnership deed. In the absence in the deed, the duties of partners are governed by the Partnership Act. The major duties of the partner are cited hereunder.

   1. **Duty to carry on business with common benefit**
      Every partner is bound to carry on the business of the firm to the greatest common advantage to all the partners. I implies that every partner must use his optimum knowledge and skill for the benefit of the firm and not for his personal advantage.

   2. **Duty to be faithful**
      Partnership is the utmost good relationship which is based on mutual trust, confidence and spirit of helpfulness and goodwill among the partners. Every partner must be just and faithful to his co-partners. He must observe utmost good faith and fairness towards the other partners of the firm.

   3. **Duty to provide full information**

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Every partner must give full and reliable information of all the matters affecting the business of the firm to his other partners. A partner shall be considered as an agent of other partners and must not conceal any information harmful to the business.

4. **Duty to furnish true accounts**
   It is the duty of every partner to furnish true and reliable accounts to his other partners. It implies that each partner must be ready to explain the accounts of the firm and provide the necessary supporting documents. The accounting environment should be like that no partner thinks that of making a secret profit at the expenses of the firm.

5. **Duty to indemnify for loss caused by fraud**
   A partner can cause loss to the firm by his gross negligence or want of skill or omission or fraud while acting in the ordinary course of business. If the partners acts bonafide grounds and the loss caused thereof then it should be borne by the firm.

6. **Duty to work without remuneration**
   A partner is not entitled to receive remuneration for taking part in the operation of the business until and unless it was expressly mentioned through the agreement between the partners.

7. **Duty not to assign his interest**
   No partner can assign or transfer his partnership interest to any other person so as to make him a partner in the business without the consent of all the partners.

8. **Duty to share losses**
   Every partner has the responsibility to share the losses of the partnership firm. The loss sharing ratio is as per the agreed in the partnership deed. If this has not been clearly stated in the partnership deed then partners are bound to contribute equally to the losses suffered by the firm irrespective of the capital contribution by them.

9. **Duty to act within authority**
   Each partner has the authority to act what he has been permitted. In case any partner has exercised the power what has not been assigned or not permitted to him, loss arising from such act shall be made good by him.

10. **Duty to use firm's property exclusively for the firm**
    It is the duty of each of the partner to use the property of the firm exclusive for the purpose of the business. No partner should use partnership property for the personal benefit.

11. **Duty to account for personal profits derived**
    If a partner derives any profit from any transactions of the firm or from the use of the property or business connection of the firm, then it is the duty of the partner to account the profit derived in the accounts of the partnership firm.

2. Answer the following questions:
   a) What is bailment? Differentiate between bailment and sale. 
   b) Discuss the status of consideration under the Contract Act, 2056.
   c) Explain the concept of Anticipatory and Actual Breach of Contract.

   **Answer:**
   a) Bailment is the delivery of goods by one person to another for the purpose, the accomplishment of which binds the bailee to return the goods to the owner. Not the
ownership but the possession is transferred in bailment. Under sale of goods, ownership is transferred with or without delivery of goods for a price.

Sale differs from bailment- sale- Under this, the ownership is transferred from the seller to the buyer. In a sale, the return of goods is not possible. In a sale, the consideration is the price in terms of money.

Bailment- Under this, there is only transfer of possession of goods from the bailer to the bailee. In a bailment, goods must be returned to the bailer upon the accomplishment of the purpose for which the goods were bailed.

b) Status of consideration under Nepalese Law of Contract

The existing contract law of Nepal defines consideration but does not require the necessity of consideration. Although, it has entitled the contracting parties to determine consideration and its quantum pursuant to section 4 of this Act. In the absence of clear statutory provision it cannot be definitely said that a contract without consideration is not enforceable in Nepal.

The non requirement or autonomy of consideration is only a general principle of contract law of Nepal. However, contractual relations cannot be established without consideration as per certain laws which regulate specific relations.

Though, Nepalese law apparently does not require consideration for the enforcement of the agreement, but courts may require necessity of consideration in the contract for giving effective remedy in practical situation. Hence, the contract law in Nepal does not require consideration as an essential element of contract for the validity of a contract; therefore, the courts have ample room to decide the case in pragmatic way to certain extent while resolving the contractual disputes.

Thus, Nepalese contract law does not require consideration as an essential element of contract like in other common law contract. Contracting parties are free to make an agreement with or without consideration as they wish. Therefore, a contract which lacks consideration is not void in Nepal.

c) Breach of contract is an actual failure by a party to a contract to perform his obligations under that contract or an indication of his intention not to do so.

a. Anticipatory Breach of Contract

A breach that occurs when one contracting party informs the other party that he or she will not perform his or her contractual duties when due, it is called anticipatory breach of contract. In the same way, where the promisor refuses to perform his obligation even before the specified time for performance and signifies his unwillingness, then there is
an anticipatory breach. It is a prior announcement of intention by one party not to perform his contractual obligations or a refusal of performance by the promisor before the due date of performance.

Nepalese Contract law has provided the conditions where anticipatory breach occurs. Section 82(1) of the Contract Act, 2056 reads as "if any party to a contract does not meet liability under the contract or gives a notice to the other party that he/she will not perform the work to be performed under the contract, or if his/her action or conduct shows that he/she is incapable of performing the work under the contract, he shall be deemed to have breached the contract."

Where anticipatory breach of contract occurs, the aggrieved party can take the following steps:

a. He may treat the contract as discharged; therefore, he is no longer bound to perform his obligations and he can repudiate the contract by furnishing the notice to other party.

b. he may sue immediately for available legal remedies

c. he may keep the contract alive for the benefit of promisor and his own to the due date of performance, which enables the promisor to perform the contract in spite of his earlier refusal.

b. Actual Breach of Contract

Actual breach occurs where one party fails or refuses to perform the obligations during the performance or on the due date of performance. Thus, where one of the parties breaches the contract by refusing to perform the promise on due date, it is known as actual breach of contract. In such a case, the aggrieved party to contract has the right to sue against one who breaches contract for remedies.

Nepalese Contract Act, 2056 defines the actual breach of contract. The provision reads; "if any party to a contract does not meet liability under the contract .... he shall be deemed to have breached the contract" (as above).

The consequences of actual breach of contract are as follows:

- it terminates the contract
- it discharges the aggrieved party from his obligations
- it enables the aggrieved party to sue for legal remedies
- it gives rise to aggrieved party to be repudiated from contract
- it creates obligation to breacher to compensate the aggrieved party